No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Charles Lorraine,

Petitioner,

-v-

State of Ohio,

Respondent.

On Petition for Writ of Certiorari to
the Ohio Eleventh Appellate District, Trumbull County Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

Office of the Ohio Public Defender

RANDALL L. PORTER - 0005835
Assistant State Public Defender
Counsel of Record
Randall.Porter@opd.ohio.gov

AND

ADRIENNE M. LARIMER - 0079837
Assistant State Public Defender
Adrienne.Larimer@opd.ohio.gov

250 E. Broad Street - Suite 1400
Columbus, Ohio 43215-9308
(614) 466-5394 (Telephone)
(614) 644-0708 (Facsimile)

Counsel for Charles Lorraine

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 (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 (Ohio 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.

Charles Lorraine was sentenced under this judge-sentencing scheme. The jury's death verdict was merely a recommendation. The judge alone made the necessary findings to sentence Lorraine to death.

Lorraine moved the trial court to vacate his death sentence in accordance with *Hurst*. The state trial 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.

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

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

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption. Pursuant to Rule 29.6. Petitioner Lorraine states that no parties are corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Charles Lorraine,

Petitioner,

-v-

State of Ohio,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Based on the rule announced in *Hurst v. Florida*, _ U.S. _, 136 S.Ct. 616 (2016), Petitioner, Charles Lorraine, respectfully petitions for a writ of certiorari 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 Eleventh Appellate District, Trumbull County Court of Appeals' affirmance of the state trial court's denial of Mr. Lorraine's motion for leave to file his motion for a new mitigation trial, *State v. Lorraine,* 11th Dist. Trumbull No. 2017-T-0028, 2018-Ohio-3325, and is attached as Appendix A. The Supreme Court of Ohio's entry declining to exercise its discretionary jurisdiction to hear Mr. Lorraine's appeal from the August 20, 2018 decision, *State v. Lorraine,* __ Ohio St.3d __, 2019-Ohio-173, 114 N.E.3d 1206 is attached as Appendix B. The state

court of appeals' decision stands in direct conflict with this Court's decision in *Hurst v. Florida*, supra, and 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 outweigh the mitigation factors is unreported and attached as Appendix C.

New Mitigation Trial Motion The state trial court's decision denying Mr. Lorraine's motion for leave to file his motion for a new mitigation trial is unreported and attached as Appendix D. The opinion of the Ohio Court of Appeals affirming the decision of the trial court denying his motion for leave to file his motion for a new mitigation trial, *State v. Lorraine*, 11th Dist. Trumbull No. 2017-T-0028, 2018-Ohio-3325 is attached as Appendix A. The Supreme Court of Ohio's decision declining to hear Mr. Lorraine's appeal to that court, State v. Lorraine, __ Ohio St.3d __, 2019-Ohio-173, 114 N.E.3d 1206 is reported and attached as Appendix B.

JURISDICTION

On January 23, 2019, the Supreme Court of Ohio declined to exercise its discretionary jurisdiction to hear Mr. Lorraine's Appeal to that Court. *State v. Lorraine*, __ Ohio St.3d __, 2019-Ohio-173, 114 N.E.3d 1206 (Appendix B). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

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

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

The Ohio statutory provisions that are relevant to this petition, Ohio Rev. Code Ann. § 2929.03 (1986) are reprinted in Appendix E.

STATEMENT OF THE CASE

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

> … 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) (Appx. E)

> 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) (Appx. E)[1]

The sentencing phase of Lorraine'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.

The Trial and Direct Appeal

The Trumbull County Grand Jury indicted Charles Lorraine for the offenses of: Aggravated Murder (Count One) in violation of Ohio Rev. Code Ann. § 2903.01(A); Aggravated Murder (Count Two) in violation of Ohio Rev. Code Ann. § 2903.01(A);Aggravated Murder (Count Three) in violation of Ohio Rev. Code Ann. § 2903.01(B); Aggravated Murder (Count Four) in violation of Ohio Rev. Code Ann. § 2903.01(B); Aggravated Burglary (Count Five) in violation of Ohio Rev. Code Ann. § 2911.11; and Aggravated Burglary (Count Six) in violation of Ohio Rev. Code Ann. § 2911.11. All the counts involved the same two victims, Doris Montgomery (counts one and three) and Raymond Montgomery (counts two and four). The indictment

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

contained four capital specifications (pursuant to both Ohio Rev. Code Ann. § 2929.04(A)(5) and § 2929.04(A)(7)) as to the first four counts of the indictment.

The jury found Lorraine guilty of all the counts and specifications contained in the indictment. The case proceeded to the sentencing phase where the trial court instructed the jury both before the presentation of evidence began and during the charge to the jury that a verdict as to the death penalty was only a recommendation:

> You will be required to make a finding and *recommendation* as to the sentences in this case.

(Sent. Tr. 526) (emphasis added).

> If, after a full and impartial consideration of all the relevant evidence from both phases of this trial, you are firmly convinced that the aggravating circumstances which the defendant was found guilty of committing in each murder are sufficient to outweigh the factors in mitigation, then the State has met its burden of proof, and the Jury shall *recommend* to the Court, that sentences of death should be imposed on the Defendant.

(Sent. Tr. 1114) (emphasis added).

> Therefore, if you find beyond a reasonable doubt that one or both of the aggravating circumstances in each count of the indictment outweigh the mitigating factors in each count, then it is your duty to *recommend* two sentences of death.

(Sent. Tr. 1114) (emphasis added).

> As to the first count there is a verdict form that says Jury finding and *recommendation*. You will see by reading that if you find that the aggravating circumstances outweigh the mitigating factors, there, you find and *recommend* the sentence of death be imposed.

(Sent. Tr. 1128) (emphasis added).

The trial court removed Counts Three and Four from the jury's consideration. The jury's sentencing verdict form clearly reflected that it was only recommending to the trial judge that it impose a sentence of death:

> We, the Jury, being duly impaneled and sworn do hereby find that the aggravating circumstances that the Defendant Charles L. Lorraine, was found guilty of committing with reference to the death of Doris Montgomery are sufficient to outweigh the mitigating factors presented in this case by proof beyond a reasonable doubt. We, therefore, find and *recommend* that the sentence of death be imposed upon Defendant.

(Sent. Tr. 1139) (emphasis added) [2]

The trial court, as required by Ohio Rev. Code Ann. § 2929.03(F) filed a separate sentencing opinion. (Appx. C). It found in relevant part:

> The Court finds from the evidence and trial that the Defendant never appeared sorry or showed any remorse about killing the Montgomerys. In a nutshell the Court finds that the lack of credible mitigating factors was remarkable and noteworthy.
>
> In conclusion as to the death of Doris Montgomery and upon consideration of the relevant evidence raised at the trial, the testimony, the other evidence, the statement of the defendant and the arguments of counsel, it is the judgment of the Court that the aggravating circumstances in Count Number 1 of this case outweigh the mitigating factors beyond a reasonable doubt.

(Appx. C, p.6-7)

> The Court finds from the evidence and trial that the Defendant never appeared sorry or showed any remorse about killing the Montgomerys. In a nutshell the Court finds that the lack of credible mitigating factors was remarkable and noteworthy.
>
> In conclusion as to the death of Doris Montgomery[3] and upon consideration of the relevant evidence raised at the trial, the

---

2 The Jury made the identical recommendation for count two as to Raymond Montgomery. Sent Tr. 1139-1140.

3 The Court previous paragraphs all relate to count two as to Raymond Montgomery, it appears that the Court's naming Doris Montgomery is merely a typographical error.

> testimony, the other evidence, the statement of the defendant and the arguments of counsel, it is the judgment of the Court that the aggravating circumstances in Count Number 2 of this case outweigh the mitigating factors beyond a reasonable doubt.

(Appx. C, p.12)

Lorraine appealed first to the Eleventh District Court of Appeals which affirmed his convictions and sentences on August 10, 1990. *State v. Lorraine,* 11th Dist. Trumbull. No. 3838, 1990 Ohio App. LEXIS 3324 (Aug. 10, 1990). Lorraine then appealed to the Supreme Court of Ohio, which affirmed the decision of the Eleventh District Court of Appeal. *State v. Lorraine,* 66 Ohio St.3d 414, 613 N.E.2d 212 (1993).

Lorraine's Motion for Leave to File His Motion for a New Mitigation Trial

On January 11, 2017, Lorraine filed his motion for leave to file his motion for a new mitigation trial. He attached thereto his motion for a new mitigation trial. The motion was premised on this Court's decision in *Hurst v. Florida,* ___U.S.___, 136 S.Ct. 616 (2016).

On March 2, 2017, the trial court filed its judgment entry denying Lorraine's motion for leave to file his motion for a new mitigation trial. (Appx. D).

Lorraine appealed to the Eleventh Appellate District, Trumbull County Court of Appeals. On August 20, 2018, the court of appeals affirmed the judgment of the trial court. *State v. Lorraine,* 11th Dist. Trumbull No. 2017-T-0028, 2018-Ohio-3325 (Appx A).

Lorraine appealed the decision of the Eleventh Appellate District to the Ohio Supreme Court. On January 23, 2019, the Supreme Court of Ohio declined to exercise

its discretionary jurisdiction to hear his appeal. *State v. Lorraine*, __ Ohio St.3d __, 2019-Ohio-173, 114 N.E.3d 1206 (Appx B).

REASON FOR GRANTING THE WRIT

I. The Issues Presented Are of Importance in The Constitutional and Uniform Administration of the Death Penalty as Ohio's sentencing scheme is remarkably similar to Florida's pre-Hurst Statute

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,* this Court held Florida's death penalty statute unconstitutional because all factual findings necessary to impose the death sentence were found by the judge, not the jury. 136 S.Ct. at 624.

Mr. Lorraine was tried by a jury and sentenced under Ohio's death penalty statute pursuant to a sentencing scheme which the Supreme Court of Ohio has described as "remarkably similar to" the Florida statute declared unconstitutional in *Hurst. State v. Rogers,* 28 Ohio St.3d 427, 430, 504 N.E.2d 52, 55 (Ohio 1986) (noting Florida's statute was upheld in *Spaziano v. Florida,* 468 U.S. 447, (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. Ohio Rev. Code Ann. § 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. Ohio Rev. Code Ann. § 2929.03(D)(3)(a) & (3)(b) (absent those judicial findings, the trial court "shall impose" a term of life imprisonment).

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

Ohio, like Florida before Hurst, requires that a jury make a sentencing recommendation before the trial judge exercises independent fact-finding and decides whether to impose the death penalty. "The term 'recommendation' ... accurately ... reflects Ohio law[.]" *Roberts,* 110 Ohio St. 3d at 92, 850 N.E.2d at 1187; *State v. Henderson,* 39 Ohio St.3d 24, 29-30, 528 N.E.2d 1237, 1243 (Ohio 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 (Ohio 1984) ("[T)he jury in the penalty phase of a capital prosecution may be instructed that its recommendation to the court that the death penalty be imposed is not binding and that the final decision as to whether the death penalty shall be imposed rests with the court[.]"); *see also Steffen v. Ohio*, 485 U.S. 916, 919 (1988) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting from denial of certiorari) (accepting this construction of the law by the Ohio Supreme Court but nonetheless voting to review the case for *Caldwell* error). As explained by the Ohio Supreme Court, 'no 'sentencing jury' is involved" in the ultimate sentencing decision. *Rogers*, 28 Ohio St. 3d at 429, 504 N.E.2d at 54.

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

Ohio law "delegates the death sentencing responsibility to the trial court upon its separate and independent finding that the aggravating factors outweigh the mitigating factors in th[e] case." State v. Buell, 22 Ohio St.3d 124, 144, 489 N.E.2d 795, 812 (Ohio 1986) (citing Ohio Rev. Code Ann. § 2929.03(D)(3)). The statutory deliberative process of Ohio judge-sentencing in capital cases has been deemed an "'austere duty'" that must be made by the trial judge "in isolation." Roberts, 110 Ohio St.3d at 94, 850 N.E.2d at 1189.

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

The judge is charged by statute with the sole responsibility of independently determining whether the punishment will be life or death.[5] *State v. Clark,* 38 Ohio St.3d 252, 259, 527 N.E.2d 844, 852 (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 for evidence relevant to the aggravating and mitigating factors. In order to comply with Ohio Rev. Code Ann. § 2929.03(D) and (F), the judge must independently make specific findings separate and independent from the jury's advisory verdict. Those particular findings are: (1) the existence and number of aggravating circumstances previously found by the jury; (2) the "sufficien[cy]" of the aggravating circumstances to justify imposition of the death penalty;

---

[5] *See State ex rel. Stewart v. Russo,* 145 Ohio St.3d 382, 2016-Ohio-421, 49 N.E.3d 1272, 1276 ("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)).

(3) the existence and number of mitigating factors; (4) the weight attributed to mitigation; and, (5) whether the aggravating circumstances outweigh by proof beyond a reasonable doubt the mitigating factors the judge found. Ohio Rev. Code Ann. § 2929.03(D)(3) & (F). The death sentence is not final until the judge files his or her findings in writing. Ohio Rev. Code Ann. § 2929.03(F). These required findings necessarily constitute judicial fact-finding, thus offending the Sixth Amendment mandate that "a jury, not a judge, ... find *each fact necessary* to impose a sentence of death." *Hurst,* 136 S.Ct. at 619 (emphasis added).

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

Hurst announced that a jury—not a judge—must make the critical findings in support of a death sentence. *Hurst,* 136 S.Ct. at 622. Applying this rule to Florida's statute, this Court noted that although a Florida jury recommends a sentence "it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." *Id.* The *Hurst* 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[.]" Ohio Rev. Code Ann. § 2929.03(D)(3).

The Ohio Supreme Court unequivocally explained that the judge is the sentencing authority who independently makes all findings necessary to impose the death penalty. *Rogers, supra; Broom, supra.*[6] "No Ohio court is bound by the jury's weighing[,]" *State v. Williams,* 23 Ohio St.3d 16, 22, 490 N.E.2d 906, 912 (1986), and there is "no 'sentencing jury'... involved" in the ultimate sentencing decision.

[6] *See also State v. Franklin,* 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, 39 (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).

Rogers, 28 Ohio St.3d at 429, 504 N.E.2d at 54.[7] The requirement that a judge make specific findings and articulate them in a written opinion is a critical step in imposing a sentence of death. Ohio Rev. Code Ann. § 2929.03(F). This has long been recognized by the Supreme Court of Ohio:

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

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

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.

---

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

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

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

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

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

The role of the Ohio trial judge in making specific findings 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 Ohio Supreme Court 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 (Ohio 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 Charles Lorraine respectfully requests this Court grant his petition for certiorari.

Respectfully submitted,

Office of the Ohio Public Defender

/s/Randall L. Porter
RANDALL L. PORTER - 0005835
Assistant State Public Defender
Counsel of Record
Randall.Porter@opd.ohio.gov

/s/Adrienne M. Larimer
ADRIENNE M. LARIMER - 0079837
Assistant State Public Defender
Adrienne.Larimer@opd.ohio.gov

250 E. Broad Street - Suite 1400
Columbus, Ohio 43215-9308
(614) 466-5394 (Telephone)
(614) 644-0708 (Facsimile)

Counsel for Charles Lorraine