No. _____

In the Supreme Court of the United States

_____

WAYNE POWELL,
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

Wayne Powell was sentenced to death following a trial where his counsel performed deficiently and failed to thoroughly investigate and prepare mitigation on his behalf. Powell pays for the cost of their mistakes with his life.

Ohio law permits indigent death row inmates, like Powell, one opportunity to correct errors caused by the ineffective assistance of trial counsel: a petition for postconviction relief in the trial court. Powell asked the trial court to provide postconviction counsel with the funds to hire four experts: a mitigation specialist, a psychologist, a substance abuse expert, and a neuropsychologist. Because Ohio's statutes do not expressly require the trial court to fund expert services in a capital postconviction case, the trial court denied funding, the appellate court affirmed, and the Ohio Supreme Court declined jurisdiction. Thus, Powell is required to navigate postconviction – the only forum for litigation of ineffective assistance of trial counsel's mitigation efforts – without the tools essential to the task.

In *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616 (2016), the Court overruled *Spaziano v. Florida*,[1] and *Hildwin v. Florida*,[2] invalidated Florida's capital punishment statute, and held all facts necessary to impose a death sentence 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

[1] 68 U.S. 447, 104 S.Ct. 3154 (1984).
[2] 490 U.S. 638, 109 S.Ct. 2055 (1989).

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.[3] The Ohio Supreme Court – invoking *Spaziano v. Florida* – has repeatedly held that investing capital sentencing authority solely in the trial judge does not violate the Sixth or Eighth Amendments.

Powell was sentenced to death under this judge-sentencing scheme where a jury's death verdict is merely a recommendation. The judge alone makes findings essential to impose the death penalty and decides whether to sentence a defendant to life or death. After *Hurst,* Powell moved the trial court to grant a new mitigation trial in conformity with the constitutional requirements this Court established in *Hurst*. The trial court denied the motion, the Court of Appeals affirmed, and the Ohio Supreme Court declined jurisdiction.

Thus, Powell's case raises two concerns of national importance:

1. **Does Ohio's postconviction process allow indigent defendants a substantive opportunity to develop claims that comport with Ohio's collateral review requirements where indigent defendants are denied funding for postconviction experts?**

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

[3] *State v. Rogers*, 28 Ohio St.3d 427, 429 (1986).

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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v.

STATE OF OHIO,
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On Petition for Writ of Certiorari to
the Supreme Court of Ohio

Wayne Powell respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS AND ORDERS BELOW

The Supreme Court of Ohio's announcement declining jurisdiction, *State of Ohio v. Wayne Powell*, Ohio Supreme Court Entry in Case No. 2019-1652, Announcement at 2020-Ohio-518 (February 18, 2020), is attached as Appendix A. The Sixth District Court of Appeals Decision and Judgment denying relief, *State of Ohio v. Wayne Powell*, Case No. L-18-1194, L-18-1195, Decision and Judgment (October 18, 2019) is attached as Appendix B. The trial court's order granting leave to file a delayed new trial motion, leave to deem attached motion filed instanter, and denial of that new trial motion, *State of Ohio v. Wayne Powell*, Case No. G-4801-CR 2005-3581-000, Lucas County Common Pleas Court, Judgment Entry (August 16,

2018) is attached as Appendix C. The trial court's order denying funds for experts and denying leave to conduct discovery, *State of Ohio v. Wayne Powell,* Case No. G-4801-CR 2005-3581-000, Lucas County Common Pleas Court, Judgment Entry (August 16, 2018), is attached as Appendix D.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio declined jurisdiction on February 18, 2020. Powell timely files this petition within 150 days of the Ohio Supreme Court's announcement declining jurisdiction. *See* Order List: 589 U.S. March 19,2020 Order. 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. 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.

B. Eighth Amendment, which provides in pertinent part:

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

C. 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.

INTRODUCTION

Capital petitioners such as Powell face a serious dilemma under Ohio's postconviction scheme. The text of the statute provides that a petitioner must include affidavits or other evidence *dehors* the record in support of his claims. R.C. § 2953.21(A). It is from the face of the petition that a trial court must determine if a hearing is required. Pursuant to Ohio's recently amended Criminal Rule 42, Powell requested, but was denied, expert funding to support his postconviction claims alleging ineffective assistance of trial counsel. Without access to expert assistance, Powell is effectively denied his Fourteenth Amendment rights to due process, equal protection, and an adequate corrective process in his state postconviction proceeding. Plainly stated, Ohio's postconviction process imposes a nearly impossible pleading standard on indigent petitioners that renders it meaningless as an effective vehicle to remedy serious constitutional violations, including the right to effective assistance of counsel.

This Court has recognized that important claims can come from initial review of collateral proceedings—claims that "often turn[] on evidence outside the trial record"—and that there is a "key difference between initial-review collateral proceedings and other kinds of collateral proceedings." *Martinez v. Ryan,* 566 U.S. 1, 10, 12 (2012). It has recognized the potential for injustice that could occur when an indigent defendant is denied the effective assistance of counsel in initial review collateral proceedings, because "[w]hen an attorney errs in initial-review collateral proceedings, it is likely

that no state court at any level will hear the prisoner's claim." *Id.* The same injustice occurs when it is the denial of resources that forces the attorney to err.

When a state adopts a procedure or rule to vindicate the constitutional rights of a litigant, it must provide any litigant a fair and reasonable opportunity to identify all relevant claims and to have those claims heard and decided. *See Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Parker v. Illinois*, 333 U.S. 571, 574 (1948). Because Ohio has chosen to establish a postconviction procedure to effectuate constitutional rights for those defendants sentenced to death, that procedure must comport with fundamental due process. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 282-83 (1998) (appellant's life interest protected by due process clause); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (death is different and so requires heightened due process). Ohio's current process for raising and determining the merits of postconviction relief claims fails to satisfy minimal standards of due process. *Case v. Nebraska*, 381 U.S. 336 (1965).

Independent of the denial of expert funding to support Powell's ineffective assistance of counsel claims, this case merits certiorari to correct Ohio's continued violation of this Court's holding in *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616 (2016). In *Hurst*, this Court overruled *Spaziano v. Florida*, and *Hildwin v. Florida,*[4] invalidated Florida's capital punishment statute, and held all facts necessary to impose a death sentence must be based on a jury's verdict, not a judge's fact finding. *Hurst*, 136 S.Ct. at 624. Yet, under Ohio's capital punishment statute, "[a]ll the power

[4] 468 U.S. 447 (1984); 490 U.S. 638 (1989).

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 (1986).

The Ohio Supreme Court – invoking *Spaziano v. Florida* – has repeatedly held that investing capital sentencing authority solely in the trial judge does not violate the Sixth or Eighth Amendments. Powell was sentenced to death under this judge-sentencing scheme where a jury's death verdict is merely a recommendation. The judge alone makes findings essential to impose the death penalty and decides whether to sentence a defendant to life or death. After *Hurst*, Powell moved the trial court to grant a new mitigation trial in conformity with the constitutional requirements this Court established in *Hurst*. The trial court denied the motion, the Court of Appeals affirmed, and the Ohio Supreme Court declined jurisdiction. Because *Hurst* explicitly overruled *Spaziano* and held that all facts necessary to impose a death sentence must be found by a jury, Ohio's death penalty scheme is unconstitutional.

STATEMENT OF THE CASE AND FACTS

Powell limits his Statement of the Case and Facts to the events relevant to the issues raised in this petition. Following his capital conviction and sentence of death, Powell timely filed a Petition for Postconviction Relief on June 30, 2008.

On July 14, 2008, Powell filed a Motion for Funds requesting funding to hire a substance abuse expert. The Ohio Supreme Court affirmed. Powell's convictions and

capital sentence in his direct appeal on June 13, 2012. *State v. Powell*, 132 Ohio St.3d 233, (2012).

On October 13, 2016, Powell filed his First Amended Postconviction Petition, a Motion for Leave to Conduct Discovery, and an Amended Motion for Funds to Hire Experts. In his motion requesting funding for experts, he specifically asked for a substance-abuse expert, a psychologist, a neuropsychologist, and a mitigation investigator. On December 12, 2016, the State filed a response arguing that Ohio's postconviction statutes do not provide for expert funding and the subject matter is barred by res judicata. Powell filed a reply on December 22, 2016.

On January 12, 2016, the United States Supreme Court announced its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). On January 12, 2017, Powell filed a Motion for Leave to file a Motion for a New Mitigation Trial pursuant to Criminal Rule 33 and *Hurst v. Florida*. The State opposed the motion on February 27, 2017. Powell replied March 13, 2017.

On July 1, 2017, Ohio Criminal Rule 42 was amended to include a provision granting complete access to file material in postconviction review, as well as a provision for the appointment of experts in postconviction.

On November 29, 2017, Powell filed a Supplemental Memorandum in Support of Amended Motion for Discovery and Funds to Hire Experts Pursuant to Rule 42, again requesting funding for a substance abuse expert, neuropsychologist, psychologist, and a mitigation investigator.

On January 19, 2018, Powell filed a request urging the court to rule on all outstanding motions before ruling on his postconviction petition.

On August 16, 2018, the trial court denied Powell's requests for funding, granted him leave to file his new trial motion, and denied the new trial motion on the merits. *See* Appendix, A-38, A-45. Powell timely appealed these denials.

On October 18, 2019, the Sixth District Court of Appeals for Ohio, in a consolidated appeal, held the trial court's order denying expert funding was a final appealable order, found no abuse of discretion in denying expert funding, and affirmed the denial of relief for a new mitigation trial pursuant to *Hurst v. Florida*. *State v. Powell*, 6th Dist. No. 2018-L-18-1194, 1195, 2019-Ohio-4286, ¶ 46. *See* Appendix, A-4.

Powell sought discretionary review in the Ohio Supreme Court by filing a Notice of Appeal and Memorandum in Support of Jurisdiction on December 2, 2019. The Ohio Supreme Court declined jurisdiction on February 18, 2020. *See* Appendix, A-2. Powell now timely files this petition for writ of certiorari within 150 days of the date the Ohio Supreme Court declined jurisdiction. *See* Order List: 589 U.S. March 19, 2020 Order.

REASONS FOR GRANTING THE WRIT

I. Does Ohio's postconviction process allow indigent defendants a substantive opportunity to develop claims that comport with Ohio's collateral review requirements where indigent defendants are denied funding for postconviction experts?

Since his arrest in 2006, Powell has been indigent. At trial, the court granted Powell funding to retain all requested experts. Critically, trial counsel failed to thoroughly investigate and explore all areas of mitigation. Instead, counsel opted to present a more generalized picture of all of Powell's mitigation through a single expert, Dr. Graves. This presentation was deficient because additional experts were needed to fully develop, and adequately explain, the mitigating value of certain subjects in which Dr. Graves lacked expertise. Instead, Dr. Graves' portrayal was deficient and affirmatively damaging to Powell when trial counsel presented these potentially mitigating facts without adequately explaining to the jury why they were mitigating.

One such example of where trial counsel's presentation fell short was the truncated presentation of Powell's family history of, and propensity for, substance abuse. When asked the significance of coming from a family with pervasive substance abuse issues, Dr. Graves responded:

> Well, it certainly makes the chances that you are going to use drugs and alcohol very high. In fact with everybody in the family seems to including all of Wayne's siblings.
>
> There are some characteristic of alcoholic family. For one they don't communicate. For another they have a kind of – the feeling part of their relationship is damaged in some way. This is not a family that Wayne

> grew up in that feels a lot except for anger occasionally. They are not very empathetic, not very involved, more detached.
>
> And trust almost is nonexistent. You don't trust anybody. Something is going to go wrong. Someone is going to mess with you. That's kind of the environment they grew up with. That's sort of what Wayne learned to do.
>
> His father fed him marijuana laced brownies at age nine. Was giving him beer by ten. Wayne was stealing beer from his grandparents at ten or eleven and drinking openly with grandparents and dad in his early teens. So he was taught how to do this. That was the kind of -and he was not to tell his mom. So taught to lie about it also.

Tr. 2561-62. But while Dr. Graves introduced Powell's history of substance abuse, he failed to explain how it was mitigating, and he lacked the necessary expertise to do so. Instead, his presentation suggested to the jury that Powell was prone to anger, lacked empathy, and was taught to lie – all damaging characteristics when not appropriately put into context. Trial counsel's use of Dr. Graves to try to explain areas of mitigation in which he did not have the expertise allowed the State to capitalize on Powell's substance abuse during closing and further discount it as mitigating:

> …they [the defense] talked about substance abuse.
>
> How mitigating is that? How does that reason or diminish the appropriateness of the death penalty in this case? There is a lot of families that go through exactly what this family went through and they don't turn out to be murderers.

Tr. 2610-11. Trial counsel should have foreseen this argument. They should have retained and presented the testimony of a substance abuse expert. But they did not, and this left Powell's jury with this incomplete and damaging portrayal of Powell.

In addition to failing to adequately explain how Powell's history of substance abuse was mitigating, trial counsel also failed to discover or present accurate

information about Powell's background and history in general. Powell's postconviction counsel has uncovered mitigating evidence that was missed by trial counsel that warrants further investigation by a mitigation expert.

In 2016, with his Amended Motion for Funds, Powell submitted an affidavit by Linda Richter, a mitigation investigator, who was qualified, willing, and available to conduct a postconviction mitigation investigation. Though the Office of the Ohio Public Defender has a Mitigation and Investigation Department that employs numerous mitigation investigators, that department is led by Dorian Hall – the same mitigation expert that trial counsel retained and failed to effectively use. Perhaps most critically, trial counsel failed to collect all necessary records and did not retain the appropriate experts to adequately develop any of the themes her investigation revealed for purposes of mitigation.

Powell deserves to have his case reviewed by an independent, conflict-free expert. Thus far, Powell has not had a mitigation investigation to support his postconviction proceedings. A robust mitigation investigation by someone with expertise like Ms. Richter would uncover information for mental health experts (a forensic psychologist, an expert in substance abuse and trauma, and a neuropsychologist) to review and reveal the presence of mental defects or disorders in support of Powell's claims of ineffective assistance of trial counsel in his capital trial.

Similarly, Powell has not had the benefit of a neuropsychological evaluation, including imaging, to assess any neurological impairment. Powell's postconviction petition alleges that he suffers from cognitive deficits that were never discovered

before – and therefore were never discussed at his mitigation hearing. The postconviction petition presents strong evidence suggesting that these cognitive deficits exist now and existed at the time of trial. Yet, these deficits were never explored at trial. Instead of conducting an adequate investigation into Powell's intelligence and neurological functioning, counsel relied on Dr. Graves, even though he was not qualified in this area. Dr. Graves' testimony on this subject was, at best, incomplete:

> Q. And as to the intelligence and achievement test can you talk to the jury a little bit about that.
>
> A. The testing I use suggesting that Wayne is probably average intellectual capability. He is right in the average range. His verbal skills have a little better – I'm sorry. The other way around. His non-verbal skills are a little better than his performance – or his verbal. It's evident he didn't get a great deal out of school when he was there.
>
> His spelling is about as a 4th grader, but his math skills are about a 7th grader which is not unusual somebody going through schools. He dropped out in the 10th grade and his reading level is in the high school range so he has gone on and gotten better in reading in some ways.

Tr. 2553-54. Though this is what the jury heard, this is not the whole story.

In December of 1981, Examiner Sturman administered to Powell the Wechsler Intelligence Scale for Children Revised (WISC-R). Powell scored an 85 on the verbal scale and a 96 on the Performance Scale. Scientific literature indicates that a significant history of substance abuse, childhood trauma, and meaningful differences in cognitive abilities in the individual subtests of the Wechsler Intelligence Scale R

IQ Test are predictive of possible neurological deficits.[5] An 11-point difference between the Verbal Scale and the Performance scale is a meaningful difference. *Id.* But since he was not qualified in this area of expertise, Dr. Graves was either unaware of this implication or failed to appreciate it. Either way, trial counsel should have discovered Powell's scores and consulted with a qualified expert who would have recognized these red flags. Once again due to trial counsel's failures, the jury was deprived of a full and accurate picture of Powell with regards to mitigation.

In his postconviction petition, Powell has asserted claims that trial counsel were ineffective for not consulting, retaining, and presenting all necessary experts to present a truly robust and compelling mitigation presentation, thus depriving him of effective counsel guaranteed by the Sixth Amendment. *See* U.S. Const. amend. VI. As he is still indigent, Powell requires funds in order to retain necessary experts to adequately develop in order to better support his claims for postconviction relief. Without them, Powell is left unable to conduct a full, complete, and conflict-free mitigation investigation during postconviction – the only forum Ohio provides where Powell can assert his constitutional right to effective assistance of counsel. The need for these experts is inextricably tied to Powell's postconviction claims, and postconviction counsel cannot rely on the record to evaluate or advocate for these claims because the evidence was not presented at trial.

[5] *See* Philip D. Harvey, PhD, *Clinical Applications of Neuropsychological Assessment*, 14(1) Dialogues in Clinical Neuroscience, 91, 91-99 (March 2012).

The trial court denied Powell's funding request stating, "Defendant fails to make a showing that he is entitled to funds for experts which is outside the contemplation of Ohio's postconviction statutes. For this reason, in addition to those noted by the State in its opposition, Defendant's motion for funds is not well-taken and denied." Appendix A-48. The trial court did not provide any further reasoning, nor did it articulate which of the State's arguments in opposition it adopted.

On appeal, Ohio's Sixth District Court of Appeals affirmed the trial court's decision. Appendix, A-24 through A-27. In its order, the Sixth District specifically noted that Ohio's postconviction statute does not contemplate a trial court providing an indigent petitioner with funds to hire experts necessary to meet the petitioner's obligations under the statute. *Id.*, at p. 25. The Sixth District noted that the trial court's entry denying funding incorporated the State's res judicata argument – an argument that responded to Powell's request to fund a postconviction substance abuse expert but ignored Powell's request to fund a postconviction neuropsychologist, psychologist, and an unconflicted mitigation specialist. Although the Sixth District affirmed the trial court's denial of postconviction expert funding, that court did not address Powell's constitutional argument that due process and equal protection require Ohio to adequately fund capital postconviction investigations when Ohio requires that capital petitioners present their ineffective assistance of counsel claims in a postconviction petition. *See* Appendix, A-24 through A-27.

In light of trial counsel's failure to adequately investigate, prepare, and present mitigation, as documented in Powell's First Amended Petition for Postconviction

Relief, the trial court should have funded a comprehensive postconviction mitigation investigation. Without this funding, Powell cannot fully develop the prejudice he suffered by the trial court's errors and his trial counsel's deficient performance.

The denial of postconviction expert funding will have dire consequences to Powell. If the direct appeal record supports it, Ohio defendants must raise ineffective assistance of counsel claims on direct appeal. *State v. Jackson*, 149 Ohio St.3d 55 (2016). However, if the postconviction petitioner relies on evidence outside of the direct appeal record to establish trial counsel's ineffectiveness, that claim is cognizable only in postconviction. *State v. Cole*, 2 Ohio St.3d 112, 114 (1982) ("Generally, the introduction in a [postconviction] petition of evidence *dehors* the record of ineffective assistance of counsel is sufficient … to avoid dismissal on the basis of *res judicata*.").

Ohio law permits the trial court to summarily deny postconviction petitions if the trial court concludes, on the face of the petition, that it does not set forth sufficient operative facts to establish grounds for relief. *State v. Calhoon*, 86 Ohio St.3d 279, 283 (1999), holding recognized in *Phillips v. Bradshaw*, 607 F.3d 199, 206 (6th Cir. 2010). Ohio expressly recognizes r*es judicata* as a basis for a trial court to summarily dismiss capital postconviction petitions. *State v. Jackson*, 141 Ohio St.3d 171 (2014).

The danger for Powell is apparent. His trial counsel were ineffective for failing to fully investigate, prepare, and present mitigation evidence. Proving that fact requires that Powell present evidence outside of the direct appeal record (evidence discovered during a comprehensive postconviction mitigation investigation). In Ohio,

the only mechanism to vindicate Powell's Sixth Amendment right to the effective assistance of counsel at his capital mitigation hearing is a postconviction petition – but Ohio does not guarantee an indigent person will receive the necessary funds for postconviction experts, even in capital cases. The end result is that Ohio provides a mechanism for capitally-sentenced individuals to assert a Sixth Amendment challenge based on ineffective assistance of counsel in mitigation, but only if the capitally-sentenced individual can afford to hire all of the experts necessary to prove trial counsel's ineffectiveness before the postconviction petition is filed. That flawed process violates due process because it effectively leaves indigent capitally-sentenced individuals – like Powell and virtually all of Ohio's death row inmates – with no remedy at all. It violates Equal Protection because a capitally-sentenced individuals who have resources can properly support their postconviction petition by hiring the required experts at their own expense, while indigent capitally-sentenced individuals are unable to support their claims and thus have their postconviction petitions dismissed as facially invalid.

The Constitution demands more than this cynical and heartless result. This Court should grant Powell's petition for writ of certiorari to resolve the due process and equal protection concerns this case presents and to ensure that capital postconviction proceedings provide indigent capitally-sentenced individuals with a meaningful remedy to constitutional violations.

II. The State of Ohio's death penalty scheme violates a defendant's right to a jury trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Hurst v. Florida held without qualification that "[t]he Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*. A jury's mere recommendation is not enough." 136 S. Ct. at 619 (emphasis added). Contrary to this requirement, Ohio's capital sentencing statutes, like Florida's pre-*Hurst* capital sentencing statutes, require the judge alone to make specific factual findings that the aggravating circumstances are sufficient to warrant a death sentence. R.C. § 2929.03 (D)(3).

Ohio's scheme cannot survive *Hurst*'s broad mandate because a judge is not authorized to impose a sentence of death until she alone finds that the aggravating circumstances are sufficient. *Id*. Additionally, trial judges in Ohio play an unconstitutional "central and singular role" in finding facts necessary to impose a sentence of death, while juries are not required to make any specific factual findings necessary to impose a death sentence. *Hurst*, 136 S. Ct. at 622. Finally, Ohio's capital sentencing statutes are "remarkably similar" to the Florida statutes invalidated by *Hurst,* and the Ohio Supreme Court has consistently interpreted Ohio's law to acknowledge that trial judges play this unconstitutional role. *State v. Rogers*, 28 Ohio St. 3d 427, 430 (1986), *rev'd on other grounds*, 32 Ohio St. 3d 70**Error! Bookmark not defined.**.

A. A trial judge in Ohio is not authorized to impose a death sentence until she alone finds that the aggravating

circumstances are sufficient to warrant the imposition of a death sentence.

Hurst requires a jury, not a judge, to make the critical findings of fact necessary to impose a death sentence. In evaluating Florida's capital sentencing scheme, the Court identified what those critical fact-findings are, leaving no doubt as to how state statutes must be read under the Sixth Amendment:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such a person shall be punished by death." Fla. Stat. § 775.082(1). 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). "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst, 136 S. Ct. at 622.

Under Florida's pre-*Hurst* statute, a judge was not authorized to impose a death sentence until she found certain statutorily defined facts *in addition to* the jury's unanimous finding that the defendant was guilty of first-degree murder. *See* Fla. Stat. § 921.141(3) (emphasis added). The additional statutory facts required to authorize a death sentence were that "sufficient aggravating circumstances exist" *and* that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See Id.*; *Hurst*, 136 S. Ct. at 622. *Hurst* identified the existence of these findings as the operable facts that must be found by the jury before a death sentence can be imposed.

Moreover, the *Hurst* Court rejected the argument that the finding of aggravating circumstances alone is what authorized a judge to impose a sentence of death. Florida argued that, during the penalty phase, the jury was required to find the existence of an aggravating circumstance in order to recommend a sentence of death and thus, their statute satisfied the Sixth Amendment. *Id*. The Court rejected this argument, recognizing that, in Florida, the finding of aggravating circumstances took a defendant only part way to death eligibility. *Id*. Without more – without judicial findings of fact – a judge could not impose a death sentence. *Id*.

Ohio's capital sentencing statute suffers from the same constitutional defects. Although a jury in Ohio finds the existence of aggravating circumstances at the guilt phase, R.C. 2929.03(B), this finding alone does not authorize the imposition of a death sentence. Like in Florida, a death sentence is authorized in Ohio only "if after receiving…the trial jury's *recommendation* that the sentence of death be imposed, *the court finds*" that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. R.C. 2929.03(D)(3) (emphasis added). Once the trial judge makes this finding, "it shall impose a sentence of death." *Id*. In Ohio, like in Florida, a death sentence is predicated on a judge's weighing of aggravating and mitigating factors.

In reaching this decision, the *Hurst* Court also rejected the notion that the jury's mere recommendation as to sentence satisfies the Sixth Amendment's jury finding requirements in capital cases. This is because the Sixth Amendment requires the jury to make specific factual findings authorizing the imposition of a death

sentence and not simply issue recommendations. *Hurst*, 136 S. Ct. at 622, 624. In Ohio, as in Florida, the jury's recommendation simply triggers the judge to undertake independent fact-finding before she is authorized to impose death. R.C. 2929.03(D)(3).

Ohio cannot "treat the advisory recommendation by the jury as the necessary factual finding" required by the Sixth Amendment. *Hurst*, 136 S. Ct. at 622. *Hurst* makes clear that "[a] jury's mere recommendation [of death] is not enough." *Id*. at 619. Ohio's reliance on this process in general, and as applied to Powell, renders its capital sentencing scheme unconstitutional under *Hurst* and the Sixth Amendment.

B. Ohio trial judges play an unconstitutional "central and singular" role in finding facts necessary to impose a sentence of death.

Further invalidating Ohio's capital sentencing statutes is the "central and singular role the judge plays" under Ohio law. *Id*. at 622. In *Hurst*, the Court broadly criticized the Florida scheme because the jury "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances" or as to how those circumstances are weighed. *Id*. This is problematic because it leaves the trial judge without "the assistance of the jury's findings of fact with respect to sentencing issues." *Id*. Ohio's trial judges are similarly left in the dark.

In Ohio, the jury is not required to make any specific factual findings when it issues its sentence recommendation. The statute does not require the jury to make any specific factual findings as to whether the defendant proved the existence of any mitigating factor, which mitigating factors the defendant proved, what weight the

jury accorded each mitigating factor, or how the jury weighed the mitigating facts against the aggravating circumstances.

Conversely, the statute instructs the judge to make very specific factual findings and to put those findings in writing. After receiving the jury's recommendation that death be imposed, the trial judge conducts independent fact-finding, which includes weighing the aggravating circumstances against the mitigating factors. R.C. 2929.03(D)(3). The statute requires the judge to state "*specific* findings as to the existence of any of the mitigating factors," both statutory and otherwise, the aggravating circumstances, "and the *reasons why* the aggravating circumstances…were sufficient to outweigh the mitigating factors." *Id*. at (F) (emphasis added).

In making these findings, the trial judge is not given any guidance–statutory or otherwise–on how to value the jury's death recommendation. In Florida, the trial judge is required to give the jury recommendation "great weight." *Hurst*, 136 S. Ct. at 620. Even this "great weight" deferential standard did not satisfy the Sixth Amendment, because the trial judge's sentencing order reflected "the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Id*. (internal quotations omitted). Similarly, in Ohio, the statute does not give any instructions on how trial judges are to consider the jury's recommendation. Thus, the judge's sentencing order reflects only her "independent judgment" about the existence of mitigating factors and how they weigh against the aggravating circumstances found by the jury. *Id*.

Finally, *Hurst* acknowledges that the sufficiency analysis – weighing the aggravating circumstances against the mitigating factors – is fact-finding that the jury must undertake. The *Hurst* Court found that in Florida, "the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely." *Id*. at 622 (citing *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005)). The Court rejected the central role Florida's statute gave to judges and found it unconstitutional that 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." *Id*. at 622 (emphasis added); *see also Woldt v. People*, 64 P.3d 256, 265–66 (Colo. 2003) (en banc) (finding that the weighing of aggravating factors against mitigating factors is "fact-finding" that made the defendant death eligible).

In Ohio, as in Florida, only the judge is required to make specific factual findings that the aggravating circumstances are sufficient to warrant the imposition of a death sentence. The statute expressly requires the judge to state "specific findings as to…the reasons why the aggravating circumstances…were sufficient to outweigh the mitigating factors." R.C. 2929.03(F). *Hurst* held that this type of weighing is fact-finding that must be done by the jury. In Ohio, a judge does it.

Again, contrary to the mandates of the Sixth Amendment pronounced in *Hurst*, Powell's trial judge unconstitutionally played the prohibited central and singular role in sentencing Powell to death. The judge further failed to expressly determine what mitigating factors he alone found to exist and what weight he alone attributed to

those factors. The judge had no way to know what mitigation the jury found or how much weight they gave it. Powell's death sentence violated the Sixth Amendment pursuant to *Hurst*, because the statutory scheme in Ohio followed by Powell's trial judge is unconstitutional.

C. This Court's precedent clearly establishes that the division of fact-finding labor in capital cases in Ohio violates the Sixth Amendment.

Ohio has consistently found that trial judges and not juries must find the facts necessary to impose a death sentence. First, Ohio has unequivocally proclaimed that the jury verdict at the mitigation phase is nothing more than a recommendation to the trial judge. The Ohio Supreme Court expressly recognized that "[a]ll power to impose the punishment of death resides in the trial court…the jury provides only a *recommendation* as to the imposition of the death penalty." *Rogers*, 28 Ohio St. 3d at 429 (emphasis added). Trial courts in Ohio must "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." *Id*. That is because, in Ohio, the trial court "is the authority in whom resides the *sole power to initially impose the death penalty*." *Id*. at 430 (emphasis added).

Second, Ohio has consistently rejected all efforts to require the jury to make specific factual findings about the existence of mitigating factors. *State v. Jenkins*, 15 Ohio St.3d 164, 177 (1984); *State v. Buell*, 22 Ohio St.3d 124, 137 (1986), *superseded by statute on other grounds*; *State v. Riley*, 2007-Ohio-879, ¶¶ 26–27 (2007). These

long-standing interpretations of Ohio law directly contradict the jury trial right announced in *Hurst*.

Additionally, Ohio has consistently cited to cases upholding Florida's pre-*Hurst* statute in rejecting constitutional challenges to the jury recommendation aspect of Ohio's capital sentencing scheme. In *Rogers*, Ohio rejected a challenge from Rogers that it was unconstitutional for his jury to be told that its sentence was a "mere recommendation." 28 Ohio St. 3d at 431. In so doing, Ohio proclaimed its system "remarkably similar" to Florida's, which was "expressly upheld in the case of *Spaziano v. Florida* []." *Id*. at 430**Error! Bookmark not defined.**. The Ohio Supreme Court quoted *Spaziano*, stating "'[if] a judge may be vested with sole responsibility for imposing the [death] penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury.'" *Id*. (quoting *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)).

Ohio again cited *Spaziano* as recently as 2014 for the same proposition. *State v. Davis*, 139 Ohio St.3d 122, 130 (2014). The problem with Ohio's reliance on *Spaziano* in finding its own scheme constitutional is obvious–*Hurst* expressly overruled *Spaziano* precisely because the Sixth Amendment *does* require a jury to find all facts necessary to authorize a death sentence. *Hurst*, 136 S. Ct. at 619, 624.

Ohio's capital sentencing scheme runs afoul of the two aspects of Florida's death penalty statutes that so troubled this Court in *Hurst*. Ohio juries do not make specific factual findings as to the existence of mitigating factors or as to the

sufficiency of aggravating circumstances necessary to authorize imposition of a sentence of death. And, in both Ohio and in Florida, the trial judge alone makes the factual findings necessary to empower her to impose a sentence of death. This sentencing structure violates the Sixth Amendment because a defendant's right to an impartial jury requires that his sentence be based "on a jury's verdict, not a judge's factfinding." *Id*. at 624. Ohio's statute is unconstitutional.

D. *Hurst* established a much broader and different Sixth Amendment right than that recognized in *Ring*.

Hurst announced broad new Sixth Amendment protections not previously provided to capital defendants. Though the Court decided a related issue in *Ring v. Arizona*, 536 U.S. 584 (2002), *Hurst*'s holding is much broader than *Ring*'s and speaks to a different facet of jury fact-finding in capital cases.

The *Ring* Court held that when a state legislature conditions an increase in the maximum punishment on the existence of a fact, the Sixth Amendment requires the jury and not a judge to find this fact. *Id*. at 589. *Ring*'s holding was merely an extension of the Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "the Sixth Amendment does not permit a defendant to be 'exposed…to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring*, 536 U.S. at 588-89 (quoting *Apprendi*, 530 U.S. at 483). *Ring* applied *Apprendi* to capital cases, just as the Court had applied *Apprendi* to other instances involving plea bargains, sentencing guidelines, criminal fines, and mandatory minimums. *See Hurst*, 136 S. Ct. at 621.

Ring did not, however, establish a new substantive right and thus did not impact capital sentencing in Ohio. That is because Ohio's statute already complied with the holding announced in *Ring*; juries have long been required to find the existence of an aggravating factor at the guilt phase in Ohio. *Ring*'s holding thus made no difference to Ohio's statutory scheme.

Hurst is different and represents a tectonic shift in capital sentencing in Ohio. While *Ring* involved the potential maximum punishment a defendant is exposed to, *Hurst* concerns the actual punishment imposed. *Hurst* requires a jury, not a judge, to find each fact necessary to *impose* a sentence of death. *See Hurst*, 136 S. Ct. at 619. *Hurst*'s ruling is not a mere application of *Ring* or *Apprendi* to a certain category of capital cases. Rather, *Hurst* broadly proclaimed that a jury is required to make specific findings of fact as to the sufficiency of the aggravating circumstances needed to authorize the imposition of a death sentence. This is because the jury's fact-finding duties under the Sixth Amendment do not end at the guilt phase but, in fact, extend throughout the penalty phase. Thus, a mere recommendation as to sentence from the jury is not enough to meet this requirement. *Id*.

It is precisely because *Ring* did not require the jury to make specific findings of fact during its sufficiency of the aggravating circumstances analysis that *Spaziano* and *Hildwin v. Florida*, 490 U.S. 638 (1989)**Error! Bookmark not defined.** survived its holding. Those cases, which predated *Ring*, held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640-41. It is that

reading of the Sixth Amendment that the *Hurst* Court expressly overruled. The Sixth Amendment requires exactly what *Spaziano* and *Hildwin* held that it did not, and thus these cases which outlived *Ring* could not survive *Hurst*.

Wayne Powell was sentenced to death under a statutory scheme that violates the Sixth and Fourteenth Amendments of the United States Constitution. This Court should grant certiorari to resolve the question of whether the weighing of aggravating circumstances against mitigating factors is a factual issue that the Sixth Amendment requires a jury must resolve.

CONCLUSION

The State of Ohio wants to execute Powell even though his trial attorneys failed to properly investigate mitigation, the postconviction process does not provide for adequate corrective process and violates the Fourteenth Amendment rights to due process and equal protection, and the Ohio capital statute violates the Sixth Amendment. The Court should grant certiorari to address these real and pressing concerns.

Respectfully submitted,

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