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

REPLY BRIEF FOR THE PETITIONER

CAPITAL CASE

KORT W. GATTERDAM
Member of the Bar of This Court
Counsel of Record
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100 (phone)
(614) 365-9145 (fax)
gatterdam@carpenterlipps.com

Counsel for Petitioner

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Respondent, the State of Ohio, contends that review of the Supreme Court of Ohio's judgment is not warranted. (Respondent's Brief in Opposition at __; hereafter, BIO at __). For the reasons set out below and in Petitioner's petition, Respondent's position is unavailing. Certiorari is warranted to determine if Ohio's death penalty scheme, classifying a jury's decision as a recommendation, accords 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.

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 judge that a sentence of life or death be imposed—without further explanation. Because this Court in *Hurst* emphasized the language in the Florida statute that defined the jury's decision as advisory in nature, Ohio's scheme that similarly classifies a jury's decision as a recommendation does not accord with the Sixth Amendment right to trial by jury articulated in *Hurst*.

I. Florida's Capital Scheme at Issue in *Hurst* Is "Remarkably Similar" to Ohio's Capital Sentencing Scheme.

Respondent argues that Ohio's death penalty law is different than Florida's and those differences make Ohio's law constitutional. (BIO at 6–10). To the contrary, the Supreme Court

of Ohio has long recognized that Ohio's death penalty 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). When the Supreme Court of Ohio noted the similarities between Ohio and Florida in *Rogers*, the court recognized how Florida's death penalty scheme was upheld in *Spaziano v. Florida*, 468 U.S. 447 (1984). *Rogers*, 28 Ohio St.3d at 430. However, this Court in *Hurst* overruled *Spaziano*. *Hurst*, 136 S. Ct. at 623–24. It follows then that if Florida's death penalty scheme was found unconstitutional in *Hurst*, and Ohio's death penalty scheme is "remarkably similar" to Florida's, review of Ohio's death penalty scheme is warranted and a similar result must follow.

This Court in *Hurst* noted that in Florida, "'[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*, 136 S. Ct. at 620 (quoting Fla. Stat. § 775.082(1)). Ohio requires the same such findings by its trial judges. *See* Ohio Rev. Code § 2929.03(D)(3) (stating that the trial judge 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" (emphasis added)); *see also 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. R.C. 2929.03(F). It is the trial court, not the jury, which performs the function of sentencing authority.").

Florida law required an evidentiary hearing after which the jury must render an 'advisory sentence' of life or death without specifying the factual basis of its recommendation. *Hurst*, 136

S. Ct. at 620. Ohio's juries also render an advisory sentence without specifying the factual basis for their recommendation. *See* Ohio Rev. Code § 2929.03(D)(2).

Notwithstanding the jury's recommendation, Florida trial judges weigh the aggravating and mitigating circumstances and enter a sentence of life or death. *Hurst*, 136 S. Ct. at 620. Ohio's trial judges perform the same function. *See* Ohio Rev. Code § 2929.03(D)(3) and (F).

Hurst received an advisory sentence of death from the jury and an actual sentence of death from the judge. *Hurst*, 136 S. Ct. at 620. So did Maurice Mason. Without the trial judge's findings, Mason could not receive the death penalty, no matter what the jury recommended. (Pet. App. 122a ("Pursuant to R.C. 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.")).

The maximum punishment Hurst faced without any judge made findings was life in prison without parole, and the trial judge increased Hurst's punishment based on her own factfinding. *Hurst*, 136 S. Ct. at 622. This Court held that this violated the Sixth Amendment. *Id.* The same thing, however, happened to Maurice Mason. The jury's death recommendation in Mason was insufficient to expose Mason to the death penalty. It was only after the trial judge's additional findings and opinion that death was appropriate that Mason could have received a death sentence. (Pet. App. 126a ("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")). Without the trial judge's additional and independent findings, the maximum sentence Mason could have

received was life imprisonment with no parole eligibility until he had served thirty full years of imprisonment sentence. *See* Former Ohio Rev. Code § 2929.03(C)(2).

The foregoing demonstrates that, 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-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 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*.

Respondent completely ignores the obvious fact that Maurice Mason could not receive the death penalty without factual findings made by the trial judge indicating why he alone believed the aggravating circumstances outweighed the mitigating factors. The trial judge's decision, unaided by the jury's general verdict, is the only way Maurice Mason could and did receive a death sentence. If this Court's decision in *Hurst* means anything, Ohio's scheme violates *Hurst* and therefore Ohio's death penalty law is unconstitutional under *Hurst*.

II. The Supreme Court of Ohio Incorrectly Held that Ohio's Capital Sentencing Scheme Was Constitutional.

The Supreme Court of Ohio opined that *Hurst* "simply applied" *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) to Florida's capital sentencing

statutes and found it violated the Sixth Amendment because it required the trial judge alone to find the existence of an aggravating circumstance. (BIO at 10–13) *Hurst*, however, did much more. The *Hurst* Court concluded that the absence of factual findings by the jury about the existence of mitigating factors or aggravating circumstances, as well as the absence of any findings about the weighing of those factors and circumstances, invalidated the Florida scheme because it deprived Hurst of his Sixth Amendment right to have a jury make all of the findings necessary to impose a sentence of death. *Hurst*, 136 S. Ct. at 622. This is significant because Ohio, like Florida, requires a trial judge to make the same findings as to mitigating factors and aggravating circumstances and conduct the same weighing, all in the absence of specific findings from the jury. *See* Ohio Rev. Code § 2929.03(D)(2)–(3) and (F). Ohio trial judges must act separately and independently of the jury in making these findings. *State v. Buell*, 22 Ohio St.3d 124, 143–44, 489 N.E.2d 795 (1986) ("R.C. 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)). This makes Ohio's statute unconstitutional in the same way that Florida's statute was found to be unconstitutional in *Hurst*.

Respondent argues that Ohio's capital sentencing scheme complied with *Hurst* because the presence of an aggravating factor is a fact that must be found by a jury. (BIO at 12) This Court in *Hurst* absolutely disagreed, holding that the judge in Florida plays a "central and singular role" because a person is not eligible for death until "findings by the court that such person shall be punished by death." *Hurst*, 136 S. Ct. at 622. This is no different than Ohio law. Until the trial judge reviews the aggravating circumstances and mitigating factors and puts pen to paper and states his or her findings in writing, the defendant cannot be sentenced to death. Not surprisingly, the State of Ohio ignores these critical similarities.

The Supreme Court of Ohio contended that the Sixth Amendment is satisfied in Ohio once the jury finds the defendant guilty of aggravated murder and at least one statutory aggravating circumstance. (BIO at 13–14) Such a contention, however, ignores how this Court in *Hurst* found that the absence of factual findings from the jury 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 unaided by the jury. The Judge is by himself in this regard completely eliminating Mason's Sixth Amendment right to have a jury make all the findings necessary to impose a sentence of death.

The Supreme Court of Ohio ignored the lack of other explicit findings in the Ohio capital scheme. For example, the 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 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 State fails to appreciate the central and singular role the judge plays under" Ohio law. *Hurst*, 136 S. Ct. at 622.

Respondent argues that weighing aggravating circumstances against mitigating factors is an assessment of a defendant's moral culpability, not a finding of fact. (BIO at 13–14) Again,

however, *Hurst* suggests that weighing of aggravated circumstances and mitigating factors is a form of fact-finding:

> 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 added). There is no other way to read this quote than as a fatal flaw in the Ohio statute. *Hurst* holds that a defendant is not eligible for the death penalty until the trial judge makes findings that the defendant be punished with death. That holding applies to the Ohio statute as well as the Florida statute. The fact that the jury finds the aggravating circumstances does not save Ohio's statute as demonstrated by the above quote from *Hurst*.

Contrary to Respondent (BIO at 15–16), and as demonstrated herein, the position advocated by Mason is supported by precedent, namely *Hurst*. Mason is not seeking "an uprooting of precedent" as claimed by Respondent (BIO at 23–26), but rather a proper application of existing precedent to Ohio's death penalty scheme. Simply put, in light of *Hurst*, this Court should review the constitutionality of Ohio's death penalty scheme and should find just as it did in Florida that Ohio's death penalty scheme violates the Sixth Amendment right to a jury trial.

III. There Is Confusion Among States That Have Addressed *Hurst*.

Respondent contends there is no confusion among Florida, Delaware, Alabama, and Ohio on application of *Hurst*. (BIO at 17–23) This is not true. 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."). Again, 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*.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the petition, certiorari should be granted and the Supreme Court of Ohio's decision should be reversed.

Respectfully submitted,

KORT W. GATTERDAM
Member of the Bar of This Court
Counsel of Record
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100 (phone)
(614) 365-9145 (fax)
gatterdam@carpenterlipps.com

Counsel for Petitioner

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