No.:

In the Supreme Court of the United States

Lance Hundley
Petitioner,

v.

The State of Ohio,
Respondent.

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

Petition for a Writ of Certiorari

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Questions Presented for Review

1. Do the Sixth and Fourteenth Amendments to the U.S. Constitution forbid a trial court from allowing a capital defendant with a questionable mental health history to decide to represent himself in a fit of pique, immediately following a guilty verdict?

2. Do the Sixth and Fourteenth Amendments to the U.S. Constitution forbid a trial court from disallowing a capital stand-by counsel when he so requests.

3. Does the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution forbid a trial court from making facetious remarks during a capital mitigation.

4. Does a trial court err in violation of the Sixth and Fourteenth amendments in demanding that a jury proceed to a unanimous verdict as to death rather than deliberate on the non-death options of, inter alia, life imprisonment.

5. Does it violate the Sixth, Eighth and Fourteenth Amendments of the Constitution for a trial court not to instruct a jury that mercy can be considered during its penalty phase deliberations, particularly when the jury asks.

6. Are Ohio's capital sentencing statutes unconstitutional under this Court's recent decision in Hurst v. Florida which held that Florida's capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death.

7. Is Ohio's death penalty framework is unconstitutional. R.C. Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied Hundley in terms U.S. Const. Amends. V, VI, VIII, and XIV; Oh. Const. Art. I, sections 2, 9, 10, and 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

Parties to the Proceeding and Rule 26.9 Statement

Petitioner and defendant-appellant below, Lance Hundley, is an individual person and Ohio domiciliary. The respondent, here, and the plaintiff-appellee below is the U.S. Pursuant to S.Ct.R. 26.9, both parties, the U.S. and Lance Hundley are non-corporate entities, and have no corporate disclosures to make.

List of Related Proceedings

There are no proceedings that qualify as "related proceedings" under Rule 14 of this Court's rules of practice.

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Constitutional Provisions, Statutes, and Rules

Petition for a Writ of Certiorari

Petitioner Lance Hundley petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Ohio, affirming the Mahoning County Court of Common Pleas' order convicting him of, inter alia, aggravated murder and sentencing him to death.

Opinions Below

The Ohio Supreme Court's decision dated July 22, 2020 is unreported and reproduced in Appendix C. The judgment entries and opinion of the Mahoning County Court of Common Pleas entering a conviction and a death sentence are dated June 6, 2018, and reproduced in Appendices A and B.

Jurisdiction

This Court's jurisdiction rests on 28 U.S. Code § 1257, allowing a writ to issue relative to the final decision of a state's highest court. The Supreme Court of the State of Ohio is Ohio's court of highest jurisdiction, and it issued its decision in this case on July 22, 2020.

Constitutional and Statutory Provisions

This cause presents 7 unique issues, each of which turns on the U.S. Constitution and, as to the last issue, a treaty to which the U.S. is a party. As to the first and second issues, this cause invites review under Sixth and Fourteenth Amendments to the U.S. Constitution on the issue of the propriety of trial court from allowing a capital defendant with a questionable mental health history to decide to

represent himself in a fit of pique and, similarly, from denying that defendant's request for stand-by counsel. As to the third issue, the matter invites review of the Due Process Clause of the Fourteenth Amendment relative to a trial court making facetious remarks during a capital mitigation. As to the fourth issue, this matter invites review under the Sixth Amendment right to a trial by jury and the Fifth and Fourteenth Amendment's due process clauses where he trial court erred in instructing the jury in the mitigation phase in a manner contrary to law, which jury instructions undermined the reliability of the jury verdict resulting in the erroneous imposition of the death penalty, materially prejudicing Hundley's right to a fair trial. Similarly, the fifth issue invites review of the the Sixth, Eighth and Fourteenth Amendments of the Constitution relative to the trial court's refusal to instruct the jury that mercy can be considered during its penalty phase deliberations, following the jury's request for clarification on that issue. The sixth issue invites review under the Sixth and Fourteenth amendments as to Ohio's capital sentencing framework and its requirement that a judge, not a jury, make the factual determinations necessary to support a sentence of death. Finally, as to the seventh issue, Ohio's capital sentencing statutes do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied Hundley in terms U.S. Const. Amends. V, VI, VIII, and XIV; Oh. Const. Art. I, sections 2, 9, 10, and 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

Reasons for Granting the Writ of Certiorari

Legal Basis

Procedural Posture and Factual Background

The attendant circumstances, the verdict, and the death sentence in this case stem from circumstances long predating the November 6, 2015 death of Erika Huff, the indictment, the trial, and even the birth of Defendant-Appellant, Lance Hundley (hereinafter referred to as "Hundley"). Hundley is someone for whom the course of human events, much more the course of a death penalty case, is unmanageable. [Tr. at 1273, 1275.] And by the time Hundley faced an indictment [R.E. 1] for, inter alia, aggravated murder and attempted murder with death penalty specifications, he had a well-developed and as-of-then untreated diagnosis of anti-social personality disorder (hereinafter referred to as "APD"). At trial, contra the Appellee's offering of testimony that Hundley beat and burned Erika Huff (hereinafter referred to as "Huff"), who suffered from multiple sclerosis, and that Hundley beat with a hammer Huff's mother, Denise Johnson, who came to check on Huff, Hundley offered that a third unknown individual attacked both him and Huff, and that following that attack, he defended himself from Denise Johonson, 70 years old at the time of trial. [Tr. at 1287, 1289, 1296, 1747, 1868, 1873.] On the basis of that evidence, the prosecution argued that Hundley was guilty of all counts of the indictment--count 1, Aggravated Murder under R.C. 2903.01,

Count 2, Attempted Murder under R.C. 2903.02, Count 3, Felonious Assault under R.C. 2903.11, Count 4 Aggravated Arson under R.C. 2909.02(A)(1) (Arson as to the person of Huff), and Count 5 Aggravated Arson under R.C. 2909.02(A)(2) (Arson as to the structure of Huff's residence). [Tr. at 1943 – 64.] The Jury agreed, and entered a guilty verdict on all counts, including death specifications. [Tr. at 2023 -- 30.] On the morning the mitigation phase was set to begin, Hundley fired his attorneys, and proceeded to mitigation on his own. [Tr. at 2039.] The trial Judge jeered him, stating, "**And when you get convicted of death, I don't want to hear about it**." [Id, emphasis added.] The jury and the court returned a death sentence. [Tr. at 2107 – 2130.] Hundley's cause proceeded to a direct appeal to the Ohio Supreme Court. The Ohio Supreme Court affirmed the conviction and sentence. This appeal follows, urging certiorari.

The case proceeded with an indictment of November 12, 2015. [Supra.]

Hundley Struggles with His Attorneys

So given Hundley's wiring—the NGRI hearing having resulted in a finding of anti-social personality disorder—one might ask how he even made it through the trial portion of the case with his attorney-client relations in tact. In actuality, though, he barely did. The first issue came up just following arraignment, with Hundley stating, "Yes. Good morning, Your Honor. At this time I would like to fire both my attorneys on grounds of insufficient counseling." [Tr. at 14.] The court responded, "Okay.

First of all, you don't have the right to fire them; okay? They're appointed to represent you. I determine if that's a conflict here." [Id.] Ultimately, however, that resulted in a substitution of counsel by the June, 2016 monthly pre-trial of the cause. [Tr. at 73.]

Issues with counsel continued. At the following monthly pre-trial, Hundley expressed concerns about counsel in conjunction with medication the County Jail gave him, stating, "And, ma'am, and they sent me to see a doctor and then y'all give me these damn pills." [Tr. at 80.] The Court responded, "Mr. Hundley, you have two lawyers. They are going to be your lawyers. You're not going to get them fired, no matter what you think or what you say. Do you understand me?" [Id.]

One final substitution took place at a critical phase--a suppression hearing. Counsel indicated, "I don't, Your Honor, other than we are scheduled for suppression this morning. I asked Mr. Hundley for a continuance of that or if he is prepared to go forward. He indicated that, A, he would like to represent himself, and, B, he is prepared to go forward with the suppression hearing." [Tr. at 195.] The court inquired briefly of Hundley as to whether he had any capacity for self-representation. [Tr. at 199 -- 215.] Particularly, the trial court indicated to Hundley that if at any point in the proceeding he could not go on by himself, stand by counsel could step in--notably, an accurate statement of law. [Tr. at 211.]

Hundley proceeded on the suppression hearing on his own, without ever signing a waiver of counsel form. [Infra.] But--per the court's

instruction--overwhelmed at the end, asked for counsel to step in. This dialogue followed the court's presenting to Hundley, a waiver-of-counsel form: "After reading the form, I do have doubts." [Tr. at 251.]

The Court asked, "On what?"

Hundley answered, "On representing myself."

Following a recess, then stand-by counsel stepped in, stating "...Mr. Hundley...is asking to reopen the suppression hearing and conduct the suppression hearing as his counsel." [Tr. at 253.]

The trial court, providing no explanation despite the earlier indication of the right of Hundley to have standby counsel step in, said curtly, "That motion is overruled." [Id.]

The Jury Enters a Guilty Verdict

Though no evidence from any witness came in to establish any plan, design, or forethought, from those facts, the jury found, as to the aggravated murder, that Hundley acted with prior calculation and design and convicted him of Count 1, Aggravated Murder under R.C. 2903.01, Count 2, Attempted Murder under R.C. 2903.02, Count 3, Felonious Assault under R.C. 2903.11, Count 4 Aggravated Arson under R.C. 2909.02(A)(1) (Arson as to the person of Erika Huff), and Count 5 Aggravated Arson under R.C. 2909.02(A)(2) (Arson as to the structure of her residence). [Supra.] The

Jury agreed, and entered a guilty verdict on all counts, including death specifications. [Supra.]

Self Representation in Mitigation

Hundley proceeded to represent himself at mitigation. The following discussion occurred as to that. Hundley asserted, "It's my constitutional right. I would like to represent myself for the second phase." [Tr. at 2039.] After discussion on the issue of timeliness, the Court responded, near sarcastically, "**That's fine. You know what, I will.**" [Id.] The court continued, "**And when you get convicted of death, I don't want to hear about it**." [Id.]

The court, counsel, and Hundley engaged in a dialogue about Hundley's competence for self representation, much as in the suppression issue, above. [Tr. at 2040 -- 2050.] The matter proceeded to jury with Hundley acting pro se.[1] The Court inquired of Hundley, "Mr. Hundley, what evidence are you putting on." [Tr. at 2051 -- 52.] Hundley answered, "I am not putting on any evidence." Hundley initially indicated that he intended to make an unsworn statement--but by the end of the

1 Problems in representation proceed to this day. Seventeen days prior to the filing deadline for this brief, Hundley and counsel spoke by video conference. This conference resulted in Hundley hanging up the conference on counsel and demanding withdrawal of counsel. Hundley, previously, mailed a pleading in that regard to the Court of Common Pleas but did not docket it with the Clerk. The Trial court has not acted on the pleading. Counsel will continue to represent Hundley until otherwise ordered.

mitigation this was all that was left. The Court asked, "Mr. Hundley?" [Tr. at 2064.]

"Rest," Hundley answered. [Id.]

The Court inquired, in front of the jury, "You don't want to make a statement to the jury?" [Id.]

Hundley answered, "No." [Tr. at 2065.]

The Jury's Deliberations and Final Verdict

The court instructed the jury and the jury began deliberations, until the jury had the following questions. [Tr. at 2098, 2100.] The jury inquired, "Is mercy considered a mitigating factor under Ohio law?" The court answered, "No." [Tr. at 2100.] At a quarter after three that day, the jury indicated, "Jury is at a standstill. 11 of 12 in agreement. 12 unwilling to change." The court ordered the jury to continue deliberations, stating, "I am going to inform you you must deliberate until 4:30. At 4:30 we will stop and go to the hotel." [Tr. at 2101.] Less than half an hour later, the jury had a verdict. [Tr. at 2102.] That verdict was death. [Supra.]

The defense noticed appeal timely, and the Ohio Supreme Court heard the issues this petition presents. The Ohio Supreme Court upheld the conviction and death sentence. This brief follows, urging reversal.

Law & Discussion

> **Issue No. 1:** Do the Sixth and Fourteenth Amendments to the U.S. Constitution forbid a trial court from allowing a capital defendant with a questionable mental health history to decide to represent himself in a fit of pique, immediately following a guilty verdict?

The trial court erred plainly by allowing Hundley to represent himself at mitigation. Despite the court's boiler-plate colloquy with Hundley, he patently lacked competency to understand basic rules of criminal procedure or substantive law. His waiver was not given knowingly, voluntarily or intelligently and should have been denied.

Courts review de novo whether a defendant knowingly, voluntarily, and intelligently waived his right to counsel, and these issues invite review under the Sixth Amendment's right-to-counsel clause, as it applies to the states through the Fourteenth Amendment, as well as under Ohio's constitutional analog of the same in Art. 1, Sec. 10 of the Ohio Constitution. This follows under this Court's decision of 1975 in *Faretta v. Cal*. (2005), 422 U.S. 806; accord Ohio's analogous decisions in *State v. Godley*, 3rd Dist. No. 5-17-29, 2018-Ohio-4253, ¶9, quotations omitted, citing *State v. Yeager*, 9th Dist. Nos. 28604 and 28617, 2018-Ohio-574, ¶7, *State v. Ott*, 9th Dist. No. 27953, 2017-Ohio-521, ¶5; *Lakewood v. Lane*, 8th Dist. No. 104534, 2017-Ohio-1039, ¶ 10, quoting *City of Columbus v. Abrahamson*, 10th Dist. No. 13AP-1077, 2014-Ohio-3930, ¶ 6; *State v. Alexander*, 4th Dist. No. 15CA3492, 2016-

Ohio-5015, ¶ 4; *State v. Mootispaw*, 4th Dist. No. 09CA33, 2010-Ohio-4772, ¶21; *State v. Griffin*, 10th Dist. No. 10AP-902, 2011-Ohio-4250, ¶26, noting that "[i]n the leading cases on the issue of waiver of the right to counsel, the Supreme Court of Ohio appears to have undertaken a de novo review without expressly reciting this standard of review." Looking to the standard, "[d]e novo review is independent, without deference to the lower court's decision." Id., citing *State v. Hudson*, 3d Dist. No. 9-12-38, 2013-Ohio-647, ¶ 27; *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio* (1992), 64 Ohio St.3d 145, 147.

Turning to the substantive issue, "[t]he Sixth Amendment to the United States Constitution provides that an accused shall have the right "to have the Assistance of Counsel for his defense." Godley supra at ¶10, quotations omitted, citing *State v. Logan*, 3d Dist. No. 1-16-28, 2017-Ohio-8932, ¶34, *State v. Owens*, 3d Dist. No. 1-07-66, 2008-Ohio-4161, ¶ 9, the Sixth Amendment to the United States Constitution. However, "...the United States Supreme Court has also recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies a correlative right to [knowingly] dispense with a lawyer's help." Id., quotations omitted, citing *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶23; *Adams v. United States* ex rel. *McCann* (1942), 317 U.S. 269, 279. So "[w]hile a defendant has a right to counsel, the defendant may also waive that right when the waiver is voluntary, knowing, and intelligent." Id., quotations omitted, citing *State v. Petaway*, 3d Dist. No. 8-05-11, 2006-Ohio-2941, ¶8; *State v. Gibson* (1976), 45 Ohio St.2d

366, paragraph one of the syllabus; *Faretta v. California* supra.

In light of the above, "[i]n order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right." Id. at par. 11, citing Gibson at paragraph two of the syllabus. For a waiver to withstand de novo review "...such waiver must be made with an apprehension of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id., citing Owens at ¶ 10, quotations omitted, Gibson at 377, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 724. But as far as the colloquy to determine knowingness of waiver,

> **...the United States Supreme Court has not prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel.** The information a defendant must possess in order to make an intelligent election will depend on a range of case-specific factors, including the defendant's education

> or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.

Id., internal quotations and formatting omitted, citing *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶10; *Iowa v. Tovar* (2004), 541 U.S. 77, 88. This case asks this Court to set effective standards for a trial court to maintain prior to allowing a self-representation.

A court should deny a request for self-representation that comes in a fit of pique and equivocally. According to the Courts, "[a]lthough a defendant's waiver of his right to counsel and decision to invoke his right of self-representation are afforded tremendous respect and deference, the right of self-representation is not absolute, and it is subject to some limitation on its invocation and exercise." Id. at par. 12, citing *State v. Buchanan*, 8th Dist. No. 104500, 2017-Ohio-1361, ¶ 12; *Indiana v. Edwards* (2008), 554 U.S. 164; *United States v. Frazier-El* (4th Cir.2000), 204 F.3d 553, 559, internal formatting and quotations omitted, stating "[a]t bottom, the right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer[,]" quoting *Martinez v. Court of Appeal of California* (2000), 528 U.S. 152, 162. First, "[t]he assertion of the right to self-representation must be clear and unequivocal." *State v. Kramer*, 3d Dist. No. 4-15-14, 2016-Ohio-2984, ¶6, quotations omitted,

quoting and citing *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶ 72; *State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070, ¶68; *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, ¶38. The waiver must be unequivocal, and apropos of this cause, "**courts have held that a request for self-representation is not unequivocal if it is a momentary caprice or the result of thinking out loud or the result of frustration**[.]" Id. at ¶13, emphasis added, citing Kramer at ¶ 6; Neyland at ¶ 73, quotations omitted, quoting; *Jackson v. Ylst* (9th Cir. 1990), 921 F.2d 882, 888; *Adams v. Carroll* (9th Cir.1989), 875 F.2d 1441, 1445; *Reese v. Nix* (8th Cir. 1991), 942 F.2d 1276, 1281. Moreover, in no way "...is a request unequivocal **if it is an emotional response**." Id., emphasis added; accord *State v. Steele*, 155 Ohio App.3d 659, 2003-Ohio-7103, ¶13, quoting *Lacy v. Lewis* (C.D.Cal.2000), 123 F.Supp.2d 533, 548. Finally, "...trial courts may constitutionally deny [defendants their] right to self-representation when there are lingering doubts concerning the defendant[s'] competency to represent themselves." (And at the end of that mitigation, there should have been lingering doubts as to competency.) In fact the U.S. Supreme Court—addressing circumstances analogous to this cause—makes clear that "...the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Id., citing Edwards at 178.

Here, as to Hundley's self-representation at

mitigation, the court plainly erred in granting Hundley's self-representation request as he made his request for self representation (1) in a fit of pique (2) likely under the duress of a personality disorder and (3) under the influence of a fair amount of goading and sarcasm from the trial court. First, this self-representation request came immediately following a guilty verdict in a death penalty case. How, in that way, could it not be an emotional response? Further, the trial court knew from the competency hearing [supra] that Hundley's APD diminished his ability to work with counsel and make sound decisions. And finally, it is worth noting--even the trial court saw a timeliness problem with Hundley representing himself, the record referencing timeliness half a dozen times. [Tr. at 2039.] The trial court initially denied the request on timeliness grounds. But immediately after that, the trial court--in its own fit of pique--said, trenchantly, "**That's fine. You know what, I will.**" [Supra.] The court continued, "**And when you get convicted of death, I don't want to hear about it**." [Supra.]

As a final thought, one might also note that Appellee objected to Hundley proceeding pro se. Prior to proceeding into the mitigation phase, the trial court inquired as to whether the Appellee had any objection to Hundley proceeding pro se. [Tr. at 2039 – 40.] Appellee offered a substantial monologue concerning the timeliness of the request and Hundley's prior requests for self-representation. [Tr. at 40.]

This, given the law above and the constitutional nature of the issue, effects structural

error; it is not as though the trial court can re-impanel the same jury for mitigation. Hundley, therefore, asks the death sentence in this cause be vacated.

> **Issue No. 2:** Do the Sixth and Fourteenth Amendments to the U.S. Constitution forbid a trial court from disallowing a capital stand-by counsel when he so requests?

The trial court, given the law above, should likewise have allowed stand-by counsel to stand in at the suppression hearing. Courts, including the U.S. Supreme Court, are rather clear on this. According to the Courts, "[s]tandby counsel is available to aid the accused if and **when the accused requests help**, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *State v. Robinson*, 8th Dist. No. 106721, 2018-Ohio-5036, ¶18, quotations omitted, citing and quoting *State v. Martin* supra at ¶28, quoting *Faretta v. California* supra at 834, fn. 46.

Here, Hundley, at the hearing, asked for stand-by counsel. [Supra.] The trial court in its colloquy with Hundley told him he would have the opportunity to have stand-by counsel stand in should he find himself overwhelmed. [Supra.] But citing no reason at all (other than as punishment to the defendant), the trial court denied the request. As to this issue, then, Hundley asks this Court to vacate the conviction and the death sentence and to remand this cause for pre-trial.

Issue No. 3: Does the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution forbid a trial court from making facetious remarks during a capital mitigation?

Though the court's remarks during the mitigation aggravate the self-representation, on their own, they merit reversal. Ohio's reviewing courts recognize--based on precedent from the U.S. Supreme Court--that in a sentencing proceeding, a "...judge should refrain from making facetious comments[.]" *State v. Buggs*, 7th Dist. No. 06 MA 28, 2007-Ohio-3148, ¶13, citing *Townsend v. Burke* (1948), 334 U.S. 736, finding offense to the Due Process Clause of the Fourteenth Amendment. In Townsend, "...the U.S. Supreme Court vacated a sentence partially due to facetious comments by the trial judge concerning the defendant's reason for receiving a stolen saxophone." Id. Specifically, "[t]he trial court joked that the defendant had accepted the stolen saxophone so that he could join the prison band." Id. Granted, "...Townsend also had the added problem that the trial judge assumed the defendant had been convicted of receiving stolen goods, when in fact, the charge had been dismissed. These combined factors led the Townsend Court to find a due process violation."

Here, by this point in the brief, the trial court's remarks are well understood.[2] Granted, the

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2 Indeed, even in during the presentation of evidence, the trial court commented caustically, indicating where the court saw the case going. During defense counsel's cross-examination of Lonnie Johnson,

trial court did not compound the problem in the way of Townsend by incorrectly assuming prior convictions. Townsend, however, was not a capital case; it was basically a petty theft matter. This cause is a capital case. Considering that, one can (and should) view things that draw into the question the solemnity of the proceeding dimly. Indeed, though the U.S. Supreme Court in tempering the Townsend decision mentioned no fewer than three times that Townsend involved a non-capital matter. Townsend supra at 739, 741, and fn. 2.

This, given the law above and the constitutional nature of the issue, effects structural error and impacts the solemnity of the proceedings. Hundley, therefore, asks the death sentence in this cause be vacated.

> **Issue No. 4:** Does a trial court err in violation of the Sixth and Fourteenth Amendments in demanding that a jury proceed to a unanimous verdict as to death rather than deliberate on the non-death options of, inter alia, life imprisonment?

In the trial court's sentencing phase of Hundley's capital murder trial, the trial court judge instructed the jury as follows:

> If all twelve of you find

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aiming toward Hundley's family history of mental health, the trial court forbade the inquiry, and said, "Call Lonnie Johnson in mitigation for all I care." [Tr. at 1274.] In other words, the trial court had its mind made up on the likelihood of the case proceeding into mitigation.

> that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstance Lance Hundley was guilty of committing is sufficient to outweigh the mitigating factors in this case, then it will be your duty to decide the sentence of death shall be imposed upon Lance Hundley. If you find that the State of Ohio has failed to prove beyond a reasonable doubt that the aggravating circumstance Lance Hundley was guilty of committing is sufficient to outweigh the mitigating factors present in the case, then it will be your duty to decide which of the following life sentence alternatives should be imposed[.]

[Tr. 2085-2086.]

In the instant case, after being instructed on the law, the jury left the courtroom on Wednesday, May 30, 2018, at 10:32 a.m. to begin deliberations. At 3:45 p.m. on the same date, the jury returned to the courtroom and the following dialogue transpired on the record between the trial court judge and the jury. The court announced, "Ladies and gentlemen of the

jury, I have a note, 'Jury is at a standstill. 11 of 12 in agreement. 12 unwilling to change. Number--I am sure that's not Juror Number 12."

Juror No. 1, responded, "11 to 1." [Id.]

The court ordered, "I am going to inform you you must deliberate until 4:30. At 4:30 we will stop and go to the hotel." [Tr. 2021.]

Thereafter, the jury left the courtroom at 3:47 and returned to the jury room to deliberate without any further discussion or argument by the parties. It must be noted that at this time, that Hundley was erroneously permitted to represent himself in the mitigation phase of the proceedings. A further review of the transcript of proceedings in this matter indicated that at 4:20 P.M. the jury reentered the courtroom and announced that they had reached a verdict in the case and ultimately concluded the aggravating circumstances that Hundley was found guilty of committing outweighs the mitigating factors presented in the case and imposed the sentence of death upon Lance Hundley. [Tr. 2102].

It is widely conceded that a trial court must fully and completely give the jury all instructions relevant and necessary for the jury to weigh evidence and discharge its duty as the fact finder. This follows from this Court's decision in *California v. Brown* (1987), 479 U.S. 538, 562, Justice Blackmon writing for the dissent, internal quotations and ellipses omitted, stating "The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure. Long ago, when, in dissent, I expressed my fear of legislation that would make the

death penalty mandatory, and thus remove all discretion from the sentencer, I observed that such legislation would be regressive for it would eliminate the element of mercy in the imposition of punishment." Ohio identifies the same black-letter principle in *State v. Comen* (1990), 50 Ohio St. 3d 206. If the law is clearly and fairly expressed, a reviewing court should not reverse a judgment. *State v. Adams,* 3d Dist. No. 3-06-24, 2007-Ohio-4932. Also, reversal of a trial court's judgment and sentence is appropriate only if the instruction given in error is so misleading so as to prejudice the party seeking reversal. *State v. Harry*, 12th Dist. A2008-01-013, 2008-Ohio-638; *State v. Norman,* 10th Dist. 12AP-505, 2013-Ohio-1908.

Hundley herein contends that when a jury reports to the trial court that they are deadlocked during the mitigation phase of this trial, the trial court was then required to instruct the jury to only consider the life sentences for Hundley and cannot allow the jury continued death penalty deliberations. This assertion is completely contrary to the course of action the trial court judge employed in the instant case. Rather than inquiring as to the nature and the status of the jury's reported deadlock, the trial court judge attempted first to identify who the holdout juror was and then ordered the jury back into the jury room for further deliberations with the threat of concluding deliberations at 4:30 P.M. and sequestering the jury in a hotel without a unanimous verdict. Coincidentally, the jury magically was able to return to the jury room and in twenty-three (23) minutes break their deadlock and

reach a "unanimous" verdict recommending a death sentence, ten (10) minutes before the self- imposed deadline for sequestration by the trial court judge.

While the determination of whether a jury is irreconcilably deadlocked is a necessarily discretionary determination for a trial court to make, there does not exist a bright-line test to determine when a trial court should instruct the jury to limit itself to the life sentence options or take the case away from the the jury. *State v. Brown* (2003), 100 Ohio St. 3d 51; *Arizona v. Washington* (1978), 434 U.S. 497; *State v. Gapen* (2004), 104 Ohio St. 3d 358. However, this concept does not permit a trial court to ignore the ability of a single juror to prevent a death penalty recommendation as stated in the court's jury instructions. The notice from the jury to the court clearly indicated they were deadlocked at 11-1 and were unable to reach a unanimous verdict. The trial court abused its discretion by not concluding that the jury was irreconcilably deadlocked, however the trial court should have instructed the jury to limit itself to the life sentence options or take the case away from the jury rather than threatening them with sequestration.

Accordingly, the previously set forth action and inaction by the trial court as evidenced in a review of the transcript of proceedings from the mitigation phase in reference to the jury's notification that it was deadlocked in its deliberations undermined the reliability of the jury verdict and sentence imposing the death sentence for Hundley herein and thereby materially prejudiced Hundley's right to a fair trial. Based upon the

preceding discussion and case law, Hundley's sentence of death imposed herein should be vacated.

> **Issue No. 5:** Does it violate the Sixth, Eighth and Fourteenth Amendments of the Constitution for a trial court not to instruct a jury that mercy can be considered during its penalty phase deliberations, particularly when the jury asks?

Prior to the start of the penalty phase, the defense filed a motion requesting the jury be instructed to consider mercy in its deliberations. [R.E. 345.] The issue came up by way of a jury question. The jury inquired, "Is mercy considered a mitigating factor under Ohio law?" The court answered, "No." [Tr. at 2100.]

The fundamental issue in a capital sentencing proceeding involves the determination of the appropriate punishment to be imposed on an individual. *Spaziano v. Florida* (1984), 468 U.S. 447. The sentencer must rationally distinguish between those individuals for *Spaziano v. Florida* (1984), 468 U.S. 447 whom death is an appropriate sanction and those for whom it is not. Id. at 460. Appropriateness of the penalty is the indispensable element of a constitutionally valid sentencing scheme.

The United States Supreme Court's opinion in *Lockett v. Ohio* (1978), 438 U.S. 586, established a defendant's right to permit the sentencer to use any factors it sees fit in deciding whether a defendant merits leniency. Chief Justice Burger explained that nothing prevented the sentencer from considering any aspect of a defendant's character or record or any

circumstances of the offense as an independent mitigating factor. Id. at 607. This principle permits the jury to consider sympathy or mercy in its sentencing decision. In *Gregg v. Georgia* (1976), 428 U.S. 153, 190, the Supreme Court endorsed the propriety of permitting the jury to consider mercy for the defendant.

In *Eddings v. Oklahoma* (1982), 455 U.S. 104, the Court declared that the sentencer may not be precluded from considering any relevant mitigating factors offered by the defendant. Eddings noted that the Eighth Amendment prohibited not only legislative exclusion of mitigating evidence but also exclusion of any relevant mitigating evidence by the sentencing body. The Supreme Court admonished all lower courts not to deny consideration of any relevant mitigating evidence. "Mercy" fits within the definition of relevant mitigating factors under Eddings, therefore, must be considered by the sentencer.

Principles of due process and the prohibition of cruel and unusual punishment require that the jury make an individualized sentencing determination. *Zant v. Stephens* (1983), 462 U.S. 862; *Barclay v. Florida* (1983), 463 U.S. 939. An individualized sentencing decision requires that the jury be given a vehicle for expressing the view that the defendant "does not deserve to be sentenced to death," that "...he was not sufficiently culpable to deserve the death penalty." *Penry v. Lynaugh* (1989), 492 U.S. 302. In Penry the Court approved a procedure and that allows a jury to recommend mercy based on the mitigation evidence introduced

by a defendant. Indeed, the jury must be free to determine what punishment is appropriate and to give a "reasoned moral response to [the] mitigating evidence." Id. at 323. *Compare California v. Brown* (1987), 479 U.S. 538, containing Justice O'Conner's concurrence, which gave the opinion of four other Justices the force of law, there is language and an analysis consistent with the notion that mercy merits independent consideration as a mitigating factor inasmuch as it relates to a "reasonable moral response" to the defendant's background and character.

There are not many things which are unwavering in the law today, especially in capital litigation. One thing that is unwavering, however, is a virtually unbroken line of cases that say that the Constitution does not permit limitations on mitigation. Ohio learned this lesson the hard way in its post-Gregg statutory scheme, see, Gregg v. Georgia, 428 U.S. 153 (1976), a scheme that was struck down by the Court in Lockett v. Ohio, supra. The infirmity with the law was that it listed only three statutory mitigators. If the defendant was found guilty of capital murder and at least one aggravator, but did not satisfy one of the three statutory mitigating circumstances, then the death penalty was the result. The Court struck that down, holding that the Constitution does not permit such limitations on mitigation. Lockett said that, given that the imposition of death by a public authority is so profoundly different from all other penalties, an individualized decision is essential in capital cases. The need for treating each defendant in a capital

case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases, where a variety of flexible techniques, such as probation, parole, and furloughs may be available to modify an initial sentence of confinement. Lockett said that the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

The epitome of this principle is the Court's decision in *Hitchcock v. Dugger* (1987), 481 U.S. 393. In that case, Hitchcock's lawyer referred to various considerations, some of which were the subject of factual dispute, that would make a death sentence inappropriate: Hitchcock's youth (20 at the time of the murder), his lack of significant prior criminal activity or violent behavior, the difficult circumstances of his upbringing, his potential for rehabilitation, and his voluntary surrender to authorities. Although counsel stressed the first two considerations, which related to mitigating circumstances specifically enumerated in the statute, he told the jury that in reaching its sentencing decision, it was to "look at the overall picture … consider everything together … consider the whole picture, the whole ball of wax." In contrast, the prosecutor told the jury that it was "to consider the mitigating circumstances and consider those by number," and then went down the statutory list, item by item, arguing that only one (Hitchcock's youth) was applicable. The trial judge instructed the jurors "on the factors in aggravation and mitigation that

you may consider under our law." He then instructed them that "the mitigating circumstances which you may consider shall be the following" and then the judge listed the statutory mitigating circumstances.

A unanimous Supreme Court reversed the limitations placed by the trial judge, and the Court's opinion, written by Justice Antonin Scalia, who fancies himself a constitutional "originalist," held that Hitchcock's right to relief under the Constitution "could not be clearer."

> We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of [various precedent]. Respondent has made no attempt to argue that this, or that it had no effect on the jury or the sentencing judge. In the absence of a showing that the error was harmless, the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

Hitchcock v. Dugger, 481 U.S., at 398-399, internal

citations omitted.

The rational in *Kansas v. Marsh* (2006), 548 U.S. 163, also supported the motion for a jury instruction. Justice Thomas writing for the majority in a decision about whether the Constitution permits Kansas to allow a death sentence when aggravating and mitigating factors are in equipoise, quoted with approval the Kansas jury instruction on mercy: "The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted." Marsh at 176. And in footnote 3, Justice Thomas explained that mercy as a mitigating factor is important "because it 'alone forecloses the possibility of Furman-type error as it' eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty." Id.

Marsh held that a "mercy" instruction saved Kansas's statute from a constitutional challenge. Addressing the dissenters' concern that the "equipoise" rule allowed unconstitutional weighing of evidence in favor of death, the majority said: "The 'mercy' jury instruction alone forecloses the possibility of Furman-type error as it eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty." Marsh, at 4 (Souter, J., dissenting), internal quotations omitted, also Id. at footnote 3.[3]

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3 The Court once again endorsed the concept of a capital jury's consideration of mercy just this term in *Kansas v. Carr* (2016), 577 U.S. ---, 136

Ohio, like Kansas, is a "weighing" state, therefore a mercy instruction is required to foreclose constitutional error. Marsh also compels the conclusion that the State may not argue that "mercy" cannot be considered by jurors during mitigation phase deliberations.

The failure to allow the instruction that the jury could consider mercy violates Hundley's State and Federal constitutional rights to effective assistance of counsel, due process of law, equal protection of the law, confrontation of the State's evidence against him, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, IX and XIV; Oh. Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Hundley has a Federal constitutional due process and Eighth Amendment right to have "mercy" considered as a mitigating factor in Ohio. The failure to allow the instruction requires a new sentencing phase be conducted.

> **Issue No. 6:** Are Ohio's capital sentencing statutes unconstitutional under this Court's recent decision in Hurst v. Florida, which held that Florida's capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death?

In 2016, this Court issued *Hurst v. Florida*, 577 U.S. 92 (2016), 136 S.Ct. 616 which held that Florida's capital sentencing laws violated the Sixth

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S.Ct. 633.

Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Like Ohio's capital punishment structure, in Florida a jury provided a recommendation to the judge with regard to punishment, but notwithstanding the recommendation, Florida law required the judge to determine whether sufficient aggravating circumstances existed. Due to the similarities between Florida's capital sentencing laws and Ohio's, Hundley submits that pursuant to *Hurst*, this Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of this case.

Ohio's death-penalty sentencing scheme is similar to Florida's in several significant ways. Pursuant to R.C. 2929.03(B), a jury in an Ohio capital case must find the defendant guilty or not guilty of the principal charge and then it must also determine "whether the offender is guilty or not guilty of each specification." The jury is instructed that each aggravating circumstance "shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification." Id.

If the jury finds a defendant guilty of both the charge and one or more of the specifications, then, like in Florida, a sentencing hearing is conducted where:

> The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this

> division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.

R.C. 2929.03(D)(1). During this sentencing hearing,

the defendant has the burden of introducing evidence of any mitigating factors, but the prosecution has the ultimate burden of "proving, by proof 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.

At the conclusion of the sentencing hearing, if the jury unanimously finds that the prosecutor has met this burden, "the jury shall **recommend** to the court that the sentence of death be imposed on the offender." R.C. 2929.03(D)(2), Emphasis added. This finding is not required to be rendered in writing and does not set forth the factual findings underlying the jury's recommendation. Once an Ohio jury makes a death-sentence recommendation, then, like in Florida, the Ohio trial court must independently consider "the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section." R.C. 2929.03(D)(3). The trial court can then sentence a defendant to death if it finds "by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." Id. As in Florida, the Ohio trial court, when it imposes a death sentence, shall:

> ...state in a separate opinion its specific findings as to the existence of any of the mitigating factors

> set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

R.C. 2929.03(F). In sum, a jury in Ohio has the responsibility of finding that one or more aggravating circumstances exist as part of the verdict at the capital defendant's trial; however, that is not the completion of the capital sentencing process. Rather, under Ohio law, the jury must then conduct a weighing process after the sentencing hearing. Once the weighing process is complete, the jury may make a death-sentence recommendation to the trial court. Because the Court in *Hurst* emphasized the language in the Florida statute that defined the jury's decision as advisory in nature, Ohio's scheme that similarly classifies a jury's decision as a recommendation violates the Sixth Amendment right to trial by jury. Like *Hurst,* the judge makes the final decision after obtaining the jury's non-specific recommendation. 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. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.'" *Hurst*, 136 S.Ct. at 622, quoting *Walton v. Arizona* supra. The Court's opinion not only pointed out the absence of factual findings about the existence of mitigating or aggravating factors, but also the absence of any findings about the weighing of those factors. *Id.* Similarly, the Ohio statute does not require the jury to make any specific findings of fact about mitigating factors, nor does it ask the jury to make any specific findings about their balancing of the mitigating and aggravating factors. Therefore, the judge must implement a sentence without those critical findings which the Sixth Amendment mandates are within the province of the jury alone. Absent those factual findings, and given the advisory nature of the jury's sentencing determination, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida and should be invalidated.

The sentencing entry confirms the trial court's "independent deliberation." [R.E. 363.] The trial court proceeds to make specific findings with regard to the aggravating circumstances. [R.E. 364.] And the findings detail the aggravating circumstances the trial court relied upon. The jury may have relied upon some of the same facts and the jury may not have. The only specific facts which the record confirms were found to support the aggravating circumstances are the facts found by the trial court. Likewise, the trial court made specific factual

findings regarding the mitigating factors. [Id.] The trial court, however, found no mitigating factors. The jury may or may not have made that factual finding. The few pages of factual findings of the trial court regarding mitigating factors are filled with facts which the jury may have agreed with and utilized in making the recommendation of death, or they may not have. Death was imposed upon the trial court's independent factual determinations as set forth in the sentencing memorandum. These factual findings were not made the jury. The Sixth Amendment requires that the specific findings authorizing the imposition of the death penalty be made by the jury. Accordingly, Hundley's death sentence must be vacated.

> **Issue No. 7:** Is Ohio's death penalty framework is unconstitutional. R.C. Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied Hundley in terms U.S. Const. Amends. V, VI, VIII, and XIV; Oh. Const. Art. I, sections 2, 9, 10, and 16. Further, does Ohio's death penalty statute violate the United States' obligations under international law?

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment.

*Robinson v. California (*1962), 370 U.S. 660. Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia* (1977), 433 U.S. 584. The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. *See Furman v. Georgia* (1972), 408 U.S. 238, Brennan, J., concurring; *Rhodes v. Chapman* (1981), 452 U.S. 337, 361; *Trop v. Dulles* (1958), 356 U.S. 86. The Ohio scheme offends this bedrock principle in the following ways.

Arbitrary And Unequal Punishment

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. *Furman*, 408 U.S. at 249, Douglas, J., concurring. A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. Id. Any arbitrary use of the death penalty also offends the Eighth Amendment. *Id.*

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina* (1976), 428 U.S. 280. Prosecutors'

uncontrolled discretion violates this requirement.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal* (Mass. 1975), 339 N.E.2d 676, 678, Tauro, C.J., concurring; *State v. Pierre* (Utah 1977), 572 P.2d 1338, Maughan, J., concurring and dissenting. Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." *Shelton v. Tucker* (1960), 364 U.S. 479, 488. To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." *O'Neal II*, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society's interests do not justify the death penalty.

Unreliable Sentencing Procedures

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. *Gregg v. Georgia* (1976), 428 U.S. 153, 188, 193-95; *Furman*, 408 U.S. at 255, 274. Ohio's scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language "that the aggravating

circumstances ... outweigh the mitigating factors" invites arbitrary and capricious jury decisions. Supra. "Outweigh" preserves reliance on the lesser standard of proof by a preponderance of the evidence. Supra. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given "specific and detailed guidance" and be provided with "clear and objective standards" for their sentencing discretion to be adequately channeled. *Gregg*; *Godfrey v. Georgia* (1980), 446 U.S. 420.

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker's discretion. *State v. Fox* (1994), 69 Ohio St. 3d 183, 193. Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating. So, for example, this leaves out the following: youth or childhood abuse as held in *Eddings v. Oklahoma* (1982) 455 U.S. 104, mental disease or defect as held in *Penry v. Lynaugh* (1989), 492 U.S. 302, history omitted, level of involvement in the crime as held in *Enmund v. Florida* (1982), 458 U.S. 782, or lack of criminal history as held in *Delo v. Lashley* (1993), 507 U.S. 272, which will not be factored into the sentencer's

decision. While the federal constitution may allow states to shape consideration of mitigation, *Johnson v. Texas* (1993), 509 U.S. 350, Ohio's capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. *See* Cho (1994), Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 J. Crim. L. & Criminology 532, 549-557, and findings of Zeisel discussed in *Free v. Peters* (7th Cir. 1993), 12 F.3d 700. This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

Ohio's Statutory Death Penalty Scheme Violates International Law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Hundley's' capital convictions and sentences cannot stand.

International Law Binds Ohio.

"International law is a part of our law[.]" *The Paquete Habana* (1900), 175 U.S. 677, 700. A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where

state law conflicts with international law, it is the state law that must yield. *See Zschernig v. Miller* (1968), 389 U.S. 429, 440. In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala* (2d Cir. 1980), 630 F.2d 876; *Forti v. Suarez-Mason* (N.D. Cal. 1987), 672 F.Supp. 1531.

Ohio's Obligations Under International Charters, Treaties, and Conventions

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the U.N. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of

these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. The glaring problem deals with equality and predictability. One could commit a murder contemporaneous with an attempted murder in Cuyahoga County, Ohio and be charged with death specifications, but commit the same series of acts in a county that lacked the resources to carry out a capital case and not receive charges with death specifications.

Conclusion

Wherefore, the defense prays this Court take jurisdiction over this cause and hear it on its merits.

Respectfully Submitted,

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