No. _____

In the Supreme Court of the United States

JAMES TENCH,
Petitioner,
v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. **Does the admission of improper and prejudicial evidence violate a capital defendant's right to due process where the record indicates that the jury relied upon that evidence in rendering its guilty verdict and in recommending a sentence of death?**

2. **When a reviewing court independently reweighs the aggravating circumstances against the mitigating factors and substitutes its judgment for that of the jury's, does that reweighing violate a capital defendant's Sixth Amendment Constitutional right as defined by this Court in *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 624 (2016)?**

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 states that no parties are corporations.

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In the Supreme Court of the United States

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James Tench respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The sentencing entry of the Medina Court of Common Pleas Court in *State v. Tench*, Case No. 14 CR-00541, is attached hereto as Appendix A at A-1. The opinion of the Supreme Court of Ohio is reported at *State v. Tench*, Slip Opinion No. 2018-Ohio-5205 and is reproduced in the Appendix, attached hereto at A-10.

JURISDICTION

The Supreme Court of Ohio rendered its opinion on July 31, 2018 and reported that opinion on December 26, 2018. *Tench*, 2018-Ohio-5205. Tench filed a *Motion for Reconsideration* in the Supreme Court of Ohio on January 7, 2019. The Court denied his motion on March 6, 2019. This Order is reproduced in the Appendix, attached hereto at A-91. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Fifth Amendment, which provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law.

B. Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

C. Eighth Amendment, which provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D. Fourteenth Amendment, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

STATEMENT OF THE CASE

A. Introduction

James Tench [hereinafter Tench] and his mother, Mary Tench, lived at 758 Camden Lane in Brunswick, Ohio. Mary was murdered on November 12, 2013. Now, Tench sits on death row, despite the fact that both phases of his capital trial were riddled with constitutional violations.

B. The Offense.

On November 11, 2013, Mary Tench was working as an State Tested Nursing Assistant for Ennis Court Assisted Living in Lakewood, Ohio. On the day in question, Mary finished her shift at 11:00 p.m., and was expected to return to her Brunswick home a little before midnight. Tragically, she never made it home.

On November 12, 2013 at 7:50 a.m., Tench went to the Brunswick Police Department to report his mother, Mary, a missing person. Vol. XVI, Tr. 2887. Tench relayed to Brunswick Police Officer, Christopher Scafidi, that his mother did not return home from work the night before. *Id.*

Unrelated to Mary's disappearance, three weeks earlier, on October 20, 2013, the Old Carolina Barbeque Restaurant in Strongsville, Ohio, was robbed at gunpoint. Vol. XXVIII, Tr. 4733. The suspect wore a skull mask and hooded sweatshirt to obscure their identity. *Id.* The gunman placed two employees in the walk-in cooler, while a third employee hid in the bathroom, and a fourth employee hid in an office. Vol. XXVIII, Tr. 4734. The gunman unsuccessfully attempted to open the restaurant's safe. Vol. XXVIII, Tr. 4734. Foiled, the gunman obtained the correct code from the

manager on-duty and robbed the store of $300 cash funds. Vol. XXVIII, Tr. 4734. The following day, Detective Borowske met with the restaurant's manager and district manager and reviewed the surveillance tape with them. Vol. XXVIII, Tr. 4735. The manager, Ray Hall, stated that the suspect looked exactly like one of his former employees, James Tench. Vol. XXVIII, Tr. 4735. Detective Borowske began investigating Tench in coordination with Brunswick Police Detective Brian Schmitt. Vol. XXVIII, Tr. 4736.

Shortly after Tench arrived at the precinct to report his mother missing, Detective Schmitt informed DetectiveWeinhardt that Tench was a person of interest in the recent robbery of the Old Carolina Barbeque restaurant in Strongsville–a fact that immediately colored Detective Weinhardt's thinking in the present case. Vol. XXVI, Tr. 4391-92.

Early that same afternoon, Detective Weinhardt and Detective Schmitt drove to the Tench residence on Camden Drive to discuss Mary's disappearance with Tench. Vol. XXVI, Tr. 4398, 4532. Tench fully cooperated with the detectives and answered their questions. Vol. XXVI, Tr. 4400. Tench expressed concern for his mother and shared that his mother had no boyfriend and that her absence, and not notifying anybody, was very uncharacteristic of her. Vol. XXVI, Tr. 4401. Tench's visit with the detectives was interrupted by the discovery of his mother's vehicle at a nearby marketing agency located at Carquest Drive. Vol. XXVI, Tr. 4416-17, 4548-49. Ultimately, Tench was arrested, first for the burglary of Old Carolina Barbeque, and then for the murder of his mother, Mary.

C. The Trial.

On August 14, 2014, the Medina County Grand Jury capitally indicted Tench under alternative theories for the murder of his mother. Count I charged Aggravated Murder with Prior Calculation and Design in violation of § 2903.01(A). Count II charged Aggravated Murder During the Commission of a Felony, to wit: Aggravated Robbery, in violation of R.C. § 2903.01(B). Count III charged Aggravated Murder During the Commission of a Felony, to wit: Kidnapping in violation of R.C. 2903.01(B). Each of the aggravated murder charges included three capital murder specifications. Count IV charged Murder, in violation of R.C. § 2903.02(A). Count V charged Felony Murder, as a result of committing an offense of violence, to wit: Felonious Assault in violation of R.C. § 2903.02(8). Count VI charged Aggravated Robbery in violation of R.C. § 2911.01(A)(3). Count VII charged kidnapping, in violation of R.C. § 2905.01(A)(2). Count VIII charged Tampering with Evidence, in violation of R.C. § 2921.12(A)(1). Counts VI and VII each contained a Repeat Violent Offender Specification in violation of R.C. § 2929.01(CC).

On February 22, 2016, jury selection began with death-qualifying the potential jurors. Even during voir dire, the jurors were primed with prejudicial evidence, particularly pertaining to Tench's involvement with the Old Carolina Barbeque robbery. Vol. XV, Tr. 2779- 2781. This prepared the jurors to doubt Tench, undermined his presumption of innocence, and, in turn, violated Tench's right to due process. The prospective jurors were struck for cause if they indicated they would not consider this evidence, assuring that Tench's jury pool was, in fact, going to consider

the other acts evidence and use it against him in his capital trial. *Id*. On March 4, 2016, Tench's trial began. The State's opening statement was infused with references to the inadmissible evidence. *Id*. at Tr. 2845. The State called 54 witnesses in its case-in-chief.

One unique feature of Tench's trial was the fact that the trial court allowed the jurors to ask questions of each of the witnesses. Once the State and the defense were done with direct, cross, and re-direct examination of a respective witness, the jury was then permitted to submit questions to the Court. In addition to being peculiar and disruptive, this process allowed the jurors to unconstitutionally become a part of the prosecution team, tying up any loose ends that the prosecution may have left open—virtually foreclosing any possibility of the existence of reasonable doubt. Additionally, it afforded unique insights as to what the jurors were focused on, a perspective that revealed a significant reliance upon what the Ohio Supreme Court ruled inadmissible and prejudicial evidence. *Tench*, 2018-Ohio-5205, ¶¶159, 162, 170, 174.

Many of the State's witnesses were called to establish the commission of other acts, not to prove that Tench was guilty of the crimes charged. The trial court permitted the State to bring forth evidence of Tench's commission of the robbery of the Old Carolina Barbeque, which subsequently allowed the State to prejudicially bring forth improper character evidence. Using Tench's robbery conviction, the State reiterated to the jury Tench's tendency to lie about committing crimes he was responsible for. Further, the numerous law enforcement witnesses who were called

to testify and who were solely involved in the robbery investigation added to the prejudice Tench suffered.

The State was permitted to elicit additional superfluous testimony from numerous witnesses, including Raymond Hull, Christina Kyker, and BCI Agent Staley. These witnesses provided information that was prejudicial, and in many instances immaterial, that ultimately proved detrimental to Tench's case. Much of the evidence brought in through these witnesses did not support the State's theory, did not prove motive, and, therefore, was completely irrelevant. *Tench*, 2018-Ohio-5205, ¶¶ 154, 162, 173.

After the State rested, the defense responded by calling six witnesses in its case-in-chief. The witnesses called, who included Tench himself, just barely scratched the surface as to what could have been presented. Trial counsel failed to call experts to assist in the defense's case even though they were well aware that a variety of forensic evidence would be used against Tench.

On March 23, 2016, the jury returned a verdict of guilty as to all counts and specifications contained in the indictment, with the exception of the Repeat Violent Offender Specification. After hearing evidence, the trial court found Tench guilty of the Repeat Violent Offender Specification. The case proceeded to the mitigation phase.

D. Mitigation phase.

Tench was raised in the midst of a tumultuous background. Some mitigating information was gathered and presented during the mitigation phase of Tench's trial,

but the jury was never given the full picture. This is because trial counsel failed to conduct a thorough investigation, not because mitigating information could not be discovered.

Instead, the jurors were left with a deficient understanding of the mitigation Tench could have offered and were left to consider the numerous instances of other acts evidence that were improperly admitted against Tench. Insofar as it relates to a defendant's "'history, character, and background,' … a jury must consider [evidence previously admitted in the guilt phase] in the penalty phase." *State v. Cassano*, 2002-Ohio-3751, ¶51, 96 Ohio St. 3d 94, 102, 772 N.E.2d 81, 93, quoting R.C. § 2929.04(B). As noted above, much of the other acts evidence in this case—particularly the Old Carolina Barbecue robbery evidence—was *improperly* admitted. *Tench*, 2018-Ohio-5205, ¶193 (emphasis in original). On April 5, 2016, the jury recommended the death penalty. The trial court then conducted its own independent review and sentenced Tench to death.

E. Conclusion

The trial court allowed numerous instances of other acts evidence to be used against James Tench in his capital trial. In its decision, the Ohio Supreme Court found numerous instances of error,[1] including four where the trial court abused its discretion in admitting evidence, including: (1) the admission of "Old Carolina robbery evidence", (2) "text deletion evidence", (3) "statement implying possible

[1] Additional errors include barring the admission of a prior inconsistent statement that would have impeached one of the State's witnesses and allowing testimony that violated the confrontation clause. *Tench*, 2018-Ohio-5205, ¶¶195, 206.

theft", and (4) "drug evidence." *Tench*, 2018-Ohio-5205, ¶¶159, 162, 170, 174. Though it determined that there were several instances where the trial court abused its discretion in admitting evidence, the Ohio Supreme Court ultimately found that the admissions were harmless. *Id*. The Ohio Supreme Court also found that the State had not proven Count VI, Aggravated Robbery. In so finding, the Court nullified one of the three aggravating circumstances in the case. Despite nullifying this aggravating circumstance, the Ohio Supreme Court found that it could cure this error through its own independent review. *Tench*, 2018-Ohio-5205, ¶ 309.

REASONS FOR GRANTING THE WRIT

1. Does the admission of improper and prejudicial evidence violate a capital defendant's right to due process where the record indicates that the jury relied upon that evidence in rendering its guilty verdict and in recommending a sentence of death?

Ohio Evid. R. 404(B) governs introduction of "other acts" evidence and strictly limits evidence of "other crimes, wrongs or acts" because of its prejudicial affect. Ohio Evid.R. 404(B) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Ohio Evid.R. 404(B) mirrors Federal Evid. R. 404(B) as well as the corresponding Evidence Rule in place in many other states.

Tench alleges that the Ohio Supreme Court violated his constitutional right to due process when that court found, despite the erroneous admission during Tench's capital trial of a multitude of other acts evidence, that this error was harmless. *Tench*,

2018-Ohio-5205, ¶138. This cannot be so, particularly where both phases of Tench's capital trial were inundated with this inadmissible evidence, and where Tench can show that the jury relied on this prejudicial evidence to his detriment. The admission of other acts evidence in this case cannot be considered insignificant where it "predispose[d] the mind of the juror[s] to believe that [Tench was] guilty, and thus effectually [] strip[ped] him of the presumption of innocence." *See Breakiron v. Horn*, 642 F.3d 126, 144 (3d Cir. 2011), [citing *Commonwealth v. Harkins*, 459 Pa. 196, 328 A.2d 156, 157-58 (1974). The improperly admitted other acts evidence undermined the integrity and fairness of Tench's capital trial where it had a substantial and injurious effect or influence on the jury's verdict, and, thus, violated Tench's constitutional right to due process.

1. Old Carolina Barbeque

On October 28, 2013, Tench committed a robbery at Old Carolina Barbeque. Despite the fact that this robbery was unrelated to his mother's disappearance and death on November 12, 2013, the trial court ruled this evidence admissible. 2/17/16 Pre-Trial Hearing Tr. 30. The Ohio Supreme Court properly recognized "there is no connection" between the robbery and Tench's mother's death." *Tench*, 2018-Ohio-5205, ¶151. In fact, that Court found "the state was using it for precisely the purpose forbidden by Evid.R. 404(B): as *propensity* evidence." *Id*. at ¶157. Indeed, that is precisely what the State argued and what the jury heard. Through the testimony of Detective Sarah Hosta Merhaut, the State elicited the following:

> State: Now, you just told us that in a typical missing adult case, there's not really that much cause for concern. They usually turn up. This case was different?
>
> Merhaut: It was slightly different. I came to learn that Mary's son was a suspect in the robbery in Strongsville that had occurred several days prior, and, obviously, that being a crime of violence, the concern would be for any family member or friend or close person of that suspect. That should something happen to them, it would be worthwhile to look into that immediately.
>
> State: So, once you became aware of that fact, it is fair to say you ramped up the efforts to locate Mary Tench?
>
> Merhaut: Correct.

Vol. XXIII, Tr. 4051.

That was not the only instance where evidence of the Old Carolina Robbery was allowed. Evidence relating to the robbery came in through multiple witnesses, many of whom were called exclusively to testify about the robbery and had no evidentiary value concerning Tench's mother's death and disappearance. *See generally* testimony of Detective Steve Borowske, (Vol. XXVIII, Tr. 4732-4751); Christina Kyker, (Vol. XVIII, Tr. 3226-3273); Jonathan Casey, (Vol. XIX, Tr. 3433-3454); Raymond Hull, (Tr. 3455-3466); Detective Dean Weinhardt, (Vol. XXVI, Tr. 4390-4510); Officer Gregory Hayest, (Vol. XIX, Tr. 3337-3405); and Detective Brian Schmitt (Vol. XXVII, Tr. 4511-4646). Specifically, Detective Schmitt's testimony made clear that Tench was not only on trial for his mother's murder, but that he had committed other violent crimes against people:

> State: So at 10:00 a.m. or thereabouts, you responded for your shift. At some point that morning, do you become aware that a woman named Mary Tench was reported missing?

> Schmitt: Yes. Upon entering my office, I was contacted by a shift sergeant and advised me that James Tench had filed a missing person report for his mother and I made the same shift sergeant aware of the previous investigation through Strongsville Police and that's why he felt it necessary to come to me right away as soon as I started my shift because I did have inside knowledge about James Tench.
>
> State: You were aware that James Tench was a suspect in a robbery at the Old Carolina Barbeque in Strongsville that occurred October 28, 2013; is that correct?
>
> Schmitt: Correct. I was in conversation with the detective from Strongsville Police the previous two weeks that *not only was it a robbery, but it was a kidnapping and robbery*. He wanted me to keep an eye on his truck because I knew Camden Lane very well. He was very concerned about the stickers that were on the truck to make it more identifiable from a surveillance video.

Vol. XXVI, Tr. 4522-4523 (emphasis added).

Detective Steve Borowske testified that the victims of the Old Carolina Barbeque robbery were "scared to death" by the incident. *Tench*, 2018-Ohio-5205, ¶142. Where evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." *Barnett v. Turner*, No. 3:15-cv-02195, 2016 U.S. Dist. LEXIS 172778, at *47 (N.D. Ohio Nov. 16, 2016) [citing *State v. Crotts,* 2004-Ohio-6550, ¶24, 104 Ohio St.3d 432, 437, 820 N.E.2d 302, 308 (2004)]. Finally, the State questioned Tench extensively about the robbery of the Old Carolina Barbeque. Tr. 5083-87, 5108, 51167-17.

There was no legitimate purpose for admitting this evidence; it tainted the jurors and tipped the scales in favor of securing a death verdict. *Tench*, 2018-Ohio-5205, ¶157 ("the state was using it for precisely the purpose forbidden by Evid.R. 404(B): as *propensity* evidence."). The fact that the jury relied on this inadmissible

evidence is also clear. Following Tench's testimony, the jurors were permitted to question Tench. Among the questions submitted were the following:

> Juror Question: Why did you lie to many people about the robbery?
>
> Juror Question: Why did you rob Old Caroline Barbeque?
>
> Juror Question: Did your mom know about the robbery before her death?
>
> Juror Question: Why wasn't the other person charged in the robbery of Old Carolina Barbeque?
>
> Juror Question: You lied on the jail phone to people about the robbery to "protect your innocence" even though you committed the crime?
>
> Juror Question: You said you denied the robbery at Old Carolina Barbeque then admitted to it for a plea bargain. You said you never harmed your mother, are you lying now?

Vol. XXX, Tr. 5139-40, 5155. *See also*, Juror Questions.

Though both defense counsel and the prosecution agreed to not pose some of the questions to Tench (because they were unduly prejudicial), the fact that the jurors generated so many questions pertaining to this improperly admitted evidence demonstrates that they were (1) at the very least thinking about it, and (2) more than likely affording it significant weight in their decisions as to both guilt and sentence. Further, because the evidence was admitted without actually being tied to the crime, the jurors were left to use their individual and collective imaginations to create a theory of the crime that made the evidence relevant. This effectively relieved the State of its burden of proof in this capital case. *See e.g.* Juror Question: "Did your mom know about the robbery before her death?" Vol. XXX, Tr. 5155.

2. Text Message Deletion

Similar to the Old Carolina Barbeque incident, the State was permitted, over defense counsel's objection, to question Christina Kyker, Tench's former girlfriend, in regard to her own personal social media account.

> State: When you were dating Mr. Tench, did anything unusual ever happen with regards to your cellphone, and I'm not big on technology but with your Facebook or something?
>
> Kyker: When we were on vacation and he – I woke up and I looked at my cellphone and I had a text message from another guy. I didn't erase the message. I left it on there. I fell back asleep.
>
> Later in the morning, I woke up. The message was deleted and then also with my Facebook, I noticed that guys were deleted off my Facebook that I didn't delete off.

Vol. XVIII, Tr. 3240.

Kyker never testified that Tench was the person who deleted these items, nor did the State introduce any evidence that he had. Thus, there was not substantial proof that the acts were even committed by Tench, a requirement for admission under Ohio law. *See State v. Lowe*, 1994-Ohio-345, 69 Ohio St.3d 527, 530, 634 N.E.2d 616, 619, (1994). Critically, as the Ohio Supreme Court found, even if Tench was responsible for the deletions, such evidence has no tendency to prove any fact of consequence to the determination of this case and should not have been presented. *Tench*, 2018-Ohio-5205, ¶162 ("The text-deletion evidence fails the first part of the *Williams* test: relevance.").

Like the Old Carolina Barbeque, the admission of this evidence prejudiced Tench. This testimony served no purpose but to demonstrate to the jury Tench's habit

of dishonest behavior. Particularly in combination with the other improperly admitted evidence at trial, the admission of this testimony deprived Tench of due process of law.

3. Statement Implying Theft

In addition to questioning him about the Old Carolina Robbery, the State also elicited testimony from Raymond Hull, a former general manager of Old Carolina Barbeque restaurant in Strongsville, that Tench was suspected of other maleficence during the course of his employment.

> State: Okay. Any concerns about how he [Tench] performed his job?
>
> Hull: There were some concerns but that was just speculation. There was nothing I could prove because sometimes the bank wasn't adding up to what he should have been so, you know, with us being brand-new and everything, we didn't know what the costs were and what was going out and what was coming in.

Vol. XIX, Tr. 3465-3466.

Hull's testimony conveyed to the jury that he suspected Tench of stealing from the restaurant. Had there been any proof implicating Tench in such activity, it might have been relevant. But, as Hull frankly admitted and as the Ohio Supreme Court found, he had *no such proof* and was merely speculating. *Tench*, 2018-Ohio-5205, ¶170 (emphasis added) ("Hull's suspicions were irrelevant."). Thus, this testimony was improperly admitted against Tench.

This testimony also prejudiced Tench, since the jury was left with the insinuation that Tench could have committed his mother's murder in conformity with his propensity for engaging in unlawful behavior or because of his dishonest

character—precisely the purpose prohibited by Evid. R. 404 (A). Again, particularly in combination with the other improperly admitted evidence, the admission of this testimony deprived Tench of due process of law.

4. Drug Evidence

At trial, the State's theory of motive had nothing to do with drug use; nor did they proffer any evidence that Tench was a drug addict, or even a drug user, at the time of his mother's murder. *Tench*, 2018-Ohio-5205, ¶¶173-74. Despite this, the State still introduced unrelated evidence suggesting drug use in their case against Tench. Vol. XX, Tr. 3599; Vol. XXIII, Tr. 4001-02.

BCI agent George Staley was permitted to testify that in his search of Tench's F-150 truck he found what he suspected to be illegal drugs.[2] Vol. XX, Tr. 3599. The State also called Martin Lewis, a forensic scientist with BCI having expertise in drug chemistry analysis and gunshot residue analysis. Lewis performed an analysis on the orangish-brown substance which had been found in Tench's truck and testified that its weight was less than 0.1 grams and that it was a substance called Alpha-PVP that it is listed as a Schedule I stimulant. Vol. XXIII, Tr. 4001-02.

Like the Old Carolina Barbeque evidence, it is clear from the record that the jury set its focus on this improper evidence. When the jury was given an opportunity to question Lewis, they wanted to know the street name for this substance to which

[2] It is worth noting that though Staley has specialized training in the area of blood stain pattern analysis, he made no mention of specialized knowledge to inform his assumption that what he found was drugs.

the witness replied, "bath salts." Vol. XXIII, Tr. 4006. The jurors later asked Tench if the drugs were his. The jurors asked:

> Juror Question: Were the drugs found in your truck yours? If not, whose were they?
>
> Juror Question: Why was there a drug bag that had Alpha PVP AKA bath salt residue in your truck?
>
> Juror Question: Why was Molly in your truck?
>
> Juror Question: Have you ever used bath salts?
>
> Juror Question: Who did the bath salts belong to?

Vol XXX, Tr. 5137. *See also*, Juror Questions. The juror's continued attention to, and interest in, this evidence suggests that they afforded it at least some significance.

This was not the only occasion that drugs were brought up in Tench's trial. Eric Balish, an agent with the U.S. Secret Service specializing in both computer and cell phone forensics, testified against Tench at trial. While Balish was performing the extractions from the cell phones in evidence, he extracted several different photos from a phone which was attributed to Tench. Vol. XXIII, Tr. 4190. Among the extracted photos were State's Exhibit 938, a photograph of a plastic bag containing some crystal or some sort of crystal contents, and State's Exhibit 939, a clear bag that appeared to contain some crystal sort of substance. Vol. XXIV, Tr. 4194.

Again, the State made no attempt to tie the images of these drugs to their case. *Tench*, 2018-Ohio-5205, ¶¶173-74. Instead, the jurors were left to infer that these photos found on Tench's phone implicated him in additional criminal acts or behavior, and that his mother's murder was just another act in conformity with his general

propensity for lawlessness. In combination with the other improperly admitted evidence, the admission of this evidence of Tench's drug use deprived Tench of due process of law.

5. Tench was prejudiced by the admission of all of this improper evidence; this violated Tench's right to due process.

Having recognized all of these errors, plus three more,[3] the Ohio Supreme Court conducted a cumulative error analysis in response to Tench's sixteenth proposition of law. The Ohio Supreme Court found that there was overwhelming evidence of Tench's guilt, and, in turn, overruled Tench's argument. *Tench*, 2018-Ohio-5205, ¶¶178, 191.

In finding that the error was harmless, the Ohio Supreme Court only considered the weight of the other, admissible evidence against Tench. The fact that other circumstantial evidence existed that implicated Tench did not negate the fact that highly prejudicial testimony was admitted and permeated the trial.[4] *See* Sections One and Four, *supra*, regarding questions asked by the jury and/or other prejudice that flowed from this evidence. This cannot be true. Courts have recognized the prejudicial nature of propensity evidence, as is the evidence here. *Breakiron v. Horn*, 642 F.3d 126, 144 (3d Cir. 2011), [citing *Commonwealth v. Harkins*, 459 Pa. 196, 328 A.2d 156, 157-58 (1974)("When the jury learns that the person being tried has

[3] *See* FN 1.

[4] In order to secure a conviction and death sentence, the State used this improper evidence to bolster its weak and purely circumstantial case at trial. Despite the Ohio Supreme Court's reliance on "overwhelming" evidence in its opinion, much of that evidence was already explained and/or challenged, even at trial. This includes DNA and bloodstain evidence. In addition, the Court's opinion ignores the contradictory testimony of several witnesses; particularly Juan Parilla and Sara Morgan.

previously committed another crime, the prejudicial impact cannot be considered insignificant. The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence.")]. The prejudice Tench suffered deprived him of due process and the resulting verdict, which he now pays for with his life, is anything but harmless.

Moreover, the Ohio Supreme Court's truncated analysis was particularly concerning because the improperly admitted evidence was then readmitted for consideration in the mitigation phase. As the Ohio Supreme Court found, the trial court's "limiting instruction" in the mitigation phase was, similarly, improper. *Tench*, 2018-Ohio-5205, ¶251. Thus, the carry-over effect to the mitigation phase was compounded. Presenting the jury with all evidence and exhibits from the trial phase, not pertinent to the aggravating circumstances and improperly admitted in the first place, impermissibly tipped the scales in favor of the death penalty and undermined the reliability of the verdict in Tench's case. *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). This deprived Tench of due process. Particularly because Tench is a capitally sentenced defendant, more process was due, not less. *Id. See also Beck v. Alabama,* 447 U.S. 625 (1980).

6. Conclusion to First Reason for Granting the Writ.

In Tench's case, the other acts evidence was so unduly prejudicial that it rendered his trial fundamentally unfair. This Court should grant the writ to correct the Ohio Supreme Court's erroneous reasoning in this case. In addition, this Court

should grant the writ to affirm that prosecutors may not solicit inadmissible evidence in order to prejudice the jury against a defendant and secure a capital conviction and death sentence.

2. When a reviewing court independently reweighs the aggravating circumstances against the mitigating factors and substitutes its judgment for that of the jury's, does that reweighing violate a capital defendant's Sixth Amendment Constitutional right as defined by this Court in *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 624 (2016)?

This Court's decision in *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 624 (2016), rendered impermissible the Ohio Supreme Court's practice of utilizing independent reweighing to cure constitutional error that occurred at trial. Specifically, this Court held in *Hurst* that a defendant's Sixth Amendment right to a jury trial is impermissibly violated where the trial court substitutes the jury's capital fact-finding with its own. *Hurst*, 136 S. Ct. at 624 (holding that a defendant's Sixth Amendment jury trial right was violated since, without judicial fact-finding, the defendant was ineligible for the death penalty). Assuming without conceding that Ohio's capital sentencing scheme does not violate *Hurst* on its face, the Ohio Supreme Court's use of appellate reweighing to cure constitutional errors that occurred at trial does, in fact, violate this constitutional mandate.

1. Legal Authority.

According to *Hurst,* a capitally charged defendant who invokes his Sixth Amendment jury trial right, is entitled to an opportunity to convince just one of twelve individuals that mitigating factors outweigh aggravating circumstances and that his life therefore should be spared. *Hurst*, 136 S. Ct. at 622 (overturning Florida

death penalty scheme because the Florida sentencing statute does not make a defendant eligible for death until findings by the court that such person shall be punished by death).

Under Ohio law, the facts necessary to impose a death sentence under "Ohio's capital sentencing scheme" include "the existence of any statutory aggravating circumstances and whether those aggravating circumstances are sufficient to outweigh the defendant's mitigating evidence." *State v. Hoffner*, 2004-Ohio-3430, 102 Ohio St.3d 358, 811 N.E.2d 48 at ¶69 [citing Ohio Rev. Code § 2929.03(B) and (D)]. Ohio law "charges the jury with determining" those facts "by proof beyond a reasonable doubt." *Id.* Thus, the jury's weighing of the aggravating circumstances against the mitigating factors is a finding of fact in Ohio.

This Court's *Hurst* decision further acknowledged that Florida's law violated *Ring v. Arizona,* 535 U.S. 584 (2002) because, under the statute, a defendant was not eligible for death until the trial judge made findings regarding the sufficiency of aggravating circumstances, mitigating circumstances, and the relative weight of each.

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. §775.082(1) (emphasis added). The trial court *alone* must find "the facts…[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." §921.141(3); *see* [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

Hurst v. Florida, 136 S. Ct. 616, 622 (2016). (Emphasis in original). *Hurst* illustrates, therefore, in a weighing scheme like Florida's or Ohio's, that death-eligibility findings

addressed in *Ring* extend to all factual determinations implicit in capital sentencings, including the relative weight of the aggravating circumstances and mitigating factors. Thus, this Court's decision in *Hurst* mandates that the jury, not a judge, must weigh the relative aggravating circumstances against the mitigating factors and make a factual determination of whether death is appropriate. *Hurst*, 136 S. Ct. at 624.

This Court's jurisprudence has made clear that the trial judge cannot unceremoniously usurp the jury's fact-finding role in a capital case. It follows that the same rule applies to the appellate court. If a reviewing court determines on direct appeal that the jury's finding of one of the aggravating circumstances was not in fact proven, and thus, improperly considered, that determination should also nullify the jury's weight determination of the aggravating circumstances and the mitigating factors. Since *Hurst* mandates that this weight determination be made by the jury, the only option for a reviewing court is to remand for a new sentencing phase. Independent reweighing cannot cure such an error.

2. Argument: the Ohio Supreme Court violated Tench's right to a jury determination of whether death is appropriate in violation of this Court's decision in *Hurst* and the Sixth Amendment to the U.S. Constitution.

In Tench's case, the jury made a factual finding that there were three death penalty specifications, as required by the statute. The Ohio Supreme Court found on direct appeal that one of those specifications—aggravated robbery—was not proven at trial beyond a reasonable doubt. *Tench*, 2018-Ohio-5205, ¶286 ("But to find Tench guilty of aggravated robbery, on which the robbery-murder aggravating circumstance

was predicated, the jury must have found that by doing this he deprived the owner of the purse or its contents and that his purpose in doing so was to deprive the owner of the property. In our view, the evidence fails to support either finding."). Thus, that court reduced the aggravating circumstances on one side of death scale from three aggravating circumstances to just two. Because the evidence did not support the jury's verdict on the aggravated robbery-murder capital specification, that verdict was constitutional error that, in turn, should have nullified that jury's recommendation of death, since that recommendation was based on a finding that the *three* aggravating circumstances he was found guilty of outweighed the mitigating factors.

In any state that allows appellate reweighing, like Ohio, the act of reweighing is tantamount to the Florida scheme's act of substituting the fact-finding of twelve jurors with that of a sentencing judge. This creates a serious and constitutionally impermissible likelihood that one who is not deserving of death may nevertheless receive a death sentence since the appellate court cannot recreate the differing perspectives and life experiences that the twelve jurors brought to bear when weighing aggravation versus mitigation at the defendant's original trial.

As applied to Tench's case, the Ohio Supreme Court's independent reweighing seriously diminished the accuracy and reliability of his death sentence. *See Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). The Ohio Supreme Court, acting in its capacity to review the case, is not the equivalent to twelve common citizens considering and giving varying weight to aggravation versus mitigation. This error is

compounded, since the improper other acts evidence was also readmitted against Tench during the mitigation phase. This improperly admitted evidence would have further tipped the scales in favor of death. *See also* Section Five, First Reason for Granting the Writ.

As the Ohio Supreme Court has previously noted, "the weighing process amounts to 'a complex moral judgment' about what penalty to impose upon a defendant who is already death eligible." *State v. Belton*, 2016-Ohio-1581, ¶ 60, 149 Ohio St. 3d 165, 176, 74 N.E.3d 319, 337 [citing *United States v. Runyon*, 707 F.3d 475, 515-516 (4th Cir. 2013)]. This complex moral judgment culminates in the jury's factual finding of whether specific and defined aggravating circumstances outweigh mitigating factors. *Hurst*, 236 S. Ct. at 622. Once the Ohio Supreme Court decided that one of the specifications—aggravated robbery—had not been proven beyond a reasonable doubt, the Ohio Supreme Court could not reweigh the aggravating circumstances and mitigating factors, as the weighing process was for the jurors in the first instance. *Hurst*, 236 S. Ct. at 622.

3. Conclusion.

The jury's recommendation of death was based upon weighing three aggravating circumstances against the mitigating factors. The Ohio Supreme Court independently nullified that finding of the jury and substituted its own when it found that one aggravator—aggravated robbery—was not proven, and, thus, reduced the number of aggravating circumstances from three to two. *Tench*, 2018-Ohio-5205, ¶1. Thus, the jury's recommendation of a death sentence is erroneous, because the jury

considered an unproven aggravating circumstance and weighed it against the mitigating factors presented. The Ohio Supreme Court's use of appellate reweighing to correct this error was unconstitutional under this Court's decision in *Hurst*. This Court should grant the writ and remand this case to the trial court for a new sentencing hearing.

CONCLUSION

The other acts evidence improperly admitted against Tench was so unduly prejudicial that it rendered his trial fundamentally unfair. This Court should grant the writ to correct the Ohio Supreme Court's erroneous reasoning in this case. In addition, this Court should grant the writ to affirm that prosecutors may not solicit inadmissible evidence in order to prejudice the jury against a defendant and secure a capital conviction.

The Ohio Supreme Court's attempt at curative reweighing seriously diminished the accuracy and reliability of Tench's death sentence because the appellate court, acting in its capacity to review his case, was not the equivalent of twelve jurors. This Court should grant the writ to correct the Ohio Supreme Court's erroneous reasoning in this case. In addition, this Court should grant the writ to affirm that reviewing courts cannot supplant the role of a jury and substitute their own judgments for that which was intended by the Sixth Amendment.

Respectfully submitted,

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