IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

vs.

DUANE SHORT

Defendant-Appellant.

Case No. 2020-1476

On appeal from the Montgomery County Court of Appeals, Second Appellate District Case No. CA 28696

THIS IS A CAPITAL CASE.

MEMORANDUM IN RESPONSE TO JURISDICTION OF APPELLEE, THE STATE OF OHIO

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WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

The single question that Duane Short asks this Court to decide is a question this Court has already answered numerous times: To what extent, if any, does the United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), apply to entitle Ohio capital defendants to a new mitigation trial because of an alleged violation of the defendant's Sixth Amendment right to have a jury make the findings necessary to support a sentence of death?

The question was first answered, in part, in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, when this Court suggested that *Hurst* had no application to Ohio's capital-sentencing scheme because Ohio's scheme does not suffer from the same constitutional flaws as the Florida scheme at issue in *Hurst*. The question was later answered head-on in *State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56, where this Court found that, unlike the Florida capital-sentencing scheme held unconstitutional in *Hurst*, "Ohio's death-penalty scheme * * * does not violate the Sixth Amendment," because Ohio's scheme " requires the critical jury findings [before a sentence of death can be imposed] that were not required by the laws in * * * *Hurst*." *Id*. at ¶ 21.

Since then, this Court has relied on its holding in *Mason* on at least eight subsequent occasions to reject the argument that Ohio's capital-sentencing procedures violate the Sixth Amendment right to a jury trial as construed in *Hurst*. *See State v. Grate*, __ Ohio St.3d __, 2020-Ohio-5584, ¶ 152; *State v. Froman*, __ Ohio St.3d __, 2020-Ohio-4523, ¶ 158; *State v. Hundley*, __ Ohio St.3d __, 2020-Ohio-3775, ¶ 125; *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 442; *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 279; *State v. Goff*, 154 Ohio St.3d 218, 2018-Ohio-3763, 113 N.E.3d 490, ¶¶ 35-36; *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.2d 1092, ¶ 228; *State ex rel. O'Malley v. Collier-*

Williams, 153 Ohio St.3d 553, 2018-Ohio-3154, 108 N.E.3d 1082, ¶ 20. *See also State v. Graham*, __ Ohio St.3d __, 2020-Ohio-6700, ¶¶ 185-186 (rejecting the defendant's request that *Mason* be overturned).

In its decision below, the Second District Court of Appeals found that the trial court properly determined that *Hurst* did not entitle Short to a new mitigation trial and that *Hurst* did not render Short's death sentence unconstitutional. In doing so the Second District did not misapply or misinterpret the law, it did not create new law, nor did it change existing law. Rather, both the court of appeals and trial court followed this Court's holding and rationale in *Mason* in properly rejecting Short's argument that *Hurst* applied to invalidate his sentence. Jurisdiction over Short's proposition of law, therefore, should be declined and this appeal should be dismissed.

STATEMENT OF THE CASE

The Montgomery County Grand Jury indicted Duane Short on three counts of aggravated murder with aggravating circumstances specifications, along with counts of breaking and entering, aggravated burglary, unlawful possession of a dangerous ordinance, and six firearm specifications. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶¶ 35-36. He was found guilty on all counts and specifications and the jury recommended a sentence of death on each count of aggravated murder. *Id*. at ¶ 37. The trial court adopted the jury's recommendation and sentenced Short to death. *Id*. This Court unanimously affirmed Short's conviction and sentence on July 28, 2011. *Id.* at ¶ 165.

On January 10, 2017, Short filed a motion with the trial court asking for leave to file a motion for a new mitigation trial pursuant to Crim.R. 33 and *Hurst v. Florida*. He attached to his motion a proposed motion for a new trial and asked that it be deemed filed instanter. The trial court sustained Short's motion for leave to file his delayed motion for a new trial, but did not grant

Short's separate request that the proposed new-trial motion be accepted as if filed instanter. The trial court instead directed Short to "file his Motion for New Trial in a timely manner, as provided by law."

Short never filed his motion for a new trial. In a conversation with the trial court two years after leave was granted, Short's counsel explained that they assumed that attaching the proposed motion for a new trial to the motion for leave to file such a motion was sufficient for filing purposes. But despite the debate over whether a timely motion for a new mitigation trial was ever actually filed, both Short and the State jointly requested that the trial court rule on the merits of the motion for a new mitigation trial that was attached to Short's motion for leave.

The trial court rendered its decision on December 30, 2019. After noting that Short failed to comply with Crim.R. 33(A), which requires that any motion for a new trial be filed within seven days *after* a defendant is granted leave to file said motion, the trial court nevertheless went on to find that, even assuming Short's motion was filed timely, it lacked merit. In particular, the trial court found that the sole basis for Short's request for a new mitigation trial–the United States Supreme Court's decision in *Hurst v. Florida*–"has been found inapplicable to Ohio's death penalty scheme." (See Short's Memorandum in Support of Jurisdiction at Appendix p. A-18) Accordingly, the trial court overruled Short's motion for a new mitigation trial on the merits.

The Second District affirmed the trial court's denial of Short's motion for a new mitigation trial. *State v. Short*, 2d Dist. Montgomery No. 28696, 2020-Ohio-5034. The Second District relied on this Court's decision in *Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, to find that Ohio's death-penalty scheme does not violate the Sixth Amendment, and that the constitutional flaws in Florida's law that were recognized in *Hurst* to do exist in Ohio. *Short* at ¶¶ 13-15.

Short now seeks leave of this Court to appeal further.

ARGUMENT

Response to Appellant's Proposition of Law:

Short's Sixth Amendment right to have a jury make the factual determination triggering the death-penalty-sentencing enhancement was not violated in this case, and neither *Hurst v. Florida,* nor any other grounds, entitles Short to a new mitigation trial.

Short criticizes the court of appeals for rejecting his contention that his Sixth Amendment right to have a jury, rather than a judge, determine the facts necessary to impose a sentence of death was violated as a result of the manner in which his sentence was imposed. As principal support for his argument, Short relies on *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 192 L.Ed.2d 504 (2016).

In *Hurst*, the United States Supreme Court ruled that Florida's death-penalty scheme, which requires the trial judge and not the jury to find the existence of aggravating circumstances before a sentence of death can be imposed, was an unconstitutional infringement on a defendant's Sixth Amendment right to a jury trial. *Id*. at 102-103. But Ohio's capital-sentencing scheme has no similarity to Florida's at all, which this Court touched upon in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, ¶ 59 ("Ohio's capital-sentencing scheme is unlike the laws at issue in * * * *Hurst*."). After *Belton*, this Court conducted a more thorough comparison of Ohio's and Florida's capital-sentencing scheme in *State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56, and rejected again the notion that Ohio's death-penalty scheme was unconstitutional under *Hurst*. *Id*. at ¶ 29. As the Court explained:

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This entitles criminal defendants "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring* [*v. Arizona,*

> 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)]. *See also Hurst*, __ U.S. __, 136 S.Ct. at 619, 193 L.Ed.2d 504 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). Ohio's death-sentence scheme satisfies this right.
>
> When an Ohio capital defendant elects to be tried by a jury, the jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and–unlike the juries in *Ring* and *Hurst*–the aggravating-circumstance specifications for which the offender was indicted. R.C. 2929.03(B). Then the jury–again unlike in *Ring* and *Hurst*–must "unanimously find[ ], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." R.C. 2929.03(D)(2). An Ohio jury recommends a death sentence only after it makes this finding. *Id.* And without that recommendation by the jury, the trial court may not impose the death sentence.
>
> Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*. *See* R.C. 2929.03(C)(2). Ohio's death-penalty scheme, therefore, does not violate the Sixth Amendment.

Mason at ¶¶ 19-21. As noted above, this Court has relied on its holding in *Mason* on at least eight subsequent occasions to reject the argument that Ohio's capital-sentencing procedures violate the Sixth Amendment right to a jury trial as construed in *Hurst*. *See infra* at pp. 1-2.

But despite this Court's repeated conclusion that Ohio's death-penalty scheme is distinctively different from the Florida scheme found unconstitutional in *Hurst*, Short nevertheless makes the extraordinary claim that "this Court's precedent has long recognized that Ohio's capital

sentencing statutes are 'remarkably similar' to the Florida statutes invalidated by *Hurst*," and he attempts to back up that claim by citing *State v. Rogers*, 28 Ohio St.3d 427, 504 N.E.2d 52 (1986). (*Memorandum in Support of Jurisdiction* at pp. 8-9, 16-17) To be sure, this Court did comment in *Rogers* that Ohio's and Florida's schemes were "remarkably similar." *Rogers* at 430. But in *Mason*, this Court clarified that "*Rogers* involved a different question [than what was confronted in *Hurst*]. * * * *Rogers* noted that the systems are similar in that they both allow for jury recommendations; it did not consider the findings that the jury was required to make before recommending a sentence." *Mason*, 153 Ohio St.3d 376, 2018-Ohio-1462 at ¶ 33. Indeed, a capital defendant who sought to rely on *Rogers* to argue that Ohio's capital sentencing statute was "remarkably similar" to Florida's was chastised in federal district court for "ripping language out of context and using it to prove a proposition not intended by the author." *Gapen v. Robinson*, S.D. Ohio No. 3:08-cv-280, 2017 WL 3524688 *3 (Aug. 15, 2017) (quoting Mag. Judge Merz). Short's reliance of *Rogers*, therefore, is "not only unconvincing, it is unsupported by law." *Id.*

Finally, although Short never made an Eighth Amendment argument in the court of appeals below, he cites to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed2d 231 (1985), in suggesting that his rights under the Eighth Amendment were violated because the jury was instructed that their sentencing verdict was only a recommendation, thereby "diminishing the jury's sense of personal responsibility for its verdict[.]" (*Memorandum in Support* at pp. 9-10) But Short's jury was never told or instructed during the penalty phase that their verdict was only a recommendation. See generally Tr. 2493-2496, 2513-2526. This additional contention by Short, therefore, is unfounded as well.

Simply stated, Short's attacks on the validity of the jury's sentencing verdict are just as meritless now as they were when he brought them originally, and *Hurst* does nothing to change

that fact. The Second District did not err, therefore, in affirming the trial court's decision to overrule Short's motion for a new mitigation trial, and further review by this Court is not warranted.

CONCLUSION

The Second District Court of Appeals followed this Court's established precedent in finding no error in the trial court's decision to overrule Short's motion for a new mitigation trial based upon an alleged Sixth Amendment violation. The court of appeals did not misapply or misinterpret the law, it did not create new law, nor did it change existing law. As a result, there is nothing further for this Court to decide or review.

For this reason, Appellee the State of Ohio respectfully requests that this Court find Duane Short's proposition of law not well-taken and deny him jurisdiction to appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Response to Jurisdiction* was sent by first class mail, postage pre-paid, to counsel for Defendant-Appellant: Kimberly S. Rigby and Erika M. LaHote, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215, on January 5, 2021.

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