# In the Supreme Court of Ohio

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| STATE OF OHIO, | : | Case No. 2015-1309 |
| | : | |
| Plaintiff-Appellee, | : | On Appeal from the |
| | : | Summit County |
| v. | : | Court of Common Pleas, |
| | : | Fifth Appellate District |
| SHAWN E. FORD, | : | |
| | : | Summit County, Ohio |
| Defendant-Appellant. | : | Case No. CR 2013 04 1008 |

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**BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO**

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## INTRODUCTION

A jury convicted Shawn Ford of five counts of aggravated murder for killing Jeffrey and Margaret Schobert. The jury also found him guilty of three statutory aggravating circumstances for each murder count, making him eligible for the death penalty. The jury heard mitigation evidence at sentencing and found, unanimously and beyond a reasonable doubt, that the aggravating circumstances outweighed any mitigating factors, so it recommended a death sentence under Ohio law. After conducting its own review, the trial court agreed and sentenced Ford to death. In his twenty-second proposition of law, Ford argues that Ohio's capital-sentencing system violates the Sixth Amendment under *Hurst v. Florida*, 136 S. Ct. 616 (2016). As this Court's cases show, he is incorrect.

"[T]he 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.'" *State v. Davis*, 116 Ohio St. 3d 404, 2008-Ohio-2 ¶ 189 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)). In a capital jury trial, therefore, the Constitution does not permit a judge to find the facts that make a defendant eligible for the death penalty. *See Hurst*, 136 S. Ct. at 621-22. Ohio's system satisfies this rule, however, because it permits death-penalty sentences only if *the jury* finds the defendant guilty of at least one aggravating circumstance. *See* R.C. 2929.03(B)-(C). This Court has thus rejected many Sixth Amendment challenges to Ohio's capital-sentencing system—even after *Hurst*. *See, e.g.*, *State v. Belton*, __ Ohio St 3d __, 2016-Ohio-1581 ¶¶ 59-60; *State v. Adams*, 144 Ohio St. 3d 429, 2015-Ohio-3954 ¶¶ 265-70; *Davis*, 2008-Ohio-2 ¶ 189. Because in Ohio "the jury's verdict, and not the judge's findings, [make a defendant] eligible for the death penalty," *Davis*, 2008-Ohio-2 ¶ 189, this Court should reject Ford's proposition of law.

## STATEMENT OF AMICUS INTEREST

"The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. Ohio is directly interested in defending the constitutionality of its capital-sentencing statutes. And as Ohio's chief law officer, *id.*, the Attorney General has a duty to defend legislation enacted by the General Assembly. Given that role, he has a strong interest in showing why Ford mistakenly argues that Ohio's capital-sentencing system is unconstitutional.

## STATEMENT OF THE CASE AND FACTS

In April 2013, Shawn Ford and an accomplice broke into the Schoberts' house and murdered Jeffrey Schobert. *State v. Ford*, Summit C.P. No. 2013 04 1008A at 6 (June 30, 2015) ("Sentencing Op."). They then lured Margaret Schobert home with texts from her husband's cell phone and killed her. *Id.* At trial, the jury convicted Ford on all 11 counts in the indictment, including five counts of aggravated murder for the Schoberts' deaths. *Id.* at 1. The indictment also included three aggravating circumstances that would make Ford death-penalty eligible: (1) a multiple-killing specification; (2) an aggravated-robbery specification; and (3) an aggravated-burglary specification. *Id.* at 1-2. The jury found Ford guilty of all three specifications for all five counts of aggravated murder. *Id.* at 2-3. The trial court merged offenses for the sentencing phase of trial, and the State chose to have Ford sentenced on one count for Jeffrey Schobert's murder and another for Margaret Schobert's murder. *Id.* at 3.

After mitigation, the jury returned a verdict of life imprisonment without the possibility of parole for Jeffrey Schobert's murder. It returned a verdict recommending death for Margaret Schobert's murder. *Id.* This recommendation reflected the jury's finding, unanimously and beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating factors. *Id.* at 3-4 (citing R.C. 2929.03(D)(2)).

Because the jury recommended a death sentence, the trial court was required to *separately* reach its own decision on whether the State proved that the aggravating circumstances outweighed the mitigating factors. *Id.* at 4. The court considered "the relevant evidence pertaining to the aggravating circumstances and mitigating factors produced during the mitigation hearing and during the first [guilt] phase of the trial, to the extent relevant" to Ford's death sentence. *Id.* The court considered only the aggravated circumstances the jury found Ford guilty of committing as weighing in favor of death. *Id.* at 4-9. But for mitigation the court considered all factors presented by Ford's defense, plus "all other evidence in mitigation against a sentence of death in the trial record." *Id.* at 5; *see id.* at 9-18. The court found that the State had proved, beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating factors, so it sentenced Ford to death. *Id.* at 18-21. Ford appealed to this Court as of right. *See* Notice of Appeal, No. 2015-1309.

## ARGUMENT

**_Amicus Curiae_ Ohio Attorney General's Proposition of Law:**

> *Because Ohio law requires a jury—not a judge—to find a defendant guilty of the aggravating circumstances that make the defendant eligible for the death penalty, Ohio's capital-sentencing system is not unconstitutional.*

As this Court has already determined, the U.S. Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), has no bearing on Ohio's capital-sentencing system. *See State v. Belton*, __ Ohio St. 3d __, 2016-Ohio-1581 ¶¶ 59-60. In his twenty-second proposition of law, Ford argues that *Hurst* rendered Ohio's system unconstitutional. Ford Br. 374-89. It did not, for three reasons. *First*, in Ohio *the jury* finds the aggravating circumstances that make a defendant eligible for the death penalty. By contrast, in *Hurst* the judge was required to make those findings. *Second*, precedent settles the argument, as this Court has already held Ohio's system

constitutional both before and after *Hurst*. *Third*, Ohio's system offers additional protections to defendants that were absent in *Hurst* and go beyond the requirements of the Sixth Amendment.

### A. *Hurst* did not invalidate Ohio's capital-sentencing system because in Ohio *a jury*—not a judge—finds the facts that make a defendant death-penalty eligible.

Ohio's capital-sentencing system remains valid after *Hurst*. The Sixth Amendment requires a jury to find all facts that expose a defendant to greater punishment. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In a capital trial, this rule means the jury must find the aggravating circumstances that make the defendant eligible for death. *Ring v. Arizona*, 536 U.S. 584, 609 (2002). Applying *Ring* and *Apprendi*, the U.S. Supreme Court held Florida's capital-sentencing system unconstitutional in *Hurst* because the judge—not the jury—was required to find whether the State had proved aggravating circumstances. 136 S. Ct. at 620-22. By its own terms, *Hurst* has no bearing on Ohio's system, where *the jury* must find the aggravating circumstances that make a defendant eligible for the death penalty.

#### 1. Under the Florida system invalidated by *Hurst, the judge*—not *the jury*—found the aggravating circumstances making the defendant eligible for the death penalty.

The Florida sentencing system that was held unconstitutional in *Hurst* differs from Ohio's system. Under Florida's system, "the maximum sentence a capital felon [could] receive on the basis of the conviction alone" was life in prison. *Id.* at 620. The felon could be sentenced to death "only if an additional sentencing proceeding 'result[ed] in findings *by the court* that such person shall be punished by death.'" *Id.* (emphasis added) (statutory citation omitted).

In this additional sentencing proceeding, the judge made "'the ultimate sentencing determinations.'" *Id.* (quoting *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002)). First, the judge would conduct an evidentiary hearing before the jury. *Id.* Next, the jury would give an "'advisory sentence' of life or death without specifying the factual basis of its recommendation."

*Id.* (statutory citation omitted). Then, "'[n]otwithstanding the recommendation of a majority of the jury,'" the judge would weigh the aggravating and mitigating circumstances and sentence the defendant to life imprisonment or death. *Id.* (statutory citation omitted). The judge was required to give the jury recommendation "'great weight,'" but was not bound by it, and the sentence would "'reflect the trial judge's independent judgment about the *existence* of aggravating and mitigating factors.'" *Id.* (emphasis added) (citations omitted).

The prosecutor in *Hurst* sought two aggravating circumstances, and the trial judge told the jury it could recommend death if it found the defendant guilty of at least one of them. *Id.* The jury recommended death by a seven-to-five vote, but it did not specify which aggravating circumstance it had found. *Id.* The judge then independently found both aggravating circumstances and sentenced the defendant to death. *Id.*

*Hurst* analyzed Florida's system against the backdrop of *Apprendi* and *Ring*. *Id.* at 620-21. The Court reiterated *Apprendi*'s rule that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Id.* at 621 (citation omitted). It then determined that Florida's system was analogous to the Arizona system held unconstitutional in *Ring*. *Id.* Arizona's system had "violated *Apprendi*'s rule" because it "allowed a judge to find the facts necessary to sentence a defendant to death." *Id.* In particular, the judge in *Ring* could sentence the defendant to death "only after independently finding at least one aggravating circumstance." *Id.* "Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence." *Id.*

The *Hurst* Court held that Florida's capital-sentencing system was unconstitutional because, like Arizona, "Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Instead, "Florida require[d] a judge to find these facts."

*Id.* While Florida "incorporate[d] an advisory jury that Arizona lacked," the Court found the distinction "immaterial." *Id.* Even if the jury "'recommend[ed] a sentence,'" "'it [did] not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation [was] not binding on the trial judge.'" *Id.* (citation omitted).

In *Hurst*, as in *Ring*, "the maximum punishment [the defendant] could have received without any judge-made findings was life in prison without parole." *Id.* Yet "a judge increased [the defendant's] authorized punishment based on her own factfinding." *Id.* And while Florida argued that the jury *did* make a factual finding by recommending death, the defendant was not eligible for death "until 'findings *by the court* that such person shall be punished by death.' The trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* (statutory citation omitted). Crucially, a trial court could disregard the jury's finding that there were not aggravating circumstances (or its recommendation of a life sentence) and, *based on its own factfinding*, impose a death sentence. *Id.* at 620.

**2. In a capital jury trial in Ohio, only a jury can find the aggravating circumstances that make a defendant eligible for the death penalty.**

Under Ohio's capital-sentencing system, by contrast, a jury finds the aggravating circumstances that make a defendant death-penalty eligible. Although not required by *Hurst*, the jury also weighs those circumstances against mitigating factors. To that end, Ohio capital jury trials have two stages: a guilt phase and a sentencing phase.

*Guilt Phase.* The jury determines the defendant's eligibility for the death penalty during the first phase of trial, the guilt phase. The indictment must charge the defendant with aggravated murder and "contain[] one or more specifications of aggravating circumstances." R.C. 2929.03(B); *see* R.C. 2929.04(A) (listing aggravating circumstances). At trial, the

prosecution bears the burden of proving an aggravating circumstance and the jury must find the defendant guilty of an aggravating circumstance unanimously and beyond a reasonable doubt. R.C. 2929.03(B). At the close of the guilt phase, a defendant becomes eligible for the death penalty only if the jury finds him guilty of aggravated murder *and* finds him guilty of at least one aggravating circumstance. R.C. 2929.03(C)(2)(a).

*Sentencing Phase—Jury.* The case then goes to the sentencing phase, where the prosecution has the burden of proving, beyond a reasonable doubt, that the aggravating circumstances that the jury found the defendant guilty of committing at the guilt phase outweigh any mitigating factors. R.C. 2929.03(D)(1). The defendant may present "evidence of any factors in mitigation of the imposition of the sentence of death." *Id.*; *see* R.C. 2929.04(B)-(C) (listing mitigating factors and giving the defendant "great latitude" to present "any other factors in mitigation"). The jury must consider (1) "the relevant evidence raised at trial," (2) "the testimony, other evidence, statement of the offender, [and] arguments of counsel," and (3) presentence investigation and mental examination reports. R.C. 2929.03(D)(2). If the jury unanimously finds, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors, it must recommend death. *Id.* If the jury does not make this finding, however, it must recommend life imprisonment. *Id.* The latter sentence controls; a judge *cannot* impose a death sentence despite the life-imprisonment ruling by the jury.

*Sentencing Phase—Judge.* If the jury recommends a death sentence, however, the court must conduct an independent review. R.C. 2929.03(D)(3). The court can consider any mitigating factors, but only the aggravated circumstances that the jury found. *Id.* The court must impose a death sentence only if it agrees with the jury, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors. *Id.* If the court imposes death, it

must explain its reasoning in a separate sentencing opinion. R.C. 2929.03(F). Yet if it does *not* find that the aggravating circumstances outweigh the mitigating factors, it must impose life imprisonment *despite* the jury's recommended death sentence. R.C. 2929.03(D)(3).

To summarize, an Ohio defendant can receive a death sentence only if: (1) the indictment charges the defendant with aggravated murder and includes aggravating circumstances; (2) the jury finds the defendant guilty of aggravated murder; (3) the jury unanimously finds the defendant guilty, beyond a reasonable doubt, of at least one aggravating circumstance; (4) the jury unanimously finds, beyond a reasonable doubt, that the aggravating circumstances outweigh any mitigating factors; *and* (5) the judge finds, beyond a reasonable doubt, that the aggravating circumstances *the jury* found outweigh any mitigating factors.

**3. Ohio's capital-sentencing system remains valid after *Hurst*.**

"Ohio's capital-sentencing [system] is unlike the laws at issue in *Ring* and *Hurst*" because "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" at the guilt phase. *Belton*, 2016-Ohio-1581 ¶ 59. The systems in *Hurst* and *Ring* were unconstitutional because the judge, not the jury, was required to find the aggravating circumstances that made defendants eligible for the death penalty. Ohio, on the other hand, requires the jury to find aggravating circumstances at the guilt phase, which "renders the defendant eligible for a capital sentence." *Id.* Unlike in *Hurst* or *Ring*, "it is not possible" for an Ohio judge to find any facts at sentencing that will make the defendant eligible for the death penalty. *Id.*

This case illustrates the difference. In *Hurst* and *Ring*, the defendants were not death-penalty eligible until a judge found aggravating circumstances. Here, the jury found Ford guilty (unanimously and beyond a reasonable doubt) of aggravating circumstances at the guilt phase, Sentencing Op. at 2-3, so Ford was eligible for death *before* sentencing based on *the jury's*

findings. *Cf. United States v. Gabrion*, 719 F.3d 511, 531-33 (6th Cir. 2013) (en banc) ("[The defendant] was already 'death eligible' once the jury found beyond a reasonable doubt that he intentionally killed [the victim] and that two statutory aggravating factors were present. At that point the jury did not need to find any additional facts in order to recommend that [he] be sentenced to death.") (internal citation omitted). Any argument that *Hurst* invalidated Ohio's capital-sentencing system thus fails on the face of *Hurst*.

**B. Under this Court's precedent, *Hurst* did not affect the constitutionality of Ohio's capital-sentencing system.**

This Court's prior cases settle any doubt about *Hurst*'s effect on Ohio's capital-sentencing system. As the Court recently explained in *Belton*, "[b]ecause 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." 2016-Ohio-1581 ¶ 59. And while *Belton* involved a defendant who was sentenced by a three-judge panel, this Court indicated the outcome would be no different in a case (like this one) tried to a jury: "[I]n 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." *Id.* (citation omitted).

Indeed, *Hurst* did not extend *Ring* but only applied it to Florida law. *Cf. id.* ¶ 58. This Court has already held that *Ring* "has no possible relevance . . . to Ohio's death penalty statute." *State v. Hoffner*, 102 Ohio St. 3d 358, 2004-Ohio-3430 ¶ 69; *see also State v. Adams*, 144 Ohio St. 3d 429, 2015-Ohio-3954 ¶ 269 ("The inapplicability of *Apprendi* is obvious if one asks a simple question: what *fact* did the trial court find to make [the defendant] death-eligible? The answer is none."); *State v. Davis*, 116 Ohio St. 3d 404, 2008-Ohio-2 ¶ 189 (holding that Ohio's system poses no *Apprendi* or *Ring* problem because "the jury's verdict, and not the judge's

findings, made [the defendant] eligible for the death penalty"). Because *Hurst* did not change the law, under this Court's precedent it did not affect Ohio's capital-sentencing system.

### C. Ford's arguments to the contrary are unpersuasive, as Ohio protects capital defendants beyond the Sixth Amendment's requirements.

Ford makes two arguments to show that Ohio's capital-sentencing system is unconstitutional under *Hurst*. Both miss the mark.

*First*, Ford argues that Ohio's system is unconstitutional because, like in *Hurst*, the jury can only *recommend* death. *See* Ford Br. at 382-83. This is constitutionally irrelevant, as defendants have no federal constitutional right to a jury at sentencing. *See Harris v. Alabama*, 513 U.S. 504, 515 (1995); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976); *see also Clemons v. Mississippi*, 494 U.S. 738, 745 (1990). That is why the federal appellate courts have upheld the federal death penalty regime by concluding that *Ring* and *Apprendi* (and so *Hurst*) *categorically* do not apply to the weighing of aggravating and mitigating circumstances. *See United States v. Runyon*, 707 F.3d 475, 515-16 (4th Cir. 2013); *Gabrion*, 719 F.3d at 531-33; *United States v. Sampson*, 486 F.3d 13, 31-32 (1st Cir. 2007); *United States v. Fields*, 483 F.3d 313, 345-46 (5th Cir. 2007); *United States v. Mitchell*, 502 F.3d 931, 993-94 (9th Cir. 2007); *United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007); *United States v. Purkey*, 428 F.3d 738, 749 (8th Cir. 2005). This Court has reached the same conclusion. *See Davis*, 2008-Ohio-2 ¶ 189. Because *Hurst* does not apply to Ohio's sentencing stage, Ford's argument is a non-starter.

Ford's argument also mistakes a virtue for a vice. While he is correct that a jury can only recommend death, in Ohio judges act as a final safeguard *against* the death penalty. Even if a jury finds the defendant guilty of aggravated murder, guilty of an aggravated circumstance, and unanimously recommends death, judges may *still* decline to impose a death sentence if they determine the aggravating circumstances do not outweigh the mitigating factors beyond a

reasonable doubt. They cannot do the opposite; if a jury recommends a life sentence, a judge *cannot* impose a death sentence. So rather than *increasing* a defendant's sentence, as the judges did in *Hurst* and *Ring*, Ohio judges have only the authority to *decrease* it. Ohio's system is not unconstitutional for exceeding the constitutional protections laid out in *Hurst*, *Ring*, and *Apprendi*. And defendants surely prefer Ohio's system to one where jury verdicts are mandatory and judges *cannot* impose a life sentence even when they disagree with the jury's death recommendation.

*Second*, Ford argues Ohio's system is unconstitutional because it does not require the jury "to make any specific findings of fact about mitigating factors" or about its "balancing of the mitigating and aggravating factors." Ford Br. at 384. "This argument founders, however, because it assumes, without the slightest support, that the weighing of aggravating and mitigating factors is a *fact*. This assumption is incorrect." *Sampson*, 486 F.3d at 32. *Hurst* does not require a jury to make *any* findings on "mitigating factors" or "balancing." It simply confirmed that a jury must find the facts that make a defendant *eligible* for the death penalty. *See Hurst*, 136 S. Ct. at 621-22. Ohio law requires just that; a defendant is death-penalty eligible if the jury finds him guilty of aggravating circumstances at the *guilt* phase. *See* Section A.2. Mitigating factors, which are considered at sentencing, are irrelevant to death-penalty eligibility.

Ford's "balancing" argument is a red herring, one this Court has already rejected. In *Belton*, this Court explicitly held that "[w]eighing is *not* a fact-finding process subject to the Sixth Amendment, because '[it] cannot increase the potential punishment to which a defendant is exposed.'" 2016-Ohio-1581 ¶ 60 (citation omitted). "Instead, the weighing process amounts to 'a complex moral judgment' about what penalty to impose upon a defendant who is already death-penalty eligible." *Id.* (citation omitted); *cf. Kansas v. Carr*, 136 S. Ct. 633, 642 (2016)

(describing weighing as "mostly a question of mercy"). Unsurprisingly, then, Ford's only support is an Ohio trial court decision that the Third District unanimously reversed. *See State v. Mason*, 2016-Ohio-8400 ¶ 31 (3rd Dist.). On the other hand, "[e]very [federal] circuit to have addressed [his] argument . . . has rejected it." *Gabrion*, 719 F.3d at 533.

Ford's argument also presents practical problems: if Ohio's capital-sentencing system is unconstitutional, how can the General Assembly fix it? Ford suggests the jury must make some "intermediate" finding about the existence of mitigating factors. But defendants *benefit* from the jury's ability to consider all mitigating factors without requiring agreement on any of them. By contrast, the jury can consider *only* the aggravating circumstances it found at the guilt stage as weighing in favor of a death sentence. Ford also suggests the jury must make a finding when weighing mitigating factors and aggravating circumstances. But the jury's ultimate decision to recommend death or life *is* a finding on whether the aggravating circumstances outweigh the mitigating factors—and under this Court's precedent, it is not a *factual* finding to which the Sixth Amendment applies. *Belton*, 2016-Ohio-1581 ¶ 60.

*Finally*, Ford's arguments ignore the additional protections Ohio gives capital defendants even beyond the requirements of *Hurst* and *Ring*. While the Arizona system invalidated in *Ring* did not even use a jury, Ohio requires a jury to find the facts making the defendant death-penalty eligible *and* to conduct the weighing process. While the Florida system invalidated in *Hurst* allowed a jury to recommend death based on a bare majority—a seven-to-five vote in *Hurst*—Ohio requires a unanimous jury. While Florida's system did not require the jury to specify the factual basis of its recommendation, an Ohio jury must make specific findings on aggravating circumstances and rely *only* on those findings during the weighing process. *Id.* And while

Florida's system allowed a judge to disregard a jury's recommendation of life—and instead impose a death sentence—in Ohio a judge is *bound* by a jury's recommendation of life.

Ford received these extra protections in his own trial. A jury, not the judge, found him guilty of the aggravating circumstances that made him eligible for the death penalty. The jury then had to find, unanimously and beyond a reasonable doubt, that the aggravating circumstances outweighed any mitigating factors. Even then, Ford could not receive the death penalty unless the trial court, having conducted its own independent weighing, determined that the aggravating circumstances outweighed the mitigating factors. These protections were not required by *Hurst*, *Ring*, or *Apprendi*, but they confirm the constitutionality of Ohio's system.

In Ohio, the jury finds the facts that make a defendant eligible for death. This satisfies the Sixth Amendment under *Hurst*, *Ring*, and *Apprendi*, so, following its own precedent, this Court should hold that Ohio's capital-sentencing system remains constitutional despite *Hurst*. The Court should reject Ford's twenty-second proposition of law.

## CONCLUSION

This Court should reject Ford's twenty-second proposition of law.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee was served via ordinary mail this 13th day of February, 2017 upon the following counsel:

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