No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD DONTA WILLIAMS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Capital Case
QUESTIONS PRESENTED

In *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), the Court overruled *Spaziano v. Florida*,[1] and *Hildwin v. Florida*,[2] invalidated Florida's capital punishment statute, and held all facts necessary to impose a death sentence must be based on a jury's verdict, not a judge's fact finding. *Hurst*, 136 S.Ct. at 624. Under Ohio's capital punishment statute, "[a]ll the power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial[]" and renders specific factual findings necessary to impose the death penalty.[3] The Ohio Supreme Court – invoking *Spaziano v. Florida* – has repeatedly held that investing capital sentencing authority solely in the trial judge does not violate the Sixth or Eighth Amendments.

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

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[1] 68 U.S. 447, 104 S.Ct. 3154, 82 L.E.2d 340 (1984).
[2] 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).
[3] *State v. Rogers*, 28 Ohio St.3d 427, 429, 504 N.E.2d 52, 55 (1986).

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

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

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

OPINIONS BELOW

The trial court denied Mr. Williams' motion for a new mitigation trial, finding that the holding in *Hurst v. Florida* has no application to Ohio's capital sentencing scheme. The Court of Appeals affirmed. *State v. Williams*, 12th Dist. Butler No. CA2017-07-105, Appendix A, at A-1. The Ohio Supreme Court declined to exercise its

discretionary jurisdiction to hear Mr. Williams' appeal from the April 9, 2018, Court of Appeals decision. Appendix B, at A-8. The State court's ruling directly conflicts with this Court's decision in *Hurst v. Florida*, *supra*, and leaves undisturbed Ohio's judge-sentencing statue for capital cases.

The trial court's order granting leave to file a motion for a new mitigation trial and denying the motion is unreported and is attached as Appendix C, at A-9. Petitioner's trial court motion for leave to file a motion for new mitigation trial, and the proposed motion for new mitigation trial ultimately deemed filed instanter, is unreported and is attached as Appendix D, at A-14. The trial court's sentencing opinion independently finding that the aggravating circumstances outweigh the mitigating factors is unreported and is attached as Appendix E, A-39. The trial court's jury instructions for the sentencing (mitigation) hearing are attached as Appendix F, at A-47. The Entry of Jury Recommendation is attached as Appendix G, at A-53.

I. Procedural History of the Case

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

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

On January 11, 2017, Clifford Donta Williams filed a motion seeking leave to file his motion for a new mitigation trial. *See* Appendix D, at A-14. Williams attached

the proposed motion for new mitigation trial to his motion seeking leave. *See* Appendix D, at A-20. The proposed motion cited to *Hurst v. Florida,* __ U.S. __, 136 S.Ct. 616, 193 L.E.2d 504 (2016) and alleged that Ohio's death penalty statutory scheme violated the Sixth Amendment. On February 27, 2017, the trial court granted Mr. Williams leave to file the motion for new trial, deemed filed instanter the proposed motion for new trial Mr. Williams attached to his motion seeking leave to file, and denied the new trial motion. *See* Entry Granting Leave to File Motion for New Mitigation Trial Pursuant to Criminal Rule 33 and Denying Said Motion as Being Not Well Taken, Appendix C, at A-9. In support of its Entry denying relief, the trial court cited to the Ohio Supreme Court's dicta discussion of *Hurst* in *State v. Belton*, 2012-0902, 147 Ohio St.3d 1440. Appendix C, at A-12.

Williams appealed the trial court's decision and the Twelfth Appellate District affirmed the decision of the trial court. *State v. Williams,* 12th Dist. Butler No. CA2017-07-105, Appendix A, at A-1. The appellate court concluded that "Ohio's capital sentencing laws in effect at the time of Williams' sentencing were not unconstitutional under *Hurst*." *Id.* ¶14, at A-3. The Ohio Supreme Court exercised its discretionary review authority and declined jurisdiction on August 15, 2018. Appendix B, at A-8. *State v. Williams,* 2018-Ohio-3256.

B. State Court Post-Trial Procedural History

Mr. Williams appealed his conviction and death sentence to the Ohio Supreme Court, which affirmed his conviction and sentence. *State v. Williams*, 73 Ohio St.3d

153, 175, 1995-Ohio-275, 652 N.E.2d 721, 738. This Court denied certiorari. *Williams v. Ohio*, 516 U.S. 1161, 116 S. Ct. 1047 (1996).

Mr. Williams filed his initial postconviction petition in the trial court in 1996. The trial court denied that petition without a hearing, and the Court of Appeals affirmed. *State v. Williams*, 12th Dist. Butler No. CA97-08-162, 1998 Ohio App. LEXIS 2782 (June 22, 1998). The Ohio Supreme Court declined jurisdiction to review the Court of Appeals decision. *State v. Williams*, 83 Ohio St.3d 1449, 700 N.E.2d 332 (1998).

C. Federal Court Procedural History

Mr. Williams filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio on June 11, 1999, and amended his petition on September 7, 2007. *Williams v. Mitchell*, S.D. OH Case No. 1:99-cv-00438-MHW-KAJ. The district court granted in part and denied in part the Respondent's Motion to Dismiss procedurally defaulted claims on December 7, 2012. Williams filed a motion for reconsideration on January 21, 2013, and the district court overruled that motion on September 16, 2013. The habeas petition is pending in the district court on the claims that were not denied.

JURISDICTION

On February 27, 2017, the trial court denied Williams' new trial motion asserting a *Hurst* violation. Appendix C, at A-9. On April 9, 2018, Ohio's 12th District Court of Appeals affirmed the trial court's order denying Williams's motion for new trial. Appendix A, at A-1. On August 15, 2018, the Supreme Court of Ohio declined to exercise its discretionary jurisdiction to review the decision of the 12th District Court

of Appeals. *State v. Williams*, 2018-Ohio-3256, Appendix B at A-8. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

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

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

The Ohio statutory provision relevant to this petition, Ohio Rev. Code Ann. § 2929.03 (1986), were attached to Williams' motion for new trial and are reprinted in Appendix D, beginning at A-36.

STATEMENT OF THE CASE

Williams' mitigation hearing was held in January 1991. Williams presented evidence of several mitigating factors including his: (a) youth (age 18) at the time of the offense; (b) history, character, background, and close family relationships; (c) difficult childhood; (d) experiences in and failure to benefit from the juvenile justice system; (e) diagnosis of paranoid schizophrenia; and (f) expression of remorse through an unsworn statement. The trial court instructed the jury that a verdict as to the death penalty was only a recommendation. *See* Jury Instructions Sentencing

(Mitigation) Hearing, Appendix F, at A-47. The trial court specifically instructed the jury:

> It's going to be your responsibility to decide what sentence to *recommend* to this Court regarding the charge of aggravated murder with specifications as outlined in Count One, Specifications One and Two, of the indictment. *Id.* (emphasis added).
>
> ***
>
> RECOMMENDATION
>
> You *shall recommend* the sentence of death if you unanimously, that is all twelve, find by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.
>
> If you do not so find, you shall unanimously *recommend* either life sentence with parole eligibility after serving twenty years of imprisonment or life sentence with parole eligibility after serving thirty years of imprisonment. *Id.* (emphasis added).

See Jury Instructions Sentencing (Mitigation) Hearing, Appendix F, at A-47, A-51.

On January 18, 1991, the jury recommended a death sentence. The jury's recommendation was recorded in an Entry of Jury Recommendation, filed January 23, 1991. Entry of Jury Recommendation, Appendix G, at A-53.

The trial court subsequently filed its sentencing opinion as required by R.C. 2929.03(F). *See* Trial Court Sentencing Opinion, Appendix E, at A-39. In its sentencing entry, the trial court went to great lengths to identify each piece of aggravating evidence and to list each of the mitigating factors it found to exist and the weight it assigned to each.

> The Court cannot find that there is anything mitigating in the nature and circumstances of the offense.

***

> [T]his Court has no reasonable doubt as to the defendant's guilt and expressly declines to give such a factor [residual doubt] any weight under the circumstances of this case.
>
> ***
>
> The Court finds that the relative weight of the mitigating factors is slight. The youth of the defendant is significant and is given some weight. The defendant's history, character and background offer very little in mitigation aside from his age ….
>
> ***
>
> The defendant's expression of remorse is not of great weight.
>
> ***
>
> Finally, the testimony of Dr. Weaver as to the defendant's mental problems is entitled to some weight.
>
> ***
>
> The evidence presented as to the defendant's mental disorder qualifies for consideration as a mitigating "other factor" under Revised Code 2929.04(B)(7), but ... [t]he Court finds it to be of minimal significance and does not give it much weight in the mitigation in this case.
>
> In contrast. the weight of the aggravating circumstances is great.

Opinion as to Sentence, Appendix F, at A-43-45.

After identifying each piece of evidence that it found relevant to the aggravating circumstances, the mitigating factors presented, and the weight attributed to each mitigating factor, the trial court again emphasized that the Court itself had made the ultimate factual determination that the aggravating circumstances outweighed the mitigating factors by proof beyond a reasonable doubt and accordingly, death was the only appropriate sentence.

> The Court finds that the aggravating circumstances are proved beyond a reasonable doubt.
>
> ***
>
> The court has independently weighed and reviewed the evidence.
>
> ***
>
> In this Court's view, the sum of all the mitigating factors is insufficient to create a reasonable doubt that the aggravating circumstances outweigh the mitigating factors ...
>
> ***
>
> The defendant, therefore, shall suffer the sentence of death in accordance with Revised Code 2929.02(A) (46).

Trial Court Sentencing Opinion, at A-39, A-42, A-45, and A-46.

REASON FOR GRANTING THE WRIT

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

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

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

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

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

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

St.3d at 430, 504 N.E.2d at 55 (citing *Spaziano,* 468 U.S. at 464). The Supreme Court of Ohio explained that Ohio's death penalty statute vests only the judge with decision-making authority to sentence a defendant to death:

> At the outset of the within analysis, it should be stated that Ohio's statutory framework for the imposition of the death penalty is altogether different from that of Mississippi, *most importantly in that Ohio has no "sentencing jury." All power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial.* The duty of the trial judge is set forth in R.C. 2929.03(D)(3*).*
>
> Immediately obvious is that, under this provision, *the jury provides only a recommendation as to the imposition of the death penalty.* The trial court must thereafter independently re-weigh the aggravating circumstances against the mitigating factors and issue a formal opinion stating its specific findings, before it may impose the death penalty. R.C. 2929.03(F). *It is the trial court, not the jury, which performs the function of sentencing authority. Thus, no "sentencing jury" was involved in the proceedings below.* Furthermore, as actual sentencer, the trial court was "present to hear the evidence and arguments and see the witnesses" and was in a position to fully appreciate a plea for mercy. *Caldwell*, supra, at 331.
>
> Furthermore, Ohio's sentencing procedures are not unique both *because a separate sentencing hearing is utilized, and because capital sentencing authority is invested in the trial judge.* See, *e.g.,* Ala. Code Subsection 13A-5-47 (1986 Supp.) (judge is not bound by jury's advisory verdict); Ariz. Rev. Stat. Annot. Section 13-703(B), (C) and (D) (1986 Supp.) (jury is completely excluded from sentencing); Colo. Rev. Stat. Section 16-11-103 (2)(C) (1985 Supp.) (trial judge may vacate a jury finding if clearly erroneous); Fla. Stat. Section 921.141(2) (1982 Cum. Supp.) (trial court independently re-weighs aggravating versus mitigating circumstances after an advisory jury verdict); Idaho Code Section 19-2515(d) (1986 Supp.) (trial court alone sentences and conducts a mitigation hearing), etc.
>
> Florida's statutory system, which is remarkably similar to Ohio's, was expressly upheld in the case of *Spaziano v. Florida* (1984), 468 U.S. 447.

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

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

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

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

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

Hurst, 136 S. Ct. at 620.

Under Ohio's capital sentencing statute, the trial judge has the sole power and responsibility to sentence a defendant to death regardless of whether the penalty is determined by: (a) a panel of three judges if the defendant waives the right to a jury trial, or (b) a jury. R.C. 2929.03(0)(2) (emphasis added); *Rogers,* 28

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

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

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

In Ohio, the jury's non-binding death-verdict serves solely to trigger the next step in the sentencing process – a step conducted by the judge, independent of the jury's recommendation. *See State v. Jenkins,* 15 Ohio St.3d 164, 203, 473 N.E.2d 264, 299 (1984) ("[T]he jury in the penalty phase of a capital prosecution may be instructed that its recommendation to the court that the death penalty be imposed is not binding and that the final decision as to whether the death penalty shall be

imposed rests with the court[.]"); *see also Steffen v. Ohio*, 485 U.S. 916, 919 (1988) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting from denial of certiorari) (accepting this construction of the law by the Ohio Supreme Court but nonetheless voting to review the case for *Caldwell* error). As explained by the Ohio Supreme Court, "no 'sentencing jury' is involved" in the ultimate sentencing decision. *Rogers*, 28 Ohio St. 3d at 429, 504 N.E.2d at 54.

B. Ohio law vests trial judges with "the sole power to initially impose the death penalty."[4]

Ohio law "delegates the death sentencing responsibility to the trial court upon its separate and independent finding that the aggravating factors outweigh the mitigating factors in th[e] case." *State v. Buell,* 22 Ohio St.3d 124, 144, 489 N.E.2d 795, 812 (1986) (citing R.C. 2929.03(D)(3)). The statutory deliberative process of Ohio judge-sentencing in capital cases has been deemed an "'austere duty'" that must be made by the trial judge "in isolation." *Roberts,* 110 Ohio St.3d at 94, 850 N.E.2d at 1189. The judge is charged by statute with the sole responsibility of independently determining whether the punishment will be life or death.[5] *State v. Clark,* 38 Ohio St.3d 252, 259, 527 N.E.2d 844, 852 (Ohio 1988) ("the jury's decision [favoring a death sentence] [i]s a recommendation that the trial court need

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

[5] *See State ex rel. Stewart v. Russo,* 145 Ohio St.3d 382, 2016-Ohio-421, 49 N.E.3d 1272 at ¶ 15 ("when a jury in a capital case recommends a life sentence, no separate sentencing opinion is required because 'the court does not act independently in imposing the life sentence, but is bound to carry out the wishes of the jurors'") (quoting *State v. Holmes,* 30 Ohio App.3d 26, 28, 506 N.E.2d 276, 278 (10th Dist. 1986) (also addressing a situation in which the trial court overrides the death sentence determination of the jury and imposes a life sentence)).

not accept."). In other words: "the power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial[,]" wherein the jury "provides only a *recommendation* as to the imposition of the death penalty." *Rogers,* 28 Ohio St.3d at 429, 54 N.E2d at 54; *see also State v. Holmes,* 30 Ohio App.3d 26, 27, 506 N.E.2d 276, 277 (1986) ("[T]he trial court still retains the responsibility for making the final decision as to whether to impose the death penalty, because the jury's recommendation of a death penalty is not binding upon the court.").

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

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

Hurst announced that a jury – not a judge – must make the critical findings in support of a death sentence. *Hurst,* 136 S.Ct. at 622. Applying this rule to Florida's statute, this Court noted that although a Florida jury recommends a sentence "it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." *Id.* 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 courts have long aligned Ohio's capital sentencing statute with Florida's statute pre-*Hurst*, characterizing the two as "remarkably similar." *Rogers,* 28 Ohio St.3d at 429-30, 504 N.E.2d at 808-10; *see also State v. Broom,* 40 Ohio St.3d 277, 291-92 n.5, 533 N.E.2d 682, 698 (1988) (comparing Ohio's statute to Florida's); *Buell, 22* Ohio St.3d at 139-41, 489 N.E.2d at 808-10 (same). The Ohio death penalty scheme suffers the same constitutional deficiencies as Florida's pre-*Hurst* statute because the Ohio statute requires the judge to make independent, specific findings and determine "by proof beyond a reasonable doubt ... that the

aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors[.]" R.C. 2929.03(D)(3).

The Ohio Supreme Court unequivocally explained that the judge is the sentencing authority who independently makes all findings necessary to impose the death penalty. *Rogers, supra; Broom, supra.*[6] "No Ohio court is bound by the jury's weighing[,]" *State v. Williams,* 23 Ohio St.3d 16, 22, 490 N.E.2d 906, 912 (1986), and there is "no 'sentencing jury'... involved" in the ultimate sentencing decision. *Rogers,* 28 Ohio St.3d at 429, 504 N.E.2d at 54.[7] The requirement that a judge make specific findings and articulate them in a written opinion is a critical step in imposing a sentence of death. R.C. 2929.03(F). This has long been recognized by the Supreme Court of Ohio:

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

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

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

[7] *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, 1998 WL 11080, *24*59-60 (8th Dist. Feb. 4, 1988) (same).

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

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

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

The *Roberts* court further observed:

> The trial court's delegation of any degree of responsibility in this sentencing opinion does not comply with *R.C. 2929.03(F)*. Nor does it comport with our firm belief that the consideration and imposition of death are the most solemn of all the duties that are imposed on a judge, as Ohio courts have also recognized. [citation and quotation omitted.] The judge alone serves as the final arbiter of justice in his courtroom, and he must discharge that austere duty in isolation.

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

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

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

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

omitted).

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

The Ohio Supreme Court has repeatedly upheld Ohio's death penalty statute on the authority of *Spaziano v. Florida,* 468 U.S. at 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, 130, 9 N.E.3d 1031 (2014) ("[N]either the Sixth nor the Eighth Amendment creates a constitutional right to be *sentenced* by a jury, even in a capital case." Citing *Spaziano,* 468 U.S. at 459); *Rogers,* 28 Ohio St.3d at 429, 504 N.E.2d at 55 ("'[A] judge may be vested with sole responsibility for imposing the [death] penalty[.]'" Quoting *Spaziano,* 468 U.S. at 465). *Hurst* expressly overrules *Spaziano's* holding "that there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed[.]" 468 U.S. at 465. *Hurst*, 136 S.Ct. at 624.

"[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240 (1983). Relying on this fundamental distinction, Justice Marshall in *Caldwell v. Mississippi* emphasized the need for jurors to appreciate their "awesome

responsibility" when determining the appropriateness of death. *Caldwell v. Mississippi*, 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240 (1985). "State-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court," [*Caldwell*, 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 State's highest court. The consequences of making minute so cumbrous a task are assaults on inviolable Eighth Amendment requirements. "Even when a jury is unconvinced that death is appropriate, their desire to 'send a message' of disapproval for the defendant's acts… [makes] the jury especially receptive to a prosecutor's reassurances that they can more freely 'err because the error may be corrected on appeal.'" *Caldwell,* 472 U.S. at 331, citing *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43, 51-52 (1983) (Stevens, J., concurring in judgment). "A defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence." *Caldwell*, 472 U.S. at 331-32.

Further, Ohio jurors are assured that a sentence of life in prison could not be increased to a death sentence on appeal, thus increasing the risk the jury may base their death sentence on a desire to avoid responsibility for it. *Caldwell,* 472 U.S. at 332, citing *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S.Ct. 2305, 2310, 81 L.Ed.2d 164, 171 (1984). Perhaps worst of all is the potential for nullifying true unanimity amongst jurors, where the possibility of appellate review is used to persuade those reluctant to invoke the death sentence to "give in." *Caldwell,* 472 U.S. at 333. Allowing Ohio's statutory scheme to remain unchallenged ignores these long-held

assertions that jurors must maintain and be reminded of the gravity of their decision, without the comfortability of deference to an appellate court. In 1991, when the jury deliberated Mr. Williams' fate, the parties informed the jury that their decision was a mere recommendation. It was an accurate statement of Ohio law in 1991, and it is an accurate statement of Ohio law today. After *Hurst,* we know that Ohio's law does not pass constitutional muster. The Court should grant the writ, vacate Mr. Williams' death sentence, and remand the case to the trial court.

CONCLUSION

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

Respectfully submitted,

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