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

APPENDIX TO WRIT OF CERTIORARI

Richard A. Cline, Chief Counsel
Death Penalty Department
Counsel of Record for Petitioner

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : CASE NO. CA2017-07-105

: JUDGMENT ENTRY

- vs - :

CLIFFORD D. WILLIAMS, :

Defendant-Appellant. :

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Stephen W. Powell, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2017-07-105
	:	OPINION
- vs -		4/9/2018
	:	
CLIFFORD D. WILLIAMS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR1990-08-0665

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Richard Cline, Kandra Roberts, Ohio Public Defender's Office, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Clifford D. Williams, appeals from the decision of the Butler County Court of Common Pleas that denied his motion for a new mitigation trial. For the reasons discussed below, this court affirms the lower court's decision.

{¶ 2} In 1990, Williams robbed and murdered Wayman Hamilton, a cab driver who was transporting him to Hamilton, Ohio. Three days later, Williams shot Jeff Wallace in the

back of the head after attempting to rob him. Wallace survived. A grand jury indicted Williams on multiple charges, including aggravated murder and three death-penalty specifications for causing Hamilton's death. Williams' charges were tried to a jury in 1991. The jury found Williams guilty of all charges in the indictment, including the death-penalty specifications.

{¶ 3} After the guilt phase, the trial proceeded to the mitigation phase. After hearing the evidence, the court instructed the jurors on their responsibility to recommend either a death sentence or a lesser penalty of life in prison with parole. The court informed the jurors that they must recommend a death sentence if they found, by proof beyond a reasonable doubt, that the aggravating circumstances presented at trial outweighed the mitigating factors. The jury found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt and therefore recommended that the court impose the death penalty. The trial court then independently weighed the aggravating circumstances and mitigating factors, accepted the jury's recommendation, and imposed a sentence of death on the aggravated murder charge and specifications.

{¶ 4} On appeal, this court affirmed Williams' conviction and death sentence. *State v. Williams*, 12th Dist. Butler Nos. CA91-04-060 and CA92-06-110, 1992 Ohio App. LEXIS 5529 (Nov. 2, 1992). In a later appeal as of right, the Ohio Supreme Court affirmed Williams' conviction and death sentence. *State v. Williams*, 73 Ohio St.3d 153 (1995).

{¶ 5} In 2017, Williams moved the trial court for a new mitigation trial. Williams argued that the death sentence violated his constitutional rights in light of *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616 (2016). The trial court denied the motion. Williams appeals, raising a single assignment of error.

{¶ 6} THE TRIAL COURT ERRED WHEN IT DENIED WILLIAMS' MOTION FOR A NEW TRIAL.

{¶ 7} In *Hurst*, the United States Supreme Court held that Florida's capital punishment scheme violated the defendant's Sixth Amendment right to trial by an impartial jury where the law required a judge to engage in an independent weighing of aggravating and mitigating facts as a prerequisite to imposing the death penalty. Williams argues that Ohio's capital punishment laws are similar to those in Florida and violate *Hurst*.

{¶ 8} In reviewing the constitutionality of a statute, there is a general presumption in favor of the validity of legislation. R.C. 1.47(A); *State v. Sinito*, 43 Ohio St.2d 98, 101 (1975). The party challenging the statute bears the burden of proving the constitutional invalidity beyond a reasonable doubt. *State v. Thompkins*, 75 Ohio St.3d 558, 560 (1996). The Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." The right to an impartial jury, in conjunction with the Due Process Clause of the Fifth Amendment, requires each element of a crime to be proved beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 104, 133 S.Ct. 2151 (2013). The United States Supreme Court has held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348 (2000).

{¶ 9} The Supreme Court has extended the rule of *Apprendi* to capital punishment. *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002). In *Ring*, the Court held that an Arizona capital sentencing scheme providing that a defendant could not be sentenced to death unless a judge, independent of the jury, found at least one aggravating circumstance violated *Apprendi*. *Id.* at 592-593. The Court concluded that the required judicial finding of an aggravated circumstance exposed the defendant to greater punishment than authorized by the jury's verdict. *Id.* at 604.

{¶ 10} Similarly, in *Hurst*, the Supreme Court found that Florida's capital punishment scheme violated *Apprendi* because it required a judge, rather than the jury, to make the "critical findings" necessary to impose the death penalty. *Hurst*, 136 S.Ct. at 622. Under the Florida law, the jury's role in death-penalty sentencing was limited to issuing an "advisory sentence." *Id.* at 620. The judge then engaged in the fact-finding process with respect to aggravating and mitigating facts, could consider evidence not presented to the jury, and then had a choice to either sentence a defendant to life in prison or death, regardless of the sentence recommended by the jury. *Id.* Under the Florida law, the maximum punishment the defendant could have received without any judicial fact-finding was life in prison. *Id.* at 622.

{¶ 11} Ohio's capital punishment scheme at the time of Williams' sentence was set forth in R.C. 2929.03 and 2929.04.[1] The death penalty cannot be imposed for aggravated murder unless a statutory aggravating circumstance is specified in the indictment. R.C. 2929.03(B) and (C)(2); and R.C. 2929.04(A). That aggravated circumstance must then be proved, beyond a reasonable doubt, at trial. *Id.*

{¶ 12} After the conviction, in the penalty phase of the trial, the jury must recommend either the imposition of a death sentence or a lesser penalty. To make that recommendation, the jury must weigh the aggravating circumstances against any mitigating factors introduced by the defendant. R.C. 2929.03(D)(2). If the jury finds, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors, then the jury must recommend that a death sentence be imposed. If the jury does not find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, then the jury shall

1. All references in this opinion are to the versions of R.C. 2929.03 and 2929.04 in effect at the time of Williams' 1991 sentence. However, for purposes of this opinion, there are no substantive changes between the 1991 version of the law and the current version.

recommend that the offender be sentenced to a life sentence or other lesser penalty. If the jury recommends the lesser penalty, "the court shall impose the sentence recommended by the jury upon the offender." *Id.*

{¶ 13} If the jury recommends the death penalty, then the next step involves the court repeating the analysis undertaken by the jury, i.e., considering whether the aggravating circumstances outweigh the mitigating factors. R.C. 2929.03(D)(3). If the court so finds, by proof beyond a reasonable doubt, then the court must impose the death penalty. If, instead, the court does not find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, then the court must impose one of the lesser sanctions. *Id.*

{¶ 14} This court concludes that Ohio's capital sentencing laws in effect at the time of Williams' sentencing were not unconstitutional under *Hurst* and that Williams has not met his burden of demonstrating the unconstitutionality of the statutory scheme beyond a reasonable doubt. Under R.C. 2929.03 and 2929.04, Williams became eligible for the death penalty only after the jury engaged in two critical fact-finding steps. During the guilt stage of the trial, the jury found Williams guilty, beyond a reasonable doubt, of both the aggravated murder and the aggravating circumstances specified in the indictment. At the sentencing stage, the jury found, beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating factors. If the jury had not found Williams guilty of the aggravated murder with specifications, or, had not found that the aggravating circumstances outweighed the mitigating factors, then the court could not have imposed the death penalty. Accordingly, under Ohio's death-penalty law, unlike Florida's law in *Hurst* and Arizona's law in *Ring*, it was not possible for the court to make a factual finding during sentencing that exposed Williams to a greater punishment than that authorized by the jury.

{¶ 15} Williams argues that the jury only serves an advisory role in death-penalty sentencing in Ohio because the law only requires the jury to provide a recommendation to

the judge. The jury's role in death-penalty sentencing is not merely advisory. The judge cannot impose the death penalty unless recommended by the jury. Williams also contends that the law is unconstitutional because it does not require the jury to explain its factual findings with respect to the weighing of aggravating circumstances and mitigating factors. Williams suggests that some form of jury interrogatories might cure this issue. However, juries are commonly asked to deliver general verdicts. This court does not agree that *Hurst* would require jury interrogatories to ensure compliance with the Sixth and Fourteenth Amendments in death-penalty sentencing.

{¶ 16} As of the time of this opinion, the Ohio Supreme Court has not directly addressed the effect of *Hurst* on capital punishment in Ohio. However, the court has strongly implied that *Hurst* is unlikely to have any impact. *State v. Roberts*, 150 Ohio St.3d 47, 2017-Ohio-2998, ¶ 84 (rejecting a defendant's explanation that his Sixth Amendment argument was untimely because *Hurst* had not yet been decided as the defendant "could have made essentially the same Sixth Amendment argument by relying on [*Apprendi*] and [*Ring*]").

{¶ 17} Finally, every Ohio court of appeals that has addressed the effect of *Hurst* on Ohio's capital sentencing scheme as it existed when the court sentenced Williams has concluded that it is constitutional.[2] *State v. Mason*, 3d Dist. Marion No. 9-16-34, 2016-Ohio-8400, ¶ 29, appeal accepted, 149 Ohio St.3d 1462, 2017-Ohio-5699; *State v. Jackson*, 8th Dist. Cuyahoga No. 105530, 2018-Ohio-276, ¶ 16; *State v. Carter*, 1st Dist. Hamilton No. C-170231, 2018-Ohio-645, ¶ 4-8; *see also State v. Mundt*, 7th Dist. Noble No. 17 NO 0446, 2017-Ohio-7771, ¶ 9-10. Accordingly, this court overrules Williams' sole assignment of error.

{¶ 18} Judgment affirmed.

S. POWELL, P.J., and HENDRICKSON, J., concur.

2. The cited cases construed prior but substantively similar versions of R.C. 2929.03 and 2929.04.

The Supreme Court of Ohio

State of Ohio

v.

Clifford D. Williams

Case No. 2018-0725

ENTRY

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

(Butler County Court of Appeals; No. CA2017-07-105)

Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

FILED

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MARTIN KOEHN
BUTLER COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO	*	**CASE NO. CR1990-08-0665**
Plaintiff,	*	**JUDGE: G. STEPHENS**
vs.	*	**ENTRY GRANTING LEAVE TO FILE MOTION FOR NEW MITIGATION**
CLIFFORD DONTA WILLIAMS	*	**TRIAL PURSUANT TO CRIMINAL RULE 33 AND DENYING SAID MOTION AS**
Defendant.	*	**BEING NOT WELL TAKEN**

FINAL APPEALABLE ORDER

****

On January 11, 2017, the Ohio Public Defender's Office, by and through undersigned counsel, filed a motion on behalf of Defendant, Clifford Donta Williams. Said motion included a motion for leave to file a motion for new mitigation trial pursuant to Ohio Criminal Rule 33, as well as a motion to deem the 'attached motion filed instanter.' Parenthetically, Defendant's motions stem from a death penalty case nearly 30 years old and are based on the United States Supreme Court's ruling in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct.616 (2016).

MOTION FOR LEAVE TO FILE

The first issue the Court must address is whether to entertain the merits of Defendant's motion for new mitigation trial under Ohio Criminal Rule 33. Ohio Criminal Rule 33 (A) provides for six bases for a defendant to move for a new trial. The Court will address only the three that have been raised by Defendant. More specifically, Defendant moves for a new mitigation trial under (A)(1), (4) and (5), in that: (1) irregularity (occurred) in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court,

Judge
Greg Stephens
Common Pleas Court
Butler County, Ohio

because of which the defendant was prevented from having a fair trial; (4) the verdict was not sustained by sufficient evidence of or is contrary to law; and (5) an error of law occurred at trial.

All three alleged grounds Defendant claims entitles him to a new trial are interrelated. The United States Supreme Court in *Hurst* struck down the Florida death penalty structure as being contra the Sixth Amendment to the United States Constitution. The structure of the Florida statutes resulted in a "hybrid" system in which a jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. See *Hurst* at 136 S.Ct.620. Defendant alleges that this ruling in *Hurst* impacts the Ohio death penalty scheme and, as such, forms the primary singular basis for the alleged errors of Criminal Rule 33(A) sections (1), (4) and (5) above.

Defendant, in the case at bar, alleges that the Florida statutes subject to the *Hurst* decision are substantially similar to the Ohio statutory scheme to the point that Defendant is entitled to have his death penalty sentence vacated and a new mitigation trial take place. Defendant's motion also urges this Court to consider the motion for new trial, despite the fact his death sentence was issued over 25 years ago, because the *Hurst* decision did not issue until the beginning of 2016, rendering it impossible for Defendant to have relied upon the *Hurst* implications in a more timely fashion.

The State of Ohio, in its response, doesn't delve into the specific time requirements of Ohio Criminal Rule 33(B) as they may apply to the reasonably unique circumstances of the case at bar. Instead, the State does correctly point out that the *Hurst* decision issued on January 12, 2016, and Defendant's motion was filed one day shy of one year later on

Judge
Greg Stephens
Common Pleas Court
Butler County, Ohio

January 11, 2017. As Defendant does not proffer an explanation for the 'nearly' one year delay in the file of the motion(s) at bar, the State moves this Court to deny said motion(s) as being untimely.

The Court would most likely be entitled to dismiss all the motion(s) presented as being untimely pursuant to Criminal Rule 33. Because of the nature of the case and the issues raised thereby, the Court chooses to overlook any timeliness issues and proceed to dispose of the motion(s) on the merits. The Court believes that, in so doing, its handling of the motion to grant leave to file would not constitute an abuse of discretion. See *State v. Johnston*, 39 Ohio St.3d 48, 58-59, 529 N.E.2d 898 (1988).

THEREFORE, it is the order of the Court that Defendant's Motion for Leave to File a Motion for a New Mitigation Trial Pursuant to Criminal Rule 33 is hereby granted. The accompanying motion and memorandum filed by Defendant addressing the merits of said motion is deemed to be filed instanter and will be considered by the Court.

MOTION FOR NEW TRIAL

The Court will note that the State of Ohio, on January 24, 2017, filed both a response to the procedural issue of the leave to file and also addressed the merits of the motion for new trial itself. As such, the Court will proceed to rule on the merits of the motion for new mitigation trial.

As noted above, the gravamen of Defendant's motion for new mitigation trial is basically that the Ohio statutory scheme for death penalty cases is substantially similar to the Florida scheme struck down in *Hurst*. As a result, Defendant argues that his death sentence should be vacated and a new trial had.

Judge
Greg Stephens
Common Pleas Court
Butler County, Ohio

Following the *Hurst* decision, the Ohio Supreme Court addressed a similar challenge in *State v. Belton*, 2016-Ohio-1581. The issue addressed by the Ohio Supreme Court was whether a defendant could waive a jury determination for the guilt phase of the case, but still be entitled to jury determination as to the sentencing phase of the case. In answering this question, the Supreme Court examined the Ohio death penalty structure in light of the *Apprendi, Ring* and *Hurst* decisions of the United States Supreme Court. The Ohio Supreme Court distinguished the statutory schemes of the Ohio and Florida systems and, in the process, validated the Ohio system in the context of the *Hurst* decision relied upon by Defendant. See *Belton* at paragraphs 58-60.

The Court notes that, since the Ohio Supreme Court's *Belton* decision in April, 2016, and its decision to deny reconsideration at 147 Ohio St.3d 1440, 63 N.E.3d 158 (Nov. 2016), this Court is bound by the validation of the Ohio statutory scheme as pronounced by the Supreme Court. The Court also notes there have been no superseding Federal decisions that have explicitly addressed Ohio's death penalty scheme. As such, the Court finds Defendant's Motion for New Trial to be not well taken, and as such, said motion is OVERRULED.

SO ORDERED

Judge
Greg Stephens
Common Pleas Court
Butler County, Ohio

Greg Stephens, Judge

THIS IS A FINAL APPEALABLE ORDER. DEFENDANT HAS THIRTY DAYS FROM THE FILING OF THIS ENTRY TO MOVE FOR APPEAL PURSUANT TO OHIO APPELLATE RULES OF PROCEDURE 4 AND 5.

cc:

Richard Cline and Kandra Roberts
Counsel for Defendant
Ohio Public Defender's Office
250 East Broad St., Suite 1400
Columbus, OH 43215

Butler County Prosecutor's Office
c/o Lina Alkamhawi

Judge
Greg Stephens
Common Pleas Court
Butler County, Ohio

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

STATE OF OHIO, *Plaintiff*,	Case No. CR90-08-0665 JUDGE MOSER
vs.	[HEARING REQUESTED]
CLIFFORD DONTA WILLIAMS, *Defendant*.	**[THIS IS A DEATH PENALTY CASE]**

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

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

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

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

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

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

Respectfully submitted,

Office of the Ohio Public Defender

By: Richard Alkire

Richard Cline (0001854) (Lead Counsel)
Chief Counsel, Death Penalty Department
Richard.cline@opd.ohio.gov

By: Kandra Roberts
Kandra Roberts (0092091) (Co-Counsel)
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(614) 644-5394 – Telephone
(614) 644-1573 – Facsimile

Counsel for Clifford Donta Williams

MEMORANDUM IN SUPPORT

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

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

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

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

motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein." *Crim. R. 33(B).*

The court sentenced Movant to death on February 22, 1991. *Hurst* was decided January 12, 2016. At sentencing, counsel could not anticipate the United States Supreme Court's holding in *Hurst,* and thus could not have filed his motion for new trial within fourteen days of the imposition of sentence. In *State v. Burke*, 2005-Ohio-891 (10th Dist.), the Court reversed the denial of a new trial motion filed 17 months after the court decision that prompted the filing of the new trial motion. *Burke*, ¶12. The *Burke* court ruled that the motion for leave to file a motion for new trial was timely filed, especially because *Burke* involved a death penalty case and because the new trial motion, if granted, could substantially affect the death sentence. *Id.* Here, the motion for leave to file a new trial motion is being tendered to the Court within 12 months of the United States Supreme Court's announcement in *Hurst.* Furthermore, if granted, the new trial motion would vacate the death sentence and require a new mitigation hearing. *Id.*

CONCLUSION

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

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

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

Respectfully submitted,

Office of the Ohio Public Defender

By: _____
Richard Cline (0001854) (Lead Counsel)
Chief Counsel, Death Penalty Department
Richard.cline@opd.ohio.gov

By: _____
Kandra Roberts (0092091) (Co-Counsel)
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Columbus, Ohio 43215
(614) 644-5394 – Telephone
(614) 644-1573 – Facsimile

Counsel for Clifford Donta Williams

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **MOTION FOR LEAVE TO FILE A MOTION FOR A NEW MITIGATION TRIAL PURSUANT TO CRIMINAL RULE 33 AND *HURST V. FLORIDA*, AND TO DEEM THE ATTACHED MOTION**

FILED INSTANTER was served on January 10, 2017 via regular U.S. Mail, upon Butler County Prosecutor Michael T. Gmoser, at the address set forth below:

Michael T. Gmoser
Butler County Prosecutor
315 High St., 11th Floor
Hamilton, OH 45011

By: _____
Kandra Roberts (0092091)

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

STATE OF OHIO, *Plaintiff,*	Case No. CR90-08-0665 JUDGE MOSER
vs.	[HEARING REQUESTED]
CLIFFORD DONTA WILLIAMS, *Defendant.*	**[THIS IS A DEATH PENALTY CASE]**

AFFIDAVIT

State of Ohio,
Franklin County, ss:

Kandra Roberts, being first duly cautioned and sworn, deposes and says:

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

(2) Movant was sentenced to death on February 22, 1991.

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

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

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

Kandra Roberts, Affiant

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

Notary Public

NOTARIAL SEAL
KIMBERLY S. RIGBY
ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission Has No Expiration Date
Section 147.03 ORC

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

STATE OF OHIO, *Plaintiff*,	Case No. CR90-08-0665 JUDGE MOSER
vs.	HEARING REQUESTED
CLIFFORD DONTA WILLIAMS, *Defendant.*	**THIS IS A DEATH PENALTY CASE**

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

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

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

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

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

The following memorandum further supports this motion.

Respectfully submitted,

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

Office of the Ohio Public Defender

By: Richard Cline
Richard Cline (0001854) (Lead Counsel)
Chief Counsel, Death Penalty Department
Richard.cline@opd.ohio.gov

By: _____
Kandra Roberts (0092091) (Co-Counsel)
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(614) 644-5394 – Telephone
(614) 644-1573 – Facsimile

Counsel for Clifford Donta Williams

MEMORANDUM IN SUPPORT

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

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

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

On January 12, 2016, the United States Supreme Court decision in *Hurst* signaled a sea-change in death penalty jurisprudence. *Hurst v. Florida,* __U.S. __, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016). After *Hurst,* it is clear that Ohio's death penalty scheme is unconstitutional. The procedure the trial court employed; to reduce the jury's sentencing verdict to a mere recommendation regarding is an irregularity in the proceedings that deprived Movant of a fair trial during the penalty phase.

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

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

In *Hurst*, a Florida jury convicted Timothy Hurst of first-degree murder. *Id.* at 619-20. In Florida, the maximum sentence a defendant may receive for first degree murder is life imprisonment. Fla. Stat. § 775.082(1). The defendant can only receive the death penalty after an additional sentencing proceeding "results in findings by *the court* that such person shall be punished by death." *Id.* (emphasis added). Otherwise, the defendant is punished by life imprisonment without parole. *Id.*

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

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

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

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

In so holding, the Court rejected Florida's argument that the jury's recommendation necessarily included a finding of an aggravating circumstance, noting "the Florida sentencing

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

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

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

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

> The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.

R.C. 2929.03(D)(1). During this sentencing hearing, the defendant has the burden of introducing evidence of any mitigating factors, but the prosecution has the ultimate burden of "proving, by

proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death." *Id.*

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

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

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

R.C. 2929.03(F).

In sum, while a jury in Ohio has the responsibility of finding that one or more aggravating circumstances exist as part of the verdict at the capital defendant's trial; that does

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

not complete the capital sentencing process. Rather, under Ohio law, the jury must then conduct a weighing process during the sentencing hearing. Once the weighing process is complete, the jury may make a death-sentence *recommendation* to the trial court. The Court in *Hurst* emphasized the fact that in Florida the jury's decision was advisory. Because Ohio's scheme similarly classifies a jury's decision as a recommendation (i.e., "advisory"), Ohio's death penalty statute is likewise unconstitutional.

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

In Ohio, the defendant has "the burden of going forward with the evidence of any factors in mitigation of the imposition of the death sentence." R.C. § 2929.03(D)(1). Ohio law requires a jury to render a unanimous verdict that the aggravating circumstance (alleged in the indictment and proven beyond a reasonable doubt in the guilt determination phase of trial) outweighs the mitigating factors beyond a reasonable doubt before the jury may recommend a sentence of death. *Id.* However, the Ohio statute does not require the jury to make any specific factual findings as to: (1) whether the defendant proved the existence of any mitigating factor (or to what degree defendant did so), (2) which mitigating factors the defendant established; or (3) what weight the jury accorded each mitigating factor. Indeed, the Ohio Supreme Court has

rejected all efforts to require that the jury make any factual finding about the existence of mitigating factors.

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

State v. Buell, 22 Ohio St. 3d 124, 137, 489 NE.2d 795 (1986), *superseded by statute on other grounds, State v. Riley,* 2007-Ohio-879, ¶¶ 26-27 (emphasis added).

The Ohio statute does not require the jury to make any specific findings of fact about mitigating factors, nor does it ask the jury to make any specific findings about their balancing of the mitigating and aggravating factors. Therefore, the judge must implement a sentence without those critical findings.[2] Absent those factual findings, and given the advisory nature of the jury's sentencing recommendation, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida and is unconstitutional.

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

Going back to at least 1986, and as recently as 2014, the Supreme Court of Ohio has cited the now overruled *Spaziano* as favorable authority to uphold the constitutionality of Ohio's own capital sentencing scheme. In holding Florida's capital sentencing structure to be unconstitutional, *Hurst* also "expressly overrule[d]" *Spaziano v. Florida* and *Hildwin v. Florida*,

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[2] Unlike in Ohio, a sentencing judge in Florida could "override" an "advisory jury verdict [recommending life]," but as a practical matter, that did not actually happen in Hurst's case, nor has any judge overridden a jury recommendation in Florida for over 15 years. *Hurst*, 136 S. Ct. at 625-26. Thus in practice, the Florida scheme functions similarly to Ohio's.

the United States Supreme Court's prior precedent upholding Florida's scheme. *Hurst*, 136 S. Ct.at 623. The Supreme Court stated, "Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*." *Hurst*, 136 S. Ct.at 624. The Court's decision to overrule *Spaziano* is strong evidence of the unconstitutionality of Ohio's own capital sentencing structure. On several occasions, the Supreme Court of Ohio favorably cited *Spaziano* as authority to uphold Ohio's own scheme.

Perhaps most damning to the constitutionality of Ohio's capital sentencing structure is the decision in *State v. Rogers*, 28 Ohio St. 3d 427, 504 N.E.2d 52 (1986), *rev'd on other grounds,* 32 Ohio St.3d 70. In *Rogers*, the Court stated, "Florida's statutory system, *which is remarkably similar to Ohio's*, was expressly upheld in the case of *Spaziano v. Florida* (1984), 468 U.S. 447. *Rogers*, 28 Ohio St. 3d at 430 (emphasis added). The 1986 version of R.C. 2929.03 at issue in *Rodgers* was substantially similar to the current version of the statute with the same problematic "recommendation" language. *See* R.C. 2929.03(D)(2) (1986) ("If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was 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.").[3]

In 2014, the Supreme Court of Ohio again cited *Spaziano* favorably:

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

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[3] The 1986 version of the statute is attached to this motion as "Exhibit A."

> *Alabama*, 513 U.S. 504, 515, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital sentence").

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

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

> Ohio has no sentencing jury. All power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial. The duty of the trial court is set forth in R.C. 2929.03(D)(3).
>
> Immediately obvious is that, under this provision, the jury provides only a *recommendation* as to the imposition of the death penalty. The trial court must thereafter independently re-weigh the aggravating circumstances against the mitigating factors and issue a formal opinion stating its specific findings, before it may impose the death penalty. R.C. 2929.03(F). It is the trial court, not the jury, which performs the function of sentencing authority. Thus, no "sentencing jury" was involved in the proceedings below.

Rogers, 28 Ohio St. 3d. at 429 (emphasis in opinion). The Ohio Supreme Court has a long history of rejecting defense counsel's claim that it is error to inform a capital jury that their verdict is a mere recommendation, and has done so precisely because telling the jury that its sentencing verdict is merely a recommendation is an accurate statement of Ohio law. *State v. Jenkins,* 15 Ohio St.3d 164, 200-203, 473 N.E.2d 264 (1984) (Jury instruction that mitigation phase death verdict was recommendation held to be accurate statement of Ohio law); *accord, State v. Williams*, 23 Ohio St. 3d 16, 21-22, 490 N.E.2d 906 (1986); *State v. Scott*, 26 Ohio St. 3d 92, 103-104, 497 N.E.2d 55 (1986); *State v. Thompson*, 33 Ohio St. 3d 1, 6, 514 N.E.2d 407

(1987); *State v. Williams,* 38 Ohio St. 3d 346, 356-357, 528 N.E.2d 910 (1988) *State v. Bradley,* 42 Ohio St. 3d 136, 147, 538 N.E.2d 373 (1989) *State v. Steffen,* 31 Ohio St. 3d 111, 113-114, 509 N.E.2d 383 (1987); *State v. DePew*, 38 Ohio St. 3d 275, 280, 528 N.E.2d 542 (1988); *State v. Beuke*, 38 Ohio St. 3d 29, 34-35, 526 N.E.2d 274 (1988); *State v. Poindexter*, 36 Ohio St. 3d 1, 3, 520 N.E.2d 568 (1988); *State v. Johnson*, 46 Ohio St. 3d 96, 105-106, 545 N.Ed.2d 635 (1989); *State v. Durr,* 58 Ohio St. 3d 86, 93-94, 568 N.Ed.2d 674 (1991); *State v. Milles,* 62 Ohio St. 3d 357, 375, 582 N.E.2d 972 (1992); *State v. Grant,* 67 Ohio St. 3d 465, 472, 620 N.E.2d 50 (1993); *State v. Carter,* 72 Ohio St. 3d 545, 559, 651 N.E.2d 965 (1995), *State v. Keith,* 79 Ohio St. 3d 514, 517-519, 684 N.E.2d 47 (1997).

Similarly, when the district courts of appeals considered death sentence cases on an appeal of right, they universally held that a jury verdict of death was only a recommendation under Ohio law. *State v. Roe*, 10th Dist. No. 86AP-59, 1987 Ohio App. LEXIS 8490, *69-70 (Aug. 25, 1987); *State v. Fort*, 8th Dist. No. 52929, 1988 Ohio App. LEXIS 384, *59-61, (Feb. 4, 1988); *State v. Maurer,* 5th Dist. No. CA-7253, 1988 Ohio App. LEXIS 1608, *26-27, (April 25, 1988); *State v. Montgomery,* 1988 Ohio App. LEXIS 3297, *10-11, (, August 12, 1988); *State v. Jackson,* 6th Dist. No. L-86-395, 1989 Ohio App. LEXIS 5064, * 39-40 (Oct. 5, 1989); *State v. Moore,* 1st Dist. No. C-950009, 1996 Ohio App. LEXIS 2617, *54 (June 26, 1996).

Finally, the Federal Courts have recognized that, in Ohio, the jury does not impose a death sentence and thus it is an accurate statement of Ohio law to instruct the jury that its death verdict is merely a recommendation. *Beuke v. Collins*, 1995 U.S. Dist. LEXIS 22095, *102 (S.D. Ohio Oct. 19, 1995).

This long line of cases demonstrates that, in Ohio as in Florida pre-*Hurst*, the trial judge is the sentencing authority: the jury's role is merely to provide an advisory recommendation to

the trial court if the jury recommends a death sentence.[4] *Hurst's* holding that Florida's procedure of basing a death sentence on an advisory jury recommendation violated the Sixth Amendment was unconstitutional (*Hurst*, 136 S. Ct. at 621), is equally applicable to Ohio.

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

In *State v. Kirkland*, the Supreme Court of Ohio granted a motion for relief[5] premised on *Hurst* and remanded the case for a new mitigation and sentencing hearing. *State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (05/04/2016 Case Announcements) at p. 3. Prior to *Hurst*, the Court in *Kirkland* had attempted to cure prejudicial prosecutorial misconduct in the penalty phase by conducting its own deliberations whether the aggravating circumstances outweighed the mitigating factors. *See State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966 at ¶¶ 96, 97. The Court, after *Hurst*, found that the jury must weigh the aggravating circumstances against the mitigating factors in a new penalty phase trial. Thus the Supreme Court of Ohio' had held that *Hurst* applies to the penalty phase of Ohio's capital sentencing scheme.

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

Both federal and state courts have concluded that weighing determinations are factual findings that must be made by juries. The number of jurisdictions so holding is likely to increase because of the broad language of *Hurst*. "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619

A Missouri Federal District Court concluded the Missouri statutory scheme violated the Sixth Amendment in light of *Hurst* and *Ring*. *McLaughlin v. Steele*, 173 F. Supp.3d 855, 896 (E.D. Mo. Mar. 22, 2016). The court found that "the weighing of mitigating and aggravating

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[4] Unlike Florida, in Ohio the trial court must follow the jury's recommendation if the jury recommends a life sentence. R.C. 2929.03(D)(2).

[5] *See* S. Ct. Prac. Rule 4.01(A), Motion for order or relief.

circumstances is a finding of fact." *Id. See also State v. Whitfield*, 107 S.W.3d 253, 259-61 (Mo. 2003) (en banc) (finding Missouri's requirement that capital jurors determine whether evidence in mitigation was sufficient to outweigh the evidence in aggravation before sentencing defendant to death was a factual finding properly made by jury). The *McLaughlin* court reasoned "all we know from the special interrogatory is what [the jury] did *not* find." *Id.* "[B]ecause the judge could not have known what the jury decided, he could not have relied upon it in imposing the death penalty, and so he must have made the factual finding himself." *Id.* This violated the Sixth Amendment. *Id.*

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

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

F. Conclusion, Part I.

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

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

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

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

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

CONCLUSION

Movant was sentenced to death under a statutory scheme that violates the Sixth and Fourteenth Amendments of the United States Constitution because in Ohio, a Jury's verdict in the mitigation phase is merely a recommendation. *Hurst*, 136 S.Ct. at 619. Applying Ohio's unconstitutional death penalty statute to Movant's case constitutes an irregularity in the proceeding, or in any order or ruling of the court, or abuse of discretion by the court, because of which Movant was prevented from having a fair trial in the penalty phase in his case. The death sentence in this case was imposed based upon a jury recommendation and independent fact finding by the trial court. Accordingly, the death sentence was imposed contrary to law and is the result of an error of law. *Hurst*, 136 S.Ct. at 619. Movant is entitled to a new penalty phase trial pursuant to Crim. R. 33(A)(1),(4) and (5).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANT WILLIAMS' MOTION FOR NEW MITIGATION TRIAL PURSUANT TO CRIMINAL RULE 33 AND *HURST V. FLORIDA*** was served on January 10, 2017 via regular U.S. Mail, upon Butler County Prosecutor Michael T. Gmoser, at the address set forth below:

Butler County Prosecutor
315 High St., 11th Floor
Hamilton, OH 45011

By: _____
Kandra Roberts (0092091)

Counsel for Clifford Donta Williams

ATTACHMENT 1:

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

§ 2929.03 Imposing sentence for a capital offense.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Comment to H 511

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

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

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

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

'97 FEB 26 PM 2:05

STATE OF OHIO, CASE NO. CR90-08-0665
(Judge Anthony Valen)

Plaintiff,

CLERK OF COURTS
BUTLER COUNTY, OHIO

vs. *

OPINION AS
TO SENTENCE

CLIFFORD DONTA WILLIAMS, *

Revised Code 2929.03(F)

Defendant. *

FILED in Common Pleas Court
BUTLER COUNTY, OHIO
FEB 26 1997
EDWARD S. ROSS, JR.
CLERK

This cause came on to be heard, after the jury's recommendation pursuant to Revised Code 2929.03(D)(2) that the sentence of death be imposed on the defendant, for this Court's independent consideration of sentence in accordance with Revised Code 2929.03(D)(3), et seq. This written opinion is made in accordance with Revised Code 2929.03(F).

The aggravating circumstances in this case are that the offense of the aggravated murder of Wayman Hamilton was committed by the defendant, acting as the principal offender, while the defendant was committing or attempting to commit an aggravated robbery, and that this offense was committed for the purpose of escaping detection, apprehension, trial or punishment for the offense of aggravated robbery as specified in Specifications One and Two to Count One of the indictment, pursuant to Revised Code 2929.04(A)(7) and 2929.04(A)(3).

The Court finds that the aggravating circumstances are proved beyond a reasonable doubt. The evidence relevant to the aggravating circumstances was that the defendant was identified by two employees of The Fuel Mart gasoline station

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c/CA

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c/Dan Eichel
c/county clerk

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hiring a Clifton Cab Company cab for a ride to the City of Hamilton. The defendant admitted he had no money. The victim, cab driver Wayman Hamilton, was dispatched to take the defendant to Hamilton, Ohio, after which he was killed for a $32.10 cab fare, the value of the cab services the defendant obtained, as well as attempting to obtain whatever money the cab driver may have been carrying.

The victim was shot once in the head, without any apparent struggle, for the purpose of eliminating him as a witness to the robbery at gunpoint, so that the defendant could escape identification, detection, apprehension, trial and punishment for the offense of aggravated robbery. Testimony of a firearms examiner, together with the circumstances of the recovery of the fired cartridge cases and identification of the defendant in the shooting and the attempted robbery of Jeff Wallace, was relevant to identity, scheme, and motive, and was in this limited sense relevant to the aggravated circumstances, that is, that the defendant was the principal offender in the aggravated murder while committing aggravated robbery as to Wayman Hamilton.

The Court finds that the following items are mitigating factors presented by the defendant:

1. The defendant's age at the time of the offense was eighteen (18), his date of birth being June 6, 1962, and the offense occurring on August 3, 1990. The Court finds that

this mitigating factor exists under Revised Code 2929.04(B)(4).

2. The defendant's family relationship with his mother and maternal grandmother are good, and he has a helpful character regarding his mother and maternal grandmother in their households. The Court finds that this mitigating factor exists under Revised Code 2929.04(B)(7).

3. The defendant's life history, as revealed in the sentencing hearing, was happy in his early years with his mother and maternal grandmother, but the defendant experienced difficulties in life due to the lack of the presence in the home of a natural father. He also experienced difficulties after his mother's marriage and expressed having, in his words, "a difficult life", conflict with his stepfather, and contact over a period of years with juvenile courts. The Court finds that this mitigating factor exists under Revised Code 2929.04(B)(7).

4. As testified to by defendant's psychiatric consultant, Dr. Glen M. Weaver, the defendant is considered by the psychiatrist to have a mental condition diagnosed as paranoid schizophrenia, which the doctor believed to be amenable to treatment. The Court finds that this mitigating factor exists under Revised Code 2929.04(B)(7).

5. The defendant, in his unsworn statement, reflected remorse for the victim's family's grief and his own family's experience with his being tried and found guilty of

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this offense. The Court finds that this mitigating factor exists under Revised Code 2929.04(B)(7).

The Court presented to the jury an instruction as to the mitigating factors set forth in Revised Code 2929.04(B)(3), "Whether, at the time of committing the offense, the defendant lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." This was done to give the defendant the benefit as to the existence of this factor.

The Court has independently weighed and reviewed the evidence. The Court fails to find that the defendant's expert witness made any credible connection between the mental condition of the defendant and his commission of the offense herein. The Court makes the finding of fact that there is no credible evidence that the defendant lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

In making this finding, the Court observes that Dr. Weaver did not specifically link his finding of the defendant's mental problems to defendant's conduct on August 3, 1990. Dr. Weaver denied any knowledge of any of the facts of the aggravated murder herein and testified that the facts of the crime were irrelevant in this opinion. Dr. Weaver, therefore, did not express a precise opinion at that the time of committing the offense the defendant lacked

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substantial capacity to conform his conduct to the requirements of law.

The defendant did not present any evidence as to the mitigating factors in Revised Code 2929.04(B)(1), (2), (5), or (6), and the Court does not find these four subsections relevant.

This Court cannot find that there is anything mitigating in the nature and circumstances of the offense. The facts of this brutal, senseless, execution-style murder of the victim, a cab driver simply performing his job while being a target for defendant's robbery, do not allow the nature and circumstances of the offense to be mitigating.

While this Court would recognize that "residual doubt" can be a mitigating factor under Revised Code 29292.04(B)(7), this Court has no reasonable doubt as to the defendant's guilt and expressly declines to give such a factor any weight under the circumstances of this case.

The Court finds that the aggravating circumstances, as set forth above in this opinion, are sufficient to outweigh the mitigating factors presented by proof beyond a reasonable doubt.

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 inasmuch as there are untold

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thousands of members of our society who have endured similar hardships in life and emerged from such difficulties without turning to violent criminal conduct.

The defendant, through his witnesses and his unsworn statement, told very little about himself, but what we do know does not in reality suggest any extenuating factors. 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, although this Court views the totality of the evidence as establishing that the defendant was able to function rationally during the period of time surrounding the criminal acts here in question.

This is not a case where, because of the defendant's peculiar mental problem, he was particularly susceptible to perceive a provocative comment or act of the victim as being sufficient to incite a deadly response and, therefore, render him unable to distinguish right from wrong or unable to control his reactive conduct. There is no evidence suggesting that the defendant perceived a threat or provocation of any kind from the victim. There is no objective nor anecdotal evidence of the defendant ever losing control of his conduct or being unable to appreciate the consequences of his conduct in any other context. Dr. Weaver did not specifically link his finding of the defendant's mental disorder to the

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defendant's conduct of the robbery and execution-style killing of Wayman Hamilton.

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 the Court fails to see how this defendant's mental disorder qualifies as a cause relevant in this case as to why the defendant should not suffer the death penalty. The Court finds it to be of minimal significance and does not give it much weight in mitigation in this case.

In contrast, the weight of the aggravating circumstances is great. The aggravated murder of Wayman Hamilton was committed by the defendant while he was acting as a principal offender; while the defendant was committing or attempting to commit an aggravated robbery; the aggravated murder was committed for the purpose of escaping detection and apprehension and, thus, trial and punishment for the offense of aggravated robbery.

In this Court's view, the sum of all the mitigating factors presented is insufficient to create a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, and the evidence relevant to these aggravating circumstances admits of no justification, excuse, or extenuating circumstances for the killing of Wayman Hamilton by the defendant, Clifford Donta Williams.

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The defendant, therefore, shall suffer the sentence of death in accordance with Revised Code 2929.02(A), Revised Code 2929.03 and Revised Code 2929.04, which shall be carried out in accordance with the provisions of Revised Code 2949.21 through 2949.26.

In accordance with Revised Code 2947.08, the date appointed for execution is hereby set for July 1, 1991.

A copy of this opinion is to be filed forthwith with the Twelfth District Court of Appeals and the Supreme Court of Ohio.

Anthony Valen, Judge

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Common Pleas Court
Butler County, Ohio

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IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

CLIFFORD DONTA WILLIAMS,

Defendant.

CASE NO. CR90-08-0665
(Judge Anthony Valen)

JURY INSTRUCTIONS
SENTENCING
(MITIGATION) HEARING

Members of the jury:

You have heard the evidence and the arguments of counsel, and now you are going to have the opportunity to hear my instructions dealing with this phase of the proceedings. 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.

I have used the word "recommend", and I want to make sure that you understand that you are not to construe that word to diminish your responsibility in this matter. It's an awesome task, and the fact that the word recommend is used should not be considered by you to lessen your task.

There are three sentences that you are to consider in this case. Those sentences, when you consider them, should be based upon the facts as you find them and the law as it is given to you. The three sentences are: death, life imprisonment with parole eligibility after serving 30 full years of imprisonment,

or life imprisonment with parole eligibility after serving 20 full years of imprisonment.

You will consider all the evidence, arguments, the unsworn statement of the defendant, and all other information which are relevant to the nature and circumstances of the following aggravating circumstances, which have been defined previously for you:

(1) That the offense of aggravated murder causing the death of Waymond Hamilton was committed while the said Clifford Donta Williams was committing or attempting to commit an aggravated robbery, or while fleeing immediately after committing or attempting to commit an aggravated robbery and that Clifford Donta Williams was the principal offender in the commission of the aggravated murder.

(2) That the death of Waymond Hamilton was committed for the purpose of escaping detection, apprehension, trial, or punishment for the offense of aggravated robbery committed against Waymond Hamilton.

You will also consider any mitigating factors, including but not limited to the nature and circumstances of the offense and the history, character, and background of the defendant and all of the following:

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

(2) The youth of the defendant;

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

Mitigating factors are factors that, while they do not justify or excuse the crime, nevertheless, in fairness and mercy, may be considered by you as extenuating or reducing the degree of the defendant's blame or punishment.

BURDEN

The prosecutor has the burden to prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty outweigh the factors in mitigation of imposing the death sentence. To outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors.

REASONABLE DOUBT

Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced that the aggravating circumstance outweighs the factors in mitigation. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

CREDIBILITY

You are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence.

To weigh the evidence, you must consider the credibility of the witnesses, including the defendant. You will apply the tests of truthfulness which you apply in your daily lives. These tests include the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear and know the things concerning which he testified; his accuracy of memory; frankness or lack of it; intelligence; interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.

You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

CONCLUSION

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly.

In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding

with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

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. A verdict form with these three options will be furnished to you.

(Read jury recommendation forms.)

For your deliberation, you will have with you in the jury room the exhibits introduced at trial and these instructions of the Court.

ALTERNATE JURORS

To the alternate jurors I now say again, you were selected to serve in the event some misfortune might occur to a member of the regular jury panel. Up to this point, fortunately, it has not been necessary for you to replace a member of the regular jury panel. Now that the regular panel is about to retire and commence deliberation on the issues of a sentencing determination, you are going to be taken to a separate room where you will remain together while the regular jury panel is

deliberating.

STATE OF OHIO

Plaintiff

vs.

CLIFFORD DONTA WILLIAMS
aka DONTA WILBURN

Defendant

Filed In Common Pleas Court
BUTLER COUNTY, OHIO
JAN 23 1991
EDWARD S. ROBB, JR.
CLERK

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CLERK OF COURTS
BUTLER CO. OHIO

CASE NO. CR90-08-0665

STATE OF OHIO
COUNTY OF BUTLER
COURT OF COMMON PLEAS

ENTRY OF JURY RECOMMENDATION

* * * * * * * * *

This 17th day of January, 1991, before the Court and Jury came the Prosecuting Attorney and the defendant personally appearing and with his counsel, Craig D. Hedric and David T. Davidson, and the indictment, trial, and Jury's Verdict of Guilty as to the capital offense and aggravating circumstances contained in the Indictment, to wit: **Aggravated Murder**, contrary to R.C. 2903.01(B), **with Specification 1 to Count One** (commission of aggravated robbery by principal offender in committing aggravated murder) contrary to R.C. 2929.04(A)(7), **with Specification 2 to Count One** (purpose to escape detection, apprehension, trial or punishment for another offense), contrary to R.C. 2929.04(A)(3), as charged in Count One of the Indictment, being as set forth in the previous Entry of Verdict, the Court conducted a penalty phase hearing before the Jury pursuant to R.C. 2929.03 through 2929.04.

WHEREFORE, the penalty phase hearing began, and on the 18th day of January, 1991, after consideration of the relevant evidence adduced by both parties at trial and in this hearing, pursuant to R.C. 2929.03 through 2929.04, the defendant's unsworn statement to the jury in his own behalf, and the arguments of counsel, the Jury in writing made its **RECOMMENDATION** to the Court as to Count One, to wit: that the sentence of death be imposed on the defendant. Final disposition as to Count One is set for February 8th, 1991, at 3:00 o'clock p.m.

ENTER

Anthony Valen
JUDGE ANTHONY VALEN

APPROVED AS TO FORM:
JOHN F. HOLCOMB
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

J'76 P'790

OFFICE OF
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

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