No. 18-6708

IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD D. WILLIAMS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Hurst v. Florida* (2016), 577 U.S. ___,136 S. Ct. 616, 624 this Court invalidated Florida's former capital-sentencing scheme because it "required the judge alone to find the existence of an aggravating circumstance."

The Ohio Supreme Court recently rejected a post-*Hurst* challenge to Ohio's death penalty sentencing scheme, concluding "[u]nder Ohio's death-penalty scheme * * * trial judges function squarely within the framework of the Sixth Amendment." *State v. Mason*, __ N.E.3d __, 2018-Ohio-1462, ¶42.

This Court denied Mason's petition for writ of certiorari on November 5, 2018. *Mason v. Ohio*, No. 18-5303, 2018 WL 3575807 (Nov. 5, 2018).

As in *Mason*, supra, the question presented is whether Ohio's death penalty scheme satisfies the requirements of the Sixth Amendment to the United States Constitution following this Court's decision in *Hurst v. Florida*.

LIST OF PARTIES

The Petitioner is Clifford D. Williams, an inmate at the Chillicothe Correctional Institution in Chillicothe, Ohio.

Respondent is the State of Ohio, represented by William T. Gmoser, Prosecuting Attorney for Butler County, Ohio.

CORPORATE DISCLOSURE

No party to this proceeding is a non-governmental corporation.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a), this Respondent otherwise accepting Petitioner's statement of Jurisdiction (Pet. p. 4).

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' Petition, reprinted in Appendix D, beginning at A-36.

STATEMENT OF THE CASE

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. (*State v. Williams*, 12th Dist. Butler No. CA2017-O07-105, 2018-Ohio-1358, ¶ 2). (Pet. App. A).

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. (Id., ¶ 3).

His conviction and sentence were affirmed by the Ohio Twelfth District Court of Appeals and by the Ohio Supreme Court. *State v. Williams,* 12th Dist. Butler Nos. CA91-04-060 and CA92-06-110, 1992 Ohio App. LEXIS 5529 (Nov. 2, 1992), and *State v. Williams* (1995), 73 Ohio St. 3d 153.

Following the issuance of this Court's decision in *Hurst v. Florida*, Williams first raised *Hurst* issues as to the constitutionality of Ohio's death penalty scheme in a motion for leave to file a motion for a new mitigation trial filed in the Common

Pleas Court, Butler County, Ohio on January 11, 2017. (Pet. App. D). The court granted leave, but denied the request for a new mitigation trial. (Pet. App. C).

The Twelfth District Court of Appeals affirmed the trial court's decision. *State v. Williams*, 12th Dist. Butler No. CA2017-07-105, 2018-Ohio-1358. (Pet. App. A).

On April 18, 2018, the Ohio Supreme Court denied a *Hurst* challenge and upheld the constitutionality of Ohio's death penalty scheme in *State v. Mason* (2018), __ N.E.3d __, 2018-Ohio-1462, specifically finding the Ohio scheme satisfies the Sixth Amendment. (Id., ¶¶ 1, 43).

On August 15, 2018 the Ohio Supreme Court declined to exercise its discretionary jurisdiction to review the Twelfth District's affirmation of the trial court's denial of Williams' motion for a new mitigation hearing. (Pet. App. B).

Williams filed his instant petition for writ of certiorari on November 13, 2018.

REASONS FOR DENYING THE PETITION

A. THE CAPITAL SENTENCING SCHEME AT ISSUE IN *HURST* DIFFERS FROM OHIO'S CAPITAL SENTENCING SCHEME IN CONSTITUTIONALLY SIGNIFICANT WAYS.

1. Contrary to Williams' Assertion, Ohio's Supreme Court Has Determined That Ohio's Death Penalty Statute Is Unlike The Statute At Issue In *Ring* And *Hurst*.

The Ohio Supreme Court, in rejecting a *Hurst* based challenge to Ohio's death penalty sentencing scheme, reasoned that in Ohio, a capital "jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and—unlike the juries in *Ring* and *Hurst*—the aggravating-circumstance specifications for which the offender was indicted." *State v. Mason*, 2018-Ohio-1462, ¶ 42,

citing R.C. 2929.03(B). "Then the jury—again unlike in *Ring* and *Hurst*—must 'unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors.'" *Id.*, citing R.C. 2929.03(D)(2). An Ohio jury may recommend a death sentence only after it makes this finding. *Id.* And without that recommendation by the jury, the trial court may not impose the death sentence. The trial judge's role did not offend the Sixth Amendment because the judge "may weigh aggravating circumstances against mitigating factors and impose a death sentence only after the jury itself has made the critical findings and recommended that sentence." *State v. Mason*, 2018-Ohio-1462, ¶42.

At page 9 of his Petition, Williams claims that the Ohio Supreme Court has determined that Ohio's death penalty scheme is "remarkably similar" to Florida's death penalty scheme. He cites *State v. Rogers* (1986), 28 Ohio St.3d 427, 430, 504 N.E.2d 52, rev'd on other grounds, 32 Ohio St.3d 70, 512 N.E.2d 581 (1987). *Rogers* involved the Ohio Supreme Court's reconsideration of Roger's death sentence in light of this Court's decision in *Caldwell v. Mississippi*. *Caldwell* addressed the issue of "whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Caldwell* v. *Mississippi*, 472 U.S. 320, 323 (1985). The Ohio Supreme Court rejected Rogers' argument, noting 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.'" *State v. Rogers*, 28 Ohio St.3d at 429, 504 N.E.2d at 54. *In this respect*, the Ohio Supreme Court deemed Florida's statutory system to be "remarkably similar" to Ohio's. *State v. Rogers*, 28 Ohio St.3d at 430, 504 N.E.2d at 55. More recent and far more relevant is the Ohio Supreme Court declaration "Ohio's capital sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*." *State v. Belton,* 149 Ohio St. 3d 165, 74 N.E.3d 319, 336, 2016-Ohio-1581, ¶ 59 , *cert. denied,* 137 S. Ct. 2296 (June 26, 2017).

2. Ohio's Statutory Scheme Does Not Allow A Defendant To Be Sentenced To Death Unless A Jury Specifically And Unanimously Finds The Existence Of One Or More Aggravating Circumstances Was Proved Beyond A Reasonable Doubt.

An actual comparison of the statutory schemes demonstrates constitutionally significant differences. In a capital case tried to a jury, Ohio requires the following in order for the defendant to receive the death penalty:

a. The "defendant must be charged in an indictment with aggravated murder and at least one specification of an aggravating circumstance." *State v. Mason*, 2018-Ohio-1462, ¶7, citing R.C. 2929.03(A) and (B).

b. The jury verdict must specifically find the defendant guilty of aggravated murder and also separately and specifically find the defendant guilty of at least one charged specification. These findings must be unanimous and beyond a reasonable doubt. *State v. Mason*, 2018-Ohio-1462, ¶8, citing R.C. 2929.03(A) and (B) and R.C. 2929.04(A).

c. Upon this finding, the defendant will be sentenced either to death or to life imprisonment. The sentence "shall be determined * * * [b]y the trial jury and the

trial judge." *State v. Mason*, 2018-Ohio-1462, ¶9 citing R.C. 2929.03(C)(2).

d. In determining the defendant's sentence, "the court and trial jury shall consider (1) any presentence-investigation or mental-examination report * * *, (2) the trial evidence relevant to the aggravating circumstances the offender was found guilty of committing and relevant to mitigating factors, (3) additional testimony and evidence relevant to the nature and circumstances of the aggravating circumstances and any mitigating factors, (4) any statement of the offender, and (5) the arguments of counsel. *State v. Mason*, 2018-Ohio-1462, ¶10 citing R.C. 2929.03(D)(1).

e. If, based on these considerations, "the *trial jury* unanimously *finds,* by proof beyond a reasonable doubt, that the aggravating circumstances * * * outweigh the mitigating factors, the *trial jury* shall recommend to the court that the sentence of death be imposed on the offender." Unless it makes such a finding, "the jury shall recommend one of the life sentences set forth in R.C. 2929.03(D)(2), and the trial court 'shall impose the [life] sentence recommended.'" *State v. Mason*, 2018-Ohio-1462, ¶11 citing R.C. 2929.03(D)(2). If the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence. *Id.*, citing *State v. Springer* (1992)*,* 63 Ohio St.3d 167, 586 N.E.2d 96, syllabus.

f. "[I]f the trial jury recommends a death sentence, and if 'the court *finds,* by proof beyond a reasonable doubt, * * * that the aggravating circumstances * * * outweigh the mitigating factors, [the court] shall *impose* sentence of death on the offender.'" *State v. Mason*, 2018-Ohio-1462, ¶12 (Pet. App. A) citing R.C. 2929.03(D)(3) (Emphasis added by the Ohio Supreme Court.). The trial court then

must articulate in a separate opinion "the reasons why the aggravating circumstances * * * were sufficient to outweigh the mitigating factors." *State v. Mason*, 2018-Ohio-1462, ¶12 (Pet. App. A) citing R.C. 2929.03(F).

3. Florida's Statutory Scheme in *Hurst* Allowed A Defendant To Be Sentenced To Death If A Judge, Independent Of Any Jury Finding, Found The Existence Of An Aggravating Circumstance.

Florida's capital sentencing scheme required a majority of jurors to find that some aggravating factor existed:

> "Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the 'avoiding a lawful arrest' aggravator applies, see § 921.141(5)(e), while three others believe that only the 'committed for pecuniary gain' aggravator applies, see § 921.141(5)(f), because seven jurors believe that at least one aggravator applies." *Florida v. Steele,* 921 So.2d 538, 545 (2006), abrogated, *Hurst* (emphasis sic).

Thus, it was not necessary for a majority of the jury to agree on the existence of any one aggravating factor. *Florida v. Steele*, 921 So.2d at 545, *see also* Fla. Stat. 921.141(5)(a)-(p) (2010) (enumerating the 16 aggravating circumstances the jury could consider) (current version at Fla. Stat. 921.141(6) (2016).

Although the Florida jury considered the issue of whether aggravating circumstances existed, "'the judge [could not] possibly know the specifics of the jury's findings and [the judge made] her own findings' because the jury was not required to make an express aggravating-circumstance finding." *State v. Mason*, 2016-Ohio-8400 at ¶25 (Citations omitted).

Ohio's capital sentencing statute requires the jury to find and specifically

identify at least one enumerated aggravating factor, unanimously and beyond a reasonable doubt, in order for the death penalty to be included in the range of possible sentences. R.C. 2929.03(B). Ohio's statute requires the jury to render a unanimous verdict on each individual aggravating circumstance, in writing, before either the jury or the judge may consider the circumstance in the sentencing phase. An Ohio jury's finding of the existence of aggravating factors is not merely advisory. Mitigating factors are to be weighed against only the specific aggravating factors found by the jury. R.C. 2929.03(D).

An Ohio jury's "aggravating-circumstance finding is binding on the trial judge, and the trial judge cannot expose the defendant to a greater penalty than authorized by the jury verdict." *State v. Mason*, 2016-Ohio-8400 at ¶28 citing *State v. Cooey* (1989)*,* 46 Ohio St.3d 20, 544 N.E.2d 895, paragraph three of the syllabus ("Only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count."), *superseded by constitutional amendment on other grounds, State v. Smith* (1997)*,* 80 Ohio St.3d 89 684 N.E.2d 688; R.C. 2929.03(D)(2) (1981) (current version at R.C. 2929.03(D)(2)(2008)). And, in Ohio, the only circumstance in which the judge may ever override a jury's verdict in a death penalty case is if the judge elects to depart downward by imposing a sentence of life despite a jury's recommendation of death. If the jury recommends life, the judge is bound by that recommendation and must impose that sentence.

B. The Ohio Supreme Court Correctly Held That Ohio's Capital Sentencing Scheme Was Constitutional.

1. The *Hurst* Opinion Applied *Apprendi* and *Ring* to Florida's Capital Sentencing Statutes.

The Ohio Supreme Court in *Mason*, supra began by reviewing Ohio's capital sentencing statutes and noted that Mason's Sixth Amendment claim relied on *Hurst,* which, in turn, relied on *Apprendi v. New Jersey*, and *Ring v. Arizona*. *State v. Mason*, 2018-Ohio-1462, ¶13 (Pet. App. A). *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. at 490. *Ring* held that an aggravating circumstance in a capital case was "'the functional equivalent of an element of a greater offense'" that must be submitted to a jury. *State v. Mason*, 2018-Ohio-1462, ¶14, *Ring v. Arizona*, 536 U.S. at 609*,* quoting *Apprendi v. New Jersey*, 530 U.S. at 494, fn. 19. The *Ring* court concluded Arizona's death-penalty law violated the Sixth Amendment because it required the trial judge alone to find the aggravating facts necessary to sentence a defendant to death. *State v. Mason*, 2018-Ohio-1462, ¶14, *See Ring v. Arizona*, 536 U.S. at 609. The Ohio Supreme Court opined that *Hurst* simply applied *Apprendi* and *Ring*. *State v. Mason*, 2018-Ohio-1462, ¶15.

Next, the Ohio Supreme Court examined the Florida statute at issue in *Hurst*. In Hurst's sentencing proceeding, the jury rendered an "advisory sentence" recommending death, but Florida law did not require the jury to specify the aggravating circumstances that influenced its decision. The sentencing judge then im-

posed a death sentence after independently determining and weighing aggravating circumstances and mitigating factors. *State v. Mason*, 2018-Ohio-1462, ¶15, (internal citations omitted) (Pet. App. A). The *Hurst* opinion concluded that Florida's scheme had to be invalidated because it did "not require the jury to make the critical findings necessary to impose the death penalty" and it "required the judge alone to find the existence of an aggravating circumstance." *State v. Mason*, 2018-Ohio-1462, ¶16; *Hurst v. Florida*, 136 S. Ct. at 622, 624.

2. Ohio's Statute Complies with *Hurst*, Because the Presence of an Aggravating Factor, Necessary To Impose the Death Penalty Is A Fact That Must Be Found By A Jury, Specifically, Not Implicitly, And Independent of A Judge.

In contrast, an Ohio capital "jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and * * * the aggravating-circumstance specifications for which the offender was indicted." *State v. Mason*, 2018-Ohio-1462, ¶20 (Pet. App. A), citing R.C. 2929.03(B). "Then the jury * * * must 'unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors.'" *State v. Mason*, 2018-Ohio-1462, ¶20 (Pet. App. A) citing R.C. 2929.03(D)(2). An Ohio jury recommends a death sentence only after it makes this finding. *Id.* Without that finding and recommendation by the jury, the trial court may not impose the death sentence.

3. *Hurst* Does Not Require That The Jury Weigh the Aggravating Circumstances Against The Mitigating Factors.

The Ohio Supreme Court then considered whether "the weighing that occurs in the sentencing phase—after the jury already has found the existence of an aggra-

vating circumstance—constitute[s] fact-finding under the Sixth Amendment." *State v. Mason*, 2018-Ohio-1462, ¶23. It determined that *Hurst* did not address this question; instead, "[t]he question in *Hurst* was more basic: did the Florida scheme require that a Florida jury make a finding of fact as to an aggravating circumstance before a sentence of death was imposed?" *State v. Mason*, 2018-Ohio-1462, ¶23, *Hurst v. Florida*, 136 S. Ct. at 622. The Ohio Court observed, *Hurst* "did refer to Florida's weighing process by mentioning the role mitigating facts play in capital sentencing [,b]ut those references merely described Florida's scheme; the court's holding did not address the weighing process." *State v. Mason*, 2018-Ohio-1462, ¶23, citing *Hurst v. Florida*, 136 S. Ct. at 622, 624. The Ohio Court concluded that *Hurst* "held only that Florida's sentencing scheme violated the Sixth Amendment because it 'required the judge alone to find the existence of an aggravating circumstance.'" *State v. Mason*, 2018-Ohio-1462, ¶23, *Hurst v. Florida*, 136 S. Ct. at 624.

4. Rather Than A Finding of Fact That Makes A Defendant Eligible For The Death Penalty, Weighing Aggravating Circumstances Against Mitigating Factors Is An Assessment of A Defendant's Individual Moral Culpability For The Purpose Of Determining If The Death Penalty, For Which The Defendant Is Already Eligible, Should Be Imposed.

The Ohio Supreme Court next analyzed the nature of the weighing process. It recounted that this Court has recognized "two different aspects of the capital decision-making process: the eligibility decision and the selection decision." *State v. Mason*, 2018-Ohio-1462, ¶24, quoting *Tuilaepa v. California,* 512 U.S. 967, 971 (1994). For purposes of the Eighth Amendment, a defendant is eligible for the death penalty if the trier of fact finds him guilty of murder and at least one aggra-

vating circumstance. *State v. Mason*, 2018-Ohio-1462, ¶24, *Tuilaepa v. California,* 512 U.S. at 972. This is necessarily a factual determination. *State v. Mason*, 2018-Ohio-1462, ¶24 (Pet. App. A), *Tuilaepa v. California,* 512 U.S. at 973. "The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure [sic] an assessment of the defendant's culpability." *Id*. This involves an exercise of judgment and "is mostly a question of mercy." *State v. Mason*, 2018-Ohio-1462, ¶24 citing *Kansas v. Carr,* ___ U.S. ___, 136 S.Ct. 633, 642, (2016) and *Tuilaepa v. California,* 512 U.S. at 978. The Ohio Supreme Court concluded the weighing that is done in the selection decision does not involve a determination of fact. *State v. Mason*, 2018-Ohio-1462, ¶24. The eligibility/selection distinction is significant in capital cases because the Sixth Amendment requires a jury to find beyond a reasonable doubt all facts that make a defendant death-eligible. *State v. Mason*, 2018-Ohio-1462, ¶25 (Pet. App. A), *See Hurst v. Florida*, 136 S. Ct. at 619. Here, the Sixth Amendment was satisfied once the jury found Mason guilty of aggravated murder and a felony-murder capital specification. *State v. Mason*, 2018-Ohio-1462, ¶29.

5. Even If *Hurst* Requires The Jury To Find That Aggravating Circumstances Outweigh Mitigating Factors, Ohio's Sentencing Scheme Is Constitutional.

The Ohio Supreme Court further concluded "that even if the weighing process were to involve fact-finding under the Sixth Amendment, Ohio adequately affords the right to trial by jury during the penalty phase." *State v. Mason*, 2018-Ohio-1462, ¶30. Pursuant to Ohio's statute, if "the *trial jury* unanimously *finds,* by proof beyond a reasonable doubt, that the aggravating circumstances * * * outweigh the

mitigating factors, the *trial jury* shall recommend to the court that the sentence of death be imposed on the offender." *State v. Mason*, 2018-Ohio-1462, ¶11, citing R.C. 2929.03(D)(2) (Emphasis added by Ohio Supreme Court.). Unless it makes such a finding, "the jury shall recommend one of the life sentences set forth in R.C. 2929.03(D)(2), and the trial court 'shall impose the [life] sentence recommended.'" *State v. Mason*, 2018-Ohio-1462, ¶11, citing R.C. 2929.03(D)(2). If the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence. *State v. Mason*, 2018-Ohio-1462, ¶11, citing *State v. Springer* (1992)*,* 63 Ohio St.3d 167, 586 N.E.2d 96, syllabus. Thus, even if *Hurst* required clarification of a requirement for jury weighing, the instant case is not the proper vehicle to do so.

6. The Position Advocated By Williams Is Not Supported By Precedent.

The Ohio Supreme Court rejected Mason's argument that this "mere recommendation" was insufficient under the Sixth Amendment. It reiterated that *Hurst* "held that the Florida scheme violated the Sixth Amendment because it did not require the jury to find that Hurst was guilty of committing a specific aggravating circumstance." *State v. Mason*, 2018-Ohio-1462, ¶31, *Hurst v. Florida*, 136 S. Ct. at 622, 624. Ohio's scheme, however, "requires the jury to make this specific and critical finding." *State v. Mason*, 2018-Ohio-1462, ¶32.

The Ohio Supreme Court rejected Mason's argument that the Sixth Amendment "requires a jury to *explain why* it concluded that the aggravating circumstances are sufficient to outweigh the mitigating factors." *State v. Mason*, 2018-Ohio-

1462, ¶34 (emphasis sic). It determined that Mason's argument failed to recognize that "Florida's statutory scheme violated the Sixth Amendment because the jury did not specify its finding of which aggravating circumstance supported its recommendation, not because the jury did not explain why it found that the aggravating circumstances were not outweighed by sufficient mitigating circumstances." *State v. Mason*, 2018-Ohio-1462, ¶35. The Court observed that "neither *Ring* nor *Hurst* held that the Sixth Amendment requires a jury to find mitigating facts." *State v. Mason*, 2018-Ohio-1462, ¶38. Instead, those cases held "that the Sixth Amendment guarantees that a jury will determine the facts that serve to *increase* the maximum punishment." *Id*. (emphasis sic), citing *Ring v. Arizona*, 536 U.S. at 589; *Hurst v. Florida*, 136 S. Ct. at 619; and *Apprendi v. New Jersey*, 530 U.S. at 490-491, fn. 16. The Court observed that Mason never explained "why further guidance for the trial court is constitutionally required." *State v. Mason*, 2018-Ohio-1462, ¶37.

The Ohio Supreme Court rejected Mason's claim that Ohio's sentencing scheme was unconstitutional because the defendant is not eligible for the death penalty until the trial judge makes "additional 'specific findings' beyond those made by the trial jury." *State v. Mason*, 2018-Ohio-1462, ¶39. The Ohio Court stated "that Mason misapprehends the issue, framing it as a question whether a death sentence 'can be imposed,' instead of whether it 'will be imposed.'" *Id.* It observed that an Ohio trial judge is not permitted "to find *additional* aggravating facts", but instead is required "to determine, independent of the jury, whether a sentence of death *should* be imposed." *Id.* (emphasis sic). Further, "the trial court cannot *in-*

crease an offender's sentence based on its own findings." *State v. Mason*, 2018-Ohio-1462, ¶40 (emphasis sic). The Court concluded that "[u]nder Ohio's death-penalty scheme, therefore, trial judges function squarely within the framework of the Sixth Amendment" because they "may weigh aggravating circumstances against mitigating factors and impose a death sentence only after the jury itself has made the critical findings and recommended that sentence." *State v. Mason*, 2018-Ohio-1462, ¶42.

Following this Court's decision in *Hurst*, the Florida Supreme Court revisited the State's capital sentencing scheme on remand. Based on the *Hurst* decision, as well as the decisions in *Apprendi* and *Ring,* the Florida Supreme Court concluded "that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury — not the judge — must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty." *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016). Further, it found that these "necessary facts" include not only the existence of aggravating factors that make a defendant eligible for the death penalty, but also that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. *Id.* Based on "the Florida Constitution and Florida's long history of requiring jury unanimity", the Florida Court held that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death,

unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 54, 57. The Florida Court emphasized that a jury could recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they out-weigh the mitigating circumstances. *Hurst v. State* 202 So. 3d at 57-58. And, the Court stated it did not "intend by our decision to eliminate the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life." *Hurst v. State*, 202 So. 3d at 58.

C. WILLIAMS SEEKS AN UPROOTING OF PRECEDENT IN SIXTH AMENDMENT JURISPRUDENCE.

Williams' position is contrary to longstanding and consistent Supreme Court precedent.

In *Apprendi v. New Jersey*, this Court stated:

> "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion— taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case." *Apprendi v. New Jersey*, 530 U.S. at 481 (emphasis sic).

The *Ring* opinion undercuts Williams' assertion. It noted that Ring's claim was "tightly delineated":

> "He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. * * * He makes no Sixth Amendment claim with respect to mitigating circumstances. * * * Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. * * * He does not question the Arizona Supreme Court's authority to

reweigh the aggravating and mitigating circumstances after that court struck one aggravator." *Ring v. Arizona*, 536 U.S. at 597, fn. 3.

In his concurring opinion, Justice Scalia stated:

"What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Ring v. Arizona*, 536 U.S. at 612-613, (emphasis sic).

Justice Kennedy's concurring opinion warned that *Apprendi* should not be extended without caution. *Ring v. Arizona,* 536 U.S. at 613. See also, *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("This Court has pointed out that jury sentencing in a capital case can perform an important societal function, * * * but it has never suggested that jury sentencing is constitutionally required."). Not one of these statements was addressed by the *Hurst* opinion.

Hurst did expressly overrule *Spaziano v. Florida* to the extent it allowed a sentencing judge, independent of a jury's factfinding, to find an aggravating circumstance that is necessary for imposition of the death penalty. *Hurst v. Florida*, 136 S. Ct. at 623, 624. In *Spaziano v. Florida*, Spaziano's "fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury." *Spaziano v. Florida*, 468 U.S. 447, 458 (1984). This Court noted, "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Spaziano v. Florida*, 468 U.S. at 459. The Court determined, "there is no constitutional imperative that a jury have the responsibility of deciding whether

the death penalty should be imposed." *Spaziano v. Florida*, 468 U.S. at 459. *Hurst* overruled specific parts of *Spaziano*. The parts left undisturbed cannot be reconciled with Mason's argument.

Williams' assertion is contrary to well established Sixth Amendment precedent. Furthermore, it is perplexing because it seems to call for the elimination of the judge's independent weighing of mitigating circumstances against the aggravating factor found by the jury. The logical outcome of Mason's argument would make capital sentencing less deliberate, less reasoned, and a less reviewable narrowing process. That is, it would run afoul of the values rooted in the Eighth Amendment and *Furman v. Georgia* and its progeny. Ohio's capital sentencing scheme strikes a just and proper balance between the values based in the Eighth Amendment, advanced by *Furman* and its progeny, and the Sixth Amendment, advanced by *Apprendi*, and its progeny. Mason urges this Court to take an unprecedented and ill-advised course.

D. THIS COURT HAS ALREADY DENIED CERTIORARI ON THE SAME QUESTION PRESENTED.

As set forth above, this Court denied the petition for writ of certiorari of Maurice Mason on November 5, 2018 (*Mason* v. Ohio, No. 18-5303, 2018 WL 3575807 (Nov. 5, 2018)). Mason had raised the same question as raised by Williams, with similar arguments.

CONCLUSION

Williams' argument fails because the capital sentencing scheme at issue in *Hurst* differs from Ohio's capital sentencing scheme in constitutionally significant

ways. Under Ohio law, a defendant cannot be sentenced to death unless he is indicted for aggravated murder and at least one specification of an aggravating circumstance. At trial, the jury must find the defendant guilty of aggravated murder and separately and specifically find the defendant guilty of at least one specification charged in the indictment. Then, the jury must find that the specified aggravating circumstance(s) outweigh(s) the mitigating factors and recommend that the defendant be sentenced to death. If the jury makes the necessary findings and recommends the death penalty, the trial judge must independently determine whether the aggravating circumstances, found by the jury, outweigh the mitigating factors. If so, the trial court must impose the death sentence. Finally, the trial court must articulate in a written opinion the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors.

In contrast, Florida's capital sentencing scheme at issue in *Hurst* required a majority of jurors to find the existence of some aggravating factor(s). It was not necessary for a majority of the jury to agree on the existence of any one specific aggravating factor and the jury was not required to make an express aggravating-circumstance finding. The jury then recommended either a sentence of death or life in prison. With no knowledge of what the jury found about any particular aggravating circumstance, the judge was required to determine whether at least one sufficient aggravating circumstance existed and whether the aggravators outweigh any mitigation. Finally, regardless of the jury's recommendation regarding the appropriate sentence, the judge would determine whether to sentence the defendant to

death or life in prison.

The Ohio Supreme Court correctly held that Ohio's capital sentencing scheme was constitutional because a jury decides whether the defendant is guilty of aggravated murder as well as the aggravating-circumstance specification(s) for which the defendant was indicted. *Mason*, supra. This, the Ohio Supreme Court held, satisfied the requirements of the Sixth Amendment. The Court went on to find that, even if *Hurst* was read to require the jury to weigh aggravating circumstances against mitigating circumstances, Ohio's statutory scheme was constitutional because the jury must find, unanimously and beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors.

Ohio's capital sentencing scheme strikes a just and proper balance between the values based in the Eighth Amendment, advanced by *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny, and the Sixth Amendment, advanced by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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