No. 20-6709

In the Supreme Court of the United States

LANCE HUNDLEY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Trial Phase

Jonathan Huff, Erika Huff's brother, testified that Erika died when she was 41 years old. (Trial Tr., at 1232.) Erika Huff resided at 44 Cleveland Street on Youngstown's south side, and suffered from multiple sclerosis. (Trial Tr., at 1233.) Erika's MS prevented her from walking, caused numbness in her hands, and deteriorated her eyesight. (Trial Tr., at 1233-1234.)

Jonathan testified that Erika had a 5-year-old daughter Corrine at the time she was murdered. (Trial Tr., at 1234.) Jonathan explained that Corrine lived with Erika's mother, Denise Johnson during the week, because Erika was unable to care for Corrine during the week (i.e., get her ready for school, etc.). (Trial Tr., at 1234-1235.) Corrine would return on the weekends to stay with Erika. (Trial Tr., at 1234-1235.)

In the fall of 2015, Defendant-Petitioner Lance Hundley began residing with Erika Huff. (Trial Tr., at 1236.) Jonathan stated that Erika and Defendant did not have a romantic relationship. Defendant's brother Gregory Hundley is the father of Erika's daughter Corrine. (Trial Tr., at 1237.)

Jonathan Huff identified Defendant in the courtroom as the person living with Erika Huff at the time she was murdered. (Trial Tr., at 1242.)

A'Shawntay Heard is an STNA employed by Comfort Keepers; Heard had been assigned to assist Erika Huff in her home for the past six years.

(Trial Tr., at 1488-1490, 1509.) Comfort Keepers provided a variety of services that included housekeeping, cooking, laundry, bathing, and dressing patients. (Trial Tr., at 1489.) Because Erika suffered from multiple sclerosis, Comfort Keepers provided assistance to her seven days a week, which included morning, afternoon, and evening hours. (Trial Tr., at 1489.)

Heard explained that the more disabled a person is, the higher the amount of services would be provided. (Trial Tr., at 1490.) Erika Huff wore adult diapers, and was confined to a wheelchair at all times. (Trial Tr., at 1491.) Erika required a high level of daily assistance: "Erika had a chair, a move-around chair that she can get around in. She had a grabber that she would try to get things with if we wasn't around or she would try to do on her own. But such as cooking for her, cleaning, like I said, bathing her, washing her up, changing her whenever she was incontinent." (Trial Tr., at 1491.)

Heard stated that Defendant-Appellant Lance Hundley moved in with Erika a couple months before she was murdered. (Trial Tr., at 1493.) Erika would talk less when Defendant was around, and he made Heard feel "[v]ery uncomfortable." (Trial Tr., at 1493-1494, 1511.) Defendant told Heard that he needed mental health counseling. (Trial Tr., at 1498.)

On the evening of November 5, 2015, Heard locked the bottom lock to the front door when she left. (Trial Tr., at 1502.) Defendant was not present when Heard left for the evening. (Trial Tr., at 1502.) Heard was the last aid from Comfort Keepers that saw Erika Huff alive. (Trial Tr., at 1496.)

At 2:00:36 a.m. on November 6, 2015, Erika Huff's Guardian Home Alert System was activated. (Trial Tr., at 1285.) Guardian alerted this fact to the Youngstown Police Department's 911 call center, who then notified Rural/Metro Ambulance Service. (Trial Tr., at 1775-1776.) Thereafter, Brittney Koch, an advanced EMT, and her partner Deanna responded to Erika Huff's residence. (Trial Tr., at 1233, 1460-1463.) Koch stated that the call was for an unknown medical emergency. Koch stated that Rural/Metro's dispatcher did not give them any specific, identifying information for the patient (i.e., patient's gender, age). (Trial Tr., at 1463-1464.)

Koch and her partner knocked on the front door and identified themselves as EMS, but no one immediately answered the door. (Trial Tr., at 1464.) A few minutes later, Defendant-Appellant Lance Hundley, opened the front door.[1] (Trial Tr., at 1465.) Koch described him as a "very tall, African-American male, red hat and dark hoodie." (Trial Tr., at 1465.) Koch identified Defendant in the courtroom as the person she spoke to at 44 Cleveland Street that morning. (Trial Tr., at 1471.)

Koch identified herself as EMS and explained to him why they were there; Defendant responded that everything was okay. Defendant stated that he accidentally hit the medical alert button and nothing was wrong. (Trial Tr., at 1465.) Koch asked Defendant again if everything was okay, and made

[1] While at St. Elizabeth's Hospital later that morning, Brittney Koch identified Defendant-Appellant Lance Hundley as the patient laying in Trauma Bay 1. (Trial Tr., at 1470.) Koch was then directed by Rural/Metro to return to the Cleveland Street residence and speak with the Youngstown detectives. (Trial Tr., at 1471.)

sure that he did not need or want any medical attention before they left. They left without ever entering the house. (Trial Tr., at 1467-1468.) Koch explained that false alarms are "extremely common." (Trial Tr., at 1468.)

Koch stated that Defendant was "very kind, very polite, no anxiety given off or anything like that, just a very nice man talking to us. * * * Very calm." (Trial Tr., at 1466.)

Around 2:00 a.m. on November 6, 2015, Denise Johnson, Erika Huff's mother, drove to Erika's house after she was notified by Guardian that Erika's life alert device had alerted them. Denise stated that her residence was a 7-8 minute drive to Erika's house. (Trial Tr., at 1288-1289, 1293.)

Denise explained that Erika "wore a Life Alert button all the time." (Trial Tr., at 1290.) Normally, when Erika pressed the button, Denise would drive to her house and let the EMTs into the house, because Erika was bound to her wheelchair. (Trial Tr., at 1290.)

When Denise arrived that morning, she did not see an ambulance. (Trial Tr., at 1294.) Denise then unlocked both the bottom and top locks to the front door, which she described as unusual. (Trial Tr., at 1295.) Denise stated that "[n]ormally the girls that help put Erika to bed only lock the bottom lock. They never lock the top lock." (Trial Tr., at 1295.)

When Denise entered Erika's house, Denise immediately smelled gasoline and saw "Lance was standing there with a gasoline can[.]" (Trial Tr., at 1295, 1298.) Defendant told Denise that Erika was in the back, and stated

"he volunteered the first responders had gone." (Trial Tr., at 1295.) Denise grabbed the gasoline can from Defendant and returned it to the garage where it belonged. (Trial Tr., at 1296.)

Denise stated that when she came back inside, Defendant "ambushed" her in the kitchen, and started repeatedly "cracking" in the head with a hammer. (Trial Tr., at 1296, 1299.) Denise asked Defendant why he was hitting her, Defendant responded, "I killed your daughter. I'm going to kill you, and I'm going to kill your son." (Trial Tr., at 1296.) Defendant also told Denise that he was doing this, because "Erika wanted to have sex with him and she was disrespecting his brother." (Trial Tr., at 1301.) Defendant continued assaulting Denise. (Trial Tr., at 1296.)

Defendant then threw the hammer down and grabbed a knife, putting it up to Denise's face, "and in a choking manner pulled [Denise] into the living room from the kitchen." (Trial Tr., at 1297.) Denise recalled feeling weary and passing out. Denise later awoke from the heat of the fire; she realized that she was laying next to Erika on her bedroom floor. (Trial Tr., at 1297, 1302.) Denise then noticed Defendant running around, who then stopped and tried hitting Denise with Erika's grabber tool after he saw her attempting to get up. (Trial Tr., at 1297.)

Denise made her way over the air conditioning unit in the bedroom window and attempted to knock it out so she could crawl out of the window, as smoke was beginning to fill the room. Youngstown police were fortunately

on the other side and removed the unit from the window, and helped her escape. (Trial Tr., at 1298, 1309, 1349.) Denise stated that no one else was inside the house besides Defendant and Erika, and she did not see anyone outside the house when she first arrived. (Trial Tr., at 1313.)

Lonnie Johnson, Denise's husband, testified that he became worried after Denise did not return home within about 15 minutes of being alerted by Guardian. (Trial Tr., at 1250-1251.) Lonnie stated that he left for Erika's house to check on Denise about 15-20 minutes after Denise left. (Trial Tr., at 1250-1251, 1264.) When he arrived at Erika's house, Lonnie found the front door locked, which he stated "the door's never locked." (Trial Tr., at 1251.) Lonnie also stated that he heard Denise yell something from inside the house. Concerned, Lonnie called 911 at 2:56 a.m. (Trial Tr., at 1256, 1285.)

Youngstown Police Officer Timothy Edwards responded to Erika Huff's residence at 3:01 a.m. (Trial Tr., at 1346.) Officers Michael Medvec and Ken Bielik were already at the scene when Edwards arrived. (Trial Tr., at 1347.) The officers proceeded around to the rear of the house and observed a fire inside. (Trial Tr., at 1348.) Edwards stated that it appeared that the fire had "just started." (Trial Tr., at 1349.) The officers successfully removed Denise Johnson from the bedroom window. (Trial Tr., at 1349.)

Edwards then "saw the rear door open, and * * * saw a taller male black gentleman with a baldhead. He looked around and saw [the officers], and then he immediately closed the door and stepped back inside." (Trial Tr.,

at 1351.) Medvec likewise saw "what was clearly a man's hand, pull the door back shut[.]" (Trial Tr., at 1388.)

Officers Edwards and Medvec entered the house through the rear door, and made their way to the room that was on fire and found the victim Erika Huff. (Trial Tr., at 1351, 1354.) Edwards stated that he did not see anyone else (besides the officers and Lonnie Johnson) outside that house wandering around the property. (Trial Tr., at 1354.) Edwards and Medvec eventually retreated due to the fire, but returned with fire extinguishers and put the fire out. (Trial Tr., at 1354, 1389.)

After the fire department arrived and provided the officers with oxygen tanks, the officers reentered the house a third time to clear the house for additional victims and persons. (Trial Tr., at 1355, 1389.) During the third entrance, the officers found Defendant "by the door. Immediately after you walk in the front door, he was laying to the right of the door." (Trial Tr., at 1355.) The yellow gym bag (State's Exhibit No. 59) was also found near the front door. (Trial Tr., at 1429.)

Unlike Denise Johnson and Erika Huff, Defendant did not have any visible or apparent injuries, and he was laying there motionless. (Trial Tr., at 1356.)

Youngstown Fire Captain Chad Manchester responded to Erika Huff's residence around 3:00 a.m. (Trial Tr., at 1516-1517.) When the truck arrived on scene, Manchester could see the house filling with smoke; smoke was

about two or three feet from the ground, but did not see any flames. (Trial Tr., at 1518.) Firefighters entered through the front door after Youngstown police cleared the house from any dangerous suspects, and extinguished the material that was smoldering on Erika Huff's left leg. (Trial Tr., at 1519-1520.) Manchester stated that the fire was contained to the back bedroom. (Trial Tr., at 1519-1521.)

Youngstown police found blood in several areas inside Erika Huff's house: blood in the hallway area; blood on the doorway or door jambs going in/out of the bedroom; blood splatter on the area between two doors and the doors themselves, leading to Erika's the bedroom; blood on the bathroom wall; blood stains on the kitchen refrigerator; and blood on the living room floor when you first enter the house. (Trial Tr., at 1441-1442, 1525, 1571, 1755; State's Exhibit Nos. 32-34, 37, 123-124.)

Brian Peterman, a fire investigator for the State Fire Marshal's Office, responded to the scene around 6:15 a.m. on November 6, 2015. Peterman stated that there was minimal fire damage to the outside of the house, and he "smelled a strong odor of gasoline in the house." (Trial Tr., at 1581-1586.)

Peterman observed that the majority of fire damage was continued to the northwest bedroom, and "clearly where the fire originated." (Trial Tr., at 1587-1588.) There was "heavy fire damage in there that was on the bed and on the floor area." (Trial Tr., at 1588.) Peterman observed that "most of the fire damage was on the bed itself[;] * * * Clearly in this case here there was

what we call an irregular burn pattern that was on the bed and continued down from the bed onto the floor in an irregular shape. " (Trial Tr., at 1588-1589.)

Peterman stated that the gasoline smell was strongest in the northwest bedroom. (Trial Tr., at 1589.) A bottle of lighter fluid was found next to Erika Huff's body, and a large knife was found in the fire debris. (Trial Tr., at 1448, 1592; State's Exhibit No. 54.)

Peterman concluded "that the exterior/interior examination, along with the fire patterns analysis specifically revealed the fire originated with the interior of the structure and specifically the northwest bedroom." (Trial Tr., at 1600.) "All of the samples collected came back positive for gasoline." (Trial Tr., at 1600.)

Christa Rajendram, a forensic laboratory supervisor for the State Fire Marshal's Office, analyzed "ignitable liquid or presence of ignitable liquid in fire debris evidence." (Trial Tr., at 1721.)

Rajendram analyzed all of the submitted items—which included various burnt clothing and debris, contents found within the yellow gym bag, the yellow gym bag, Erika Huff's clothing, and Defendant's clothing—and concluded that gasoline was present on all of items. (Trial Tr., at 1726-1733.)

David Miller, a forensic scientist assigned to the Bureau of Criminal Investigation's DNA section, analyzed several items submitted by the Youngstown Police Department. (Trial Tr., at 1634, 1646.)

Miller found that the hammer's handle (State's Exhibit No. 55) had a DNA mixture, which included Denise Johnson as a major contributor, and an unknown person as a minor contributor. (Trial Tr., at 1646-1647.) "[B]oth the stain on the head of the hammer and the stain on the claw of the hammer we had -- Denise Johnson was included * * *. And we can say definitively that Erika Huff and Lance Hundley are not contributors to that DNA profile." (Trial Tr., at 1648-1649.)

Miller found that the blood stain on the bill of Defendant's hat (State's Exhibit No. 64) also included Denise Johnson's DNA: "the results are the same as the head of the hammer and the claw of the hammer. So Denise Johnson is included[.]" (Trial Tr., at 1648-1649.)

Denise Johnson's DNA was also found on the grabbing aid (State's Exhibit No. 56) and the grabber end; "Denise Johnson is included * * * with Erika Huff and Lance Hundley excluded as contributors." (Trial Tr., at 1651.) The stains on the black discs on the grabbing aid; "Denise Johnson is included as a possible contributor to the major DNA profile. * * * And there is some additional data not sufficient for comparison. * * * Erika Huff and Lance Hundley are not that major DNA profile that Denise Johnson is consistent * * *." (Trial Tr., at 1651-1652.)

Denise Johnson and Defendant's DNA was found on the inside collar to Defendant's shirt found in the gym bag (State's Exhibit No. 60): "we have two possible contributors for this and Lance Hundley and Denise Johnson

cannot be excluded as possible contributors to the mixture of DNA profiles on the inside collar of this item." (Trial Tr., at 1652.) The blood stain on center of the shirt and the stain on the bottom of the shirt; Denise Johnson is included, while Erika Huff and Defendant are excluded. (Trial Tr., at 1653.)

Logan Schepeler, a forensic scientist assigned to BCI's DNA section, performed YSTR analysis on several DNA profiles found on the hammer's handle (State's Exhibit No. 55), the black discs of the grabbing aid (State's Exhibit No. 56), the bill of Defendant's hat (State's Exhibit No. 64), the inside of Defendant's hat (State's Exhibit No. 64), and the grabbing aid's handle (State's Exhibit No. 56). (Trial Tr., at 1700-1703.)

"Generally speaking we do YSTR testing because we may have a large amount of female DNA that is basically covering up any male DNA that might be present. I like to refer to it as the needle in the haystack, where the haystack in this sense is female DNA." (Trial Tr., at 1704.)

Schepeler performed YSTR testing on the rape kit collected during the autopsy, which included the vaginal and perianal samples (State's Exhibit No. 152). (Trial Tr., at 1563, 1704.) Standard STR testing found no foreign DNA to Erika Huff on those samples, and likewise, there was no foreign DNA to Erika Huff using YSTR testing. (Trial Tr., at 1705.)

Schepeler's YSTR testing concluded that Defendant's DNA was present on his hat (State's Exhibit No. 64), and Erika Huff's grabbing aid (State's Exhibit No. 56). (Trial Tr., at 1707-1709.)

Schepeler also analyzed fingernail clippings collected during Erika Huff's autopsy for both STR and YSTR. (Trial Tr., at 1563, 1710-1711; State's Exhibit No. 153.) The STR testing on Erika's fingernail clippings resulted in a mixture; "Erika Huff was included as an expected contributor. Lance Hundley was included with a statistic of one on 300,000." (Trial Tr., at 1711.) "Lance Hundley was included in YSTRs with a statistic of one in 700." (Trial Tr., at 1712.)

Dr. Joseph Felo, M.D., is a forensic pathologist and the chief medical examiner for Cuyahoga County's Medical Examiners Office. Dr. Felo did not perform Erika Huff's autopsy; Dr. Joseph Ohr performed her autopsy, but he died prior to trial. (Trial Tr., at 1791.)

Prior to his testimony, Dr. Felo reviewed the autopsy report prepared by Dr. Ohr (State's Exhibit No. 80), the toxicology reports, any photographs that were taken at the scene and during the autopsy, and any police or medical reports that were prepared. (Trial Tr., at 1790-1792.)

Erika Huff suffered ***numerous contusions***: Left Eye, Forehead, Left Cheek, Right Side of Face, Nose, Upper Lip Area, Left Upper Arm, Abdomen, and Chest. (Trial Tr., at 1795-1810; State's Exhibit No. 95, 109-110.)

Erika Huff had what appeared to have been defensive wounds to her left forearm/wrist and right hand areas. (Trial Tr., at 1804-1806; State's Exhibit Nos. 111-114.)

Erika was also ***strangled***; "there is an indentation that's visible around the neck. That is because of a ligature that was squeezed around her neck and left an imprint." (Trial Tr., at 1800; State's Exhibit No. 102.) The ligature that was wrapped around Erika's neck was a black cord, wire-type object with stainless steel. (Trial Tr., at 1801.)

Erika had petechial hemorrhages on the white of both her right and left eyes. (Trial Tr., at 1807-1808; State's Exhibit Nos. 117-118.) Dr. Felo explained that "[i]n this case it occurred because of the strangulation that squeezed the blood around the neck." (Trial Tr., at 1807.) This also meant that Erika Huff was alive when she was strangled. (Trial Tr., at 1807.)

Dr. Felo stated that "[t]he bruising about the body happened before the strangulation because the bruising happened when her heart is pumping and there's a survival time from it. * * * That happened before the strangulation, but she was still alive. As the ligature is wrapped snugly around her neck and the bleeding comes out of her eyes, there's also some of the hemorrhages on the inner portion of her body as well which would indicate that she was still alive but in the dying process." (Trial Tr., at 1809.)

Dr. Felo concluded that Erika Huff died from two mechanisms: "[t]hat blunt trauma is of her head, her face and chest and her abdomen. That on top of or in conjunction with the ligature strangulation is why she died." (Trial Tr., at 1810-1811.)

Dr. Felo concluded that Erika Huff was dead prior to the fire being started: "[t]here's no sign that she was alive, meaning the skin didn't get a red color like if you have got a sunburn or something along those lines. That was absent." (Trial Tr., at 1811.)

Dr. Felo concluded that Erika Huff ***did not suffer a quick death***: "[t]he beating takes a while because of the amount of blood that is accumulated in her body and the fact that the bruising is developing. The strangulation would be seconds to minutes as far as a timeframe." (Trial Tr., at 1812.) Dr. Felo estimated the timeframe from "several minutes, up to hours. * * * It certainly was not an immediate death." (Trial Tr., at 1812.)

Defendant-Petitioner Lance Hundley testified on his own behalf. (Trial Tr., at 1851.) Defendant stated that he moved in with Erika Huff in September 2015, after his brother's house became too crowded. (Trial Tr., at 1855-1856.)

On November 5, 2015, Defendant stated he went to a couple bars that evening, and returned home sometime before 11:30 p.m. (Trial Tr., at 1866.) Defendant stated that he spoke with Erika, and the two then smoked a marijuana blunt. (Trial Tr., at 1867-1868.) Defendant then went to sleep on the couch. (Trial Tr., at 1868.)

Defendant stated that the next thing he remembered "was being woke up with somebody strangling [him] from behind." (Trial Tr., at 1868.) Defendant stated that he could not see the person's face, and he then

"blacked out." (Trial Tr., at 1868.) Defendant stated that he made it to his feet and started walking towards the back of the house, and that is when he observed "a guy come out of Erika's room with a gas can." (Trial Tr., at 1869.)

Defendant described the person as a dark-skinned, African-American male, close to his height. Defendant stated that he looked at the individual, then went into his bedroom and locked the door; he then came out and saw Erika laying on her bedroom floor and it was on fire. (Trial Tr., at 1869-1870.)

Defendant stated that he "didn't know if somebody was still in the house." (Trial Tr., at 1871.) So he went into the kitchen and grabbed a hammer and a knife. Defendant then took a position to defend himself, because he heard a noise by the screen door. (Trial Tr., at 1871.)

Defendant stated that Denise Johnson then entered the house, so he dropped the knife and the hammer on the corner table. (Trial Tr., at 1871-1872.) Defendant stated that he spoke with Denise and told her that someone came into the house. Defendant stated that be observed Lonnie Johnson and another individual outside in the car: "The person that was in the passenger seat was the same person that I seen run out that door." (Trial Tr., at 1872.)

Defendant claimed that Denise "had the gas can in her hand[,]" and then told Defendant, "Lance, it's not too late. We can come up with something to tell the police." (Trial Tr., at 1873.)

Defendant admitted that he attacked Denise Johnson; Defendant stated that he then grabbed the hammer and hit Denise with it. (Trial Tr., at

1873.) Defendant stated that he dropped the hammer, but still had the knife in his hand. (Trial Tr., at 1874.) Defendant stated that he then stabbed Denise with the knife. (Trial Tr., at 1874.)

Defendant stated that he returned to his bedroom and looked for his cell phone; he then opened the back door to his bedroom and saw three individuals (one he thought was Lonnie). (Trial Tr., at 1875.) He then closed and locked the door. (Trial Tr., at 1876.)

Defendant then went towards the front door, but did not exit because he saw a shadow outside the front door. Defendant stated that he thought the people outside would come in and kill him. (Trial Tr., at 1876.)

Defendant admitted that he changed and hid the clothes that he was wearing: "I changed my clothes thinking that if Erika mother alive that she would have to explain the blood, her blood that was on me." (Trial Tr., at 1876.) "I was going to hide them." (Trial Tr., at 1877.)

Defendant denied killing Erika Huff, but admitting the altercation with Denise Johnson. (Trial Tr., at 1878-1879.)

Defendant stated that Denise and Lonnie Johnson were responsible for Erika Huff's murder. (Trial Tr., at 1879.) Defendant blurted out, "I have no motive. I have no motive. * * * None whatsoever." (Trial Tr., at 1879.)

During cross examination, Defendant stated that he did not see any flashing lights from the police cruisers, and denied answering the door when Rural/Metro responded to the house. (Trial Tr., at 1884-1885.)

Defendant stated that the unknown black male exited Erika's bedroom, went into Defendant's bedroom, and exited through the back door. (Trial Tr., at 1888.)

Defendant stated that the fire was burning while he was struggling with Denise Johnson. (Trial Tr., at 1893-1894.)

Defendant admitted that he was mad at Denise. (Trial Tr., at 1897.)

Defendant did not tell anyone at the hospital that he was choked out, and never told this to Youngstown Detective Ron Rodway. (Trial Tr., at 1899.) Defendant never told Det. Rodway that Denise and Lonnie Johnson were there that night and responsible for Erika's murder. (Trial Tr., at 1905, 1918.)

Defendant stated that he even though he went to EMT school 24 years ago, he did not perform CPR on Erika. (Trial Tr., at 1909-1910.)

Defendant stated that he did not know about Erika's medical alert button that she wore. (Trial Tr., at 1910.)

Defendant admitted that he planned to hide his clothes in the duffle bag. (Trial Tr., at 1914-1915.)

Verdict

The jury found Defendant guilty of the following offenses: Count One, Aggravated Murder, in violation of R.C. 2903.01(A)(F), and the accompanying Death Specification, in violation of R.C. 2929.04(A)(5) and R.C. 2941.14; Count Two, Attempted Murder, in violation of R.C. 2903.02(B)(D) and R.C.

2923.02(A), a felony of the first degree; Count Three, Felonious Assault, in violation of R.C. 2903.11(A)(1)(D), a felony of the second degree; Count Four, Aggravated Arson, in violation of R.C. 2909.02(A)(1)(B)(1)(2), a felony of the first degree; and Count Five, Aggravated Arson, in violation of R.C. 2909.02(A)(2)(B)(1)(3), a felony of the second degree.

Mitigation Phase

Defendant-Petitioner Lance Hundley proceeded pro se in the mitigation phase, and chose not to present any evidence.

Sentence

Defendant-Petitioner Lance Hundley was sentenced as follows: **Death for Count One**, Aggravated Murder, in violation of R.C. 2903.01(A)(F) and R.C. 2929.04(A)(5); **11 Years for Count Two**, Attempted Murder, in violation of R.C. 2903.02(B)(D) and R.C. 2923.02(A), a felony of the first degree; **11 Years for Count Four**, Aggravated Arson, in violation of R.C. 2909.02(A)(1)(B)(1)(2), a felony of the first degree.

Direct Appeal

Defendant timely appealed as of right to the Supreme Court of Ohio, and the Ohio Court affirmed Defendant's convictions and death sentence. *State v. Hundley*, Slip Opinion No. 2020 Ohio 3775.

REASONS FOR DENYING THE WRIT

I. Defendant Voluntarily and Intelligently Waived His Sixth Amendment Right to Counsel, and Unequivocally Invoked His Constitutional Right to Self-Representation at Mitigation.

As for Defendant's first question presented, he contends that the trial court failed to conduct a proper inquiry to ensure that he voluntarily waived his right to counsel at mitigation. To the contrary, Defendant executed a written waiver of his right to counsel, and the record reflects that he knowingly and voluntarily waived this right to counsel at mitigation. Therefore, Defendant knowingly and voluntarily waived his Sixth Amendment right to counsel at mitigation.

A. A CRIMINAL DEFENDANT MAY VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL IN WRITING AND IN OPEN COURT.

A criminal defendant "has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he knowingly, voluntarily and intelligently elects to do so." *State v. Downie*, 183 Ohio App.3d 665, 671, 2009 Ohio 4643, 918 N.E.2d 218 (7th Dist.), quoting *State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph one of the syllabus, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

"[W]hen a criminal defendant elects to proceed pro se, the trial court must demonstrate substantial compliance with Crim.R. 44(A) by making a

sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." *State v. Martin*, 103 Ohio St.3d 385, 2004 Ohio 5471, 816 N.E.2d 227, paragraph two of the syllabus. Ohio Criminal Rule 44(C) provides that for a defendant charged with a serious crime, the waiver of counsel must be in writing and done in open court: "Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing." Ohio Crim.R. 44(C).

"A criminal defendant must 'unequivocally and explicitly invoke' the right to self-representation." *State v. Obermiller*, 147 Ohio St.3d 175, 2016 Ohio 1594, 63 N.E.3d 93, ¶ 29, quoting *State v. Cassano*, 96 Ohio St.3d 94, 2002 Ohio 3751, 772 N.E.2d 81, ¶ 38. "Requiring that a request for self-representation be both unequivocal and explicit helps to ensure that a defendant will not 'tak[e] advantage of and manipulat[e] the mutual exclusivity of the rights to counsel and self-representation.'" *Obermiller*, supra at ¶ 29, quoting *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir., 2000).

To determine whether the defendant fully understood and intelligently relinquished his right to counsel, "the trial court must ensure that the defendant is aware of 'the dangers and disadvantages of self-representation' and that he is making the decision with his 'eyes open.'" *State v. Lawson*, 7th Dist. No. 12 MA 194, 2014 Ohio 879, ¶ 16, quoting *Faretta*, 422 U.S. at 835.

"Ohio courts determine whether under the totality of the circumstances the defendant's waiver of his or her right to counsel was voluntarily, knowingly, and intelligently given." *Downie*, 183 Ohio App.3d at 673.

1. DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

Here, Defendant contends that the trial court failed to conduct a proper inquiry to ensure that he voluntarily and intelligently waived his right to counsel at mitigation.

"In 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." *Downie*, 183 Ohio App.3d at 672, quoting *Gibson*, at paragraph two of the syllabus. "In other words, the record must show that the defendant understandingly and intelligently rejected the offer of counsel." *State v. Wells*, 7th Dist. Belmont No. 09 BE 12, 2009 Ohio 6803, ¶ 23.

To begin, trial counsel unequivocally stated that Defendant was competent at the time he waived his right to counsel at mitigation:

> Well, Your Honor, it's a quandary in this regard; ***I have no question that Lance Hundley is competent***, and I lay that predicate out. I know the court has examined that before I arrived, and I in good conscience as an officer of the court can't say anything other than he is competent. That means he has the right to choose, even if it's going to hurt him. Justice Scalia said that in one of the main cases in this area * * * although I would here in open court

> vigorously advice you not to represent yourself. I think that is the path of death. I would counsel against it -- however, the right of self-representation is primary.

(Emphasis added.) (Trial Tr., at 2042-2043.)

Here, the trial court sufficiently inquired to determine whether Defendant fully understood and intelligently relinquished his right to counsel in open court. (Trail Tr., at 2044-2050.) The trial court explained to Defendant "the dangers and disadvantages of self-representation," and the possible penalties that he faced. (Trail Tr., at 2044-2050.) Defendant read and signed the "Waiver of Counsel" form that explained his Sixth Amendment right to counsel in detail, and the inherent dangers of self-representation. (Trial Tr., at 2050.) *See Hundley*, supra at ¶¶ 105-106.

Furthermore, Defendant previously knowingly and intelligently waived his right to counsel, and represented himself at the suppression hearing. (Trial Tr., at 195-219, 2044.)

Thus, the trial court made a sufficient inquiry to determine whether Defendant fully understood and intelligently relinquished his right to counsel (on two separate occasions in this case). *See Martin*, at paragraph two of the syllabus; *see also State v. Adams*, 7th Dist. Mahoning No. 14 MA 77, 2016 Ohio 891, ¶¶ 20-21.

Therefore, the Supreme Court of Ohio properly concluded that Defendant knowingly and voluntarily waived his Sixth Amendment right to counsel at mitigation. *See Hundley*, supra at ¶ 110.

II. The Sixth Amendment and Article I, Section 10 of the Ohio Constitution Do Not Afford a Criminal Defendant the Right to the Assistance of Stand-By Counsel Once He Knowingly and Voluntarily Waives His Right to Counsel.

As for Defendant's second question presented, he contends that the trial court improperly denied his request for stand-by counsel during the suppression hearing. To the contrary, a criminal defendant does not have a state or federal constitutional right to the assistance of stand-by counsel. Therefore, Defendant's Sixth Amendment right to counsel was not violated.

1. THERE IS NO STATE OR FEDERAL CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF STAND-BY COUNSEL ONCE A DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVES HIS 6TH AMENDMENT RIGHT TO COUNSEL.

While a criminal defendant is afforded a constitutional right to the assistance of counsel, "the Sixth Amendment right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.'" *Martin*, 103 Ohio St.3d at 389, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942). The court clarified this right in *Faretta*: "Although not stated in the Amendment in so many words, the right to self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." (Footnote omitted.) *Martin*, 103 Ohio St.3d at 389, quoting *Faretta*, 422 U.S. at 819-820. This Court recognized the

defendant's independent right to self-representation. *See Martin*, 103 Ohio St.3d at 389, citing *Gibson*, supra.

But, "there is no independent right, under state or federal law, to standby counsel in the event that a criminal defendant chooses self-representation." *Hundley*, supra at ¶ 99; *accord State v. Hackett*, Slip Opinion No. 2020 Ohio 6699, ¶ 1.

Federal courts have concluded the same. *See United States v. Keiser*, 578 F.3d 897, 903 (8th Cir., 2009); *Wilson v. Parker*, 515 F.3d 682, 696 (6th Cir., 2008); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir., 2006); *United States v. Morrison*, 153 F.3d 34, 55 (2nd Cir., 1998); *Childress v. Johnson*, 103 F.3d 1221, 1232 (5th Cir., 1997); *United States v. Schmidt*, 105 F.3d 82, 90 (2nd Cir., 1997); *United States v. Singleton*, 107 F.3d 1091, 1093 (4th Cir., 1997); *United States v. Roof*, 225 F.Supp3d 394 (D.S.C. 2016).

Numerous state courts have also concluded that a criminal defendant does not have a constitutional right to stand-by counsel. *See e.g., State v. Gunther*, 278 Neb. 173, 178-179 (2009) (holding that "there is no federal Sixth Amendment constitutional right to effective assistance of standby counsel" and no such right under the Nebraska Constitution, either); *People v. Mirenda*, 57 N.Y.2d 261, 265-266, 455 N.Y.S.2d 752, 442 N.E.2d 49 (1982) (concluding that a defendant has no state or constitutional right to the assistance of a lawyer while conducting a *pro se* defense"); *State v. Martin*, 608 N.W.2d 445, 451 (Iowa 2000) (stating, "[t]he trial court *may appoint*

standby counsel even over the defendant's objection."); *State v. Vincent*, 137 N.M. 462, 476, 2005 NMCA 064, 112 P.3d 1119 (N.M. Ct. App.) (recognizing that "there is no federal constitutional right to standby counsel"); *People v. Smith*, 249 Ill.App.3d 460, 470, 189 Ill.Dec. 98, 619 N.E.2d 799 (Ill. App. Ct. 1993) (stating "[a] trial judge has discretion to appoint standby counsel for a *pro se* defendant."); *see also State v. Silva*, 107 Wash. App. 605, 626-627 (Wash. Ct. App. 2001); *People v. Pecoraro*, 175 Ill. 2d 294, 333 (1997); *People v. Redd*, 173 Ill. 2d 1, 39 (1996); *People v. Dennany*, 445 Mich. 412, 440-442 (1994).

Here, even though Defendant did not specifically ask for or object to the assistance of stand-by counsel, it is apparent in the record that Defendant's stand-by counsel was present and available to Defendant during the *entire* suppression hearing. (Trial Tr., at 195-253.) In fact, Defendant conferred with counsel before and immediately following the suppression hearing. (Trial Tr., at 218, 251-253.) *See Hundley*, supra at ¶ 100.

Therefore, the Supreme Court of Ohio properly concluded that Defendant's Sixth Amendment right to counsel was not violated, because a criminal defendant does not have a state or federal constitutional right to the assistance of stand-by counsel. *See Hundley*, supra at ¶¶ 98-101.

III. The Trial Court's Comment was Not Factious, and Defendant's Death Sentence was Not Based on Any Improper Considerations by the Trial Court.

As for Defendant's third question presented, he contends that the trial court's facetious remarks made during the mitigation phase violated his right to due process. To the contrary, the trial court's statement was not facetious, and he did not establish that the court enhanced his sentence based on any improper considerations. Therefore, the trial court's comment in this case did not deprive Defendant of his right to due process.

In *Townsend v. Burke*, this Court "recognized that even a sentence within the limits of a state's sentencing laws may violate due process if the sentencing proceedings are fundamentally unfair." *State v. Arnett*, 88 Ohio St.3d 208, 217, 2000 Ohio 302, 724 N.E.2d 793, citing *Townsend v. Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255, 92 L. Ed. 1690, 1693 (1948).

In *Townsend*, the state court addressed the offender at sentencing and recounted his criminal record: "1937, receiving stolen goods, a saxophone. What did you want with a saxophone? Didn't hope to play in the prison band then, did you?" *Arnett*, 88 Ohio St.3d at 218, quoting *Townsend*, 334 U.S. at 740. The state court, however, was inaccurate in his statement because the receiving stolen property offense had been dismissed, and "[t]he record also revealed other blatant inaccuracies in the judge's concluding comments." *Id.*

This Court concluded "that the petitioner's sentence was 'inconsistent with due process,' because it lacked an essential requirement of 'fair play,' since the court sentenced the petitioner 'on the basis of assumptions concerning his criminal record which were ***materially untrue***.'" (Emphasis added.) *Arnett*, 88 Ohio St.3d at 218, quoting *Townsend*, 334 U.S. at 741. "The Townsend court carefully narrowed the scope of the fairness standard that it applied, saying, 'It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a ***foundation so extensively and materially false***, which the prisoner had no opportunity to correct * * *, that renders the proceedings lacking in due process.'" (Emphasis added.) *Id.*

For example, "[s]ince *Townsend*, several federal circuit courts have recognized that reviewing courts may vacate sentences as violative of due process when the sentencing judge's comments reveal that the court imposed or ***enhanced the offender's sentence because of improper considerations*** such as the offender's race or national origin, false or unreliable information, or parochialism." (Emphasis added.) (Internal citations omitted.) *Arnett*, 88 Ohio St.3d at 218.

Here, Defendant contends that the trial court's comment in regards to his self-representation violated his right to due process:

> **DEFENDANT**: It's my constitutional right. I would like to represent myself for the second phase.

THE COURT: That's fine. You know what, I will.

DEFENDANT: Thank you.

THE COURT: And when you get convicted of death, I don't want to hear about it.

DEFENDANT: Thank you.

(Trial Tr., at 2039.)

Here, the trial court candidly indicated to Defendant that waiving his right to counsel during the mitigation phase would likely lead to a death sentence, while on the other hand, having the assistance of highly experienced counsel was his best option to avoid a death sentence. In fact, Defense counsel agreed with the trial court:

> Well, Your Honor, it's a quandary in this regard; I have no question that ***Lance Hundley is competent***, and I lay that predicate out. I know the court has examined that before I arrived, and I in good conscience as an officer of the court can't say anything other than he is competent. That means he has the right to choose, even if it's going to hurt him. Justice Scalia said that in one of the main cases in this area * * * although ***I would here in open court vigorously advice you not to represent yourself. I think that is the path of death***. I would counsel against it -- however, the right of self-representation is primary.

(Emphasis added.) (Trial Tr., at 2042-2043.)

Therefore, the Supreme Court of Ohio properly concluded that the trial court's comment in this case did not deprive Defendant of his right to due process, because "[t]here is nothing in the record that indicates any sense of facetiousness, * * *." *State v. Buggs*, 7th Dist. Mahoning No. 06 MA 28, 2007 Ohio 3148, ¶ 14; *see Hundley*, supra at ¶¶ 111-114.

IV. The Trial Court's Instruction to Continue Deliberating Did Not Deprive Defendant of His Right to Due Process, Because the Jury was Not "Irreconcilably Deadlocked."

As for Defendant's fourth question presented, he contends that the trial court improperly instructed the jury to continue deliberating after the jury became "irreconcilably deadlocked." To the contrary, the trial court did not abuse its discretion in finding that the jury was not irreconcilably deadlocked. Therefore, Defendant's right to due process was not violated.

A. THE COURT'S INSTRUCTION TO CONTINUE DELIBERATELY DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO DUE PROCESS.

Here, Defendant contends that the trial court improperly instructed the jury to continue deliberating after the jury became "irreconcilably deadlocked." Defendant argues that the trial court should have instructed the jury to deliberate only towards reaching a unanimous verdict on one of the three *life* sentences.

"Whether a jury is irreconcilably deadlocked is a 'necessarily discretionary determination' for the trial court to make." *State v. Gapen*, 104 Ohio St.3d 358, 378, 2004 Ohio 6548, 819 N.E.2d 1047, quoting *State v. Brown*, 100 Ohio St. 3d 51, 2003 Ohio 5059, 796 N.E.2d 506, ¶ 37, quoting *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717, fn. 28 (1978). "There is no 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 jury. In making such a determination, the court must

evaluate each case based on its own particular circumstances." *Gapen*, 104 Ohio St.3d 378-379, citing *State v. Mason*, 82 Ohio St.3d 144, 167, 1998 Ohio 370, 694 N.E.2d 932 (1998).

Here, the trial court instructed the jury to continue deliberating after the jury indicated that it was "at a standstill." (Trial Tr., at 2101.) The trial court's instruction came after the jury had been deliberating ***less than 5 hours*** (taking their breaks into consideration). Further, there is no evidence that the trial court's instruction coerced the jury into returning a death sentence; the jury was free to return a life or death sentence.

This case is distinguishable from *Springer*: "[t]he jury queried the judge several more times, again indicating that it was struggling against a stalemate. The jury then informed the court on the *third day* of deliberations that it was hopelessly deadlocked and could not unanimously recommend any sentence, and it was discharged." (Emphasis added.) *Gapen*, 104 Ohio St.3d 379-380, citing *State v. Springer*, 63 Ohio St.3d 167, 168-169, 586 N.E.2d 96 (1992); *see also Brown*, supra (finding the jury was not irreconcilably deadlocked after 3 days deliberations); *Mason*, 82 Ohio St.3d at 167 (finding the jury was not irreconcilably deadlocked after four and one-half hours of deliberations).

Therefore, the Supreme Court of Ohio properly concluded that the trial court's instruction to continue deliberating was proper. *See Hundley*, supra at ¶ 115-119.

V. Defendant was Afforded His Right to Due Process, Because the Trial Court is Not Required to Give the Jury an Instruction to Consider "Mercy" During its Penalty-Phase Deliberations.

As for Defendant's fifth question presented, he contends that the trial court's refusal to allow the jury to consider "mercy" during its penalty-phase deliberations violated his Sixth, Eighth, and Fourteenth Amendment rights. The Supreme Court of Ohio, however, has long held that the failure to give the jury a limited instruction on "mercy" is consistent with the Eighth Amendment, because it "would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner." *State v. Lorraine*, 66 Ohio St.3d 414, 417, 613 N.E.2d 212 (1993), citing *California v. Brown*, 479 U.S. 538, 541 (1987), *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Furman v. Georgia*, 408 U.S. 238 (1972). Therefore the trial court did not abuse its discretion when it refused to instruct the jury to consider "mercy" during its penalty-phase deliberations.

This Court's Eighth Amendment jurisprudence establishes two separate prerequisites to a valid death sentence. "First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *Brown*, 479 U.S. at 541, citing *Gregg*, 428 U.S. at 153, and *Furman*, 408 U.S. at 238.

"Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his 'character or record and any of the circumstances of the offense.'" *Brown*, 479 U.S. at 541, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954 (1978). "Consideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death.'" *Brown*, 479 U.S. at 541, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

In *Brown*, the jury was instructed not to be persuaded by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Brown*, 479 U.S. at 542. The U.S. Supreme Court concluded that the instruction was proper. *See id*. at 543. Prior to *Brown*, this Court held that "[t]he instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies." *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264, paragraph three of the syllabus (1984).

In *Brown*, this Court reasoned that the instruction was consistent with the Eighth Amendment's need for reliability, and provides a safeguard to ensure that reliability is present in the sentencing process:

> An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson,* 428 U.S., at 305, 96 S.Ct., at 2991. Indeed, by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process. *See Roberts v. Louisiana*, 428 U.S. 325, 335, and n. 11, 96 S.Ct. 3001, 3007, and n. 11, 49 L.Ed.2d 974 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

Brown, 479 U.S. at 543.

Subsequently, the Supreme Court of Ohio likened this Court's analysis of "sympathy" in *Brown* to that of "mercy." *Lorraine*, 66 Ohio St.3d at 417. "Mercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors." *State v. Clark*, 8th Dist. Cuyahoga No. 89371, 2008 Ohio 1404, ¶ 57, quoting *Lorraine*, 66 Ohio St.3d at 418. This Court previously found "[m]ercy is not a mitigating factor." *State v. O'Neal*, 87 Ohio St.3d 402, 416, 2000 Ohio 449, 721 N.E.2d 73.

"Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary,

capricious or unpredictable manner." *Lorraine*, 66 Ohio St.3d at 417, citing *Brown*, 479 U.S. at 541, *Gregg*, 428 U.S. at 153, and *Furman*, 408 U.S. at 238. And "[t]he arbitrary result which may occur from a jury's consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio." *Lorraine*, 66 Ohio St.3d at 417.

And specific to Defendant's argument here, neither *Kansas v. Marsh*, 548 U.S. 163, 176, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), nor *Penry v. Lynaugh*, 492 U.S. 302, 326, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), "holds that a trial court must consider mercy as a mitigating factor in capital proceedings." *State v. Jackson*, 141 Ohio St.3d 171, 216, 2014 Ohio 3707, 23 N.E.3d 1023.

Therefore, it cannot be said that the trial court erred by refusing Defendant's request to include an instruction on "mercy." *See State v. Tench*, 156 Ohio St.3d 85, 2018 Ohio 5205, 123 N.E.3d 955, ¶ 253, citing *State v. Wilks*, 154 Ohio St.3d 359, 2018 Ohio 1562, 114 N.E.3d 1092, ¶¶ 179, 224.

The Supreme Court of Ohio's decision is consistent with both the U.S. and Ohio Constitutions, and the trial court's instructions to the jury were precisely what due process commands. *See Hundley*, supra at ¶ 120-123; *State v. Davis*, 116 Ohio St.3d 404 (2008); *State v. Carter*, 89 Ohio St.3d 593 (2000).

VI. Ohio's Capital Sentencing Statutes Satisfy the Sixth Amendment's Requirement that the Jury, not the Judge, Finds Each Fact Necessary to Impose a Death Sentence.

As for Defendant's sixth question presented, he contends that Ohio's capital sentencing statutes are unconstitutional pursuant to this Court's decision in *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), in which this Court found that Florida's capital-sentencing scheme violated a defendant's Sixth Amendment right to a jury trial. To the contrary, Florida's law required the judge, rather than the jury, to make the factual determinations necessary to support a death sentence, while Ohio's capital sentencing statutes require the jury to find a defendant death-penalty eligible. Therefore, Ohio's capital sentencing statutes are constitutional pursuant to *Hurst v. Florida*.

In 2000, this Court held that "the Sixth Amendment does not permit a defendant to be 'expose[d] * * * to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" (Emphasis sic.) *State v. Davis*, 116 Ohio St.3d 404, 2008 Ohio 2, 880 N.E.2d 31, ¶ 189, quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Apprendi*, this Court concluded that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

Two years later, this Court applied *Apprendi* to invalidate Arizona's capital-sentencing scheme. *See Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Under Arizona's former capital-sentencing scheme, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." *Ring*, 536 U.S. at 588. The Court found this system unconstitutional, because the aggravating factors operated as "the functional equivalent of an element of a greater offense." *Id.* at 609, quoting *Apprendi*, 530 U.S. at 494, fn. 19. This Court explained that the jury must make the finding in relation to the aggravating circumstance, because the existence of the aggravating circumstance made a defendant eligible for the death penalty. *See id.*

In *Hurst v. Florida*, the Florida statute limited the jury's role by only allowing the jury to make an advisory recommendation, as the trial court was free to impose a death sentence even if the jury recommended a life sentence. *See Hurst*, 136 S.Ct. at 620. Similar to Arizona's statutes at issue in *Ring*, if a jury did recommend a death sentence, the trial court had to find the existence of an aggravating circumstance rather than the jury. *See id.* at 620-622. Thus, this Court held that Florida's capital-sentencing scheme, like the Arizona law in *Ring*, violated the defendant's Sixth Amendment right to a

jury, because "Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *See Hurst*, 136 S.Ct. at 622.

The Supreme Court of Ohio previously compared Ohio's capital-sentencing scheme to *Ring* and *Hurst*, and concluded that Ohio's capital-sentencing scheme did not violate a defendant's Sixth Amendment right to a jury trial, like *Ring* and *Hurst*. *See State v. Belton*, 149 Ohio St.3d 165, 2016 Ohio 1581, 74 N.E.3d 319, ¶¶ 59-60.

Subsequently in *State v. Mason*, the Supreme Court of Ohio again found that Ohio's capital sentencing statutes satisfy the Sixth Amendment's requirement that a jury, not a judge, find each fact necessary to impose a death sentence. *See State v. Mason*, 153 Ohio St.3d 476, 481, 2018 Ohio 1462, 108 N.E.3d 56, *cert. denied*, *Mason v. Ohio*, __ U.S. __, 139 S.Ct. 456, 202 L.Ed.2d 351 (2018).

The Supreme Court of Ohio recognized that "[w]hen an Ohio capital defendant elects to be tried by a jury, the jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and—unlike the juries in *Ring* and *Hurst*—the aggravating-circumstance specifications for which the offender was indicted." *Mason*, 153 Ohio St.3d at 481, citing R.C. 2929.03(B). Then, unlike *Ring* and *Hurst*, the jury may only recommend a death sentence *after* it "unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." *Mason*, 153 Ohio St.3d at 481,

citing R.C. 2929.03(D)(2). "And ***without that recommendation*** by the jury, the ***trial court may not impose*** the death sentence." (Emphasis added.) *Mason*, 153 Ohio St.3d at 482.

Thus, this Court recognized that Ohio's capital sentencing statutes require the jury to make the critical findings that were lacking in both *Ring* and *Hurst*. *See Mason*, 153 Ohio St.3d at 482.

Here, the Sixth Amendment was satisfied once the jury found Defendant guilty of aggravated murder *and* the offense involved the purposeful killing of or attempt to kill two or more persons. *See id.* at 484.

Therefore, "Ohio's death-penalty scheme does not violate a defendant's right to a trial by jury as guaranteed by the Sixth Amendment." *Mason*, 153 Ohio St.3d at 488; *accord Hundley*, supra at ¶ 125, quoting *McKinney v. Arizona*, ___U.S.___, 140 S.Ct. 702, 206 L.Ed.2d 69 (2020); *see also Tench*, supra at ¶ 279; *Wilks*, supra at ¶ 228.

VII. Ohio's Death Penalty is Constitutional under Both the U.S. and Ohio Constitutions, and Does Not Otherwise Violate the United States' Obligations under International Law.

As for Defendant's seventh question presented, he contends that Ohio's death penalty is unconstitutional pursuant to state, federal, and international law, "including that they constitute cruel and unusual punishment, violate his rights to due process and equal protection, are arbitrary and vague, burden the right to a jury, prevent adequate appellate review, and violate international law and treaties." *Hundley*, supra at ¶ 124. The Supreme Court of Ohio has consistently rejected each of these arguments. *Id.* at ¶ 124.

In the United States, capital punishment has been a facet of the law since the birth of this country. *See* Fifth Amendment to the U.S. Constitution. Over time, the death penalty has been refined and even halted, but never found per se unconstitutional. *See State v. Phillips*, 74 Ohio St.3d 72, 103, 1995 Ohio 171, 656 N.E.2d 643, citing *Lorraine*, 66 Ohio St.3d at 426, *State v. Henderson*, 39 Ohio St.3d 24, 528 N.E.2d 1237 (1988), and *Jenkins*, supra, *cert. denied*, *Jenkins v. Ohio*, 472 U.S. 1032 (1985).

Therefore, Defendant's death sentence must stand, because Ohio's death-penalty statutes are constitutional pursuant to state, federal, and international law, and Ohio's capital punishment scheme ensures that the death penalty is not imposed in an arbitrary or discriminatory manner. *See Wilks*, supra at ¶¶ 227-228.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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