No. _____

In the Supreme Court of the United States

_____

DUANE SHORT,
Petitioner,

v.

STATE OF OHIO,
Respondent.

_____

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

PETITION FOR WRIT OF CERTIORARI

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Capital Case

QUESTION PRESENTED

The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose death, meaning a mere recommendation as to sentence is not enough. *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016). Because the jury's role in capital cases is so important, the law requires that the trial court not diminish the jury's sense of responsibility in making such an awesome decision. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

Starting with voir dire in Duane Short's capital trial, the jurors were told that the sentence they were determining was only a recommendation. Tr. 357-58, 375-76. This error extends beyond *Caldwell* as both Ohio and federal courts have since continued to evolve their jurisprudence to align with the evolving standards of decency required by the Constitution. The evolving standards of decency required by the Eighth Amendment are in line with a reading of *Hurst* and *Caldwell* together to conclude that the practice of using language to diminish the seriousness of the jury's verdict, by reminding them that their verdict is only a recommendation, is unconstitutional.

This Court should accept jurisdiction in this case and answer the following question:

> Is Ohio's capital sentencing scheme, which permits telling the jury that their decision is only a mere recommendation, unconstitutional under *Hurst v. Florida*?

LIST OF PARTIES

There are no parties to the proceeding other than those listed in the caption. Pursuant to Rule 29.6, Petitioner states that no parties are corporations. Duane Short is the Petitioner; the State of Ohio is the Respondent.

LIST OF RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Montgomery County Common Pleas Court decision sentencing Short to death: *State of Ohio v. Duane Short*, Case No. 2004 CR 02635, Sentencing Opinion (June 7, 2006).

2. Ohio Supreme Court decision affirming conviction and sentence: *State v. Short*, 129 Ohio St.3d 360, 952 N.E.2d 1121, 2011 Ohio LEXIS 1848 (July 28, 2011).

3. Ohio Supreme Court decision denying application to reopen appeal: *State v. Short*, 134 Ohio St.3d 1482, 984 N.E.2d 27, 2013 Ohio LEXIS 669 (March 13, 2013).

4. Montgomery County Common Pleas Court decision sustaining Respondent's motion for summary judgment and overruling Petitioner's postconviction petition: *State of Ohio v. Duane Short*, Case No. 2004 CR 02635, Sentencing Opinion (December 6, 2016).

5. Intermediate Court of Appeals decision affirming the trial court's decision sustaining respondent's motion for summary judgment and denying Short's post-conviction petition and amendments: *State v. Short*, 2nd Dist. Montgomery No. 01CA0078454, 2018-Ohio-2429, 2018 Ohio App. LEXIS 2623, 2018 WL 3090038 (June 22, 2018).

6. Ohio Supreme Court decision declining jurisdiction in discretionary appeal: *State v. Short*, 154 Ohio St. 3d 1430, 2018-Ohio-4670, 2018 LEXIS 2753, 111 N.E.3d 1191.

7. United States Supreme Court decision declining certiorari: *Short v. Ohio*, 2019 U.S. LEXIS 3306, 139 S. Ct. 2013, 204 L. Ed. 2d 221, 87 U.S.L.W. 3439, 2019 WL 861358.

8. Montgomery County Common Pleas Court decision finding the Court lacks Jurisdiction to Consider Defendant's Untimely Motion for New Mitigation Trial and, in the Alternative, Overruling Defendant's Motion for New Mitigation Trial: *State of Ohio v. Duane Short*, Case No. 2004 CR 02635, Decision, Order, and Judgment Entry (December 30, 2019).

9. Intermediate Court of Appeals decision affirming trial court's ruling as to *Hurst*: *State v. Short*, 2nd Dist. Montgomery No. 28696, 2020-Ohio-5034, 2020 Ohio App. LEXIS 3871, 2020 WL 6255261(October 23, 2020).

10. Ohio Supreme Court decision declining jurisdiction in discretionary appeal: *State v. Short*, 161 Ohio St.3d 1451, 2021-Ohio-534, 163 N.E.3d 590 (March 2, 2021).

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No. _____

In the Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI

Based on the new rule announced in *Hurst v. Florida*, 577 U.S. 92 (2016) , Duane Short respectfully asks that a writ of certiorari issue to review the denial of his motion for new mitigation trial and an order to remand to the trial court for a new sentencing hearing.

OPINIONS BELOW

The Supreme Court of Ohio's announcement declining jurisdiction, *State of Ohio v. Duane Short*, Ohio Supreme Court Entry in Case No. 2020-1476, Announcement at 2021-Ohio-534 (March 2, 2021), is attached as Appendix A. The Second District Court of Appeals Decision and Judgment denying relief, *State of Ohio v. Duane Short*, Case No. CA 28696, Decision and Judgment (October 23, 2020) is

attached as Appendix B. The trial court's order denying Short a new mitigation trial, *State of Ohio v. Duane Short*, Case No. 2004 CR 02635, Montgomery County Common Pleas Court, Decision, Order, and Entry Finding the Court Lacks Jurisdiction to Consider Defendant's Untimely Motion for New Mitigation Trial and, in the Alternative, Overruling Defendant's Motion for New Mitigation Trial (December 30, 2019) is attached as Appendix C.

JURISDICTION

On March 2, 2021, the Supreme Court of Ohio declined jurisdiction to hear Short's appeal to that Court. *State v. Short,* 161 Ohio St.3d 1451, 2021-Ohio-534, 163 N.E.3d 590. *See* Appendix, A-1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

A. Sixth Amendment, which provides in pertinent part:

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

B. Eighth Amendment, which provides, in pertinent part:

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

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

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Ohio statutory provisions that are relevant to this petition and were in effect at the time of Short's trial, Ohio Rev. Code Ann. § 2929.03 (1997), are reprinted in Appendix E.

STATEMENT OF THE CASE AND RELEVANT FACTS

On July 22, 2004, Duane Short was arrested for, and later charged with, causing the deaths of Rhonda Short and Donnie Sweeney. The State also indicted Short on charges of breaking and entering, aggravated burglary, and unlawful possession of a dangerous ordinance, all stemming from the homicides at 5035 Pepper Drive in Huber Heights, Ohio.

Voir dire began in Short's case on April 17, 2006. During voir dire, both the trial court and counsel questioned the prospective jurors as to their ability to serve on the jury. Specifically, both the court and counsel focused on the prospective jurors' ability to consider the possible sentences, including a sentence of death. Defense counsel asked the jurors:

> Okay. We talked about in the second phase mitigating factors and aggravating circumstances. If one outweighs the other, you have a certain result. If the aggravating circumstances outweigh the mitigating factors, then your ***recommendations*** of death would be a possibility.
>
> If the mitigating factors outweigh the aggravating circumstances, then it is not a possibility.
>
> Does everybody understand?

Tr. 357-58 (emphasis added). The court further explained to the jurors:

> The question in the second phase of the trial if that phase is necessary, is whether or not the aggravating circumstances outweigh the mitigating – mitigating factors beyond a reasonable doubt. If the jury in the case determines that – just a minute, ladies, and gentlemen – the aggravating circumstances do not outweigh the mitigating factors, then the jury is prohibited from imposing the death penalty.
>
> In such case, the jury would have to make a choice among several life sentence options, which I will discuss with you later. If you decide that the aggravating circumstances do outweigh the mitigating factors beyond a reasonable doubt, you may then impose the death penalty. ***At that point before the sentence is actually ordered, the Court must independently determine if the imposition of the death penalty is supported by proof beyond a reasonable doubt.***

Tr. 375-76 (emphasis added).

After multiple days of voir dire, on April 26, 2006, the trial court empaneled and swore in a jury, and Short's case proceeded to trial the following day. The State presented thirty-two (32) witnesses at the trial phase. Defense counsel called one witness on Short's behalf. On May 4, 2006, the jury retired for deliberations. The next day, the jury returned a verdict finding Short guilty on all counts and specifications.

The sentencing phase began on May 8, 2006. Despite Short's jurors stating during voir dire that they would consider mitigation, defense counsel provided them with nothing regarding Short's character, history, and background that would have been entitled to weight and effect. Short's counsel mistakenly told Short that "the best route to take" was to waive the presentation of mitigation to a jury. Tr. 2548. Without any mitigation to weigh and consider, the jury deliberated quickly and on May 9, 2006, recommended that Short be sentenced to death.

Following the jury's death recommendation, defense counsel moved for a sentencing hearing pursuant to § 2929.19(A)(1). Tr. 2544. Short's counsel then sought to introduce mitigating evidence to the trial court, since under Ohio law, a jury's verdict of death is a recommendation that can only be imposed by a judge. Tr. 2547. The trial court refused to allow additional testimony. Tr. 2556-2558, 2580.

On May 30, 2006, the trial court filed its § 2929.03(F) sentencing opinion correctly articulating its role following the jurors' recommendation:

> The court must now conduct its own independent review of the evidence and determination of whether the aggravating circumstances outweigh the mitigating evidence beyond a reasonable doubt, pursuant to O.R.C. §2929.03. The court is required to weigh the two aggravating circumstances for which the Defendant was found guilty against any mitigating factors the court may find in its independent search of the entire record.

State v. Short, Case No. 2004 CR 02635, Montgomery County Common Pleas Court, Opinion of Trial Judge, Filed May 6, 2006, p. 7, attached hereto as Appendix D. *See* Appendix A-21. The court detailed its individual findings of fact as to what mitigating factors were present in Short's case and what weight it attributed to them compared to the aggravating circumstances. *Id.* at A-21–28. In its sentencing opinion, the court stated that, "there is very little evidence in the record regarding the history, character and background of the defendant." *Id.* at A-22. Ultimately, the trial court "reviewed the entire record for evidence of mitigation" but found that "the mitigating factors pale in significance when considering the aggravating circumstances." *Id.* at A-22, A-28. The court agreed with the jury's recommendation and sentenced Short to death.

Following his conviction, on January 12, 2016, this Court announced its decision in *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016). On January 10, 2017, premised on the decision in *Hurst*, Short filed a Motion for Leave to file a Motion for a New Mitigation Trial pursuant to Criminal Rule 33 on the following grounds:

> (1) There was irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial in the penalty phase of this case [Crim. R. 33(A)(1)];
>
> (2) The verdict of a death sentence in this case is not sustained by sufficient evidence or is contrary to law because the death sentence was imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016) [Crim. R. 33(A)(4)]; and
>
> (3) The death sentence in this case is the result of an error of law in as much as it was imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016) [Crim. R. 33(A)(5)].

See Defendant Duane Short's Motion for Leave to File a Motion for a New Mitigation Trial Pursuant to Criminal Rule 33 and *Hurst v. Florida* and To Deem the Attached Motion Filed Instanter, filed January 10, 2017. The State opposed the motion on February 3, 2017. Short timely replied on February 10, 2017.

On December 30, 2019, the trial court ruled that since Short did not independently re-file his motion for new trial, "there is no timely motion for a new mitigation trial before this court, and the court lacks jurisdiction to consider an untimely motion for a new mitigation trial" and also overruled his Motion for New Mitigation Trial on the merits, holding that "Short has failed to provide support as

required by law for his motion for a new mitigation trial." *State v. Short*, Case No. 2004 CR 02635, Montgomery County Common Pleas Court, Decision, Order, and Entry Finding the Court Lacks Jurisdiction to Consider Defendant's Untimely Motion for New Mitigation Trial and, in the Alternative, Overruling Defendant's Motion for New Mitigation Trial, Filed December 30, 2019. *See* Appendix A-10.

On appeal, on October 23, 2020, the Second District Court of Appeals reversed the trial court's decision where it "concluded that it lacked jurisdiction" to consider the merits of Short's motion. *State v. Short*, 2nd Dist. No. CA 28696, 2020-Ohio-5034, ¶1. *See* Appendix A-22, A-26-27. Upon considering the merits, that court affirmed the trial court's determination that "Short is not entitled to a new mitigation trial under the authority of *Hurst v. Florida*, 577 U.S. 92 136 S.Ct. 616, 193 L.Ed.2d 504 (2016)." Appendix A-3; *see also* Appendix A-8.

Short sought discretionary review in the Ohio Supreme Court by filing a Notice of Appeal and Memorandum in Support of Jurisdiction on December 7, 2020. The Ohio Supreme Court declined jurisdiction on March 2, 2021. *See* Appendix, A-1. Short now timely files this petition for writ of certiorari within 150 days of the date the Ohio Supreme Court declined jurisdiction. *See* Order List: 589 U.S. March 19, 2020, Order.

REASON FOR GRANTING THE WRIT

The State of Ohio's death penalty scheme violates a defendant's right to a jury trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and runs contrary to this Court's decision in *Hurst v. Florida*.

Hurst held without qualification that "[t]he Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence*

of death. A jury's mere recommendation is not enough." 577 U.S. at 94 (emphasis added). Contrary to this requirement, Ohio's capital sentencing statutes, like Florida's pre-*Hurst* capital sentencing statute, requires the judge alone to make specific factual findings that the aggravating circumstances are sufficient to warrant a death sentence. R.C. 2929.03 (D)(3).

Ohio's sentencing scheme cannot survive *Hurst*'s broad mandate because a judge is not authorized to impose a sentence of death until the judge alone finds that the aggravating circumstances are sufficient. *Id.* *Hurst* is instructive that advisory jury verdicts are insufficient to support a death sentence. Because a jury's mere recommendation is not enough for imposing a capital sentence, it follows that statements to the jury that diminish their sense of responsibility are unconstitutional. Rather, jurors tasked to decide whether to impose a death sentence must fully understand the gravity of their decision – and neither the Court nor the Prosecutor may diminish the importance of the jury's role. *Caldwell,* 472 U.S. at 328-29.

Additionally, trial judges in Ohio play an unconstitutional "central and singular role" in finding facts necessary to impose a sentence of death, while juries are not required to make any specific factual findings necessary to impose a death sentence. *Hurst*, 577 U.S. at 99. Finally, the Ohio Supreme Court has long recognized that Ohio's capital sentencing statutes are "remarkably similar" to the Florida statutes invalidated by

Hurst and have consistently interpreted Ohio's law to acknowledge that trial judges play this unconstitutional role. *State v. Rogers*, 28 Ohio St.3d 427, 430, 504 N.E.2d 52 (1986), *rev'd on other grounds*, 32 Ohio St.3d 70.

I. Because a jury's mere recommendation is not enough for imposing a capital sentence, statements to the jury that diminish their sense of responsibility are unconstitutional.

"The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst*, 577 U.S. at 94. *Hurst* represents a tectonic shift in capital sentencing in Ohio, recognizing Sixth Amendment protections not previously provided to capital defendants. *Hurst* broadly proclaimed that a jury is required to make specific findings of fact as to the sufficiency of the aggravating circumstances needed to authorize the imposition of a death sentence. The jury's fact-finding duties under the Sixth Amendment do not end at the culpability phase but in fact extend throughout the penalty phase. Thus, a mere recommendation as to the sentence from the jury is not enough to meet this requirement. *Id.*

A trial court violates the Eighth Amendment when it diminishes the jury's sense of personal responsibility for the consequences of its verdict—a verdict that, under Ohio law, is a precondition to any death sentence. *Caldwell*, 472 U.S. at 328-29; R.C. 2929.03(D)(3) (Trial judge may not impose death sentence absent jury recommendation of death in its weighing verdict.). "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to

believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29. Because of the grave position that capital sentencing jurors are put in, "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333.

Caldwell makes clear that the jury must bear the entire burden of the decision whether the defendant lives or dies when the jury reaches its sentencing verdict. *Caldwell*, 472 U.S. at 333. *Hurst* makes clear that a jury recommendation is not enough for death to be imposed. *Hurst*, 577 U.S. at 94. Yet, beginning in voir dire, the trial court was quite specific when it told Short's jurors that the jury's role was merely to recommend whether to impose a death sentence, but that the ultimate decision of whether to impose a death sentence resided solely with the judge. Tr. 357-58, 375-76. Short's jurors were absolved from the weight of sentencing a man to death. While an accurate statement of the law in Ohio before *Hurst*, such instruction diminishes the jury's sense of personal responsibility for its verdict and unfairly influences the jury to return a death verdict.

II. A trial judge in Ohio is not authorized to impose a death sentence until the judge alone finds that the aggravating circumstances are sufficient to warrant the imposition of a death sentence.

Hurst requires a jury, not a judge, to make the critical findings of

fact necessary to impose a death sentence. In evaluating Florida's capital sentencing scheme, this Court identified what those critical fact-findings are, leaving no doubt as to how state statutes must be read under the Sixth Amendment:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such a person shall be punished by death." Fla. Stat. § 775.082(1). The trial court alone must find "the facts…[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst, 577 U.S. at 99-100.

Under Florida's pre-*Hurst* statute, a judge was not authorized to impose a death sentence until she found certain statutorily defined facts *in addition to* the jury's unanimous finding that the defendant was guilty of first-degree murder. *See* Fla. Stat. § 921.141(3) (emphasis added). The additional statutory facts required to authorize a death sentence were that "sufficient aggravating circumstances exist" *and* that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See Id.*; *Hurst*, 577 U.S. at 100. *Hurst* identified the existence of these findings as the operative facts that must be found by the jury before a death sentence can be imposed.

Moreover, this Court rejected the argument that the finding of

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

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

In reaching this decision, this Court also rejected the notion that the jury's mere recommendation as to sentence satisfies the Sixth Amendment's jury finding requirements in capital cases. This is because the Sixth Amendment requires the jury to make specific factual findings authorizing the imposition of a death sentence and not simply issue

recommendations. *Hurst*, 577 U.S. at 100, 102. In Ohio, as in Florida, the jury's recommendation simply triggers the judge to undertake independent fact-finding before she is authorized to impose death. R.C. 2929.03(D)(3).

Despite *Hurst*'s mandate, that is precisely what happened in Short's case. Following the jury's recommendation, the judge, as required by R.C. 2929.03(D)(3), conduct[ed] an independent review of the facts and weigh[ed] the Aggravating Circumstance of Felony Murder against the mitigating factors introduced by the Defendant. *See* Appendix A-21–28. Ultimately, it was the trial judge, not the jury, who imposed Short's sentence of death.

> On May 9, 2006, the jury announced its verdicts and found beyond a reasonable doubt that the aggravating circumstances which the Defendant was found guilty of committing in the aggravated murders as set forth in Counts 2, 4 and 5 outweighed the mitigating factors in this case and they, therefore, *recommended* the Defendant be sentenced to death as to Counts 2, 4 and 5.
>
> …
>
> The jury in Counts 2, 4 and 5 found the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. *The court*, having conducted the same process and …having independently reviewed and weighed the evidence in the record, finds the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, and the sentence of death shall be imposed upon the Defendant.

See Appendix A-21, A-28 (emphasis added).

Ohio cannot "treat the advisory recommendation by the jury as the necessary factual finding" required by the Sixth Amendment. *Hurst*, 577

U.S. at 98-99. *Hurst* makes clear that "[a] jury's mere recommendation [of death] is not enough." *Id.* at 94. Ohio's reliance on this process in general, and as applied to Short, renders its capital sentencing scheme unconstitutional under *Hurst* and the Sixth Amendment.

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

Further invalidating Ohio's capital sentencing statutes is the "central and singular role the judge plays" under Ohio law. *Id.* at 99. In *Hurst*, this Court broadly criticized the Florida scheme because the jury "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances" or as to how those circumstances are weighed. *Id.* This is problematic because it leaves the trial judge without "the assistance of the jury's findings of fact with respect to sentencing issues." *Id.* Ohio's trial judges are similarly left in the dark.

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

Conversely, the statute instructs the judge to make very specific factual findings and to put those findings in writing. After receiving the

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

In making these findings, the trial judge is given no guidance – statutory or otherwise – on how to value the jury's death recommendation. In Florida, the trial judge was required to give the jury recommendation "great weight." *Hurst*, 577 U.S. at 96. Even this deferential "great weight" requirement did not satisfy the Sixth Amendment, because the trial judge's sentencing order reflected "the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Id*. (internal quotations omitted). Similarly, in Ohio, the statute does not give any instructions on how trial judges are to consider the jury's recommendation. Thus, the judge's sentencing order reflects only her "independent judgment" about the existence of mitigating factors and how those factors weigh against the aggravating circumstances found by the jury. *Id*.

Finally, *Hurst* acknowledges that the sufficiency analysis – weighing the aggravating circumstances against the mitigating factors – is fact-finding that the jury must undertake. This Court found that in

Florida, "the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely." *Id.* at 622 (citing *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005)). This Court rejected the central role Florida's statute gave to judges and found it unconstitutional that the "trial court alone must *find the facts*…[t]hat sufficient aggravating circumstances exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Hurst,* 577 U.S. at 100 (emphasis added); *Woldt v. People*, 64 P.3d 256, 265-66 (Colo. 2003) (en banc) (finding that the weighing of aggravating factors against mitigating factors is "fact-finding" that made the defendant death eligible).

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

Again, contrary to the mandates of the Sixth Amendment pronounced in *Hurst*, Short's trial judge unconstitutionally played the prohibited central and singular role in sentencing Short to death. Following the jury's recommendation, the trial judge outlined her role in the sentencing process:

The court must now conduct its own independent review of the

> evidence and determination of whether the aggravating circumstances outweigh the mitigating evidence beyond a reasonable doubt, pursuant to O.R.C. §2929.03. The court is required to weigh the two aggravating circumstances for which the Defendant was found guilty against any mitigating factors the court may find in its independent search of the entire record.

State v. Short, Case No. 2004 CR 02635, Montgomery County Common Pleas Court, Opinion of Trial Judge, Filed May 6, 2006, p. 7. *See* Appendix A-21. The trial court went on to expressly determine its individual findings of fact as to what mitigating factors were present in Short's case and what weight it alone attributed to them compared to the aggravating circumstances. *Id.* at Appendix A-21–28. The court had no way to know what mitigation the jury found or how much weight they gave it. Ultimately, the court alone determined that, "there is very little evidence in the record regarding the history, character and background of the defendant" and "the mitigating factors pale in significance when considering the aggravating circumstances." *Id.* at A-22, A-28. Short's death sentence violates the Sixth Amendment pursuant to *Hurst*. The statutory scheme in Ohio, and as followed by Short's trial judge, is unconstitutional.

CONCLUSION

Duane Short was sentenced to death under a statutory scheme that violates the Sixth and Fourteenth Amendments of the United States Constitution. The trial court sentenced Short to die based on a fatally flawed process that allowed jurors to disavow their personal

responsibility for the death sentence they authorized against a fellow human being. That process violates both the Sixth Amendment right to have jurors determine the facts necessary to impose a death sentence and the Eighth Amendment's evolving standard of decency requirement and runs contrary to this Court's decision in *Hurst*.

For all the foregoing reasons, Petitioner Duane Short respectfully requests that this Court grant this petition for writ of certiorari, vacate the lower court rulings, and remand this matter for a new mitigation hearing before a jury.

Respectfully submitted,

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