

IN THE SUPREME COURT OF THE UNITED STATES

Nathaniel E. Jackson,
Petitioner

-v-s-

THE STATE OF OHIO
Respondent

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE

STATE OF OHIO'S RESPONSE TO NATHANIEL JACKSON'S QUESTION PRESENTED

The Respondent State of Ohio (“State of Ohio”) submits to this Court that Petitioner, Ohio death row inmate, Nathaniel Jackson (“Jackson”) presents no question worthy of review. Specifically, Jackson argues that his death sentence runs afoul of this Court’s decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed. 2d 504 (2016). Jackson asserts that in Ohio a jury’s death verdict is “merely a recommendation” and that “the judge alone makes findings essential to the death penalty.” This is patently false. In fact, in *Mason v. Ohio*, United States Supreme Court Case No. 18-5303, this Court recently denied a fellow Ohio death-row inmate’s petition which presented the same argument Jackson now presents in his latest petition to this Court. See Orders List: 586 U.S. Thus, no compelling reason to grant this petition exists as required by Supreme Court Rule 10, and said petition should be denied.

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CONSTITUTIONAL PROVISION NOT INVOLVED

Jackson argues he has suffered a Sixth and Eighth Amendment violation in light of this Court's decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed. 2d 504 (2016). In fact, he has not. The Ohio Supreme Court held in *State v. Mason*, 153 Ohio St. 3d 476, 2018-Ohio-1462, 108 N.E.3d 56, cert. denied, 139 S. Ct. 456, 202 L. Ed. 2d 351 (2018), that "Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)] and *Hurst*. See R.C. 2929.03(C)(2). Ohio's death-penalty scheme, therefore, does not violate the Sixth Amendment." This Court recently, on November 5, 2018, denied Mason's petition for writ of certiorari which lodged the same argument Jackson now presents to this Court. *Mason v. Ohio*, United States Supreme Court Case No. 18-5303. Jackson in no way distinguishes his claim from the claim rejected in *Mason*. Thus, no constitutional provision is involved in this case and no compelling reasons to grant this petition exist as required by Supreme Court Rule 10.

STATEMENT OF THE CASE

A Trumbull County grand jury indicted Jackson on two counts of aggravated murder for his role as the triggerman in the December 11, 2001 home invasion and murder of Robert Fingerhut in violation of R.C. 2903.01(A) and (B) on December 28, 2001. Importantly, "[b]oth murder counts carried two felony-murder death-penalty specifications: murder during an aggravated burglary and during an aggravated robbery. R.C. 2929.04(A)(7). The grand jury also indicted Jackson on separate counts of aggravated burglary and aggravated robbery with a firearm specification on each count." *State v. Jackson*, 107 Ohio St. 3d 300, 307, 2006-Ohio-1, 839 N.E.2d 362, 371, ¶ 73.

After a jury trial, Jackson was found guilty in November of 2002 of two counts of aggravated murder and the accompanying aggravating circumstances, to wit: that Jackson murdered Robert Fingerhut while committing aggravated burglary and aggravated robbery, in addition to one count of aggravated burglary and one count of aggravated robbery. At the conclusion of the penalty phase of the trial and after weighing the aggravating circumstances and mitigating factors, the jury recommended a death sentence. Jackson's conviction and death sentence were affirmed by the Ohio Supreme Court in *State v. Jackson*, 107 Ohio St. 3d 300, 2006-Ohio-1. This Court denied his first petition for writ of certiorari on June 5, 2006. *Jackson v. Ohio*, 547 U.S. 1182, 126 S. Ct. 2359, 165 L. Ed. 2d 285 (2006).

His codefendant, Donna Roberts, housemate and former wife of Mr. Fingerhut, was likewise tried and sentenced to death for conspiring with Jackson, her paramour, to kill Mr. Fingerhut for \$500,000 in insurance proceeds. The late Trumbull County Common Pleas Judge John Stuard presided over both trials. Though The Ohio Supreme Court affirmed her conviction, it reversed and remanded the death sentence on August 2, 2006, due to the fact that the trial judge delegated the typing of the findings of fact and conclusions of law sentencing Roberts to death to the State's trial attorneys on Roberts' case. *State v. Roberts*, 110 Ohio St. 3d 71, 2006-Ohio-3665, 850 N.E. 2d 1168.

Following the Ohio Supreme Court's decision in *Roberts*, Jackson filed a motion for new trial and/or sentencing on February 28, 2008. The trial court denied that motion. *State v. Jackson*, 190 Ohio App. 3d 319, 2010-Ohio-5054, 941 N.E. 2d 1221, ¶¶8-14. Appellant appealed to the Eleventh District Court of Appeals which held that: "Based on the Supreme Court of Ohio's holding in *Roberts*, appellant is entitled to the same relief afforded to his co-defendant. Thus, the trial judge must personally review and evaluate the appropriateness of the

death penalty, prepare an entirely new sentencing entry as required by R.C. 2929.03(F), and conduct whatever other proceedings are required by law and consistent with this opinion. *Id.* at ¶ 167.” *Id.* at ¶29.

Pursuant to this remand, Judge Stuard conducted a resentencing hearing on August 14, 2012. For a second time, Judge Stuard sentenced Jackson to death. Judge Stuard retired at the end of 2012, and Judge Ronald Rice succeeded him and is presently the Trumbull County Common Pleas Judge assigned to Jackson’s case. Jackson appealed his second death sentence to the Ohio Supreme Court.

This Honorable Court decided *Hurst* on January 12, 2016. Oral arguments were held in the Ohio Supreme Court in Jackson’s appeal from his resentencing over four months later on April 19, 2016. Even though it was available to him, Jackson did not submit *Hurst* as an additional authority for the Ohio Supreme Court to consider, nor is *Hurst* addressed in the Court’s decision upholding his conviction and sentence. *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, (2016), *reconsideration denied*, 147 Ohio St.3d 1439, 2016-Ohio-7677, 63 N.E.3d 157, ¶3 (2016), and *cert. denied*, 137 S.Ct. 1586, 197 L.Ed.2d 714 (2017). Instead, Jackson filed an application for reopening in the Ohio Supreme Court pursuant to S.Ct. Prac. R. 11.06 arguing *for the first time* that his appellate counsel were ineffective in failing to raise *Hurst*. That motion was denied. *State v. Jackson*, 151 Ohio St.3d 1422, 2017-Ohio-8371.

Importantly, as noted by the Eleventh Appellate District, Jackson had multiple opportunities to raise a *Hurst*-like claim based on law decided well before *Hurst*. “Appellant was capable, however, of raising the same argument prior to *Hurst* by relying on *Apprendi v. New Jersey* [120 S.Ct. 2348] and *Ring v. Arizona*, both of which were decided prior to his sentence. See *State v. Roberts*, 150 Ohio St.3d 47, 2017-Ohio-2998, ¶ 84, 78 N.E.3d 851; *State v. Mundt*,

7th Dist. Noble No. 17 NO 0446, 2017-Ohio-7771, ¶ 9. Thus, appellant was not “unavoidably prevented” from filing a timely motion for new trial on the basis that Ohio's death penalty sentencing scheme allegedly violates the Sixth Amendment.” *State v. Jackson*, 2018-Ohio-2146, ¶ 13, appeal not allowed, 2018-Ohio-4092, ¶ 1, 153 Ohio St. 3d 1495, 108 N.E.3d, ¶ 25.

Despite several reviews of his sentence by Ohio appellate courts, Jackson, like many other Ohio death-row inmates, filed a “Motion for New Mitigation Trial” pursuant to Ohio Criminal Rule 33 relying upon this Court’s decision in *Hurst*. The trial court denied that motion and Jackson appealed to the Eleventh District Court of Appeals. While Ohio Crim. R. 33 makes absolutely no reference to a sentencing proceeding, capital or non-capital, the state courts proceeded to review Jackson’s claim.

Specifically, the Eleventh District Court of Appeals stated: “***[b]ecause Jackson has repeatedly emphasized before the trial court and on appeal that his motion was only intended to be considered a Crim.R. 33 motion for new trial, we agree to proceed on that basis.***” *State v. Jackson*, 2018-Ohio-2146, ¶ 13, citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993. While the Eleventh District Court of Appeals and the trial court determined that Jackson’s motion, cloaked as an Ohio Crim. R. 33 motion, was better categorized as a post-conviction petition pursuant to Ohio R.C. 2953.21 et seq., both courts reviewed and rejected Jackson’s claim pursuant to the Ohio Crim. R. 33 guidelines. In fact, the courts found Jackson’s claim to be both time barred and meritless as either a Ohio Crim. R. 33 motion or as a post-conviction petition. *Jackson*, 2018-Ohio-2146, ¶25.

While Ohio’s Eleventh Appellate District opted not to address the constitutionality question, the court did note, albeit in brevity, to the Ohio Supreme Court’s decision in *State v. Mason*, 153 Ohio St. 3d 476, 2018-Ohio-1462, 108 N.E.3d 56, cert. denied, 139 S. Ct. 456, 202

L. Ed. 2d 351 (2018), which held that Ohio's death penalty scheme does not violate the Sixth Amendment. *Jackson*, 2018-Ohio-2146, ¶ 36. Jackson appealed to the Ohio Supreme Court and that court declined jurisdiction. *State v. Jackson*, 153 Ohio St. 3d 1495, 2018-Ohio-4092, 108 N.E.3d 1104. Jackson now seeks a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. An Ohio death row inmate's petition alleging a *Hurst* claim has been previously denied by this Court.

Jackson's *Hurst*-claim follows in the appellate footsteps of fellow death row inmate, Maurice Mason. In *Mason*, 2018-Ohio-1462, The Ohio Supreme Court painstakingly reviewed the significant differences between the sentencing scheme at issue in *Hurst* and Ohio's statutory framework and ultimately concluded that Ohio's death penalty scheme is constitutional and does not run afoul of this Court's decision in *Hurst*. Mason subsequently filed a petition for certiorari in this Court in regards to *Hurst* and its application to Ohio's death penalty sentencing scheme. This Court recently denied that petition *Mason v. Ohio*, United States Supreme Court Case No. 18-5303. See Orders List: 586 U.S. The State submits that Mason's petition presented a similar, if not identical, "claim" that Jackson now presents in his latest petition to this Court. As this Court has already denied certiorari to another Ohio death row inmate attempting to lodge this claim, Jackson's petition should also be denied.

II. Ohio's Death Penalty Scheme is unlike the capital sentencing scheme in *Ring* and *Hurst*

Jackson relies on *State v. Rogers*, 28 Ohio St. 3d 427, 504 N.E.2d 52 (Ohio 1986) in support of his contention that Ohio's death penalty scheme is "remarkably similar to" the Florida statute which was declared unconstitutional in *Hurst*. However, Jackson completely ignores the multiple distinctions between Florida's pre-*Hurst* capital sentencing statutes and Ohio's practice.

The Ohio Supreme Court stated in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581

that:

Ohio's capital sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*. In Ohio, a capital case does not proceed to the sentencing phase until *after* the fact-finder has found a defendant guilty of one or more aggravating circumstances. See R.C. 2929.03(D); R.C. 2929.04(B) and (C); **337 *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

Belton at ¶59. (Italics original).

More recently, the Ohio Supreme Court painstakingly discussed the crucial differences between Ohio and Florida's procedures in its recent decision in *Mason* and held that Ohio's death-sentence scheme satisfies the Sixth Amendment requirements. *Mason*, 153 Ohio St. 3d 476, 2018-Ohio-1462, ¶¶6-12, ¶¶18-21, ¶29.

Specifically, the Supreme Court of Ohio stated:

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

Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*. See R.C. 2929.03(C)(2). Ohio's death-penalty scheme, therefore, does not violate the Sixth Amendment. *Mason*'s various arguments to the contrary misapprehend both what the Sixth Amendment requires and what it prohibits.

Mason, 153 Ohio St. 3d 476, 2018-Ohio-1462, ¶¶20-21.

Thus, Ohio's capital sentencing scheme is unlike the sentencing scheme determined to be unconstitutional in *Hurst*.

A. In Ohio, a jury's death-verdict is not akin to recommendation deemed unconstitutional in *Hurst*.

Like Mason, Jackson fails to appreciate the critical differences in the jury's role in Ohio's death penalty process and the process at issue in *Hurst*.

Ohio Revised Code §§ 2929.03 and 2929.04 establish the requirements for the imposition of a death sentence when a criminal defendant elects to be tried by a jury. The Ohio Supreme Court outlined the following procedure in *Mason*, ¶¶6-12:

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

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

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

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

are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.' Id.

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

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

Mason, 153 Ohio St. 3d 476, 2018-Ohio-1462.

As the Ohio Supreme Court specifically explained in *Mason*:

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

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

Mason misses a key distinction between Ohio's statutory scheme and the Florida and Arizona statutory schemes at issue in *Hurst* and *Walton*: in Ohio, a jury is required to find the defendant guilty of a specific aggravating circumstance, thus establishing the aggravating circumstance that a trial court will weigh against the mitigating factors in its independent determination of punishment. *See R.C. 2929.03(D)(3); State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996), paragraph one of the syllabus. Mason does not explain why further guidance for the trial court is constitutionally required."

Mason, 2018-Ohio-1462, ¶¶32, 35, 37.

As such, the jury's death-verdict is neither advisory nor a "mere recommendation," but instead, it is a unanimous finding by a jury that specific aggravating circumstances proven beyond a reasonable doubt outweigh mitigating factors thereby making a defendant eligible for a death sentence in Ohio.

B. In Ohio, a sentencing court may not impose the death sentence unless the trial jury determines that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Jackson argues that the sentencing judge has the "sole power and responsibility to sentence a defendant to death" and that a death sentence is not authorized by law until the trial judge determines the sentence. Jackson's petition, p. 13. Again, Jackson overlooks Ohio's statutory framework.

"Ohio does not permit the trial judge to find *additional* aggravating facts but requires the judge to determine, independent of the jury, whether a sentence of death *should* be imposed. *See State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 160.

First, unlike the Arizona scheme found unconstitutional by the United States Supreme Court in *Ring*, under the Ohio scheme, the trial court cannot *increase* an offender's sentence based on its own findings. Rather, the trial court safeguards offenders from wayward juries, similar to how a

court might grant a motion for acquittal following a jury verdict under Crim.R. 29(C).

Second, Mason wrongly supposes that the Sixth Amendment prohibits judicial fact-finding.***"

Mason, 2018-Ohio-1462, ¶¶ 38-41.

Jackson hinges his entire argument that the Sixth Amendment requires the jury alone to decide whether a sentence of death will be imposed. However, *Hurst* did not create this requirement. "Ohio trial judges may weigh aggravating circumstances against mitigating factors and impose a death sentence only after the jury itself has made the critical findings and recommended that sentence." *Mason, supra*, ¶42.

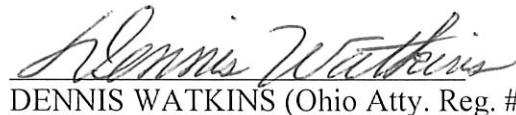
Unlike Florida, Ohio's death penalty scheme does not permit a sentencing judge to increase an offender's sentence. In other words, in Ohio, if a jury were to be unable to unanimously determine that the aggravating circumstances outweigh the mitigating factors and "recommend" a life sentence, the sentencing judge is precluded from imposing the death sentence. In fact, an Ohio sentencing court may only override a jury's verdict in a death penalty case when the trial judge elects to make a downward departure, i.e., impose a life sentence instead of the jury recommendation of death.

Therefore, "[u]nder Ohio's death-penalty scheme, *** trial judges function squarely within the framework of the Sixth Amendment." *Mason*. As it is the jury, and not the judge, that first determines the existence of the aggravating circumstance and determines that such aggravating circumstance outweighs mitigating factors, the Ohio capital sentencing scheme is well-within the parameters of constitutionality in light of *Hurst*.

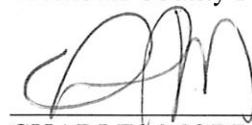
CONCLUSION

Jackson's death sentence does not violate the Sixth or Eighth Amendment and Ohio's death penalty sentencing scheme does not run afoul of this Court's decision in *Hurst*. This Court declined to review these same arguments in *Mason v. Ohio*, and Jackson provides no distinction from the claim now raised and the claim presented and rejected in *Mason*. The State of Ohio submits Jackson fails to submit any compelling reason to merit review by this Court as required by U.S. Supreme Court Rule 10. As such, the State of Ohio requests that this Court **DENY** Jackson's petition for certiorari.

Respectfully submitted,



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