No. 16-1116

IN THE SUPREME COURT OF THE UNITED STATES

CHARLOTTE JENKINS, Warden,
PETITIONER,

v.

PERCY HUTTON,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that manifest injustice justified lifting the procedural default imposed by the state courts.

2. Whether the Court of Appeals correctly applied clear Eighth Amendment law in finding that failure to instruct the jury regarding aggravating circumstances left the jury with unguided and unfettered discretion to impose a death sentence.

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INTRODUCTION

The Warden's Petition for a Writ of Certiorari is based on improper assertions of Ohio law, mischaracterizations of the Court of Appeals's opinion, and basic misunderstandings of Eighth Amendment law.

This Court has repeatedly emphasized that it does not engage in error correction, particularly where the asserted errors are based on the lower court's purported failure to assess the facts correctly. *See* Sup. Ct. R. 10. Such review is especially unwarranted here, where the alleged factual errors are based solely on Petitioner's mischaracterization of the record.

For these reasons, the Petition should be denied.

STATEMENT OF THE CASE

There is no dispute that Mr. Hutton's jury was never instructed on the limitations of circumstances that it could consider in favor of death. While the jury was instructed about the definition of mitigating factors there was no similar instruction defining the aggravating circumstances. As such, the jury was given unfettered discretion to impose a death sentence by considering anything the jury deemed "aggravating" as a circumstance that warranted a death sentence.

Although the Warden repeatedly refers to "aggravating circumstance" in her Petition and properly states the parameters of Ohio law regarding "aggravating circumstances," the jury was never instructed on aggravating circumstances. This error began with the indictment in which the Prosecutor presented to the grand jury indictment forms that referred to "Specification" not aggravating circumstance. Not only did the indictments not inform the trial jury about the definition of "aggravating circumstances" but the indictments specifically included "Specifications" that could not be considered at the sentencing proceeding in weighing

"aggravating circumstances" against mitigating factors. Counsel for the Warden might understand the limitation of aggravating circumstances, the difference between a specification in the indictment and an aggravating circumstance at sentencing, and the nuances and intricacies of capital sentencing proceedings and the weighing process, but Hutton's jurors were not capital litigators or even lawyers. Because the jurors were regular people selected for the awesome responsibility of deciding whether a fellow human being should die or live, it was incumbent on the trial court to properly instruct and guide the jury's discretion through its decision-making process. This did not occur.

The Grand Jury returned indictments charging Bruce Laster and Percy Hutton with two counts of Aggravated Murder. Count 1 alleged Aggravated Murder (purposeful and with prior calculation and design) with Specification 1 (use of a gun), Specification 2 (course of conduct killing or attempting to kill two people), and Specification 3 (committing a murder while committing a felony). Count 2 alleged Aggravated Murder (purposeful killing while committing a kidnapping) with Specification 1 (use of a gun), Specification 2 (course of conduct killing or attempting to kill two people), and Specification 3 (committing a murder while committing a felony). Although not defined in the indictments on Specifications 2 and 3 would qualify as aggravating circumstances for a capital sentencing proceeding.

The matter then proceeded to trial. There is no dispute that at no point during the trial was the jury ever told that the "Specification" in the indictments were in any way related to the "aggravating circumstances" at the sentencing proceedings.

The Warden attempts to fabricate an instruction to the jury by relying on the prosecutor's closing arguments. Pet. at 7. The prosecutor did state in one sentence that "The givens in this case are those aggravating circumstances that you found to exist in the first phase of these proceedings."

Trial Tr., 16-29 PageID#7729. It is axiomatic that closing arguments are not proper instructions to the jury as that duty is the sole province of the judge. It is routine to advise the jury both before and after closing arguments of counsel that the trial court will provide the jury with the law of the case. In fact, just before deliberations in the trial phase the court instructed the jury:

> It now becomes the duty of the Court to correctly instruct you on the law which applies to this case.
>
> It is your sworn duty to accept these instructions to apply the law as it is now given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be.

Trial Tr., 16-29 PageID#7650. Later the court then instructed the jury that "The evidence does not include the indictment, the opening statements or the closing arguments of counsel. Opening statements and closing arguments of counsel are designed to assist you, but they are not evidence." Trial Tr., 16-29 PageID#7653.

Even if this one sentence somehow instructed the jury it suffers from the same fatal flaw. The prosecutor never defined what aspects of the jury's verdicts constituted an aggravating circumstance. The jury still had no idea what to put on death's side of the equation.

The Warden's argument demonstrates the error - at no point was the jury clearly, directly, and overtly instructed what constituted an aggravating circumstance in the case and how and what to weigh on death's side of the scale. This was a clear and plain error depriving Hutton of his Eighth Amendment rights to guided jury discretion before sentencing him to death.

REASONS FOR DENYING CERTIORARI

I. The Court of Appeals Properly Reviewed Miscarriage of Justice Standards to Lift the Procedural Default.

The Court of Appeals properly applied the limited manifest injustice standard announced in *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992). In *Sawyer*, the Court held that "the 'actual

innocence' requirement must focus on those elements that render a defendant eligible for the death penalty." *Id.* The Court of Appeals did exactly that in finding a fundamental miscarriage of justice to lift the default. The element at issue is that defined by Ohio law: that aggravating circumstance outweighs the mitigating factors. Ohio law specifically restricts the jury's consideration to specific, enumerated aggravating circumstances. *State v. Wogenstahl*, 75 Ohio St.3d 344, 355 (1996); O.R.C. § 2929.04(A)(1). At the time of Hutton's trial O.R.C. § 2929.03(D)(2) directed:

> If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

It is clear that, absent a jury's unanimous finding that the aggravating circumstance outweighs the mitigating factors the State did not carry its burden of proof to enhance the sentence from a term of years to death. This is the very definition of an element. *Schad v. Arizona*, 501 U.S. 624 (1991). It is axiomatic that the State must prove every element of the offense beyond a reasonable doubt in order to obtain a conviction. *In re Winship*, 397 U.S. 358 (1970). *See also Richardson v. United States*, 526 U.S. 813 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Glover v. United States*, 531 U.S. 198 (2001); *Ring v. Arizona*, 536 U.S. 584 (2002). This Constitutional dictate includes the requirement that the state prove every fact necessary to enhance a sentence beyond the statutory maximum. *Apprendi*, 530 U.S. at 490. This specifically includes any facts necessary to make the defendant eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Ring*.

This Court continues to recognize the importance of the Great Writ and the duty of the federal courts to give substantive review to *habeas* petitions. *See Miller-El v. Dretke*, 545 U.S. 231

(2005); *Williams v. Taylor*, 529 U.S. 362 (2000). Even under the AEDPA changes to the Great Writ, "the province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. 137 (1803). The Court specifically recognized that ceding federal review to the states would render AEDPA unconstitutional. *Williams*, 529 U.S. at 378-79. *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) ("The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing.") (emphasis in original). The Court of Appeals simply refused to abdicate its duty under *Marbury* and determined that a death sentence predicated on a total failure to instruct the jury on the definition of aggravating circumstances constituted a fundamental miscarriage of justice. *Hutton v. Mitchell*, 839 F.3d 486, 497 (6th Cir. 2016) ("This would abdicate our role as judges to independently review the case before us.") In this regard the Court of Appeals followed the most fundamental Eighth Amendment cases: *Furman v. Georgia*, 408 U.S. 238 (1972); and *Gregg*. Rather than reworking *Sawyer* the Court of Appeals applied the Court's test to this case.

In order to manufacture a claim that the Court of Appeals violated *Sawyer* the Warden artificially breaks down *Sawyer* until it is unrecognizable. There is simply no "eligibility" versus "weighing", "factual" versus "legal" innocence or "gateway" versus "Constitutional claims" distinction in *Sawyer*. *Sawyer* speaks only of "elements that render a defendant eligible for the death penalty." *Sawyer*, 505 U.S. at 347. Actual innocence of the death penalty does not require or even implicate the trial phase determination of guilt. *Sawyer*, 505 U.S. at 343. "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance *or that*

some other condition of eligibility had not been met." *Id.*, at 345 (emphasis added). The Court of Appeals properly identified the element (a valid jury determination that aggravating circumstance outweighed mitigating factors), determined that this element was lacking and therefore, Hutton was innocent of the death penalty. Although the Warden repeatedly attempts to recast the Court of Appeals opinion into an application of *Ring v. Arizona*, the Court of Appeals did not decide this matter under *Ring* but under the Eighth Amendment foundational law of *Gregg v. Georgia*. It is through the lens of *Gregg* that the fundamental miscarriage of justice is revealed. This review was entirely consistent with both the letter and the spirit of *Sawyer*, *Sawyer*, 505 U.S. at 341-342 (citing *Gregg*), as well as the historical purpose of *habeas* review. *See Wainwright v. Sykes*, 433 U.S. 72, 91 (1977).

Because the Court of Appeals's decision does not contradict or misapply the Court's directions in *Sawyer* the Warden resorts to a parade of horribles flowing from the Court of Appeals's decision. As outlined below, this parade of horribles is non-existent.

The Warden attempts to create an issue by conflating a proper statement of Ohio law with the full requirements of Ohio law and with the facts of what happened in Hutton's trial. The Warden is correct that the jury must find beyond a reasonable doubt that the defendant is guilty of aggravated murder and is guilty of at least one statutorily defined aggravating circumstance. O.R.C. § 2929.03(B) - (C) (1985). What the Warden does not address is that under Ohio law the jury must make a separate and distinct finding before a defendant can be sentenced to death. The jury must find beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factors. O.R.C. § 2929.03(D)(2). If the jury does not reach this finding, regardless of the reason, the defendant cannot be sentenced to death. As with a guilty verdict, a verdict against death is an acquittal of the death sentence. Innocence of the death penalty is shown when "some other

condition of eligibility had not been met." *Sawyer*, 505 U.S. at 345. Because the jury was never instructed what it could consider on death's side of the equation, the prime condition of eligibility for a death sentence was not reached: Hutton is innocent of the death penalty.

Although the foundation of Hutton's claim is a legal, Constitutional challenge, it is also a factually based claim. The legal issue surrounds the requirements under Ohio law and the Constitution in guiding a jury's discretion to consider a death sentence. *Gregg*. Because the trial court failed to instruct the jury about its duties and limits in considering the state's case for death Hutton's Eighth Amendment right to guided jury discretion was violated.

For purposes of miscarriage of justice analysis the claim also involves factual review of the impact of the error. Just because these issues involve the same set of facts does not mean that the Court of Appeals improperly considered the issue of factual innocence. Rather, the specifics of what the jury did not find is the factual innocence proof. The jury never found that the aggravating circumstance outweighed the mitigating factors because the jury was never given a definition of an aggravating circumstance. The question for miscarriage of justice is whether the execution would be a miscarriage of justice, not whether the error that occurred was a miscarriage. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). But, as in *Schlup*, the evidence to lift the default can be the same evidence that supports the underlying Constitutional violation. In *Schlup* the evidence of innocence was predicated on the same evidence that demonstrated the *Brady* violation.

In a final effort to obtain this Court's review the Warden attempts to fabricate a conflict in the circuits that simply does not exist. The cases proffered by the Warden simply do not address the issue reviewed by the Court of Appeals in this case. One of the cases does not even apply *Sawyer* but simply evaluates a state's procedural default as an independent and adequate state rule. *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010). The other cases, *McKay v. United States*, 657 F.3d

1190 (11th Cir. 2011); *Wooten v. Norris*, 578 F.3d 767 (8th Cir. 2009); and *Black v. Workman*, 682 F.3d 880 (10th Cir. 2012), simply address the impact of *Sawyer* on claims that additional evidence would have changed a sentencing calculation. Those cases have no application to an eligibility based *Sawyer* review. There is simply no conflict to be resolved by this Court.

Alternative Grounds for Relief

The remains an independent ground to lift the procedural default. Throughout proceedings on both direct appeal and state post-conviction Hutton was represented by attorney David Doughten. Doughten came onto Hutton's case in the Ohio Supreme Court at direct appeal. This was the appeal in which *sua sponte* three Justices addressed the jury instruction issue and determined that Hutton was entitled to relief. *State v. Hutton*, 53 Ohio St.3d 36, 50-51 (1990). Because Doughten had not raised or briefed this issue four Justices refused to address the issue and imposed a procedural default. *Id.*, 53 Ohio St.3d at n.1.

After the direct appeal proceedings concluded Doughten represented Hutton in state post-conviction proceedings. *State v. Hutton*, 2004-Ohio-3731, 2004 Ohio App. Lexis 3356 (8th Dist. 2004). Doughten did not raise either ineffective assistance of trial counsel for failing to object to the fatally flawed jury instructions or the ineffective assistance of appellate counsel for failing to raise either the merits of the jury instructions or the issue of ineffective assistance of trial counsel. Doughten failed to raise these claims in spite of the Ohio Supreme Court's refusal to consider the claim because neither trial counsel nor appellate counsel had raised the issue. Of course Doughten could not be expected to raise ineffective assistance of appellate counsel because he was appellate counsel. *See State v. Cole*, 2 Ohio St.2d 112, 114 (1982). Doughten's failure to raise this issue serves as cause and prejudice to lift any procedural default. *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 133 S.Ct. 1911 (2013).

Ohio has a unique procedure whereby ineffective assistance of appellate counsel claims can be litigated. Ohio App.R.26(B). A timely application was filed raising the issue of Doughten's ineffective assistance on direct appeal. Although the court of appeals dismissed the application because the issue of ineffective assistance of counsel could have been raised on an earlier appeal the Ohio Supreme Court reversed that judgment and addressed the merits of the ineffective assistance of appellate counsel claims. The issue is exhausted and not procedurally defaulted and can serve as cause and prejudice to lift the procedural default. *Edwards v. Carpenter*, 529 U.S. 446 (2000).

When the matter moved to federal court Doughten was appointed by the district court to represent Hutton in his habeas litigation. D.Ct. Order and Opinion, Case No. 1:05-cv-2391, Doc. 67, PageID#1614. Doughten did raise the issue of the flawed jury instructions as the Eighth Claim for Relief, Amended Petition, Case No. 1:05-cv-2391, Doc. 60, PageID#1362, and the ineffective assistance of appellate counsel for failing to raise the related issues as the Eleventh Claim for Relief. Amended Petition, Case No. 1:05-cv-2391, Doc. 60, PageID#1366-1370.

After the district court denied the petition finding the jury instruction issue defaulted, Doughten filed a motion to alter or amend judgment pursuant to Fed. R. Civ.P. 59(e) raising the issue of his conflict of interest that prevented him from raised issues of his own ineffectiveness in state court proceedings as cause and prejudice based on *Martinez* and *Trevino*. The District Court denied this motion. Doc. 71.

The matter proceeded on appeal to the Sixth Circuit where Doughten was permitted to withdraw from the case and the undersigned counsel were appointed. The Sixth Circuit rejected the merits of Hutton's ineffective assistance of counsel claim holding that appellate counsel was not deficient in failing to raise the claim because other claims were raised. *Hutton*, 839 F.3d at

500-501. The Court of Appeals referenced *Jones v. Barnes*, 463 U.S. 745 (1983), for the proposition that appellate counsel is not required to raise every possible issue in order to be effective. *Hutton*, 839 F.3d at 501.

The failure of counsel to raise the jury instruction issue at any point in the litigation either before but certainly after the Ohio Supreme Court review in which three justices found grounds for relief on that issue is deficient performance. This was not a questionable or weak claim for relief. There is simply no excuse for counsels' failure to raise this claim. The Court of Appeals's logic is extracted from *Barnes* that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible." *Barnes*, 463 U.S. at 752. But *Barnes* was not a capital case and the Court has historically and not infrequently held that "death is different." *See e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). In 1983, 11 years after Furman had been decided, Justice O'Connor observed that the "Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-999; at 999, n. 9 (1983) (citing cases). *See also, e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion) ("In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases"); *Gardner*

v. Florida, 430 U.S. 349, 357-358 (1977) (Stevens, J., plurality opinion) ("From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

> Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.

Standard 4-1.2(c) of the ABA Standards for Criminal Justice (3d ed. 1991). Counsel in capital cases clearly have a different responsibility, duty, and standard than counsel in non-capital cases. Winnowing issues, especially an issue that definitively removes the defendant from death row, is not an option.

And modern capital practice mandates that attorneys recognize what has long been recognized: that the death penalty itself is not a static reality but is fluid and evolving. Issues that are not 'winning issues' today may be a client's saving grace tomorrow. *Compare Ring v. Arizona*, 536 U.S. 584 (2002), with *Walton v. Arizona*, 497 U.S. 639 (1990); *Atkins v. Virginia*, 536 U.S. 304 (2002), with *Penry v. Lynaugh*, 492 U.S. 302 (1989); and *Roper v. Simmons*, 543 U.S. 551 (2005), with *Stanford v. Kentucky*, 492 U.S. 361 (1989). In *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987), Justice Scalia wrote for a unanimous Court: "We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)."

At the time sixteen men had been executed in Florida under this Constitutionally flawed statute and all had challenged the statutory scheme in the same way as Hitchcock. He was granted relief and is alive today while the other sixteen were executed.

Nor is there any evidence that counsel made a strategic decision in failing to raise this issue. The failure to develop the factual predicate necessary to show that counsels' failure was based on error and not strategy lies with attorney Doughten who did not, and could not, investigate his own ineffectiveness.

Hutton was clearly prejudiced by counsels' failures. The majority of the justices on the Ohio Supreme Court refused to consider this issue because counsel did not raise it. But three justices, even under plain error review, found the claim meritorious. Had the issue been properly raised and litigated there is a reasonable probability that the outcome of the appeal would have been different. This constitutes prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court should deny the Warden's petition because there are alternative grounds upon which the Court of Appeals's decision is valid.

II. The Court of Appeals Properly Reviewed this Claim under the Eighth Amendment Requirements for Guided Jury Discretion in Capital Cases.

The Warden's second claim for review rests on miscasting both the Court of Appeal's decision in converting it from an Eighth Amendment decision to a Sixth Amendment decision and the requirements under Ohio law for eligibility for a death sentence. Because the Court of Appeals properly applied the Eighth Amendment to an Eighth Amendment issue review by this Court is not warranted. Additionally, Ohio law requires a jury finding that the aggravating circumstance outweighs the mitigating factors before a defendant is eligible for a death sentence. Absent that finding the defendant is not eligible for a death sentence and the court must sentence the defendant to a life term.

The Court of Appeals appropriately began the analysis of this error with *Gregg v. Georgia*, 428 U.S. 153 (1976). The Eighth Amendment requires that juries be strictly controlled in deciding to sentence a defendant to death. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg*; *Walton v. Arizona*, 497 U.S. 639, 656 (1990) (Scalia, J., concurring). This is the core difference between an Eighth Amendment claim under *Gregg* and a Fourteenth Amendment claim under *McGautha v. California*, 402 U.S. 183 (1971). The jury instructions found acceptable in *McGautha* under the Fourteenth Amendment were found Constitutionally flawed in *Furman* and *Gregg* under the 8th Amendment. Because the trial court did not instruct the jury what constituted an aggravating circumstance the jury was left to unfettered discretion to place anything on death's side of the equation.

Under Ohio law the jury's decision that an aggravating circumstance outweighs the mitigating factors is a predicate fact necessary to impose a death sentence. Absent a unanimous jury verdict for death the maximum sentence that could be imposed was a term of years. O.R.C. § 2929.04(D)(2). Because the jury was not instructed at all as to the definition of aggravating circumstance the jury did not unanimously find beyond a reasonable doubt that the prosecution carried its burden. *In re Winship*, 397 U.S. 358 (1970). *See also Richardson v. United States*, 526 U.S. 813 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Schad v. Arizona*, 501 U.S. 624 (1991). Although these cases address a Sixth Amendment right to jury verdict, the Court of Appeals properly recognized the Eighth Amendment implications as outlined in *Furman* and *Gregg*. *Hutton*, 839 F.3d at 500. Clearly established Eighth Amendment law requires juries to be properly instructed on the factors to be put on death's side of the equation. *Gregg*. Because the core Eighth Amendment concern in capital sentencing is avoiding arbitrary and capricious death sentence we mandate guided discretion in capital cases. "As a general

proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Gregg*, 428 U.S. at 195. Absent the proper instruction Hutton's jury was never guided in its discretion to impose death.

The Ohio Supreme Court held that the facts necessary to impose a death sentence under "Ohio's capital sentencing scheme" include "the existence of any statutory aggravating circumstances and whether those aggravating circumstances are sufficient to outweigh the defendant's mitigating evidence." *State v. Hoffner*, 102 Ohio St.3d 358, 369 (2004) (citing Ohio Rev. Code § 2929.03(B) and (D)). Ohio law "charges the jury with determining" those facts "by proof beyond a reasonable doubt." *Id*. Thus, the weighing of aggravating and mitigating circumstances is a finding of fact in Ohio. *Id.*; *accord Rauf v. State*, 145 A.3d 430 (Del. 2016). *Hurst* mandates that a jury must make such factual findings. *Hurst v. Florida*, 136 S.Ct. 616, 624 (2016) (holding that a defendant's Sixth Amendment jury trial right was violated since, without judicial fact-finding, the defendant was ineligible for the death penalty); *see also State v. Kirkland*, 140 Ohio St.3d 73, 107-109 (2014) (O'Neill, J., dissenting).

This creates a serious and constitutionally impermissible likelihood that one who is not guilty of death may nevertheless receive a death sentence because the jury did not know what it could and could not consider on death's side of the calculus.

> At the beginning of our Republic and throughout most of its history, defendants did not go to the gallows unless juries said they should. And the role of the jury was seen as especially important when a defendant's life was in the balance, because it made sure that a defendant would suffer the ultimate punishment only if twelve members of the community deliberated together and unanimously concluded that should be so. . . . As the U.S. Supreme Court has long recognized, death is different. The proposition that any defendant should go to his death without a jury of his peers deciding that should happen would have been alien to the Founders, and starkly out of keeping with predominant American practices as of the time of *Furman* itself.

Rauf v. State, 145 A.3d 430, 437-438 (Del. 2016) (Strine, C.J. concurring). *Gregg*'s and *Hurst*'s effect in a case like this is inescapable: when a defendant invokes his right to a jury trial and is then deprived of his right to a proper jury instruction on the ultimate question of life or death, the only constitutional remedy is a new, fair, sentencing hearing at which the jury can decide his fate in accordance with the Sixth and Eighth Amendments.

As the Court of Appeals recognized, there is a clear difference between a case in which a jury is properly instructed on the aggravating circumstances and only later is one of those aggravating circumstances declared invalid and a case in which the jury is not instructed at all about what to consider in favor of death. The first situation can be addressed by full and proper appellate reweighing. *Clemons v. Mississippi*, 494 U.S. 738 (1990). The second situation can only be addressed by invalidating the resulting death sentence as arbitrary and capricious. *Furman*; *Gregg*. The two errors are systemically different and the Court of Appeals properly recognized the differences in reviewing Hutton's claim.

IV. Conclusion

For the reasons outlined above, the Warden's Petition for Writ of Certiorari attempts to manufacture errors that simply did not occur in the Court of Appeals's review of Hutton's case. At its core, the Warden's Petition is nothing more than an appeal to the Court to take another look at the case for the sole reason that the Warden lost. This is not a valid basis for review. Therefore, Mr. Hutton requests the Court deny the Warden's Petition.

Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE

No. 16-1116

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RESPONDENT.

As required by Supreme Court Rule 33.1(h), I certify that the Brief in Opposition to Petition for a Writ of Certiorari contains 5150 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 2017.

_____
Michael J. Benza

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the enclosed Respondent's Motion to Proceed In Forma Pauperis and Brief in Opposition were served via first-class U.S. mail, postage prepaid, on this 1st day of May, 2017 upon:

Eric E. Murphy
State Solicitor
30 E. Broad Street, 17th Floor
Columbus, OH 43215

All persons required to be served have been served.

_____
Michael J. Benza