No. 18-9372

In the Supreme Court of the United States

QUISI BRYAN,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – EXECUTION SET FOR OCTOBER 26, 2022

QUESTION PRESENTED

This case presents two interrelated questions:

1. Did the Sixth Circuit properly hold that 28 U.S.C. §2244(b)(2)—which bars courts from hearing "second or successive" federal habeas petitions—deprived the federal courts of authority to issue Quisi Bryan relief on his second federal habeas petition?

2. Did the Sixth Circuit properly hold that federal habeas claims are "ripe" without regard to whether they can succeed under binding case law?

LIST OF PARTIES

The Petitioner is Quisi Bryan, an inmate at the Chillicothe Correctional Institution.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State of Ohio v. Quisi Bryan*, CR393660 (Cuyahoga Ct. Com. Pl.) (sentence entered December 19, 2000, postconviction relief denied November 18, 2005 and May 11, 2009, motion for new mitigation trial denied April 10, 2017).

2. *State of Ohio v. Quisi Bryan*, 2001-0253 (Ohio) (decided March 17, 2004, reconsideration denied and mandate issued May 12, 2004, motion for relief denied March 15, 2017).

3. *State of Ohio v. Quisi Bryan*, CA-05-087482 (Cuyahoga Ct. App.) (appeal dismissed October 10, 2006).

4. *State of Ohio v. Quisi Bryan*, CA-09-093038 (Cuyahoga Ct. App.) (decided May 13, 2010).

5. *State of Ohio v. Quisi Bryan*, 2010-1187 (Ohio) (jurisdiction declined December 15, 2010).

6. *Quisi Bryan v. David Bobby*, 1:11-cv-00060 (N.D. Ohio) (judgments entered on July 16, 2015 and July 5, 2018).

7. *Quisi Bryan v. David Bobby*, 15-3778, 15-3834 (6th Cir.) (decided December 15, 2016, mandate issued October 6, 2017).

8. *Quisi Bryan v. Charlotte Jenkins*, 16-9680 (U.S.) (certiorari denied October 2, 2017).

9. *State of Ohio v. Quisi Bryan*, CA-17-105774 (Cuyahoga Ct. App.) (judgment entered March 29, 2018).

10. *Quisi Bryan v. Tim Shoop*, 1:18-cv-00591 (N.D. Ohio) (judgment entered June 12, 2018).

11. *In re Quisi Bryan*, 18-3557 (6th Cir.) (permission to file a second petition denied February 19, 2019).

12. *In Re Quisi Bryan*, 18-9659 (U.S.) (original petition filed on June 6, 2019).

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INTRODUCTION

Almost 20 years ago, an Ohio jury convicted Petitioner Quisi Bryan of murdering a police officer and attempting to murder a witness. The jury recommended a death sentence, and a state trial court accepted that recommendation. Then began the proceedings that gave rise to this case. Bryan first directly appealed his case all the way to the Ohio Supreme Court, unsuccessfully. *State v. Bryan,* 101 Ohio St.3d 272 (2004). Relevant here, he argued that the prosecutor in his case had made improper statements during the guilt and penalty phases of his trial. Bryan argued that these statements prejudiced his ability to avoid a death sentence. The Ohio Supreme Court rejected that argument for two reasons. *First*, it held that the statements did not constitute reversible error under the applicable plain-error standard. *Second*, it held that its independent reweighing of the aggravating and mitigating circumstances cured any potential impacts the statements might have had.

Bryan sought state post-conviction relief, unsuccessfully. *See State v. Bryan*, 127 Ohio St.3d 1461 (2010); *State v. Bryan*, 2010-Ohio-2088, ¶1 (Ohio Ct. App.). He then petitioned for *federal* habeas relief, unsuccessfully. In federal court, Bryan sought habeas relief based on the same allegedly improper statements that he relied on in the state courts. The District Court and Sixth Circuit both refused to upset the Ohio Supreme Court's holding. This Court denied certiorari. *Bryan v. Jenkins*, 138 S. Ct. 179 (2017).

Bryan is now taking another crack at federal habeas relief. According to Bryan, the Ohio Supreme Court violated *Hurst v. Florida*, 136 S. Ct. 616 (2016), by

rejecting the prosecutorial-misconduct argument after independently reweighing the aggravating and mitigating circumstances. The trouble with this approach is 28 U.S.C. §2244(b)(2), which prohibits "second or successive" petitions. The District Court refused to consider Bryan's second-or-successive petition, and the Sixth Circuit did the same. *In re Bryan*, No. 18-3557, 2019 U.S. App. LEXIS 4840 (6th Cir. Feb. 19, 2019), included at Pet.App.1–4. Bryan seeks review of that decision. According to him, his petition was *not* second or successive, because his *Hurst* claim did not ripen until this Court issued its *Hurst* decision in 2016 and the Ohio Supreme Court denied him *Hurst*-based relief.

This Court should deny certiorari for two main reasons. The first is that Bryan does not allege a circuit split, and instead seeks correction of the Sixth Circuit's factbound application of the second-or-successive doctrine. The second reason to deny certiorari is that Bryan would lose his claim to habeas relief *even if he prevailed* on the second-or-successive issue. Ohio's capital-sentencing scheme does not violate *Hurst*. And even if the Ohio Supreme Court had violated *Hurst* in this case when it reweighed the aggravating and mitigating factors, that supposed error would not entitle Bryan to relief. Bryan does not, and cannot, challenge the Ohio Supreme Court's primary holding that the prosecutor's statements were not reversible error—a holding that it reached without regard to the allegedly problematic reweighing.

JURISDICTION

The Sixth Circuit denied Bryan's request to file his second habeas petition on February 19, 2019. Pet.App.1–4. Bryan timely filed his certiorari petition on May

17, 2019. The Court lacks jurisdiction to consider a writ of certiorari about a "denial of authorization by a court of appeals to file a second or successive application." 28 U.S.C. §2244(b)(3)(E). The Court does have jurisdiction to consider whether 28 U.S.C. §2244(b)'s restrictions for "second or successive" petitions apply to Bryan's petition, *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641–42 (1998), or whether the petition is in fact second or successive, *Castro v. United States*, 540 U.S. 375, 379–80 (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2244(b)(2). The Act goes on to provide:

> The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. §2244(b)(3)(E).

The Sixth Amendment to the Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . .

STATEMENT

1. This case should be about a traffic stop. Officer Wayne Leon pulled over Quisi Bryant on June 25, 2000. *See Bryan v. Bobby*, 843 F.3d 1099, 1104 (6th Cir. 2016). Leon noticed that Bryan's temporary tags had been altered, so he took Bryan's license to run a police check. *Id.* While Leon called the police station, Bryan—a drug dealer, who was on parole for an attempted robbery and subject to an outstanding arrest warrant for a parole violation—shot Leon in the face. Leon died instantly. *Id.*

A witness, Kenneth Niedhammer, heard the shot that killed Leon while stopped at a traffic light. *Id.* Niedhammer saw Leon's body, and he saw Bryan erratically fleeing the scene. *Id.* He followed Bryan, and Bryan twice exited his car to shoot at Neidhammer. *Id.* Bryan missed. The police eventually caught Bryan, and the State charged him with murdering Leon and attempting to murder Neidhammer. *Id.*

2. An Ohio jury convicted Bryan of both crimes. *Bryan*, 843 F.3d at 1104. In the penalty phase of Bryan's trial, the jury recommended a death sentence. The trial court accepted its recommendation and sentenced Bryan to death. *Id.* at 1105.

Bryan directly appealed his conviction and sentence, ultimately reaching the Ohio Supreme Court. *State v. Bryan,* 101 Ohio St.3d 272 (2004). There, Bryan argued that the prosecutor made a number of improper statements during the guilt phase of his trial—for example, he remarked on the underlying facts of Bryan's prior convictions. *Id.* at 291–94, 297–300. The Ohio Supreme Court agreed that some of the remarks were improper. *Id.* at 291. But it found no *reversible* error. *Id.* at

292. The reason for this was that Bryan failed to preserve most of his challenges to the prosecutor's remarks, meaning they could be reviewed only for plain error. *Id.* at 292–94. The court held that each error was either harmless or insufficiently egregious to satisfy the very high plain-error standard. It therefore affirmed Bryan's conviction. *Id.*

The court likewise rejected Bryan's challenges concerning the prosecutor's statements during the *penalty* phase. *Id.* at 297–300. The court held that some of the challenged statements were "within the realm of fair comment," *id.* at 298, inside the "latitude accorded both parties," *id.* at 299, or "fair rebuttal," *id.* at 300. It determined that other statements were improper, but it again found no error egregious enough to warrant reversal under the plain-error standard. *Id.* at 299. *In the alternative*, the court reweighed the aggravating and mitigating circumstances pertaining to the death sentence, and concluded that Bryan's death sentence was proportionate to death sentences approved in similar cases. *See id.* at 307. The court held that its "independent assessment of the sentence ha[d] cured any lingering impact from the prosecutor's comments." *Id.* at 299.

3. After unsuccessfully pursuing state post-conviction relief, Bryan filed his first federal habeas petition in 2011, raising sixteen claims. *Bryan v. Bobby*, 114 F. Supp.3d 467, 483–85 (N.D. Ohio 2015). As in his direct appeal, Bryan sought relief based on alleged prosecutorial misconduct at both the guilt and penalty phases. *Id.* at 484. The District Court denied relief on that claim. The Sixth Circuit affirmed

in relevant part, and this Court denied Bryan's petition for certiorari. *Bryan v. Jenkins*, 138 S. Ct. 179 (2017).

4. Following this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), Bryan returned to the Ohio Supreme Court, moving to reopen his case in light of *Hurst*. In *Hurst*, this Court had held that juries, not judges, must "find each fact necessary to impose a sentence of death." *Id.* at 619. According to Bryan, the Ohio Supreme Court violated *Hurst* when it affirmed his death sentence after independently reweighing the aggravating and mitigating circumstances. Mot. For Relief, No. 2001-0253 (Jan. 12, 2017), available at https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2001/0253. *Hurst* does not apply retroactively. But Bryan argued that the Ohio Supreme Court implicitly decided, as a matter of state law, to make *Hurst* retroactive through a summary remand in *State v. Kirkland*, 145 Ohio St.3d 1455 (2016). *See* Mot. For Relief 6. He therefore asked the court to reopen his case, retroactively apply *Hurst*, and award him relief.

The Ohio Supreme Court summarily denied Bryan's motion. *State v. Bryan*, 148 Ohio St.3d 1423 (2017).

5. Once the Ohio Supreme Court denied Bryan's motion, he tried to file a second habeas petition in the United States District Court for the Northern District of Ohio. There, he argued that "it was unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016), for the Ohio Supreme Court to have used independent reweighing to cure the penalty-phase prosecutorial misconduct in his case." Pet.App.1. The District Court determined that the petition was "second or successive" under 28

U.S.C. §2244(b)(2), and transferred the case to the Sixth Circuit. *Bryan v. Shoop*, No. 1:18CV591, 2018 U.S. Dist. LEXIS 97990 (N.D. Ohio June 12, 2018).

The Sixth Circuit agreed with the District Court. It first explained that §2244(b)(2) generally prohibits filing "second or successive § 2254 petition[s]," but that there are "two exceptions." Pet.App.2. Specifically, courts may permit such petitions if they rest on "newly discovered evidence," §2244(b)(2)(B), or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," §2244(b)(2)(A). Pet.App.2 (internal quotation marks omitted). Bryan relied on the second of these exceptions, since he claimed entitlement to relief under *Hurst*. Pet.App.2. However, the Sixth Circuit explained, "the Supreme Court has not made [*Hurst*] retroactive." Pet.App.2 (citing *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017)). Thus, Bryan's claim did not fall into either of the two exceptions that allow courts to entertain second-or-successive petitions.

Bryan made one other argument: he took the position that his petition was not second or successive in the first place. More specifically, Bryan argued that his *Hurst* claim "was previously unripe," bringing it "outside § 2244's ambit." Pet.App.2. The *Hurst* claim, he said, became ripe only when the Ohio Supreme Court issued its unexplained summary remand in *Kirkland*, 145 Ohio St.3d 1455, which Bryan understood as making *Hurst* retroactive under state law. *See* Pet.App.2–3.

The Sixth Circuit rejected this argument, concluding that Bryan's *Hurst* claim was "ripe" long before *Hurst* made it legally viable. The court recognized "that not all second-in-time petitions are 'second or successive.'" Pet.App.3 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). And it assumed for the sake of argument that Bryan had "correctly interpreted both *Hurst* and the Ohio Supreme Court's unexplained" ruling in *Kirkland*. Pet.App.3. But it held that, despite all this, Bryan's claim ripened in 2004, "before he first reached federal court," Pet.App.3, since the alleged error occurred when the Ohio Supreme Court independently reweighed the evidence. In other words, Bryan's claim was ripe in 2004, regardless of whether Bryan would have prevailed had he raised it.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for certiorari. It presents no circuit split or issue of exceptional importance. On top of that, Bryan's underlying claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016), would not entitle him to relief even if he could show that his petition were neither second nor successive.

I. Bryan presents a narrow issue, identifies no circuit split, and fails to adequately explain the issue's importance beyond this case.

While Bryan's petition presents two questions, those questions really boil down to one: Did the Sixth Circuit err when it rejected Bryan's ripeness-based argument? After all, Bryan does not argue that he satisfies 28 U.S.C. §2244(b)(2)'s exceptions for second-or-successive petitions. Thus, his only chance to prevail requires establishing that his petition is *not* second or successive. And the only ar-

gument he makes on that front is that the claim he sought to raise was not "ripe" at the time of his first federal habeas proceeding.

This issue is not worth the Court's time. It presents no circuit split, and presents no issues of broad, general importance.

A. This case does not involve a circuit split.

Bryan concedes that the factual basis for his claim—the Ohio Supreme Court's independent reweighing of the aggravating and mitigating circumstances in his case—"may have been apparent at the time of his initial habeas petition." Pet. 29. But he contends that his habeas claim was not "legally cognizable" until "federal law changed" (apparently through *Hurst*) and then state law changed (by the Ohio Supreme Court supposedly making *Hurst* retroactive through an unexplained order). *See id.* at 29–30.

Bryan, however, does not cite any case from any circuit holding that a habeas claim becomes ripe only once the law changes to make that claim legally viable. Indeed, the circuits agree that legal viability is irrelevant to ripeness. *See, e.g.*, *Ybarra v. Filson*, 869 F.3d 1016, 1031 (9th Cir. 2017) (rejecting a *Hurst* claim as a "disguised and unauthorized second or successive habeas petition"); *United States v. Claycomb*, 577 F. App'x. 804, 805 (10th Cir. 2014) ("But what makes a claim unripe is that the factual predicate has not matured, not that the law was unsettled."); *United States v. Obeid*, 707 F.3d 898, 902 (7th Cir. 2013) ("[C]ourts have been careful to distinguish genuinely unripe claims (where the factual predicate that gives rise to the claim has not yet occurred) from those in which the petitioner merely has some excuse for failing to raise the claim in his initial petition . . . only the former

class of petitions escapes classification as 'second or successive.'"); *Johnson v. Wynder*, 408 F. App'x. 616, 619 (3d Cir. 2010) ("[T]hat a legal argument is unlikely to succeed, or is even futile, does not make it unripe."); *Garcia v. Quarterman*, 573 F.3d 214, 220 (5th Cir. 2009) (rejecting an interpretation of "non-successive" as encompassing a legal theory "unavailable to [the petitioner] at the time of [the] first habeas petition").

The circuits' agreement makes sense in light of §2244(b)(2)(A). That provision already addresses when a "second or successive" petition can proceed because of a new legal rule. It says that petitioners may file an otherwise second-or-successive petition if "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." If, as Bryan contends, petitions are not second or successive when they raise claims that became legally viable *after* the petitioner's first habeas petition, then §2244(b)(2)(A) is superfluous—under Bryan's reading, the statutory exception for "new rule[s]" applies *only* to petitions that are not second or successive in the first place. *In re Coley*, 871 F.3d 455, 457–58 (6th Cir. 2017); *see also Ybarra*, 869 F.3d at 1031 (explaining that "AEDPA already establishes a procedure to address" previously unavailable constitutional rules).

B. This case does not present any issues of broad, general importance.

Nothing in Bryan's petition suggests this case presents issues of broad importance. Indeed, Bryan's petition displays that he is seeking case-specific error correction. He suggests, for example, that the Sixth Circuit misunderstood his ar-

gument, reached a conclusion inconsistent with this Court's already-issued decisions, and failed to follow its own precedent. Pet. 28. Even if all these things were true (none is), they would still not show why this case is important to others.

The closest Bryan gets to addressing the broader implications of this case comes when he implies that review is necessary to ensure that federal courts can properly supervise state courts' application of federal law. *See* Pet. i, 3, 18–21, 24–25. That is not a serious concern. This Court can and does grant certiorari to review directly state-court decisions. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). Federal courts can review issues raised within a *first* habeas petition. *See* 28 U.S.C. §2254(d). And federal courts can review second petitions that fall within already-existing exceptions for "second or successive" petitions. 28 U.S.C. §2254(b)(2). Finally, petitioners can file original writs of habeas corpus in this Court—Bryan himself has done just that. *See In re Bryan*, No. 18-9659. With all these opportunities for review, Bryan's concerns about a lack of federal oversight are overblown. This case presents no reason to upset the balance Congress struck in placing limits on second-or-successive habeas petitions.

II. This is a bad vehicle for addressing the questions presented.

Even if Bryan's questions presented were worth this Court's time, there is no need to address them in this case. Bryan's petition for habeas relief is doomed on the merits, making any decision on the second-or-successive issue irrelevant.

A. Bryan is alleging a violation of state law, not federal law.

Initially, Bryan's supposedly "ripened" claim alleges a violation of state law, not federal law. *Hurst* does not apply retroactively as a matter of federal law. So if

it applies here at all, it applies because the Supreme Court of Ohio exercised its state-law authority to give *Hurst* retroactive effect. When States choose to give "broader retroactive effect to this Court's new rules," they do so as a matter of "*state* law," not federal law. *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) (emphasis in original). Thus, even if Bryan is right that Ohio exercised its own "sovereign authority" to make *Hurst* retroactive as a matter of state law, Pet.22, that would not give rise to a *federal* constitutional claim.

Regardless, the Ohio Supreme Court has not retroactively applied *Hurst*. *See State v. Belton*, 149 Ohio St.3d 165, 176 (2016). Instead, it has held that Ohio law *complies* with *Hurst*, because it does not allow a judge "to make a factual finding during the sentencing phase that will expose a defendant to greater punishment." *Id.* at 176. Because Ohio law complies with *Hurst*, the Supreme Court of Ohio has never had occasion to announce whether *Hurst* applies retroactively as a matter of state law. Bryan's contrary argument rests entirely on *State v. Kirkland*, 145 Ohio St.3d 1455 (2016). But that summary remand contains no analysis or discussion, and thus never addresses whether *Hurst* applies retroactively as a matter of state law. Indeed, it never addresses anything at all.

B. Ohio's death-penalty scheme is consistent with *Hurst*.

Regardless, Ohio's capital-sentencing system comports with *Hurst*. In *Hurst*, the Court invalidated Florida's capital-sentencing system because it allowed a judge to increase the maximum punishment—from life imprisonment to a death sentence—"based on her own factfinding." 136 S. Ct. at 620–22. That, the Court held, violated the Sixth Amendment right to a jury trial, under which "any fact that 'ex-

pose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Id.* at 621 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

Ohio's approach is much different than Florida's. For a defendant to be death-penalty eligible under Ohio law, the State must charge and prove an aggravating circumstance at the guilt phase and the jury must find an aggravating circumstance beyond a reasonable doubt. *See* Ohio Rev. Code §2929.03 (addressing sentencing for aggravated murder); Ohio Rev. Code §2929.04(A) (listing aggravating circumstances). Then, at the mitigation phase, the jury must determine beyond a reasonable doubt that that the aggravating circumstances outweigh any mitigating factors. Ohio Rev. Code §2929.03(D)(1). Only then, if the jury recommends death, does a court independently weigh mitigating factors against whatever aggravating circumstance the jury found. Ohio Rev. Code §2929.03(D)(3); *see also* Ohio Rev. Code §2929.05(A) (mandating, upon appeal, that the Ohio Supreme Court independently weigh "whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case"). As a result, the court cannot impose a death sentence unless the jury first decides that a death sentence would be appropriate.

Ohio's scheme does not violate *Hurst*. It tasks juries with finding every fact necessary to support a death sentence. In other words, it is impossible for a judge to increase a sentence based on judge-found facts. A judge's only options are to (1) impose the jury's recommended sentence or (2) impose a *lesser* sentence. *See* Ohio Rev. Code §2929.03(D)(1)–(3). The Ohio Supreme Court has already held, on multiple occasions,

that Ohio's capital-sentencing system complies with *Hurst*. *State v. Goff*, 154 Ohio St.3d 218, 224–26 (2018); *State v. Mason*, 153 Ohio St.3d 476 (2018); *Belton*, 149 Ohio St.3d at 176. This Court has denied review of the issue. *Goff v. Ohio*, No. 18-8016, 2019 U.S. LEXIS 4043 (U.S.) (cert. denied June 17, 2019); *Mason v. Ohio*, 139 S. Ct. 456 (2018); *Belton v. Ohio*, 137 S. Ct. 2296 (2017).

C. Bryan attacks the Ohio Supreme Court's *alternative* analysis.

In light of the foregoing, Bryan's complaint seems to rest not with Ohio's capital-sentencing scheme generally, but rather with the Ohio Supreme Court's determination that it cured any "lingering impact" from the prosecutor's improper statements by independently reweighing the aggravating and mitigating circumstances. Pet. 10 (quoting *Bryan*, 101 Ohio St.3d at 299). In other words, Bryan argues that, even if Ohio courts *generally* comply with *Hurst*, the Ohio Supreme Court violated *Hurst in his case* by weighing evidence and determining whether that evidence supported a death sentence.

There are two problems with Bryan's seeking review of that narrower issue. First, it is specific to Bryan, and so presents no issue of general importance. Second, and more fundamentally, the Supreme Court of Ohio independently reweighed the evidence only to support its *alternative* holding. The court's *primary* holding was that the prosecutor's improper remarks—both at the guilt and penalty phases—did not amount to reversible plain error. *Bryan*, 101 Ohio St.3d at 291–94, 297–99. Because of that primary holding, which Bryan tried and failed to challenge in his first proceedings, the Supreme Court of Ohio did not even need to reweigh the

evidence. Since Bryan does not (and cannot) challenge the court's primary holding, any error in the reweighing was harmless.

CONCLUSION

The Court should deny Bryan's petition for writ of certiorari.

Respectfully submitted,

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