No. 18-5892

In the Supreme Court of the United States

ANDRE JACKSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Is Ohio's death penalty sentencing statute unconstitutional under *Hurst v. Florida*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

STATEMENT OF THE CASE

On Thursday, June 25, 1987, Jackson murdered 74-year old Emily Zak inside the bathroom of the Washboard Laundromat at 27575 Euclid Avenue in Euclid, Ohio, where Zak worked at the counter. *See* Pet. App. 12a. Jackson forced Zak into the bathroom, severely beat her, shoved her face into the toilet bowl, and then – standing on her back – broke her neck over the rim of the bowl by stomping on it with his foot. *Id.* Jackson also stole the key to the cash register that Zak kept pinned to the front of her smock. He then ransacked the laundromat and stole the cash register, containing $100. *Id.*

Jackson's case proceeded to a jury trial in 1988. The jury found Jackson guilty of guilty of aggravated murder and aggravated robbery, as well as one capital specification of felony-murder under Ohio R.C. 2929.04(A)(7) for committing the aggravated murder in the course of an aggravated robbery. *See* Pet. App. 3a. Following the sentencing phase, the jury unanimously recommended the death penalty. *Id.* The trial court agreed with the jury's recommendation and sentenced Jackson to death. *Id.*

Ohio state courts affirmed Jackson's convictions on direct appeal and on postconviction review. *See* Pet. App. 12a-25a; 27a-45a (direct appeal); Pet. App. 48a-52a; 53a (postconviction). This Court denied certiorari over both Jackson's direct appeal and postconviction proceedings. *See Jackson v. Ohio*, 502 U.S. 835 (1991) (direct appeal); *Jackson v. Ohio*, 517 U.S. 1214 (1996) (postconviction).

Jackson filed a petition for a writ of habeas corpus in United States District Court for the Northern District of Ohio in December of 1996. The district court denied Jackson's petition in 2001. *See* Pet. App. 56a-136a. In 2003, the Sixth Circuit agreed to stay proceedings in Jackson's appeal of the district court's denial of his habeas petition so that Jackson could return to state court and pursue a claim that he was intellectually disabled, and therefore exempt from execution, under *Atkins v. Virginia*, 546 U.S. 304 (2002). Jackson's *Atkins* claim is still pending in the trial court, 15 years later.

While Jackson's *Atkins* petition was pending, this Court issued its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), striking down Florida's capital sentencing statute as unconstitutional under the Sixth Amendment. Following that decision, Jackson filed a motion in the trial court for a new sentencing phase, arguing that Ohio's capital sentencing statute was also unconstitutional under *Hurst*.

The trial court denied Jackson's motion. *See* Pet. App. 137a. The state appellate court affirmed. *See* Pet. App. 1a-6a. The state supreme court denied discretionary review. *See* Pet. App. 7a. Jackson now asks this Court to grant certiorari to review that decision.

SUMMARY OF THE ARGUMENT

This petition is one of a series of similar claims brought by Ohio death row inmates alleging that their death sentences are unconstitutional under *Hurst v. Florida*. Without exception, this Court denied every one of these petitions:

- *Landrum v. Ohio*, No. 16-9596 (petition denied 10/2/2017);

- *LaMar v. Ohio*, No. 17-5626 (petition denied 10/16/2017);
- *Lott v. Ohio*, No. 17-5627 (petition denied 10/30/2017)
- *Moore v. Ohio*, No. 17-9425 (petition denied 10/1/2018);
- *Mason v. Ohio*, No. 18-5303 (brief of respondent filed 9/28/2018).

This Court should do so again in this case. Ohio's capital sentencing statute already provides defendants with all of the rights to which *Hurst* says they are entitled. Ohio's statute requires the jury to unanimously find the existence of any aggravating circumstances before the case may proceed to a sentencing phase. At the sentencing phase, Ohio law requires the jury to unanimously recommend the death penalty before the court may impose such a penalty. And during that sentencing phase, Ohio law further limits both the jury and the trial court's consideration only to the aggravating circumstances that the jury found during the guilt phase. Ohio's statute is materially different from the Florida statute in *Hurst*, and is constitutional under the Sixth Amendment.

REASONS FOR DENYING THE WRIT

I. Ohio's death penalty sentencing statute is constitutional under *Hurst*.

A. Ohio's statute requires the jury to find every fact that authorizes an increase in the defendant's punishment.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court struck down a Florida death penalty statute that did "not require jury findings on aggravating circumstances." *State v. Steele*, 921 So.2d 538, 544 (Fla. 2006). Instead, Florida juries simply "render[ed] an 'advisory sentence' of life or death without specifying the factual basis of the recommendation." *Hurst* at 620, quoting Fla. Stat. § 921.141(2).

The jury was not required to do so unanimously and did not even have to agree amongst themselves which aggravating circumstances applied. *Steele* at 545. Instead, Florida judges determined de novo what aggravating circumstances applied, and then sentenced the defendant based on the judge's own findings.

In *Hurst*, this Court held that this violated the Sixth Amendment right to trial by jury. "If a State makes an increase in a defendant's authorized punishment contingent on [a] finding of fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." *Ring v. Arizona* 536 U.S. 584, 602 (2002). The Florida statute was unconstitutional because the Florida judge "increased [the defendant's] authorized punishment based on her own factfinding" when she determined which aggravating circumstances applied. *Hurst* at 622.

By contrast, Ohio's General Assembly drafted Ohio's capital sentencing statute, Ohio R.C. 2929.03, in a manner that preemptively solved these problems. Ohio's statute differs from the Florida statute this Court struck down in *Hurst* in at least seven significant respects. Every one of those differences provides Ohio defendants with greater protections than did the Florida statute in *Hurst*.

1. Florida's statute required only a simple majority of jurors to impose the death penalty.

Under the Florida statute, only "a majority vote [wa]s necessary for a death recommendation." *Ault v. State*, 53 So. 3d 165, 205 (Fla. 2010), citing Fla. Stat. § 921.141(3). For example, the jury in *Hurst* only voted 7-5 in favor of death. *Hurst* at 620. Although this Court has never held that unanimity is constitutionally required, Ohio juries must nevertheless be unanimous to recommend a death sentence. *See*

State v. Brooks, 75 Ohio St.3d 148, 162 (1996) ("In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. Jurors from this point should be so instructed"); *see also* Ohio R.C. 2929.03(D)(2) (requiring the jury to "unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors" to recommend a death sentence, and that "[a]bsent such a finding, the jury shall recommend that the offender be sentenced to one of" a series of life sentences).

2. The Florida statute effectively created a presumption in favor of death.

The Florida statute directed the jury to ask "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating factors found to exist[.]" Fla. Stat. § 921.141(2)(b). The Ohio statute places the burden on the prosecution to prove that the aggravating circumstances outweigh the mitigating factors. *See* Ohio R.C. 2929.03(D)(2).

3. Florida juries did not make findings about aggravating circumstances and did not have to unanimously find any aggravating circumstances.

The Florida statute did "not require jury findings on aggravating circumstances." *State v. Steele*, 921 So.2d 538, 544 (Fla. 2006). Florida trial courts were actually prohibited from using special verdict forms that would have required the jury to record its vote on each aggravating circumstance. *Id.* at 544-548. Moreover, "[n]othing in [Florida law] * * * requires a majority of the jury to agree on which aggravating circumstances exist." *Id.* at 545 (emphasis in original). As the

Florida Supreme Court explained in *Steele*, Florida law permitted a jury to recommend a death sentence where four jurors believed one aggravator applied, and three jurors believed that a second aggravator applied, because in that situation, "seven jurors believe that at least one aggravator applies." *Id.*

Ohio's statute requires the jury to render a unanimous verdict on each individual aggravating circumstance before that circumstance may be considered in the sentencing phase. *See* Ohio R.C. 2929.03(B) ("the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, * * * whether the offender is guilty or not guilty of each specification").

4. Florida juries were instructed that their verdict was only a recommendation.

The Standard Jury Instructions for the state of Florida actually informed the jury that their verdict was only a non-binding recommendation: "The decision as to which punishment shall be imposed rests with the judge of this court; however, the law requires that you, the jury, provide an advisory sentence as to which punishment should be imposed upon the defendant." Fla. Std. Jury Instructions Crim. No. 7.11(2).

The Ohio Jury Instructions do not contain any reference to an "advisory sentence" or to a "recommendation," nor do they say anything that would lead the jury to believe that its verdict is anything other than final. In fact, the Supreme Court of Ohio has "emphatically emphasize[d]" that "the better procedure would be to have no comment by the prosecutor or by the trial judge on the question of who

bears the ultimate responsibility for determining the penalty." *State v. Buell*, 22 Ohio St.3d 124, 144 (1986).

5. The Florida statute allowed the parties to present additional evidence, never presented to the jury, to the judge in a separate hearing.

Once a Florida jury rendered what the statute referred to as an "advisory sentence," the trial court made the final decision as to whether to "enter a sentence of life imprisonment or death[.]" Fla. Stat. § 921.141(3). To make that determination, the Florida trial court conducted a separate sentencing hearing, known as a *Spencer* hearing, without a jury present. At that hearing, both sides were given an opportunity "to present additional evidence" and "to comment on or rebut information in any presentence or medical report." *Spencer v. State*, 615 So. 2d 688, 690-691 (Fla. 1993). The court was "not limited in sentencing to consideration of only that material put before the jury," and "during sentencing, evidence may be presented as to any matters deemed relevant[.]" *Engle v. State*, 438 So.2d 803, 813 (Fla.1983).

Under Ohio law, there is no separate evidentiary hearing before the judge and the parties may not present additional evidence. The trial court may only consider the evidence offered at trial, along with the statements of counsel and any presentence or mental examination reports requested by the defendant. *See* Ohio R.C. 2929.03(D)(1) ("The court, and the trial jury if the offender was tried by a jury, shall consider * * * any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death").

6. Florida judges had unbridled discretion to choose which of 16 aggravating circumstances applied to the case.

The Florida trial court was not limited to the aggravating circumstances found by the jury and could "consider and find an aggravator that was not presented to or found by the jury." *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1998). In fact, this had to occur by necessity because "in Florida the jury * * * [did] not make specific factual findings with regard to the existence of mitigating or aggravating circumstances[.]" *Walton v. Arizona*, 497 U.S. 639, 648 (1990). The trial court received only a "yes" or "no" answer to the question, "[w]hether sufficient aggravating circumstances exist as enumerated in subsection (5)" of Florida's death penalty statute. Fla. Stat. § 921.141(2)(a). That statute contained 16 different aggravating circumstances. Fla. Stat. § 921.141(5)(a)-(p).

As a result, the Florida trial court did not even know what aggravators the jury found existed, or how many jurors found any particular aggravator. Thus, "the trial court is required to make independent findings on aggravation, mitigation, and weight." *Russ v. State*, 73 So.3d 178, 198 (Fla. 2011). The judge could pick any of the 16 aggravators he or she believed applied.

In Ohio, the jury does make specific factual findings with regard to the existence of any aggravating circumstances. In the mitigation phase, both the jury and the trial court are limited to the aggravating circumstances unanimously found by the jury during the first phase. *See State v. Cooey*, 46 Ohio St.3d 20 (1989), paragraph three of the syllabus ("Only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count"); Ohio R.C.

2929.03(D)(1) ("The court, and the trial jury if the offender was tried by a jury, shall consider * * * any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing").

Jackson incorrectly claims in his petition that Ohio courts "must independently make specific findings separate and apart from the jury's advisory verdict" as to "the existence and number of aggravating circumstances previously found by the jury" and "the 'sufficien[cy] of the aggravating circumstances[.]" *See Petition*, p. 14. Nowhere does Ohio law allow, let alone require, a judge to make separate findings as to whether aggravating circumstances exist in the case. Ohio R.C. 2929.03(F) requires a judge, when adopting a jury's death penalty recommendation and sentencing a defendant to death, to note in its written opinion "the aggravating circumstances the offender was found guilty of committing[.]" This refers to the aggravating circumstances found by the jury in the guilt phase, not to any separate findings by the judge at any point.

7. Florida judges could impose the death penalty even when the jury recommended life imprisonment.

The Florida trial court could impose a death sentence as long as it found beyond a reasonable doubt that at least one "sufficient" aggravating circumstance existed and that the aggravators were not outweighed by any mitigation. Fla. Stat. § 921.141(3). In making this determination, the court was "not bound by the jury's recommendation." *Williams* v. *State*, 967 So.2d 735, 751 (Fla. 2007); *see also* Fla. Stat. § 921.141(3) ("[n]otwithstanding the recommendation of a majority of the jury,

the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death").

The Florida judge could thus override the jury's recommendation regardless of what that recommendation actually was. The judge could impose death if the jury recommended life, and could impose life if the jury recommended death. *See Hurst* at 625 (Alito., J. dissenting), citing *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). This gave Florida courts the discretion to not only depart downward and impose a lesser sentence, but also to depart upward and impose a greater sentence.

In Ohio, the only circumstance in which the judge may ever override a jury's verdict in a death penalty case is if the judge elects to depart downward by imposing a sentence of life over a jury's recommendation of death. If the jury recommends life, the judge is bound by that recommendation and must impose that sentence without discretion. *See* R.C. 2929.03(D)(2) (if the jury recommends one of three life options, "the court shall impose the sentence recommended by the jury upon the offender"). It is thus impossible in Ohio for a judge to expose a defendant to a greater penalty than that authorized by the jury verdict.

B. The numerous differences between the Ohio and Florida statutes are outcome-determinative under *Hurst*.

The most important feature that renders Ohio's statute constitutional under the Sixth Amendment is that the jury, not the judge, determines beyond a reasonable doubt the existence of any aggravating circumstances – the finding that makes a defendant eligible for the death penalty. In *Ring*, this Court held that any fact that authorizes an increase in the defendant's authorized punishment must be found by

the jury beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. at 602. The Ohio statute does this by requiring the jury to find, unanimously and beyond a reasonable doubt, the existence of any aggravating circumstances. The judge has no discretion to make any factual findings apart from those the jury has already made. The judge is limited to the aggravating circumstances that the jury found in the first phase and can neither add to, nor subtract from, those findings under any circumstances.

In *Hurst*, this Court struck down the Florida statute because "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Hurst* at 622. The "findings" and "facts" this Court was referring to were the aggravating circumstances. Under the Florida statute, Florida juries never rendered any verdicts regarding any aggravating circumstances. Once the case proceeded to the second phase, the jury chose from a list of 16 aggravators any that they believed applied. The jury did not have to be unanimous and could mix and match aggravators to arrive at a simple majority of seven to recommend death. And once the trial court received the jury's death penalty recommendation, the court did not even know what aggravators the jury found. As a result, the judge was, in every case, the first fact-finder to find any aggravating circumstances that made the defendant eligible for death. On appeal, the Florida Supreme Court had only the judge's finding to review because only the judge ever made any findings in the record. The jury's vote as to any particular aggravating circumstances was unknown.

This Court in *Hurst* found the jury's role in recommending a sentence was insufficient to survive under *Ring* because a Florida jury "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances[.]" *Id.*, quoting *Walton v. Arizona*, 497 U.S. at 648. Instead, the Florida statute required the judge to issue specific factual findings as to which aggravating circumstances applied, but deprived the jury of any opportunity to do so. The statute thus "required the judge alone to find the existence of an aggravating circumstance[.]" *Hurst* at 624.

The Ohio statute does not allow this. Under Ohio law, the aggravating circumstances must be returned by the grand jury and contained in the indictment. The jury must unanimously find the aggravating circumstances beyond a reasonable doubt before the case may proceed to a second phase. At that second phase, the jury is limited to the aggravators it found during the first phase. If the jury recommends death, the trial court may only consider the aggravating circumstances the jury found and has no discretion to add any others. The trial court has the benefit of specific verdict forms returned by the jury for each aggravating circumstance, and the appellate court will know from the record exactly what aggravators the jury found.

If the trial court issues a written opinion imposing a death sentence under Ohio R.C. 2929.03(F), that opinion can only rely upon the aggravating circumstances the jury found to impose a death sentence. By definition, that sentence must rely exclusively upon factual findings the jury has already made. This satisfies the requirement of *Ring* that any "finding of fact" that "makes an increase in the

defendant's authorized punishment" possible "must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. at 602.

This Court in *Hurst* criticized the Florida statute for reducing the jury's role to what it referred to as an "advisory verdict." *Hurst* at 620. That verdict was truly "advisory" in that the jury never made any findings regarding aggravating circumstances. The trial court had unlimited discretion to find any aggravators it wished and to return any verdict it wished. It was that "advisory" nature of the verdict that this Court struck down in *Hurst*. Ohio's statute does not allow this. Ohio judges may only consider the aggravating circumstances found by the jury, and they must impose a life sentence if the jury so recommends. The fact that an Ohio judge always has the opportunity to veto the jury's recommendation of death does not make that verdict "advisory" in the sense that this Court used the term in *Hurst*. The Ohio jury's verdict is binding, not advisory, as to which aggravating circumstances exist.

C. The Sixth Amendment does not require a jury to make any findings about mitigating factors because such factors cannot increase a defendant's punishment.

Jackson points out that the Ohio statute does not require the jury to make any specific findings about mitigating factors. This is true, but irrelevant, because the Sixth Amendment right to jury fact-finding does not apply to mitigating evidence. Unlike aggravating circumstances, mitigating factors by definition cannot "make[] an increase in the defendant's authorized punishment" possible. *Ring* at 602. They can only result in a decrease in punishment.

This Court has "often recognized [the distinction] * * * between facts in aggravation of punishment and facts in mitigation." *Apprendi v. New Jersey*, 530

U.S. 466, 490 fn. 16 (2000). The jury's consideration of a mitigating factor "neither expos[es] the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor * * * impos[es] upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme." *Id.* As a result, the Sixth Amendment never requires a jury to find anything regarding mitigating circumstances.

D. *Hurst* did not create a new constitutional right to jury-sentencing in capital cases.

Contrary to Jackson's position, *Hurst* does not require the jury to impose a capital sentence. This is evidence by the fact that Justice Breyer concurred in the result only in *Hurst* and authored a brief, separate opinion reiterating his position that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." *Hurst* at 624 (Breyer, J., concurring). If *Hurst* had held there was a constitutional right to be sentenced by a jury, Justice Breyer would not have concurred and written that "I cannot join the Court's opinion." *Id.* There is thus no right to jury-sentencing in capital cases, and the constitutionality of Ohio's statute remains unaffected.

This Court explained in *Hurst* that it overruled its prior decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989) "to the extent they allow a sentencing judge to find an *aggravating circumstance*, independent of a jury's fact finding, that is necessary for imposition of the death penalty." *Hurst* at 624 (emphasis added). This Court further stated:

> "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."

Id. In Ohio, the judge never – under any circumstances – finds the existence of an aggravating circumstance. The jury alone makes that finding. It is that crucial difference that invalidated the Florida statute but protects the Ohio statute.

E. Jackson is asking this Court to invalidate Ohio's death penalty statute because it provides greater protections to defendants facing the death penalty.

Finally, Ohio's capital sentencing statute, Ohio R.C. 2929.03, gives the judge the power to accept or reject a jury's recommendation of death as a benefit to the defendant, not as a detriment. This statute "affords significantly more safeguards to the defendant" than a statute that does not allow a judge to override the jury's recommendation of death because it gives the defendant "a second chance for life with the trial judge[.]" *Dobbert v. Florida*, 432 U.S. 282, 296 (1977).

The irony of Jackson's *Hurst* claim is that the reason Ohio law requires a trial court to conduct an independent reweighing before sentencing a defendant to death is to give the defendant a second chance at a life sentence if the jury has recommended death. Jackson is attempting to convert this second chance at a lesser sentence into a constitutional deficiency. Jackson's argument, if accepted, would compel Ohio's General Assembly to remove this additional safeguard from the statute. Under Jackson's interpretation of the Sixth Amendment, the trial court cannot depart *downward* from the jury's recommendation. This would result in a statute that offers fewer protections rather than more, and a net detriment to capital defendants. Ohio

could adopt a statute that lessens the State's burden to obtain a death sentence, but the Sixth Amendment surely does not require it do so.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court of the United States, Christopher D. Schroeder, counsel of record for Respondent and a member of the Bar of this Court, hereby certifies that on October 9, 2018, he served Kathryn L. Sandford, counsel of record for Petitioner Andre Jackson, and co-counsel Randall L. Porter, by placing in the United States Mail, postage pre-paid, properly addressed to Attorneys Sandford and Porter at the Officer of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, a copy of the Brief in Opposition to Petition for Writ of Certiorari.

All parties required to be served in this case have been served.

Respectfully submitted,

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