

No. 18-6532

**In the Supreme Court of the United States**

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AUSTIN MYERS,

*Petitioner,*

v.

OHIO,

*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF OHIO*

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**BRIEF IN OPPOSITION TO THE  
PETITION FOR WRIT OF CERTIORARI**

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## **CAPITAL CASE**

### **QUESTION PRESENTED**

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

## **LIST OF PARTIES**

The Petitioner is Austin Myers, an inmate at the Chillicothe Correctional Institution in North Chillicothe, Ohio.

The Respondent is the State of Ohio.

## TABLE OF CONTENTS

QUESTION PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	iv-v
CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE .....	vi
STATEMENT OF JURISDICTION.....	vii
STATEMENT OF STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE .....	viii-xxiii
STATEMENT OF THE CASE.....	1-5
ARGUMENT .....	6-12
REASONS FOR DENYING THE WRIT .....	6-12
I.    Myers' Question Presented should be denied because this Court has already denied certiorari on the same question and Ohio's death penalty scheme is constitutional.....	6-12
CONCLUSION.....	13

## TABLE OF AUTHORITIES

### Cases

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	12
<i>Caldwell v. Mississippi</i> , 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).....	7
<i>Hurst v. Florida</i> , -- U.S. --, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) .....	6, 7, 9, 10, 11, 12
<i>Mason v. Ohio</i> , No. 18-5303, 2018 WL 3575807 (U.S. Nov. 5, 2018).....	6
<i>Ring v. Arizona</i> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).....	6, 9, 11, 12
<i>State v. Belton</i> , 2016-Ohio-1581, 74 N.E.3d 319 .....	9
<i>State v. Hoffner</i> , 2004-Ohio-3430, 811 N.E.2d 48 .....	7, 9
<i>State v. Mason</i> , 2018-Ohio-1462, 108 N.E.3d 56.....	6, 7, 8, 9, 10, 11, 12
<i>State v. Myers</i> , 2018-Ohio-1903, -- N.E.3d -- .....	2, 3, 4, 5
<i>State v. Myers</i> , 2018-Ohio-3025, 103 N.E.3d 830.....	5
<i>State v. Rogers</i> , 504 N.E.2d 52 (Ohio 1986) .....	6, 7
<i>State v. Skatzes</i> , 2004-Ohio-6391, 819 N.E.2d 215 .....	9
<i>State v. Springer</i> , 586 N.E.2d 96 (Ohio 1992).....	8

### Statutes

Former Fla. Stat. 921.141(2).....	10
Ohio Rev. Code Ann. §2903.01(A) .....	1
Ohio Rev. Code Ann. §2903.01(B) .....	1
Ohio Rev. Code Ann. §2905.01(A)(2).....	1
Ohio Rev. Code Ann. §2911.01(A)(3).....	1
Ohio Rev. Code Ann. §2911.11(A)(1).....	1
Ohio Rev. Code Ann. §2911.21(A) .....	1

Ohio Rev. Code Ann. §2913.02(A)(1).....	1
Ohio Rev. Code Ann. §2921.12(A)(1).....	1
Ohio Rev. Code Ann. §2927.01(B) .....	1
Ohio Rev. Code Ann. §2929.03(A) .....	7
Ohio Rev. Code Ann. §2929.03(B) .....	7, 9, 10
Ohio Rev. Code Ann. §2929.03(C)(2).....	8, 9
Ohio Rev. Code Ann. §2929.03(C)(2)(b) .....	8
Ohio Rev. Code Ann. §2929.03(D)(1).....	8
Ohio Rev. Code Ann. §2929.03(D)(2).....	8, 9
Ohio Rev. Code Ann. §2929.03(D)(3).....	8
Ohio Rev. Code Ann. §2929.03(F).....	8, 11
Ohio Rev. Code Ann. §2929.04(A) .....	7
Ohio Rev. Code Ann. §2929.04(A)(7).....	1
Ohio Rev. Code Ann. §2929.04(B)(6).....	5

## **Rules**

Ohio Crim.R. 29(C) .....	12
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## **Constitutional Provisions**

U.S. Const. amend. VI .....	6, 7, 9, 10, 11, 12
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**CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS  
OF THE OPINIONS AND ORDERS ENTERED IN THE CASE**

*State v. Myers*, 2018-Ohio-1903, -- N.E.3d -- (Opinion of Supreme Court of Ohio affirming conviction and sentence)

*State v. Myers*, 2018-Ohio-3025, 103 N.E.3d 830 (Decision of Supreme Court of Ohio denying Motion for Reconsideration)

*State v. Myers*, No. 14CR29826 (Oct. 16, 2014) (Warren County Common Pleas Court, Judgment Entry of Sentence on Aggravated Murder with Death Specifications Pursuant to R.C. §2929.03(F))

## STATEMENT OF JURISDICTION

28 U.S.C. § 1257 sets forth this Court's jurisdiction to review final judgments or decrees rendered by the highest court of a State. Section (a) of that provision states:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

It is Respondent's position that Petitioner's Question Presented does not satisfy this provision. Ohio's death penalty statutes are not repugnant to, and do not violate any right, privilege, or immunity of the Petitioner under, the United States Constitution. Therefore, this Court does not have jurisdiction to consider the question submitted by Petitioner.



**STATEMENT OF STATUTES, RULES, AND CONSTITUTIONAL  
PROVISIONS INVOLVED IN THE CASE**

**STATUTES**

**28 U.S.C. § 1257 State courts; certiorari**

- (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
- (b) For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

**Ohio Rev. Code Ann. §2929.03 (2014) Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences**

- (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 sentence of the offender as follows:
- (1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:
- (a) Life imprisonment without parole;
- (b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

- (c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
  - (d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
  - (e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.
- (2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.
- (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 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. The instruction to the jury 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 the instruction shall not mention the penalty that 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 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court

does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)(a) 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 one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite

term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) 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 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 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 the offender's 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, the offender is subject to cross-examination only if the offender 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 one of the following:

- (a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;
- (b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life

imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

- (c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. 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, by proof beyond a reasonable doubt, 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) Except as provided in division (D)(3)(b) of this section, one of the following:
  - (i) Life imprisonment without parole;
  - (ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
  - (iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
  - (iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.
- (b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.
- (E) If the offender raised the matter of age at trial pursuant to section 2929.023 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 of 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) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or 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 or an indefinite term consisting of a minimum term of thirty years and a maximum term of 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. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, 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. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division 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)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

**Ohio Rev. Code Ann. §2929.04 (2014) 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 a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person 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 under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention"

has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

- (a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.
- (b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section 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, of 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 law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.
- (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 the victim's 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 the victim's testimony in any criminal proceeding.
- (9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.
- (10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.
- (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 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 the offender's conduct or to conform the offender's 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 facts 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 three judges against the aggravating circumstances the offender was found guilty of committing.

## **CONSTITUTIONAL PROVISIONS**

### **U.S. Const. amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.



## STATEMENT OF THE CASE

On February 24, 2014, a Warren County Grand Jury charged Defendant-Petitioner Austin Myers in a nine-count indictment with:

- aggravated murder (purposeful and with prior calculation and design) in violation of Ohio Rev. Code Ann. §2903.01(A) with aggravating circumstances (death penalty) specifications;
- aggravated felony murder in violation of Ohio Rev. Code Ann. §2903.01(B) with aggravating circumstances (death penalty) specifications;
- kidnapping in violation of Ohio Rev. Code Ann. §2905.01(A)(2);
- aggravated robbery in violation of Ohio Rev. Code Ann. §2911.01(A)(3) with a one-year firearm specification;
- aggravated burglary in violation of Ohio Rev. Code Ann. §2911.11(A)(1) with a one-year firearm specification;
- grand theft of a firearm in violation of Ohio Rev. Code Ann. §2913.02(A)(1) with a one-year firearm specification;
- tampering with evidence in violation of Ohio Rev. Code Ann. §2921.12(A)(1);
- safecracking in violation of Ohio Rev. Code Ann. §2911.21(A); and
- abuse of a corpse in violation of Ohio Rev. Code Ann. §2927.01(B) with a three-year firearm specification.

(Record, Docket Entry 5)

Each of the aggravated murder counts had the same three aggravating circumstances (death penalty) specifications in violation of Ohio Rev. Code Ann. §2929.04(A)(7) attached: (1) that the offense was committed while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and he was the principal offender in the

commission of the offense or, if not the principal offender, committed the offense with prior calculation and design; (2) that the offense was committed while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary, and he was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design; and (3) that the offense was committed while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery, and he was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design. (Record, Docket Entry 5)

Specifically, Myers and his co-defendant, Timothy Mosley, conspired to commit the aggravated murder of Myers' childhood friend, Justin Back. (Record, Docket Entry 89) *See also State v. Myers*, 2018-Ohio-1903, ¶ 1-15, -- N.E.3d --. After planning the aggravated murder, purchasing multiple items at various stores to commit and cover up the aggravated murder, and constructing a homemade garrote, or "choke wire," Myers and Mosley went to Back's home in Waynesville, Ohio, where Back resided with his mother and step-father, who were not at home at the time. (Record, Docket Entry 89) *Myers*, at ¶ 2-15. Back welcomed them inside and, in accordance with Myers' and Mosley's plan, Mosley assaulted Back by putting the garrote over Back's head in an attempt to strangle him, while Myers grabbed Back to restrain him. (Record, Docket Entry 89) *Myers*, at ¶ 16. Back resisted, and a struggle ensued on the floor. (Record, Docket Entry 89) *Myers*, at ¶ 17-19. Mosley, in a panic, pulled out his pocket knife and stabbed Back in the back and chest, while Myers pulled on the garrote around Back's neck. *Myers*, at ¶ 19. After killing Back, Myers and Mosley stole a safe, jewelry, a firearm, and other items from the home before dumping Back's dead body in a wooded area in Preble County, Ohio. (Record,

Docket Entry 89) *Myers*, at ¶ 20-21, 24-25. Myers then shot two rounds into the body with the stolen firearm. (Record, Docket Entry 89) *Myers*, at ¶ 26. They then opened the stolen safe, burned bloody clothing and other evidence in Mosley's backyard, and disposed of the safe and other evidence. (Record, Docket Entry 89) *Myers*, at ¶ 27-29.

The case proceeded to a jury trial on September 22, 2014. (Record, Jury Trial Transcript 1) The trial phase was conducted from September 22 to October 1, 2014. (Record, Jury Trial Transcript 1) The jury found Myers guilty beyond a reasonable doubt of all counts, aggravating circumstances (death penalty) specifications, and firearm specifications. (Record, Jury Trial Transcript 1767-72)

After the trial court merged the aggravated murder counts and the specifications to those counts and the State elected to proceed on the aggravating circumstances specification relating to aggravated robbery, the case proceeded to the sentencing phase of the trial before a jury on October 6, 2014. (Record, Jury Trial Transcript 1788; Record, Sentencing Phase Transcript 1) After considering the evidence presented in the sentencing phase and weighing the aggravating circumstance and the mitigating factors, the jury found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt and unanimously found that death be imposed against Myers. (Record, Sentencing Phase Transcript 162; Record, Docket Entry 315)

Contrary to Myers' assertion, the jury that was seated in his case was not confused about its role in the sentencing phase. After the assistant prosecutor referred to the jury's sentencing verdict as a "recommendation" during voir dire, the trial court instructed the panel that "[a]ny verdict that is rendered by you should be considered by you as if it is absolute and will be carried out in this case." (Record, Jury Trial Transcript 368) Moreover, as the Supreme Court of Ohio recognized in its decision affirming Myers' convictions and sentence, "[n]one of the prospective jurors on the panel

at the time of the alleged error ultimately served on the jury.”<sup>1</sup> *Myers*, at ¶ 98. After the close of evidence in the sentencing phase, the court instructed the jury:

If all twelve of you find that the State of Ohio proved beyond a reasonable doubt the aggravating circumstance the defendant was found guilty of committing is sufficient to outweigh the mitigating factors in this case, then it will be your duty to decide the sentence of death shall be imposed on Austin Myers. If you find the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstance Austin Myers was guilty of committing is sufficient to outweigh the mitigating factors present in the case, then it will be your duty to decide which of the following life sentence alternatives will be imposed.

(Record, Sentencing Phase Transcript 150)

After having received the jury’s verdict in the sentencing phase, the trial court independently considered the evidence and weighed the aggravating circumstance and mitigating factors, found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt, and imposed the sentence of death against Myers. (Record, Docket Entry 319) The court’s decision was journalized in its October 16, 2014 Judgment Entry of Sentence on Aggravated Murder with Death Specifications Pursuant to Ohio Rev. Code Ann. §2929.03(F). (Record, Docket Entry 319)

On the same day, the court sentenced Myers to a total term of fifteen years in prison for the kidnapping, aggravated robbery, aggravated burglary, grand theft of a firearm, tampering with evidence, safecracking, abuse of a corpse, the three-year firearm specification, and the one-year firearm specification that remained after merger, to be served concurrently with the sentence for aggravated murder. (Record, Docket Entry 321) The court filed a judgment entry to that effect on

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<sup>1</sup> Myers is incorrect when he states on page 8 of his petition that the Supreme Court of Ohio found that the assistant prosecutor’s use of the term “recommendation” “impermissibly diminished the juries [sic] sense of responsibility.” The Court stated that “*Myers contends* that the prosecutor’s use of ‘recommendation’ impermissibly diminished the jury’s sense of responsibility[.]” *Myers*, at ¶97 (emphasis added). The Court did not find that it was error, stating only that “Myers can demonstrate no prejudice as a result of his *claimed* error.” *Myers*, at ¶97 (emphasis added).

October 16, 2014. (Record, Docket Entry 321) An amended judgment entry was filed the next day. (Record, Docket Entry 322)

Thereafter, Myers filed a direct appeal in the Supreme Court of Ohio, which affirmed his convictions and the imposition of the death penalty on May 17, 2018. *Myers*, at ¶ 1, 231. The court independently reviewed Myers' death sentence and found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. *Myers*, at ¶ 204-226. Regarding the Ohio Rev. Code Ann. §2929.04(B)(6) mitigating factor, degree of participation, the court found that the factor was not entitled to significant weight due to Myers' role in the aggravated murder. *Myers*, at ¶ 222. The court wrote:

Even though Myers did not inflict the fatal wounds, he had a large role in the offense. He came up with the idea of stealing the safe and of killing Back to get it. He chose that as an easy way to make some money over the alternative of robbing or burglarizing a drug dealer. He rejected Mosley's proposal to burglarize the Cateses' house on January 27, when they knew no one was home. He came up with the initial idea of killing Back, and he brainstormed with Mosley to arrive at the plan of making and using a garrote. He bought the materials to make the garrote.

Myers also extensively participated "in the acts that led to the death of the victim." He restrained Back while Mosley slipped the garrote over Back's head and continued to restrain him when Mosley, having failed in his attempt to strangle Back, pulled his knife and began stabbing him.

*Myers*, at ¶ 222-223 (citation omitted). The court also found the death sentence to be proportionate to death sentences affirmed in similar cases. *Myers*, at ¶ 227. Myers asked the Supreme Court of Ohio to reconsider its decision, which the State opposed. On August 1, 2018, the court denied his motion for reconsideration. *State v. Myers*, 2018-Ohio-3025, 103 N.E.3d 830.

On October 30, 2018, Myers filed a petition for a writ of certiorari and a motion for leave to proceed *in forma pauperis* in this Court. The State of Ohio hereby responds.

## ARGUMENT

### Reasons for Denying the Writ

#### **I. Myers' Question Presented should be denied because this Court has already denied certiorari on the same question and Ohio's death penalty scheme is constitutional.**

Although Myers did not challenge the constitutionality of Ohio's death penalty scheme in the trial court or on appeal, Myers asks this Court for a writ of certiorari to review the question of whether *Hurst v. Florida*, -- U.S. --, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) rendered Ohio's death penalty scheme unconstitutional. Respondent State of Ohio asks this Court to deny his petition because this Court has already denied certiorari on the same question, and Ohio's death penalty scheme is constitutional.

The Supreme Court of Ohio held in *State v. Mason*, 2018-Ohio-1462, ¶ 43, 108 N.E.3d 56 that Ohio's death penalty scheme does not violate a defendant's right to a trial by jury as guaranteed by the Sixth Amendment to the United States Constitution. On July 16, 2018, the defendant in that case filed a petition for a writ of certiorari in this Court in Case No. 18-5303. The question presented was whether Ohio's death penalty scheme accords with the Sixth Amendment right to trial by jury as articulated in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and *Hurst*. This Court denied the petition on November 5, 2018. *Mason v. Ohio*, No. 18-5303, 2018 WL 3575807 (U.S. Nov. 5, 2018). The State asks this Court to deny Myers' petition on the same issue for the same reasons.

Moreover, Ohio's death penalty scheme is constitutional under the Sixth Amendment. Myers cites *State v. Rogers*, 504 N.E.2d 52 (Ohio 1986) for the proposition that, in Ohio, "[a]ll power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial." However, the question of whether Ohio's death penalty scheme comports with the Sixth Amendment was not before the Supreme Court of Ohio in *Rogers*. See

*Mason*, 2018-Ohio-1462, at ¶ 33. Rather, the issue decided in *Rogers* was whether statements made during the mitigation phase of trial violated *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) by minimizing the importance of the jury's role. The Supreme Court of Ohio noted in *Rogers* that the Ohio and Florida systems are similar in that they both allow for jury recommendations, but it did not consider the findings that the jury is required to make before recommending a sentence. *Mason*, 2018-Ohio-1462, at ¶ 33.

More recently, in *Mason*, the Supreme Court of Ohio squarely addressed the Sixth Amendment issue. To determine the issue, the court thoroughly reviewed Ohio's death penalty scheme and the reasons this Court found Florida's death penalty scheme unconstitutional in *Hurst*. After its thorough review of Ohio's death penalty statutes, *Hurst*, and the relevant and applicable case law governing the Sixth Amendment issue, the court stated that "Ohio's capital-sentencing scheme places the responsibility for making all factual determinations regarding whether a defendant should be sentenced to the death with the jury." *Mason*, 2018-Ohio-1462, at ¶ 17, citing *State v. Hoffner*, 2004-Ohio-3430, ¶ 69, 811 N.E.2d 48. The court's analysis and holding are instructive.

The court first described what is statutorily required for a death sentence to be imposed in Ohio:

First, to face the possibility of a death sentence, a defendant must be charged in an indictment with aggravated murder and at least one specification of an aggravating circumstance. R.C. 2929.03(A) and (B). . . .<sup>2</sup>

Second, the jury verdict must state that the defendant is found guilty of aggravated murder and must state separately that he is guilty of at least one charged specification. R.C. 2929.03(B). The state must prove guilt of the principal charge and of any specification beyond a reasonable doubt. *Id.*; R.C. 2929.04(A). . . .

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<sup>2</sup> Citation by the Supreme Court of Ohio to "R.C." indicates citation to sections of the Ohio Revised Code Annotated.

Third, once the jury finds the defendant guilty of aggravated murder and at least one specification, he will be sentenced either to death or to life imprisonment. R.C. 2929.03(C)(2). When the defendant is tried by a jury, the penalty “shall be determined \* \* \* [b]y the trial jury and the trial judge.” R.C. 2929.03(C)(2)(b).

Fourth, in the sentencing phase, the court and trial jury shall consider (1) any presentence-investigation or mental-examination report (if the defendant requested an investigation or examination), (2) the trial evidence relevant to the aggravating circumstances the offender was found guilty of committing and relevant to mitigating factors, (3) additional testimony and evidence relevant to the nature and circumstances of the aggravating circumstances and any mitigating factors, (4) any statement of the offender, and (5) the arguments of counsel. R.C. 2929.03(D)(1). In this proceeding, the state must prove 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.*

Fifth, the *jury finds* and then recommends the sentence: “If the *trial jury* unanimously *finds*, by proof beyond a reasonable doubt, that the aggravating circumstances \* \* \* outweigh the mitigating factors, the *trial jury* shall recommend to the court that the sentence of death be imposed on the offender.” (Emphasis added.) R.C. 2929.03(D)(2). But “[a]bsent such a finding” by the jury, the jury shall recommend one of the life sentences set forth in R.C. 2929.03(D)(2), and the trial court “shall impose the [life] sentence recommended.” *Id.* Also, if the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence. *State v. Springer*, 63 Ohio St.3d 167, 586 N.E.2d 96 (1992), syllabus.

Sixth, if the trial jury recommends a death sentence, and if “the *court finds*, by proof beyond a reasonable doubt, \* \* \* that the aggravating circumstances \* \* \* outweigh the mitigating factors, [the court] shall *impose* sentence of death on the offender.” (Emphasis added.) R.C. 2929.03(D)(3). Then, the court must state in a separate opinion “the reasons why the aggravating circumstances \* \* \* were sufficient to outweigh the mitigating factors.” R.C. 2929.03(F).

*Mason*, 2018-Ohio-1462, at ¶7-12 (alteration in original). All of these steps were followed in Myers’ case.



**A. Ohio’s death penalty scheme is materially different than Florida’s pre-*Hurst* or Arizona’s pre-*Ring* schemes.**

The Supreme Court of Ohio explained in *Mason* why the death penalty scheme in Ohio is unlike the ones invalidated by this Court in *Hurst* and, before that, in *Ring*. The death penalty scheme in Arizona that was invalidated in *Ring* required the trial judge alone to find the aggravating facts necessary to sentence a defendant to death. *Mason*, 2018-Ohio-1462, at ¶14, citing *Ring*, at 609. Similarly, the death penalty scheme in Florida that was invalidated in *Hurst* did “not require the jury to make the critical findings necessary to impose the death penalty.” *Mason*, 2018-Ohio-1462, at ¶16, quoting *Hurst*, 136 S.Ct. at 622. Florida’s scheme violated the Sixth Amendment because Florida law “required the judge alone to find the existence of an aggravated circumstance.” *Mason*, 2018-Ohio-1462, at ¶16, quoting *Hurst*, 136 S.Ct. at 624.

In contrast,

[w]hen an Ohio capital defendant elects to be tried by jury, the jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and – unlike the juries in *Ring* and *Hurst* – the aggravating-circumstance specifications for which the offender was indicted. R.C. 2929.03(B). Then the jury – again unlike in *Ring* and *Hurst* – must “unanimously find[ ], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors.” R.C. 2929.03(D)(2). An Ohio jury recommends a death sentence only after it makes this finding. *Id.* And without that recommendation by the jury, the trial court may not impose the death sentence.

Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*. See R.C. 2929.03(C)(2). Ohio’s death-penalty scheme, therefore, does not violate the Sixth Amendment.

*Mason*, 2018-Ohio-1462, at ¶ 20-21 (alteration in original). See also *State v. Belton*, 2016-Ohio-1581, ¶ 59-60, 74 N.E.3d 319; *State v. Skatzes*, 2004-Ohio-6391, ¶ 221, 819 N.E.2d 215; *Hoffner*, at ¶ 69-70.

**B. The statutory requirement in Ohio that the jury “shall recommend” to the court that the sentence of death be imposed does not make Ohio’s death penalty scheme similar to the one invalidated in *Hurst*.**

In upholding the constitutionality of Ohio’s death penalty scheme in *Mason*, the Supreme Court of Ohio addressed Mason’s argument, also raised by Myers in this case, that an Ohio jury’s death-verdict is advisory only. In response to that argument, the Supreme Court of Ohio detailed the material differences between the process by which an Ohio jury reaches its death recommendation and the Florida process at issue in *Hurst*. *Mason*, 2018-Ohio-1462, at ¶ 30.

The court explained:

The Florida statute required the jury to render an “advisory sentence” after hearing the evidence presented in a sentencing-phase proceeding:

Advisory sentence by the jury. —After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Former Fla. Stat. 921.141(2). In *Hurst*, the court held that the Florida scheme violated the Sixth Amendment because it did not require the jury to find that Hurst was guilty of committing a specific aggravating circumstance. *Hurst* at ---, 136 S.Ct. at 622, 624.

Ohio law, in contrast, requires a jury to find the defendant guilty beyond a reasonable doubt of at least one aggravating circumstance, R.C. 2929.03(B), before the matter proceeds to the penalty phase, when the jury can recommend a death sentence. Ohio’s scheme differs from Florida’s because Ohio requires the jury to make this specific and critical finding.

*Mason*, 2018-Ohio-1462, at ¶ 31-32.

**C. The absence of required factual findings by the jury does not render Ohio's death penalty scheme constitutionally infirm.**

As for Mason's reliance on *Hurst*'s reference to the "specific factual findings" by a jury that were lacking under Florida's scheme, upon which Myers also relies and contrasts with the findings that the trial court is required to make, the Supreme Court of Ohio stated as follows:

While it is true that a trial court must fully explain its reasoning for imposing a sentence of death, Mason does not provide any support for the proposition that the Sixth Amendment requires *a jury* to explain why it found that the aggravating circumstances outweigh the mitigating factors. In citing *Hurst* for this proposition, Mason fails to appreciate that Florida's statutory scheme violated the Sixth Amendment because the jury did not specify its finding of which aggravating circumstance supported its recommendation, not because the jury did not explain why it found that the aggravating circumstances were not outweighed by sufficient mitigating circumstances.

*Mason*, 2018-Ohio-1462, at ¶ 35.

The court also rejected Mason's argument that the Sixth Amendment requires the jury to make findings regarding mitigating factors or to specify the factors that it considered in mitigation. *Id.* at ¶ 38. *Ring* and *Hurst* "recognized that the Sixth Amendment guarantees that a jury will determine the facts that serve to *increase* the maximum punishment." *Mason*, 2018-Ohio-1462, at ¶ 38. "Because a finding that mitigating facts exist is not 'necessary to impose a sentence of death,'" the Supreme Court of Ohio found that argument to be meritless. *Mason*, at ¶ 38.

**D. Ohio Rev. Code Ann §2929.03(F) states that the judgment in a capital case is not final until the court files a written sentencing opinion. It also states that such sentencing opinion must include the court's findings as to the existence of any 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. Neither of those requirements makes Ohio's death penalty scheme unconstitutional.**

Finally, regarding Mason's concern about the trial court's independent findings that culminate in a written sentencing opinion, which Myers shares, the Supreme Court of Ohio

found that Mason misapprehended the issue, “framing it as a question whether a death sentence ‘can be imposed,’ instead of whether it ‘will be imposed.’ Ohio does not permit the trial judge to find *additional* aggravating facts but requires the judge to determine, independent of the jury, whether a sentence of death *should* be imposed.” *Mason*, 2018-Ohio-1462, at ¶ 39. Under Ohio’s scheme, “the trial court cannot *increase* an offender’s sentence based on its own findings. Rather, the trial court safeguards offenders from wayward juries, similar to how a court might grant a motion for acquittal following a jury verdict under [Ohio] Crim.R. 29(C).” *Mason*, 2018-Ohio-1462, at ¶ 40 (alteration added). Additionally, *Hurst* and *Ring* decry judicial fact-finding only “in the context of reviewing statutory schemes that fail to provide for any *jury* fact-finding on critical questions.” *Mason*, 2018-Ohio-1462, at ¶ 41.

*Hurst* did not hold that the jury alone must decide whether a sentence of death will be imposed. *Mason*, 2018-Ohio-1462, at ¶ 42. “Ohio trial judges may weigh aggravating circumstances against mitigating factors and impose a death sentence only after the jury itself has made the critical findings and recommended that sentence. Thus, ‘the judge’s authority to sentence derives wholly from the jury’s verdict.’” *Id.* at ¶ 42, quoting *Blakely v. Washington*, 542 U.S. 296, 306, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). As a result, the Supreme Court of Ohio concluded that, “[u]nder Ohio’s death-penalty scheme, . . . trial judges function squarely within the framework of the Sixth Amendment.” *Mason*, at ¶ 42 (alteration added).

Ohio’s death penalty scheme does not offend the Sixth Amendment. Thus, the State asks this Court to deny Myers’ petition for a writ of certiorari, just as it denied Mason’s petition for a writ of certiorari in Case No. 18-5303

### CONCLUSION

This Court has already denied certiorari on the same question presented by Myers. Additionally, Ohio's death penalty scheme is constitutional. For the reasons set forth in the above argument, Respondent asks this Court to deny Myers' petition for a writ of certiorari.

Respectfully Submitted,



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