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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Office of the Ohio Public Defender

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

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COUNSEL FOR CEDRIC CARTER

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-170231 TRIAL NO. B-9202977
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
CEDRIC CARTER,	:	
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

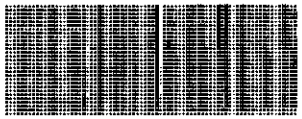
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on February 21, 2018 per Order of the Court.

By: _____
Presiding Judge



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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-170231 TRIAL NO. B-9202977
Plaintiff-Appellee,	:	*OPINION.*
vs.	:	
CEDRIC CARTER,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 21, 2018

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman*, Chief Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy Young, Ohio Public Defender, and *Richard A. Cline*, Senior Assistant Public Defender, for Defendant-Appellant.

MILLER, Judge.

{¶1} Cedric Carter challenges the constitutionality of Ohio's death penalty statute arguing that imposition of the death penalty requires judicial fact finding in violation of his Sixth Amendment right to a jury trial as set forth in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). Carter is incorrect.

{¶2} Carter was charged with aggravated murder and aggravated robbery for the 1992 robbery and shooting-death of a United Dairy Farmer clerk, Frances Messinger. As required by the version of R.C. 2929.04(A) in effect in 1992, Carter's indictment included a death penalty specification—that Carter committed aggravated murder while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of aggravated robbery, and that he was the principal offender or, if not the principal offender, committed the aggravated murder with prior calculation or design. *See* former R.C. 2929.04(A)(7). Former R.C. 2929.04(A) required that the specification be "proved beyond a reasonable doubt." And former R.C. 2929.03(B) required the trial court to instruct the jury that the specification had to be proven beyond a reasonable doubt. The jury in this case was properly instructed. The jury's verdict form indicated that the jury unanimously found Carter guilty of both charges and of the death penalty specification. Under former R.C. 2929.03(C)(1), Carter became death penalty eligible *only* after the jury found him guilty of the aggravating circumstances set forth in his indictment.

{¶3} The case proceeded to the sentencing phase. Former R.C. 2929.03(D)(1) provided that, if the jury found the defendant guilty of an aggravating circumstance, the jury was required to "determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case." Here, the jury unanimously found that

the state had proven beyond a reasonable doubt that the aggravating circumstances that it had found Carter guilty of were sufficient to outweigh the mitigating factors. The jury therefore recommended the death penalty to the trial judge under former R.C. 2929.03(D)(2). Had the jury not recommended the death penalty, that sentence would not have been available to the court. *See* former R.C. 2929.03(D)(2). The trial judge subsequently engaged in his own weighing process as set forth in former R.C. 2929.03(D)(3), and found "by proof beyond a reasonable doubt * * * that the aggravating circumstances which Defendant Cedric Carter was found guilty of committing did outweigh the mitigating factors in the case * * *." Pursuant to former R.C. 2929.03(D)(3), the trial court imposed the death sentence.

{¶4} Carter contends that *Hurst*, ___ U.S. ___, 136 S.Ct. 616, 194 L.Ed.2d 504, requires us to vacate the trial court's sentence. It does not.

{¶5} In *Hurst*, the United States Supreme Court struck down Florida's death penalty statute on the ground that it required judicial fact finding before a defendant was death penalty eligible. The Court surmised that the Florida statute "does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Id.* at 622, citing former Fla.Stat. 921.141(3); *see Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (any fact that exposes a defendant to greater punishment is an element of the offense that must be submitted to the jury); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (a jury must find any fact necessary to impose the death penalty).

{¶6} The Ohio statute is different. In 1992, Ohio's death penalty statute required the aggravating circumstances, i.e., that which made Carter eligible for the death penalty, to be included in Carter's indictment and proven beyond a reasonable

doubt at trial. *See* former R.C. 2929.03(D). Carter's indictment complied with that provision. And the jury was properly instructed that the state had to prove the death penalty specification beyond a reasonable doubt. *See id.* The jury's verdict form separately stated the jury's finding as to the aggravating factors.

{¶7} By contrast, under the former Florida statute, the maximum sentence a capital felon could receive on the basis of the jury's guilty verdict alone was life imprisonment. *Hurst* at 620, citing former Fla.Stat. 775.082(1). After a Florida defendant was found guilty, the court held an evidentiary hearing and the jury was required to issue an advisory sentence of life or death by majority vote only. *Id.*, citing former Fla.Stat. 921.141(1) and (2). The jury did not have to specify the factual basis for its recommendation. *Id.*, citing former Fla.Stat. 921.141(2). A Florida trial judge was free to impose a sentence of death even if the jury did not recommend it. *Id.* at 622. Additionally, the Florida statute required findings by the trial judge alone before the court could impose the death penalty. *Id.*

{¶8} Post-*Hurst*, the Ohio Supreme Court recognized that, unlike the Florida statute, under Ohio law "the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence," and therefore "it is not possible to make a factual finding during sentencing phase that will expose a defendant to greater punishment." *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 59. In other words, in Ohio a jury must first find a defendant guilty of an aggravating factor before the death penalty becomes a possibility. While *Belton* involved the 2008 version of Ohio's death penalty statute, the relevant provisions are substantially similar to the ones under review today. The key point from *Belton* is that the sentencing phase under Ohio law involves a weighing—not a fact-finding—process. *Id.* at ¶ 60. The Ohio jury's role in the mitigation phase

affords an extra layer of protection to the accused. Without a jury recommendation that the defendant be sentenced to death, that sentence is unavailable. The Ohio judge's ability to reject a death sentence recommendation affords a safety valve and maintains a court's traditional role in imposing punishment. These layers of protection afforded a defendant comply with *Hurst*. *See State v. Jackson*, 8th Dist. Cuyahoga No. 105530, 2018-Ohio-276; *State v. Mason*, 3d Dist. Marion No. 9-16-34, 2016-Ohio-8400. Carter's sole assignment of error is overruled. The trial court's judgment is affirmed.

Judgment affirmed.

MOCK, P.J., and **ZAYAS, J.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

ENTERED
FEB 21 2018

The Supreme Court of Ohio

State of Ohio

v.

Cedric Carter

Case No. 2018-0482

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Hardin County Court of Appeals; No. C-170231)

Maureen O'Connor
Chief Justice

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
APR 20 2017

STATE OF OHIO,	:	Case No. B-9202977
Plaintiff	:	Judge Patrick Dinkelacker
vs.	:	
CEDRIC CARTER	:	***ENTRY GRANTING DEFENDANT LEAVE TO FILE FOR NEW***
Defendant	:	***MITIGATION TRIAL***

This matter came before the Court pursuant to "Defendant's Motion for Leave to File a Motion for a New Mitigation Trial Pursuant to Criminal Rule 33 and *Hurst v. Florida*, and to Deem the Attached Motion Filed Instanter." The Court, having considered the Motion and the pertinent law, finds the Motion to be well-taken and hereby grants the Motion.

The Court grants Defendant leave to file a Motion for a new mitigation trial pursuant to Criminal Rule 33 and *Hurst v. Florida*.

Judge Patrick T. Dinkelacker 4-20-17
Hamilton County Court of Common Pleas

A TRUE COPY OF THE ORIGINAL
ENTERED 4/20/17
ATTEST AFTAB PUREVAL
CLERK.
BY
DATE 4/20/17

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
APR 20 2017

STATE OF OHIO,	:	Case No. B-9202977
Plaintiff	:	Judge Patrick Dinkelacker
vs.	:	
CEDRIC CARTER	:	***ENTRY DENYING DEFENDANT'S MOTION FOR NEW MITIGATION***
Defendant	:	***TRIAL PURSUANT TO CRIMINAL RULE 33 HURST V. FLORIDA AND***
	:	***OTHER OHIO SUPREME COURT PRONOUNCEMENTS***

This matter came before the Court pursuant upon "defendant's motion for a new mitigation trial pursuant to Criminal Rule 33 and *Hurst v. Florida*." The Court, having considered the motion and the pertinent law, finds this motion to be not well taken and it is hereby OVERRULED.

WHEREFORE, the Court denies defendant's motion for a new mitigation trial pursuant to Criminal Rule 33 *Hurst v. Florida* and the Supreme Court of Ohio "Case Announcements" and rulings of November 16, 2016. (A copy of the "Case Announcements" are attached).

Judge Patrick T. Dinkelacker 4-20-17
Hamilton County Court of Common Pleas

A TRUE COPY OF THE ORIGINAL
ENTERED 4/20/17
ATTEST AFTAB PUREVAL
CLERK.
BY
DATE 4/20/17

APPENDIX D

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

November 9, 2016

[Cite as *11/09/2016 Case Announcements* #2, 2016-Ohio-7681.]

MOTION AND PROCEDURAL RULINGS

1997-1474. State v. Sheppard.
Hamilton App. Nos. C-950402 and C-950744. This cause came on for further consideration upon the filing of appellant's motion for order or relief. It is ordered by the court that the motion is denied.

O'Neill, J., dissents and would remand the case to the trial court for resentencing in accordance with *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

1998-0019. State v. Fears.
Hamilton C.P. No. B9702360B. This cause came on for further consideration upon the filing of appellant's motion for stay of execution pending determination of the applicability of *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), to Angelo Fears's death sentence. It is ordered by the court that the motion is denied.

It is further ordered that appellant's motion for leave to file a reply to the memorandum in opposition to stay of execution is granted.

O'Neill, J., dissents and would grant the motion for stay of execution.

1999-0395. State v. Myers.
Greene App. No. 96CA38. This cause came on for further consideration upon the filing of appellant's motion for order or relief. It is ordered by the court that the motion is denied.

O'Neill, J., dissents.

2001-1518. State v. Gapen.

Montgomery C.P. No. 2000CR02945. This cause came on for further consideration upon the filing of appellant's motion for order or relief. It is ordered by the court that the motion is denied.

It is further ordered that the motion of amicus curiae, Franklin County Prosecuting Attorney Ron O'Brien, for leave to file a memorandum in support of the state of Ohio's opposition to the motion for order or relief is denied.

O'Donnell and Kennedy, JJ., dissent and would grant the motion of amicus curiae for leave to file.

O'Neill, J., dissents and would grant appellant's motion for order or relief and would grant the motion of amicus curiae for leave to file.

RECONSIDERATION OF PRIOR DECISIONS

2010-0854. State v. Kirkland.
Hamilton C.P. No. B0901629. Reported at 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318. On motion for reconsideration. Motion denied.

Pfeifer, O'Donnell, and Kennedy, JJ., dissent.

2012-0902. State v. Belton.
Lucas C.P. No. CR0200802934000. Reported at __ Ohio St.3d __, 2016-Ohio-1581, __ N.E.3d __. On motion for reconsideration. Motion denied.

O'Neill, J., dissents.

IN THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO, *Plaintiff,*	Case No. B 9202977 JUDGE NADEL
vs.	
CEDRIC CARTER, *Defendant.*	[HEARING REQUESTED] **[THIS IS A DEATH PENALTY CASE]**

DEFENDANT'S MOTION FOR LEAVE TO FILE A MOTION FOR A NEW MITIGATION TRIAL PURSUANT TO CRIMINAL RULE 33 AND *HURST V. FLORIDA*, AND TO DEEM THE ATTACHED MOTION FILED INSTANTER

Movant, through counsel and pursuant to Criminal Rule 33, moves this Court for leave to file a motion for a new mitigation trial on the following grounds:

(1) There was irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial in the penalty phase of this case [Crim. R. 33(A)(1)];

(2) The verdict of a death sentence in this case is not sustained by sufficient evidence or is contrary to law because the death sentence was imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016) [Crim. R. 33(A)(4)]; and

(3) The death sentence in this case is the result of an error of law inasmuch as it was imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016) [Crim. R. 33(A)(5)].

The proposed New Trial Motion is attached. The following memorandum and affidavit support this Motion for Leave to File.

Respectfully submitted,

Office of the Ohio Public Defender

By: Richard Cline
Richard Cline (0001854) (Lead Counsel)

Chief Counsel, Death Penalty Department
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and

Keith Yeazel by cc, per email auth.
Keith Yeazel, Esquire (0041274) (Co-Counsel)
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keith.yeazel@gmail.com
Columbus, Ohio 43206-2523
(614) 885-2900 – Telephone
Counsel for Cedric Carter

MEMORANDUM IN SUPPORT

I. Criminal Rule 33 Authorizes Court to Grant a Motion for New Trial in this Case

Criminal Rule 33 authorizes this Court to grant a new trial when any one several grounds exist: (1) irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial; (2) the verdict is not sustained by sufficient evidence or is contrary to law; or (3) an error of law occurred at trial. *See*, Crim. R. 33(A)(1)(4) and (5). As shown in the proposed motion for new trial, attached hereto, all three of these grounds exist in this case.

II. Movant was Unavoidably Prevented from Filing His Motion Within 14 Days of the Jury's Verdict

Pursuant to Criminal Rule 33(B), a Motion for New Trial ordinarily must be filed "within fourteen days after the verdict was rendered, or the decision of the Court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was

unavoidably prevented from filing such motion within the time provided herein." *Crim. R. 33(B).*

The court sentenced Movant to death on July 30, 1992. *Hurst* was decided January 12, 2016. At sentencing, counsel could not anticipate the United States Supreme Court's holding in *Hurst,* and thus could not have filed his motion for new trial within fourteen days of the imposition of sentence. In *State v. Burke*, 2005-Ohio-891 (10th Dist.), the Court reversed the denial of a new trial motion filed 17 months after the court decision that prompted the filing of the new trial motion. *Burke*, ¶12. The *Burke* court ruled that the motion for leave to file a motion for new trial was timely filed, especially because *Burke* involved a death penalty case and because the new trial motion, if granted, could substantially affect the death sentence. *Id.* Here, the motion for leave to file a new trial motion is being tendered to the Court within 12 months of the United States Supreme Court's announcement in *Hurst.* Furthermore, if granted, the new trial motion would vacate the death sentence and require a new mitigation hearing. *Id.*

CONCLUSION

As shown in the attached *Motion for New Mitigation Trial Pursuant to Criminal Rule 33 and Hurst v. Florida,* Movant was sentenced to death under a statutory scheme that violates the Sixth and Fourteenth Amendments of the United States Constitution because in Ohio, a Jury's verdict in the mitigation phase is merely a recommendation. *Hurst*, 136 S.Ct. at 619. Applying Ohio's unconstitutional death penalty statute to Movant's case constitutes an irregularity in the proceeding, or in any order or ruling of the court, or abuse of discretion by the court, because of which Movant was prevented from having a fair trial in the penalty phase in his case. The death sentence in this case was imposed based upon a jury recommendation and independent fact finding by the trial court. Accordingly, the death sentence was imposed contrary to law and is

the result of an error of law. *Hurst*, 136 S.Ct. at 619. Movant is entitled to a new penalty phase trial pursuant to Crim. R. 33(A)(1),(4) and (5).

Accordingly, Movant respectfully asks the Court to grant him leave to file the attached *Motion for New Mitigation Trial Pursuant to Criminal Rule 33 and Hurst v. Florida, instanter*, and deem the attached motion filed effective the date of the Court's Order granting this motion.

Respectfully submitted,

Office of the Ohio Public Defender

By: Richard Cline

Richard Cline (0001854) (Lead Counsel)
Chief Counsel, Death Penalty Department
richard.cline@opd.ohio.gov
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
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(614) 644-1573 – Facsimile

and

Keith Yeazel by rac per email auth

Keith Yeazel, Esquire (0041274) (Co-Counsel)
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keith.yeazel@gmail.com
Columbus, Ohio 43206-2523
(614) 885-2900 – Telephone
Counsel for Cedric Carter

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO CRIMINAL RULE 33 AND *HURST V. FLORIDA*** was served on January 10, 2017 via regular U.S. Mail, upon all counsel of record, at the address(s) set forth below:

Ryan L. Nelson, Esquire
Assistant County Prosecutor
Hamilton County, Ohio
230 E. Ninth St., Suite 4000
Cincinnati, Ohio 45202

By: Richard Alline
Richard Cline (0001854) (Lead Counsel)

IN THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO, *Plaintiff,*	Case No. B 9202977 JUDGE NADEL
vs.	[HEARING REQUESTED]
CEDRIC CARTER, *Defendant.*	**[THIS IS A DEATH PENALTY CASE]**

AFFIDAVIT

State of Ohio,
Franklin County, ss:

Richard Cline, being first duly cautioned and sworn, deposes and says:

(1) I am counsel of record for Movant in the attached *MOTION FOR LEAVE TO FILE A MOTION FOR A NEW MITIGATION TRIAL PURSUANT TO CRIMINAL RULE 33 AND HURST V. FLORIDA, AND TO DEEM THE ATTACHED MOTION FILED INSTANTER.*

(2) Movant was sentenced to death on July 30, 1992.

(3) On January 12, 2016, the United States Supreme Court announced its decision in *Hurst v. Florida,* 136 S.Ct. 616 (2016).

(4) Counsel could not have filed a motion based on *Hurst* prior to January 12, 2016. *Hurst* is a complex decision, has generated considerable discussion and debate about the parameters of its holding, and takes time to digest and understand.

(5) All of the statements in this Affidavit are true and within my personal knowledge, to the best of my knowledge and belief.

Richard Cline, Affiant

Sworn to before me and subscribed in my presence by Richard Cline, who is personally known to me, on January 10, 2017.

NOTARY SEAL STATE OF OHIO

TERI SLACK
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES Apr 9, 2017

Notary Public

0IN THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO, *Plaintiff,*	Case No. B 9202977 JUDGE NADEL
vs.	[HEARING REQUESTED]
CEDRIC CARTER, *Defendant.*	**[THIS IS A DEATH PENALTY CASE]**

DEFENDANT'S MOTION FOR NEW MITIGATION TRIAL PURSUANT TO CRIMINAL RULE 33 AND *HURST V. FLORIDA*

Movant, through counsel and pursuant to Criminal Rule 33, moves this Court to grant a new trial on the following grounds:

(1) There was irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial in the penalty phase of this case [Crim. R. 33(A)(1)];

(2) The verdict of a death sentence in this case is not sustained by sufficient evidence or is contrary to law because the death sentence was imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016) [Crim. R. 33(A)(4)]; and

(3) The death sentence in this case is the result of an error of law inasmuch as it was imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016) [Crim. R. 33(A)(5)].

The following memorandum further supports this motion.

Respectfully submitted,

Office of the Ohio Public Defender

By: Richard A Cline

Richard Cline (0001854) (Lead Counsel)
Chief Counsel, Death Penalty Department
richard.cline@opd.ohio.gov
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

Attachment 1 to *Motion for Leave to File Defendant's Motion for New Mitigation Trial Pursuant to Criminal Rule 33 and* Hurst v. Florida, and to deem this motion filed instanter.

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and

Keith Yeazel by ac per email auth
Keith Yeazel, Esquire (0041274) (Co-Counsel)
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Counsel for Cedric Carter

MEMORANDUM IN SUPPORT

I. Criminal Rule 33 Authorizes Court to Grant a Motion for New Trial in this Case

Criminal Rule 33 authorizes this Court to grant a new trial when any one several grounds exist: (1) irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial; (2) the verdict is not sustained by sufficient evidence or is contrary to law; or (3) an error of law occurred at trial. *See,* Crim. R. 33(A)(1)(4) and (5). As will be shown below, all three of these grounds exist in this case.

II. Irregularity in Proceedings, or in Order or Ruling of the Court, or Abuse of Discretion by the Court

On January 12, 2016, the United States Supreme Court decision in *Hurst* signaled a sea-change in death penalty jurisprudence. *Hurst v. Florida,* __U.S.__, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016). After *Hurst,* it is clear that Ohio's death penalty scheme is unconstitutional. The decision of the trial court to allow the jury to render a mere recommendation regarding the imposition of the death sentence is an irregularity in the proceedings or in an order or ruling of the court, or abuse of discretion by the court, which prevented Movant from having a fair trial during the penalty phase of this capital case. To understand why the trial court's action deprived

Movant of a fair trial in the penalty phase of this capital case, the Court must examine the holding in *Hurst.*

A. The Supreme Court's Decision in *Hurst v. Florida.*

Hurst held that Florida's capital sentencing structure violated the Sixth Amendment right to trial by jury because it required the judge, not the jury, to make the factual determinations necessary to support a sentence of death. *Hurst,* 136 S.Ct. at 619. Pursuant to *Hurst*, Ohio's capital sentencing is likewise unconstitutional inasmuch as the trial judge, not the jury, makes the factual determinations necessary to impose a sentence of death.

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

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

On post-conviction review, the Florida Supreme Court again vacated the sentence. *Id.* At Hurst's re-sentencing, a jury again recommended death and the judge so sentenced, basing her decision on the Court's independent findings of aggravating circumstances as well as the jury's recommendation. *Id.*

The United States Supreme Court accepted certiorari of Hurst's appeal to resolve the tension between *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and its earlier decisions, *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) and *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82. L.Ed.2d 340 (1984). In *Ring*, the Supreme Court held that the Sixth Amendment requires a jury to find any fact necessary to qualify a capital defendant for a death sentence. *Hurst*, 136 S. Ct. at 621. Although *Ring* had not expressly overruled *Hildwin* and *Spaziano*, cases which approved the constitutionality of Florida's capital sentencing scheme, *Ring*'s holding seemed to compel such an outcome. *Hurst* laid the confusion to rest, holding that Florida's law "violates the Sixth Amendment in light of *Ring*." *Id.* at 620. *Hurst* "expressly overrule[d]" *Spaziano* and *Hildwin*. *Id.* at 623

Justice Sotomayor explained in the 8-1 majority opinion that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. *A mere recommendation is not enough.*" *Id.* at 619 (emphasis added). The *Hurst* opinion states that like Arizona, the state whose sentencing scheme was at issue in *Ring*, "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Id.* at 622. The Court continued: "Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial." *Id.* Because "the maximum punishment Timothy Hurst could have received, without any judge-made findings, was life in prison without parole," and because "a judge

increased Hurst's authorized punishment based on her own factfinding," the Court held that "Hurst's sentence violates the Sixth Amendment." *Id.*

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

B. Similarities Between Ohio and Florida's Capital Sentencing Schemes.

Ohio's death-penalty sentencing scheme is similar to Florida's in several significant aspects. Pursuant to R.C. 2929.03(B), a jury in an Ohio capital case must find the defendant guilty or not guilty of the principal charge and then it must also decide "whether the offender is guilty or not guilty of each specification." The jury will be instructed that each aggravating circumstance "shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification." *Id.*

If the jury finds a defendant guilty of both the charge and one or more of the specifications, then, like in Florida, a sentencing hearing is conducted where:

> The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found

> guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.

R.C. 2929.03(D)(1). During this sentencing hearing, the defendant has the burden of introducing evidence of any mitigating factors, but the prosecution has the ultimate burden of "proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death." *Id.*

At the conclusion of the sentencing hearing, if the jury unanimously finds that the prosecutor has met this burden, "the jury shall *recommend* to the court that the sentence of death be imposed on the offender." R.C. 2929.03(D)(2) (emphasis added). The finding is not required to be rendered in writing and the jury's sentencing recommendation verdict does not set forth the factual findings underlying the jury's recommendation.[1]

Once an Ohio jury makes a death-sentence recommendation, then, like in Florida, the Ohio trial court must independently consider "the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section." R.C. 2929.03(D)(3). The trial court can then sentence a defendant to death if it finds "by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." *Id.* As in Florida, when the Ohio trial court imposes a death sentence it shall:

> state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating

[1] In Florida, the jury's recommendation does not need to be unanimous. *Hurst*, 136 S. Ct. at 620. Nevertheless, the point is that, like Florida, Ohio juries make a recommendation to the trial court for imposing a death sentence.

> circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

R.C. 2929.03(F).

In sum, a jury in Ohio has the responsibility of finding that one or more aggravating circumstances exist as part of the verdict at the capital defendant's trial; however, that does not complete the capital sentencing process. Rather, under Ohio law, the jury must then conduct a weighing process after the sentencing hearing. Once the weighing process is complete, the jury may make a death-sentence *recommendation* to the trial court. The Court in *Hurst* emphasized the language in the Florida statute that defined the jury's decision as advisory when it held Florida's death penalty statute unconstitutional. Because Ohio's scheme similarly classifies a jury's decision as a recommendation (i.e., "advisory"), Ohio's death penalty statute is likewise unconstitutional.

In *Hurst*, the Court broadly criticized the Florida scheme because the jury "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.'" *Hurst* 136 S. Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)). The Court's opinion not only pointed out the absence of factual findings about the existence of aggravating circumstances or mitigating factors, but also the absence of any findings about the weighing of those factors. *Id.*

In Ohio, the defendant has "the burden of going forward with the evidence of any factors in mitigation of the imposition of the death sentence." R.C. § 2929.03(D)(1). Ohio law requires a jury to render a unanimous verdict that the aggravating circumstance (alleged in the indictment and proven beyond a reasonable doubt in the guilt determination phase of trial) outweighs the mitigating factors beyond a reasonable doubt before the jury may recommend a sentence of

death. *Id.* However, the Ohio statute does not require the jury to make any specific factual findings as to: (1) whether the defendant proved the existence of any mitigating factor (or to what degree defendant did so), (2) which mitigating factors the defendant established; or (3) what weight the jury accorded each mitigating factor. Indeed, the Ohio Supreme Court has rejected all efforts to require that the jury make any factual finding about the existence of mitigating factors.

> As we concluded in *Jenkins, supra,* at 177, such written findings are not an "indispensible ingredient" in assisting appellate courts in determining whether the death sentence was arbitrarily or capriciously imposed. Additionally, while the *jury* is not required to do so, pursuant to R.C. 2929.03(F) the *trial judge* must make specific written findings as to both aggravating and mitigating circumstances including a weight evaluation. As such, these findings serve to enhance the record available upon appellate review. In addition, the statutory requirement that the appellate court make an independent determination of sentence appropriateness is an additional safeguard against arbitrary imposition of the death penalty and is not merely the answer to a constitutional mandate of proportionality review. Issue 5 is not well-taken.

State v. Buell, 22 Ohio St. 3d 124, 137, 489 NE.2d 795 (1986), *superseded by statute on other grounds, State v. Riley,* 2007-Ohio-879, ¶¶ 26-27 (emphasis added). Consequently, if Ohio's death penalty statute did somehow survive a *Hurst* challenge, it would still be unconstitutional because Ohio's statute allows the jury to apply unbridled discretion to impose the death penalty without requiring the jury to make any factual finding that would allow for meaningful judicial review of the death sentence.

The Ohio statute does not require the jury to make any specific findings of fact about mitigating factors, nor does it ask the jury to make any specific findings about their balancing of the mitigating and aggravating factors. Therefore, the judge must implement a sentence without those critical findings.[2] Absent those factual findings, and given the advisory nature of the jury's

[2] Unlike in Ohio, a sentencing judge in Florida could "override" an "advisory jury verdict [recommending life]," but as a practical matter, that did not actually happen in Hurst's case, nor has any judge overridden a jury

sentencing recommendation, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida and is unconstitutional.

C. The Supreme Court of Ohio's Statements Comparing Ohio and Florida.

Going back to at least 1986, and as recently as 2014, the Supreme Court of Ohio has cited the now overruled *Spaziano* as favorable authority to uphold the constitutionality of Ohio's own capital sentencing scheme. In holding Florida's capital sentencing structure to be unconstitutional, *Hurst* also "expressly overrule[d]" *Spaziano v. Florida* and *Hildwin v. Florida*, the United States Supreme Court's prior precedent upholding Florida's scheme. *Hurst*, 136 S. Ct.at 623. As the Supreme Court stated, "Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*." *Hurst*, 136 S. Ct.at 624. The Court's decision to overrule *Spaziano* is strong evidence of the unconstitutionality of Ohio's own capital sentencing structure. On several occasions, the Supreme Court of Ohio favorably cited *Spaziano* as authority to uphold Ohio's own scheme.

Perhaps most damning to the constitutionality of Ohio's capital sentencing structure is the decision in *State v. Rogers*, 28 Ohio St. 3d 427, 504 N.E.2d 52 (1986), *rev'd on other grounds*, 32 Ohio St.3d 70. In *Rogers*, the Court stated, "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 430 (emphasis added). The 1986 version of R.C. 2929.03 at issue in *Rodgers* was substantially similar to the current version of the statute with the same problematic "recommendation" language. *See* R.C. 2929.03(D)(2) (1986) ("If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was

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recommendation in Florida for over 15 years. *Hurst*, 136 S. Ct. at 625-26. Thus in practice, the Florida scheme functions similarly to Ohio's.

found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender.").

In a 2014 case, *State v. Davis*, the Supreme Court of Ohio again cited *Spaziano* favorably:

> The starting point for constitutional analysis of Davis's claim is the recognition that although the Sixth Amendment guarantees the right to trial by jury, neither the Sixth nor the Eighth Amendment creates a constitutional right to be *sentenced* by a jury, even in a capital case. "[D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. * * * The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). *See also Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion); *Harris v. Alabama*, 513 U.S. 504, 515, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital sentence").

State v. Davis, 139 Ohio St. 3d 122, 130, 2014-Ohio-1615 at ¶39 (emphasis original). However, *Hurst* stated that "[t]he Sixth Amendment *requires a jury, not a judge, to find each fact necessary to impose a sentence of death.* A mere recommendation is not enough." *Id.* at 619 (emphasis added). Thus the Supreme Court of Ohio's previous reliance on *Spaziano* is now undermined by the holding in *Hurst.*

Ohio has unabashedly proclaimed that the jury verdict at the mitigation phase of a capital trial is merely a recommendation to the trial court – where the real power to sentence a defendant to death resides. The Ohio Supreme Court decided that question thirty years ago:

> 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 court 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.

Rogers, 28 Ohio St. 3d. at 429 (emphasis in opinion). The Ohio Supreme Court has a long history of rejecting defense counsel's claim that it is error to inform a capital jury that their verdict is a mere recommendation, and has done so precisely because telling the jury that its sentencing verdict is merely a recommendation is an accurate statement of Ohio law. *State v. Jenkins*, 15 Ohio St.3d 164, 200-203, 473 N.E.2d 264 (1984) (Jury instruction that mitigation phase death verdict was recommendation held to be accurate statement of Ohio law); *accord, State v. Williams*, 23 Ohio St. 3d 16, 21-22, 490 N.E.2d 906 (1986); *State v. Scott*, 26 Ohio St. 3d 92, 103-104, 497 N.E.2d 55 (1986); *State v. Thompson*, 33 Ohio St. 3d 1, 6, 514 N.E.2d 407 (1987); *State v. Williams*, 38 Ohio St. 3d 346, 356-357, 528 N.E.2d 910 (1988) *State v. Bradley*, 42 Ohio St. 3d 136, 147, 538 N.E.2d 373 (1989) *State v. Steffen*, 31 Ohio St. 3d 111, 113-114, 509 N.E.2d 383 (1987); *State v. DePew*, 38 Ohio St. 3d 275, 280, 528 N.E.2d 542 (1988); *State v. Beuke*, 38 Ohio St. 3d 29, 34-35, 526 N.E.2d 274 (1988); *State v. Poindexter*, 36 Ohio St. 3d 1, 3, 520 N.E.2d 568 (1988); *State v. Johnson*, 46 Ohio St. 3d 96, 105-106, 545 N.Ed.2d 635 (1989); *State v. Durr*, 58 Ohio St. 3d 86, 93-94, 568 N.Ed.2d 674 (1991); *State v. Milles*, 62 Ohio St. 3d 357, 375, 582 N.E.2d 972 (1992); *State v. Grant*, 67 Ohio St. 3d 465, 472, 620 N.E.2d 50 (1993); *State v. Carter*, 72 Ohio St. 3d 545, 559, 651 N.E.2d 965 (1995), *State v. Keith*, 79 Ohio St. 3d 514, 517-519, 684 N.E.2d 47 (1997).

Similarly, when the district courts of appeals considered death sentence cases on an appeal of right, they universally held that a jury verdict of death was only a recommendation under Ohio law. *State v. Roe*, 1987 Ohio App. LEXIS 8490, *69-70, 1987 WL 16174 (10th Dist. No. 86AP-59, August 25, 1987); *State v. Fort*, 1988 Ohio App. LEXIS 384, *59-61, 1988 WL 11080 (8th Dist. No. 52929, February 4, 1988); *State v. Maurer*, 1988 Ohio App. LEXIS 1608,

*26-27, 1988 WL 38529 (5th Dist. No. CA-7253, April 25, 1988); *State v. Montgomery,* 1988 Ohio App. LEXIS 3297, *10-11, 1988 WL 84427 (6th Dist. No. L-86-395, August 12, 1988); *State v. Jackson,* 1989 Ohio App. LEXIS 5064, * 39-40 (8th Dist. No. 55758, October 5, 1989); *State v. Moore,* 1996 Ohio App. LEXIS 2617, *54, 1996 WL 348193 (1st Dist. No. C-950009, June 26, 1996).

Finally, the Federal Courts have recognized that, in Ohio, the jury does not impose a death sentence and thus it is an accurate statement of Ohio law to instruct the jury that its death verdict is merely a recommendation. *Beuke v. Collins,* 1995 U.S. Dist. LEXIS 22095, *102 (S.D. Ohio No. C-1-92-507, October 19, 1995).

This long line of cases demonstrates that, in Ohio as in Florida pre-*Hurst*, the trial judge is the sentencing authority: the jury's role is merely to provide an advisory recommendation to the trial court if the jury recommends a death sentence.[3] *Hurst* held that imposing a death sentence based on an advisory jury recommendation of a death sentence was unconstitutional in Florida. *Hurst*, 136 S. Ct. at 621. It is equally unconstitutional in Ohio.

D. The Supreme Court of Ohio Granted Relief Premised on *Hurst.*

In *State v. Kirkland,* the Supreme Court of Ohio granted a motion for relief[4] premised on *Hurst* and remanded the case for a new mitigation and sentencing hearing. *State v. Kirkland,* 2010-0854, 2016-Ohio-2807 (05/04/2016 Case Announcements) at p. 3. Prior to *Hurst*, the Court in *Kirkland* originally attempted to cure prejudicial prosecutorial misconduct in the penalty phase by conducting its own deliberations regarding whether the aggravating circumstances outweighed the mitigating factors. *See State v. Kirkland,* 140 Ohio St.3d 73, 2014-Ohio-1966 at ¶¶ 96, 97. The Court, after *Hurst*, found that the jury must weigh the aggravating circumstances

[3] Unlike Florida, in Ohio the trial court must follow the jury's recommendation if the jury recommends a life sentence. R.C. 2929.03(D)(2).
[4] *See* S. Ct. Prac. Rule 4.01(A), Motion for order or relief.

against the mitigating factors in a new penalty phase trial. This demonstrates the Supreme Court of Ohio's stance that *Hurst* applies to the penalty phase of Ohio's capital sentencing scheme.

While the Court in *Kirkland* did not rule on the advisory nature of Ohio's penalty phase jury verdict, *Hurst* is clear: when a jury functions simply to provide a recommendation, the constitutional protections of the Sixth Amendment are not met. *Id.* at 622. "A jury's mere recommendation is not enough." *Id.* at 619.

E. The Weighing of Aggravating and Mitigating Factors Implicates *Hurst*.

Implicit in the Supreme Court of Ohio granting a *Hurst*-premised motion in *Kirkland* is that *Hurst* must apply to the penalty phase of Ohio's capital sentencing structure. Additionally, both federal and state courts have concluded that weighing determinations are factual findings that must be made by juries. The jurisdictions so holding are likely to increase because of the broad language of *Hurst*. *See Hurst*, 136 S. Ct. at 619: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."

In *McLaughlin v. Steele*, a Missouri Federal District Court concluded the Missouri statutory scheme violated the Sixth Amendment in light of *Hurst* and *Ring*. *McLaughlin v. Steele*, 2016 WL 1106884, at *29, 2016 U.S. Dist. LEXIS 36643 (E.D. Mo. Mar. 22, 2016). The court found that "the weighing of mitigating and aggravating circumstances is a finding of fact." *Id. See also State v. Whitfield*, 107 S.W.3d 253, 259-61 (Mo. 2003) (en banc) (finding Missouri's requirement that capital jurors determine whether evidence in mitigation was sufficient to outweigh the evidence in aggravation before sentencing defendant to death was a factual finding properly made by jury). The *McLaughlin* court reasoned "all we know from the special interrogatory is what [the jury] did *not* find." *Id.* "[B]ecause the judge could not have known

what the jury decided, he could not have relied upon it in imposing the death penalty, and so he must have made the factual finding himself." *Id.* This violated the Sixth Amendment. *Id.*

In *Woldt v. People*, the Supreme Court of Colorado found its state statute's requirement that the sentencing body decide "whether the mitigating factors outweighed the aggravating factors" was "fact-finding" that rendered the defendant eligible for a death sentence and must be made by a jury. 64 P.3d 256, 265-66 (Colo. 2003) (en banc). Additionally, while the Supreme Court of Nevada has considered weighing "*mostly* a question of mercy," the process is thereby regarded as retaining some factual inquiry. *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (Nev. 2011) (emphasis added).

In Ohio, the jury only weighs aggravating circumstances against mitigating factors in order to arrive at an advisory jury recommendation regarding a death sentence. Even then, the jury does not make any factual findings that identify which mitigating factors, if any, the jury deemed proven. Nor does the jury make any factual finding about the weight the jury accorded each mitigating factor when the jury reached its advisory recommendation that the death penalty be imposed.

(F) Conclusion to Part I.

Ohio's death penalty statute unconstitutionally permits a trial judge, rather than a trial jury, to determine all of the facts necessary to impose the death penalty. *Hurst,* 136 S.Ct. at 619. Like the statute found unconstitutional in Florida, Ohio's death penalty statute requires only that the jury make a recommendation of a death sentence, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Accordingly, Movant was prevented from having a fair trial in the sentencing phase of his case, and is entitled to a new mitigation phase trial pursuant to Crim. R. 33(A)(1).

III. Death Sentence Imposed in this Case is not Sustained by Sufficient Evidence or is Contrary to Law

As shown above, the Ohio death penalty statute violates the Sixth and Fourteenth Amendments to the United States Constitution because, in Ohio, a Jury's verdict in the mitigation phase is merely a recommendation. *Hurst*, 136 S.Ct. at 619. The death sentence in this case was imposed based upon a jury recommendation and independent fact finding by the trial court. Accordingly, the death sentence was imposed based upon insufficient factual findings (findings only made by a judge) and contrary to law. *Hurst*, 136 S.Ct. at 619. Movant is entitled to a new mitigation phase trial pursuant to Crim. R. 33(A)(4).

IV. The Death Sentence Imposed in this Case is the Result of an Error in Law

As shown above, the Ohio death penalty statute violates the Sixth and Fourteenth Amendments to the United States Constitution because, in Ohio, a Jury's verdict in the mitigation phase is merely a recommendation. *Hurst*, 136 S.Ct. at 619. The death sentence in this case was imposed based upon a jury recommendation and independent fact finding by the trial court. Accordingly, the death sentence was imposed contrary to law. *Hurst*, 136 S.Ct. at 619. Movant is entitled to a new mitigation phase trial pursuant to Crim. R. 33(A)(5).

CONCLUSION

Movant was sentenced to death under a statutory scheme that violates the Sixth and Fourteenth Amendments of the United States Constitution because in Ohio, a Jury's verdict in the mitigation phase is merely a recommendation. *Hurst*, 136 S.Ct. at 619. Applying Ohio's unconstitutional death penalty statute to Movant's case constitutes an irregularity in the proceeding, or in any order or ruling of the court, or abuse of discretion by the court, because of which Movant was prevented from having a fair trial in the penalty phase in his case. The death sentence in this case was imposed based upon a jury recommendation and independent fact

finding by the trial court. Accordingly, the death sentence was imposed contrary to law and is the result of an error of law. *Hurst*, 136 S.Ct. at 619. Movant is entitled to a new penalty phase trial pursuant to Crim. R. 33(A)(1),(4) and (5).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO CRIMINAL RULE 33 AND *HURST V. FLORIDA*** was served on January 10, 2017, via regular U.S. Mail, upon all counsel of record, at the address(s) set forth below:

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By: Richard Cline
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ATTACHMENT 1:

Defendant's Motion for a New Mitigation Trial R.C. § 2929.03 (1986)

§ 2929.03 Imposing sentence for a capital offense.

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

parole eligibility after serving twenty years of imprisonment on the offender.

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

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

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

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

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

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

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

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to divi-

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

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

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

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

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

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

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

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

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

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

HISTORY: 134 vH 511 (Eff 1-1-74); 139 vS 1. Eff 10-19-81.

Committee Comment to H 511

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

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

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

STATE OF OHIO C920604 CASE NO. B-922977

Plaintiff : O P I N I O N

-vs- : (Judge Norbert A. Nadel)

CEDRIC CARTER :

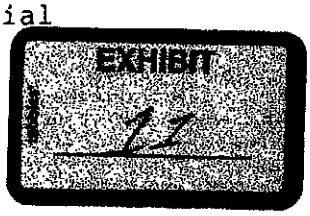
Defendant :

This case originated with the filing of an indictment on April 14, 1992, against Defendant Cedric Carter, charging him with Aggravated Murder in Count One of the indictment and charging him with one specification of Aggravating Circumstances as to Count On, thus qualifying this case as a possible death penalty case under the laws of the State of Ohio. In addition, defendant was charged with the following offense:

In Count Two of the indictment, defendant was charged with Aggravated Robbery.

This opinion deals only with the Aggravated Murder charges and the specification pertaining to said murder. It is prepared and will be filed with the First District Court of Appeals and with the Supreme Court of Ohio in compliance with the requirements of O.R.C. 2929.03(F).

Since the date of the subsequent arraignment, the docket sheet reflects an extensive process of trial preparation. Numerous motions were filed before and during trial. They were heard and ruled upon during the course of the pretrial



preparation, the guilt or innocence trial and the sentencing proceedings. All rulings on said motions are reflected either on the docket sheet of the case or on the record.

GUILT OR INNOCENCE TRIAL

The guilt or innocence trial of Defendant Cedric Carter commenced on July 6, 1992, with the process of jury selection from a special venire of one hundred (100). On July 7, 1992, the jury was impaneled and sworn. The jury finally selected consisted of twelve regular members and three alternates. On the regular panel of the jury there were five women and seven men. None of the alternates had to be used although they were kept intact and not discharged until after the verdict on the sentencing proceeding was read in open court and the regular panel discharged. The Court elected to retain the alternates until the regular panel was finally discharged in order to assure that no mistrial might have to be declared while the regular panel was deliberating on the sentencing recommendation if then a member of the regular panel should become ill or need to be excused because of some other personal reason.

On July 8, 1992, the State commenced its case and produced evidence on the charge of Aggravated Murder as set forth in Count One of the indictment, evidence as to the specification of Aggravating Circumstances as to Count One, and evidence on the other Count in the indictment. During the course of the guilt or innocence trial, the State of Ohio presented fifteen (15) witnesses and the defense rested after calling two witnesses, including the defendant.

There was absolutely no doubt that Cedric Carter was the perpetrator of the murder of Frances Messinger as well as the other offense charged in the separate Count of the indictment.

After receiving instructions of law from the Court which were applicable to the guilt or innocence issue in the first trial and upon due deliberation, the trial jury did, on July 11, 1992, find defendant guilty of Aggravated Murder as charged in Count One of the indictment and also found defendant guilty of the specification contained in the indictment as it pertains to Count One. In addition, the jury found the defendant guilty of the other separate Count of the indictment as charged.

The Aggravating Circumstances which Defendant Cedric Carter was found guilty of committing were that the defendant, Cedric Carter, committed the offense of Aggravated Murder of Frances Messinger while Cedric Carter was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of Aggravated Robbery, and Cedric Carter was the principal offender in the commission of the Aggravated Murder or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

Before receiving and reading the jury's verdict in open court, the Court allowed the alternate jurors, who were sequestered separately, to fully examine the exhibits admitted into evidence. This was done in order to assure that the alternate jurors had seen and heard exactly the same evidence the regular jurors had before it in reaching their verdict, so that if an alternate juror had to be pressed into service in the

sentencing proceeding, that alternate juror could join the deliberative process with exactly the same exposure to evidence as the regular jurors.

SENTENCING PROCEEDINGS

On July 13, 1992, the second phase of this matter, hereinafter referred to as the sentencing proceedings commenced pursuant to O.R.C. 2929.03(D).

It should be noted that all of the jurors were sequestered during their deliberations on guilt or innocence and during their deliberations on the sentencing proceedings.

At the sentencing proceedings the Court reversed the traditional trial procedure ordering defendant to proceed first. This reversal of procedure did not, in any way, alter the burden of proof placed upon the State as the instructions of the court indicated. The original trial jury, still intact, heard additional testimony and the arguments of respective counsel relative to the factors in favor of and in mitigation of the sentence of death.

After receiving the instructions of the Court as to the applicable law in the sentencing proceedings and upon due deliberation, the trial jury, on July 15, 1992, returned its verdict and found unanimously that the State of Ohio proved by proof beyond a reasonable doubt that the Aggravating Circumstances which Defendant Cedric Carter was found guilty of committing were sufficient to outweigh the mitigating factors in

this case. The jury recommended in its verdict that the sentence of death be imposed as mandated by provisions of O.R.C. 2929.03(D)(2).

The Court then discharged all the jurors and continued the case until July 30, 1992, in order to personally review the numerous exhibits and testimony before imposing sentence.

IMPOSITION OF SENTENCE PROCEEDINGS

On July 30, 1992, the Court proceeded to impose sentence pursuant to O.R.C. 2929.03(D)(3). On that same date, the Court announced that its written opinion would be filed within fifteen (15) days as required by O.R.C.2929.03(F).

The Court found by proof beyond a reasonable doubt upon a review of the relevant evidence at both trials and the arguments of respective counsel, along with the presentence and mental examination reports, that the Aggravating Circumstances which Defendant Cedric Carter was found guilty of committing did outweigh the mitigating factors in the case and, therefore, on July 30, 1992, this Court imposed the sentence of death upon defendant, Cedric Carter, ordering said execution to take place on October 30, 1992.

OPINION

The provisions of O.R.C. 2929.03(F) now require this Court to state in a separate opinion the Court's specific findings as to the existence of any of the mitigating factors specifically enumerated in O.R.C. 2929.04(B) or the existence of any other mitigating factors, and also requires the Court to state reasons why the Aggravating Circumstances that the offender was found

guilty of committing were sufficient to outweigh the mitigating factors, since that is what the Court has in fact found by imposing the death penalty. In other words, the Court must put in writing the justification for its sentence.

In meeting its responsibility under the statute, the Court will review all mitigating factors described in O.R.C. 2929.04(B) as well as any other mitigating factors raised by Defendant and will indicate what conclusions were reached from the evidence as to each. Those possible mitigating factors specifically set forth in the statute are as follows:

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

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

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

(4) The youth of the offender;

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

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

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

(8) The nature and circumstances of the offense, the history, character and background of the offender.

The Court will first, however, review the Aggravating Circumstances which defendant has been found guilty of committing and will indicate why the jury's conclusions on these matters were correct.

AGGRAVATING CIRCUMSTANCES

The Aggravating Circumstances that the defendant, Cedric Carter, was found guilty of committing were that the defendant, Cedric Carter, committed the offense of Aggravated Murder of Frances Messinger while Cedric Carter was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of Aggravated Robbery, and Cedric Carter was the principal offender in the commission of the Aggravated Murder or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

In deliberating upon its decision in this case as required by O.R.C. 2929.03(3)(D), the Court placed itself in the same position as if it were one of the members of the jury panel. The Court evaluated all of the relevant evidence raised at both

trials and the arguments of respective counsel, all of which had been available to the jury in its deliberation at various stages of this case.

The principles of law which guided this Court are contained in the written jury instructions provided to the jury during the two trials and which are part of the transcript. The evidence and testimony were tested by the Court from the viewpoint of credibility and relevancy to the existence of Aggravating Circumstances along with their qualitative and quantitative measure.

In the guilt or innocence trial and in the sentencing proceedings, as well as in counsel's arguments to the jury, there was never a doubt in any respect that defendant was the principal perpetrator of the offenses charged in Count One of the indictment. A complete review of the evidence pertaining to Count One and the specification of Aggravating Circumstance as to Count One and the other Count reveals to this Court, beyond any doubt, that the murder of Frances Messinger, as well as the offense charged in the other Count of the indictment were committed by Defendant, Cedric Carter.

The evidence showed that during the early morning hours of April 6, 1992, Cedric Carter entered the United Dairy Farmers store on Madison Road in Cincinnati, Ohio, where Frances Messinger was working alone as a clerk.

Additionally, the evidence showed that Carter ordered an ice cream cone and then pulled a gun and ordered Mrs. Messinger to give him the contents of the cash drawer. When Mrs. Messinger

closed the cash drawer defendant fired two shots, the second of which struck her in the forehead. The victim was left dying on the floor as Cedric Carter ran from the store.

It was therefore the Court's conclusion, upon a full and complete review of all the relevant evidence, that there was proof beyond a reasonable doubt that defendant, as the principal offender, committed the offense of the Aggravated Murder of Frances Messinger while defendant was committing the offense of Aggravated Robbery.

The Court also found from the evidence that there was proof beyond a reasonable doubt that the defendant, as the principal offender, committed the offense of Aggravated Murder of Frances Messinger while defendant was committing the offense Aggravated Robbery.

The Court further finds that defendant's killing of Frances Messinger, a fifty-seven-year-old woman, wife and mother of seven children, who was working alone with no way to defend herself, was a completely unnecessary and cold-blooded act. This killing evidenced the particularly malicious outlook of this defendant.

MITIGATING FACTORS

The Court will now review all possible mitigating factors and indicate whether they were present, and if so, what if any, consideration the Court gave to them. Those listed in O.R.C. 2929.04(B) are as follows:

(1) "Whether the victim of the offense induced or facilitated it." The Court finds absolutely no evidence whatsoever to suggest that Frances Messinger in any respect induced or facilitated the offense. This factor was not present.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that offender was under duress, coercion, or strong provocation." Again, the Court finds absolutely no evidence of any nature that would suggest that the defendant was under duress, coercion, or strong provocation. This factor was not present.

(3) "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Again, the Court finds from the evidence that defendant did not suffer from a mental disease or defect.

(4) "The youth of the offender." The Court finds that defendant was, at the time of his trial, 19 years of age. There was no evidence to suggest that his age was a factor that should be taken into account in mitigation of the sentence of death.

(5) "The offender's lack of a significant history of prior criminal conviction and delinquent adjudications." The record in this case, including the presentence report, indicates that the defendant has two delinquency adjudications as a juvenile and two convictions for criminal

offenses as an adult. Therefore, the Court would deem it inappropriate to give the defendant any consideration pursuant to mitigating factor number five.

(6) "If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim." The Court finds in this case that defendant was the principal offender and, therefore, this mitigating factor was not present.

The Court now reviews the remaining possible mitigating factors enumerated in O.R.C. 2929.04(B). These two remaining possible mitigating factors are closely interrelated and will be reviewed as interrelated.

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

(8) "The nature and circumstances of the offense, the history, character and background of the offender."

The nature and circumstances of this offense appear clear to the Court. Therefore, it will not be this Court's intention to reiterate in this opinion each and every detail of the murder of Frances Messinger or the other offense committed by defendant.

It is quite clear that Frances Messinger was a fifty-seven year old wife and mother of seven children who was working alone as a night clerk at the Untied Dairy Farmers on Madison Road on April 6, 1992.

It probably seemed just like any other night as she started her shift as a clerk at the United Dairy Farmers.

It should have been an ordinary night, a Sunday turning uneventfully into Monday, April 5 into April 6, and perhaps for Frances Messinger for a time it appeared so. But it was not. Frances Messinger did not know that Cedric Carter, Virgil Simms, and Kenny Hill even then were riding around looking and planning for someone and some place to rob. She did not know that Kenny Hill had already gotten a gun and ammunition. She did not know that they planned for Carter to use it. She did not know in those early morning hours that she was already being watched by Carter, Simms and Hill. Simms, acting as the driver of the getaway car, kept it running and served as a lookout.

Hill and Carter went one time, two times around the block waiting for Frances Messinger to be alone with no one to help her, no one to observe, or they thought.

Hill and Carter entered that United Dairy Farmers. Across the street, Carol Blum looked out the window in horror where she worked as a waitress at the Chili Company. She looked across the street to the United Dairy Farmers. She saw something and she hoped what she saw was not true. She hoped what she believed she saw could not be. But she could not ignore what she had seen, so at 2:22 she dialed 911: "I just seen something. I have seen two male blacks running from the United Dairy Farmers. I don't see her getting up." Carol Blum saw those two male blacks inside the United Dairy Farmers. One of them stood in front of the counter with his arm extended as if pointing a gun toward the area of the

register, the second male's back was behind the counter, and while the first stood in front with his arm extended, the second bent down, then up, and then ran. He was followed by the first. When they left that United Dairy Farmers they turned in the direction of Taylor Street.

People who knew Frances Messinger stopped by that evening to make a purchase and to chat that night as they had so often before. But this night was no ordinary night for them or for Frances. For this night they found her lying dead behind the counter.

A bullet pierced the cabinet door behind that counter and another bullet mortally struck Frances Messinger. These bullets were fired from the weapon that Hill gave to Carter -- the weapon that Carter used.

The defendant himself in his statements to the police indicated how he and Hill waited until no one was around and then entered one by one.

Cedric Carter first told the police that Hill shot Mrs. Messinger, and only when confronted with the inconsistencies in his statement did he then admit he shot her; but even then he tried to minimize his involvement saying he accidentally shot her.

Cedric Carter told police he planned to get that register open. He would order an ice cream cone and the drawer would be open to make change. Hill would grab the money. The receipt offered into evidence showed an ice cream cone purchase at 2:19.

They planned that while Carter distracted Mrs. Messinger by ordering the ice cream cone, Hill would slip him the weapon, which Hill did. Carter pointed that weapon at Frances and demanded that she leave the register drawer open, but Frances had already closed it before Hill could grab the money.

When Cedric Carter saw her fumbling for buttons to set off an alarm he fired that gun not once, but twice. He shot her dead center in her forehead at a distance of no more than ten feet away, and then ran.

It should be noted from the defendant's appearance in the courtroom that he was physically large and developed. He had a massively well developed chest and upper arms. He looked every bit the part of an extremely strong person. It is logical to infer that the last moments in the life of Frances Messinger, in the United Dairy Farmers store, and in very close proximity to the defendant, must have been filled with great horror and pain.

The proven facts of the Aggravating Circumstances reveal a cruel, willful, cold-blooded disregard for human life and values far beyond what this Court has seen in other cases.

At the sentencing hearing, the boyfriend of defendant's mother testified that Cedric Carter had a bad temper. Also, Dr. David Chiappone, a clinical psychologist, testified that defendant told him he liked to torture animals as a child. Dr. Chiappone also testified that defendant indicated that he was physically abusive to women and other people he would meet on the streets.

While the Court recognizes that the defendant had an unfortunate upbringing, the Court finds that there is no evidence to show that the childhood experiences of the defendant resulted in any emotional scarring of the defendant which could manifest itself in later life and possibly explain his behavior on April 6, 1992.

In addition, there is no evidence to suggest that defendant was under the influence of drugs on the evening of the murder of Frances Messinger, other than his self-serving declarations.

CONCLUSION

The sole issue which confronted the Court is stated as follows:

> DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, CEDRIC CARTER, WAS FOUND GUILTY OF COMMITTING, OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?

In this regard all of the statutory mitigating circumstances and all other possible mitigating factors raised by counsel have now been reviewed and discussed. The same has been done with the Aggravating Circumstances.

Upon full, careful and complete scrutiny of all the mitigating factors set forth in the statute or called to the Court's attention by defense counsel in any manner, and after considering fully the Aggravating Circumstances which exist and have been proven beyond a reasonable doubt, the Court concludes

that the Aggravating Circumstances do far outweigh all the mitigating factors advanced by defendant, Cedric Carter, beyond a reasonable doubt as required by O.R.C. 2929.03(D)(3).

For all of the above reasons, the recommendation of the trial jury was adopted and the sentence of death was imposed upon the defendant, Cedric Carter, on July 30, 1992.

DATE: 8/3/92

Norbert A. Nadel, Judge

sion (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

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

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

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

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

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

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

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

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

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

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

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

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the ac-

cused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

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

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

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

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

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

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

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

death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

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

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

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

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

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

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

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

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

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

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

Committee Comment to H 511

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

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

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the is-

sue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

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

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

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

(2) The offense was committed for hire.

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

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

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

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

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

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

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

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

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

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

(4) The youth of the offender;

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

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

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

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

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