

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Austin Myers,

Petitioner,

-v-

State of Ohio,

Respondent.

On Petition for Writ of Certiorari to
the Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016), this Court: (a) overruled *Spaziano v. Florida*, 468 U.S. 460-65 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989); (b) invalidated Florida's capital punishment statute; and (c) held that all facts necessary to impose a sentence of death must be based on a jury's verdict, not a judge's fact finding. *Hurst*, 136 S. Ct. at 624.

Under Ohio's capital punishment statute, “[a]ll the power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial” and renders specific factual findings necessary to impose the death penalty. *State v. Rogers*, 28 Ohio St.3d 427, 429 (1986). The Supreme Court of Ohio, citing *Spaziano*, has repeatedly held that Ohio’s death penalty statutory scheme does not violate the Sixth or Eighth Amendments.

Austin Myers was sentenced pursuant to this judge-sentencing scheme. The jury’s verdict was merely a recommendation. The judge alone made the findings necessary to sentence Myers to death.

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

Did *Hurst v. Florida* render Ohio’s death penalty scheme unconstitutional?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner Myers states that no parties are corporations.

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The Supreme Court of Ohio's opinion, *State v. Myers*, 2018-Ohio-1903, 2018 WL 2254363 (2018), is reported and attached as Appendix A. The Supreme Court of Ohio denied a motion for reconsideration on August 1, 2018. *State v. Myers*, 153 Ohio St. 3d 1451, 2018-Ohio-3025, 103 N.E.3d 830 (2018). The October 16, 2014, Judgement Entry of Sentence where the trial court independently found that the aggravating circumstances outweighed the mitigating factors is attached as Appendix B. The October 17, 2014, Amended Judgment Entry and Sentence is attached as Appendix C.

JURISDICTION

On May 17, 2018, the Supreme Court of Ohio denied Mr. Myers' direct appeal. *State v. Myers*, 2018-Ohio-1903, 2018 WL 2254363 (2018). Appendix A. The Supreme Court of Ohio denied a motion for reconsideration on August 1, 2018. *State v. Myers*, 153 Ohio St. 3d 1451, 2018-Ohio-3025, 103 N.E.3d 830 (2018). The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

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

Amendment 14 of the United States Constitution provides, in relevant part: "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Ohio statutory provisions relevant to this petition, Ohio Rev. Code Ann. §§ 2929.03 and 2929.04, are reprinted in Appendix D and E.

INTRODUCTION

"The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*. A jury's mere recommendation is not enough." *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616, 619 (2016) (emphasis added).

In *Hurst*, this Court held that Florida’s capital sentencing scheme violated Hurst’s Sixth Amendment right to trial by jury because it required the judge, not a jury, to make factual determinations necessary to impose a sentence of death. The decision in *Hurst* applies equally to the Ohio capital sentencing scheme because the trial judge in Ohio is required to independently make and articulate additional “specific findings” in order to impose a sentence of death after receiving the jury’s recommendation of death. Therefore, Ohio’s capital sentencing scheme as set out in Ohio Rev. Code § 2929.03 (D)(3) violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Ohio’s scheme cannot survive *Hurst*’s broad mandate because a judge is not authorized to impose a sentence of death until the judge alone finds that the aggravating circumstances are sufficient. *Id.* Additionally, trial judges in Ohio play an unconstitutional “central and singular role” in finding facts necessary to impose a sentence of death, while juries are not required to make all specific factual findings necessary to impose a death sentence. *Hurst*, 136 S. Ct. at 622. Finally, Ohio Supreme Court precedent has long recognized that Ohio’s capital sentencing statutes are “remarkably similar” to the Florida statutes invalidated by *Hurst* and have consistently interpreted Ohio’s law to acknowledge that trial judges play this unconstitutional role. *State v. Rogers*, 28 Ohio St. 3d 427, 430 (1986), *rev’d on other grounds*, 32 Ohio St. 3d 70.

This Court should accept this case to clarify the rule of *Hurst*, a rule that has been understood and applied differently and inconsistently in multiple states,

including Florida, Delaware, Alabama, and Ohio. The Supreme Courts of Florida and Delaware have accepted the ruling in *Hurst* and found that their sentencing schemes violated the Sixth Amendment: *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016) (per curiam) (“[W]e hold that the Supreme Court’s decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury.”); *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam) (holding unconstitutional Delaware’s death penalty scheme because it did not require the jury to find that the aggravating circumstances outweighed the mitigating factors). The Supreme Courts of Alabama and Ohio, by contrast, interpreted *Hurst* narrowly and found no Sixth Amendment violation: *Ex Parte Bohannon*, 222 So.3d 525, 532 (Ala. 2016) (concluding that *Hurst* did not mention the jury’s weighing of the aggravating circumstances and mitigating factors and that “nothing in our review of *Apprendi*, *Ring*, and *Hurst* leads us to conclude that *Hurst* and the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence”); *State v. Mason*, 2018-Ohio-1462, ¶ 29 (“The Sixth Amendment was satisfied once the jury found Mason guilty of aggravated murder and a felony-murder capital specification.”). This Court should accept this case to resolve these conflicts in the interpretation of the Sixth Amendment right to a jury trial for capital sentencing as articulated in *Hurst*.

STATEMENT OF THE CASE

Austin Myers and Timothy Mosely, were charged with causing the death of Justin Back in Warren County, Ohio, in January 2014. Moseley, the actual killer and

principal offender, pled guilty and was sentenced to life without parole in exchange for his testimony against Myers. Myers demanded a jury trial. The jury found Myers guilty of aggravated murder and the death penalty specification that the murder occurred during the commission of an aggravate robbery. Appendix B.

At the time of Myers' trial, the Ohio statutory procedure required the trial judge, after receiving the jury's sentence recommendation, to conduct an independent assessment of the evidence to determine whether the jury's sentencing recommendation should be accepted, and the defendant sentenced to death.

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.

Ohio Rev. Code § 2929.03(F). Appendix D at 2.

The jury was confused as to whether the verdict they recommended would be accepts by the trial court. During death-qualification voir dire the prosecutor asked a prospective juror whether he "could return a recommendation for death." Tr. 367.

The defense objected and the trial court instructed the panel:

Ladies and gentlemen, [the prosecutor] has twice now used the term recommendation. It's not a recommendation, it's a verdict. Any verdict that is rendered by you should be considered by you as if it is absolute and will be carried out in this case. *** [S]o don't take what the attorneys say in this case as being the facts or the law. You'll get that later in the proceedings.

Tr. 368.

The trial court then instructed the jury before the sentencing phase deliberation, “In Ohio, a solitary juror may prevent a death penalty recommendation by finding the aggravating circumstances in the case does not outweigh the mitigating factors.” Sentencing Phase Tr. 151. The judge reinforced that the jury’s decisions was a mere “recommendation.”

Shortly thereafter, the jury returned its sentencing verdict, “We therefore unanimously find the sentence of death be imposed on Myers.” Sentencing Phase Tr. 162. The trial court made it clear that the court, not the jury, made the ultimate determination as to the weighing of the mitigation factors against the aggravating circumstances and whether a sentence of death should be imposed. The judge explained to Myers:

The verdict of the jury is a unanimous recommendation for the death penalty to be imposed. It is now incumbent upon the Court to determine whether or not this penalty is appropriate, and the Court will deliberate and make an independent determination using the same weighing process that was employed by the jury.

Sentencing Phase Tr. 167.

On October 16, 2014, at sentencing, the trial court once again explained:

With respect to the jury’s verdict, the jury did their job in this case. They were very thoughtful, they were very deliberate and the Court is proud of their service and humbled by the gravity in which they understood this difficult decision. Whether or not the Court ultimately agrees with their decision or not, does not mean that they were not correct in their evaluation of the aggravating circumstances and the mitigating factors. In Ohio, the death penalty is not handed down by a jury. It is imposed by a Judge. The Judge cannot even consider the death penalty until the jury has considered the case and unanimously determined that death is appropriate.

The Court has considered all the evidence and balanced the aggravating circumstances against the mitigating factors set forth above. The Court finds that the State has proven beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factor, therefore the sentence of death shall be imposed.

Sentencing Tr. 17-18, 21.

On October 16, 2014, the trial court filed its sentencing opinion pursuant to Ohio Rev. Code § 2929.03(F). Appendix B. The court wrote, “In the Sentencing Phase, the jury unanimously recommended a sentence of death be imposed.” Appendix B at 1.

Whether the Court ultimately agrees with their (the jury’s) decision or not does not mean that they were not correct in their evaluation of the Aggravating Circumstances and the Mitigating Factors. In Ohio, the death penalty is not handed down by a jury. It is imposed by a judge. This is how the system is designed to work. The judge cannot even consider the death penalty until a jury has considered the case and unanimously determined death is appropriate. However, the law requires the judge make a separate and independent determination as to the appropriateness of death as a sentence in this case without deference to the verdict of the jury.

The law does not allow a jury to be told their verdict is a recommendation for good reason: to do so would allow them to shift the responsibility to the Judge, thus denying the gravity, the immediacy and permanency of their decision. It is in this same vain that the law does not allow the judge to give deference to the verdict of the jury in a capital case. We do this for the exact same reason. To do so, would allow the Judge or the Court to shift its responsibility to the ultimate decision for this sentence.

Appendix B at 5.

On January 12, 2016, this Court decided *Hurst*. On May 5, 2016, following this Court's decision, Myers raised the recommendation issue on direct appeal to the Supreme Court of Ohio.

The Ohio Supreme Court found the prosecutor's use of "recommendation" during voir dire and the trial court's sentencing phase instruction impermissibly diminished the jury's sense of responsibility citing. The court cited *Caldwell v. Mississippi*, 472 U.S. 320 (1985), but found Myers could not demonstrate prejudice as a result of the "claimed" error. *State v. Myers*, 2018-Ohio-1903, 2018 WL 2254363 (2018). Appendix A. In *Caldwell*, this Court found, "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.

The Ohio Supreme Court's decision stands in direct conflict with this Court's decision in *Hurst*.

REASONS FOR GRANTING THE WRIT

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

Ohio's capital sentencing statute is unconstitutional pursuant to this Court's decision in *Hurst v. Florida* because the statute vests sentencing authority in the trial judge, instead of the jury. The statute specifically commands that it is the trial judge who makes specific, independent findings that are required to sentence a defendant to death. In *Hurst*, this Court held Florida's death penalty statute was unconstitutional because that statute required that the judge, not the

jury, makes all of the factual findings necessary to impose the death sentence. 136 S.Ct. at 624.

Myers was tried by a jury and sentenced pursuant to Ohio's death penalty statute, a sentencing scheme which the Supreme Court of Ohio has described as "remarkably similar to" the Florida statute declared unconstitutional in *Hurst. State v. Rogers*, 28 Ohio St.3d at 430 (noting Florida's statute was upheld in *Spaziano v. Florida*, 468 U.S. 447 (1984)), *rev'd on other grounds*, 32 Ohio St.3d 70 (1987).

In *Rogers*, the Supreme Court of Ohio held that "the Sixth Amendment provides no right to a jury determination of the punishment to be imposed; nor does the Ohio system impugn the Eighth Amendment." 28 Ohio St.3d at 430 (citing *Spaziano*, 468 U.S. at 464). The Supreme Court of Ohio explained that Ohio's death penalty statute vests only the judge with decision-making authority to sentence a defendant to death:

At the outset of the within analysis, it should be stated that Ohio's statutory framework for the imposition of the death penalty is altogether different from that of Mississippi, *most importantly in that Ohio has no "sentencing jury."* All power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial. The duty of the trial judge is set forth in R.C. 2929.03(D)(3).

Immediately obvious is that, under this provision, *the jury provides only a recommendation as to the imposition of the death penalty.* The trial court must thereafter independently re-weigh the aggravating circumstances against the mitigating factors and issue a formal opinion stating its specific findings, before it may impose the death penalty. R.C. 2929.03(F). *It is the trial court, not the jury, which performs the function of sentencing authority. Thus, no "sentencing jury" was involved in the proceedings below.* Furthermore, as actual sentencer, the trial court was "present to hear the evidence and arguments and see the witnesses" and was in a position to fully appreciate a plea for mercy. *Caldwell*, *supra*, at 331.

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

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

Rogers, 28 Ohio St.3d at 429-30 (emphasis added).

Under Ohio law:

The trial judge is charged by statute with the sole responsibility of personally preparing the opinion setting forth the assessment and weight of the evidence, the aggravating circumstances of the murder, and any relevant mitigating factors prior to determining what penalty should be imposed.

State v. Roberts, 110 Ohio St.3d 71, 93-94 (2006).

This Court should invalidate Ohio's judge-sentencing capital scheme, because, like Florida's *pre-Hurst* statute, it violates the Sixth, Eighth, and Fourteenth Amendments. *Hurst*, 136 S.Ct. at 622.

II. OHIO LAW PROVIDES FOR A JURY'S NON-BINDING RECOMMENDATION TO IMPOSE A DEATH SENTENCE AND THEN A JUDGE MAKES INDEPENDENT, NECESSARY FINDINGS AND DECIDES THE PENALTY.

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

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

Hurst, 136 S.Ct. at 620.

Pursuant to Ohio’s capital sentencing statute, the trial judge has the sole power and responsibility to sentence a defendant to death regardless of whether the penalty is determined by: (a) a panel of three judges if the defendant waives the right to a jury trial, or (b) the trial jury *and the trial judge*, if the defendant was tried by jury. Ohio Rev. Code § 2929.03(0)(2) (emphasis added); *Rogers*, 28 Ohio St.3d at 430. A death sentence is not authorized by law until the trial judge considers the evidence, makes specific findings, and memorializes in writing the decision to impose death. Ohio Rev. Code §§ 2929.03(D)(3)(a) & (3)(b) (absent those judicial findings, the trial court “shall impose” a term of life imprisonment).

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

Ohio, like Florida before *Hurst*, requires that a jury make a sentencing recommendation before the trial judge exercises independent fact-finding and decides whether to impose the death penalty. “The term ‘recommendation’ ...

accurately ... reflects Ohio law[.]” *Roberts*, 110 Ohio St. 3d at 92; *State v. Henderson*, 39 Ohio St.3d 24, 29-30 (1988). Unlike Florida, however, the Ohio statute does not assign “great weight” to the jury’s advisory death verdict. *Hurst*, 136 S.Ct. at 620. “[U]nder Ohio’s framework, the trial court is not a simple ‘buffer where the jury allows emotion to override the duty of a deliberate determination,’ [citation omitted], but is the authority in whom resides the sole power to initially impose the death penalty.” *Rogers*, 28 Ohio St.3d at 430 (distinguishing and quoting *Cooper v. State*, 336 So.2d 1133, 1140 (Fla. 1976)).

In Ohio, the jury’s non-binding death-verdict serves solely to trigger the next step in the sentencing process which is conducted by the judge, independent of the jury’s recommendation. *See State v. Jenkins*, 15 Ohio St. 3d 164, 203 (1984) (“[T]he jury in the penalty phase of a capital prosecution may be instructed that its recommendation to the court that the death penalty be imposed is not binding and that the final decision as to whether the death penalty shall be imposed rests with the court[.]”); *see also Steffen v. Ohio*, 485 U.S. 916, 919 (1988) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting from denial of certiorari) (accepting this construction of the law by the Ohio Supreme Court but nonetheless voting to review the case for *Caldwell* error). As explained by the Ohio Supreme Court, “no ‘sentencing jury’ is involved” in the ultimate sentencing decision. *Rogers*, 28 Ohio St. 3d at 429.

B. Ohio law vests trial judges with “the sole power to initially impose the death penalty.”¹

Ohio law “delegates the death sentencing responsibility to the trial court upon its separate and independent finding that the aggravating factors outweigh the mitigating factors in th[e] case.” *State v. Buell*, 22 Ohio St.3d 124, 144, (1986) (citing Rev. C. § 2929.03(D)(3)). The statutory deliberative process of Ohio judge-sentencing in capital cases has been deemed an “austere duty” that must be made by the trial judge “in isolation.” *Roberts*, 110 Ohio St.3d at 94. The judge is charged by statute with the sole responsibility of independently determining whether the punishment will be life or death.² *State v. Clark*, 38 Ohio St.3d 252, 259 (Ohio 1988) (“the jury’s decision [i]s a recommendation that the trial court need not accept.”). In other words: “the power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial[,]” wherein the jury “provides only a *recommendation* as to the imposition of the death penalty.” *Rogers*, 28 Ohio St.3d at 429; *see also State v. Holmes*, 30 Ohio App.3d 26, 27 (1986) (“[T]he trial court still retains the responsibility for making the final decision as to whether to impose the death penalty, because the jury’s recommendation of a death penalty is not binding upon the court.”).

¹ *Rogers*, 28 Ohio St.3d at 430.

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

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

III. APPLICATION OF HURST TO OHIO'S CAPITAL SENTENCING SCHEME.

In *Hurst*, this Court broadly criticized the Florida death penalty scheme because of the lack of specific factual findings from the jury regarding the existence of mitigation of aggravating circumstances, leaving trial courts without the assistance of a jury's findings of fact. *Hurst*, 136 S.Ct. at 622. Applying this rule to Florida's statute, this Court noted that although a Florida jury recommends a sentence "it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." *Id.* This Court held Florida's statute unconstitutional because

the statute placed the judge in the “central and singular role” of making a defendant eligible for death by requiring the judge independently to find “the facts ... [t]hat sufficient aggravating circumstances exist and ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.’” *Id.* (quoting ...Fla. Stat. § 921.141(3)). The fact that a Florida judge was required to afford “great weight” to the jury's recommendation did not cure the statute’s unconstitutional mandate that the trial court exercise “independent judgment” and make fact-findings. *Hurst*, 136 S.Ct. at 620, 622.

Ohio is no different from Florida in that regard. Ohio courts have long-aligned Ohio’s capital sentencing statute with Florida’s, characterizing the two as “remarkably similar.” *Rogers*, 28 Ohio St.3d at 429-30; *see also State v. Broom*, 40 Ohio St.3d 277, 291-92 n.5 (1988) (comparing Ohio’s statute to Florida’s); *Buell*, 22 Ohio St.3d at 139-41 (same). The Ohio death penalty scheme suffers the same constitutional deficiencies as Florida’s *pre-Hurst* statute because the Ohio statute requires the judge to make independent, specific findings and determine “by proof beyond a reasonable doubt, ... that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors[.]” Ohio Rev. Code § 2929.03(D)(3).

The Ohio Supreme Court unequivocally explained that the judge is the sentencing authority who independently makes all findings necessary to impose the death penalty. *Rogers, supra; Broom, supra.*³ “No Ohio court is bound by the

³ *See also State v. Franklin*, 97 Ohio St.3d 1, 10 (2002) (there is no error when instructing jurors that their sentence is only a recommendation because that is an accurate statement of law); *State v. Keenan*, 81 Ohio St.3d 133, 153, (1998) (same); *State v. Phillips*, 74 Ohio St.3d 72, 101 (1995) (same); *State v. Durr*, 58

jury's weighing[.]" *State v. Williams*, 23 Ohio St.3d 16, 22 (1986), and there is "no 'sentencing jury'... involved" in the ultimate sentencing decision. *Rogers*, 28 Ohio St.3d at 429.⁴ The requirement that a judge make specific findings and articulate them in a written opinion is a critical step in imposing a sentence of death. Ohio Rev. Code § 2929.03(F). This has long been recognized by the Supreme Court of Ohio:

R.C. 2929.03 governs the imposition of sentences for aggravated murder. R.C. 2929.03(F) clearly contemplates that the trial court itself will draft the death-sentence opinion: "*The court * * * when it imposes sentence of death, shall state in a separate opinion its specific findings* as to the existence of any of the mitigating factors * * *, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

Roberts, 110 Ohio St.3d at 93 (Emphasis added).

The Ohio Supreme Court, in *Roberts*, stressed the "crucial role" of the trial court when imposing a sentence of death:

Our prior decisions have stressed the crucial role of the trial court's sentencing opinion in evaluating all of the evidence, including mitigation evidence, and in carefully weighing the specified aggravating circumstances against the mitigating evidence in determining the appropriateness of the death penalty.

Roberts, 110 Ohio St.3d at 93.

The court further observed:

The trial court's delegation of any degree of responsibility in this sentencing opinion does not comply with *R.C. 2929.03(F)*. Nor does it

Ohio St.3d 86, 93-94 (1991) (same); *State v. Beuke*, 38 Ohio St.3d 29, 34-35 (1988) (same) (collecting cases).

⁴ See also *State v. Glenn*, No. 89-P-2090, 1990 WL 136629, *56 (11th Dist. Sept. 21, 1990) ("Ohio has 'no sentencing jury.'"); *State v. Fort*, No. 52929, 1988 WL 11080, *24*59-60 (8th Dist. Feb. 4, 1988) (same).

comport with our firm belief that the consideration and imposition of death are the most solemn of all the duties that are imposed on a judge, as Ohio courts have also recognized. [citation and quotation omitted]. The judge alone serves as the final arbiter of justice in his courtroom, and he must discharge that austere duty in isolation.

Id. at 93-94. (invalidating a trial judge’s sentence that is not the product of its own, independent analysis and conclusions).

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

[T]he General Assembly has set specific standards in the statutory framework it created to guide a sentencing court's discretion “by requiring examination of *specific factors* that argue in favor of or against imposition of the death penalty[.]

State v. Davis, 38 Ohio St.3d 361, 372-73 (1988) (citation omitted).

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

The Ohio Supreme Court has repeatedly upheld the State’s death penalty statute on the authority of *Spaziano v. Florida*, 468 U.S. at 460-65, and the

proposition that investing capital sentencing authority in the trial judge does not violate either the Sixth or Eighth Amendments. *See, e.g., State v. Davis*, 139 Ohio St.3d 122 (2014) (“neither the Sixth nor the Eighth Amendment creates a constitutional right to be *sentenced* by a jury, even in a capital case”) (citing *Spaziano*, 468 U.S. at 459); *Rogers*, 28 Ohio St.3d at 429 (“a judge may be vested with sole responsibility for imposing the [death] penalty”) (quoting *Spaziano*, 468 U.S. at 465). *Hurst* expressly overrules *Spaziano*’s holding “that there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed[.]” 468 U.S. at 465.

“[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” *California v. Ramos*, 463 U.S. 992, 998-99 (1983). Relying on this fundamental distinction, Justice Marshall in *Caldwell v. Mississippi* emphasized the need for jurors to appreciate their “awesome responsibility” when determining the appropriateness of death. *Caldwell v. Mississippi*, 472 U.S. 321, 330 (1985). “State-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court,” [*Caldwell*, 472 U.S. at 330] presents the danger that “the jury will choose to minimize the importance of its role,” [*Caldwell*, 472 U.S. at 333] especially where they are told that the finality of their sentence rests with the court. “Even when a jury is unconvinced that death is appropriate, their desire to ‘send a message’ of disapproval for the defendant’s acts... [makes] the jury especially receptive to a prosecutor’s reassurances that they can more freely ‘err because the error may be corrected on appeal.’” *Caldwell*, 472 U.S. at 331, citing *Maggio v.*

Williams, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring in judgment). “A defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence.” *Caldwell*, 472 U.S. at 331-32.

Further, Ohio jurors are assured that a sentence of life in prison cannot be increased to a death sentence on appeal, thus increasing the risk the jury may base their death sentence in a desire to avoid responsibility for it. *Caldwell*, 472 U.S. at 332, citing *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984). Perhaps worst of all is the potential for nullifying true unanimity amongst jurors, where the possibility of appellate review is used to persuade those reluctant to invoke the death sentence to “give in.” *Caldwell*, 472 U.S. at 333. Allowing Ohio’s statutory scheme to remain unchallenged ignores these long-held assertions that jurors must maintain and be reminded of the gravity of their decision, without the comfortability of deference to the court. It was an accurate statement of Ohio law then, and it is an accurate statement of Ohio law now. After *Hurst*, we know that Ohio’s law does not pass constitutional muster.

CONCLUSION

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

Respectfully submitted,

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