

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CEDRIC CARTER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

Office of the Ohio Public Defender

Richard A. Cline – 0001854
Chief Counsel, Death Penalty Department

Appellate Services Division
250 East Broad St., Suite 1400
Columbus, Ohio 43215
Phone: (614) 644-1538 (Direct)
Phone: (614) 466-5394 (Main)
Facsimile: (614) 644-0708
Richard.Cline@opd.Ohio.gov

COUNSEL FOR CEDRIC CARTER

September 18, 2018

Capital Case QUESTIONS PRESENTED

In *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), the Court overruled *Spaziano v. Florida*, and *Hildwin v. Florida*,¹ invalidated Florida’s capital punishment statute, and held all facts necessary to impose a death sentence must be based on a jury’s verdict, not a judge’s fact finding. *Hurst*, 136 S.Ct. at 624. Under Ohio’s capital punishment statute, “[a]ll the power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial[]” and renders specific factual findings necessary to impose the death penalty.² The Ohio Supreme Court – invoking *Spaziano v. Florida* – has repeatedly held that investing capital sentencing authority solely in the trial judge does not violate the Sixth or Eighth Amendments.

Mr. Carter was sentenced to death under this judge-sentencing scheme where a jury’s death verdict is merely a recommendation. The judge alone makes findings essential to impose the death penalty and decides whether to sentence a defendant to life or death. After *Hurst*, Mr. Carter moved the trial court to grant a new mitigation trial in conformity with the constitutional requirements this Court established in *Hurst*. The trial court denied the motion, the Court of Appeals affirmed, and the Ohio Supreme Court declined jurisdiction.

¹ 468 U.S. 447 (1984); 490 U.S. 638 (1989).

² *State v. Rogers*, 28 Ohio St.3d 427, 429, 504 N.E.2d 52, 55 (1986).

Because *Hurst* explicitly overruled *Spaziano*, and held that all facts necessary to impose a death sentence must be found in accordance with the right to trial by jury, the following question is presented:

Is Ohio's death penalty scheme unconstitutional under *Hurst v. Florida*?

TABLE OF CONTENTS

TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	6
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	6
STATEMENT OF THE CASE.....	7
REASON FOR GRANTING THE WRIT	9
I. The Issues Presented Are of Importance in The Constitutional and Uniform Administration of the Death Penalty.	9
II. Ohio Law Provides For A Jury's Non-Binding Recommendation To Impose A Death Sentence And Then A Judge Makes Independent, Necessary Findings And Decides The Penalty.....	11
III. Application Of Hurst To Ohio's Capital Sentencing Scheme.	15
CONCLUSION	20

APPENDICES:

Appendix A – <i>State v. Carter</i> , 2018-Ohio-645, 95 N.E.3d 443 (1st Dist.).....	A-1
Appendix B – <i>State v. Carter</i> , Case Announcement 2018-Ohio-2358	A-7
Appendix C – <i>State v. Carter</i> , Hamilton County Common Pleas Court, Trial Court Opinion Denying New Trial Motion	A-8
Appendix D - Entry Granting Defendant Leave to File Motion for New Mitigation Trial.	A-9
Appendix E – <i>State v. Carter</i> , Hamilton County Common Pleas Court, Trial Court Opinion finding that the aggravating circumstances outweigh the mitigating factors.	A-12
Appendix F – Trial Court Sentencing Entry	A-38
Appendix G - Ohio Rev. Code Ann. § 2929.03 (1981).....	A-54

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Rumsey</i> , 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)	19
<i>Atkins v. Virginia</i> , 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002)	5
<i>Caldwell v. Mississippi</i> , 472 U.S. 321, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)	19, 20
<i>California v. Ramos</i> , 463 U.S. 992, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1983)	19
<i>Carter v. Jenkins</i> , __ U.S. __, 137 S.Ct. 637, 196 L.Ed.2d 537 (2017)	6
<i>Carter v. Mitchell</i> , 2006 U.S. Dist. LEXIS 55597, 2006 WL 2334853 (S.D. Ohio, W.D. August 10 2006)	5
<i>Carter v. Mitchell</i> , 2013 U.S. Dist. LEXIS 5566, 2013 WL 146366 (S.D. Ohio, W.D. January 14, 2013)	5
<i>Carter v. Mitchell</i> , 2013 U.S. Dist. LEXIS 62231, 2013 WL 1828950 (S.D. Ohio, W.D. May 1, 2013)	5
<i>Carter v. Mitchell</i> , 2013 U.S. Dist. LEXIS 81065, 2013 WL 3279744 (S.D. Ohio, W.D. June 10, 2013)	6
<i>Carter v. Mitchell</i> , 693 F.3d 555 (6th Cir. 2012)	5
<i>Carter v. Mitchell</i> , 829 F.3d 455 (6th Cir. 2016)	6
<i>Carter v. Ohio</i> , 516 U.S. 1014, 116 S.Ct. 575, 133 L.Ed.2d 498 (1995)	4
<i>Carter v. Ohio</i> , 525 U.S. 848, 119 S.Ct. 120, 142 L.E.2d 97 (1998)	4
<i>Cooper v. State</i> , 336 So.2d 1133 (Fla. 1976)	12
<i>Hurst v. Florida</i> , __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016)	passim
<i>Maggio v. Williams</i> , 464 U.S. 46, 104 S.Ct. 311, 78 L.Ed.2d 43 (1983)	19
<i>Spaziano v. Florida</i> , 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)), <i>rev'd on other grounds</i> , 32 Ohio St.3d 70, 512 N.E.2d 581 (1987)	9, 10, 18
<i>State ex rel. Stewart v. Russo</i> , 145 Ohio St.3d 382, 49 N.E.3d 1272	13
<i>State v. Belton</i> , 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319	3
<i>State v. Belton</i> , 2012-0902, 147 Ohio St.3d 1440 (2016)	3

<i>State v. Beuke</i> , 38 Ohio St.3d 29, 526 N.E.2d 274 (1988).....	16
<i>State v. Broom</i> , 40 Ohio St.3d 277, 533 N.E.2d 682 (1988)	15, 16
<i>State v. Buell</i> , 22 Ohio St.3d 124, 489 N.E.2d 795 (1986)	13, 15
<i>State v. Carter</i> , 157 Ohio App.3d 689, 813 N.E.2d 78 (1st Dist. 2004)	5
<i>State v. Carter</i> , 1st Dist. Hamilton No. C-170231, 2018-Ohio-645, 95 N.E.3d 443	3
<i>State v. Carter</i> , 1st Dist. Hamilton No. C-9200604 (November 9, 2001)	4
<i>State v. Carter</i> , 1st Dist. Hamilton No. C-9200604 (October 21, 1999)	4
<i>State v. Carter</i> , 1st Dist. Hamilton No. C-920604, 1993 WL 512859, 1993 Ohio App. LEXIS 5233 (November 3, 1993).....	4
<i>State v. Carter</i> , 1st Dist. Hamilton No. C-960718, 1997 WL 705487, 1997 Ohio App. LEXIS 5084 (November 14, 1997).....	4
<i>State v. Carter</i> , 2013 U.S. Dist. LEXIS 90572, 2013 WL 3279744 (S.D. Ohio, W.D. June 27, 2013).....	6
<i>State v. Carter</i> , 2018-Ohio-2380, 100 N.E.3d 422	3
<i>State v. Carter</i> , 2018-Ohio-645, 95 NE.3d 443 (1st Dist.).....	1
<i>State v. Carter</i> , 72 Ohio St.3d 545, 651 N.E.2d 965 (1995)	4
<i>State v. Carter</i> , 81 Ohio St.3d 1467, 690 N.E.2d 1287 (1998)	4
<i>State v. Carter</i> , 93 Ohio St.3d 581, 757 N.E.2d 362 (2001)	4
<i>State v. Carter</i> , Hamilton County Common Pleas No. B 9202977 (February 11, 2005).....	5
<i>State v. Clark</i> , 38 Ohio St.3d 252, 527 N.E.2d 844 (1988).....	13
<i>State v. Davis</i> , 139 Ohio St.3d 122, 9 N.E.3d 1031 (2014)	18
<i>State v. Davis</i> , 38 Ohio St.3d 361, 528 N.E.2d 925 (1988)	18
<i>State v. Durr</i> , 58 Ohio St.3d 86, 568 N.E.2d 674 (1991)	16
<i>State v. Fort</i> , No. 52929, 8th Dist. Cuyahoga, 1988 Ohio App. LEXIS 384, 1988 WL 11080 (1988)	16
<i>State v. Franklin</i> , 97 Ohio St.3d 1, 776 N.E.2d 26 (2002).....	16
<i>State v. Glenn</i> , 11th Dist. Portage No. 89-P-2090, 1990 WL 136629 (Sept. 21, 1990).....	16
<i>State v. Green</i> , 90 Ohio St.3d 352, 738 N.E.2d 1208 (2000)	17

<i>State v. Henderson</i> , 39 Ohio St.3d 24, 528 N.E.2d 1237 (1988).....	12
<i>State v. Holmes</i> , 30 Ohio App.3d 26, 506 N.E.2d 276 (10th Dist. 1986)	13, 14
<i>State v. Jenkins</i> , 15 Ohio St.3d 164, 473 N.E.2d 264 (1984)	12
<i>State v. Keenan</i> , 81 Ohio St.3d 133, 689 N.E.2d 929 (1998)	16
<i>State v. Kirkland</i> , 2010-0854, 147 Ohio St.3d 1440 (2016)	3
<i>State v. Phillips</i> , 74 Ohio St.3d 72, 656 N.E.2d 643 (1995).....	16
<i>State v. Roberts</i> , 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168 (2006)	passim
<i>State v. Rogers</i> , 28 Ohio St.3d 427, 504 N.E.2d 52 (1986).....	passim
<i>State v. Williams</i> , 23 Ohio St.3d 16, 490 N.E.2d 906 (1986)	16
<i>Steffen v. Ohio</i> , 485 U.S. 916, 108 S.Ct 1089, 99 L.Ed.2d 250 (1988)	13
Constitutional Provisions	
28 U.S.C. § 1257	6
U.S. Const., amend. VI.....	passim
U.S. Const., amend. VIII.....	passim
U.S. Const., amend. XIV	6, 8, 11
Statutes	
Fla. Stat. § 921.141	15
Ohio Rev. Code Ann. § 2929.03 (1981)	passim
Rules	
Ohio App.R. 26.....	4
Ohio Crim.R. 33.....	3

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CEDRIC CARTER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

Based on the new rule announced in *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), Cedric Carter respectfully asks that a writ of certiorari issue to review the denial of his motion for new mitigation trial and an order to remand to the trial court for a new sentencing hearing.

OPINIONS BELOW

The trial court denied Mr. Carter's motion for a new mitigation trial, finding that the holding in *Hurst v. Florida* has no application to Ohio's capital sentencing scheme. The Court of Appeals affirmed. *State v. Carter*, 2018-Ohio-645, 95 N.E.3d 443, ¶8 (1st Dist.). Appendix A. The Ohio Supreme Court declined to exercise its

discretionary jurisdiction to hear Mr. Carter's appeal from the February 21, 2018 Court of Appeals decision. Appendix B. The State court's ruling directly conflicts with this Court's decision in *Hurst v. Florida, supra*, and leaves undisturbed Ohio's judge-sentencing statute for capital cases.

The trial court's order granting leave to file a new trial motion is unreported and is attached as Appendix C. The trial court's order denying the motion for new trial is unreported and is attached as Appendix D. Petitioner's trial court motion for leave to file a motion for new trial, and the proposed motion for new trial ultimately deemed filed instant, is unreported and is attached as Appendix E. The trial court's sentencing opinion independently finding that the aggravating circumstances outweigh the mitigating factors is unreported and is attached as Appendix F.

I. Procedural History of the Case

Mr. Carter litigated the constitutionality of his conviction and death sentence in state and federal court. Mr. Carter will first outline the state court proceedings regarding the *Hurst* issue presented in this petition, and then provide a history of prior court proceedings to contextualize his presentation of the *Hurst* issue to the Ohio courts.

A. *Hurst*-based New Trial Motion in State Court

On January 11, 2017, Cedric Carter filed a motion seeking leave to file his motion for a new mitigation trial. *See* Appendix E, at A-12. Carter attached the proposed motion for new mitigation trial to his motion seeking leave. The proposed motion cited to *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.E.2d 504 (2016) and

alleged that Ohio's death penalty statutory scheme violated the Sixth Amendment. On April 20, 2017, the trial court granted Mr. Carter leave to file the motion for new trial and deemed filed instant the proposed motion for new trial Mr. Carter attached to his motion seeking leave to file. *See* Entry Granting Defendant Leave to File Motion for New Mitigation Trial, Appendix C, at A-8. That same day, the trial court, without opinion, entered an Order denying the motion for new mitigation trial. *See* Entry Denying Defendant's Motion for New Mitigation Trial Pursuant to Criminal Rule 33 *Hurst v. Florida* and Other Ohio Supreme Court Pronouncements. Appendix D, at A-9. In support of its Order denying relief, the trial court cited to the Ohio Supreme Court's November 9, 2016 Case Announcements denying motions for reconsideration in *State v. Kirkland*, 2010-0854, 147 Ohio St.3d 1440 (2016), and *State v. Belton*, 2012-0902, 147 Ohio St.3d 1440 (2016). *Id.* at A-10.

Carter appealed the trial court's decision and the First Appellate District affirmed the decision of the trial court. *State v. Carter*, 1st Dist. Hamilton No. C-170231, 2018-Ohio-645, 95 N.E.3d 443, Appendix A, at A-1. The appellate court concluded that "the sentencing phase under Ohio law involves a weighing—not a fact-finding—process." 2018-Ohio-645, ¶ 8, citing *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 59.

The Ohio Supreme Court exercised its discretionary review authority and declined jurisdiction on June 20, 2018. Appendix B at A-7. *State v. Carter*, 2018-Ohio-2380, 100 N.E.3d 422 (1st Dist.).

B. State Court Post-Trial Procedural History

Mr. Carter appealed his conviction and death sentence to the Ohio Court of Appeals, which affirmed his conviction and sentence. *State v. Carter*, 1st Dist. Hamilton No. C-920604, 1993 WL 512859, 1993 Ohio App. LEXIS 5233 (November 3, 1993). The Ohio Supreme Court affirmed Mr. Carter's conviction and sentence. *State v. Carter*, 72 Ohio St.3d 545, 563, 651 N.E.2d 965, 980 (1995). This Court denied certiorari. *Carter v. Ohio*, 516 U.S. 1014, 116 S.Ct. 575, 133 L.Ed.2d 498 (1995).

Mr. Carter filed his initial postconviction petition in the trial court in 1996. The trial court denied that petition without a hearing, and the Court of Appeals affirmed. *State v. Carter*, 1st Dist. Hamilton No. C-960718, 1997 WL 705487, 1997 Ohio App. LEXIS 5084 (November 14, 1997). The Ohio Supreme Court declined jurisdiction to review the Court of Appeals decision. *State v. Carter*, 81 Ohio St.3d 1467, 690 N.E.2d 1287 (1998). This court denied certiorari. *Carter v. Ohio*, 525 U.S. 848, 119 S.Ct. 120, 142 L.Ed.2d 97 (1998).

Mr. Carter filed a petition for writ of habeas corpus in the district court and, in 1999, returned to state Court to file an application to reopen his direct appeal pursuant to Ohio R. App. 26(B). The Court of Appeals denied the Rule 26(B) application. *State v. Carter*, 1st Dist. Hamilton No. C-9200604 (October 21, 1999). Carter filed another Rule 26(B) application in 2000. The Court of Appeals denied that application. *State v. Carter*, 1st Dist. Hamilton No. C-9200604 (November 9, 2001). The Ohio Supreme Court affirmed. *State v. Carter*, 93 Ohio St.3d 581, 583, 757 N.E.2d 362 (2001).

Mr. Carter filed another petition for postconviction relief in 2003 citing *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), alleging that he is intellectually disabled and thus categorically ineligible for a death sentence. The trial court denied that petition, but the Court of Appeals reversed and remanded for an evidentiary hearing. *State v. Carter*, 157 Ohio App.3d 689, 697, 813 N.E.2d 78 (1st Dist. 2004). Mr. Carter voluntarily dismissed the *Atkins* petition in 2005. *State v. Carter*, Hamilton County Common Pleas No. B 9202977 (February 11, 2005).

B. Federal Court Procedural History

On November 12, 1998, Mr. Carter filed a petition for writ of habeas corpus. In 2006, the district court adopted a report and recommendation of the magistrate judge denying relief on all habeas claims and dismissed the petition. *Carter v. Mitchell*, 2006 U.S. Dist. LEXIS 55597, 2006 WL 2334853 (S.D. Ohio, W.D. August 10 2006). On appeal, the Sixth Circuit affirmed in part, reversed in part, and remanded the case to the district court for further proceedings. *Carter v. Mitchell*, 693 F.3d 555, 569 (6th Cir. 2012).

On remand, the magistrate judge again recommended that the habeas petition be dismissed. *Carter v. Mitchell*, 2013 U.S. Dist. LEXIS 5566, 2013 WL 146366 (S.D. Ohio, W.D. January 14, 2013). Mr. Carter moved to stay the district court proceedings and hold them in abeyance while he introduced in state Court the additional evidence Mr. Carter had developed in federal habeas. The magistrate judge recommended denial of the stay and abey motion. *Carter v. Mitchell*, 2013 U.S. Dist. LEXIS 62231, 2013 WL 1828950 (S.D. Ohio, W.D. May 1, 2013). On June 10,

2013, the district court adopted the magistrate judge's recommendation to deny habeas relief and dismiss the petition. *Carter v. Mitchell*, 2013 U.S. Dist. LEXIS 81065, 2013 WL 3279744 (S.D. Ohio, W.D. June 10, 2013). On June 27, 2013, the district court adopted the magistrate judge's recommendation to deny Mr. Carter's request for a stay and abey order. *State v. Carter*, 2013 U.S. Dist. LEXIS 90572, 2013 WL 3279744 (S.D. Ohio, W.D. June 27, 2013).

On July 13, 2016, the Sixth Circuit Court of Appeals affirmed the district court's denial of habeas relief. *Carter v. Mitchell*, 829 F.3d 455, 476 (6th Cir. 2016). This Court denied certiorari on January 29, 2017. *Carter v. Jenkins*, __ U.S. __, 137 S.Ct. 637, 196 L.Ed.2d 537 (2017).

JURISDICTION

On June 20, 2018, the Supreme Court of Ohio declined to exercise its discretionary jurisdiction to hear Mr. Carter's Appeal to that Court. *State v. Carter*, 2018-Ohio-2380, 100 N.E.3d 422 (Ohio, June 20, 2018). A-7. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 6 of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"

Amendment 8 of the United States Constitution prohibits, in relevant part, the infliction of "cruel and unusual punishments."

Amendment 14 of the United States Constitution provides, in relevant

part: “No state . . . shall 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.”

The Ohio statutory provisions that are relevant to this petition, Ohio Rev. Code Ann. § 2929.03 (1981), are reprinted in Appendix G.

STATEMENT OF THE CASE

On July 11, 1992, a grand jury in Hamilton County returned a two-count indictment against Carter for aggravated murder, with, *inter alia*, a death-penalty specification for causing the death of Frances Messenger while committing an aggravated robbery. The jury was instructed that the trial court determined the facts necessary to impose a sentence of death:

You must understand however, that a jury recommendation to this court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the Defendant rests with this Court after the Court follows certain additional procedures required by the law of this State.

Therefore, even if you recommend the death penalty, the law requires this court to decide whether or not the defendant will actually be sentenced to death or life imprisonment.

TR. 1303.

The jury instruction reference to “additional procedures required by the law of this State” refers to the trial court’s independent factual findings necessary to impose a death sentence. *See* R.C. § 2929.03(D)(3). This is precisely the kind of judicial fact-finding that *Hurst* sought to invalidate and renders Carter’s death sentence

unconstitutional in violation of the Sixth and Fourteenth Amendments as interpreted in that case.

On July 15, the jury found beyond a reasonable doubt that the specified aggravating circumstances of the aggravated murder outweighed the mitigating factors and recommended the imposition of the death penalty.

REASON FOR GRANTING THE WRIT

I. The Issues Presented Are of Importance in The Constitutional and Uniform Administration of the Death Penalty.

Ohio's capital sentencing statute is unconstitutional under *Hurst v. Florida* because it vests sentencing authority in the trial judge who makes specific, independent findings that are required to sentence a defendant to death. In *Hurst*, 136 S.Ct. at 624, this Court held Florida's death penalty statute unconstitutional because all factual findings necessary to impose the death sentence were found by the judge, not the jury.

Mr. Carter was tried by a jury and sentenced under Ohio's death penalty statute, a sentencing scheme which the Supreme Court of Ohio has described as “remarkably similar to” the Florida statute declared unconstitutional in *Hurst*. *State v. Rogers*, 28 Ohio St.3d 427, 430, 504 N.E.2d 52, 55 (1986) (noting Florida's statute was upheld in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), *rev'd on other grounds*, 32 Ohio St.3d 70, 512 N.E.2d 581 (1987)). Under Ohio law:

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.

State v. Roberts, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 159 (2006).

Adhering to *Spaziano, supra*, the Supreme Court of Ohio held that “the Sixth Amendment provides no right to a jury determination of the punishment to be imposed; nor does the Ohio system impugn the Eighth Amendment.” *Rogers*, 28 Ohio

St.3d at 430 (citing *Spaziano*, 468 U.S. at 464). The Supreme Court of Ohio explained that Ohio's death penalty statute vests only the judge with decision-making authority to sentence a defendant to death:

At the outset of the within analysis, it should be stated 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."* All power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial. The duty of the trial judge is set forth in R.C. 2929.03(D)(3).

Immediately obvious is that, under this provision, *the jury provides only a recommendation as to the imposition of the death penalty.* 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. Thus, no "sentencing jury" was involved in the proceedings below.* Furthermore, as actual sentencer, the trial court was "present to hear the evidence and arguments and see the witnesses" and was in a position to fully appreciate a plea for mercy. *Caldwell*, supra, at 331.

Furthermore, Ohio's sentencing procedures are not unique both *because a separate sentencing hearing is utilized, and because capital sentencing authority is invested in the trial judge.* See, e.g., Ala. Code Subsection 13A-5-47 (1986 Supp.) (judge is not bound by jury's advisory verdict); Ariz. Rev. Stat. Annot. Section 13-703(B), (C) and (D) (1986 Supp.) (jury is completely excluded from sentencing); Colo. Rev. Stat. Section 16-11-103 (2)(C) (1985 Supp.) (trial judge may vacate a jury finding if clearly erroneous); Fla. Stat. Section 921.141(2) (1982 Cum. Supp.) (trial court independently re-weighs aggravating versus mitigating circumstances after an advisory jury verdict); Idaho Code Section 19-2515(d) (1986 Supp.) (trial court alone sentences and conducts a mitigation hearing), etc.

Florida's statutory system, which is remarkably similar to Ohio's, was expressly upheld in the case of *Spaziano v. Florida* (1984), 468 U.S. 447.

Rogers, 28 Ohio St.3d at 429-30, 504 N.E.2d at 54-55 (emphasis added).

Ohio's judge-sentencing capital scheme, like Florida's *pre-Hurst* statute, violates the Sixth, Eighth, and Fourteenth Amendments. *Hurst*, 136 S.Ct. at 622 (because the trial court made the final critical findings, Florida's death penalty scheme was unconstitutional).

II. Ohio Law Provides For A Jury's Non-Binding Recommendation To Impose A Death Sentence And Then A Judge Makes Independent, Necessary Findings And Decides The Penalty.

The provisions that rendered Florida's statute unconstitutional are also present in Ohio's death penalty statute. This Court described the Florida statute in *Hurst*:

The additional sentencing proceeding Florida employs is a “hybrid” proceeding “in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.” *Ring v. Arizona*, 536 U.S. 584, 608, n. 6, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. §921.141(1) (2010). Next, the jury renders an “advisory sentence” of life or death without specifying the factual basis of its recommendation. §921.141(2). “Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.” §921.141(3). If the court imposes death, it must “set forth in writing its findings upon which the sentence of death is based.” *Ibid*. Although the judge must give the jury recommendation “great weight,” *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (per curiam), the sentencing order must “reflect the trial judge’s independent judgment about the existence of aggravating and mitigating factors[.]” (citation omitted).

Hurst, 136 S. Ct. at 620.

Under Ohio's capital sentencing statute, the trial judge has the sole power and responsibility to sentence a defendant to death regardless of whether the penalty is determined by: (a) a panel of three judges if the defendant waives the right to a jury trial, or (b) the trial jury *and the trial judge*, if the defendant was

tried by jury. R.C. 2929.03(0)(2) (emphasis added); *Rogers*, 28 Ohio St.3d at 430, 540 N.E.2d at 55. A death sentence is not authorized by law until the trial judge considers the evidence, makes specific findings, and memorializes in writing the decision to impose death. R.C. 2929.03(D)(3)(a) & (3)(b) (absent those judicial findings, the trial court “shall impose” a term of life imprisonment).

A. In Ohio, a jury's death-verdict is advisory only.

Ohio, like Florida before *Hurst*, requires that a jury make a sentencing recommendation before the trial judge exercises independent fact-finding and decides whether to impose the death penalty. “The term ‘recommendation’ ... accurately ... reflects Ohio law[.]” *Roberts*, 110 Ohio St. 3d at 92, 850 N.E.2d at 1187; *State v. Henderson*, 39 Ohio St.3d 24, 29-30, 528 N.E.2d 1237, 1243 (1988). Unlike Florida, however, the Ohio statute does not assign “great weight” to the jury's advisory verdict. *Hurst*, 136 S.Ct. at 620. “[U]nder Ohio's framework, the trial court is not a simple ‘buffer where the jury allows emotion to override the duty of a deliberate determination,’ [citation omitted], but is the authority in whom resides the sole power to initially impose the death penalty.” *Rogers*, 28 Ohio St.3d at 430, 504 N.E.2d at 55 (distinguishing and quoting *Cooper v. State*, 336 So.2d 1133, 1140 (Fla. 1976)).

In Ohio, the jury's non-binding death-verdict serves solely to trigger the next step in the sentencing process – a step conducted by the judge, independent of the jury's recommendation. See *State v. Jenkins*, 15 Ohio St.3d 164, 203, 473 N.E.2d 264, 299 (1984) (“[T]he 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 decision as to whether the death penalty shall be imposed rests with the court[.]”); *see also Steffen v. Ohio*, 485 U.S. 916, 919, 108 S.Ct. 1089, 99 L.Ed.2d 250 (1988) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting from denial of certiorari) (accepting this construction of the law by the Ohio Supreme Court but nonetheless voting to review the case for *Caldwell* error). As explained by the Ohio Supreme Court, “no ‘sentencing jury’ is involved” in the ultimate sentencing decision. *Rogers*, 28 Ohio St. 3d at 429, 504 N.E.2d at 54.

B. Ohio law vests trial judges with “the sole power to initially impose the death penalty.”³

Ohio law “delegates the death sentencing responsibility to the trial court upon its separate and independent finding that the aggravating factors outweigh the mitigating factors in th[e] case.” *State v. Buell*, 22 Ohio St.3d 124, 144, 489 N.E.2d 795, 812 (1986) (citing R.C. 2929.03(D)(3)). The statutory deliberative process of Ohio judge-sentencing in capital cases has been deemed an “austere duty” that must be made by the trial judge “in isolation.” *Roberts*, 110 Ohio St.3d at 94, 850 N.E.2d at 1189. The judge is charged by statute with the sole responsibility of independently determining whether the punishment will be life or death.⁴ *State v. Clark*, 38 Ohio St.3d 252, 259, 527 N.E.2d 844, 852 (1988) (“the jury’s decision

³*Rogers*, 28 Ohio St.3d at 430, 540 N.E.2d at 55.

⁴*See State ex rel. Stewart v. Russo*, 145 Ohio St.3d 382, 49 N.E.3d 1272, 1276 (“when a jury in a capital case recommends a life sentence, no separate sentencing opinion is required because ‘the court does not act independently in imposing the life sentence, but is bound to carry out the wishes of the jurors’”) (quoting *State v. Holmes*, 30 Ohio App.3d 26, 28, 506 N.E.2d 276, 278 (10th Dist. 1986) (also addressing a situation in which the trial court overrides the death sentence determination of the jury and imposes a life sentence)).

[favoring a death sentence] [i]s a recommendation that the trial court need not accept.”). In other words: “the power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial[,]” wherein the jury “provides only a *recommendation* as to the imposition of the death penalty.” *Rogers*, 28 Ohio St.3d at 429, 54 N.E.2d at 54; *see also State v. Holmes*, 30 Ohio App.3d 26, 27, 506 N.E.2d 276, 277 (1986) (“[T]he trial court still retains the responsibility for making the final decision as to whether to impose the death penalty, because the jury's recommendation of a death penalty is not binding upon the court.”).

Ohio law directs the judge to review several enumerated sources of information for evidence relevant to the aggravating and mitigating factors. To comply with R.C. 2929.03(D) and (F), the judge must independently make specific findings separate and independent from the jury's advisory verdict. Those particular findings are: (1) the existence and number of aggravating circumstances previously found by the jury; (2) the “sufficien[cy]” of the aggravating circumstances to justify imposition of the death penalty; (3) the existence and number of mitigating factors; (4) the weight attributed to mitigation; and, (5) whether the aggravating circumstances outweigh by proof beyond a reasonable doubt the mitigating factors the judge found. R.C. 2929.03(D)(3) & (F). The death sentence is not final until the judge files his or her findings in writing. R.C. 2929.03(F). These required findings necessarily constitute judicial fact-finding, thus offending the Sixth Amendment mandate that “a jury, not a judge, ... find *each fact necessary* to impose a sentence of death.” *Hurst*, 136 S.Ct. at 619 (emphasis added).

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

Hurst announced that a jury – not a judge – must make the critical findings in support of a death sentence. *Hurst*, 136 S.Ct. at 622. Applying this rule to Florida's statute, this Court noted that although a Florida jury recommends a sentence "it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." *Id.* The *Hurst* Court held Florida's statute unconstitutional because the statute placed the judge in the "central and singular role" of making a defendant eligible for death by requiring the judge independently to find "the facts ... [t]hat sufficient aggravating circumstances exist and ' [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* (quoting ...Fla. Stat. § 921.141(3)). The fact that a Florida judge was required to afford "great weight" to the jury's recommendation did not cure the statute's unconstitutional mandate that the trial court exercise "independent judgment" and make fact-findings. *Hurst*, 136 S.Ct. at 620, 622.

Ohio courts have long aligned Ohio's capital sentencing statute with Florida's statute pre-*Hurst*, characterizing the two as "remarkably similar." *Rogers*, 28 Ohio St.3d at 429-30, 504 N.E.2d at 808-10; *see also State v. Broom*, 40 Ohio St.3d 277, 291-92 n.5, 533 N.E.2d 682, 698 (1988) (comparing Ohio's statute to Florida's); *Buell*, 22 Ohio St.3d at 139-41, 489 N.E.2d at 808-10 (same). The Ohio death penalty scheme suffers the same constitutional deficiencies as Florida's pre-*Hurst* statute because the Ohio statute requires the judge to make independent, specific findings and determine "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)(3).

The Ohio Supreme Court unequivocally explained that the judge is the sentencing authority who independently makes all findings necessary to impose the death penalty. *Rogers, supra; Broom, supra*.⁵ “No Ohio court is bound by the jury’s weighing[.]” *State v. Williams*, 23 Ohio St.3d 16, 22, 490 N.E.2d 906, 912 (1986), and there is “no ‘sentencing jury’... involved” in the ultimate sentencing decision. *Rogers*, 28 Ohio St.3d at 429, 504 N.E.2d at 54.⁶ The requirement that a judge make specific findings and articulate them in a written opinion is a critical step in imposing a sentence of death. R.C. 2929.03(F). This has long been recognized by the Supreme Court of Ohio:

R.C. 2929.03 governs the imposition of sentences for aggravated murder. R.C. 2929.03(F) clearly contemplates that the trial court itself will draft the death-sentence opinion: “*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 * * *, 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***.*”

Roberts, 110 Ohio St.3d at 93, 850 N.E.2d at 1188 (Emphasis added).

⁵ See also *State v. Franklin*, 97 Ohio St.3d 1, 10, 776 N.E.2d 26, 39 (2002) (there is no error when instructing jurors that their sentence is only a recommendation because that is an accurate statement of law); *State v. Keenan*, 81 Ohio St.3d 133, 153, 689 N.E.2d 929, 948 (1998) (same); *State v. Phillips*, 74 Ohio St.3d 72, 101, 656 N.E.2d 643, 669 (1995) (same); *State v. Durr*, 58 Ohio St.3d 86, 93-94, 568 N.E.2d 674, 682-83 (1991) (same); *State v. Beuke*, 38 Ohio St.3d 29, 34-35, 526 N.E.2d 274, 281-82 (1988) (same) (collecting cases).

⁶ See also *State v. Glenn*, 11th Dist. Portag No. 89-P-2090, 1990 WL 136629, *56 (Sept. 21, 1990) (“Ohio has ‘no sentencing jury.’”); *State v. Fort*, No. 52929, 8th Dist. Cuyahoga, 1988 Ohio App. LEXIS 384, 1988 WL 11080, *24*59-60 (1988) (same).

The *Roberts* court went on to stress the “crucial role” of the trial court when imposing a sentence of death:

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, 110 Ohio St.3d at 93, 850 N.E.2d at 1188.

The *Roberts* court further observed:

The trial court's delegation of any degree of responsibility in this sentencing opinion does not comply with R.C. 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 also recognized. [citation and quotation omitted.] The judge alone serves as the final arbiter of justice in his courtroom, and he must discharge that austere duty in isolation.

Roberts, 110 Ohio St.3d at 94, 850 N.E.2d at 1189 (invalidating a trial judge's sentence that is not the product of its own independent analysis and conclusions).

Judicial fact-finding in Ohio capital cases is so crucial that the Ohio Supreme Court has not hesitated to vacate the death sentence when a judge improperly performs this duty. For example, in *State v. Green*, 90 Ohio St.3d 352, 363, 738 N.E.2d 1208, 1224 (2000), the court reversed a death sentence because the judge's specific findings were improper and failed to follow the mandated statutory scheme. Likewise, the Supreme Court of Ohio vacated a death sentence because of errors in a judge'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[.]”

State v. Davis, 38 Ohio St.3d 361, 372-73, 528 N.E.2d 925, 936 (1988) (citation omitted).

The role of the Ohio trial judge in making specific findings of “specific factors” pursuant to the “specific standards in the statutory framework” is far more than ministerial; it is essential. The judge must make and articulate specific findings according to the statutory scheme. This requirement of judicial findings above and beyond the jury's advisory verdict places the judge in the “central and singular role” of the sentencer and violates the right to a trial by jury as enunciated in *Hurst*.

The Ohio Supreme Court has repeatedly upheld Ohio's death penalty statute on the authority of *Spaziano v. Florida*, 468 U.S. at 459-65, and the proposition that investing capital sentencing authority in the trial judge does not violate either the Sixth or Eighth Amendments. *See, e.g., State v. Davis*, 139 Ohio St.3d 122, 130, 9 N.E.3d 1031 (2014) (“[N]either the Sixth nor the Eighth Amendment creates a constitutional right to be *sentenced* by a jury, even in a capital case.” Citing *Spaziano*, 468 U.S. at 459); *Rogers*, 28 Ohio St.3d at 429, 504 N.E.2d at 55 (“[A] judge may be vested with sole responsibility for imposing the [death] penalty[.]” Quoting *Spaziano*, 468 U.S. at 465). *Hurst* expressly overrules *Spaziano's* holding “that there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed[.]” 468 U.S. at 465. *Hurst*, 136 S.Ct. at 624.

“[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” *California v. Ramos*, 463 U.S. 992, 998-99, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240

(1983). Relying on this fundamental distinction, Justice Marshall in *Caldwell v. Mississippi* emphasized the need for jurors to appreciate their “awesome responsibility” when determining the appropriateness of death. *Caldwell v. Mississippi*, 472 U.S. 321, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240 (1985). “State-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court,” [*Caldwell*, 455 U.S. at 330] presents the danger that “the jury will choose to minimize the importance of its role,” [*Caldwell*, 455 U.S. at 333] especially where they are told that the finality of their sentence rests with the court. The consequences of making minute so cumbersome a task are assaults on inviolable Eighth Amendment requirements. “Even when a jury is unconvinced that death is appropriate, their desire to ‘send a message’ of disapproval for the defendant’s acts... [makes] the jury especially receptive to a prosecutor’s reassurances that they can more freely ‘err because the error may be corrected on appeal.’” *Caldwell*, 472 U.S. at 331, citing *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43, 51-52 (1983) (Stevens, J., concurring in judgment). “A defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence.” *Caldwell*, 472 U.S. at 331-32.

Further, Ohio jurors are assured that a sentence of life in prison could not be increased to a death sentence on appeal, thus increasing the risk the jury may base their death sentence in a desire to avoid responsibility for it. *Caldwell*, 472 U.S. at 332, citing *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S.Ct. 2305, 2310, 81 L.Ed.2d 164, 171 (1984). Perhaps worst of all is the potential for nullifying true unanimity

amongst jurors, where the possibility of appellate review is used to persuade those reluctant to invoke the death sentence to “give in.” *Caldwell*, 472 U.S. at 333. Allowing Ohio’s statutory scheme to remain unchallenged ignores these long-held assertions that jurors must maintain and be reminded of the gravity of their decision, without the comfortability of deference to the court. In 1992, when the jury deliberated Mr. Carter’s fate, the parties informed the jury that their decision was a mere recommendation. It was an accurate statement of Ohio law in 1992, and it is an accurate statement of Ohio law today. After *Hurst*, we know that Ohio’s law does not pass constitutional muster. The Court should grant the writ, vacate Mr. Carter’s death sentence, and remand the case to Ohio.

CONCLUSION

For the foregoing reasons, Petitioner Cedric respectfully request this Court grant this petition for certiorari.

Respectfully submitted,

Office of the Ohio Public Defender

/s/ Richard A. Cline

RICHARD A CLINE – 0001854

Chief Counsel, Death Penalty Department

Appellate Services Division

250 East Broad Street, Suite 1400

Columbus, Ohio 43215

Phone: (614) 644-1538 (Direct)

Phone: (614) 466-5394 (Main)

Facsimile: (614) 644-0708

Richard.Cline@opd.Ohio.gov

COUNSEL FOR CEDRIC CARTER