No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Lawrence Alfred Landrum,

Petitioner,

-v-

State of Ohio,

Respondent.

On Petition for Writ of Certiorari to
the Ohio Fourth Appellate District, Ross County Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

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

Under Ohio's capital punishment statute, "[a]ll the power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial" and renders specific factual findings necessary to impose the death penalty. *State v. Rogers,* 28 Ohio St.3d 427, 429, 505 N.E.2d 52, 55 (1986). The Supreme Court of Ohio, citing *Spaziano,* has repeatedly held that Ohio's death penalty statutory scheme procedure does not violate the Sixth or Eighth Amendments.

Lawrence Landrum was sentenced under this judge-sentencing scheme where a jury's death verdict is merely a recommendation. The judge alone makes findings essential to the death penalty and decides whether to sentence a defendant to life or death.

Mr. Landrum, in his motion for a new mitigation trial, moved the trial court to vacate his death sentence in accordance with *Hurst*. The state court denied his motion, the state court of appeals affirmed that decision, *albeit* for different reasoning, and the Supreme Court of Ohio declined to exercise its discretionary jurisdiction to review the court of appeals' decision.

Given that this Court in *Hurst* explicitly overruled *Spaziano*, and the Supreme Court of Ohio repeatedly relied on *Spaziano*, in upholding Ohio's death scheme in which the trial judge independently makes the ultimate decision as to whether the aggravating circumstances outweigh the mitigating factors and the defendant should be sentenced to death, the following question is presented:

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

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PETITION FOR WRIT OF CERTIORARI

Based on the rule announced in *Hurst v. Florida*, _ U.S. _, 136 S.Ct. 616 (2016), Lawrence Landrum respectfully asks that a writ of certiorari issue to review the denial of his motion to vacate his death sentence and remand to the trial court for a new sentencing hearing.

OPINIONS BELOW

At issue in this petition is the Fourth Appellate District, Ross County Court of Appeals' denial of Mr. Landrum's motion for leave to file his motion for a new mitigation trial, State v. *Landrum*, No. 17CA3607, 2018-Ohio-1280, (4th Dist. March 29, 2018) and is reproduced at Appendix A. The Supreme Court of Ohio's entry declining to exercise its discretionary jurisdiction to hear Mr. Landrum's appeal from the January 25, 2018 decision, *State v. Landrum,* 153 Ohio St.3d 1461, 2018-Ohio-3258, 104 N.E.3d 792 (2018) (Table) is reproduced at Appendix B. The state court of appeals' decision leaves undisturbed a judge-sentencing statute for capital cases.

Prior history of the case is as follows:

Sentencing Opinion: The decision of the trial court independently finding that the aggravating circumstances outweighed the mitigation factors is unreported and reproduced at Appendix C.

Direct Appeal: The decision of the state appellate court denying Mr. Landrum's direct appeal is reported at *State v. Landrum*, No. 1330, 1989 Ohio App. LEXIS 143 (4th Dist. Jan. 12, 1989). The decision of the Supreme Court of Ohio denying his direct appeal is reported at *State v. Landrum*, 53 Ohio St.3d 107, 559 N.E.2d 710 (Ohio 1990). The entry of this Court denying his petition for writ of certiorari is reported at *Landrum v. Ohio*, 498 U.S. 1127, 111 S. Ct. 1092, 112 L. Ed. 2d 1196 (1991).

Post-Conviction: The trial court's decision summarily dismissing Mr. Landrum's post-conviction petition is unreported. The opinion of the Court of Appeals affirming the trial court's summary disposition of Mr. Landrum's post-conviction petition is reported at *State v. Landrum,* No. 98 CA 2401, 1999 Ohio App. LEXIS 71 (4th Dist. Jan. 11, 1999). The Supreme Court of Ohio's entry declining to hear the appeal from that decision is reported at *State v. Landrum,* 85 Ohio St.3d 1476, 709 N.E.2d 849 (1999) (Table).

Reopening of Direct Appeal: Mr. Landrum filed an application to reopen his direct appeal with the Fourth Appellate District, Ross County Court of Appeals. The decision of the court of appeals denying the application is unreported. The

decision of the Supreme Court of Ohio affirming the decision of the court of appeals is reported at *State v. Landrum,* 87 Ohio St.3d 315, 720 N.E.2d 524 (1999).

Federal Habeas: After exhausting his state court remedies, Mr. Landrum sought federal habeas relief. The Magistrate Judge's decision recommending that Mr. Landrum be granted relief on one portion of his ineffectiveness claim is reported at *Landrum v. Anderson,* 2005 U.S. Dist. LEXIS No. 41846, p. *130 (S.D. Ohio, Nov. 1, 2005). The District Court's decision adopting the recommendation of the Federal Magistrate Judge is reported at *Landrum v. Anderson,* 2006 U.S. Dist. LEXIS No. 27510 (S.D. Ohio April 17, 2006).

The decision of the United States Court of Appeals for the Sixth Circuit reversing the grant of habeas relief is reported at *Landrum v. Mitchell,* 625 F.3d 905 (6th Cir. 2010). The Sixth Circuit's decision denying *en banc* review is reported at *Landrum v. Mitchell,* 2011 U.S. App. LEXIS 549 (6th Cir. Jan. 5, 2011).

The decision of this Court denying Landrum's petition for writ of certiorari is reported at *Landrum v. Mitchell,* 565 U.S. 830, 132 S. Ct. 127, 181 L. Ed. 2d 49 (2011).

Federal Rule 60 Proceedings

Mr. Landrum sought relief from the district court's decision pursuant to this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 272 (2012) and *Trevino v. Thaler*, 569 U.S. 413,133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013). The Magistrate Judge's initial report and recommendations that Landrum be denied relief on the merits of his Rule 60 motion and that a certificate of appealability be granted, is reported at *Landrum v. Anderson,* No. 1:96-cv-641,

2013 U.S. Dist. LEXIS 138635 (S.D. Ohio Sept. 26, 2013). The magistrate judge's supplemental report and recommendations that Landrum be denied relief on the merits of his Rule 60 motion is reported at *Landrum v. Anderson,* 1:96-cv-641, 2014 U.S. Dist. LEXIS 54332 (S.D. Ohio April 18, 2014). The district court's opinion overruling Landrum's objections, denying relief on the merits of Landrum's Rule 60 Motion, and granting a certificate of appealability is reported at *Landrum v. Anderson,* 1:96-cv-641, 2014 U.S. Dist. LEXIS 72640 (S.D. Ohio May 27, 2014).

The opinion of the Sixth Circuit Court of Appeals affirming the decision of the district court is reported at *Landrum v. Anderson,* 813 F.3d 330 (6th Cir. 2016). The order of the Sixth Circuit Court of Appeals denying rehearing and rehearing *en banc* is reported at *Landrum v. Anderson,* No. 14-3591, 2016 U.S. App. LEXIS 7179 (6th Cir. April 12, 2016).

The entry of this Court denying Landrum's petition for writ of certiorari is reported at *Landrum v. Jenkins,* __ U.S. __, 137 S. Ct. 333, 196 L. Ed. 2d 264 (2016).

Reopening of his Direct Appeal: Mr. Landrum filed a motion to reopen his direct appeal pursuant to Ohio Supreme Court Rule. 4.01 The decision of the Supreme Court of Ohio denying Landrum's 4.01 motion is reported at *State v. Landrum*, 148 Ohio St.3d 1423, 2017-Ohio-905, 71 N.E.3d 296 (2017).

The entry of this Court denying Landrum's petition for writ of certiorari is reported at *Landrum v. Ohio,* __ U.S. __, 138 S. Ct. 161, 199 L.E.2d 97 (2017).

Motion for a New Mitigation Trial: The state trial court's decision denying Mr. Landrum's motion for a new mitigation trial is unreported and attached at Appendix. D. The opinion of the Fourth Appellate District, Ross County affirming the decision of the trial court, *albeit* it for different reasons, is reported at *State v. Landrum*, No. 17CA3607, 2018-Ohio-1280, Decision and Judgment Entry (4th Dist. March 29, 2018) and is reproduced at Appendix A. The Supreme Court of Ohio's entry declining to exercise its discretionary jurisdiction to hear Mr. Landrum's appeal from the March 29, 2018 decision is reported at *State v. Landrum,* 153 Ohio St.3d 1461, 2018-Ohio-3258, 104 N.E.3d 792 (Ohio 2018)(Table) is reproduced at Appendix B.

JURISDICTION

On August 15, 2018, the Supreme Court of Ohio declined to exercise its discretionary jurisdiction to hear Mr. Landrum's appeal to that Court. *State v. Landrum,* 153 Ohio St.3d 1461, 2018-Ohio-3258, 104 N.E.3d 792 (Ohio 2018) (Table) Appendix B. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

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

Amendment 14 of the United States Constitution provides, in relevant part: "No state . . . shall deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Ohio statutory provision that is relevant to this petition, Ohio Rev. Code Ann. § 2929.03 (1987) are reprinted in Appendix F.

STATEMENT OF THE CASE

On September 27, 1985, the Ross County Grand Jury indicted Mr. Landrum for the death of Harold White Sr. Appendix E. The indictment contained two counts, aggravated murder (Count One) and aggravated burglary (Count Two). (*Id.*). Count One contained two capital specifications, Mr. Landrum: 1) committed the aggravated murder to avoid detection as to the aggravated burglary and 2) committed the aggravated murder during the course of the aggravated burglary and he was the principal offender in the commission of the aggravated murder. (*Id.*).

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

> … if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender.

Ohio Rev. Code Ann. § 2929.03(D)(3) (1986) (Appendix 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.

Id. at § 2929.03(F) (Appendix F)[1]

The Capital Sentencing Proceedings

The sentencing phase of Mr. Landrum's case was tried pursuant to Ohio Rev. Code Ann. § 2929.03(D)(3) (1986), where the trial judge and not the jury made the ultimate decision as to whether a sentence of death would be imposed. Appendix F. The mitigation hearing began on March 18, 1986. Landrum presented evidence supporting a number of mitigating factors including his: (a) lack of history of violent behavior; (b) dysfunctional home environment in which he was raised including inconsistent discipline and abrupt changes in that environment, (c) experiences in and failure to benefit from the juvenile justice system, (d) lack of success in the military, (e) drug and alcohol dependence, (f) repentance and remorse, (g) close family relationships, (h) ability to successfully adapt to prison life, and (i) ability to contribute to society.

The trial court instructed the jury over objection of counsel that a verdict as to the death penalty was only a recommendation and was not binding on the trial court (3/18/86, Tr. 88-89), and that a recommendation of less than death was binding on the trial court (*Id.* Tr. 89-90):

> Now ladies and gentlemen, a jury recommendation to the Court

[1] While Ohio Revised Code § 2929.03 has since been amended, these two provisions remain intact in the statute.

> that the death penalty be imposed is just that, -- a recommendation and is not binding upon this Court. *The final decision as to whether the death penalty shall be imposed upon the defendant, rests upon this Court.* In the final analysis, after following the procedures and applying the criteria set forth in the Statute, *I, the Judge in this case, will make the decision as to whether the defendant, Lawrence Landrum, will be sentenced to death, or to life imprisonment*.

(*Id. at* Tr. 88-89) (emphasis added)

> In this event [the jury finds that the aggravating circumstances do not outweigh the mitigating factors by proof beyond a reasonable doubt] you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court and your recommendation to the Court shall be one of the following in that event: One (1) - - that Lawrence Landrum be sentenced to life imprisonment after twenty (20) full years of imprisonment or two (2) - - that Lawrence Landrum be sentence to life imprisonment with parole eligibility after thirty full years of imprisonment. *The particular recommendation which you make is binding upon the Court and I, the Judge, must impose the specific life sentence which you have recommended.*

(*Id.* at Tr. 89-90) (emphasis added)

The jury on the first day deliberated from 2:30 to 11:20. (*Id.* at Tr. 98). The record does not indicate when on the second day of deliberations, the jury returned its sentencing verdict. (3/19/86, Tr. 2-3). The jury's verdict read in pertinent part, "[w]e the jury, recommend that the sentence of death be imposed upon the defendant Lawrence Landrum." (*Id.* at Tr. 3).

On April 2, 1986, the trial court conducted the sentencing hearing. It imposed a sentence of death:

> As to Count One, the Aggravated Murder charge against you, and again, *I have independently weighed the Mitigating Circumstances which you have presented during the trial and to this Court. I have considered everything that I possibly could consider in this case.* I have attempted to follow the law as the law was given to the jury in this case . . .

(4/02/86, Tr. 5-6) (emphasis added).

The trial court subsequently filed its sentencing opinion in which it again emphasized that it made the ultimate factual determination that the aggravating circumstances outweighed the mitigating factors by proof beyond a reasonable doubt and accordingly, death was the only appropriate sentence:

> *Therefore, upon full consideration of all relevant evidence raised at the trial, the testimony, other evidence, the testimony of the defendant, and the arguments of counsel, this Court is compelled to conclude* that the mitigating circumstances offered by the defendant in this cause do not outweigh [sic] the aggravating specification. Based thereon this Court specifically finds by proof beyond a reasonable doubt that the aggravating circumstances which the defendant, Lawrence Alfred Landrum, was found guilty of committing did outweigh the mitigating factors in this case beyond a reasonable doubt. For these reasons then, this Court is compelled to impose the sentence of death upon the defendant, Lawrence Alfred Landrum.

(Trial court's sentencing opinion, pp.17-18) (emphasis added).

Mr. Landrum's Motion for a New Mitigation Trial

On January 12, 2016, this Court decided *Hurst v. Florida*, _U.S. _, 136 S. Ct. 616 (2016). On January 12, 2007, Mr. Landrum filed, with the trial court, a motion for leave to file a motion for a new mitigation trial. He premised his motion on this Court's decision in *Hurst.* He attached to the motion for leave his motion for a new mitigation trial. On June 14, 2017, Judge Leonard F. Holzazpfel, sitting by assignment, overruled Mr. Landrum's motion for a new mitigation trial. (T.d. 8, p. 3) ("the Court finds the Defendant's motion for a new trial pursuant to Ohio Crim. R. 33 is not well taken. It is therefore Ordered that defendant's motion for a new sentencing hearing be and is hereby overruled."). Appendix D.

Mr. Landrum timely appealed to the Fourth Appellate District, Ross County Court of Appeals. On March 29, 2018, the Ross County Court of Appeals affirmed the judgment of the trial court. *State v. Landrum,* 4th Dist. No. 17CA3607, 2018-Ohio-1280. Appendix A. However, the Court, instead of reaching the merits, found the motion for leave was untimely. *Id,* at ¶ 25.

Mr. Landrum timely appealed to the Supreme Court of Ohio. On August 15, 2018, the Court declined to exercise its discretionary jurisdiction to hear Mr. Landrum's appeal. Appendix B.

REASON FOR GRANTING THE WRIT

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

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

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

(1987). Under Ohio law:

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

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

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

> At the outset of the within analysis, it should be stated that Ohio's statutory framework for the imposition of the death penalty is altogether different from that of Mississippi, *most importantly in that Ohio has no "sentencing jury." All power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial.* The duty of the trial judge is set forth in R.C. 2929.03(D)(3*).*
>
> Immediately obvious is that, under this provision, *the jury provides only a recommendation as to the imposition of the death penalty*. The trial court must thereafter independently re-weigh the aggravating circumstances against the mitigating factors and issue a formal opinion stating its specific findings, before it may impose the death penalty. R.C. 2929.03(F). *It is the trial court, not the jury, which performs the function of sentencing authority. Thus, no "sentencing jury" was involved in the proceedings below.* Furthermore, as actual sentencer, the trial court was "present to hear the evidence and arguments and see the witnesses" and was in a position to fully appreciate a plea for mercy. *Caldwell*, supra, at 331.
>
> Furthermore, Ohio's sentencing procedures are not unique both *because a separate sentencing hearing is utilized, and because capital*

> *sentencing authority is invested in the trial judge.* See, *e.g.,* Ala. Code Subsection 13A-5-47 (1986 Supp.) (judge is not bound by jury's advisory verdict); Ariz. Rev. Stat. Annot. Section 13-703(B), (C) and (D) (1986 Supp.) (jury is completely excluded from sentencing); Colo. Rev. Stat. Section 16-11-103 (2)(C) (1985 Supp.) (trial judge may vacate a jury finding if clearly erroneous); Fla. Stat. Section 921.141(2) (1982 Cum. Supp.) (trial court independently re-weighs aggravating versus mitigating circumstances after an advisory jury verdict); Idaho Code Section 19-2515(d) (1986 Supp.) (trial court alone sentences and conducts a mitigation hearing), etc.
>
> Florida's statutory system, which is remarkably similar to Ohio's, was expressly upheld in the case of *Spaziano v.. Florida* (1984), 468 U.S. 447.

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

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

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

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

> The additional sentencing proceeding Florida employs is a "hybrid" proceeding "in which [a] jury renders an advisory verdict, but the judge makes the ultimate sentencing determinations." *Ring v. Arizona*, 536 U.S. 584, 608, n. 6, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. §921.141(1) (2010). Next, the jury renders an "advisory sentence" of life or death without specifying the factual basis of its recommendation. §921.141(2). "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence

> of life imprisonment or death." §921.141(3). If the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid.* Although the judge must give the jury recommendation "great weight," *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (per curiam), the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors[.]," (citation omitted).

Hurst, 136 S. Ct. at 620.

Under Ohio's capital sentencing statute, the trial judge has the sole power and responsibility to sentence a defendant to death regardless of whether the penalty is determined by: (a) a panel of three judges if the defendant waives the right to a jury trial, or (b) the trial jury *and the trial judge,* if the defendant was tried by jury. R.C. 2929.03(0)(2) (emphasis added); *Rogers,* 28 Ohio St.3d at 430, 540 N.E.2d at 55. A death sentence is not authorized by law until the trial judge considers the evidence, makes specific findings, and memorializes in writing the decision to impose death. R.C. 2929.03(D)(3)(a) & (3)(b) (absent those judicial findings, the trial court "shall impose" a term of life imprisonment).

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

Ohio's Statute, like Florida's statue prior to *Hurst,* requires that a jury make a sentencing recommendation before the trial judge exercises independent fact-finding and decides whether to impose the death penalty. "The term 'recommendation' ... accurately ... reflects Ohio law[.]" *Roberts,* 110 Ohio St. 3d at 92, 850 N.E.2d at 1187; *State v. Henderson,* 39 Ohio St.3d 24, 29-30, 528 N.E.2d 1237, 1243 (1988). Unlike Florida, however, the Ohio statute does not assign "great weight" to the jury's advisory verdict. *Hurst,* 136 S.Ct. at 620. "[U]nder Ohio's framework, the trial court is not a simple 'buffer where the jury allows emotion to

override the duty of a deliberate determination,' [citation omitted], but is the authority in whom resides the sole power to initially impose the death penalty." *Rogers,* 28 Ohio St.3d at 430, 504 N.E.2d at 55(distinguishing and quoting *Cooper v. State,* 336 So.2d 1133, 1140 (Fla. 1976)).

In Ohio, the jury's non-binding death-verdict serves solely to trigger the next step in the sentencing process which is conducted by the judge, independent of the jury's recommendation. *See State v. Jenkins,* 15 Ohio St. 3d 164, 203, 473 N.E.2d 264, 299 (1984) ("[T)he jury in the penalty phase of a capital prosecution may be instructed that its recommendation to the court that the death penalty be imposed is not binding and that the final decision as to whether the death penalty shall be imposed rests with the court[.]"); *see also Steffen v. Ohio*, 485 U.S. 916, 108 S.Ct. 1089, 99 L.Ed.2d 250 (1988) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting from denial of writ of certiorari) (accepting this construction of the law by the Supreme Court of Ohio but nonetheless voting to review the case for *Caldwell* error). As explained by the Supreme Court of Ohio, "no 'sentencing jury' is involved" in the ultimate sentencing decision. *Rogers*, 28 Ohio St. 3d at 429, 504 N.E.2d at 54.

B. Ohio law vests trial judges with "the sole power to initially impose the death penalty."[2]

Ohio law "delegates the death sentencing responsibility to the trial court upon its separate and independent finding that the aggravating factors outweigh the mitigating factors in th[e] case." *State v. Buell,* 22 Ohio St.3d 124, 144, 489 N.E.2d 795, 812 (1986) (citing R.C. 2929.03(D)(3)). The statutory deliberative process

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

of Ohio judge-sentencing in capital cases has been deemed an "'austere duty'" that must be made by the trial judge "in isolation." *Roberts,* 110 Ohio St.3d at 94, 850 N.E.2d at 1189. The judge is charged by statute with the sole responsibility of independently determining whether the punishment will be life or death.[3] *State v. Clark,* 38 Ohio St.3d 252, 259, 527 N.E.2d 844, 852 (1988) ("the jury's decision [i]s a recommendation that the trial court need not accept."). In other words: "the power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial[,]" wherein the jury "provides only a *recommendation* as to the imposition of the death penalty." *Rogers,* 28 Ohio St.3d at 429, 54 N.E2d at 54; *see also State v. Holmes,* 30 Ohio App.3d 26, 27, 506 N.E.2d 276, 277 (1986) ("[T]he trial court still retains the responsibility for making the final decision as to whether to impose the death penalty, because the jury's recommendation of a death penalty is not binding upon the court.").

Ohio law directs the judge to review several enumerated sources of information relevant to the aggravating and mitigating factors. In order to comply with R.C. 2929.03(D) and (F), the judge must independently make specific findings separate and independent from the jury's advisory verdict. Those particular findings include: (1) the existence and number of aggravating circumstances; (2) the existence and number of mitigating factors; (3) the weight attributed to the

[3] *See State ex rel. Stewart v. Russo,* 145 Ohio St.3d 382, 385, 49 N.E.3d 1272, 1276 (2016) ("when a jury in a capital case recommends a life sentence, no separate sentencing opinion is required because 'the court does not act independently in imposing the life sentence, but is bound to carry out the wishes of the jurors'") (quoting *State v. Holmes,* 30 Ohio App.3d 26, 28, 506 N.E.2d 276, 278 (10th Dist. 1986) (also addressing a situation in which the trial court overrides the death sentence determination of the jury and imposes a life sentence)).

mitigating factors; and, (4) whether the aggravating circumstances outweigh by proof beyond a reasonable doubt the mitigating factors that the judge determined existed. The death sentence is not final until the judge files his or her findings in writing. R.C. 2929.03(F). These required findings necessarily constitute judicial fact-finding, thus violating the Sixth Amendment mandate that "a jury, not a judge, ... find *each fact necessary* to impose a sentence of death." *Hurst,* 136 S.Ct. at 619 (emphasis added).

III. Application Of Hurst To Ohio's Capital Sentencing Scheme.

Hurst announced that a jury-not a judge-must make the critical findings necessary to impose a sentence of death. *Hurst,* 136 S.Ct. at 622. Applying this rule to Florida's statute, this Court noted that although a Florida jury recommends a sentence "it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." *Id.* This Court held Florida's statute unconstitutional because the statute placed the judge in the "central and singular role" of making a defendant eligible for death by requiring the judge independently to find "'the facts ... [t]hat sufficient aggravating circumstances exist and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* (quoting ...Fla. Stat. § 921.141(3)). The fact that a Florida judge was required to afford "great weight" to the jury's recommendation did not cure the statute's unconstitutional mandate that the trial court exercise "independent judgment" and make fact-findings. *Hurst,* 136 S.Ct. at 620, 622.

Ohio courts have long-aligned Ohio's capital sentencing statute with

Florida's, characterizing the two as "remarkably similar." *Rogers,* 28 Ohio St.3d at 429-30, 504 N.E.2d at 808-10; *see also State v. Broom,* 40 Ohio St.3d 277, 291-92 n.5, 533 N.E.2d 682, 698 (1988) (comparing Ohio's statute to Florida's); *Buell, 22* Ohio St.3d at 139-41, 489 N.E.2d at 808-10 (same). The Ohio death penalty scheme suffers the same constitutional deficiencies as Florida's *pre-Hurst* statute because the Ohio statute requires the judge to make independent, specific findings and determine "by proof beyond a reasonable doubt, ... that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors[.]" R.C. 2929.03(D)(3).

The Supreme Court of Ohio unequivocally has explained that the judge is the sentencing authority who independently makes all findings necessary to impose the death penalty. *Rogers, supra; Broom, supra.*[4] "No Ohio court is bound by the jury's weighing[,]" *State v. Williams,* 23 Ohio St.3d 16, 22, 490 N.E.2d 906, 912 (1986), and there is "no 'sentencing jury'... involved" in the ultimate sentencing decision. *Rogers,* 28 Ohio St.3d at 429, 504 N.E.2d at 54.[5] The requirement that a judge make specific findings and articulate them in a written opinion is a critical step in imposing a sentence of death. R.C. 2929.03(F). This has long been recognized

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

[5] *See also State v. Glenn*, No. 89-P-2090, 1990 WL 136629, *56 (11th Dist. Sept. 21, 1990) ("Ohio has 'no sentencing jury.'"); *State v. Fort*, No. 52929, 1998 WL 11080 , *24*59-60 (8th Dist. Feb. 4, 1988) (same).

by the Supreme Court of Ohio:

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

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

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

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

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

The *Roberts* court further observed:

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

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

Judicial fact-finding in Ohio capital cases is so crucial that the Supreme Court of Ohio has vacated death sentences when judges improperly performs this duty. For example, in *State v. Green,* 90 Ohio St.3d 352, 363, 738 N.E.2d 1208, 1224 (2000),

the court reversed a death sentence because the judge's specific findings were improper and failed to follow the mandated statutory scheme. Likewise, the Supreme Court of Ohio vacated a death sentence because of errors the a judge's sentencing opinion:

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

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

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

The Supreme Court of Ohio has repeatedly upheld the State's death penalty statute on the authority of *Spaziano v. Florida,* 468 U.S. at 460-65, and the proposition that investing capital sentencing authority in the trial judge does not violate either the Sixth or Eighth Amendments. *See, e.g., State v. Davis,* 139 Ohio St.3d 122, 9 N.E.3d 1031, 1042 (2014) ("neither the Sixth nor the Eighth Amendment creates a constitutional right to be *sentenced* by a jury, even in a capital case") (citing *Spaziano,* 468 U.S. at 459); *Rogers,* 28 Ohio St.3d at 429, 504 N.E.2d at 55 ("'a judge may be vested with sole responsibility for imposing the

[death] penalty'") (quoting *Spaziano,* 468 U.S. at 465). *Hurst* expressly overrules *Spaziano's* holding "that there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed[,]" 468 U.S. at 465.

CONCLUSION

For the foregoing reasons, Petitioner Lawrence Landrum respectfully request this Court grant this petition for writ of certiorari.

Respectfully submitted,

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