No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE MASON,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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QUESTION PRESENTED

A capital sentencing jury in Ohio has the responsibility of finding that one or more statutory aggravating circumstances were proven to exist beyond a reasonable doubt as part of the verdict at the trial phase of a capital defendant's trial. That, however, is not the completion of the capital sentencing process. Rather, under Ohio law, the jury must consider whether any mitigating circumstances have been demonstrated and then conduct a weighing process to determine whether, in its opinion, the statutory aggravating circumstances outweigh the factors in mitigation. Once the weighing process is complete, the jury renders a general verdict recommending to the trial court that sentence of death be imposed—without further explanation.

Does Ohio's death penalty scheme, classifying a jury's decision as a recommendation, accord with the Sixth Amendment right to trial by jury as articulated in *Ring v. Arizona*, 536 U.S. 584 (2002), and especially in *Hurst v. Florida*, 136 S.Ct. 616 (2016), where this Court emphasized language in Florida's death penalty scheme defining the jury's decision as advisory?

LIST OF PARTIES

The Petitioner is Maurice Mason. The Respondent is the State of Ohio.

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner, Maurice Mason, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The Supreme Court of Ohio's opinion, *State v. Mason*, __ N.E.3d __, 2018-Ohio-1462, 2018 WL 1872180, is reproduced as Appendix A (Pet. App. 1a–23a). The opinion issued by the Ohio Court of Appeals for the Third Appellate District, *State v. Mason*, 3d Dist. Marion No. 9-16-34, 2016-Ohio-8400, 2016 WL 7626193, is reproduced as Appendix B (Pet. App. 24a–66a). The trial court's opinion from 2016 finding Ohio's death-penalty scheme unconstitutional is reproduced as Appendix C (Pet. App. 67a–116a). The trial court's original opinion from 1994 imposing a death sentence is reproduced as Appendix D (Pet. App. 117a –126a).

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio issued its opinion finding Ohio's death-penalty did not violate the Sixth Amendment on April 18, 2018. Mason now timely files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which are set forth in Appendix E.

The statutes involved are Ohio Rev. Code §§ 2929.03 and 2929.04, which are also set forth in Appendix E as effective in 1993 and in 2017, respectively.

INTRODUCTION

"The Sixth Amendment requires a jury, not a judge, **to find each fact necessary to impose a sentence of death**. A jury's mere recommendation is not enough." *Hurst v. Florida*,

136 S. Ct. 616, 619 (2016) (emphasis added). This Court in *Hurst* held that Florida's capital sentencing scheme violated Hurst's Sixth Amendment right to trial by jury because it required the judge, not a jury, to make factual determinations necessary to impose a sentence of death. The decision in *Hurst*, premised on this Court's earlier ruling in *Ring v. Arizona*, 536 U.S. 584 (2002), applies equally to the Ohio capital sentencing scheme because the trial judge in Ohio is required to independently make and articulate additional "specific findings" in order to impose a sentence of death after receiving the jury's recommendation that death be imposed. Therefore, Ohio's capital sentencing scheme as set out in Ohio Rev. Code § 2929.03 violates the Sixth, Eighth, and Fourteenth Amendments.

In this case, the Marion County Court of Common Pleas, relying on *Ring* and the plain language of *Hurst*, concluded that Ohio's death-penalty statute would deny Maurice Mason his Sixth Amendment right to have a jury determine every fact necessary to impose a death sentence. However, the Ohio Court of Appeals for the Third Appellate District (hereafter Third District) reversed, concluding that *Ring* and *Hurst* did not apply and that Ohio's death penalty scheme did not violate the Sixth Amendment. The Supreme Court of Ohio affirmed the Third District.

This Court should accept this case to clarify the rule of *Hurst*, a rule that has been understood and applied differently and inconsistently in multiple states, including Florida, Delaware, Alabama, and now Ohio. The Supreme Courts of Florida and Delaware have accepted the ruling in *Hurst* and found that their sentencing schemes violated the Sixth Amendment: *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (per curiam) ("[W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by

the jury."); *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam) (holding unconstitutional Delaware's death penalty scheme because it did not require the jury to find that the aggravating circumstances outweighed the mitigating factors) The Supreme Courts of Alabama and Ohio, by contrast, interpreted *Hurst* narrowly and found no Sixth Amendment violation: *Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) (concluding that *Hurst* did not mention the jury's weighing of the aggravating circumstances and mitigating factors and that "nothing in our review of *Apprendi*, *Ring*, and *Hurst* leads us to conclude that in *Hurst* the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence"); *Mason*, 2018-Ohio-1462, ¶ 29 (Pet. App. 12a) ("The Sixth Amendment was satisfied once the jury found Mason guilty of aggravated murder and a felony-murder capital specification."). This Court should accept this case to resolve these conflicts in the interpretation of the Sixth Amendment right to a jury trial for capital sentencing articulated in *Hurst*.

STATEMENT OF THE CASE

Maurice Mason was charged with causing the death of Robin Dennis in Marion County, Ohio in February 1993. Mason demanded a trial by jury. The jury found Mason guilty of aggravated murder, of the death penalty specification that the murder occurred during the commission of a rape, and of other offenses. Following the penalty phase of the trial, the jury recommended that a death sentence be imposed. On July 12, 1994, the Marion County Court of Common Pleas issued a judgment entry sentencing Mason to death. (Pet. App. 117a –126a)

After the Third District, *State v. Mason*, 3d Dist. Marion No. C-9-94-45 (Dec. 9, 1996), and the Supreme Court of Ohio, *State v. Mason*, 82 Ohio St.3d 144, 694 N.E.2d 932 (1998), affirmed Mason's conviction and death sentence, and after Mason exhausted other state court remedies, Mason pursued federal habeas corpus relief. On October 3, 2008, the U.S. Court of

Appeals for the Sixth Circuit found that trial counsel rendered ineffective assistance at the sentencing phase, and granted Mason a conditional writ of habeas. *Mason v. Mitchell*, 543 F.3d 766, 785 (6th Cir. 2008)

After the matter returned to the Marion County Court of Common Pleas, on May 6, 2016, Mason filed a motion to dismiss capital components pursnt to *Hurst v. Florida*, 136 S. Ct. 616 (2016). On June 20, 2016, the Marion County Court of Common Pleas granted Mason's motion and declared Ohio's death-penalty statute in effect in 1993 unconstitutional under *Hurst*. (Pet. App. 67a–116a) The State appealed the trial court's decision and on December 27, 2016, the Third District reversed. *State v. Mason*, 3d Dist. Marion No. 9-16-34, 2016-Ohio-8400, 2016 WL 7626193. (Pet. App. 24a–66a) Mason appealed the Third District's decision and on April 18, 2018, the Supreme Court of Ohio affirmed. *State v. Mason*, __ N.E.3d __, 2018-Ohio-1462, 2018 WL 1872180. (Pet. App. 1a–23a)

REASONS FOR GRANTING THE WRIT

OHIO'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL PURSUANT TO *HURST V. FLORIDA*, 136 S. CT. 616 (2016).

The Ohio Supreme Court has recognized Ohio's death penalty scheme as being remarkably similar to Florida's death penalty scheme. *State v. Rogers*, 28 Ohio St.3d 427, 430, 504 N.E.2d 52 (1986), *rev'd on other grounds*, 32 Ohio St.3d 70, 512 N.E. 2d 581 (1987). The Ohio scheme suffers from the same infirmities that caused this Court in *Hurst* to invalidate Florida's scheme. Under the Ohio scheme, the trial judge, not the jury, ultimately determines whether the aggravating circumstances outweigh the mitigating factors. No death penalty can be imposed without the trial judge independently finding mitigating factors, independently weighing the aggravating circumstances against the mitigating factors, and independently

committing those decisions to a written decision explaining why death is appropriate. Ohio's death penalty, like Florida's before, violates the Sixth Amendment.

In this Petition, Mason will first address Florida's capital sentencing scheme found unconstitutional in *Hurst*, then apply the principles of *Hurst* to Ohio's capital sentencing scheme. Mason then will demonstrate why the Supreme Court of Ohio failed to properly apply *Hurst* in finding Ohio's capital sentencing scheme constitutional and explain why the trial court correctly applied *Hurst* to Ohio's capital sentencing scheme. For the reasons explained below, Mason respectfully asks this Court to grant the petition for a writ of certiorari and ultimately to reverse the Supreme Court of Ohio.

I. *Hurst* and Florida's Capital Sentencing Scheme.

In *Hurst*, a Florida jury convicted Timothy Hurst of first-degree murder. *Hurst*, 136 S. Ct. at 619–20. In Florida, first-degree murder is a capital felony, but the maximum sentence a defendant may receive based solely on that conviction is life imprisonment. Fla. Stat. § 775.082(1). A capitally charged defendant can receive the death penalty only after an additional sentencing proceeding "results in **findings by the court** that such person shall be punished by death." *Id.* (emphasis added). Otherwise, the defendant is punished by life imprisonment without the chance of parole. *Id.*

Accordingly, after Hurst was found guilty of first-degree murder, the initial trial judge conducted an evidentiary hearing before the jury. *Hurst*, 136 S. Ct. at 620. At the conclusion of the evidentiary hearing, the jury rendered an "advisory sentence" of death without specifying the factual basis of its recommendation. *Id.* Under Florida law, the trial court must give the jury's recommendation "great weight," but must *independently* weigh the aggravated and mitigating

circumstances before entering a sentence of life imprisonment or death. *Id.* The trial court in *Hurst* did this and imposed a death sentence. *Id.*

On post-conviction review, the Florida Supreme Court vacated the sentence for reasons that are not relevant here. *Id.* At Hurst's re-sentencing hearing, a jury again recommended death and the trial court so sentenced, independently determining that the heinous-murder and robbery aggravating circumstances existed, and assigning "great weight" to those independent findings as well as the jury's recommendation of death. *Id.*

This Court accepted Hurst's appeal to resolve the tension between *Ring v. Arizona*, 536 U.S. 584 (2002) and this Court's earlier decisions, *Hildwin v. Florida*, 490 U.S. 638 (1989) (concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury) and *Spaziano v. Florida*, 468 U.S. 447 (1984) (holding that Florida's sentencing structure did not violate the Sixth or Eighth Amendment and finding it constitutional to place responsibility on the trial judge to impose a capital sentence). In *Ring*, the Supreme Court held that the Sixth Amendment requires a jury to find any fact necessary to qualify a capital defendant for a death sentence. *Hurst*, 136 S. Ct. at 621. Although *Ring* had not expressly overruled *Hildwin* and *Spaziano*, *Ring*'s holding seemed to compel such an outcome. *Hurst* laid the confusion to rest, holding that Florida's law "violates the Sixth Amendment in light of *Ring*." *Id.* at 620.

The majority opinion explained that like Arizona, the state whose sentencing scheme was at issue in *Ring*, "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Id.* at 622. This Court continued: "Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial." *Id.* Because "the maximum

punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole," and because "a judge increased Hurst's authorized punishment based on her own factfinding," this Court held that "Hurst's sentence violates the Sixth Amendment." *Id.*

In so holding, this Court rejected Florida's arguments, noting "the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. § 775.082(1)) (emphasis in original). Because "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,'" this Court found that a Florida jury's function is solely advisory and does not satisfy the constitutional standard outlined by *Ring*. *Id.* (quoting Fla. Stat. § 921.141(3)) (emphasis in original). Thus, the Florida jury's function was found to be solely advisory and did not satisfy the constitutional standard required by the Sixth Amendment.

II. *Hurst* and Ohio's Capital Sentencing Scheme.

In 2018, the Supreme Court of Ohio claimed there was a "material difference between the process by which an Ohio jury reaches its death recommendation and the Florida process at issue in *Hurst*." *Mason*, 2018-Ohio-1462, ¶ 30 (Pet. App. 13a). In reality, however, Ohio's death penalty sentencing statutes do not differ from the capital sentencing scheme in Florida in any material manner. Indeed, in 1987, the Supreme Court of Ohio recognized that Ohio's scheme is "remarkably similar" to Florida's. *See State v. Rogers*, 28 Ohio St.3d 427, 430, 504 N.E.2d 52 (1986), *rev'd on other grounds*, 32 Ohio St.3d 70, 512 N.E. 2d 581 (1987). Accordingly, this Court's decision in *Hurst* mandates finding Ohio's capital sentencing scheme unconstitutional under the Sixth Amendment.

A. Ohio's Capital Sentencing Scheme Asks the Jury to Make a Recommendation Regarding the Sentence to Impose.

Ohio Rev. Code. § 2929.03 (D)(2) sets forth the jury's role at the penalty phase of a capital trial in Ohio:

> [T]he trial jury . . . shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall **recommend** to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall **recommend** that the offender be sentenced to [one of the following life sentences].

Ohio Rev. Code. § 2929.03(D)(2) (emphasis added). Ohio law does not require the jury to set forth any of the factual findings underlying its recommendation.[1] The jury merely renders a general verdict concluding that the statutory aggravating circumstances outweigh the factors in mitigation without any explanation whatsoever. Thus, the trial court has no guidance whatsoever from the jury as to what mitigating factors it found or what weight it gave to those mitigating factors, or how it weighed the mitigating factors against the statutory aggravating circumstances. The trial court must therefore make those findings and weigh the aggravating circumstances and mitigating factors independently and without guidance of any kind from the jury.

Ohio courts have long recognized that the jury's recommendation that death be imposed is just that—a recommendation. *State v. Henderson*, 39 Ohio St.3d 24, 29–30, 528 N.E.2d 1237 (1988); *see also State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), paragraph six of the syllabus ("The jury in the penalty phase of a capital prosecution may be instructed that its recommendation to the court that the death penalty be imposed is not binding and that the final

[1] At the time of Hurst's trial in Florida, the jury's recommendation did not need to be unanimous. *Hurst*, 136 S. Ct. at 620. Nevertheless, the point is that, as in Florida, Ohio juries make a recommendation to the trial court for imposing a death sentence but the final decision statutorily rests with the trial court.

decision as to whether the death penalty shall be imposed rests with the court."). As the Supreme Court of Ohio has recognized, a recommendation means that the trial court is the final arbiter of whether death is imposed, not the jury. *See Rogers*, 28 Ohio St.3d at 429 ("[T]he jury provides only a recommendation as to the imposition of the death penalty," and "Ohio has no 'sentencing jury'" because "[a]ll power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial."); *id.* at 430 (stating that "under Ohio's framework, the trial court is not a simple 'buffer where the jury allows emotion to override the duty of a deliberate determination,' but is the authority in whom resides the sole power to initially impose the death penalty" (citation omitted)).

B. Ohio's Capital Sentencing Scheme Vests Trial Courts with the Sole Power to Impose a Sentence of Death.

In Ohio, once a jury makes a death-sentence recommendation, the trial court must **independently** consider the same evidence the jury considered. Ohio Rev. Code. § 2929.03(D)(3). The trial court may sentence a defendant to death only if "**the court finds**, by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." *Id.* (emphasis added); *see also State v. Buell*, 22 Ohio St.3d 124, 143–44, 489 N.E.2d 795 (1986) ("Ohio Rev. Code § 2929.03(D)(3) delegates the death sentencing responsibility to the trial court upon its **separate and independent finding** that the aggravating factors outweigh the mitigating factors in this case." (footnote omitted) (emphasis added)).

Further, Ohio's death penalty scheme does not end with Ohio Rev. Code. § 2929.03(D)(3). Instead, upon receipt of the recommendation of the jury that the offender be sentenced to death, the trial court may only sentence the defendant to death if the trial judge makes additional findings under Ohio Rev. Code. § 2929.03(D)(3) and **articulates those**

additional findings in a written opinion pursuant to Ohio Rev. Code. § 2929.03(F). *See Rogers*, 28 Ohio St.3d at 429 ("The trial court must thereafter independently re-weigh the aggravating circumstances against the mitigating factors and issue a formal opinion stating its specific findings, before it may impose the death penalty. Ohio Rev. Code § 2929.03(F). It is the trial court, not the jury, which performs the function of sentencing authority."). This process involves far more than simply reweighing the statutory aggravating circumstances and the mitigating factors. Only the trial court, not the jury, articulates its findings and its weighing process in the form of written findings.

Ohio Rev. Code. § 2929.03(F) provides a more detailed explanation of the process the trial court must engage in after receiving a jury recommendation to impose death. Ohio Rev. Code. § 2929.03(F) dictates the trial court's independent role in determining the existence of mitigating factors, the weight to be given to those factors, and whether those mitigating factors are or are not outweighed by the statutory aggravating circumstances:

> The court . . . , when it imposes sentence of death, shall state in a separate opinion **its specific findings** as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

Ohio Rev. Code. § 2929.03(F) (emphasis added). Ohio Rev. Code. § 2929.03(F) likewise requires the trial court to explain "its specific findings" of mitigating factors and why those factors were not outweighed by the aggravating circumstances when it imposes a life sentence over a jury recommendation of death. *Id.* In sum, once the jury has made a recommendation that a sentence of death be imposed, the trial court must still independently make these "specific findings" as to the existence of mitigating factors, the statutory aggravating circumstances the offender was found to have committed, and why the statutory aggravating circumstances do or

do not outweigh the mitigating factors—and the trial court must make those "specific findings" in writing. Ohio Rev. Code. § 2929.03(F); *see also State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E. 2d 1168, ¶ 159 ("The trial judge is charged by statute with the sole responsibility of personally preparing the opinion setting forth the assessment and weight of the evidence, the aggravating circumstances of the murder, and any relevant mitigating factors prior to determining what penalty should be imposed.").

The Ohio capital sentencing scheme does not require the jury to make any specific findings of fact about mitigating factors or the weight to be assigned those mitigating factors, nor does it require the jury to make any specific findings about how it weighed the mitigating and aggravating factors. The jury's verdict is merely a general verdict finding that the statutory aggravating circumstances outweigh the factors in mitigation beyond a reasonable doubt. As a consequence, the trial court has no guidance as to what factors in mitigation the jury considered or found, what weight the jury gave to each mitigating factor, why the jury found the aggravating circumstances outweighed the mitigating factors, and how the jury conducted the weighing.

In order to comply with Ohio Rev. Code. § 2929.03(D) and (F), the trial court must make these "specific findings" independently and "in isolation." *Buell*, 22 Ohio St.3d at 143–44; *Roberts*, 2006-Ohio-3665, ¶ 160. Otherwise, the trial court would have to engage in "an exercise of judicial extrasensory perception[] by forcing the court to determine the course and matter of the jury's deliberations." *State v. Holmes*, 30 Ohio App.3d 26, 28, 506 N.E.2d 276 (10th Dist. Franklin 1986); *see also State ex rel. Stewart v Russo*, 145 Ohio St.3d 382, 2016-Ohio-421, 49 N.E.3d 1272, ¶ 15. Because a trial court cannot engage in "extrasensory perception" as to what the jury deliberations consisted of, the trial court must make those "specific findings" required by statute independently and without guidance from the jury. Thus, the trial court is required to

make independent "specific findings" above and beyond the jury's recommendation of death. Because "the trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,'" the result is the same as in *Hurst* where this Court found that a Florida jury's function is solely advisory and does not satisfy the constitutional standard outlined by *Ring*. *Hurst*, 136 S. Ct. at 622 (citation omitted).

C. Application of *Hurst* to Ohio's Capital Sentencing Scheme.

In *Hurst*, this Court broadly criticized the Florida death penalty scheme because of the lack of specific factual findings from the jury regarding the existence of mitigating or aggravating circumstances, leaving trial courts without the assistance of a jury's findings of fact. *Hurst*, 136 S. Ct. at 622. Ohio is no different from Florida in that regard. When the jury recommends a death sentence, it only renders a general verdict announcing that the jury has found that the statutory aggravating circumstances outweigh the mitigating factors. There is no explanation what mitigating factors were found and by how many members of the jury, what mitigating factors were rejected, or why mitigating factors were outweighed by the statutory aggravating circumstances.

This Court in *Hurst* concluded that the absence of factual findings about the existence of mitigating or aggravating factors, as well as the absence of any findings about the weighing of those factors by the jury, invalidated Florida's death penalty scheme. *Id.* Similarly, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida because the trial judge must make these findings independently and without any guidance from the jury.

The requirement that the trial court make these "specific findings" and articulate them in an opinion—even in light of the jury's general verdict recommending a sentence of death—before it can impose a sentence of death is a critical step in imposing a sentence of death. This has long been recognized by the Supreme Court of Ohio: "Our prior decisions have stressed the crucial role of the trial court's sentencing opinion in evaluating all of the evidence, including mitigation evidence, and in carefully weighing the specified aggravating circumstances against the mitigating evidence in determining the appropriateness of the death penalty." *Roberts*, 2006-Ohio-3665, ¶ 157. The *Roberts* court further observed:

> The trial court's delegation of any degree of responsibility in this sentencing opinion does not comply with Ohio Rev. Code § 2929.03(F). Nor does it comport with our firm belief that the consideration and imposition of death are the most solemn of all the duties that are imposed on a judge, as Ohio courts have recognized. . . . The judge alone serves as the final arbiter of justice in his courtroom, and he must discharge that austere duty in isolation.

Roberts, 2006-Ohio-3665, ¶ 160.

The trial court's role in making and reporting its "specific findings" as to aggravating circumstances, mitigating factors, and why the aggravating factors do or do not outweigh the factors in mitigation is crucial to the ultimate decision to impose or not impose death. As such, it requires the trial court to make additional "specific findings" beyond those made by the trial jury and without any guidance from the trial jury. Without these additional findings by the trial court, no sentence of death can be imposed under Ohio Rev. Code. § 2929.03(D)(3) and (F).

Judicial fact-finding in capital cases is so crucial that the Supreme Court of Ohio has not hesitated to vacate the death sentence where the trial court has performed the crucial duty improperly. For example, in *State v. Green*, 90 Ohio St.3d 352, 360, 363, 738 N.E. 2d 1208 (2000), the court vacated a death sentence because the trial court's "specific findings" were improper and failed to follow the mandated statutory scheme. Likewise, the court vacated a

death sentence because of errors in the trial court's sentencing opinion, noting: "[T]he General Assembly has set specific standards in the statutory framework it created to guide a sentencing court's discretion 'by requiring examination of *specific factors* that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.'" *State v. Davis*, 38 Ohio St.3d 361, 371–73, 528 N.E.2d 925 (1988) (citation omitted) (emphasis in original)).

The role of the trial judge in making these "specific findings" or "specific factors" pursuant to the "specific standards in the statutory framework" is far more than ministerial; it is crucial. The trial judge must make and articulate "specific findings" according to the statutory scheme. Indeed, the original trial court, in imposing a death sentence, wrote:

> Pursuant to Ohio Rev. Code § 2929.039(F) (sic), this Court now sets forth its **specific findings** as to the existence of any of the mitigating factors set forth in Division (B) of §2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

(Pet. App. 122a (emphasis added)). This requirement that the trial judge make "specific findings" above and beyond the jury recommendation of death violates the Sixth Amendment right to a trial by jury enunciated in *Ring* and *Hurst*.

This Court in *Hurst* concluded that where a state's law dictates that a judge is responsible for making independent factual determinations before a sentence of death can be imposed, that law violates the Sixth Amendment. Although a jury in a capital case in Ohio has the initial responsibility for finding statutory aggravating circumstances, considering mitigating factors, and determining that the statutory aggravating circumstances outweigh the mitigating factors, that unarticulated verdict is merely a recommendation to the trial court. The jury's verdict does not give the trial court any guidance on how the trial court must independently consider the

statutory aggravating circumstances, determine the existence of mitigating factors or the weight to be given to them, or how to weigh the statutory aggravating circumstances against whatever mitigating factors the trial court independently finds.

The jury's verdict is not the completion of the capital sentencing process. It is merely one of many critical steps. The trial court has an additional, critical, and final step to make in the death sentencing process. The trial court must still make an independent determination as to what statutory aggravating circumstances exist, what mitigating factors do or do not exist, and whether the statutory aggravating circumstances do or do not outweigh the mitigating factors that the trial court has independently found to exist and to articulate "specific findings" and reasoning under Ohio Rev. Code § 2929.03(D)(3) and (F). Without the trial court's independent findings, death cannot be imposed.

As in *Hurst*, in Ohio the jury's verdict is a recommendation and it is advisory only. The verdict does not require the jury to enumerate its factual findings as to the existence of statutory aggravating circumstances or mitigating factors, or to explain why the aggravating circumstances outweigh the mitigating factors. There is no distinction between a capital sentencing scheme that classifies a jury's decision as "advisory" (Florida) or "a recommendation" (Ohio). Neither affords the capital defendant his Sixth Amendment right to trial by jury because the trial court then has to make and articulate independent "specific findings" before it can impose a sentence of death. Because no death sentence can be imposed in Ohio without a trial judge making independent factual determinations, Ohio's death penalty violates the Sixth Amendment right to trial by jury.

III. The Supreme Court of Ohio Failed to Properly Apply This Court's Holding in *Hurst* in Concluding that Ohio's Death-Penalty Scheme Did Not Violate the Sixth Amendment.

The Supreme Court of Ohio held that the "Ohio death-penalty scheme does not violate the Sixth Amendment, because the jury must find that offender guilty beyond a reasonable doubt and that an aggravating circumstance exists." *Mason*, 2018-Ohio-1462, syllabus (Pet. App. 1a).[2] The court determined that the weighing of aggravating circumstances and mitigating factors is "a determination of the sentence itself," and is not a fact-finding process subject to the Sixth Amendment. *Id.* at ¶ 28–29 (Pet. App. 11a–12a). Thus, the court found that "[t]he Sixth Amendment was satisfied once the jury found Mason guilty of aggravated murder and a felony-murder capital specification." *Id.* at ¶ 29 (Pet. App. 12a). The court further determined "that even if the weighing process were to involve fact-finding under the Sixth Amendment, Ohio adequately affords the right to trial by jury during the penalty phase," and accused Mason of "fail[ing] to appreciate the material difference between the process by which an Ohio jury reaches its death recommendation and the Florida process at issue in *Hurst*." *Id.* at ¶ 30 (Pet. App. 13a). For the following reasons, the Supreme Court of Ohio erred in reaching these conclusions.

Under Ohio law, the finding of a statutory aggravating circumstance at the trial phase does not make the defendant death eligible—as the term was used by this Court in *Hurst*. A finding of a statutory aggravating circumstance under Ohio law makes the defendant eligible for enhanced penalties (i.e., in 1993, death, life imprisonment with parole eligibility after twenty full

[2] Under Ohio law, allegations of statutory aggravating circumstances must be "specified in the indictment or count in the indictment." Ohio Rev. Code § 2929.05(A). The statutory aggravating circumstances are referred to as "specifications." *See* Ohio Rev. Code § 2929.021 (A) ("If an indictment or count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code . . . .").

years or thirty full years of imprisonment as opposed to an undefined term of life imprisonment) that he otherwise would not be eligible for upon a conviction of aggravated murder without a specification of an aggravating circumstance. The defendant, found guilty of aggravated murder and a specification, is still entitled to a determination, first by the jury and then by the trial judge, of whether he is eligible for a sentence of death or an enhanced penalty of life imprisonment. Without further proceedings and fact-finding, the defendant is not eligible for a sentence of death, and instead the maximum sentence is a life sentence.

A sentence of death cannot be imposed in Ohio without affording the capitally charged defendant an opportunity to present mitigating evidence and to present allocution, and without a jury finding that the statutory aggravating circumstances outweigh any factors in mitigation beyond a reasonable doubt under Ohio Rev. Code § 2929.03(D). Even then, the jury's unexplained general verdict is merely a recommendation to the trial court. The trial court must still independently make and articulate "specific findings" about the existence of statutory aggravating circumstances, the existence of mitigating factors and the weight to be given to them, and why the aggravating circumstances do or do not outweigh the factors in mitigation. *See* Ohio Rev. Code § 2929.03(D)(3) and (F). Only when the trial court independently makes these additional specific findings can it impose a death sentence.

This is precisely the type of procedure this Court found to violate the Sixth Amendment in *Hurst*:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment. . . .
>
> Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding

> of an aggravating circumstance." Brief for Respondent 44. The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*. "[T]he additional requirement that a judge *also* find an aggravator," Florida concludes, "only provides the defendant additional protection." Brief for Respondent 22.
>
> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see *Steele*, 921 So.2d, at 546. "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983) The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst, 136 S. Ct. at 622 (emphasis in original). In Ohio, the jury renders a general verdict finding that the statutory aggravating circumstances outweigh the mitigating factors. No other information about their deliberations or findings is provided to the trial court. As a consequence, the trial judge has no guidance as to what factors in mitigation the jury considered or found, what weight the jury gave to each mitigating factor, why the jury found the aggravating circumstances outweighed the mitigating factors, or how the jury conducted the weighing. The fact that the jury finds the aggravating circumstances does not save Ohio's statute under this Court's reasoning in *Hurst*.

Where the jury returns a life verdict, under Ohio Rev. Code § 2929.03(D)(2)(c), the trial judge is bound by that verdict and does not act independently in imposing a life sentence. *See State ex rel. Stewart v. Russo*, 145 Ohio St.3d 382, 2016-Ohio-421, 49 N.E.3d 1272, ¶ 15. Conversely, where the jury returns a death recommendation, the trial court must act independently and articulate in writing the court's independent findings about the existence of statutory aggravating circumstances and mitigating factors, and whether the statutory

aggravating circumstances outweigh the factors in mitigation beyond a reasonable doubt, all with no guidance from the jury. Ohio Rev. Code § 2929.03(D), (F); *Buell*, 22 Ohio St.3d at 143–44.[3] Where the trial court independently makes improper findings of aggravating circumstances (*State v. Green*, *supra*), or fails to consider mitigating factors (*State v. Davis*, *supra*), or improperly involves the prosecutor in the decision making or opinion writing process (*State v. Roberts*, *supra*), the death sentence cannot stand because the independent process of making the "specific findings" required by statute is tainted. Thus, the trial court under Ohio's statutory scheme has the same "central and singular role" in imposing a sentence of death as the role of the Florida judge that this Court found violated the Sixth Amendment right to a jury trial in *Hurst.*

Again, this Court in *Hurst* found that the absence of factual findings about the existence of **mitigating** factors, as well as the absence of any findings about the **weighing** of those factors and circumstances, invalidated the Florida scheme. *Hurst*, 136 S. Ct. at 622. In other words, *Hurst* went farther than discussing only aggravating circumstances by noting the deficiencies for when a trial judge alone must determine whether the mitigating factors do or do not outweigh the aggravating circumstances. As in Florida, the trial judge in Ohio still has a central and singular role to independently determine that the statutory aggravating circumstance(s) exist, whether any mitigating factors have been proven, and whether the statutory aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The trial judge must independently make and articulate in writing these final factual determinations after obtaining the jury's non-

[3] *See* Ohio Rev. Code § 2929.03(D)(3) ("Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, *if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds*, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender." (emphasis added)).

specific recommendation. There are no material or significant differences between the "central and singular role" of the Florida trial judge found to violate the Sixth Amendment in *Hurst* and the role of the Ohio trial judge under Ohio Rev. Code § 2929.03 (D) and (F). Both are required to make additional factual findings that the jury did not make or articulate before any defendant can be sentenced to death. Ohio's statutory scheme for imposing a sentence of death therefore violates the Sixth Amendment in the same way that this Court found the Florida scheme to violate the Sixth Amendment in *Hurst*, and the Supreme Court of Ohio erred in holding to the contrary.

IV. The Trial Court Correctly Applied *Hurst* to Ohio's Capital Sentencing Scheme.

The trial court here considered the constitutionality of former Ohio Rev. Code §§ 2929.03 and 2929.04 in effect in 1993 when this murder occurred. (Pet. App. 72a–79a)[4] The trial court noted that Ohio, like Florida, uses a hybrid system in which the jury renders an advisory verdict but the trial judge makes the ultimate sentencing determination. (Pet. App. 94a) The trial court then explained why application of this Court's precedent led to his conclusion that Ohio's capital scheme, like Florida's, was unconstitutional.

> Using the concept of death penalty eligible as in the *Hurst* case, the Defendant in the case at bar would not become death penalty eligible unless the jury, at the sentencing hearing, recommends a death sentence to this Court, and this Court, after considering the mitigating factors and comparing them to the aggravated factors found by the jury in this case, finds beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors found by the jury in

[4] Former Ohio Rev. Code §§ 2929.03 and 2929.04 are substantially similar today with the main difference being the addition of life imprisonment without parole as a potential alternative to a death sentence and increasing the other life sentence from twenty or thirty full years of imprisonment before parole eligibility to twenty-five and thirty full years of imprisonment before parole eligibility. The provisions controlling the jury's making a death-sentence recommendation pursuant to Ohio Rev. Code § 2929.03(D)(2), the trial judge independently finding mitigating factors and weighing them against the statutory aggravating circumstances pursuant to Ohio Rev. Code § 2929.03(D)(3), and trial judge – independently of the jury – making specific findings pursuant to Ohio Rev. Code § 2929.03(F), have not changed.

> this case. Only at that point would this Defendant be death penalty eligible. Former Ohio Rev. Code § 2929.03(D)(3).
>
> This procedure would allow this Court to increase the maximum penalty on the Defendant from the maximum potential sentence of life imprisonment with the possibility of parole after thirty full years in prison, at the time the jury makes its death penalty recommendation to the Court, to a death sentence. This is an increase of the maximum sentence that cannot be imposed on the defendant, similar to those which were forbidden in *Ring v. Arizona* and *Hurst v. Florida*. This procedure is unconstitutional because "the Sixth Amendment requires the jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst v. Florida*, 136 S. Ct., at 619.

(Pet. App. 105a–106a)

Because Ohio's capital sentencing scheme "had no provision for the jury making specific findings which would authorize the imposition of the death penalty" and instead required the trial court "to make specific findings," the trial court found that "the Ohio death penalty statute in effect in February, 1993 is unconstitutional." (Pet. App. 107a) The trial court further explained:

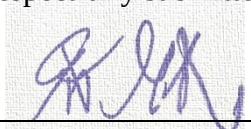
> Because the determination of guilt of an aggravating circumstance, by itself, only renders the defendant eligible for a maximum sentence of life imprisonment with eligibility of parole after thirty full years of imprisonment under former Ohio Rev. Code § 2929.03(D)(2), it is not only possible, but it is a requirement that the trial court make additional factual determinations in weighing the mitigating and aggravating factors during the sentencing phase that will expose a defendant to the greater punishment of death. As Ohio's death penalty statute in effect at the time of this incident, unlike the Kansas death penalty statute, requires the judge, and not the jury, to independently make the determination for the death sentence, and the trial judge to independently weigh the factors necessary to impose a sentence of death, with the jury recommendation for death being only advisory, this Court finds the death penalty provisions in former Ohio Rev. Code § Section 2929.03(D) and (E) to be unconstitutional under the Sixth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in the cases of *Apprendi v. New Jersey*), *Ring v. Arizona* and *Hurst v. Florida*.

(Pet. App. 111a–112a)

CONCLUSION

Consistent with this Court's holding in *Hurst*, Ohio's death penalty scheme requires the trial judge to make factual findings independent of and without guidance from the jury. Ohio's death penalty scheme therefore denies capitally charged defendants such as Maurice Mason their Sixth Amendment right to a trial by jury under *Hurst*. For all the foregoing reasons, the petition for a writ of certiorari should be granted and the Supreme Court of Ohio's decision should be reversed.

Respectfully submitted,



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July 16, 2018

No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE MASON,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix
A

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Mason*, Slip Opinion No. 2018-Ohio-1462.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2018-OHIO-1462

THE STATE OF OHIO, APPELLEE, *v.* MASON, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Mason*, Slip Opinion No. 2018-Ohio-1462.]

Criminal law—Sixth Amendment to the United States Constitution—Death penalty—Right to trial by jury—Ohio death-penalty scheme does not violate the Sixth Amendment, because the jury must find that offender guilty beyond a reasonable doubt and that an aggravating circumstance exists.

(No. 2017-0200—Submitted January 23, 2018—Decided April 18, 2018.)

APPEAL from the Court of Appeals for Marion County, No. 9-16-34, 2016-Ohio-8400.

FISCHER, J.

{¶ 1} At issue in this case is whether Ohio's death-penalty scheme violates the right to a trial by jury as guaranteed by the Sixth Amendment to the United States Constitution. The Marion County Court of Common Pleas found that it does,

but the Third District Court of Appeals reversed the trial court's judgment. Because the Ohio scheme satisfies the Sixth Amendment, we affirm.

I. Facts and Procedural History

{¶ 2} A jury found that appellant, Maurice Mason, raped and murdered Robin Dennis in 1993. *See State v. Mason*, 82 Ohio St.3d 144, 148, 694 N.E.2d 932 (1998). The jury found Mason guilty of aggravated murder with a felony-murder capital specification, rape, and having a gun while under disability. The jury recommended a death sentence, and the trial court sentenced him to death. The Third District Court of Appeals and this court affirmed the convictions and sentence. *State v. Mason*, 3d Dist. Marion No. 9-94-45, 1996 WL 715480 (Dec. 9, 1996); *Mason*, 82 Ohio St.3d 144, 694 N.E.2d 932.

{¶ 3} In 2008, after finding that Mason's trial counsel had provided ineffective assistance, the United States Court of Appeals for the Sixth Circuit granted a conditional writ of habeas corpus and remanded the case to the trial court for a new penalty-phase trial. *Mason v. Mitchell*, 543 F.3d 766, 768 (6th Cir.2008). On remand, Mason moved the trial court to dismiss the capital specification from his indictment, arguing that Ohio's death-penalty scheme violates the Sixth Amendment right to trial by jury. He relied on the United States Supreme Court's decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016), which invalidated Florida's former capital-sentencing scheme because it "required the judge alone to find the existence of an aggravating circumstance." The trial court granted Mason's motion, and the state appealed to the Third District Court of Appeals, which reversed the judgment and remanded the case.

{¶ 4} On appeal here, Mason argues that Ohio's death-penalty scheme is unconstitutional under *Hurst*.

II. Analysis

A. Standard of Review

{¶ 5} We must presume that the death-penalty scheme enacted by the General Assembly is constitutional. R.C. 1.47. To prevail on his facial challenge, Mason must establish "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. Thus, "doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute." *State v. Gill*, 63 Ohio St.3d 53, 55, 584 N.E.2d 1200 (1992).

B. Ohio's Death-Penalty Scheme

{¶ 6} R.C. 2929.03 and 2929.04 establish what is required for a death sentence to be imposed in Ohio when the defendant elects to be tried by a jury. The essential steps outlined below are required under current law and under the versions of R.C. 2929.03 and 2929.04 in effect when Dennis was killed in 1993. *See* Am.Sub.S.B. No. 1, 139 Ohio Laws, Part I, 1, 9-17. Although the Ohio General Assembly has since amended R.C. 2929.03 and 2929.04, because the changes to the wording at issue in this appeal were not substantive, the amendments do not affect the analysis in this case.

{¶ 7} First, to face the possibility of a death sentence, a defendant must be charged in an indictment with aggravated murder and at least one specification of an aggravating circumstance. R.C. 2929.03(A) and (B). The state charged Mason with aggravated murder under R.C. 2903.01(B) and an aggravating circumstance (committing aggravated murder while committing rape) under R.C. 2929.04(A)(7).

{¶ 8} Second, the jury verdict must state that the defendant is found guilty of aggravated murder and must state separately that he is guilty of at least one charged specification. R.C. 2929.03(B). The state must prove guilt of the principal charge and of any specification beyond a reasonable doubt. *Id.*; R.C. 2929.04(A).

The jury found Mason guilty of aggravated murder and the charged aggravating circumstance.

{¶ 9} Third, once the jury finds the defendant guilty of aggravated murder and at least one specification, he will be sentenced either to death or to life imprisonment. R.C. 2929.03(C)(2). When the defendant is tried by a jury, the penalty "shall be determined * * * [b]y the trial jury and the trial judge." R.C. 2929.03(C)(2)(b).

{¶ 10} Fourth, in the sentencing phase, the court and trial jury shall consider (1) any presentence-investigation or mental-examination report (if the defendant requested an investigation or examination), (2) the trial evidence relevant to the aggravating circumstances the offender was found guilty of committing and relevant to mitigating factors, (3) additional testimony and evidence relevant to the nature and circumstances of the aggravating circumstances and any mitigating factors, (4) any statement of the offender, and (5) the arguments of counsel. R.C. 2929.03(D)(1). In this proceeding, the state must prove beyond a reasonable doubt that "the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death." *Id.*

{¶ 11} Fifth, the *jury finds* and then recommends the sentence: "If the *trial jury* unanimously *finds*, by proof beyond a reasonable doubt, that the aggravating circumstances * * * outweigh the mitigating factors, the *trial jury* shall recommend to the court that the sentence of death be imposed on the offender." (Emphasis added.) R.C. 2929.03(D)(2). But "[a]bsent such a finding" by the jury, the jury shall recommend one of the life sentences set forth in R.C. 2929.03(D)(2), and the trial court "shall impose the [life] sentence recommended." R.C. 2929.03(D)(2). Also, if the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence. *State v. Springer*, 63 Ohio St.3d 167, 586 N.E.2d 96 (1992), syllabus.

{¶ 12} Sixth, if the trial jury recommends a death sentence, and if "the court *finds*, by proof beyond a reasonable doubt, * * * that the aggravating circumstances * * * outweigh the mitigating factors, [the court] shall *impose* sentence of death on the offender." (Emphasis added.) R.C. 2929.03(D)(3). Then, the court must state in a separate opinion "the reasons why the aggravating circumstances * * * were sufficient to outweigh the mitigating factors." R.C. 2929.03(F).

C. Sixth Amendment Caselaw

1. *Apprendi*, *Ring*, and *Hurst*

{¶ 13} Mason's Sixth Amendment claim principally relies on *Hurst*, which, in turn, relied on *Apprendi v. United States*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Apprendi* involved New Jersey's "hate crime" law, which allowed a trial court to enhance an offender's penalty if the trial judge found that the offender had been motivated by racial or other bias in committing an offense. *Apprendi* at 468. The question in *Apprendi* was whether such an aggravating fact must be found by a jury based on proof beyond a reasonable doubt. *Id.* at 469. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

{¶ 14} Two years later, in *Ring*, the Supreme Court applied *Apprendi* to invalidate Arizona's former death-penalty scheme, which permitted imposition of a death sentence based *solely* on a trial judge's finding of the existence of a statutory aggravating circumstance. *See Ring* at 609. The *Ring* court concluded that an aggravating circumstance in a capital case was " 'the functional equivalent of an element of a greater offense' " that must be submitted to a jury. *Id.*, quoting *Apprendi* at 494, fn. 19. Arizona's death-penalty law violated the Sixth Amendment because that law required the trial judge alone to find the aggravating facts necessary to sentence a defendant to death. *See id.* at 609.

{¶ 15} The Supreme Court applied *Apprendi* and *Ring* in *Hurst*. A jury found Timothy Hurst guilty of first-degree murder. Although that offense was a capital felony under Florida law, the jury's verdict alone did not qualify Hurst for the death penalty: at the time of his conviction, Florida law provided that " '[a] person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.' " *Hurst*, ___ U.S. at ___, 136 S.Ct. at 620, 193 L.Ed.2d 504, quoting former Fla.Stat. 775.082(1), C.S.H.B. No. 3033, Ch. 98-3, Laws of Fla. In Hurst's sentencing proceeding, the jury, as required by former Fla.Stat. 921.141(2), C.S.H.B. 207, Ch. 96-302, Laws of Fla., rendered an "advisory sentence" recommending death, but Florida law did not require the jury to specify the aggravating circumstances that influenced its decision. *Id.*, citing former Fla. Stat. 921.141. The sentencing judge then imposed a death sentence after independently determining and weighing aggravating circumstances and mitigating factors. *Id.*, citing former Fla.Stat. 921.141(3). Hurst's sentencing judge, who explained her findings in writing, found that two aggravating circumstances existed. *Id.*

{¶ 16} The United States Supreme Court began its review of Hurst's Sixth Amendment claim by reciting *Apprendi*'s basic tenet: "any fact that 'expose[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." *Hurst* at ___, 136 S.Ct. at 621, quoting *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348, 147 L.Ed.2d 435. It then explained that the *Apprendi* rule had required invalidation of Arizona's death-penalty scheme in *Ring* because Arizona had allowed the imposition of the death penalty based solely on judicial fact-finding of the aggravating facts. *Hurst* at ___, 136 S.Ct. at 621, citing *Ring*, 536 U.S. at 591-593, 597, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556. The *Hurst* court concluded that under the same analysis, Florida's scheme had to be invalidated, because Florida did "not require the jury to make the

critical findings necessary to impose the death penalty." *Id.* at ___, 136 S.Ct. at 622. The court observed that the Florida jury's advisory sentence was immaterial for Sixth Amendment purposes, because it did not include " 'specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation [was] not binding on the trial judge.' " *Id.*, quoting *Walton* v. *Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The court held that Florida's scheme violated the Sixth Amendment because Florida law "required the judge alone to find the existence of an aggravating circumstance." *Id.* at ___, 136 S.Ct. at 624.

2. Past Sixth Amendment Challenges to Ohio's Death-Penalty Scheme

{¶ 17} After the *Ring* decision was issued in 2002, we held that Ohio's death-penalty scheme does not violate the Sixth Amendment right to a jury trial. *See State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 68-70. We explained that in contrast to Arizona's scheme, Ohio's capital-sentencing scheme places the responsibility for making all factual determinations regarding whether a defendant should be sentenced to death with the jury. *Id.* at ¶ 69. We noted that "R.C. 2929.03 charges the jury with determining, by proof beyond a reasonable doubt, the existence of any statutory aggravating circumstances and whether those aggravating circumstances are sufficient to outweigh the defendant's mitigating evidence." *Id.*, citing R.C. 2929.03(B) and (D). *See also State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 221.

{¶ 18} After the *Hurst* decision, we revisited the issue in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 59, stating that "Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*." In reaching that conclusion, we reasoned that Ohio law requires a jury in a capital case to make the findings required by the Sixth Amendment, because "the determination of guilt of an aggravating circumstance renders [an Ohio] defendant eligible for a

capital sentence," *id.*, and the weighing of aggravating circumstances against mitigating factors "is *not* a fact-finding process subject to the Sixth Amendment," (emphasis sic) *id.* at ¶ 60. Mason argues that *Belton* is not controlling here, because the *Hurst* question was not squarely presented in that case.

D. Ohio's Death-Penalty Scheme and the Sixth Amendment

{¶ 19} 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*, 536 U.S. at 589, 122 S.Ct. 2428, 153 L.Ed.2d 556. *See also Hurst*, ___ U.S. at ___, 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.

{¶ 20} When an Ohio capital defendant elects to be tried by 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.

{¶ 21} 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's various arguments to the contrary misapprehend both what the Sixth Amendment requires and what it prohibits.

1. Death Eligibility

{¶ 22} Mason's arguments focus on the sentencing phase within Ohio's death-penalty scheme—namely, the "weighing" process that follows after a defendant has been found guilty of aggravated murder and at least one capital specification. He contends that the jury does too little during this phase (merely recommending a death sentence), while the trial court does too much (imposing the sentence based on its own specific, written findings). Before addressing these points, it is necessary to consider a threshold question: does the weighing that occurs in the sentencing phase—after the jury already has found the existence of an aggravating circumstance—constitute fact-finding under the Sixth Amendment?

{¶ 23} *Hurst* does not answer, or even address, this question. The question in *Hurst* was more basic: did the Florida scheme require that a Florida jury make a finding of fact as to an aggravating circumstance before a sentence of death was imposed? *See Hurst*, ___ U.S. at ___, 136 S.Ct. at 622, 193 L.Ed.2d 504. Florida's former capital-sentencing scheme was unconstitutional because, instead of requiring the jury to make the critical finding before making its recommendation, it "required the judge alone to find the existence of an aggravating circumstance." *Id.* at ___, 136 S.Ct. at 624. The *Hurst* court did refer to Florida's weighing process by mentioning the role mitigating facts play in capital sentencing. *Id.* at ___, 136 S.Ct. at 622, quoting *Walton*, 497 U.S. at 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (a Florida jury " 'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances' "); *id.*, quoting former Fla.Stat. 921.141(3) ("The trial court *alone* must find 'the facts * * * [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances' " [emphasis, ellipsis, and brackets sic]). But those references merely described Florida's scheme; the court's holding did not address the weighing process. In the end, the court held only that Florida's sentencing scheme violated the Sixth Amendment because it "required the judge alone to find the

existence of an aggravating circumstance." *Id.* at ___, 136 S.Ct. at 624. With that in mind, it is necessary to consider additional caselaw on the subject.

a. The nature of the weighing process

{¶ 24} The United States Supreme Court has recognized "two different aspects of the capital decision-making process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). For purposes of the Eighth Amendment, a defendant is eligible for the death penalty if the trier of fact finds him guilty of murder and at least one aggravating circumstance. *Id.* at 972. This determination is necessarily factual. *Id.* at 973. *See also Kansas v. Carr*, ___ U.S. ___, 136 S.Ct. 633, 642, 193 L.Ed.2d 535 (2016) (stating that "the aggravating-factor determination (the so-called 'eligibility phase') * * * is a purely factual determination"). "The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure [sic] an assessment of the defendant's culpability." *Tuilaepa* at 973. This, the Supreme Court has said, "is mostly a question of mercy," involving an exercise of judgment. *Carr* at 642. *See also Tuilaepa* at 978 ("at the selection stage, the States are not confined to submitting to the jury specific propositional questions"). Thus, the selection decision does not obviously involve a determination of fact.

{¶ 25} The eligibility/selection distinction is relevant under the Sixth Amendment in capital cases because the Sixth Amendment requires a jury to find beyond a reasonable doubt all *facts* that make a defendant death-eligible. *See Hurst* at ___, 136 S.Ct. at 619 (referring to "each fact necessary to impose a sentence of death"); *Ring*, 536 U.S. at 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 ("Capital defendants, no less than noncapital defendants * * * are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"). *See also Blakely v. Washington*, 542 U.S. 296, 309, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (referring to "the jury's traditional function of

finding the facts essential to lawful imposition of the penalty"); *Apprendi*, 530 U.S. at 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (referring to "the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense").

{¶ 26} Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances. *See United States v. Gabrion*, 719 F.3d 511, 532-533 (6th Cir.2013) (rehearing en banc); *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir.2013); *United States v. Mitchell*, 502 F.3d 931, 993-994 (9th Cir.2007); *United States v. Sampson*, 486 F.3d 13, 31-32 (1st Cir.2007); *United States v. Fields*, 483 F.3d 313, 345-346 (5th Cir.2007); *United States v. Purkey*, 428 F.3d 738, 749 (8th Cir.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004); *Oken v. State*, 378 Md. 179, 251, 835 A.2d 1105 (2003); *Commonwealth v. Roney*, 581 Pa. 587, 601, 866 A.2d 351 (2005); *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); *Nunnery v. State*, 127 Nev. 749, 770-775, 263 P.3d 235 (2011); *State v. Fry*, 2006-NMSC-001, ¶ 37-38, 138 N.M. 700, 126 P.3d 516.

{¶ 27} But some post-*Hurst* decisions have held otherwise. *See Smith v. Pineda*, S.D.Ohio No. 1:12-cv-196, 2017 U.S. Dist. LEXIS 22082, *6 (Feb. 16, 2017) (finding that Ohio's scheme satisfies the Sixth Amendment but also finding that "the relative weight of aggravating circumstances and mitigating factors is a question of fact akin to an element under the *Apprendi* line of cases"); *Chinn v. Jenkins*, S.D.Ohio No. 3:02-cv-512, 2017 U.S. Dist. LEXIS 22088, *5 (Feb. 13, 2017) (same); *Davis v. Bobby*, S.D.Ohio No. 2:10-cv-107, 2017 U.S. Dist. LEXIS 157948, *6-7 (Sept. 25, 2017); *Rauf v. State*, 145 A.3d 430, 434 (Del.2016).

{¶ 28} In *Gabrion*, the Sixth Circuit (analyzing the federal death-penalty statute) explained that the weighing process requires "not a finding of fact in support of a particular sentence * * * [but] a determination of *the sentence itself*, within a

range for which the defendant is already eligible." (Emphasis sic.) *Id.* at 533. This analysis is persuasive and applies to the Ohio scheme, which expressly makes the weighing process a determination of the sentence itself. *See* R.C. 2929.03(C)(2)(b) ("if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender * * * shall be determined * * * [b]y the trial jury and the trial judge, if the offender was tried by jury"). In other words, after completing its role as the fact-finder concerning a defendant's guilt, an Ohio jury assumes a different role as a "sentencer" (albeit in conjunction with the trial court). *See Brown v. Sanders*, 546 U.S. 212, 216, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006) ("Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it"). *But see State v. Rogers*, 28 Ohio St.3d 427, 429, 504 N.E.2d 52 (1986), *reversed on reconsideration on other grounds,* 32 Ohio St.3d 70, 512 N.E.2d 581 (1987) (recognizing the trial court as the ultimate "sentencing authority").

b. Ohio's statutory scheme does not violate the Sixth Amendment

{¶ 29} Based on the above analysis, we were correct to state in *Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, at ¶ 60, that "[w]eighing is *not* a fact-finding process subject to the Sixth Amendment." (Emphasis sic.) The Sixth Amendment was satisfied once the jury found Mason guilty of aggravated murder and a felony-murder capital specification. *See State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 269 ("Adams became death-eligible when the jury unanimously found him guilty of aggravated murder in the course of some predicate felony"); *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 189 ("the jury's verdict, and not the judge's findings, made Davis eligible for the death penalty"); *State v. Gumm*, 73 Ohio St.3d 413, 417, 653 N.E.2d 253 (1995) ("At the point in time at which the factfinder * * * finds the defendant guilty of both aggravated murder and an R.C. 2929.04(A) specification, the defendant has become

'death-eligible,' and a second phase of the proceedings (the 'mitigation' or 'penalty' or 'sentencing' or 'selection' phase begins"). *See also Jenkins v. Hutton*, ___ U.S. ___, 137 S.Ct. 1769, 1772, 198 L.Ed.2d 415 (2017) (stating that Hutton was death-eligible under Ohio law when the jury found him guilty of aggravated murder and two aggravating circumstances). Accordingly, we approve our analysis in *Belton* and reject Mason's claim that Ohio's death-penalty scheme is unconstitutional under *Hurst*.

2. The Jury's Role in Sentencing

{¶ 30} While we uphold our conclusion in *Belton* that weighing is not a fact-finding process subject to the Sixth Amendment, we further conclude that even if the weighing process were to involve fact-finding under the Sixth Amendment, Ohio adequately affords the right to trial by jury during the penalty phase. Mason contends that it does not, because the process permits a jury only to *recommend* a death sentence. *See* R.C. 2929.03(D)(2). Here, he emphasizes the statement in *Hurst* that "[a] jury's mere recommendation is not enough." *Hurst*, ___ U.S. at ___, 136 S.Ct. at 619, 193 L.Ed.2d 504. But he fails to appreciate the material difference between the process by which an Ohio jury reaches its death recommendation and the Florida process at issue in *Hurst*.

{¶ 31} The Florida statute required the jury to render an "advisory sentence" after hearing the evidence presented in a sentencing-phase proceeding:

> Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Former Fla.Stat. 921.141(2). In *Hurst*, the court held that the Florida scheme violated the Sixth Amendment because it did not require the jury to find that Hurst was guilty of committing a specific aggravating circumstance. *Hurst* at ___, 136 S.Ct. at 622, 624.

{¶ 32} Ohio law, in contrast, requires a jury to find the defendant guilty beyond a reasonable doubt of at least one aggravating circumstance, R.C. 2929.03(B), before the matter proceeds to the penalty phase, when the jury can recommend a death sentence. Ohio's scheme differs from Florida's because Ohio requires the jury to make this specific and critical finding.

{¶ 33} Mason disputes this conclusion, relying on this court's statement in *Rogers*, 28 Ohio St.3d at 430, 504 N.E.2d 52, that Florida's system "is remarkably similar to Ohio's." But *Rogers* involved a different question. *See id.* at 429-430. *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.

{¶ 34} Mason also argues that Ohio's scheme is inadequate under the Sixth Amendment because it requires the jury to render "only a general verdict." Here, Mason relies on *Hurst*'s reference to the " 'specific factual findings' " by a jury that were lacking under Florida's scheme. *See Hurst*, ___ U.S. at ___, 136 S.Ct. at 622, 193 L.Ed.2d 504, quoting *Walton*, 497 U.S. at 648, 110 S.Ct. 3047, 111 L.Ed.2d 511. He contends that this requires a jury to *explain why* it concluded that the aggravating circumstances are sufficient to outweigh the mitigating factors. He contrasts the jury's general verdict to the trial court's sentencing opinion, which indeed must explain "the reasons why the aggravating circumstances the offender

was found guilty of committing were sufficient to outweigh the mitigating factors," R.C. 2929.03(F).

{¶ 35} While it is true that a trial court must fully explain its reasoning for imposing a sentence of death, Mason does not provide any support for the proposition that the Sixth Amendment requires *a jury* to explain why it found that the aggravating circumstances outweigh the mitigating factors. In citing *Hurst* for this proposition, Mason fails to appreciate that Florida's statutory scheme violated the Sixth Amendment because the jury did not specify its finding of which aggravating circumstance supported its recommendation, not because the jury did not explain why it found that the aggravating circumstances were not outweighed by sufficient mitigating circumstances.

{¶ 36} On a related point, Mason contends that the jury's sentencing-phase finding and recommendation are insufficient because they provide no guidance to the trial court for its own findings and sentence determination. His argument relies on the statement in *Hurst* that " '[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.' " *Hurst* at ___, 136 S.Ct. at 622, quoting *Walton* at 648.

{¶ 37} Mason misses a key distinction between Ohio's statutory scheme and the Florida and Arizona statutory schemes at issue in *Hurst* and *Walton*: in Ohio, a jury is required to find the defendant guilty of a specific aggravating circumstance, thus establishing the aggravating circumstance that a trial court will weigh against the mitigating factors in its independent determination of punishment. *See* R.C. 2929.03(D)(3); *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996), paragraph one of the syllabus. Mason does not explain why further guidance for the trial court is constitutionally required.

{¶ 38} Mason also complains that Ohio's statutory scheme does not require the jury to make findings regarding mitigating factors or to specify the factors that it considered in mitigation. There is only limited support for the argument that a jury

must do so: *Hurst*, again quoting *Walton*, notes that Florida's former scheme did not require the jury to " 'make specific factual findings with regard to the existence of mitigating or aggravating circumstances.' " *Hurst*, ___ U.S. at ___, 136 S.Ct. at 622, 193 L.Ed.2d 504, quoting *Walton*, 497 U.S. at 648, 110 S.Ct. 3047, 111 L.Ed.2d 511. Notably, however, neither *Ring* nor *Hurst* held that the Sixth Amendment requires a jury to find mitigating facts. *See State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 186. Rather, they recognized that the Sixth Amendment guarantees that a jury will determine the facts that serve to *increase* the maximum punishment. *Ring*, 536 U.S. at 589, 122 S.Ct. 2428, 153 L.Ed.2d 556; *Hurst* at ___, 136 S.Ct. at 619. *See also Apprendi*, 530 U.S. at 490-491, 120 S.Ct. 2348, 147 L.Ed.2d 435, fn. 16 (stating that "[c]ore concerns animating the jury and burden-of-proof requirements are thus absent" when a trial judge alone finds a mitigating fact that reduces an offender's sentence). Because a finding that mitigating facts exist is not "necessary to impose a sentence of death," *Hurst* at ___, 136 S.Ct. at 619, this aspect of Mason's claim has no merit.

3. The Trial Judge's Role and the Sixth Amendment

{¶ 39} One of Mason's main concerns is the last step in Ohio's capital-sentencing process: the trial judge's independent findings that culminate in a written sentencing opinion. *See* R.C. 2929.03(D)(3) and (F). He contends that the trial judge must "make additional 'specific findings' beyond those made by the trial jury" and that an offender is not eligible for the death penalty until this judicial task is complete. Relying on *Hurst*, he says that a death sentence can be imposed in Ohio only after the trial judge makes these "independent factual determinations." But Mason misapprehends the issue, framing it as a question whether a death sentence "can be imposed," instead of whether it "will be imposed." Ohio does not permit the trial judge to find *additional* aggravating facts but requires the judge to determine, independent of the jury, whether a sentence of death *should* be imposed. *See State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 160.

{¶ 40} Two significant flaws are apparent in Mason's claim. First, unlike the Arizona scheme found unconstitutional by the United States Supreme Court in *Ring*, under the Ohio scheme, the trial court cannot *increase* an offender's sentence based on its own findings. Rather, the trial court safeguards offenders from wayward juries, similar to how a court might grant a motion for acquittal following a jury verdict under Crim.R. 29(C).

{¶ 41} Second, Mason wrongly supposes that the Sixth Amendment prohibits judicial fact-finding. To be sure, *Hurst* and *Ring* both decry judicial fact-finding to some extent. But they do so in the context of reviewing statutory schemes that fail to provide for any *jury* fact-finding on critical questions. *See Hurst*, ___ U.S. at ___, 136 S.Ct. at 622, 193 L.Ed.2d 504, (noting "the central and *singular* role the judge play[ed] under Florida law" [emphasis added]); *Ring*, 536 U.S. at 592, 122 S.Ct. 2428, 153 L.Ed.2d 556 (noting that the court alone made the factual determination of an aggravating factor under Arizona law). The Supreme Court made clear in *Blakely*, 542 U.S. at 308, 124 S.Ct.2531, 159 L.Ed.2d 403, that "the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *See also Alleyne v. United States*, 570 U.S. 99, 116, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment"); *United States v. Booker*, 543 U.S. 220, 233, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range").

{¶ 42} Mason suggests that under *Hurst*, the Sixth Amendment requires the jury alone to decide whether a sentence of death will be imposed. But *Hurst* did not create this requirement. Ohio trial judges may weigh aggravating circumstances

against mitigating factors and impose a death sentence only after the jury itself has made the critical findings and recommended that sentence. Thus, "the judge's authority to sentence derives wholly from the jury's verdict." *Blakely* at 306. Under Ohio's death-penalty scheme, therefore, trial judges function squarely within the framework of the Sixth Amendment.

III. Conclusion

{¶ 43} We conclude that Ohio's death-penalty scheme does not violate a defendant's right to a trial by jury as guaranteed by the Sixth Amendment. For this reason, the trial court erred in granting Mason's motion to dismiss the death-penalty specification from his indictment. We accordingly affirm the decision of the Third District Court of Appeals.

Judgment affirmed.

O'CONNOR, C.J., and JENSEN, FRENCH, HALL, and DEWINE, JJ., concur.

KENNEDY, J., concurs, with an opinion.

JAMES D. JENSEN, J., of the Sixth District Court of Appeals, sitting for O'DONNELL, J.

MICHAEL T. HALL, J., of the Second District Court of Appeals, sitting for O'NEILL, J.

KENNEDY, J., concurring.

{¶ 44} Because the majority's judgment is in line with our holding in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, I concur in that judgment. Although the majority never explicitly addresses Mason's argument that the analysis of *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), in *Belton* is dicta, its failure to cite *Belton* as binding precedent that resolves this case implies that the majority agrees that our holding in *Belton* is dictum.

{¶ 45} With regard to dicta, Chief Justice Marshall wrote the following almost 200 years ago in *Cohens v. Virginia*: "It is a maxim not to be disregarded,

that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." 19 U.S. 264, 399, 5 L.Ed. 257 (1821). For this reason, a court is not bound to follow its own dicta from a prior case in which the point at issue "was not fully debated." *Cent. Virginia Community College v. Katz*, 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006); *see also Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.*, 70 Ohio St.3d 281, 284, 638 N.E.2d 991 (1994) (explaining that dicta in a prior case had no binding effect on a court's decision in a later case).

{¶ 46} This is so because " '[t]he problem with dicta, and a good reason that it should not have the force of precedent for later cases, is that when a holding is unnecessary to the outcome of a case, it may be made with less care and thoroughness than if it were crucial to the outcome.' " *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 89 (O'Donnell, J., concurring in part and dissenting in part), quoting *Bauer v. Garden City*, 163 Mich.App. 562, 571, 414 N.W.2d 891 (1987).

{¶ 47} Our determination in *Belton* that Ohio's death-penalty statutes do not contravene the holding in *Hurst*, however, is not dictum. The issue presented in the third proposition of law in *Belton* was whether Ohio's death-penalty statute violated the Sixth Amendment right to a jury trial. The court quoted Belton as asserting that

> "even if a capital defendant enters a guilty plea to Aggravated Murder and the accompanying death specifications, he has a right to a jury trial to determine the existence of any mitigating factors and to determine whether the aggravating circumstance or

> circumstances to which he would plead guilty outweigh those factors by proof beyond a reasonable doubt."

Belton, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, at ¶ 55. In effect, Belton argued that the Sixth Amendment guarantees a capital defendant the right to have a jury make additional factual determinations before sentencing—that notwithstanding his having waived the right to have a jury determine guilt, only a jury can make the finding that the aggravating circumstances outweighed the mitigating factors. The court answered the question squarely presented by the parties by applying *Hurst*—then the United States Supreme Court's most recent pronouncement on the issue—and explaining that the Sixth Amendment right to a jury trial is not implicated by a sentencing scheme that requires the trial judge to weigh aggravating circumstances against mitigating factors before selecting death as the appropriate sentence.

{¶ 48} The fact that the court could have analyzed the question presented in a different way—for instance, by considering whether Belton's waiver of a jury trial relinquished any right to a jury's participation in sentencing—does not mean that the way we did answer it is dicta. In *Richards v. Mkt. Exchange Bank Co.*, 81 Ohio St. 348, 367, 90 N.E. 1000 (1910), we rejected the view that "the determination of a question fairly presented by the record becomes mere dicta if there happens to be another proposition on which the decision might have been based."

{¶ 49} That a case could be distinguished on some factual basis from another case does not affect the authority of the rule of law it announced or reduce its holding to mere dictum. *See United States v. Schuster*, 684 F.2d 744, 748 (11th Cir.1982), *adopted on reh'g*, 717 F.2d 537 (11th Cir.1983) (en banc) ("Virtually all cases are factually distinguishable, but that does not vitiate the underlying rule of law to be derived from [a prior decision]"); *State v. Rice*, 169 N.H. 783, 795, 159

A.3d 1250 (2017) (acknowledging that the case was distinguishable from a prior case on the facts, but concluding that the "factual distinction" did not "justif[y] a difference in outcome"). Our decision in *Belton* is binding precedent controlling the outcome of this appeal, because its holding did not go beyond the facts and issues then before the court and its analysis was necessary for our ruling. Therefore, it is not dictum.

{¶ 50} Applying *Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, I agree that Ohio's death-penalty statutes do not violate the Sixth Amendment right to a jury trial as construed by *Hurst*, __ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504. As we explained in *Belton*, the weighing of aggravating circumstances and mitigating factors required to ensure that only a defendant deserving of the ultimate penalty is sentenced to death "is *not* a fact-finding process subject to the Sixth Amendment" (emphasis sic), *id.* at ¶ 60, but rather "amounts to 'a complex moral judgment' about what penalty to impose upon a defendant who is already death-penalty eligible," *id.*, quoting *United States v. Runyon,* 707 F.3d 475, 515-516 (4th Cir.2013).

{¶ 51} Once the jury found Mason guilty of aggravated murder and at least one aggravating circumstance, under former R.C. 2929.03(C)(2), Am.Sub.S.B. No. 1, 139 Ohio Laws, Part I, 1, 10, the court could impose only one of the following penalties: "death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment." Therefore, the maximum penalty authorized by the statute following the jury's verdict at the trial phase was death, and no judicial fact-finding could expose Mason to any greater punishment.

{¶ 52} Because Mason was eligible for capital punishment based on the jury's verdict at the end of the trial phase, his argument that Ohio's death-penalty scheme violates the Sixth Amendment because it does not require the jury to make specific findings of fact regarding the mitigating circumstances or why the

mitigating circumstances were outweighed by the aggravating circumstances is not well taken. Accordingly, the majority correctly affirms the judgment of the court of appeals, and I concur.

Ray A. Grogan, Marion County Prosecuting Attorney, and Kevin P. Collins, Assistant Prosecuting Attorney, for appellee.

Carpenter, Lipps & Leland, L.L.P., and Kort Gatterdam; and Todd Anderson, for appellant.

Michael DeWine, Attorney General, Eric E. Murphy, State Solicitor, and Michael J. Hendershot, Chief Deputy Solicitor, urging affirmance for amicus curiae Ohio Attorney General.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Christopher D. Schroeder, Assistant Prosecuting Attorney, urging affirmance for amicus curiae Cuyahoga County Prosecutor's Office.

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, urging affirmance for amicus curiae Ohio Prosecuting Attorneys Association.

Jeffrey M. Gamso and Erika B. Cunliffe, urging reversal for amicus curiae Ohio Association of Criminal Defense Lawyers.

The Supreme Court of Ohio

State of Ohio

v.

Maurice Mason

Case No. 2017-0200

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Marion County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed, consistent with the opinion rendered herein.

It is further ordered that mandates be sent to and filed with the clerks of the Court of Appeals for Marion County and the Court of Common Pleas for Marion County.

(Marion County Court of Appeals; No. 9-16-34)

Maureen O'Connor
Chief Justice

Appendix
B

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLANT, **CASE NO. 9-16-34**

v.

MAURICE MASON, **O P I N I O N**

DEFENDANT-APPELLEE.

Appeal from Marion County Common Pleas Court
Trial Court No. 93CR0153

Judgment Reversed and Cause Remanded

Date of Decision: December 27, 2016

APPEARANCES:

Brent W. Yager **for Appellant**

Kort Gatterdam and Todd Anderson **for Appellee**

Timothy J. McGinty **for Amicus Curiae, Cuyahoga County Prosecutor's Office**

Jeffrey M. Gamso **for Amicus Curiae, Ohio Assoc. of Criminal Defense Lawyers**

PRESTON, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals the entry of the Marion County Court of Common Pleas granting defendant-appellee's, Maurice Mason ("Mason"), motion to dismiss the death-penalty specification from his indictment. In 1994, Mason was sentenced to death for the 1993 murder of nineteen-year-old Robin Dennis ("Dennis."). *See State v. Mason*, 82 Ohio St.3d 144, 144-148 (1998). In 2008, Mason was granted federal habeas corpus relief as to his death sentence and, while his resentencing was pending, the United States Supreme Court invalidated Florida's death-penalty statute in *Hurst v. Florida*. 577 U.S. ___, 136 S.Ct. 616 (2016). Mason filed a motion to dismiss the death-penalty specification from his indictment arguing that Ohio's death-penalty statue is unconstitutional under *Hurst*. For the reasons that follow, we reverse the trial court's decision granting Mason's motion and declaring unconstitutional Ohio's death-penalty statute in effect in 1993.

{¶2} On September 30, 1993, the Marion County Grand Jury indicted Mason on three counts: Count One of aggravated murder in violation of R.C. 2903.01(B), with a death-penalty specification under R.C. 2941.14 and 2929.04(A)(7) alleging that the murder occurred during the commission of a rape; Count Two of rape in violation of R.C. 2907.02(A)(2), a first-degree felony, with a prior-aggravated-felony specification under R.C. 2941.142; and Count Three of having weapons

while under disability in violation of R.C. 2923.13(A)(2), a fourth-degree felony, with an offense-of-violence specification under R.C. 2941.143. (Doc. No. 1).[1] On December 21, 1993, Mason was re-indicted by the Marion County Grand Jury on the same charges, with a firearm specification under R.C. 2941.141 and 2929.71 added to each count. (Doc. No. 67).

{¶3} After pleading not guilty to the charges in the indictments, the case proceeded to a jury trial on May 31, 1994 through June 18, 1994. (Doc. Nos. 10, 99, 391). On June 18, 1994, the jury found Mason guilty of the charges and specifications in the December 21, 1993 indictment. (Doc. Nos. 340, 341, 342, 391). On June 27, 1994, the trial proceeded to the penalty phase and mitigation evidence was presented in the presence of the jury. (Doc. No. 391). On June 29, 1994, the jury recommended that Mason be sentenced to death under R.C. 2929.03(D)(2) after concluding that the aggravating circumstance of which Mason was convicted outweighed the mitigating factors in the case. (Doc. Nos. 380, 391).

{¶4} On July 7, 1994, the trial court issued its separate opinion accepting the jury's death-sentence recommendation after weighing the aggravating circumstance against the mitigating factors. (Doc. No. 391). That same day, the trial court sentenced Mason to death on Count One, 15-25 years in prison on Count Two, 3-5 years in prison on Count Three, and 3 years in prison on the firearm specification,

[1] In 1984, Mason was convicted in Marion County, Ohio of burglary under R.C. 2911.12, a second-degree felony. (Doc. No. 1).

and ordered that Mason serve all of the sentences consecutively. (Doc. Nos. 388, 391). The trial court filed its sentencing entry on July 12, 1994. (Doc. No. 391). After a hearing on August 9, 1994, the trial court denied on August 12, 1994 Mason's motion for a new trial. (Doc. No. 414). Mason filed his notice of appeal on September 6, 1994. (Doc. No. 423). On December 9, 1996, this court affirmed Mason's conviction and sentence, and the trial court's denial of Mason's motion for a new trial. *State v. Mason*, 3d Dist. Marion No. 9-94-45, 1996 WL 715480 (Dec. 9, 1996). *See also State v. Mason*, 3d Dist. Marion No. 9-94-45, 1996 WL 715479 (Dec. 9, 1996) (affirming Mason's death sentence). On June 17, 1998, the Supreme Court of Ohio affirmed Mason's convictions and death sentence. *Mason*, 82 Ohio St.3d 144.

{¶5} Prior to this court's review of Mason's direct appeal, Mason filed a petition for post-conviction relief on September 20, 1996. (Doc. No. 447). The trial court denied Mason's petition on November 21, 1996. (Doc. No. 451). This court affirmed the decision of the trial court on June 6, 1997. *State v. Mason*, 3d Dist. Marion No. 9-96-70, 1997 WL 317431 (June 6, 1997).

{¶6} On July 15, 1999, Mason filed a petition for a writ of habeas corpus in federal court, which was denied by the United States District Court for the Northern District of Ohio on May 9, 2000. *Mason v. Mitchell*, 95 F.Supp.2d 744 (N.D.Ohio 2000). The United States Court of Appeals for the Sixth Circuit affirmed the district

court's denial of Mason's petition but remanded the case for an evidentiary hearing regarding his claim of ineffective assistance of counsel at sentencing. *Mason v. Mitchell*, 320 F.3d 604, 642 (6th Cir.2003). After the evidentiary hearing, the district court on October 31, 2005 denied Mason's ineffective-assistance-of-counsel claim and dismissed his petition. *Mason v. Mitchell*, 396 F.Supp.2d 837 (N.D.Ohio 2005). On October 3, 2008, the Sixth Circuit reversed the district court's decision and granted "a conditional writ of habeas corpus that will result in the vacation of his death sentence unless the state of Ohio commences a new penalty-phase trial against him within 180 days[.]" *Mason v. Mitchell*, 543 F.3d 766 (6th Cir.2008).

{¶7} After a number of pleadings in federal court from 2009 to 2013, which extended Mason's resentencing beyond 180 days, the Sixth Circuit concluded that "the State of Ohio is not barred from seeking the death penalty in the new penalty-phase trial against Mason, even though the State failed to recommence the sentencing proceeding within this court's 180-day deadline." *Mason v. Mitchell*, 729 F.3d 545, 548-549, 552 (6th Cir.2013).

{¶8} On May 6, 2016, Mason filed a "motion to dismiss capital components pursuant to *Hurst v. Florida*." (Doc. No. 616). On May 17, 2016, the State filed a memorandum in opposition to Mason's motion. (Doc. No. 618). The trial court granted Mason's motion on June 20, 2016. (Doc. No. 619).

{¶9} The State filed its notice of appeal on June 24, 2016. (Doc. No. 620). The State raises two assignments of error. For ease of our discussion, we will address the State's assignments of error together.

Assignment of Error No. I

The trial court erred as a matter of law in failing to apply binding precedent from the Ohio Supreme Court in *State v. Belton*, 2016 Ohio 1581 (April 20, 2016) to reject Mason's claim that the Sixth Amendment requires a jury finding that aggravating circumstances outweigh mitigating factors beyond a reasonable doubt. Trial court decision, Apx. Pgs. 16-19, 43-44.

Assignment of Error No. II

The trial court erred as a matter of law in concluding that the Sixth Amendment requires jury factfinding in capital sentencing. Trial court decision, Apx. Pgs. 36-40.

{¶10} In its assignments of error, the State argues that the trial court erred in concluding that the death-penalty specification should be removed from Mason's indictment because Ohio's death-penalty statute is unconstitutional. Specifically, in its first assignment of error, the State argues that the trial court erred by failing to apply *State v. Belton* to reject Mason's constitutional argument. ___ Ohio St.3d ___, 2016-Ohio-1581. In its second assignment of error, the State argues that the trial court erred by concluding that Ohio's death-penalty statute in effect in 1993 is unconstitutional under the Sixth Amendment to the United States Constitution.

{¶11} As an initial matter, we address this court's jurisdiction to address the merits of this appeal. Section 3(B)(2), Article IV of the Ohio Constitution provides

that courts of appeal "shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the court of record inferior to the court of appeals within the district." R.C. 2501.02 defines the jurisdiction of the courts of appeal, "In addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district[.]"

{¶12} "Both grants of jurisdiction require that, in order to be appealable, a trial court's order must be final." *State v. Rivera*, 9th Dist. Lorain Nos. 08CA009426 and 08CA009427, 2009-Ohio-1428, ¶ 8. *See also* R.C. 2505.03(A) ("Every final order, judgment, or decree of a court * * * may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction."). ""'If an order is not final, then an appellate court has no jurisdiction."'" *Rivera* at ¶ 8, quoting *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, ¶ 14, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20 (1989).

{¶13} R.C. 2505.02 describes final orders that may be appealed. Ordinarily, in capital cases, "a final, appealable order consists of both the sentencing opinion * * * and the judgment of conviction." *State v. Ketterer*, 126 Ohio St.3d 448, 2010-

Ohio-3831, ¶ 18. *See also State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.*, 130 Ohio St.3d 326, 2011-Ohio-5456, ¶ 20 (discussing the appellate court's jurisdiction to review the capital defendant's appeal of the denial of his constitutional challenge). At least a portion—the death sentence—of Mason's sentence was vacated by the trial court on February 2, 2010 after the Sixth Circuit Court of Appeals concluded that Mason's death sentence was unconstitutional because his trial counsel at his sentencing hearing was ineffective. *See Mason*, 543 F.3d at 784-785; *Mason*, 729 F.3d at 551; (Doc. No. 474). Mason's convictions were affirmed. *See, e.g., Mason*, 729 F.3d at 548. Mason's resentencing is pending.

{¶14} Notwithstanding the requirements of *Ketterer* or R.C. 2505.02, the State may appeal specific orders under R.C. 2945.67. *See State v. Craig*, 116 Ohio St.3d 135, 2007-Ohio-5752, ¶ 13, citing *State v. Hayes*, 25 Ohio St.3d 173 (1986). In particular, R.C. 2945.67(A) provides, in relevant part, "A prosecuting attorney * * * may appeal as a matter of right any decision of a trial court in a criminal case, * * * which decision grants a motion to dismiss all or any part of an indictment * * *."

{¶15} In this case, Mason filed a motion captioned "Defendant's Motion to Dismiss Capital Components pursuant to *Hurst v. Florida*." (Doc. No. 616). In his motion, Mason requests that the trial court "pursuant to *Hurst v. Florida*, * * * dismiss that portion of the aggravated murder indictment in [Mason's] case that

elevates the potential penalty from life imprisonment to death." (*Id.*). In particular, he requests, "Due to the similarities between Florida's capital sentencing laws and Ohio's, Mason submits that pursuant to *Hurst*, this Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of this case." (*Id.*).

{¶16} The trial court issued its entry, captioned "Ruling on Defendant's Motion to Dismiss Capital Components Pursuant to *Hurst vs. Florida*," addressing Mason's argument "that pursuant to Hurst, [the trial] Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of [his] case." (Emphasis sic.) (Doc. No. 619). In its entry, the trial court "sustained" Mason's "Motion * * * to Dismiss Capital Components" after concluding that "the Ohio death penalty statute applicable in this Case is unconstitutional for purposes of imposing the death penalty, [and] death may not be imposed as a penalty in this case." (*Id.*). Based on those facts, we conclude that the State appealed an order of the trial court subject to an appeal as of right under R.C. 2945.67(A). That is, we conclude that the State filed an appeal as of right from the trial court's decision granting Mason's motion to dismiss the death-penalty specification of the indictment. *See Craig*, 116 Ohio St.3d 135, 2007-Ohio-5752, at ¶ 13, citing *Hayes*, 25 Ohio St.3d at 175. *But see Rivera*, 2009-Ohio-1428, at ¶ 1, 11, 14-15, 30 (dismissing the State's appeal of the trial court's decision that "the State of Ohio's

method of execution by lethal injection" is unconstitutional for the lack of a final, appealable order because, in part, it was not an order subject to R.C. 2945.67(A), despite that the relief requested by the defendants' was the dismissal of the death-penalty specification from their indictments). Accordingly, we conclude that this appeal is properly before this court.

{¶17} We review de novo a trial court's decision to dismiss all or any part of an indictment based on the constitutionality of the statute under which the defendant is indicted. *See State v. Schwentker*, 11th Dist. Ashtabula No. 2015-A-0012, 2015-Ohio-5526, ¶ 25 (reviewing de novo on the State's appeal as of right under R.C. 2945.67(A) the trial court's decision granting the defendant's motion to dismiss the indictment), citing *State v. Rode*, 11th Dist. Portage No. 2010-P-0015, 2011-Ohio-2455, ¶ 14, citing *State v. Wendel*, 11th Dist. Geauga No. 97-G-2116, 1999 WL 13332193, *2 (Dec. 23, 1999); *State v. Mutter & Mutter*, 4th Dist. Scioto Nos. 15CA3690 and 15CA3691, 2016-Ohio-512, ¶ 19 ("We apply a de novo standard of review to a lower court's ruling on a motion to dismiss an indictment based on double jeopardy."), citing *State v. Trimble*, 4th Dist. Pickaway No. 13CA8, 2013-Ohio-5094, ¶ 5 and *State v. Hill*, 8th Dist. Cuyahoga No. 101633, 2015-Ohio-2389, ¶ 17 ("We review a trial court's judgment on a motion to dismiss an indictment de novo."). *See also State v. Hernon*, 9th Dist. Medina No. 2933-M, 2000 WL 14009, *2 (Dec. 29, 1999) ("The adequacy of an indictment is a question of law, requiring

a de novo review."), citing *State v. Smoot*, 2d Dist. Clark No. 96-CA-107, 1997 WL 432225, *4 (July 18, 1997). We also review de novo the determination of a statute's constitutionality. *State v. Hudson*, 3d Dist. Marion No. 9-12-38, 2013-Ohio-647, ¶ 27, citing *City of Akron v. Callaway*, 162 Ohio App.3d 781, 2005-Ohio-4095, ¶ 23 (9th Dist.) and *Andreyko v. City of Cincinnati*, 153 Ohio App.3d 108, 2003-Ohio-2759, ¶ 11 (1st Dist.). "De novo review is independent, without deference to the lower court's decision." *Id.*, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio*, 64 Ohio St.3d 145, 147 (1992).

{¶18} In his motion to dismiss the death-penalty specification from his indictment, Mason argues that Ohio's death-penalty statute is unconstitutional. In support of his constitutional challenge, Mason relies on *Hurst*, in which the United States Supreme Court concluded that Florida's death penalty statutory scheme violates the Sixth Amendment of the United States Constitution. 136 S.Ct. 616. The trial court agreed with Mason's argument and concluded that the version of Ohio's death-penalty statute in effect in 1993 is unconstitutional under *Hurst*. Specifically, the trial court analyzed:

> The Ohio death penalty statutes in effect at the time of the murder in this case had no provision for the jury making specific findings which would authorize the imposition of the death penalty. Rather, the trial court, and not the jury, is required to make the specific

> findings, under former Ohio R.C. 2929.03 (F). Also, the jury's recommendation for a death penalty does not authorize the death penalty; only the trial judge's weighing of the mitigating and aggravating factors, and the trial judge's specific findings, authorize the imposition of the death penalty. For this reason also, the Ohio death penalty statute in effect in February, 1993 is unconstitutional.

(Doc. No. 619).

{¶19} The trial court's analysis is erroneous. In *Hurst*, the United States Supreme Court concluded that Florida's death-penalty statute is unconstitutional under the Sixth Amendment, as applied by the Court in *Apprendi v. New Jersey* and *Ring v. Arizona*, because Florida's death-penalty statute abrogated the jury's fact-finding role. *Hurst* at 617-618. In reaching its conclusion, the United States Supreme Court applied its analysis from *Ring*, in which the Court "held that Arizona's capital sentencing scheme, which allowed a judge to find the facts necessary to sentence a defendant to death, violated the *Apprendi* rule." Kimberly J. Winbush, *Application of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) to State Death Penalty Proceedings*, 110 A.L.R.5th 1 (2003), citing *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). *See also Hurst* at 621. The "*Apprendi* rule" states that "any fact that 'expose[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" under the Sixth Amendment. *Hurst* at 621, quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348 (2000).

{¶20} It appears that the trial court read and applied *Hurst* in a vacuum—namely, the statement, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619. Reading the entirety of *Hurst* reveals that the Florida statutory scheme is substantially different from Ohio's scheme.

{¶21} Ohio's death penalty is governed by R.C. 2929.03 and R.C. 2929.04.[2] R.C. 2929.04 provides, in relevant part, "Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt." R.C. 2929.04(A) (1981) (current version at R.C. 2929.04(A) (2016)).[3] [4] R.C. 2929.03 provides, in relevant part:

> (B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating

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[2] We apply statutes as they existed at the time of the offense. *See, e.g., State v. Sheriff*, 3d Dist. Logan No. 8-11-14, 2012-Ohio-656, ¶ 15, citing *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374. Accordingly, we review the language of Ohio's death-penalty statutes as those statutes existed at the time of the offense in this case—1993.

[3] The language of R.C. 2929.04(A) has not been amended since 1981.

[4] In this case, the indictment included the death-penalty specification identified in R.C. 2929.04(A)(7)—that Mason committed aggravated murder while committing, attempting to commit, or fleeing immediately after committing or attempting to commit rape. (Doc. Nos. 1, 67).

circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, * * * and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

* * *

(D)(1) * * * When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. * * * The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was

found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of

counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender,

the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

* * *

> (F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

R.C. 2929.03(B), (D)(1)-(3), (F) (1981) (current version at R.C. 2929.03 (2008)).[5]

{¶22} Plainly, under Ohio's death-penalty statute, a defendant is not eligible for the death penalty unless at least one of the R.C. 2929.04(A) aggravating circumstances is specified in the indictment, and that aggravating circumstance is found by the trier of fact beyond a reasonable doubt. If at least one of the R.C. 2929.04(A) aggravating circumstances is specified in the indictment and that aggravating circumstance is found by the trier of fact beyond a reasonable doubt, the defendant's case proceeds to the penalty phase in which the trier of fact weighs the mitigating evidence presented by the defendant against that aggravating circumstance to determine the penalty that should be imposed on the defendant—a

[5] R.C. 2929.03 has been amended a number of times since 1993. The substantive changes to R.C. 2929.03 include revisions to the life-sentence options that may be imposed and the defendant's appellate rights when he or she is sentenced to death—that is, none of those revisions changed the role of the jury or the judge. *See* R.C. 2929.03 (2008).

life-imprisonment sentence or death. R.C. 2929.04(B) (1981) (current version at R.C. 2929.04(B) (2016)); R.C. 2929.03(D)(1), (2) (1981) (current version at R.C. 2929.03(D)(1), (2) (2008)). The burden is on the State to prove beyond a reasonable doubt that the aggravating circumstance sufficiently outweighs the mitigating evidence. R.C. 2929.03(D)(1) (1981) (current version at R.C. 2929.03(D)(1) (2008)).

{¶23} In cases involving a trial by jury, if the jury unanimously finds that the aggravating circumstance outweighs the mitigating factors, then the jury is to recommend that the trial court impose the death penalty. R.C. 2929.03(D)(2) (1981) (current version at R.C. 2929.03(D)(2) (2008)). If the jury finds the opposite, then the jury is to recommend, and the trial court must impose, a life-imprisonment sentence. *Id.* If the jury recommends that a defendant receive the death penalty, the trial court is to consider the "relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable," the presentence-investigation report and weigh the aggravating circumstance of which the defendant was found guilty against the mitigating factors to ensure that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. R.C. 2929.03(D)(2), (3) (1981) (current version at R.C. 2929.03(D)(2), (3) (2008)). If the trial court concludes that the aggravating circumstance does not outweigh the mitigating factors beyond a reasonable doubt, then the trial court may

deviate from the jury's death-penalty recommendation and impose a life-imprisonment sentence. R.C. 2929.03(D)(3), (F) (1981) (current version at R.C. 2929.03(D)(3), (F) (2008)). If the trial court concludes that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, then the trial court is required to issue a separate opinion enumerating the mitigating factors and explaining why those factors do not outweigh the aggravating circumstance. R.C. 2929.03(F) (1981) (current version at R.C. 2929.03(F) (2008)).

{¶24} By contrast, Florida's death penalty statute, in effect at the time *Hurst* was decided, provided that "'[a] person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.'" *Hurst*, 577 U.S. ___, 136 S.Ct. at 620, quoting Fla. Stat. 775.082(1) (2010).[6] "The additional sentencing proceeding Florida employ[ed was] a 'hybrid' proceeding 'in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.'" *Id.*, quoting *Ring*, 536 U.S. at 608, fn. 6. "First, the sentencing judge conduct[ed] an evidentiary hearing before a jury." *Id.*, citing Fla. Stat. 921.141(1) (2010). "Next, the jury render[ed] an 'advisory sentence' of life or death without specifying the factual basis of its recommendation." *Id.*, citing Fla. Stat. 921.141(2) (2010). "'Notwithstanding the recommendation of a majority of the

[6] Florida amended its statutory scheme in response to *Hurst*. 2016 Fla. Sess. Law Serv. Ch. 2016-13 H.B. 7101 (Mar. 7, 2016).

jury, the court, after weighing the aggravating and mitigating circumstances, [was to] enter a sentence of life imprisonment or death.'" *Id.*, quoting Fla. Stat. 921.141(3) (2010). "If the court impose[d] death, it [was to] 'set forth in writing its findings upon which the sentence of death is based.'" *Id.*, quoting Fla. Stat. 921.141(3) (2010). "Although the judge [was to] give the jury recommendation 'great weight,' the sentencing order [was to] 'reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors.'" (Internal citation omitted.) *Id.*, quoting *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975) and *Blackwelder v. State*, 851 So.2d 650, 653 (Fla.2003).

{¶25} Stated differently, under Florida's scheme, "[t]he trial judge [was] tasked with making independent findings as to the presence of aggravating factors, mitigating factors, and the balance between the two." Guyer, *Ring Around the Jury: Reviewing Florida's Capital Sentencing Framework in Hurst v. Florida*, 11 Duke J.Const.L.&Pub.Policy Sidebar 242 (2016), citing Fla. Stat. 921.141(2), (3) (2010). Although the question of whether there were any aggravating circumstances was presented to the jury, "the judge [could not] possibly know the specifics of the jury's findings and [the judge made] her own findings" because the jury was not required to make an express aggravating-circumstance finding. *Id.* at 251, citing *Ross v. State*, 386 So.2d 1191, 1197 (Fla.1980) and Fla. Stat. 921.141(2), (3) (2010). "As Florida case law notes, 'the trial court [was] required to make independent findings

on aggravation, mitigation, and weight[]'; therefore, [t]he jury's recommendation [] ha[d] no identifiable binding effect at the sentencing stage." *Id.*, quoting *Russ v. State*, 73 So.3d 178, 198 (Fla.2011) and citing *Ring*, 536 U.S. at 587, citing *Apprendi*, 530 U.S. at 492.

{¶26} Most pertinently in *Hurst*, the United States Supreme Court, in overruling its past decisions in *Spaziano v. Florida*[7] and *Hildwin v. Florida,*[8] stated, "The decisions are overruled to the extent they allow a sentencing judge to find an *aggravating circumstance*, independent of a jury's fact finding, that is necessary for imposition of the death penalty." (Emphasis added.) *Hurst* at 624. Further, the United States Supreme Court held,

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the *judge alone* to find the existence of an aggravating circumstance, is therefore unconstitutional.

(Emphasis added.) *Id.*

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[7] In *Spaziano v. Florida*, the United States Supreme Court held that a trial court's imposition of a death sentence after the jury recommended a life sentence did not violate the Eighth Amendment of the United States Constitution. 468 U.S. 447, 104 S.Ct. 3154 (1984).

[8] In *Hildwin v. Florida*, the United States Supreme Court held that the Sixth Amendment of the United States Constitution permitted the trial court to find an aggravating circumstance. 490 U.S. 638, 109 S.Ct. 2055 (1989).

{¶27} Florida's statutory scheme invalidated in *Hurst* differs from Ohio's statutory scheme. The Florida statutory scheme instructed the jury to find the aggravating circumstances during the penalty phase; instructed the jury that it was to find at least one aggravating circumstance to impose death from a list of aggravating circumstances that could apply to the facts of the case; and instructed the jury that death could be imposed by a simple majority vote.[9] Further, nothing in Florida's statute required "a majority of the jury to agree on *which* aggravating circumstances exist[ed]." (Emphasis sic.) *State v. Steele*, 921 So.2d 538, 545 (Fla.2006), *abrogated*, *Hurst*. *See also* Fla. Stat. 921.141(5)(a)-(p) (2010) (enumerating the 16 aggravating circumstances the jury could consider) (current version at Fla. Stat. 921.141(6) (2016).

{¶28} Also different, Florida's statutory scheme permitted the trial judge to conduct a separate sentencing hearing, known as a *Spencer* hearing, to hear and consider evidence not heard by the jury. *See Spencer v. State*, 615 So.2d 688, 690-691 (Fla.1993); *Engle v. State*, 438 So.2d 803, 813 (Fla.1983). In Ohio, there is no separate hearing or opportunity to present any additional evidence—that is, the trial court is not permitted to consider any evidence not presented to the jury. R.C.

[9] While the unanimity of the jury was not at issue in *Hurst*, we nonetheless acknowledge that difference from Ohio's statutory scheme in effect in 1993. *Compare* R.C. 2929.03(D)(2) (1981) (current version at R.C. 2929.03(D)(2) (2008)) with Fla. Stat. 921.141(3) (2010) (current version at Fla. Stat. 921.141(3) (2016)). *See also Hurst* at 620 (noting that "[t]he jury recommended death by a vote of 7 to 5" for Hurst); *State v. Belton*, ___ Ohio St.3d ___, 2016-Ohio-1581, ¶ 59 (acknowledging that a defendant cannot be sentenced to death in Ohio unless the jury unanimously recommends the death sentence).

2929.03(D) (1981) (current version at R.C. 2929.03(D) (2008)). Likewise in stark contrast to Ohio's statutory scheme, Florida's death-penalty statute permitted the trial court to impose a death sentence when the jury recommended a life-imprisonment sentence. *See Williams v. State*, 967 So.2d 735, 751 (Fla.2007); *Hurst* at 625 (Alito, J. dissenting), citing *Tedder*, 322 So.2d at 910. Indeed, Florida's statute specifically referred to the jury's sentence as "advisory" and read, "Notwithstanding the recommendation of a majority of the jury * * *." *See* Fla. Stat. 921.141(2), (3) (2010) (current version at Fla. Stat. 921.141(2), (3) (2016)). Under Ohio's death-penalty statute, the jury's aggravating-circumstance finding is binding on the trial judge, and the trial judge cannot expose the defendant to a greater penalty than authorized by the jury verdict. *See State v. Cooey*, 46 Ohio St.3d 20 (1989), paragraph three of the syllabus ("Only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count."), *superseded by constitutional amendment on other grounds*, *State v. Smith*, 80 Ohio St.3d 89 (1997); R.C. 2929.03(D)(2) (1981) (current version at R.C. 2929.43(D)(2)(2008)).

{¶29} The stark differences between Ohio's and Florida's death-penalty statutes are outcome-determinative for Mason's challenge to Ohio's death-penalty statute under *Hurst*. *See Hurst* at 624. The trial court in this case ignored the most important feature that renders Ohio's death-penalty statute constitutional under the

Sixth Amendment through *Apprendi*, *Ring*, and *Hurst*—that the jury, not the judge, determines beyond a reasonable doubt the existence of an aggravating circumstance—the feature that subjects a defendant to the possibility of death as a sentence. Accordingly, we hold that the trial court erred in concluding that Ohio's death-penalty statute in effect in 1993 is unconstitutional under *Hurst*.

{¶30} Furthermore, not only is the trial court's analysis erroneous, it is inconsistent with Ohio precedent. The trial court attempts to avoid the application of stare decisis by construing as dicta a recent Supreme Court of Ohio decision discussing the application of *Hurst* to Ohio's death-penalty statute. *See Belton*, ___ Ohio St.3d ___, 2016-Ohio-1581, at ¶ 58-61.[10] The trial court distinguished *Belton*:

> It is true, as stated by the Ohio Supreme Court in State v. Belton, that the determination of guilt of an aggravating circumstance renders the defendant potentially eligible for a capital sentence.
>
> The Ohio Supreme Court also stated in Belton that because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a

[10] On May 2, 2016, Belton filed a motion for reconsideration of the Supreme Court of Ohio's decision requesting, in part, that the Court remand his case to the trial court or allow for additional briefing concerning his constitutional argument relative to *Hurst* because after Belton's appeal was fully briefed, the United States Supreme Court issued its decision in *Hurst*. While the Supreme Court of Ohio addressed *Hurst* in Belton's appeal, Belton contends in his motion for reconsideration that the Supreme Court of Ohio's application of *Hurst* to his argument improperly relies on pre-*Hurst* precedent. The Supreme Court of Ohio denied Belton's motion on November 9, 2016. *State v. Belton*, 197 Ohio St.3d 1990, 2016-Ohio-7681.

defendant to greater punishment. However, this Court respectfully disagrees that the determination of guilt of an aggravated circumstance alone is what renders a defendant eligible for the imposition of a capital sentence. The ultimate eligibility for a capital sentence in Ohio does not occur until the trial judge makes his or her own determination based on the factors contained in former R.C. Section 2929.03(D)(3), that a death sentence is appropriate. Even the jury recommendation for a death sentence, pursuant to former R.C. Section 2929.03(D)(2), does not by itself make a defendant eligible for imosition [sic] of a capital sentence. Again, the jury's determination of guilt of an aggravating circumstance, by itself, only renders the defendant eligible for a maximum sentence of life imprisonment with parole eligibility after serving thirty years of imprisonment on the offender, former R.C. 2929.03(D)(2)(b).

The Ohio Supreme Court also noted that the trial judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. To this statement this Court agrees that the Ohio statute is different from the Florida statute in Hurst in this regard; however, this fact does not save the Ohio death penalty statute from being unconstitutional under the Sixth Amendment of the United

States Constitution as interpreted in Apprendi vs New Jersey, Ring vs Arizona and Hurst vs Florida.

As to the case law cited by the Ohio Supreme Court in Paragraph 60 of the Belton decision, the continued viability of those cases is doubtful given the statements of the United States Supreme Court in Hurst vs Florida.

(Underline sic.) (Doc. No. 619).

{¶31} The trial court is not free to "respectfully disagree" with the Supreme Court of Ohio when the court of superior jurisdiction has clearly spoken on an issue. *See generally Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 1 ("Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system."); *State v. Bethel*, 10th Dist. Franklin No. 07AP-810, 2008-Ohio-2697, ¶ 26 ("'Under this principle, we are bound by and must follow the decisions of the Ohio Supreme Court. To do otherwise would do violence to the doctrine that ours is a government of law, not of men.'"), quoting *Thacker v. Bd. of Trustees of Ohio State Univ.*, 31 Ohio App.3d 17, 23 (10th Dist.1971), *overruled in part on other grounds, sub nom. Schenkolewski v. Cleveland Metroparks Sys.*, 67 Ohio St.2d 31 (1981), paragraph one of the syllabus.

{¶32} The Supreme Court of Ohio's discussion of *Hurst* in *Belton* is persuasive if not authoritative. *See State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, ¶ 143 (12th Dist.) (Ringland, J., concurring in part and dissenting in part). "'Dicta' is defined as '[e]xpressions in court's opinions which go beyond the facts before court and therefore are * * * not binding in subsequent cases as legal precedent.'" *Westfield Ins. Co.* at ¶ 85, quoting *Black's Law Dictionary* 454 (6th Ed.1990). *See also Peters v. Tipton*, 7th Dist. Harrison No. 13HA10, 2015-Ohio-3307, ¶ 6 ("Obiter dictum, dictum and dicta are interchangeable terms defined by the Ohio Supreme Court as '"an incidental and collateral opinion uttered by a judge, and therefore (as not material to his decision or judgment) not binding."'"), quoting *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 505-506 (1948), quoting *Webster's New International Dictionary* (2d Ed.). "Dicta includes statements made by a court in an opinion that are not necessary for the resolution of the issues." *Gissiner v. Cincinnati*, 1st Dist. Hamilton No. C-070536, 2008-Ohio-3161, ¶ 15, citing *Katz v. Enzer*, 29 Ohio App.3d 118, 122 (1st Dist.1985) and *Levy Overall Mfg. Co. v. Crown Overall Mfg. Co.*, 34 Ohio C.D. 762, 763 (1st Dist.1916). Lower courts are generally not bound by dicta; however, "such extraneous statements may still constitute persuasive authority." *Bachus v. Loral Corp.*, 9th Dist. Summit No. 15041, 1991 WL 199906, *2 (Oct. 2, 1991), citing *Lane v. Greene*, 21 Ohio App.

62, 69-70 (4th Dist.1926); *Ecker v. Cincinnati*, 52 Ohio App. 422, 426 (1st Dist.1936).

{¶33} In *Belton*, the Supreme Court of Ohio addressed Belton's constitutional challenge to Ohio's death-penalty scheme and held "that when a capital defendant in Ohio elects to waive his or her right to have a jury determine guilt, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial." *Belton*, ___ Ohio St.3d ___, 2016-Ohio-1581, at ¶ 61. In arriving at that conclusion, the Supreme Court of Ohio plainly stated:

> Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*. In Ohio, a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. *See* R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

> Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is not a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); *see, e.g., State v. Fry*, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State*, 869 A.2d 285, 303-305 (Del.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death-penalty eligible. *United States v. Runyon*, 707 F.3d 475, 515-516 (4th Cir.2013) (citing cases from other federal appeals courts).

Id. at ¶ 59-60. The resolution of Belton's constitutional argument turned on the issue of the constitutionality of Ohio's death-penalty statute under *Apprendi* and *Ring*, as the United States Supreme Court applied the law of those cases in *Hurst*. Indeed, the Supreme Court of Ohio's analysis of Belton's constitutional argument

is, as the State argues, "an exposition of the logical steps taken to reach its ultimate conclusion." (Appellant's Brief at 9).

{¶34} Although *Belton* is distinguishable from Mason's case, the result is still the same.[11] Unlike Mason, "Belton entered a no-contest plea to charges of aggravated robbery and aggravated murder with capital specifications, and a three-judge panel sentenced him to death." *Belton* at ¶ 1. On appeal, Belton argued that capital defendants in Ohio have "a right to a jury trial to determine the existence of any mitigating factors and to determine whether the aggravating circumstance or circumstances to which he would plead guilty outweigh those factors by proof beyond a reasonable doubt" under the Sixth Amendment through *Apprendi* and *Ring*. *Id.* at ¶ 55. Notwithstanding Belton's jury waiver, Mason's argument is substantially similar to Belton's argument—Ohio's death-penalty statute unconstitutionally abrogates the jury's role in the penalty phase.

{¶35} Even if we are to accept as true the trial court's conclusion that the Supreme Court of Ohio's application of *Hurst* in *Belton* is merely dicta, *Belton* is highly persuasive. At the very least, the Supreme Court of Ohio's discussion of *Hurst* in *Belton* "sheds some light on how the majority of our highest court might

[11] Although Ohio's death penalty statute was amended between 1993, the time that Mason committed his crimes, and 2008, the time that Belton committed his crimes, those amendments do not impact the applications of *Hurst* to Ohio's death-penalty statute. *Compare* R.C. 2929.03 (1981) *with* R.C. 2929.03 (2008). *Compare* R.C. 2929.04 (1981) *with* R.C. 2929.04 (2002).

rule on" the specific issue presented by this case. *Blankenburg*, 197 Ohio App.3d, 2012-Ohio-1289, at ¶ 143.

{¶36} Moreover, not only is *Belton* at least persuasive authority, there is other authority controlling the issue presented by this case. That is, we need not look beyond the Supreme Court of Ohio's application of *Apprendi* and *Ring* to Ohio's death-penalty statute. Indeed, the United States Supreme Court did not create a new standard in *Hurst* by which we are to judge the death penalty. *See Raglin v. Mitchell*, S.D. Ohio No. 1:00-CV-767, 2016 WL 4035185, *3 (July 28, 2016), fn. 2 ("the holding in *Hurst* is not a new 'substantive' rule"). Instead, the United States Supreme Court was applying the standard put forth in *Apprendi*, as applied to capital cases in *Ring*, to Florida's death-penalty statute in *Hurst*. *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692, *5 (Ala.2016) ("The United States Supreme Court's holding in *Hurst* was based on an application, not an expansion, of *Apprendi* and *Ring* * * *."); *Ex parte State*, ___ So.3d ___, 2016 WL 3364689 *6 (Ala.App.2016) ("The [United States Supreme] Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*."). Applying *Apprendi* and *Ring* to Ohio's death-penalty statute, the Supreme Court of Ohio did not reach the result that the trial court reached in this case. *See State v. Hoffner*, 102 Ohio St.3d

358, 2004-Ohio-3430, ¶ 68-70. *See also State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 269 (concluding that Ohio's death-penalty-sentencing phase does not invoke *Apprendi* because, under Ohio's statute, the trial court does not make factual findings that make a defendant death-eligible; rather, the jury does.)

{¶37} In *Hoffner*, the Supreme Court of Ohio held "that *Ring* has no possible relevance * * * to Ohio's death penalty statute." *Hoffner* at ¶ 69. *See also State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 221 (concluding that the jury's determination of a death-penalty specification beyond a reasonable doubt "does not run afoul of what *Ring* requires" and noting that the Court concluded in *Hoffner* that *Ring* "is not applicable to Ohio's capital-sentencing scheme"); *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 5 (noting that the court concluded in *Hoffner* that *Ring* is "not applicable to Ohio's capital-sentencing scheme"), *abrogated on other grounds*, *Oregon v. Ice*, 555 U.S. 160, 164, 129 S.Ct. 711 (2009), citing *Hoffner* at ¶ 69-70. The Supreme Court of Ohio compared Arizona's death-penalty statute to Ohio's death-penalty statute:

> Under the Arizona sentencing statutes proscribed in *Ring*, the trial court was solely responsible for making all factual determinations regarding whether a defendant should be sentenced to death. In contrast, Ohio's capital-sentencing scheme places that responsibility with the jury. R.C. 2929.03 charges the jury with determining, by

> proof beyond a reasonable doubt, the existence of any statutory aggravating circumstances and whether those aggravating circumstances are sufficient to outweigh the defendant's mitigating evidence.

Hoffner at ¶ 69, citing R.C. 2929.03(B) and (D).

{¶38} Notwithstanding the trial court's departure from Ohio precedent, the trial court also ignored Sixth Amendment jurisprudence and wrongly extended the reach of the Sixth Amendment's right-to-a-trial-by-jury precedent. Going rogue, the trial court erroneously analyzed the concepts of death eligibility, Ohio's weighing process during the penalty phase, and advisory-sentence recommendations.

{¶39} First, the trial court misinterpreted the concept of "death eligibility." That is, the trial court considers a defendant to be death eligible only after the trial court sentences the defendant to death in its written opinion under R.C. 2929.03(F). The trial court's characterization of death eligibility ignores the distinction between whether a defendant is eligible for the death penalty and whether the death penalty is the appropriate sentence for a defendant who is already eligible for the death penalty. *See Ex Parte State*, 2016 WL 3364689, at *8 (discussing the distinction "between whether a capital defendant is *eligible* for the death penalty, and whether

the death penalty is an *appropriate* sentence for a capital defendant who *is* eligible for the death penalty"). (Emphasis sic.)

{¶40} The Supreme Court of Ohio clearly defined the concept of death eligibility. In Ohio, a defendant is eligible for a death sentence if a jury finds beyond a reasonable doubt that the defendant is guilty of one of the R.C. 2929.04(A) aggravating circumstances. *Belton*, ___ Ohio St.3d ___, 2016-Ohio-1589, at ¶ 59; *Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, at ¶ 269 ("Adams became death-eligible when the jury unanimously found him guilty of aggravated murder in the course of some predicate felony."); *State v. Davis*, 116 Ohio St. 3d 404, 2008-Ohio-2, ¶ 189; *State v. Gumm*, 73 Ohio St.3d 413, 417 (1995) ("At the point in time at which the factfinder (either a jury or three-judge panel) finds the defendant guilty of both aggravated murder and an R.C. 2929.04(A) specification, the defendant has become 'death-eligible,' and a second phase of the proceedings (the 'mitigation' or 'penalty' or 'sentencing' or 'selection' phase) begins * * *."), citing R.C. 2929.03(C)(2). The defendant in *Davis* argued "that the Sixth Amendment requires any finding of fact that makes a defendant eligible for the death penalty to be unanimously made by a jury" under *Apprendi* and *Ring*. *Davis* at ¶ 189. The Supreme Court of Ohio concluded that Davis's argument was meritless because "Davis's reliance on *Apprendi* and *Ring* is misplaced because the jury's verdict, and not the judge's findings, made Davis eligible for the death penalty." *Id.*

Accordingly, the trial court's conclusions about the concept of death eligibility in Ohio are erroneous.

{¶41} Also erroneous is the trial court's conclusion that Ohio's weighing process during the penalty phase is unconstitutional. *See U.S. v. Fields*, 483 F.3d 313, 346 (5th Cir.2007) ("Capital defendants have no constitutional right to a jury at sentencing."), citing *Proffitt v. Florida*, 428 U.S. 242, 253, 96 S.Ct. 2960 (1976); *Harris v. Alabama*, 513 U.S. 504, 517, 115 S.Ct. 1031 (1995), *overruled on other grounds*, *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2155 (2013). *See also Fields* at 346 ("Indeed, the Supreme Court has explicitly held that judges may do the weighing of aggravating and mitigating circumstances consistent with the Constitution."), citing *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441 (1990).

{¶42} As we noted above, *Hurst* did not expand *Apprendi* and *Ring*. Those cases "require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less." *In re Bohannon*, 2016 WL 5817692, at *5. The *Apprendi* rule, as applied to death-penalty cases by *Ring*, "only prevents courts from using judicially found aggravating factors in its weighing process." Bentsen, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionally Significant Facts*, 90 Va.L.Rev. 645, 677 (2004), fn. 166.

Because Ohio's death-penalty statute requires the jury, not the judge, to determine that an aggravating circumstance exists beyond a reasonable doubt, Ohio's death-penalty statute does not violate the Sixth Amendment. *Compare In re Bohannon* at *5 (applying *Apprendi*, *Ring*, and *Hurst* to Alabama's death-penalty statute and concluding that its statute does not violate the Sixth Amendment because the jury "determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make the defendant death-eligible").

{¶43} Furthermore, *Apprendi* and *Ring* do "not convert the judicial function of weighing aggravating and mitigating factors into a necessary factual determination that the aggravating factor(s) outweigh any mitigating factors." Bentsen at 677, fn. 166, citing *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954 (1978). "Whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact necessary to make a capital defendant eligible for the death penalty but is a 'moral or legal judgment' guiding the trial court's discretion in determining '"whether a defendant eligible for the death penalty should in fact receive that sentence."'" *Ex parte State*, 2016 WL 3364689, at *8, quoting *Ex parte Waldrop*, 859 So.2d 1181, 1189 (Ala.2002), quoting *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630 (1994). The weight afforded to the aggravating circumstance and mitigating factors "is one of judgment, of shades of

gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral * * *. What [a weighing statute] requires, is not a finding of fact, but a moral judgment." *U.S. v. Gabrion*, 719 F.3d 511, 532-533 (6th Cir.2013) (discussing the federal death penalty statute, which also requires a jury to weigh factors in determining whether a sentence of death is appropriate). *See also U.S. v. Sampson*, 486 F.3d 13, 32 (1st Cir.2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found. The outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party. Hence, the weighing of aggravators and mitigators does not need to be 'found.'"), citing *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir.2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination), *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir.1983), and *Gray v. Lucas*, 685 F.2d 139, 140 (5th Cir.1982).

{¶44} In *Apprendi*, the United States Supreme Court discussed the role of mitigating evidence and noted the consideration of mitigating evidence

> neither expos[es] the defendant to a deprivation of liberty greater than authorized by the verdict according to statute, nor * * * impos[es] upon the defendant a greater stigma than accompanying the jury

> verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

Appredni, 530 U.S. at 490, fn. 16. Because mitigating factors are not facts that expose defendants to harsher penalties, there is no requirement that the jury unanimously find a mitigating factor. *See State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶ 259, citing *Mills v. Maryland*, 486 U.S. 367, 383, 108 S.Ct. 1860 (noting that the jury may not be instructed that it must unanimously agree on a mitigating factor before that factor may be weighed against an aggravating circumstance). *See also McKoy v. North Carolina*, 494 U.S. 433, 433-434, 11 S.Ct. 1227 (1990).

{¶45} *Hurst* did not disturb *Apprendi*'s holding that "trial courts may 'exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute.'" (Emphasis sic.) *In re Bohannon,* 2016 WL 5817692, at *6, quoting *Apprendi* at 481. *See also United States v. Sampson*, D.Mass No. 01-10384-LTS, 2016 WL 3102003, *3 (June 2, 2016) ("The Supreme Court, however, focused its analysis and its ultimate statements of the holding in *Hurst* on the first of those 'facts' – the finding of aggravating factors – and, besides quoting the statutory language, included no discussion of the second – the weighing of mitigating and aggravating factors."), citing *Hurst*, 136 S.Ct. at 620-624. Furthermore, "*Hurst* does

not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment." *In re Bohannon* at *6.

{¶46} In Ohio, there is no additional *finding*—within the meaning of the Sixth Amendment—not found by a jury that exposes a defendant to a harsher penalty. In Ohio, the only independent review done by the trial court is its reweighing of the aggravating circumstance and mitigating factors under R.C. 2929.03(F). The reweighing is not a "critical finding" that exposes the defendant to a harsher penalty. Indeed, notwithstanding the precedential-value issue of *Belton* discussed above, the Supreme Court of Ohio discussed that the weighing process for sentencing purposes is not subject to the Sixth Amendment because the weighing process cannot increase the potential penalty that the defendant faces. *See Belton*, ___ Ohio St.3d ___, 2016-Ohio-1581, at ¶ 60. Accordingly, the trial court's analysis regarding the constitutionality of Ohio's weighing process during the penalty phase is flawed.

{¶47} Finally, the trial court erroneously categorizes the jury's death recommendation in Ohio as "advisory." To reach this conclusion, the trial court ignores that the aggravating-circumstance finding in Ohio is made by the jury, not the judge. *Compare In re Bohannon* at *7 ("Bohannon ignores the fact that the finding required by *Hurst* to be made by the jury, i.e., the existence of the

aggravating factor that makes a defendant death-eligible, is indeed made by the jury, not the judge, in Alabama."). "Nothing in *Apprendi*, *Ring*, or *Hurst* suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range." *Id.* Unlike the jury's verdict in Florida, which was truly advisory because the jury did not make any findings regarding the aggravating circumstance, the jury's verdict in Ohio contains explicit findings as to the specific aggravating circumstance it found beyond a reasonable doubt. Therefore, the jury's death recommendation in Ohio is not advisory as was the jury's recommendation in Florida. *See id. Compare People v. Jackson*, 21 Cal.5th 269, 374, 205 Cal.Rptr.3d 386, 376 P.3d 528 (2016) (comparing California's death-penalty scheme to Florida's death-penalty scheme at issue in *Hurst* and concluding that California's does not violate the Sixth Amendment because, if the jury reaches a verdict of death, "[t]he trial court simply determines 'whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented'"), quoting Cal.Penal Code 190.4(e).

{¶48} For these reasons, we conclude that Ohio's death-penalty statute in effect in 1993 does not violate the Sixth Amendment. As such, the trial court erred in granting Mason's motion to dismiss the death-penalty specification from his indictment. The State's assignments of error are sustained.

{¶49} Having found error prejudicial to the appellant herein in the particulars assigned and argued, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Judgment Reversed and Cause Remanded

SHAW, P.J. and WILLAMOWSKI, J., concur.

/jlr

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLANT, **CASE NO. 9-16-34**

v.

MAURICE MASON, **JUDGMENT ENTRY**

DEFENDANT-APPELLEE.

For the reasons stated in the opinion of this Court, the assignments of error are sustained and it is the judgment and order of this Court that the judgment of the trial court is reversed with costs assessed to Appellee for which judgment is hereby rendered. The cause is hereby remanded to the trial court for further proceedings and for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

JUDGE

JUDGE

JUDGE

DATED: December 27, 2016

Appendix C

IN THE COURT OF COMMON PLEAS FOR MARIO
GENERAL DIVISION

STATE OF OHIO,	:	Case No. 93CR01S3
Plaintiff,	:	Judge William R. Finnegan
-vs-	:	RULING ON DEFENDANT'S MOTION TO DISMISS
MAURICE MASON,	:	CAPITAL COMPONENTS
Defendant.	:	PURUSANT TO HURST vs. FLORIDA

This day this case came on before the Court upon the Defendant's Motion to Dismiss Capital Components Pursuant to Hurst v. Florida. The State of Ohio has filed an Opposition to said Motion.

PROCEDURAL STATUS OF THIS CASE

On September 30, 1993, an indictment was filed charging Defendant Maurice A. Mason with aggravated felony murder, rape, and having a weapon while under disability. The indictment also contained a death-penalty specification of committing murder in the course of a rap and further specifications that involved firearms, prior felony, and prior offense of violence.

On July 15, 1994, a judgment entry was filed whereby Judge William Wiedemann accepted ajury's recommendation and sentenced Mason to death for aggravated murder. Due to counsel's ineffective assistance for the sentencing

phase, on October 3, 2008, the United States Court of Appeals for the Sixth Circuit granted Mason a conditional writ of habeas corpus. *Mason v. Mitchell,* 543 F 3d 766, 785 (6th Cir. 2008). Based on the Sixth Circuit's ruling, the matter was remanded to this Court of a new penalty phase hearing, which was scheduled to commence on February 16, 2010.

On February 4, 2010, Mason moved to prohibit the new penalty-phase hearing. Mason argued the time to hold the new penalty phase hearing had expired. On December 13, 2010, Judge Robert Davidson denied the motion. However, on September 4, 2013, the Sixth Circuit agreed with Mason that the State did not comply with its conditional writ by failing to commence a new penalty-phase trial within 180 days of its judgment becoming final. *Mason v. Mitchell,* 729 F 3d 545, 500-51 (6th Cir. 2013). Nevertheless, the panel held that the State could still seek the death penalty at a new penalty-phase trial. *Id.* At 551-52. The United States Supreme Court denied certiorari from the Sixth Circuit's decision on April 28, 2014.

On October 16, 2014, Mason filed an application for DNA testing. As a result of the application, testing of evidentiary items in this case is still pending. Further, the penalty-phase trial is currently scheduled for November 7, 2016.

HURST V. FLORIDA ACCORDING TO THE DEFENDANT

While this matter was awaiting the new penalty-phase trial, on January 12, 2016, the United States Supreme Court issued *Hurst v. Florida*, ___ U.S. , 136 S. Ct. 616 (2016), which held that Florida's capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Due to the similarities between Florida's capital sentencing laws and Ohio's, Mason submits that pursuant to *Hurst*, this Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of this case.

In *Hurst*, a Florida jury had convicted Timothy Hurst of first-degree murder, but did not identify which of the presented theories - premediated murder or felony murder - buttressed their funding. *Hurst*, 136 S. Ct. at 619-20. In Florida, first-degree murder is a capital felony, but the maximum sentence a capital defendant may receive based solely on the conviction is life imprisonment. Fla. State Section 775.082(1). The defendant will receive the death penalty only after an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Id.* Otherwise, the defendant is punished by life imprisonment without parole. *Id.*

Accordingly, after Hurst was found guilty of first-degree murder, the judge conducted an evidentiary hearing before the jury. *Hurst*, 136 S. Ct. at 620. At the conclusion of the evidentiary hearing, the jury rendered an "advisory sentence" of death without specifying the factual basis of its recommendation. *Id.* Under Florida law, the trial court must give the jury's recommendation "great weight," but must independently weigh the aggravated and mitigating circumstances before entering a sentence of life imprisonment or death. *Id.* The trial court in Hurst did this, and imposed a death sentence. *Id.*

On post-conviction review, the Florida Supreme Court vacated the sentence for reasons that are not relevant here. *Id.* At Hurst's re-sentencing hearing, a jury again recommended death and the judge so sentenced, basing its decision on the independent findings of aggravating circumstances as well as the jury's recommendation. *Id.*

The United States Supreme Court accepted certiorari of Hurst's appeal to resolve the tension between *Ring v. Arizona*, 536 U.S. 584 (2002) and its earlier decisions, *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Ring*, the Supreme Court held that the Sixth Amendment requires a jury to find any fact necessary to qualify a capital defendant for a death sentence. *Hurst*, 136 S. Ct. at 621. Although *Ring* had not expressly overruled *Hildwin* and *Spaziano*, cases which approved the constitutionality of Florida's capital sentencing

scheme, *Ring*'s holding seemed to compel such an outcome. *Hurst* laid the confusion to rest, holding that Florida's law "violates the Sixth Amendment in light of *Ring*." *Id.* at 620.

Justice Sotomayor explained in her 8-1 majority opinion that like Arizona, the state whose sentencing scheme was at issue in *Ring*, "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Id.* at 622. Justice Sotomayor continued: "Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial." *Id.* Because "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole," and because "a judge increased Hurst's authorized punishment based on her own factfinding," the Court held that "Hurst's sentence violates the Sixth Amendment." *Id.*

In so holding, the Court rejected Florida's argument that the jury's recommendation necessitated the finding of an aggravating circumstance, noting "the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. Section 775.082(1)) (emphasis in opinion). Because "[t]he trial court *alone* must find 'the facts. . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating

circumstances,'" the Court found that a Florida jury's function is solely advisory and does not satisfy the constitutional standard outlined by *Ring*. *Id.* (quoting Section 921.141(3)) (emphasis in original).

OHIO DEATH PENALTY STATUTE IN FEBRUARY, 1993

The controlling law before this Court is the law which was applicable on the date of the murder, February 8, 1993. The applicable law is found in former R.C. 2929.03 which reads as follows:

> "(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.
>
> "(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

"(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

"(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

"(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

"(b) By the trial jury and the trial judge if the offender was tried by jury.

"(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a decedent in

a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factor in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for thedefense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

"The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the' imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

"(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of

counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing arc sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

"(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(l) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judgesunanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

"(a) Life imprisonment with parole eligibility after serving twenty full years

"(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

"(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

"(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant

to this section is not final until the opinion is filed.

"(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court."

Also applicable is former R.C. Section 2929.04, which is as follows:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

"(5) Prior to the offense at bar, the of fender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

"(8) The victims of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

"(B) If one or more of the aggravating circumstances listed in division (a) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

"(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

"The existence of any of the mitigating factors listed on division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing."

Laws of Ohio Volume 139, Senate Bill 1 (1980); State v. Hudson, 93-LW-2905 (Jefferson Ct. of App. 1993).

THE CLAIMS OF THE DEFENDANT

The Defendant in his Motion states that the Ohio death penalty law is similar to the unconstitutional Florida death penalty statute in that under the Ohio statute the recommendation for a death sentence by the jury is not required to be rendered in writing and does not set forth the factual findings underlying the jury's recommendation. He claims that the Ohio statute is also similar in that the trial court must independently consider consider the criteria listed in former R.C. Section 2929.03(D)(3), and then sentence a defendant to death if the trial court finds by proof beyond a reasonable doubt that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors. The Ohio statute, as with the Florida statute, requires a trial court state its specific findings as to the existence of any of the mitigating factors of former R.C. section 2929.04 (B), as well as the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. Former R.C. section 2929.03 (F).

As a result of this procedure, the Defendant claims that Ohio's death penalty statute, which provides for a jury recommendation as to a death sentence, is like the Florida procedure of a death advisory verdict from the jury to the judge, which was held to be not in accord with the Sixth Amendment

right to trial by jury. The Defendant further states that the failure to require a jury to make specific findings about their balancing of the mitigating and aggravating factors leaves the trial judge with having to implement a sentence without the critical findings of the jury. The defendant concludes that absent the factual findings of the jury, and given the advisory nature of the jury's sentencing determination, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida, and should be held unconstitutional.

THE POSITION OF THE STATE OF OHIO

The State of Ohio maintains that a jury recommendation as to a capital sentence is constitutional. The State also maintains that the holding in Hurst vs. Florida is that the factors, circumstances, and elements that would render the death sentence as an available penalty must be presented to a jury and determined beyond a reasonable doubt, just like an element of the crime itself. The State also argues that the Ohio capital sentencing scheme is well within constitutional bounds, where the aggravating circumstances are enumerated in the indictment and presented to the jury as part of the guilt phase adjudication of the State's case-in-chief. It is sufficient for constitutional purposes, where the jury, not the

judge, determines whether the death penalty is an available sentencing option through a finding of guilt beyond a reasonable doubt on one or more aggravating circumstances.

In short, the State maintains that since the jury in Ohio determines the guilt of enumerated capital specifications beyond a reasonable doubt during the guilt phase of the case, and that the jury determines whether the death penalty is an available sentencing option through a finding of guilt beyond a reasonable doubt on one or more aggravating circumstances, that the Ohio death penalty statute is well within constitutional bounds.

THE OHIO SUPREME COURT COMMENTS ON HURST vs FLORIDA

This Court is aware that the Ohio Supreme Court has made comment in reference to the case of Hurst v. Florida, in the case of State v. Belton, 2016-Ohio-1581 (Ohio 2016). These comments read as follows:

> **{¶ 58}** More recently, the Supreme Court applied *Apprendi* and *Ring* to invalidate Florida's capital-sentencing scheme in *Hurst v. Florida,* 577 U.S., 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Florida law at issue in *Hurst* limited the jury's role in capital sentencing to making an advisory recommendation; a trial court was then free to impose a death sentence even if the jury recommended against it. *Id.* at 620. And even when a jury did recommend a death sentence, a trial court was not permitted to follow that recommendation until *the judge* found the existence of an aggravating circumstance. *Id.* at 620, 622. Thus, "Florida [did]

not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Instead, the trial judge in *Hurst* "increased [the defendant's] authorized punishment based on her own factfinding" when she sentenced him to death. *Id.* The Supreme Court held that Florida's capital-sentencing law, like the Arizona law in *Ring,* violated the Sixth Amendment. *Id*

{¶ 59} Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst.* In Ohio, a capital case does not proceed to the sentencing phase until *after* the fact-finder has found a defendant guilty of one or more aggravating circumstances. *See* R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson,* **141 Ohio St.3d 254, 2014-Ohio-4751**, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

{¶ 60} Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring.* Weighing is *not* a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." *State v. Gales,* **265 Neb. 598**, 628, **658 N.W.2d 604** (2003); *see, e.g., State v. Fry,* **138 N.M. 700**, 718, **126 P.3d 516** (2005); *Ortiz v. State,* **869 A.2d 285**, 303-305 (Del.2005); *Ritchie v. State,* **809 N.E.2d 258**, 268 (Ind.2004). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death-penalty eligible. *United States v. Runyon, 707* F.3d 475, 515-516 (4th Cir.2013) (citing cases from other federal appeals courts).

In Belton, the Ohio Supreme Court was faced with the issue that when a capital defendant Ohio elects to waive his or her rights to have a jury determine guilt, if the Sixth Amendment guarantees the defendant a jury at the sentencing phase of the trial. The Ohio Supreme Court was not faced with the issue this court faces, whether the Ohio death penalty statute in effect at the time of this incident is unconstitutional for not being in compliance with the requirements of Hurst v. Florida. This Court notes that Hurst v. Florida was issued by the United States Supreme Court on January 12, 2016, and that State v. Belton was submitted to the Ohio Supreme Court on January 26, 2016, only two weeks later. Given this close time proximity, this Court reviewed the filings in the Belton case on the Ohio Supreme Court online docket website.

A review of the website reveals that Hurst vs. Florida was not mentioned in any filings in the Belton case until January 21, 2016, when Belton filed Supplemental Authorities. The filing did not contain any comments relating to the Hurst case.

At oral argument in the Belton case on January 26, 2016, counsel for Belton mentioned the Hurst case but stated that he was not at oral argument to argue that case.

Counsel for the State of Ohio at oral argument did discuss the Hurst case, and a discussion of approximately eight minutes ensued. However, it is clear that the issue before this court, whether the Ohio death penalty statute in effect in February, 1993, is constitutional in light of the decision of the United States Supreme Court in Hurst vs Florida, was not the issue under consideration in the State vs Belton case. As such, the statements of the Ohio Supreme Court concerning Hurst vs Florida in Belton are dicta.

Nevertheless, this Court shall consider the statements made by the Ohio Supreme Court in the Belton case.

ANALYSIS

In considering the issues raised by the Defendant, this Court finds it helpful to examine the approaches various states have taken in their death penalty statutes. The Court will examine the death penalty statutes of four states.

ARIZONA AND RING VS ARIZONA, 536 U.S. 584 (2002)

In the Ring case, Ring was convicted of felony murder by a jury. Under the Arizona statute, Ring could not be sentenced to death, the maximum statutory penalty for first-degree murder, unless further findings were made. Arizona's first-degree murder statute directed the judge who presided at the trial to conduct a separate sentencing hearing to determine the existence or nonexistence of certain enumerated circumstances for the purpose of determining the sentence to be imposed. The statute further stated that the hearing was to be conducted by the court alone. At the conclusion of the sentencing hearing, the judge was to determine the presence or absence of the enumerated aggravating circumstances and any mitigating circumstances. The Arizona law authorized the judge to sentence the defendant to death only if there was at least one aggravating circumstance and that there are no mitigating circumstances sufficiently substantial to call for leniency. Ring vs. Arizona, Id. at 592.

The United States Supreme Court held the Arizona statute to be unconstitutional, ruling that the Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.

FLORIDA AND HURST vs. FLORIDA, ____U.S._____, 136 S. Ct 616 (2016)

Under the Florida statute in Hurst, the maximum sentence a capital felon could receive on the basis of a conviction alone is life imprisonment. The defendant could be sentenced to death, but only if an additional sentence proceeding resulted in findings by the court that such person shall be punished by death. In that proceeding, the judge first conducts an evidentiary hearing before a jury. Next, the jury, by majority vote, renders an "advisory sentence". Notwithstanding that recommendation, the court had to independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death.

In the Hurst case, the United States Supreme Court held the Florida statute to be unconstitutional because the Florida statute required not the jury but the judge to make the critical findings necessary to impose the death penalty. The fact that Florida provided an advisory jury was immaterial. The court found that the maximum penalty that could be imposed was unconstitutionally increased by the judge's own fact-finding. Hurst vs Florida, Id., at 619.

STATE OF OHIO vs. MAURICE MASON, THE CASE AT BAR.

Under the law applicable in this case under the Ohio death penalty statute, the maximum sentence the Defendant can receive based on a conviction of aggravated murder alone is life imprisonment with parole eligibility after serving twenty years of imprisonment, former R.C. 2929.03 (A) and (C)(1). If the jury finds the Defendant guilty of any of the aggravating circumstances alleged in the indictment beyond a reasonable doubt, the case proceeds to a sentencing hearing before the jury. As is stated in former R.C. Section 2929.03 (D) (2):

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing arc sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

It can be seen that the maximum sentence the Defendant is facing at this point of the proceedings without additional findings would be life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the jury would make a recommendation of a death sentence in the sentencing hearing, this Court would then follow the procedure as stated in former R.C. 2929.03(D)(3):

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(l) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:
> "(a) Life imprisonment with parole eligibility after serving twenty full years
> "(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

KANSAS AND KANSAS vs. CARR ___ U.S. ___ 136 S.Ct. 633 (2016)

Kansas vs. Carr was decided by the United States Supreme Court just one week after its Hurst vs. Florida decision.

Although the issue in the Carr case involved an Eighth Amendment issue, as opposed to the Sixth Amendment issue now before this Court, Carr contains a helpful discussion concerning how evidence regarding aggravating and mitigating factors in a capital murder case should be considered by a jury and judge.

For purposes of this Motion, a review of the Kansas death penalty statute is appropriate.

In the Carr case each of the three appealing defendants were convicted of four counts of capital murder, as well as several other felonies. Pursuant to K.S.A. Statute Section 21-6617(b), the State moved the court to conduct a separate hearing to determine whether the defendants should be put to death.

After hearing the evidence, the jury issued verdicts of death on each of the four counts of capital murder, finding unanimously

that the state proved the existence of four aggravating factors beyond a reasonable doubt, and that those aggravating factors outweighed the mitigating circumstances beyond a reasonable doubt. Kansas vs Carr, Id., at 640.

K.S.A. Statute Section 21-6617(f) allows the court to review any jury verdict imposing a sentence of death to ascertain whether the imposition of the death sentence is supported by the evidence. If the court determines that the imposition of the death sentence is not supported by the evidence it shall modify the sentence and sentence the defendant to life without the possibility of parole. When the court enters a judgment modifying the sentencing verdict of the jury, the court shall state its reasons for doing so in a written memorandum which shall become part of the record.

In the Carr case, the trial court did not modify the sentencing verdict of death of the jury.

WHAT HAPPENS IN THE CAPITAL DECISION-MAKING PROCESS?

A good summary of what occurs in the capital decision-making process of a capital murder trial is found in Tuilaepa vs California, 512 U.S. 967 (1994), at 971-973:

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. *Coker* v. *Georgia*, 433 U.S. 584 (1977). To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. See, *e.g.*, *Lowenfield* v. *Phelps*, 484 U.S. 231, 244-246 (1988); *Zant* v. *Stephens*, 462 U.S. 862, 878 (1983). The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). *Lowenfield*, *supra*, at 244-246. As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. See *Arave* v. *Creech*, 507 U. S. ___, ___ (1993) (slip op., at 10) ("If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm"). Second, the aggravating circumstance may not be unconstitutionally vague. *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980); see *Arave*, *supra*, at ___ (slip op., at 7) (court "`must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer'") (quoting *Walton* v. *Arizona*, 497 U.S. 639, 654 (1990)).
>
> We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an *individualized* determination on the basis of the

character of the individual and the circumstances of the crime." *Zant*, *supra*, at 879; see also *Woodson* v. *North Carolina*, 428 U.S. 280, 303-304 (1976) (plurality opinion). That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime. *Blystone* v. *Pennsylvania*, 494 U.S. 299, 307 (1990) ("requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"); see *Johnson* v. *Texas*, 509 U. S. ___, ___ (1993) (slip op., at 11).

The eligibility decision fits the crime within a defined classification. Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." *Arave*, *supra*, at ___ (slip op., at 7) (internal quotation marks omitted). The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability. The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time. See *Romano* v. *Oklahoma*, 512 U. S. ___, ___ (1994) (slip op., at 4) (referring to "two somewhat contradictory tasks"). There is one principle common to both decisions, however: The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision. See *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (procedures must "minimize the risk of wholly arbitrary and capricious action"). That is the controlling objective when we examine eligibility and selection factors for vagueness. Indeed, it is the reason that eligibility and selection factors (at least in some sentencing schemes) may not be "too vague." *Walton*, *supra*, at 654; see *Maynard* v. *Cartwright*, 486 U.S. 356, 361-364 (1988).

OHIO HAS A HYBRID SYSTEM OF SENTENCING IN CAPITAL CASES

The great majority of states with the death penalty commit sentencing decisions as to the imposition of the death penalty to juries. Ohio is one of the minority states that have a hybrid system in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. See footnote 6 of Ring vs Arizona. In this regard, this Court notes that footnote 6 in Ring incorrectly lists Ohio as a state where the imposition of the death penalty is decided by a jury. Clearly, Ohio is a hybrid system state. Florida is another state that uses the hybrid system.

With the above background, this Court will consider the arguments raised by the parties to this Case.

A KEY ISSUE: WHAT ARE "CRITICAL FINDINGS"?

Critical findings are those findings which are necessary to impose the death penalty. Hurst vs Florida, 136 S. Ct., at 622.

Looking at the Ohio death penalty statutes applicable to this Case, in order to render an accused subject to a penalty of life imprisonment with parole eligibility after serving twenty years of imprisonment, if the indictment contains no death penalty specifications, the critical finding is:

1) the finding by the jury that the defendant is guilty of aggravated murder beyond a reasonable doubt, see former R.C. 2929.03(A);

   or, if the indictment contains one or more death penalty specifications, the critical findings by the jury are:

   that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) but is not guilty beyond a reasonable doubt of any of the death penalty specifications in the indictment, see former R.C. 2929.03(C)(1).

In order to render an accused subject to a penalty of life imprisonment with parole eligibility after serving twenty full years of imprisonment, if the indictment contains one or more death penalty specifications, the critical findings by the jury are:

1) that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) that the accused is guilty beyond a reasonable doubt of one or more of the death penalty specifications in the indictment;

3) that, after considering the enumerated factors in former R.C. 2929.03(D)(2), the jury does not unanimously find beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors; and

4) the jury makes a recommendation to the trial court that the accused be sentenced to a term of life imprisonment with parole eligibility after serving twenty full years of imprisonment, see former R.C. 2929.03(D)(2);

or

1) the finding of the jury that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) the finding of the jury that the accused is guilty of one or more of the death penalty specifications beyond a reasonable doubt;

3) the jury unanimously finds beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors;

4) the jury unanimously recommends to the court that the death penalty be imposed; and,

5) the trial judge, after considering the factors enumerated in former R.C. 2929.03(D)(3), does not find by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, see former R.C. 2929.03(D)(3)(a).

In order to render an accused subject to a penalty of life imprisonment with parole eligibility after serving thirty full years of imprisonment, if the indictment contains one or more death penalty specifications, the critical findings by the jury are:

1) that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) that the accused is guilty beyond a reasonable doubt of one or more of the death penalty specifications in the indictment;

3) after considering the enumerated factors in former R.C. 2929.03(D)(2), the jury does not unanimously find beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors; and

4) the jury makes a recommendation to the trial court that the accused be sentenced to a term of life imprisonment with parole eligibility after serving thirty full years of imprisonment, see former R.C. 2929.03(D)(2);

or

1) the finding of the jury that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) the finding of the jury that the accused is guilty of one or more of the death penalty specifications beyond a reasonable doubt;

3) the jury unanimously finds beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors;

4) the jury unanimously recommends to the court that the death penalty be imposed; and,

5) the trial judge, after considering the factors enumerated in former R.C. 2929.03(D)(3), does not find by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, see former R.C. 2929.03(D)(3)(b).

In order to render an accused subject to the death penalty, if the indictment contains one or more death penalty specifications, the critical findings are:

1) the finding of the jury that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) the finding of the jury that the accused is guilty of one or more of the death penalty specifications beyond a reasonable doubt;

3) the jury unanimously finds beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors;

4) the jury unanimously recommends to the court that the death penalty be imposed; and,

5) the trial judge, after considering the factors enumerated in former R.C. 2929.03(D)(3) finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, see former R.C. 2929.03(D)(3).

Each and every one of these five critical findings must be made for an accused to become death penalty eligible in Ohio. If any one of these critical findings are lacking, imposition of the death penalty is impossible.

ANOTHER KEY ISSUE: WHAT IS MEANT BY "DEATH PENALTY ELIGIBLE"?

As stated before, the State of Ohio maintains that Ohio's capital sentencing statutes are well within constitutional bounds, because the death penalty is not an available sentencing option unless the jury first determines guilt beyond a reasonable doubt of aggravating circumstances that have been enumerated in the indictment. The State takes the position that when an accused is convicted by the jury in this manner, the defendant becomes death penalty eligible. The State is using the definition of death penalty eligible as the situation of when an accused faces the potential of a death sentence. Using this definition, according to the State, being death penalty eligible would mean that this Court could not subsequently and unconstitutionally increase the maximum possible penalty on the defendant thereafter in the sentencing portion of the hearing.

The Ohio Supreme Court, in its comments on Hurst vs. Florida, appears to consider the term death penalty eligible in the same manner as is advocated by the State in this Case. See State vs Benton, supra, Paragraph 59.

However, in Hurst vs Florida, United States Supreme Court clearly uses the concept of death penalty eligible in a narrower context than that advocated by the State in this Case. As was stated in Hurst, the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death". Hurst vs Florida, 136 S. Ct., at 622. This can only happen in the selection portion of the sentencing hearing.

The United States Supreme Court was using the concept of death penalty eligible in the sense of being applicable when there are findings which actually authorize the imposition of the death penalty on the accused, in the selection phase of the sentencing hearing, and not in the sense that an accused is only potentially facing a death penalty if certain subsequent conditions are met, as in the eligibility phase of the sentencing hearing.

This can be seen from the language in the Hurst opinion where the Supreme Court refuted the argument of the State of Florida that the jury recommendation of a death sentence necessarily included a finding of an aggravated circumstance, qualifying the defendant for the death penalty under Florida law. In its refutation of this argument, the Supreme Court not only commented that the Florida death penalty statute required the trial court alone to find that sufficient aggravating circumstances exist (which occurs during the eligibility portion of the sentencing hearing), but also, that the trial court alone must find that there are insufficient mitigating circumstances to outweigh the aggravating circumstances (something that only occurs in the selection portion of the sentencing hearing.) Hurst vs Florida, Id., at 622.

If the position taken by the State of Ohio in this Case was correct, that the inquiry of eligibility of the death penalty being the maximum penalty is ended once the jury makes a finding of an aggravating circumstance beyond a reasonable doubt, there would be no reason for the United States Supreme Court in Hurst to criticize the Florida statute requiring the court alone to find that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. If the argument of the State of Ohio in this Case was correct, it would make no difference that the trial court alone makes the determination

and weighing of mitigating and aggravating factors to impose the death penalty, since the potential maximum penalty was already fixed once the jury found the Defendant guilty of aggravated murder and an aggravated circumstance.

Clearly this is not the case. The determination of maximum sentence continues into the selection phase of the sentencing hearing.

This court must apply the concept of death penalty eligible as it is used in Hurst vs. Florida.

WHEN DOES THE DEFENDANT IN THIS CASE BECOME DEATH PENALTY ELIGIBLE?

Considering the four state death penalty statutes discussed above, and applying the Hurst concept of death penalty eligible, the defendant in the Ring case in Arizona did not become death penalty eligible until the trial court made the aggravated findings and increased Ring's maximum sentence to a death sentence. This was unconstitutional.

The defendant in the Hurst case in Florida did not become death penalty eligible until the trial court independently found the existence of aggravating factors and made independent findings as to aggravated and mitigating factors,

which increased Hurst's maximum sentence to a death sentence. This was held unconstitutional.

The defendants in the Carr case in Kansas did not become death penalty eligible until the jury returned death verdicts on each of the four capital counts against each defendant. As of the time of the death verdicts of the jury were returned, the maximum sentence the defendants will receive is the death sentence. There was no way the Kansas trial judge could increase the sentence over the death verdicts issued by the jury; the trial judge could only reduce the sentence to life imprisonment if the judge found the jury death verdicts to be unsupported by the evidence. This is constitutional.

Using the concept of death penalty eligible as in the Hurst case, the Defendant in the case at bar would not become death penalty eligible unless the jury, at the sentencing hearing, recommends a death sentence to this Court, and this Court, after considering the mitigating factors and comparing them to the aggravated factors found by the jury in this case, finds beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors found by the jury in this case. Only at that point would this Defendant be death penalty eligible. Former R.C. 2929.03(D)(3).

This procedure would allow this Court to increase the maximum penalty on the Defendant from the maximum potential sentence of life imprisonment with the possibility of parole after thirty full years in prison, at the time the jury makes its death penalty recommendation to the Court, to a death sentence. This is an increase of the maximum sentence that cannot be imposed on the defendant, similar to those which were forbidden in Ring vs Arizona and Hurst vs Florida. This procedure is unconstitutional because "the Sixth Amendment requires the jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Hurst vs Florida, 136 S Ct., at 619.

UNDER HURST VERSUS FLORIDA, THE SIXTH AMENDMENT REQUIRES THAT THE SPECIFIC FINDINGS AUTHORIZING THE IMPOSITION OF THE SENTENCE OF DEATH BE MUST BE MADE BY THE JURY

In Spaziano vs Florida, 468 U.S. 447 (1984) and Hildwin vs Florida, 490 U.S. 638 (1989), the United States Supreme Court held that the Sixth Amendment did not require that the specific findings authorizing the imposition of the sentence of death be made by the jury. The Ohio Supreme Court cited these cases for this proposition as partial support for upholding the constitutionality of the Ohio death penalty statute, in State vs Davis, 139 Ohio

St. 3d 122, 2014-Ohio-1615 and State vs Dunlap, 73 Ohio St. 3d 308, 1995-Ohio-243.

In Hurst vs Florida, United States Supreme Court stated that the above-stated proposition of law in the Hildwin and Spaziano cases was wrong and irreconcilable with Apprendi vs New Jersey, 530 U.S. 466 (2000). Hurst vs Florida, 136 S. Ct., at 623. As a result, the Sixth Amendment does require that the specific findings authorizing the imposition of the death penalty must be made by the jury.

The Ohio death penalty statutes in effect at the time of the murder in this case had no provision for the jury making specific findings which would authorize the imposition of the death penalty. Rather, the trial court, and not the jury, is required to make the specific findings, under former Ohio R.C. 2929.03 (F). Also, the jury's recommendation for a death penalty does not authorize the death penalty; only the trial judge's weighing of the mitigating and aggravating factors, and the trial judge's specific findings, authorize the imposition of the death penalty. For this reason also, the Ohio death penalty statute in effect in February, 1993 is unconstitutional.

THE OHIO SURPEME COURT COMMENTS ON

HURST V. FLORIDA

The Ohio Supreme Court in its comments on the Hurst vs. Florida case, pointed out that the Ohio death penalty statute, in contrast to the statutes held unconstitutional in Arizona and Florida, does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances.

This court notes that whether the jury finds a defendant guilty of one or more aggravating circumstances in the sentencing phase of the trial, rather than the guilt phase, is an insignificant difference for constitutional analysis purposes. Tuilaepa vs California, supra, makes clear that this determination may be made either in the guilt phase or sentencing phase of the trial. In the Kansas death penalty statute in Carr, even the possibility of a death penalty being imposed is not possible until the prosecuting attorney makes a motion for the court to conduct a separate hearing to determine whether the defendant will be sentenced to death. The motion is not filed until after the defendant has

already been convicted of capital murder. See K.S.A. 21-6617(b). Likewise, the Florida Legislature, presumably in response to the Hurst vs Florida case, has amended its death penalty statutes. It should be noted that in the revised statute, Florida still has the finding of aggravating factors by the jury being made in the sentencing portion of the trial, and not during the guilt phase. See Fla. Stat. 921.141, effective October 1, 2016.

It is true, as stated by the Ohio Supreme Court in State v. Belton, that the determination of guilt of an aggravating circumstance renders the defendant potentially eligible for a capital sentence.

The Ohio Supreme Court also stated in Belton that because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. However, this Court respectfully disagrees that the determination of guilt of an aggravated circumstance alone is what renders a defendant eligible for the imposition of a capital sentence. The ultimate eligibility for a capital sentence in Ohio does not occur until the trial judge makes his or her own determination based on the factors contained in former R.C. Section 2929.03(D)(3), that a death sentence is appropriate. Even the jury recommendation for a death

sentence, pursuant to former R.C. Section 2929.03(D)(2), does not by itself make a defendant eligible for imosition of a capital sentence. Again, the jury's determination of guilt of an aggravating circumstance, by itself, only renders the defendant eligible for a maximum sentence of life imprisonment with parole eligibility after serving thirty years of imprisonment on the offender, former R.C. 2929.03(D)(2)(b).

The Ohio Supreme Court also noted that the trial judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. To this statement this Court agrees that the Ohio statute is different from the Florida statute in Hurst in this regard; however, this fact does not save the Ohio death penalty statute from being unconstitutional under the Sixth Amendment of the United States Constitution as interpreted in Apprendi vs New Jersey, Ring vs Arizona and Hurst vs Florida.

As to the case law cited by the Ohio Supreme Court in Paragraph 60 of the Belton decision, the continued viability of those cases is doubtful given the statements of the United States Supreme Court in Hurst vs Florida.

It is clear that the determination of factors by the trial court under the Ohio death penalty statute involves factual determinations. The United States Supreme Court in Kansas vs Carr stated that the finding of aggravated factors is a purely factual matter, and that the determination of mitigating factors has both a factual component and a judgmental component. The Supreme Court went on to state that the determination that mitigation exists is largely a judgment call, in that what one juror may consider as mitigating another might not, and that the ultimate question of whether mitigating circumstances outweigh the aggravating circumstances is largely a question of mercy. Kansas vs Carr, 136 S. Ct., at 642.

Because the determination of guilt of an aggravated circumstance, by itself, only renders the defendant eligible for a maximum sentence of life imprisonment with eligibility of parole after thirty full years of imprisonment under former R.C. 2929.03(D)(2), it is not only possible, but is a requirement that the trial court make additional factual determinations in weighing the mitigating and aggravating factors during the sentencing phase that will expose a defendant to the greater punishment of death. As Ohio's death penalty statute in effect at the time of this incident, unlike the Kansas death penalty statute, requires the judge, and not the jury, to independently make the

determination for the death sentence, and the trial judge to independently weigh the factors necessary to impose a sentence of death, with the jury recommendation for death being only advisory, this Court finds the death penalty statute provisions in former R.C. Section 2929.03(D) and (E) to be unconstitutional under the Sixth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in the cases of Apprendi vs New Jersey, Ring vs Arizona and Hurst v. Florida.

Having determined that the death penalty statute is unconstitutional, this Court must next determine whether the Defendant is eligible for the sentence of life imprisonment with eligibility of parole after twenty or thirty full years of imprisonment.

BECAUSE DEATH MAY NOT BE IMPOSED IN THIS MATTER, THE SENTENCING PROCEDURE IN FORMER R.C. 2929.03(D) IS NOT APPLICABLE.

Former R.C. 2929.03(D)(1) provided that the sentencing procedure contained in R.C. 2929.03(D) was applicable when death may be imposed as a penalty for aggravated murder.

As this Court has found the death penalty statute provisions in former R.C. 2929.03(D) and (E) to be unconstitutional, the death penalty may not be imposed in this Case, and the sentencing procedure in former R.C. 2929.03(D) is no longer applicable in this Case.

SUMMARY

The United States Supreme Court in Tuileapa vs California made clear that there are two aspects of the capital decision-making process. The first determination, called the eligibility determination, requires the jury to find the defendant guilty of murder, and at least one aggravating circumstance at either the guilt or penalty phase of the trial. There is a second determination of death penalty eligibility by the sentencer to determine whether a defendant eligible for the death penalty should in fact receive that sentence. This is called the selection determination.

Ohio's death penalty statutes, like the Florida statute struck down in Hurst vs Florida, does not make a defendant eligible for death until findings by the court that such person shall be put to death, former R.C. 2929.03(D)(3). The trial court in Ohio, similar to the Florida court in Hurst, must weigh by itself, the aggravating and mitigating factors before it in determining whether the death sentence should

be imposed, former R.C. 2929.03(D)(3). Also like the struck down Florida death penalty statute, the death penalty recommendation of the jury is only advisory, and is not binding on the court. Former R.C. 2929.03(D)(2).

Hurst vs Florida requires the jury to make the critical findings necessary to impose the death penalty. Under the Ohio death penalty statute, the critical findings necessary to impose the death penalty, involving the weighing of aggravating and mitigating factors, is done by the trial court, and not the jury. The recommendation for imposition of the death penalty by the jury is not constitutionally sufficient, according to Hurst vs Florida.

Apprendi vs New Jersey holds that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

Kansas vs Carr makes clear that in the selection portion of a capital sentencing case, that there is a factual component in the decision as to whether the defendant should actually receive the death penalty.

The maximum penalty the Defendant faces, should the jury recommend to this Court that the death penalty be imposed, and without any additional fact-finding required by this Court pursuant to former R.C. 2929.03(D)(3), is life imprisonment with possibility of parole after having served thirty full years

imprisonment. The maximum penalty against the Defendant can be raised to a death sentence only if this Court, independent of the jury, weighs the required factors in former R.C. 2929.03(D)(3) and finds that the aggravating factors the defendant was found guilty of committing outweigh the mitigating factors.

The additional fact-finding required by this Court independent of the jury under former R.C. 2929.03(D)(3), which raises the maximum penalty which can be imposed upon the Defendant to death, violates the Sixth Amendment requirement that a jury, not a judge, find each fact necessary to impose a sentence of death, as interpreted by Apprendi vs New Jersey, Ring vs Arizona and Hurst vs Florida.

Hurst vs Florida makes clear that the Sixth Amendment requires that the specific findings authorizing the imposition of the death penalty be made by the jury. The Ohio death penalty statute applicable to this case has no provision for the jury to make specific findings relating to the weighing of aggravating and mitigating factors. As a result, the Ohio death penalty statute applicable in this case violates the Sixth Amendment as interpreted in Hurst vs Florida.

As the Ohio death penalty statute applicable in this Case is unconstitutional for purposes of imposing the death penalty, death may not be imposed as a penalty in this case, and pursuant to former R.C. 2929.03(D)(1), the provisions for the hearing provided under former R.C. 2929.03 (D) are no longer applicable.

The Motion of the Defendant to Dismiss Capital Components Pursuant to Hurst vs Florida is sustained.

William R. Finnegan

Judge William R. Finnegan

cc: Brent W. Yager, Marion County Prosecutor
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Appendix
D

IN THE COURT OF COMMON PLEAS OF MARION COUNTY, OHIO

STATE OF OHIO,	:	Case No. 93-CR-153
Plaintiff,	:	
-vs-	:	Judge William Wiedemann
MAURICE A. MASON,	:	OPINION
Defendant.	:	Pursuant to R.C. 2929.03(F)
	:	

STATEMENT OF THE CASE

On September 30, 1993, the defendant, Maurice A. Mason, was indicted for Aggravated Murder in violation of §2903.01(P) of the Ohio Revised Code in Count I of the indictment with one specification of aggravated circumstances. In addition, the defendant was indicted for Rape in violation of R.C. 2907.02(A)(2) in Count II and Having Weapons While Under Disability pursuant to R.C. 2923.13(A)(2) in Count III. The defendant appeared at his arraignment before this Court on October 4, 1993 with Attorneys Lawrence Winkfield and Ted Coulter at which time the defendant entered a plea of not guilty to each count of the indictment and the specifications. The defendant requested that Attorneys Winkfield and Coulter be appointed by the Court to represent him and the Court, upon determining that the defendant was indigent, appointed

A

Lawrence Winkfield as lead counsel and Ted Coulter as co-counsel on October 3, 1993 pending approval of same by the Supreme Court of Ohio. On December 14, 1993, the Supreme Court certified Mr. Winkfield as lead trial counsel and Mr. Coulter as trial co-counsel and approved them as counsel in this case. On December 21, 1993, the defendant was reindicted with a firearm specification to each count in the indictment pursuant to R.C. 2941.141/2929.71.

On October 20, 1993, the Court assigned the case for trial commencing March 28, 1994. However, the case was subsequently reassigned for trial by agreement of the parties to commence May 31, 1994.

During the course of the pre-trial preparation, numerous motions were filed on behalf of the defendant and by the State, all of which were heard in open court and which were either ruled upon on the record or by journal entry as reflected on the docket sheet of the case.

A jury consisting of seven women and five men and two alternates were selected from a venire of 125 persons and were impaneled and sworn on June 2, 1994. The State of Ohio presented 32 witnesses and 80 exhibits were admitted during the guilt or innocence phase of the trial. The Defense presented 31 witnesses and 45 exhibits were admitted into evidence. The case was submitted to the jury following

arguments and the Court's instructions on June 17, 1994. After due deliberation, the jury found the defendant guilty of Aggravated Murder as charged in the first count of the indictment and guilty of the specification contained in the first count of the indictment. The jury also found the defendant guilty of Rape and Having a Weapon While Under Disability and guilty of the firearm specification. The jury was permitted to separate from June 18, 1994 until June 27, 1994, at which time the sentencing proceedings commenced pursuant to R.C. 2929.03(D).

The defendant, having the burden of going forward with the evidence during the sentencing proceedings, proceeded first. The burden of proof however to determine whether the death penalty was appropriate beyond a reasonable doubt remained with the State which was allowed the opening and closing arguments. The defendant presented eight lay witnesses and no expert witnesses. The defendant was permitted to testify without taking an oath and without being subjected to cross-examination by the State. The defendant offered 13 exhibits, all of which consisted of artwork of the defendant. The State rested without offering any evidence in rebuttal.

On June 29, 1994, following argument and instructions of the Court and after due deliberation, the jury returned an

unanimous verdict that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstances which the defendant, Maurice A. Mason, was found guilty of committing were sufficient to outweigh the mitigating factors in this case and further recommended that the sentence of death be imposed pursuant to R.C. 2929.03(D)(2).

Sentencing by the Court was assigned for hearing on July 7, 1994. The Court, after reviewing its notes, the exhibits and after duly considering the evidence adduced at both phases of the trial, found by proof beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing did outweigh the mitigating factors in the case and imposed the sentence of death upon the defendant on July 7, 1994, and further ordered that the execution take place on the 18th day of January, 1995.

FACTS

During February, 1993, the defendant, a black male, age 29, resided with his wife at 1115 Bermuda Drive, Marion, Ohio. The victim, Robin Dennis, a white female, age 19, resided with her husband in Richwood, Ohio. Following a party on the evening of February 7, 1993, Robin Dennis and her husband stayed overnight as guests of their friends, Michael Young and

Carolyn Young, at their residence at 196 Neil Avenue, Marion, Ohio. The following day, Monday, February 8, 1993, the defendant with a friend joined Robin, her husband Chris, and the Youngs at the Young residence in the early afternoon. The defendant had been a long-time acquaintance of Chris Dennis and during their visit at the Young residence, they negotiated a trade of a pistol which Dennis had in his possession for a portable television of the defendant which was at the defendant's residence. Some time after 1:00 p.m. on February 8, the defendant and Robin Dennis departed the Young residence together in an automobile owned by Robin Dennis. The trip was purportedly to go to the defendant's residence to get the portable television to be exchanged for the gun which was in the possession of the defendant. Neither Robin Dennis nor the defendant returned to the Young residence that day.

On February 10, 1993, Robin's automobile was found abandoned and stuck in a farm field north of Marion, Ohio. Following an extended search, the body of Robin Dennis was found in an abandoned building on February 15, 1993. Robin had died from massive head injuries and due to the decomposition the body, death was estimated to have occurred several days prior to the body being found. The coroner found evidence of semen in the vagina of the victim and on her panties. Subsequent DNA testing of the semen and blood

samples of the defendant confirmed a match which was uncontested by the defendant. The defendant further admitted at trial that he and Robin had sexual relations during the morning of February 8, 1993. The State produced a mass of circumstantial evidence identifying beyond a reasonable doubt that the defendant was the perpetrator of the murder of Robin Dennis. The defendant voluntarily gave several statements to the sheriff's deputies which were conflicting and which conflicted with his testimony at trial.

Pursuant to R.C. 2923.039(F), this Court now sets forth its specific findings as to the existence of any of the mitigating factors set forth in Division (B) of §2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

AGGRAVATING CIRCUMSTANCES

The defendant was found guilty of the offense of Aggravated Murder of Robin Dennis in violation of R.C. 2903.01 and was further found guilty of the aggravating circumstances as set forth in the specification that the offense of

Aggravated Murder was committed by the defendant while the defendant while committing or attempting to commit the offense of Rape or was fleeing immediately after committing or attempting to commit the offense of Rape and that the defendant was the principal offender in the commission of the aggravated murder.

MITIGATING FACTORS

R.C. 2929.04(B) sets forth the following mitigating factors which the Court must consider and weigh against the aggravating circumstances:

1. Whether the victim of the offense induced or facilitated it;

2. Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

3. Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

4. The youth of the offender:

5. The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

6. If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

7. Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

No evidence was offered by the defendant in support of factors one through six and these factors were therefore not included in the Court's charge to the jury and will not be considered by the Court.

The Court, in considering "other factors" will include the nature and circumstances of the offense, the history, character and background of the offender.

The nature and circumstances of the offense are clearly set forth in the Statement of Facts above. The rape and murder of Robin Dennis were committed in a vicious and reprehensible manner.

The defendant offered minimal evidence in mitigation of a death sentence. In final argument, counsel for the defendant stressed residual doubt as a factor the jury should consider. In its review of the evidence, the Court finds no residual doubt to exist whatsoever. Not only were the aggravating circumstances proven beyond a reasonable doubt they were proven beyond any possible doubt. The Court

therefore gives no weight to this mitigating factor.

Other factors which the defendant asked the jury to consider were his artistic talent, his good conduct while in jail and the family wishes that he not be sentenced to death. The Court finds that none of these factors are relevant to the issue of whether the defendant should be sentenced to death and are therefore given no mitigating weight by the Court.

The Court further finds that there is nothing for the Court to consider concerning the nature and circumstances of the crime or the history, character and background of the defendant which would provide any mitigating weight for consideration by the Court. Furthermore, the defendant in his unsworn statement during the mitigation phase of the trial consistently denied any involvement in the crime and offered no hint of any sorrow or remorse for the victim or her family.

The Court has searched for any other factors which might have been overlooked by the jury and can find none.

After carefully reviewing all the mitigating factors set forth in the statute or called to the Court's attention by the defendant and after considering the aggravating circumstances which have been proven beyond a reasonable doubt, it is the opinion of this Court that the aggravating circumstances outweigh the mitigating factors as required by R.C. 2929.03(D)(3).

The Court therefore finds that the recommendation of the jury that the sentence of death be imposed upon the defendant is appropriate and which recommendation is hereby adopted by the Court and which sentence was imposed on the 7th day of July, 1994.

JUDGE WILLIAM WIEDEMANN

cc: Jim Slagle
Lawrence Winkfield
Ted Coulter

Appendix E

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury trials, USCA CONST Amend. VI-Jury trials
Current through P.L. 115-51. Also includes P.L. 115-53 through 115-60. Title 26 current through 115-60.

End of Document

U.S.C.A. Const. Amend. VIII

Amendment VIII. Excessive Bail, Fines, Punishments

Currentness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S.C.A. Const. Amend. VIII, USCA CONST Amend. VIII
Current through P.L. 115-51. Also includes P.L. 115-53 through 115-60. Title 26 current through 115-60.

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text
Current through P.L. 115-51. Also includes P.L. 115-53 through 115-60. Title 26 current through 115-60.

2929.03 Imposition of sentence for aggravated murder.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)

(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)

(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)

(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon

the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment

imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender

pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)

(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall make and retain a copy of the entire record in the case, and shall deliver the original of the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall make and retain a copy of the entire record in the case, and shall deliver the original of the entire record in the case to the supreme court.

Cite as R.C. § 2929.03

Amended by 131st General Assembly File No. TBD, SB 139, §1, eff. 4/6/2017.

Effective Date: 01-01-1997; 03-23-2005; 2007 SB10 01-01-2008 .

2929.04 Death penalty or imprisonment - aggravating and mitigating factors.

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or intellectual disabilities facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

Cite as R.C. § 2929.04

Amended by 131st General Assembly File No. TBD, HB 158, §1, eff. 10/12/2016.

Effective Date: 05-15-2002 .

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code;

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

HISTORY: 139 v S 1. Eff 10-19-81.

[§ 2929.02.3] § 2929.023 Defendant may raise matter of age.

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

HISTORY: 139 v S 1. Eff 10-19-81.

[§ 2929.02.4] § 2929.024 Investigation services and experts for indigent.

If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120. of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.

HISTORY: 139 v S 1. Eff 10-19-81.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggra-

vated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof

beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 4. Eff 9-21-95.

Committee Comment to H 511

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is estab-

lished by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

Committee Comment to H 511

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; and (7) felony murder.

The section also provides that even if one or more aggravating circumstances is proved beyond a reasonable doubt, the death penalty for aggravated murder is still precluded if the trial court finds that any of three mitigating circumstances is established by a preponderance of the evidence. The mitigating circumstances are: (1) the victim of the offense induced or facilitated it; (2) the offender acted under duress, coercion, or strong provocation; and (3) although the defense of insanity could not be or was not established, the offense was chiefly the product of the offender's mental deficiency or psychosis (psychosis is mental illness, as distinguished from a behavioral disorder. Primarily psychopaths have a behavioral disorder.)

Transition—capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a lesser penalty under the circumstances of a particular case, then the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See, sections 2903.01, 2929.02 to 2929.04, and 2941.14.

Transition—offenses other than capital offenses.

Persons charged with an offense, other than a capital offense, committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense. Any such person convicted and sentenced prior to January 1, 1974, must be sentenced under the penalty provided in the law under which he was tried. Any such person either convicted or sentenced on or after January 1, 1974, must be sentenced under the lesser of the penalties provided for the offense for which he was tried or for the substantially equivalent offense in the new code. If there is no substantially equivalent offense in the new code, sentence must be imposed under the old law.

[**Editor's Note:** A 1981 amendment added an eighth aggravating circumstance: murder of a witness to an offense. The amendment added four new mitigating circumstances: (1) youth of the offender, (2) lack of prior criminal involvement, (3) degree of participation, and (4) any other relevant matters.]

§ 2929.05 Appellate review of death sentence.

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever