No. 18-5303

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Based on this Court's decision in *Hurst v. Florida* (2016), 577 U.S. ___,136 S. Ct. 616, Mason challenged the constitutionality of Ohio's capital sentencing scheme. The Ohio Supreme Court rejected Mason's arguments and concluded "[u]nder Ohio's death-penalty scheme * * * trial judges function squarely within the framework of the Sixth Amendment." *State v. Mason*, __ N.E.3d __, 2018-Ohio-1462, ¶42 (Pet. App. A). It reasoned that in Ohio, a capital "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." *State v. Mason*, 2018-Ohio-1462, ¶20 (Pet. App. A), citing 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.'" *Id.*, citing R.C. 2929.03(D)(2). An Ohio jury may recommend 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. The trial judge's role did not offend the Sixth Amendment because the judge "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." *State v. Mason*, 2018-Ohio-1462, ¶42 (Pet. App. A).

The question is whether Ohio's capital sentencing scheme satisfies the requirements of the Sixth Amendment to the United States Constitution.

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INTRODUCTION

The investigation of the death of Robin Dennis led the State of Ohio to indict Maurice Mason for aggravated murder with a specified aggravating circumstance (committing aggravated murder while committing rape) which, if proved, would make him eligible for the death penalty. The jury found Mason guilty of aggravated murder as well as the specified aggravating circumstance. After additional proceedings in the sentencing phase, the jury found that the specified aggravating circumstance outweighed any mitigating factors. The jury then recommended that Mason be sentenced to death. After independently reweighing the aggravating circumstance found by the jury against the mitigating circumstances, the trial court accepted the jury's recommendation and sentenced Mason to death. Now, relying on this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), Mason argues that Ohio's capital sentencing statutes violate the Sixth Amendment.

Mason's argument is wrong because the capital sentencing scheme at issue in *Hurst* differs from Ohio's capital sentencing scheme in constitutionally significant ways. Under Ohio law, a defendant can't be sentenced to death unless he is indicted for aggravated murder and at least one specification of an aggravating circumstance. At trial, the jury must find the defendant guilty of aggravated murder and separately and specifically find the defendant guilty of at least one specification charged in the indictment. Then, the jury must find that the specified aggravating circumstance(s) outweigh(s) the mitigating factors and recommend that the defendant be sentenced to death. If the jury makes the necessary findings and recommends the death penalty, the trial judge must independently determine whether

the aggravating circumstances, found by the jury, outweigh the mitigating factors. If so, the trial court must impose the death sentence. Finally, the trial court must articulate in a written opinion the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors.

In contrast, Florida's capital sentencing scheme at issue in *Hurst* required a majority of jurors to find the existence of some aggravating factor(s). It was not necessary for a majority of the jury to agree on the existence of any one specific aggravating factor and the jury was not required to make an express aggravating-circumstance finding. The jury then recommended either a sentence of death or life in prison. With no knowledge of what the jury found about any particular aggravating circumstance, the judge was required to determine whether at least one sufficient aggravating circumstance existed and whether the aggravators outweigh any mitigation. Finally, regardless of the jury's recommendation regarding the appropriate sentence, the judge would determine whether to sentence the defendant to death or life in prison.

The Ohio Supreme Court correctly held that Ohio's capital sentencing scheme was constitutional because a jury decides whether the defendant is guilty of aggravated murder as well as the aggravating-circumstance specification(s) for which the defendant was indicted. This, the Ohio Supreme Court held, satisfied the requirements of the Sixth Amendment. The Court went on to find that, even if *Hurst* was read to require the jury to weigh aggravating circumstances against mitigating circumstances, Ohio's statutory scheme was constitutional because the jury must find,

unanimously and beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors. Furthermore, contrary to Mason's claim, there is little inconsistency or confusion among the states about the holding of *Hurst*. Although the Alabama Supreme Court adopted a narrower reading of *Hurst* than the Supreme Courts of Florida and Delaware, Ohio's sentencing scheme would pass muster under each of the three decisions. No State has adopted the position advocated by Mason.

Rather than a clarification of *Hurst*, Mason seeks a radical modification of Sixth Amendment jurisprudence. Mason urges this Court to hold that the Sixth Amendment requires the jury to articulate specific findings regarding mitigating factors and the weight to be assigned them, to make specific findings about how it weighed the mitigating and aggravating factors, and to actually impose the death penalty, independent of a judge. Mason's position is contrary to longstanding and consistent Supreme Court precedent. It would make capital sentencing less deliberate, less reasoned, and a less reviewable narrowing process. Ohio's capital sentencing scheme strikes a just and proper balance between the values based in the Eighth Amendment, advanced by *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny, and the Sixth Amendment, advanced by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny.

COUNTERSTATEMENT

On February 13, 1993, nineteen-year-old Robin Dennis was found dead inside an abandoned building in a rural area of Marion County, Ohio. She was lying face down on the ground, wearing only a bra. Her jeans and panties were down around

her ankles and lower leg. A blood-stained board with protruding nails was lying about twenty feet from her body. There were eight distinct lacerations on her head. She also had a black eye and bruises on her head, face, and body. Sperm was found in her vagina and in her panties. Analysis established the presence of DNA from Ms. Dennis and Maurice Mason and no one else.

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). The jury found Mason guilty of aggravated murder and the charged aggravating circumstance. After additional proceedings in the sentencing phase, the jury found unanimously and beyond a reasonable doubt that the aggravating circumstance outweighed any mitigating factors. The jury then unanimously recommended that Mason be sentenced to death. After independently reweighing the aggravating circumstances against the mitigating circumstances, the trial court accepted the jury's recommendation and sentenced Mason to death. *State v. Mason* (1998), 82 Ohio St. 3d 144, 144-148. His conviction and sentence were affirmed by the Ohio Third District Court of Appeals and by the Ohio Supreme Court. *State v. Mason*, 1996 Ohio App. LEXIS 5691, 1996 WL 715480 (3rd Dist. 1996) and *State v. Mason*, 82 Ohio St. 3d 144.

During federal habeas proceedings, a divided panel of the Sixth Circuit Court of Appeals granted relief on a claim of ineffective assistance of counsel during the sentencing phase. *Mason v. Mitchell*, 320 F. 3d 604 (6th Cir. 2003). Following additional federal and state litigation, a divided panel of the Sixth Circuit Court of Ap-

peals again granted relief on a claim of ineffective assistance of counsel during the sentencing phase. *Mason v. Mitchell*, 543 F. 3d 766 (6th Cir. 2008). Resentencing proceedings were commenced below, interrupted by additional federal litigation, where a unanimous panel of the Sixth Circuit determined it was appropriate for the resentencing proceedings to continue and the case was remanded to the trial court. *Mason v. Mitchell*, 729 F. 3d 545 (6th Cir. 2013).

Following the issuance of this Court's decision in *Hurst v. Florida*, Mason moved the trial court to dismiss the capital aspect of the sentencing proceedings, contending that *Hurst* required capital sentencing to be conducted by a jury, and not the judge as authorized under R.C. 2929.03 (eff. 10-19-81) and R.C. 2929.04 (eff. 10-19-81). The Court of Common Pleas for Marion County granted Mason's motion. Trial Court Opinion, pgs. 16-19, pgs. 43-44 (Pet. App. C). The Third District Court of Appeals reversed the trial court's decision. *State v. Mason*, 3rd Dist. App. No. 9-16-34, 2016-Ohio-8400. On July 5, 2017, the Ohio Supreme Court accepted jurisdiction on Mason's appeal of the decision of the Third District Court of Appeals. On April 18, 2018, the Ohio Supreme Court affirmed the decision of the Court of Appeals. *State v. Mason* (2018), __ N.E.3d __, 2018-Ohio-1462 (Pet. App. A).

REASONS FOR DENYING THE PETITION

A. THE CAPITAL SENTENCING SCHEME AT ISSUE IN *HURST* DIFFERS FROM OHIO'S CAPITAL SENTENCING SCHEME IN CONSTITUTIONALLY SIGNIFICANT WAYS.

1. Contrary to Mason's Assertion, Ohio's Supreme Court Has Determined That Ohio's Death Penalty Statute Is Unlike The Statute At Issue In *Ring* And *Hurst*.

At pages 4 and 7 of his Petition, Mason claims that the Ohio Supreme Court has determined that Ohio's death penalty scheme is "remarkably similar" to Florida's death penalty scheme. He cites *State v. Rogers* (1986), 28 Ohio St.3d 427, 430, 504 N.E.2d 52, rev'd on other grounds, 32 Ohio St.3d 70, 512 N.E.2d 581 (1987). That case involved the Ohio Supreme Court's reconsideration of Roger's death sentence in light of this Court's decision in *Caldwell v. Mississippi*. *Caldwell* addressed the issue of "whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Caldwell* v. *Mississippi*, 472 U.S. 320, 323 (1985). The Ohio Supreme Court rejected Rogers' argument, noting that "Ohio's statutory framework for the imposition of the death penalty is altogether different from that of Mississippi, most importantly in that Ohio has no 'sentencing jury.'" *State v. Rogers*, 28 Ohio St.3d at 429, 504 N.E.2d at 54. *In this respect*, the Ohio Supreme Court deemed Florida's statutory system to be "remarkably similar" to Ohio's. *State v. Rogers*, 28 Ohio St.3d at 430, 504 N.E.2d at 55. More recent and far more relevant is the Ohio Supreme Court declaration "Ohio's capital sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*." *State v. Belton,* 149 Ohio St. 3d 165, 74 N.E.3d 319, 336, 2016-Ohio-

1581, ¶ 59 , *cert. denied,* 137 S. Ct. 2296 (June 26, 2017).

2. Ohio's Statutory Scheme Does Not Allow A Defendant To Be Sentenced To Death Unless A Jury Specifically And Unanimously Finds The Existence Of One Or More Aggravating Circumstances Was Proved Beyond A Reasonable Doubt.

An actual comparison of the statutory schemes demonstrates constitutionally significant differences. In a capital case tried to a jury, Ohio requires the following in order for the defendant to receive the death penalty:

a. The "defendant must be charged in an indictment with aggravated murder and at least one specification of an aggravating circumstance." *State v. Mason*, 2018-Ohio-1462, ¶7 (Pet. App. A)., citing R.C. 2929.03(A) and (B).

b. The jury verdict must specifically find the defendant guilty of aggravated murder and also separately and specifically find the defendant guilty of at least one charged specification. These findings must be unanimous and beyond a reasonable doubt. *State v. Mason*, 2018-Ohio-1462, ¶8 (Pet. App. A) citing R.C. 2929.03(A) and (B) and R.C. 2929.04(A).

c. Upon this finding, the defendant will be sentenced either to death or to life imprisonment. The sentence "shall be determined * * * [b]y the trial jury and the trial judge." *State v. Mason*, 2018-Ohio-1462, ¶9 (Pet. App. A) citing R.C. 2929.03(C)(2).

d. In determining the defendant's sentence, "the court and trial jury shall consider (1) any presentence-investigation or mental-examination report * * *, (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. *State v. Mason*, 2018-Ohio-1462, ¶10 (Pet. App. A) citing R.C. 2929.03(D)(1).

e. If, based on these considerations, "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." Unless it makes such a finding, "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.'" *State v. Mason*, 2018-Ohio-1462, ¶11 (Pet. App. A) citing R.C. 2929.03(D)(2). If the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence. *Id.*, citing *State v. Springer* (1992), 63 Ohio St.3d 167, 586 N.E.2d 96, syllabus.

f. "[I]f 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.'" *State v. Mason*, 2018-Ohio-1462, ¶12 (Pet. App. A) citing R.C. 2929.03(D)(3) (Emphasis added by the Ohio Supreme Court.). The trial court then must articulate in a separate opinion "the reasons why the aggravating circumstances * * * were sufficient to outweigh the mitigating factors." *State v. Mason*, 2018-Ohio-1462, ¶12 (Pet. App. A) citing R.C. 2929.03(F).

3. Florida's Statutory Scheme in *Hurst* Allowed A Defendant To Be Sentenced To Death If A Judge, Independent Of Any

Jury Finding, Found The Existence Of An Aggravating Circumstance.

Florida's capital sentencing scheme required a majority of jurors to find that some aggravating factor existed:

> "Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the 'avoiding a lawful arrest' aggravator applies, see § 921.141(5)(e), while three others believe that only the 'committed for pecuniary gain' aggravator applies, see § 921.141(5)(f), because seven jurors believe that at least one aggravator applies." *Florida v. Steele,* 921 So.2d 538, 545 (2006), abrogated, *Hurst* (emphasis sic).

Thus, it was not necessary for a majority of the jury to agree on the existence of any one aggravating factor. *Florida v. Steele*, 921 So.2d at 545, *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).

Although the Florida jury considered the issue of whether aggravating circumstances existed, "'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." *State v. Mason*, 2016-Ohio-8400 at ¶25, citing Guyer, *Ring Around the Jury: Reviewing Florida's Capital Sentencing Framework in Hurst v. Florida,* 11 Duke J. Const. L. & Pub. Policy Sidebar 242, 251 (2016), and *Ross v. Florida,* 386 So.2d 1191, 1197 and Fla. Stat. Ann. 921.141(2), (3) (2010).

Ohio's capital sentencing statute requires the jury to find and specifically identify at least one enumerated aggravating factor, unanimously and beyond a

reasonable doubt, in order for the death penalty to be included in the range of possible sentences. R.C. 2929.03(B). Ohio's statute requires the jury to render a unanimous verdict on each individual aggravating circumstance, in writing, before either the jury or the judge may consider the circumstance in the sentencing phase. An Ohio jury's finding of the existence of aggravating factors is not merely advisory. Mitigating factors are to be weighed against only the specific aggravating factors found by the jury. R.C. 2929.03(D).

An Ohio 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." *State v. Mason*, 2016-Ohio-8400 at ¶28 citing *State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895, 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* (1997), 80 Ohio St.3d 89 684 N.E.2d 688; R.C. 2929.03(D)(2) (1981) (current version at R.C. 2929.03(D)(2)(2008)). And, in Ohio, the only circumstance in which the judge may ever override a jury's verdict in a death penalty case is if the judge elects to depart downward by imposing a sentence of life despite a jury's recommendation of death. If the jury recommends life, the judge is bound by that recommendation and must impose that sentence.

B. THE OHIO SUPREME COURT CORRECTLY HELD THAT OHIO'S CAPITAL SENTENCING SCHEME WAS CONSTITUTIONAL.

1. The Hurst Opinion Applied *Apprendi* and *Ring* to Florida's Capital Sentencing Statutes.

The Ohio Supreme Court began by reviewing Ohio's capital sentencing stat-

utes and noted that Mason's Sixth Amendment claim relied on *Hurst,* which, in turn, relied on *Apprendi v. New Jersey*, and *Ring v. Arizona*. *State v. Mason*, 2018-Ohio-1462, ¶13 (Pet. App. A). *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." *Apprendi v. New Jersey*, 530 U.S. at 490. *Ring* held 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. *State v. Mason*, 2018-Ohio-1462, ¶14 (Pet. App. A), *Ring v. Arizona*, 536 U.S. at 609, quoting *Apprendi v. New Jersey*, 530 U.S. at 494, fn. 19. The *Ring* court concluded Arizona's death-penalty law violated the Sixth Amendment because it required the trial judge alone to find the aggravating facts necessary to sentence a defendant to death. *State v. Mason*, 2018-Ohio-1462, ¶14, *See Ring v. Arizona*, 536 U.S. at 609. The Ohio Supreme Court opined that *Hurst* simply applied *Apprendi* and *Ring*. *State v. Mason*, 2018-Ohio-1462, ¶15 (Pet. App. A).

Next, the Ohio Supreme Court examined the Florida statute at issue in *Hurst*. In Hurst's sentencing proceeding, the jury rendered an "advisory sentence" recommending death, but Florida law did not require the jury to specify the aggravating circumstances that influenced its decision. The sentencing judge then imposed a death sentence after independently determining and weighing aggravating circumstances and mitigating factors. *State v. Mason*, 2018-Ohio-1462, ¶15, (internal citations omitted) (Pet. App. A). The *Hurst* opinion concluded that Florida's

scheme had to be invalidated because it did "not require the jury to make the critical findings necessary to impose the death penalty" and it "required the judge alone to find the existence of an aggravating circumstance." *State v. Mason*, 2018-Ohio-1462, ¶16 (Pet. App. A), *Hurst v. Florida*, 136 S. Ct. at 622, 624.

2. Ohio's Statute Complies with *Hurst*, Because the Presence of an Aggravating Factor, Necessary To Impose the Death Penalty Is A Fact That Must Be Found By A Jury, Specifically, Not Implicitly, And Independent of A Judge.

In contrast, an Ohio capital "jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and * * * the aggravating-circumstance specifications for which the offender was indicted." *State v. Mason*, 2018-Ohio-1462, ¶20 (Pet. App. A), citing R.C. 2929.03(B). "Then the jury * * * must 'unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors.'" *State v. Mason*, 2018-Ohio-1462, ¶20 (Pet. App. A) citing R.C. 2929.03(D)(2). An Ohio jury recommends a death sentence only after it makes this finding. *Id.* Without that finding and recommendation by the jury, the trial court may not impose the death sentence.

3. *Hurst* Does Not Require That The Jury Weigh the Aggravating Circumstances Against The Mitigating Factors.

The Ohio Supreme Court then considered whether "the weighing that occurs in the sentencing phase—after the jury already has found the existence of an aggravating circumstance—constitute[s] fact-finding under the Sixth Amendment." *State v. Mason*, 2018-Ohio-1462, ¶23 (Pet. App. A). It determined that *Hurst* did not address this question; instead, "[t]he 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?" *State v. Mason*, 2018-Ohio-1462, ¶23 (Pet. App. A), *Hurst v. Florida*, 136 S. Ct. at 622. The Ohio Court observed, *Hurst* "did refer to Florida's weighing process by mentioning the role mitigating facts play in capital sentencing [,b]ut those references merely described Florida's scheme; the court's holding did not address the weighing process." *State v. Mason*, 2018-Ohio-1462, ¶23 (Pet. App. A), citing *Hurst v. Florida*, 136 S. Ct. at 622, 624. The Ohio Court concluded that *Hurst* "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.'" *State v. Mason*, 2018-Ohio-1462, ¶23 (Pet. App. A), *Hurst v. Florida*, 136 S. Ct. at 624.

4. Rather Than A Finding of Fact That Makes A Defendant Eligible For The Death Penalty, Weighing Aggravating Circumstances Against Mitigating Factors Is An Assessment of A Defendant's Individual Moral Culpability For The Purpose Of Determining If The Death Penalty, For Which The Defendant Is Already Eligible, Should Be Imposed.

The Ohio Supreme Court next analyzed the nature of the weighing process. It recounted that this Court has recognized "two different aspects of the capital decision-making process: the eligibility decision and the selection decision." *State v. Mason*, 2018-Ohio-1462, ¶24 (Pet. App. A), quoting *Tuilaepa v. California,* 512 U.S. 967, 971 (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. *State v. Mason*, 2018-Ohio-1462, ¶24 (Pet. App. A), *Tuilaepa v. California,* 512 U.S. at 972. This is necessarily a factual determination.

State v. Mason, 2018-Ohio-1462, ¶24 (Pet. App. A), *Tuilaepa v. California,* 512 U.S. at 973. "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." *Id.* This involves an exercise of judgment and "is mostly a question of mercy." *State v. Mason*, 2018-Ohio-1462, ¶24 Pet. App. A), citing *Kansas v. Carr,* ___ U.S. ___, 136 S.Ct. 633, 642, (2016) and *Tuilaepa v. California,* 512 U.S. at 978. The Ohio Supreme Court concluded the weighing that is done in the selection decision does not involve a determination of fact. *State v. Mason*, 2018-Ohio-1462, ¶24 (Pet. App. A). The eligibility/selection distinction is significant in capital cases because the Sixth Amendment requires a jury to find beyond a reasonable doubt all facts that make a defendant death-eligible. *State v. Mason*, 2018-Ohio-1462, ¶25 (Pet. App. A), *See Hurst v. Florida*, 136 S. Ct. at 619. Here, the Sixth Amendment was satisfied once the jury found Mason guilty of aggravated murder and a felony-murder capital specification. *State v. Mason*, 2018-Ohio-1462, ¶29 (Pet. App. A).

5. Even If *Hurst* Requires The Jury To Find That Aggravating Circumstances Outweigh Mitigating Factors, Ohio's Sentencing Scheme Is Constitutional.

The Ohio Supreme Court further concluded "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." *State v. Mason*, 2018-Ohio-1462, ¶30 (Pet. App. A). Pursuant to Ohio's statute, 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." *State v. Mason*, 2018-Ohio-1462, ¶11 (Pet. App. A), citing R.C. 2929.03(D)(2) (Emphasis added by Ohio Supreme Court.). Unless it makes such a finding, "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.'" *State v. Mason*, 2018-Ohio-1462, ¶11 (Pet. App. A), citing R.C. 2929.03(D)(2). If the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence. *State v. Mason*, 2018-Ohio-1462, ¶11 (Pet. App. A), citing *State v. Springer* (1992), 63 Ohio St.3d 167, 586 N.E.2d 96 , syllabus. Thus, even if *Hurst* required clarification of a requirement for jury weighing, the instant case is not the proper vehicle to do so.

6. The Position Advocated By Mason Is Not Supported By Precedent.

The Ohio Court rejected Mason's argument that this "mere recommendation" was insufficient under the Sixth Amendment. It reiterated that *Hurst* "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." *State v. Mason*, 2018-Ohio-1462, ¶31 (Pet. App. A), *Hurst v. Florida*, 136 S. Ct. at 622, 624. Ohio's scheme, however, "requires the jury to make this specific and critical finding." *State v. Mason*, 2018-Ohio-1462, ¶32 (Pet. App. A).

The Ohio Supreme Court rejected Mason's argument that the Sixth Amendment "requires a jury to *explain why* it concluded that the aggravating circumstances are sufficient to outweigh the mitigating factors." *State v. Mason*, 2018-Ohio-1462, ¶34 (Pet. App. A) (emphasis sic). It determined that Mason's argument failed

to recognize 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." *State v. Mason*, 2018-Ohio-1462, ¶35 (Pet. App. A). The Court observed that "neither *Ring* nor *Hurst* held that the Sixth Amendment requires a jury to find mitigating facts." *State v. Mason*, 2018-Ohio-1462, ¶38 (Pet. App. A). Instead, those cases held "that the Sixth Amendment guarantees that a jury will determine the facts that serve to *increase* the maximum punishment." *Id*. (emphasis sic), citing *Ring v. Arizona*, 536 U.S. at 589; *Hurst v. Florida*, 136 S. Ct. at 619; and *Apprendi v. New Jersey*, 530 U.S. at 490-491, fn. 16. The Court observed that Mason never explained "why further guidance for the trial court is constitutionally required." *State v. Mason*, 2018-Ohio-1462, ¶37 (Pet. App. A).

The Ohio Supreme Court rejected Mason's claim that Ohio's sentencing scheme was unconstitutional because the defendant is not eligible for the death penalty until the trial judge makes "additional 'specific findings' beyond those made by the trial jury." *State v. Mason*, 2018-Ohio-1462, ¶39 (Pet. App. A). The Ohio Court stated "that Mason misapprehends the issue, framing it as a question whether a death sentence 'can be imposed,' instead of whether it 'will be imposed.'" *Id.* It observed that an Ohio trial judge is not permitted "to find *additional* aggravating facts", but instead is required "to determine, independent of the jury, whether a sentence of death *should* be imposed." *Id.* (emphasis sic). Further, "the trial court

cannot *increase* an offender's sentence based on its own findings." *State v. Mason*, 2018-Ohio-1462, ¶40 (Pet. App. A) (emphasis sic). The Court concluded that "[u]nder Ohio's death-penalty scheme, therefore, trial judges function squarely within the framework of the Sixth Amendment" because they "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." *State v. Mason*, 2018-Ohio-1462, ¶42 (Pet. App. A).

C. There Is No Confusion Among The Four States That Have Addressed *Hurst*.

At page 2 of his Petition, Mason asserts that "[t]his 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." Mason's Petition further asserts, at pages 2 and 3, that the "Supreme Courts of Florida and Delaware have accepted the ruling in *Hurst* and found that their sentencing schemes violated the Sixth Amendment", but the "Supreme Courts of Alabama and Ohio, by contrast, interpreted *Hurst* narrowly and found no Sixth Amendment violation." Contrary to Mason's claim, there is little inconsistency or confusion among the states about the holding of *Hurst*.

1. Delaware requires a capital jury to find the existence of at least one aggravating circumstance unanimously and beyond a reasonable doubt and to unanimously find that aggravating circumstances outweigh mitigating factors before a defendant may be sentenced to death. It allows a judge to override a jury recommendation of death.

Shortly after this Court decided *Hurst v. Florida*, the State of Delaware charged Benjamin Rauf with First Degree Intentional Murder and First Degree

Felony Murder and expressed its intention to seek the death penalty upon conviction. *Rauf v. State*, 145 A.3d 430, 432 (Del. 2016). The Superior Court certified five questions to the Delaware Supreme Court in *Rauf v. State*. The Delaware Supreme Court began by analyzing the capital sentencing scheme of Florida in *Hurst*:

> "First, Florida's statute charged the jury with deciding by a majority vote both (1) whether a death eligibility factor exists; and (2) whether the aggravating circumstances outweigh the mitigating circumstances. Second, Florida's statute did not require the jury to decide whether a death eligibility factor exists beyond a reasonable doubt. And third, a jury under Florida's statute made 'an 'advisory sentence' of life or death without specifying the factual basis of its recommendation." *Rauf v. State,* 145 A.3d at 459.

An additional and obvious similarity was that Delaware was one of three capital sentencing schemes that permitted a judge to override a jury's recommendation of a life sentence: "Both Florida's invalidated law and Delaware's leave the ultimate sentencing phase and the final sentencing decision in the hands of a judge. Both have a jury make a recommendation to the court, but this is merely advisory." *Rauf v. State*, 145 A.3d at 459. The only other two States to do this were Florida and Alabama. *Rauf v. State*, 145 A.3d at 461.

The Delaware Court then compared the *Hurst* statute to Delaware's:

> "In Delaware, by contrast, a jury must find a death eligibility factor unanimously and beyond a reasonable doubt. The jury in Delaware is then charged with making a non-unanimous decision of whether the aggravating factors outweigh the mitigating factors, under a preponderance of the evidence standard. That recommendation, like in Florida, is advisory, but unlike Florida, does not ask jurors to specifically vote whether they believe death is the appropriate punishment." *Rauf v. State,* 145 A.3d at 459

In response to the certified questions, the Delaware Supreme Court held the State's capital sentencing scheme to be unconstitutional because:

1. It allowed a sentencing judge in a jury trial to find the existence of an aggravating circumstance, independent of the jury, that had been alleged by the State for weighing in the selection phase of a capital sentencing proceeding. *Rauf v. State*, 145 A.3d at 433 ;

2. It did not require a jury's finding of an aggravating circumstance to be made unanimously and beyond a reasonable doubt. *Rauf v. State*, 145 A.3d at 433-434;

3. It did not require a jury, rather than a sentencing judge, to find that the aggravating circumstances, already found to exist, outweigh the mitigating circumstances. *Rauf v. State*, 145 A.3d at 434;

4. It did not require that finding to be made unanimously and beyond a reasonable doubt. *Id.*; and,

5. The unconstitutional provisions in Delaware's capital sentencing scheme were not severable. *Id.*

The Delaware Supreme Court noted that its "reading of *Hurst* is contestable, and that *Hurst* can be read as simply reiterating that any factual finding that makes a defendant eligible to receive the death penalty must be made by the jury." *Rauf v. State*, 145 A.3d at 436. However, the Delaware Court embraced "the notion that the Sixth Amendment right to a jury extends to all phases of a death penalty case, and specifically to the ultimate sentencing determination of whether a defendant should live or die." *Id.* It concluded, "[a]lthough states may give judges a role

in tempering the harshness of a jury or in ensuring proportionality, they may not execute a defendant unless a jury has unanimously recommended that the defendant should suffer that fate." *Rauf v. State*, 145 A.3d at 436 and also 478 ("it would remain constitutional for states to provide a meaningful role for the trial judge in reviewing any death sentence recommendation made by a jury and giving the trial judge the option to give a more merciful sentence if she believed that was justified.").

2. Florida requires a capital jury to find the existence of at least one specific aggravating circumstance unanimously and beyond a reasonable doubt and to unanimously find that aggravating circumstances outweigh mitigating factors before a defendant may be sentenced to death. It allows a judge to override a jury recommendation of death.

Following this Court's decision in *Hurst*, the Florida Supreme Court revisited the State's capital sentencing scheme on remand. Based on the *Hurst* decision, as well as the decisions in *Apprendi* and *Ring,* the Florida Supreme Court concluded "that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury — not the judge — must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty." *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016). Further, it found that these "necessary facts" include not only the existence of aggravating factors that make a defendant eligible for the death penalty, but also that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. *Id.* Based on "the Florida Constitution and Florida's long history of requiring jury unanimity", the Florida Court held that "before the trial judge may consid-

er imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 54, 57. The Florida Court emphasized that a jury could recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they out-weigh the mitigating circumstances. *Hurst v. State* 202 So. 3d at 57-58. And, the Court stated it did not "intend by our decision to eliminate the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life." *Hurst v. State*, 202 So. 3d at 58.

3. Alabama requires a capital jury to find the existence of at least one aggravating circumstance unanimously and beyond a reasonable doubt.

The State of Alabama convicted Jerry Bohannon of capital murder. In *Ex parte Bohannon*, the Supreme Court of Alabama was asked to determine whether Bohannon's death sentence must be vacated in light of *Hurst v. Florida* and whether the circuit court's characterization of the jury's penalty-phase determination as a recommendation and as advisory conflicts with *Hurst*. *Ex parte Bohannon,* 222 So. 3d 525, 527 (Ala. 2016), *cert. denied,* 137 S. Ct. 831 (2017).

The Alabama Supreme Court determined, "because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amend-

ment." *Ex parte Bohannon,* 222 So. 3d at 532. It also determined that *Hurst* did "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." *Ex parte Bohannon*, 222 So. 3d at 532. The Alabama Court reiterated its previous holding that "the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.'" *Ex parte Bohannon*, 222 So. 3d at 532-533, quoting *Ex parte Waldrop,* 859 So. 2d 1181, 1189-1190 (Ala. 2002).

The Alabama Court emphasized 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." It found nothing in *Apprendi, Ring*, or *Hurst* suggesting "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." *Ex parte Bohannon*, 222 So. 3d at 534. It concluded, "[t]herefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with *Hurst*." *Ex parte Bohannon*, 222 So. 3d at 534.

Four state supreme courts have addressed this issue. Both Florida and Delaware interpret *Hurst* to require that the jury find not only the existence of an aggravating circumstance, but also that that aggravating circumstance outweighs the mitigating factors. Alabama interprets *Hurst* to require only that the jury find the existence of an aggravating circumstance. An Alabama capital jury is not required to determine that the aggravating circumstance outweighs the mitigating factors.

Ohio's Supreme Court held that the Sixth Amendment and *Hurst* require only that the jury find the existence of an aggravating circumstance. However, Ohio's legislature has imposed an additional requirement: a capital jury must find that the aggravating circumstance outweighs the mitigating factors. Thus, the issue of whether the Sixth Amendment requires a capital jury to find that that the aggravating circumstances outweigh the mitigating factors is not presented in this case.

The requirements of the capital sentencing schemes of Florida, Delaware, and Ohio are nearly identical. Ohio's capital sentencing scheme would pass muster under the analysis employed by Florida, Alabama, and Delaware. No state's supreme court has adopted the position advocated by Mason.

D. Rather Than A Clarification Of *Hurst*, Mason Seeks An Uprooting Of Precedent In Sixth Amendment jurisprudence.

Mason urges this Court to hold that the Sixth Amendment requires the jury to articulate specific findings regarding mitigating factors and the weight to be assigned them, to make specific written findings about how it weighed the mitigating and aggravating factors, and to actually impose the death penalty, independent of a judge. See Petition at pages 8, 11, and 19.

Mason's position is contrary to longstanding and consistent Supreme Court precedent.

In *Apprendi v. New Jersey*, this Court stated:

> "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion— taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case." *Apprendi v. New Jersey*, 530 U.S. at 481 (emphasis sic).

The *Ring* opinion undercuts Mason's assertion. It noted that Ring's claim was "tightly delineated":

> "He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. * * * He makes no Sixth Amendment claim with respect to mitigating circumstances. * * * Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. * * * He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." *Ring v. Arizona*, 536 U.S. at 597, fn. 3.

In his concurring opinion, Justice Scalia stated:

> "What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Ring v. Arizona*, 536 U.S. at 612-613, (emphasis sic).

Justice Kennedy's concurring opinion warned that *Apprendi* should not be extended without caution. *Ring v. Arizona,* 536 U.S. at 613. See also, *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("This Court has pointed out that jury sentencing in a capital

case can perform an important societal function, * * * but it has never suggested that jury sentencing is constitutionally required."). Not one of these statements was addressed by the *Hurst* opinion.

Hurst did expressly overrule *Spaziano v. Florida* to the extent it allowed a sentencing judge, independent of a jury's factfinding, to find an aggravating circumstance that is necessary for imposition of the death penalty. *Hurst v. Florida*, 136 S. Ct. at 623, 624. In *Spaziano v. Florida*, Spaziano's "fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury." *Spaziano v. Florida*, 468 U.S. 447, 458 (1984). This Court noted, "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Spaziano v. Florida*, 468 U.S. at 459. The Court determined, "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Spaziano v. Florida*, 468 U.S. at 459. *Hurst* overruled specific parts of *Spaziano*. The parts left undisturbed cannot be reconciled with Mason's argument.

Mason's assertion is contrary to well established Sixth Amendment precedent. Furthermore, it is perplexing because it seems to call for the elimination of the judge's independent weighing of mitigating circumstances against the aggravating factor found by the jury. The logical outcome of Mason's argument would make capital sentencing less deliberate, less reasoned, and a less reviewable narrowing process. That is, it would run afoul of the values rooted in the Eighth Amendment and *Furman v. Georgia* and its progeny. Ohio's capital sentencing scheme strikes a

just and proper balance between the values based in the Eighth Amendment, advanced by *Furman* and its progeny, and the Sixth Amendment, advanced by *Apprendi*, and its progeny. Mason urges this Court to take an unprecedented and ill-advised course.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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