No. 18-8992

IN THE SUPREME COURT OF THE UNITED STATES

Charles Lorraine,
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 CHARLES LORRAINE'S QUESTION PRESENTED

The Respondent State of Ohio ("State of Ohio") submits to this Court that Petitioner, Ohio death row inmate, Charles Lorraine ("Lorraine") presents no question worthy of review. Specifically, Lorraine 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, and in *Jackson v. Ohio,* United States Supreme Court Case No. 18-7353, this Court recently denied two fellow Ohio death-row inmate's petition which presented the same argument Lorraine 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

Lorraine 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 Lorraine now presents to this Court. *Mason v. Ohio*, United States Supreme Court Case No. 18-5303. Similarly, this Court further denied Nathaniel Jackson's petition for writ of certiorari which also unsuccessfully lodged the identical argument. *Jackson v. Ohio*, United States Supreme Court Case No. 18-7353. Lorraine in no way distinguishes his claim from the claims rejected in *Mason* and *Jackson, supra*. 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

The State would refer the Court to the opinion of the courts below for a recitation of the facts surrounding Appellant's conviction and sentence. By way of review, Appellant was indicted by a Trumbull County grand jury on two counts of aggravated murder under R.C. 2903.01(A) and two counts under R.C. 2903.01(B), all with death penalty specifications and two additional counts of aggravated burglary. *State v. Lorraine*, 11th Dist. No. 3838, 1990 WL 116921, at *1 (Ohio Ct. App. Aug. 10, 1990), aff'd, 66 Ohio St. 3d 414, 613 N.E.2d 212 (1993). Appellant's original

mitigation hearing was held in 1986, over three decades ago, after a jury of Appellant's peers found him guilty, beyond a reasonable doubt, of the home invasion and stabbing deaths of two elderly Warren citizens, Doris and Raymond Montgomery. The Eleventh District affirmed appellant's convictions and death sentence on August 10, 1990. *Id.* The Ohio Supreme Court affirmed that decision in *State v. Lorraine*, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993), and this Court denied certiorari in *Lorraine v. Ohio*, 510 U.S. 1054, 114 S.Ct. 715, 126 L.Ed.2d 679 (1994).

A point of the procedural history of which the State would like to remind the Court was that in 2003, Appellant filed a petition pursuant to *Atkins v. Virginia*, 536 U.S 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011 (2002). The trial court, per State's motion, dismissed Appellant's petition without hearing. On appeal, the matter was remanded back to the trial court for an evidentiary hearing. *State v. Lorraine*, 11th Dist. 2003-T-159, 2005-Ohio-2529.

Despite repeated delays, on January 12, 2010, all parties - including three non-local, taxpayer-financed mental retardation experts - gathered for the long-awaited evidentiary hearing. Without calling a single witness, Appellant approached the bench, told the judge he was not mentally retarded and that he agreed to his counsel's seven-year detour through the state courts just to extend his life. Appellant waived his right to an evidentiary hearing. The trial court subsequently found that Appellant was not mentally retarded under *Atkins* and denied his second petition for postconviction relief on March 1, 2010. *Lorraine*, 11th Dist. No. 2017-T-0028, 2018-Ohio-3325, ¶13.

Appellant's efforts to forestall his execution have worked like a charm. At State's request, the Ohio Supreme Court set Appellant's execution date - already delayed for seven years over a bogus Atkins claim - for January 18, 2012. However, that execution date was postponed as

Appellant joined the throng of Ohio death row inmates arguing in the federal courts that lethal injection is cruel and unusual punishment in *In re Ohio Execution Protocol Litigation*, 840 F.Supp.2d 1044 (S.D.Ohio 2012). That stay was eventually lifted, and at State's request, this Court subsequently set an execution date of March 15, 2023; a date approximately thirty-seven (37) years after the commission of his horrific crimes. *06/15/2018 Case Announcements*, 2018-Ohio-2313.

Notably, this Court decided *Hurst* on January 12, 2016, almost *twenty-three* (23) years after Appellant's conviction and sentence became final. Nearly one year *after Hurst* was decided, Appellant filed a motion for leave to file motion for "new mitigation trial." Appellant also filed a S.Ct.Prac. Rule 4.01 motion for relief in the Ohio Supreme Court simultaneously with his motion for leave in the courts below. Therein, he moved the Ohio Supreme Court to vacate his death sentence seeking remand for a new sentencing hearing pursuant to *Hurst, supra*, the same authority relied upon and the same relief sought in the instant action. The Ohio Supreme Court took a mere two months to deny, without commentary, Lorraine's motion. *State v. Lorraine*, Ohio Supreme Court No. 1990-1927, Entry March 15, 2017.

Despite several reviews of his sentence by Ohio appellate courts, Lorraine, 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.* While Ohio Crim. R. 33 makes absolutely no reference to a sentencing proceeding, capital or non-capital, the state courts proceeded to review Lorraine's claim. The trial court ultimately denied Lorraine's motion, and he subsequently appealed to the Eleventh District Court of Appeals.

The appellate court concluded "[t]here is no provision in Crim.R. 33, or in any Ohio Criminal Rule, that provides for a new sentencing hearing. ***Appellant cannot escape the fact that Crim.R. 33 is not the proper vehicle to obtain the relief he seeks by captioning his motion,

"Motion for New Mitigation Trial," when it is, in fact, a motion for a new sentencing hearing." [Citations omitted]. *State v. Lorraine*, 2018-Ohio-3325, ¶27. Despite this, the Eleventh District Court held that "even if Crim.R. 33 was the proper vehicle, appellant could not succeed on his motion for leave to file a delayed motion for new trial." *Id*, ¶28. In other words, the courts below denied Lorraine's motion, whether construed as a post-conviction relief petition or taken on its face as a Crim. R. 33 "Motion for New Mitigation Hearing."

Importantly, as noted by the concurring opinion of the Eleventh Appellate District, Lorraine had multiple opportunities to raise a *Hurst*-like claim based on law decided well before *Hurst*. "It has been held, however, that a defendant could have raised the same arguments years prior to the decision in Hurst by relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *State v. Mundt*, 7th Dist. Noble No. 17 NO 0446, 2017-Ohio-7771, 2017 WL 4217360, ¶ 9. It is worth noting as well that Lorraine did not file his motion until a year after the *Hurst* decision was issued. Thus, there was no evidence of unavoidable delay, from a legal standpoint, for the failure to raise the arguments Lorraine now sets forth." *Lorraine,* 2018-Ohio-3325, ¶46 (concurring opinion).

While Ohio's Eleventh Appellate District opted not to address the constitutionality question, the court referenced, 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. *Lorraine*, 2018-Ohio-3325, ¶ 40. Lorraine later appealed to the Ohio Supreme Court which declined jurisdiction in *State v. Lorraine*, Ohio Supreme Court Case No 2018-1405 on

January 23, 2019. See 01/23/2019 Case Announcements #2, 2019-Ohio-173. Lorraine 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 twice.

Lorraine's *Hurst*-claim follows in the appellate footsteps of fellow Ohio death row inmates, Maurice Mason and Nathaniel Jackson. In *State v. Mason*, 2018-Ohio-1462, the Ohio Supreme Court extensively 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 in *Mason v. Ohio*, United States Supreme Court Case No. 18-5303 and also denied a similar petition in *Jackson v. Ohio,* United States Supreme Court Case No. 18-7353 raising the same arguments Lorraine now presents in his latest petition to this Court. See Orders List: 586 U.S. As this Court has already denied certiorari to at least two other Ohio death row inmate attempting to lodge this same claim, Lorraine's petition should also be denied.

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

Lorraine 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, Lorraine 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).
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> *Belton* at ¶59. (Italics original).

More recently, the Ohio Supreme Court extensively 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 and Jackson, Lorraine 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 unanimously determines that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Lorraine 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. Lorraine's petition, p. 11. Again, Lorraine 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.***"
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> *Mason*, 2018-Ohio-1462, ¶¶ 38-41. (Italics original).

Lorraine 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

Lorraine'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 v. Ohio.* Lorraine provides

no distinction from the claim now raised and the claim presented and rejected in both of those cases. The State of Ohio submits Lorraine 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** Lorraine's petition for certiorari.

Respectfully submitted,

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I do hereby certify that a copy of the foregoing Brief in Opposition was sent by ordinary U.S. Mail to Randall L. Porter (Ohio Atty. Reg. #0005835) and Adrienne M. Larimer (#0079837) Assistant Ohio State Public Defenders, 250 E. Broad St., Suite 1400, Columbus, Ohio, 43215-9308 on this 15th day of May, 2019.

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