

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DONNA ROBERTS,

Petitioner,

V.

THE STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
A Death Penalty Case

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CAPITAL CASE

**STATE OF OHIO'S RESPONSE TO DONNA ROBERTS'S
QUESTION PRESENTED**

- 1) A substitute trial judge is capable of giving effective weight to the contents of a capital defendant's allocution for purposes of mitigation even though that judge may not personally witness the allocution but instead, pursuant to court order, reads the allocution as it appears in the court record.
- 2) This Court's decision in *Hurst v. Florida*, 577 U.S. _____, 136 S.Ct. 616 (2016) does not preclude the assignment of a substitute judge for any phase of a capital murder trial.

**LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE
29.6 STATEMENT**

The Respondent, State of Ohio ("State of Ohio"), points out that while Trumbull County Prosecuting Attorney Dennis Watkins remains counsel of record in this case, Assistant Prosecuting Attorney Christopher Becker replaces Assistant Prosecuting Attorney LuWayne Annos for purposes of this Petition. Respondent agrees that none of these parties have a corporate interest in the outcome of this case.

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A CAPITAL CASE

OPINIONS BELOW

Petitioner correctly lists and attaches three decisions entered by the Ohio Supreme Court. The most recent opinion affirmed her death sentence for the aggravated murder of Robert Fingerhut, Petitioner's ex-husband with whom she lived. The other two opinions remanded her death sentence to the trial court, the Trumbull County Court of Common Pleas, for resentencing only. As is clear from the three Ohio Supreme Court opinions, her conviction has never been at issue and her guilt was established by overwhelming evidence. *State v. Roberts*, 110 Ohio St. 3d 71, 2006-Ohio-3665, 850 N.E. 2d 1168 ("*Roberts I*"). *State v. Roberts*, 150 Ohio St.3d 47, 2017-Ohio-2998, 78 N.E.3d 851, ¶113 (2017), *reconsideration denied*, 150 Ohio St.3d 1411, 2017-Ohio-6964, 78 N.E.3d 910. ("*Roberts III*").

JURISDICTION

The State of Ohio does not take exception to the jurisdictional synopsis presented by the Petitioner at page 1 of her petition.

CONSTITUTIONAL PROVISIONS

The State of Ohio disagrees that Petitioner's case presents any U.S. Constitutional questions worthy of review. Petitioner seeks to argue to this Court that because the trial judge who participated in the original and first re-sentencing in her case left the bench and died shortly thereafter, she suffers an Eighth Amendment violation because a substitute judge –for the third time – sentenced her to death. Petitioner has no authority from this Court or any other to support

this argument. The Ohio Supreme Court flatly rejected Petitioner's argument of an Eighth Amendment violation.

The late Trumbull County Common Pleas Judge John Stuard ("Judge Stuard") presided over Petitioner's capital murder trial and sentencing in 2003. He also presided over a court-ordered resentencing in 2007. Judge Stuard retired from the bench and passed away in 2013 before the Ohio Supreme Court ordered her third sentencing hearing. Judge Ronald Rice ("Judge Rice") replaced Judge Stuard. "[T]he retirement and death of the original trial judge and the substitution of Judge Rice did not deny Roberts the ability to present mitigating evidence or to have it considered by the sentencer. Her claim to the contrary is not supported by the *Lockett* [v. *Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978)] line of cases she cites, and both [*People v.*] *Lewis* [33 Cal.4th 214, 14 Cal. Rptr 3d 566, 91 P 3d 928 (2004)] and [*People v.*] *Espinoza* 3 Cal. 4th 806, 12 Cal. Rptr. 2d 682, 838 P. 2d 204 (1992)], the only cases we have found that address this issue in the capital-sentencing context, reject the notion that a capital defendant may be sentenced to death only by a judge who has personally presided over one or both phases of the trial. We therefore reject this Eighth Amendment argument." *Roberts III*, at ¶ 59.

The State of Ohio also submits that Petitioner has suffered no Fourteenth or Sixth Amendment violations. Petitioner argues that this Court's decision in *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616, 193 L.Ed. 2d 504 (2016), which invalidated Florida's capital sentencing scheme, likewise invalidates Petitioner's Ohio death sentence merely because a substitute judge stepped in for Petitioner's third sentencing hearing. This Court decided *Hurst* after parties briefed Petitioner's case in the Ohio Supreme Court, but before the court conducted oral arguments. Petitioner submitted *Hurst* as additional authority and was permitted to argue her

opinion as to its applicability. The court afforded the State of Ohio the same courtesy, and the State was permitted to offer contra opinion during oral arguments. Ultimately, the Ohio Supreme Court declined to address the Sixth Amendment issue because it was not briefed by either party. “When an appellant’s initial brief fails to mention an argument as a basis for reversing the judgment under review, we need not address that argument in deciding the appeal. *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17–19; *State v. Carter*, 27 Ohio St.2d 135, 139, 272 N.E.2d 119 (1971) (failure to include issue in brief ‘would warrant our refusal to consider it). As we observed in *Quarterman*, ‘justice is far better served when it has the benefit of briefing, arguing, and lower court consideration before making a final determination.’ *Quarterman* at ¶ 19, quoting *Sizemore v. Smith*, 6 Ohio St.3d 330, 333, 453 N.E.2d 632 (1983), fn. 2. Because Roberts failed to brief her Sixth Amendment claim, it is not properly before the court.” *Roberts III*, ¶85.

In her motion for reconsideration, as in this Petition, Petitioner argued that her third sentence of death runs afoul of *Hurst* because Judge Rice on re-sentencing merely read a “cold record” and independently determined what factors were mitigating and what weight should be assigned thereto when placed in the balances against the aggravating circumstances found by her jury. She also argued that because *Hurst* invalidated Florida’s capital sentencing scheme, Ohio’s capital statutes should fall as well. The court below essentially sidestepped that issue due to the tardiness of Petitioner’s argument. “We recognize that the United States Supreme Court decided *Hurst* after the submission of briefs in this case, *but Roberts could have made essentially the same Sixth Amendment argument by relying on Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We therefore decline to address this claim because it has not been presented in a

proposition of law or briefed by the parties, having been raised for the first time during oral argument.” (Emphasis added). *Roberts III*, ¶¶ 84, 85. Petitioner failed to cite to either *Ring* or *Apprendi* in her brief in the Ohio Supreme Court. Petitioner now seeks to use *Hurst* as an entrée to belatedly formulate an issue that was fair game and easily arguable in 2014 when she submitted her initial brief in the Court below.

In short, the State of Ohio submits that *Hurst* does not provide Petitioner a Sixth or Fourteenth Amendment argument worthy of review.

STATEMENT OF THE CASE

The State of Ohio takes few exceptions to the procedural recitation as it appears at pages 2 and 3 of her Petition. Respondent would clarify that when the Ohio Supreme Court remanded the case for a second sentencing hearing, Judge Stuard had in fact referenced Petitioner’s allocution at resentencing, but it was included in the companion sentencing entry rather than included in the findings of fact itself. The Ohio Supreme Court, in a 4-to-3 opinion, ruled the omission of references to the allocution in the findings of fact constituted reversible error:

“Pursuant to our mandate, the trial judge invited Roberts to make a statement in allocution at the hearing on October 22, 2007, and Roberts did. One week later, on October 29, the trial court imposed sentence and filed its sentencing opinion. Before imposing sentence, the trial court heard a brief statement from Roberts’s counsel and asked Roberts if she had anything further to say. *The trial court then stated that it had considered the record and the oral statements.* The sentencing opinion notes that the trial court had been instructed to provide Roberts with the right of allocution before reimposing a sentence. Beyond this, however, the opinion does not discuss Roberts’s allocution.*** When we consider the presence of relevant and potentially significant mitigation in Roberts’s allocution, the utter lack of anything else

offered for the specific purpose of mitigation, and our order specifically calling the matter of allocution to the trial judge's attention, we can hardly conclude that the trial court's failure to mention the allocution in its sentencing opinion was a mere oversight. Given these unusual circumstances, we are justified in drawing the inference that when the trial judge weighed the aggravating circumstances against the mitigating factors, he did not consider Roberts's allocution." (Emphasis added). *State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, 998 N.E.2d 1100, ¶¶52, 64 ("*Roberts II*").

The State of Ohio respectfully disagrees with the Ohio Supreme Court's majority decision in the 2013 case and submits the dissenting opinion correctly analyzed the status of the allocution in the first remand: "****[T]he trial court allowed Roberts to allocute prior to reimposing sentence. And before it imposed the sentence, the court stated that it had considered the record and the oral statements, which included her allocution. In my view, no reasonable inference may be drawn from the failure of the trial court to specifically incorporate the content of the allocution made by Roberts in its sentencing opinion. Obviously, because we remanded for that right to be accorded before sentencing, the trial court listened to Roberts and was aware of what she presented. In this case, then, '[t]here is no showing of irregularity to contradict the presumption of regularity accorded all judicial proceedings.****' (Internal cites omitted). *Id.* at ¶111. Petitioner sought review by this Court of this decision, but this Court denied her petition for writ of certiorari in *Roberts v. Ohio*, 134 S.Ct. 1554 (2014). The State of Ohio does not wish to belabor the facts of a case rejected by this Court almost four years ago, but the record before this Court should be clear: Contrary to the holding of a one-justice majority in *Roberts II*, Judge Stuard did in fact consider Petitioner's 2007 allocution prior to resentencing.

The State of Ohio would also like to address what it views as a major omission from Petitioner's Statement of the Case. Because so much of Petitioner's argument centers on perceived constitutional violations regarding Judge Rice's consideration of her mitigating evidence, the State of Ohio would remind the Court that between the point of her conviction and the commencement of her mitigation hearing afforded under Ohio law, Petitioner made it abundantly clear that she would present *absolutely no mitigation evidence*, and would instead rely upon an unsworn statement to the jury. In an in camera discussion with her counsel, the trial court personally addressed Petitioner and explained the rather obvious pitfalls of such a strategy. *Roberts I*, ¶133 During this in camera hearing, Petitioner's trial counsel summarized for Judge Stuard the type of evidence they had planned to introduce before Petitioner stopped them in their tracks. They also placed in the record that they disagreed with her decision. *Id.*, at ¶134. In an abundance of due caution, Judge Stuard referred Petitioner for a psychological evaluation to determine if she was mentally competent to waive the presentation of mitigation testimony and evidence. The doctor found her decision to abandon any mitigation presentation was "rational." *Id.* at ¶135. The doctor also opined that Petitioner "suffered no psychiatric or psychological abnormality that would prohibit a rational decision regarding presentation of mitigating evidence." *Id.*

The Ohio Supreme Court restated Petitioner's prohibition against the presentation of mitigating evidence in its most recent opinion. "Before the mitigation hearing, Roberts informed her counsel that she did not wish to present any mitigating evidence except an unsworn statement. As a result, the court conducted an *Ashworth* hearing and found her competent to make that decision. See generally *State v. Ashworth*, 85 Ohio St.3d 56, 706 N.E.2d 1231 (1999), paragraph one of the syllabus. At the mitigation hearing, Roberts exercised her right pursuant to

[Ohio Revised Code] 2929.03(D)(1) to make an unsworn statement to the jury and declined to present any other evidence.” *Roberts III*, ¶ 18.

The record reflects Judge Stuard proceeded with a mitigation hearing which essentially consisted of Petitioner delivering a lengthy, unsworn diatribe wherein she insisted that the jurors recommend the death penalty since her co-defendant, Nathaniel Jackson, had been sentenced to death in a separate trial. *Id.* at ¶137. See also, *State v. Jackson*, 107 Ohio St. 3d 300, 2016-Ohio-1, 839 N.E. 2d 362. Her jury obliged. At her sentencing hearing, Judge Stuard inadvertently omitted Petitioner’s opportunity to make a statement in allocution before announcing the death sentence. However, before the hearing adjourned Petitioner made the following statement: “Thank you for your decision [to impose the death penalty]. I was a little worried you might try to find something not to do that. I appreciate what you did. Thank you.” (Roberts Trial T.p. Vol. XXVIII, p. 6374).

This fact was noted by Ohio Supreme Court in the opinion upon which Petitioner seeks review: “Roberts had an opportunity to present mitigating evidence during the penalty phase of her trial, but she elected not to do so. Previously, she had made an unsworn statement and had an opportunity for allocution. Judge Rice reviewed and considered her unsworn statement, her allocution [at resentencing], and the evidence in the trial record before imposing sentence for the third time.” *Roberts III*, at ¶ 54.

The court below revisited Petitioner’s unsworn statement to her jury. *Id.* at ¶¶95-99. The State of Ohio submits the following synopsis by the Ohio Supreme Court is very telling: “Roberts also accused the prosecutor of appealing to racial and religious prejudice and used her statement ‘to demand racial equality.’ She explained that she had refused to present mitigating evidence so that the jury would have no choice but to return a death verdict. Her case and

Jackson's, she argued, differed only in that she is white and he is black. Because Jackson had been sentenced to death, she told the jury, 'the right thing' would be to sentence her to death too." *Id.* at ¶ 99. The Ohio Supreme Court correctly noted in 2013 that "[a]lthough she had given an unsworn statement before the jury, that statement contained no mitigation; indeed, Roberts had used it to insist that a sentence of death be imposed upon her." *Roberts II*, at ¶ 56, citing *Roberts I* at ¶137 & 148.

The Ohio Supreme Court summarized Petitioner's 2007 allocution in its opinion. *Id.* at ¶¶100-113. The court noted that Petitioner never apologized for her role in her Mr. Fingerhut's aggravated murder: "In light of the trial evidence, her claim that she loved Fingerhut lacks credibility. And although she expressed sadness about Fingerhut's murder, she never accepted any responsibility for it; rather, she chose to deny that she had ever made plans with Jackson to kill Fingerhut, notwithstanding overwhelming evidence to the contrary. Finally, the nature and circumstances of the offense offer nothing in mitigation. Motivated at least in part by greed, she assisted Jackson in murdering Fingerhut in his home, which they planned prior to Jackson's release from prison." *Id.* at ¶¶ 113-114.

Though not mentioned in either the 2013 or 2017 Ohio Supreme Court opinions, this Court should be aware that – in addition to expressing absolutely no remorse whatsoever – Petitioner never requested leniency. She never retracted her earlier statements that death was the appropriate sentence. *Id.* at ¶56.

Having provided this Court with these clarifications, the State of Ohio takes no further exceptions to the Statement of the Case as presented by Petitioner.

REASONS FOR DENYING WRIT

Review of A Written Allocution Does Not Compromise Consideration of Allocution

Petitioner correctly states that when she stood before Judge Rice for her *third* sentencing hearing the Ohio Supreme Court had instructed that Petitioner was not entitled to a second allocution. But this restriction does not amount to constitutional error. Quoting this Court's decision in *Saffle v. Parks*, 494 U.S. 484, 490, 110 S.Ct. 1257, 108 L.Ed. 2d 415 (1990), the Ohio Supreme Court recognized that "the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial." *Roberts III* at ¶52.

That did not happen in this case. The "State" did not bar Petitioner from presenting mitigating evidence. She did that herself. Nevertheless, the Ohio Supreme Court in *Roberts II* ordered a second sentencing to permit Petitioner to offer an allocution, in *addition* to the lengthy unsworn statement she made before her jury. Petitioner did so. And while it is true Judge Stuard did not parse out her allocution in his second sentencing entry, Judge Rice offered a painstaking analysis of Petitioner's twenty- page soliloquy offered during her second sentencing which is reflected in his sentencing opinion.

Petitioner cites to this Court's opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978) to support her proposition that pursuant to the Eighth and Fourteenth Amendments, the sentencing judge cannot be precluded from "considering as a mitigating factor, any aspect of the defendant's character or record any of the circumstances of the offense that the defense proffers as a basis for a sentence less than death." *Id.* at 604. However, as the Ohio Supreme Court correctly noted, "[i]n the instant case, the retirement and death of the original trial judge and the substitution of Judge Rice did not deny Roberts the ability to present mitigating evidence or to have it considered by the sentencer. Her claim to the contrary is not supported by the *Lockett* line of

cases she cites***.” *Roberts III*, at ¶59. This is absolutely correct. The court below went on for *fourteen* paragraphs discussing excerpts from Petitioner’s 2007 allocution which were possible fodder for the mitigation, but which Petitioner opted to skip in 2003. *Roberts III*, at ¶¶100-114.

The State of Ohio at this juncture would point out that Petitioner complains that because Judge Rice, “never heard any witness testify, he could not have accurately determined their credibility.” Petition at p. 5. As a reminder, pursuant to Petitioner’s prohibitions, no witnesses testified at her mitigation hearing. Therefore, there is no credibility to judge here. Moreover, the State of Ohio had absolutely no opportunity to rebut any of the statements Petitioner made during her allocution, and for the most part, it appears both Judge Rice and the Ohio Supreme Court accepted her statements as a truthful recitation of her life story as she chose to tell it.

One exception to this general acceptance of Petitioner’s veracity is reflected in the record. Both Judge Rice and the Ohio Supreme Court made note of the fact that Petitioner admitted in open court that she lied when she claimed Mr. Fingerhut abused her in order to persuade the triggerman, Nathaniel Jackson, to kill Mr. Fingerhut. “In her unsworn statement and in her allocution, Roberts asserted that she and Fingerhut had a good relationship and loved each other deeply. The trial court reasonably viewed these statements to be inconsistent with the relationship she had maintained with Jackson, her conspiracy with him to murder Fingerhut, her pecuniary motive for that murder, and her feigned emotional outbursts during police interviews. The sentencing opinion properly referred to these facts to refute her claims.” *Roberts III*, at ¶ 82.

While there may be little, if any, federal law available to address the issue as to whether a substitute judge must personally witness a defendant deliver an allocution, the court below cited two California cases, *People v. Espinoza*, 3 Cal.4th 806, 12 Cal.Rptr.2d 682, 838 P.2d 204

(1992), and *People v. Lewis*, 33 Cal.4th 214, 14 Cal.Rptr.3d 566, 91 P.3d 928 (2004), in reaching its decision that Judge Rice did not need to personally observe Petitioner's allocution.

"In both cases, the defendants argued that because the substitute judge had not personally heard all the evidence, he could not properly impose a death sentence. And in both cases, the court rejected that argument. *Espinoza* at 830, 12 Cal.Rptr.2d 682, 838 P.2d 204; *Lewis* at 226, 14 Cal.Rptr.3d 566, 91 P.3d 928. The court in *Lewis* explained: '[W]hen the original trial judge is unavailable, necessity requires the replacement judge to evaluate the credibility of the witnesses as best he or she can from the written record. We find no constitutional obligation to provide more.'** both *Lewis* and *Espinoza*, the only cases we have found that address this issue in the capital-sentencing context, reject the notion that a capital defendant may be sentenced to death only by a judge who has personally presided over one or both phases of the trial. We therefore reject this Eighth Amendment argument." *Roberts III*, at ¶¶58,59.

Though not referenced in the Petition, the State of Ohio would point out that Ohio Crim. R. 25(B) provides for the designation of a substitute judge after a verdict or finding of guilt if the trial judge is unable to perform the duties of the court. *Roberts, III*, at ¶38. The court below found such substitution "entirely proper." "[Ohio] Crim.R. 25(B) applies to sentencing in general. We can find nothing in its language that precludes its operation in a capital case. Moreover, the rule applies by its terms to the situation in this case. Because the original trial judge retired and subsequently died before we remanded the case in *Roberts II* he was 'unable to perform the duties of the court after a verdict or finding of guilt.' Crim.R. 25(B)." *Roberts III*, at ¶ 40.

The logic behind this holding is self-evident. Particularly in capital cases which may ricochet between the state and federal courts for decades, the states need a mechanism to

substitute a trial judge for post-verdict and post-sentencing proceedings in some cases. Judges are mortal. They die. They retire. They are voted off the bench. They move on to other judgeships or other legal endeavors. The fact that a substitute judge may come to the game late does not mean the capital defendant suffers a constitutional violation in the process.

For the reasons thus stated, Petitioner's constitutional rights were not violated by the unavoidable situation wherein a substitute judge read, reviewed, considered and analyzed her 2007 allocution, but found little mitigation value therein.

This Court's Decision in *Hurst* Does Not Invalidate Ohio's Death Penalty Scheme

Petitioner, like many other Ohio death row inmates, advances the argument that this Court's decision in *Hurst v. Florida* ____ U.S. ____, 136 S.Ct.616, 193 L.Ed. 2d 504 (2016), invalidates Ohio's death penalty statutes as it did Florida's. This is not correct. As stated previously, the Ohio Supreme Court declined to review the specific impact of *Hurst* on Petitioner's case because she failed to raise *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), or *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) – the pre-cursors to *Hurst* - in her briefing in the court below. While *Hurst* has become the Ohio capital defense bar's cause *de jour*, it has gained little to no traction in Ohio's courts.

From a broad perspective, the State submits that the federal constitutional shortcomings this Court identified in *Hurst* are simply absent from the Ohio death penalty scheme. Though it did not repeat the analysis in Petitioner's case, the Ohio Supreme Court drew the following distinctions between Ohio's and Florida's death penalty scheme in a case decided just four months after this Court decided *Hurst*:

“Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*. In Ohio, a capital case does not proceed to the sentencing phase until *after* the fact-finder has found a defendant guilty of one or more aggravating circumstances. See [Ohio] R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2). Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is *not* a fact-finding process subject to the Sixth Amendment, because ‘[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.’ *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); see, e.g., *State v. Fry*, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State*, 869 A.2d 285, 303–305 (Del.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004).” (Emphasis original). *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶¶ 59-60, *reconsideration denied*, 147 Ohio St.3d 1440, 2016-Ohio-7681, 63 N.E.3d 158. This Court declined to review *Belton* in *Belton v. Ohio*, 137 S.Ct. 2296 (2017).

The State of Ohio expects that the Ohio Supreme Court will offer additional guidance on *Hurst* in a pending capital murder case, *State v. Mason*, Ohio Supreme Court No. 2017-0200. Death row inmate Maurice Mason challenges the opinion by Ohio's Third District Court of Appeals which overturned a “rogue” Ohio trial court decision dismissing a death penalty

specification from an indictment and using *Hurst* as its excuse to do so. *State v. Mason*, 3rd Dist. Marion No. 9-16-34, 2016-Ohio-8400, ¶¶ 18-48., *appeal allowed*, 149 Ohio St.3d 1462, 2017-Ohio-5699, 77 N.E.3d 987. This case has been briefed and oral arguments are scheduled for January 23, 2018.

With regard to Petitioner's case specifically, she returns to her earlier theme of the credibility call Judge Rice was faced with when stacking Petitioner's allocution against the facts adduced during the guilt phase of Petitioner's trial. Petition at p. 8. To that end, she argues "[t]he Sixth Amendment, we now understand from *Hurst*, requires a jury not a judge to find every fact necessary for a death sentence to be imposed." *Id.*

That is exactly what happened in this case. Long before Judge Rice reviewed the record and wrote his sentencing opinion, a Trumbull County, Ohio, jury unanimously determined that Petitioner was guilty of two counts of aggravated murder, in violation of Ohio Revised Code 2903.01(A) (purposely causing death with prior calculation and design) and (B) (felony murder) along with two death specifications pursuant to Ohio Revised Code 2929.04(A)(7): one charging aggravated murder during the commission of aggravated burglary and one charging aggravated murder during the commission of aggravated robbery, with each alleging prior calculation and design and/or that Petitioner was the principal offender. The jury also convicted her of aggravated burglary, Ohio Revised Code 2911.11, with a firearm specification, Ohio Revised Code 2941.145, and aggravated robbery, Ohio Revised Code 2913.01, with a firearm specification. *Roberts III*, ¶17. Thus, because the jury – and not Judge Rice – found every fact necessary for a death sentence to be imposed, Petitioner's case fully complies with this Court's decision in *Hurst*. Further review would be pointless and of no value.

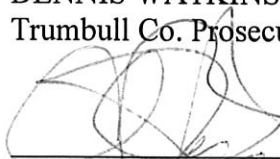
CONCLUSION

Petitioner presents no persuasive argument to cause this Court to grant further review. Her guilt is not an issue. She received from her trial jury what she requested: a unanimous recommendation for a death sentence. Petitioner waived her right to present mitigating evidence to a jury. The substitute judge fully and fairly considered her allocution along with the facts adduced at trial. Even with this Court's decision in *Hurst*, she does not demonstrate constitutional error in the decisions from the courts below. The State of Ohio submits her petition for writ of certiorari must be denied.

Respectfully submitted,



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