

Case No. 18-9372

**IN THE
SUPREME COURT OF THE UNITED STATES**

QUISI BRYAN, PETITIONER,

VS.

TIM SHOOP, WARDEN, RESPONDENT.

**On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit**

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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**REPLY TO BRIEF IN OPPOSITION
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Bryan has presented a significant issue of broad, general importance.

The Warden asserts that Bryan “is seeking case-specific error correction.” Brief in Opposition at 11. However, Bryan’s habeas petition presents exceptional circumstances that, if left unresolved, will result in disparate interpretations of the federal Constitution across the several states so that the Constitution may mean one thing in Ohio and another thing in other states because the Sixth Circuit’s holding that 28 U.S.C. § 2244 bars federal review of the Ohio Supreme Court’s disposition of Bryan’s claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016), allows a state court to be the final arbiter of the meaning and application of federal constitutional law.

The Warden asserts that there are many avenues for review of state determinations of federal constitutional claims. Brief in Opposition at 12. The Warden mentions the ability to file an original writ with this Court, but conveniently ignores the fact that the Sixth Circuit’s decision barring review of Bryan’s subsequent federal habeas petition pursuant to 28 U.S.C. § 2244 definitively renders a certain class of federal constitutional claims – those that a state court voluntarily adjudicates retroactively – unreviewable by any federal court save, perhaps, this Court through its original writ jurisdiction.

The Circuit Court erroneously applied § 2244(b) to Bryan’s habeas petition in a way that conflicts with this Court’s jurisprudence interpreting the constitutional underpinnings of federalism. Simply put, § 2244 does not contemplate and is not

applicable to cases where a state court voluntarily reverses the finality of a petitioner's conviction in order to retroactively apply a new rule of constitutional law that the United States Supreme Court has not made retroactive. In those rare and exceptional circumstances, federal review pursuant to § 2254(d) must follow. Otherwise, the federal constitution is susceptible to differing state-by-state interpretations that can never be reconciled through federal review.

This issue is of broad, general importance insofar as it is repugnant to our system of government to allow each State to define for itself the meaning of the federal Constitution, and it is nonsensical and unduly burdensome to create a class of claims that can only attain federal review through this Court's original writ jurisdiction. As such, this Court should grant certiorari in this matter to correct the Sixth Circuit's ruling, which misinterprets the reach and applicability of § 2244, misinterprets this Court's ripeness precedent, and violates the principles of federalism in the process.

Bryan is alleging a violation of federal constitutional law.

The Warden argues that, because *Hurst* does not apply retroactively as a matter of federal law, the State of Ohio's retroactive application of *Hurst* is strictly a matter of state law. Brief in Opposition at 12-13. In support of this proposition, the Warden cites to language from *Danforth v. Minnesota*, 552 U.S. 264 (2008), which is taken out of context. In *Danforth* this Court described the relationship between state and federal courts in a simple, practical manner: "States are independent sovereigns with plenary authority to make and enforce their own laws **as long as they do not**

infringe on federal constitutional guarantees.” *Id.* at 280. (Emphasis added.) The *Danforth* Court declared that the “fundamental interest in federalism” is that which “allows individual States to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways—**so long as they do not violate the Federal Constitution.**”

That federal constitutional law as determined by the Supreme Court is binding upon state courts is a basic premise of our system of federalism. *See, e.g., Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016). In clarifying the nature and scope of federalism where retroactivity of such law is concerned, the *Danforth* Court held that state courts are free to make a new rule of constitutional law retroactive, but that retroactive application must not infringe on federal constitutional guarantees or violate the Federal Constitution. *Id.* The Court’s *Danforth* analysis drew a noted distinction between existing (even if newly recognized) constitutional **rights** and the scope of available **remedies**. Although a state’s decision to provide a retroactive remedy by applying a newly recognized federal constitutional right retroactively is a matter of state law, the question of whether the right was indeed violated remains a question of federal constitutional law.

The *Danforth* Court made clear that states like Ohio can assess for themselves whether some new federal right is so important as to warrant their own courts’ intervention in judgments they previously considered final. *Id.* at 288 (finding “no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations”); *see also, Slack v. McDaniel*, 529 U.S.

473, 489 (2000). This is within any state's sovereign right to do. However, as to the matter of the actual interpretation of federal constitutional law once a state has decided to apply such law retroactively, the *Danforth* Court made clear that the act of providing a remedy does not transform the claim from one of federal law to state law, and federal courts retain the final say on whether states have applied federal law correctly in accord with the Constitution.

Consistent with that understanding, the Ohio Supreme Court was within its sovereign right to revisit its own final judgments and provide Bryan (and Kirkland before him) a forum within which to seek a remedy for a sentencing phase violation implicating the right recognized by this Court in *Hurst*. Acting within the scope of its sovereign authority, the Ohio Supreme Court permitted Bryan to seek a remedy asking for a new sentencing phase hearing based solely upon federal constitutional rights articulated in *Hurst*. Until then, Bryan's state court judgment was, for both state and federal habeas concerns, a final adjudication. Having been provided a forum within which to remedy (exhaust) a newly-recognized federal constitutional *Hurst* violation, Bryan went forward and litigated the new clearly established violation of his federal constitutional rights. He lost on the merits. Bryan then sought, naturally and consistent with our system of federalism, a federal court determination of whether the state court's adjudication of Bryan's federal rights was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d).

In adjudicating Bryan's *Hurst* claim on the merits, the Ohio Supreme Court reversed the finality of its own state court judgment, allowed for the possibility of a

new sentencing phase trial, and ultimately denied Bryan's claim, effectively interpreting the federal Constitution and applying now clearly established federal law in the process. *Danforth* says nothing that minimizes the federal courts' ongoing fundamental responsibility to thereafter assure that the state court judgment and adjudication of Bryan's federal constitutional rights was a reasonable application of federal constitutional law.

**Bryan is challenging the Ohio Supreme Court's direct,
non-alternative ground for upholding his death sentence.**

The Warden claims that the Ohio Supreme Court's primary analysis of Bryan's claim did not rely on appellate reweighing to uphold his death sentence. Brief in Opposition at 15. However, although a number of instances of prosecutorial misconduct complained of on appeal were not objected to at Bryan's trial, other instances were indeed objected to. With regard to the misconduct that occurred over defense objection, the Ohio Supreme Court made **no** finding of whether the prosecutor's improper remarks prejudicially affected Bryan's substantial rights **at the penalty phase**. The court found that at the guilt phase the prosecutorial misconduct complained of did not prejudicially affect Bryan's substantive rights in view of the overwhelming evidence of his guilt. *State v. Bryan*, 804 N.E.2d 433, 460 (Ohio 2004). The court then used its independent assessment to "cure" any lingering impact of the prosecution's statements as to the penalty phase. *Id.* at 464.

The use of reweighing based on *Clemons v. Mississippi*, 494 U.S. 738 (1990), to uphold Bryan's death sentence violated his federal constitutional rights as articulated in *Hurst* and retroactively applied in *Kirkland*. He lost his sentencing-

phase prosecutorial misconduct claim based on the court's reweighing. The Sixth Circuit's disposition of the claim in habeas belies this fact. The court affirmed in reliance on *Clemons*, finding that:

The prosecutor's alleged acts of misconduct were many. *See Bryan*, 804 N.E.2d at 463–65, ¶¶ 176–78, 180–86 (outlining them). Some the state supreme court held improper. *Id.* at 464, ¶¶ 180–82. The district court agreed.

Nonetheless, assuming the comments at the worst, any harm was cured when the Ohio Supreme Court independently reweighed aggravation and mitigation. *Bryan*, 804 N.E.2d at 469–71, ¶¶ 215–27; *see also id.* at 464, ¶ 182 (“[O]ur independent assessment of the sentence has cured any lingering impact from the prosecutor's comments”). *See LaMar v. Houk*, 798 F.3d 405, 431 (6th Cir. 2015) (citing *Lundgren v. Mitchell*, 440 F.3d 754, 783 (6th Cir. 2006)), *cert. denied*, — U.S. —, 136 S.Ct. 1715, 194 L.Ed.2d 814 (2016); *see also Clemons v. Mississippi*, 494 U.S. 738, 749–50, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

Bryan v. Bobby, 843 F.3d 1099, 1114 (6th Cir. 2016).

Moreover, the Ohio Supreme Court's guilt-phase determination that Bryan's substantive rights were not violated because of overwhelming evidence of his guilt is inapposite to the jury's penalty-phase determination of whether aggravation outweighs mitigation. That reasoning therefore cannot support the court's denial of the claim. Again, the court in fact sought to cure such lingering impact and uphold Bryan's death sentence upon its independent review.

Ohio's application of *Clemons* violates *Hurst*.

The Warden spends considerable time defending Ohio's death penalty scheme as compliant with *Hurst*. Brief in Opposition at 13-15. However, Bryan is not arguing and has not argued that Ohio's death penalty scheme violates *Hurst* in general.

Bryan's claim is that *Hurst* invalidated Ohio's interpretation and application of *Clemons* specific to Ohio's death penalty scheme.

The *Hurst* Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. As the Warden concedes, Brief in Opposition at 14, the facts necessary to impose a death sentence in Ohio include the existence of any statutory aggravating circumstances **and** whether those aggravating circumstances are sufficient to outweigh the defendant's mitigation evidence beyond a reasonable doubt. Thus, Ohio "tasks juries with finding every fact necessary to support a death sentence" and includes weighing aggravation versus mitigation among those facts. Brief in Opposition at 14.

This structure places the jury's weighing determination among the factual findings on which the Ohio legislature conditions an increase in a defendant's maximum possible punishment from life imprisonment to death. In a weighing scheme like Ohio's, where the jury's weight determination directly affects the defendant's death eligibility, the *Hurst* Court's clearly established federal law that a jury must find each fact necessary to impose a sentence of death invalidates the *Clemons*-based appellate reweighing procedure whereby an appellate court substitutes its judgment regarding the weight of aggravation versus mitigation for that of the jury to "cure" errors that may have influenced the jury's weight determination.

This is not a case-specific claim. Following *Hurst*, the Ohio appellate courts can no longer rely on *Clemons* to use reweighing to rectify the type of error that took place in Bryan's case and others. Under *Hurst*, Ohio's appellate courts may not reweigh

aggravating circumstances to cure a defect in the jury's weighing determination because the appellate court is thereby substituting its judgment for that of the jury in a capital sentencing scheme wherein the weighing determination directly affects the defendant's death-eligibility. Once the reviewing courts determine that a jury's finding that aggravation outweighs mitigation is unreliable, the weight determination is nullified. At that point, life in prison is the maximum sentence a defendant in Ohio can receive under Ohio law absent a non-defective jury finding that aggravation outweighed mitigation. *See* R.C. 2929.03(D)(2). However, the Ohio Supreme Court has consistently relied upon *Clemons*'s authority to cure errors through independent reweighing. *See, e.g., State v. Combs*, 581 N.E.2d 1071 (1991) (rejecting argument that appellate reweighing cannot be used for error correction "where the jury's deliberations are tainted by prosecutorial misconduct, injection of nonstatutory aggravating circumstances, or other error"); *State v. Lott*, N.E.2d 253, 303-305 (1990) (consideration of invalid aggravating circumstances was sentencing error cured by appellate reweighing). These cases lead back to the Ohio Supreme Court's now unreasonable reliance on *Clemons*.

Under *Hurst*, there was no valid jury fact finding in Bryan's case because, having found constitutional error to have taken place during the sentencing phase of his trial specific to the weighing of aggravators versus mitigators, the appellate court could not just "cure" the error by reweighing based upon a cold record. *See Satterwhite v. Texas*, 486 U.S. 249, 262 (1988) (Marshall, J. and Brennan, J., concurring in part and concurring in judgment) ("Because of the moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer, predicting the reaction of a sentencer to a

proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise.”). *Hurst* mandates, as a matter of clearly established federal law, only a jury can make the determinations that render an individual death eligible. In Bryan’s case, and others, it was the weighing of aggravating circumstances and mitigating factors by the **reviewing court** that unconstitutionally and unreasonably determined death eligibility.

CONCLUSION

Based on the foregoing, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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