No. _____

IN THE SUPREME COURT OF THE UNITED STATES

James Goff,

Petitioner,

-v-

State of Ohio,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

ANGELA MILLER - 0064902
Attorney at Law
awmillerlaw@att.net

258 Starling Lane South
Jupiter, Florida 33458
(561) 529-0545 (Telephone)
(561) 422-4820 (Facsimile)

Counsel for James Goff

Capital Case

QUESTION PRESENTED

In *Hurst v. Florida*, _ U.S. _, 136 S. Ct. 616 (2016), this Court: (a) overruled *Spaziano v. Florida*, 468 U.S. 447, 460-65 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989), (b) invalidated Florida's capital punishment statute, and (c) held that all facts necessary to impose a sentence of death must be based on a jury's verdict, not a judge's fact finding. *Hurst*, 136 S. Ct. at 624.

James Goff was sentenced under Ohio's judge-sentencing scheme where a jury's death verdict is a recommendation and the trial judge alone makes the findings essential to sentence a defendant to life or death. Like *Hurst*, Goff's case was remanded to the trial court. It was at this sentencing, in 2015, that the trial judge reviewed, weighed and based his decision on evidence never considered by a jury.

Mr. Goff appealed his case to the Twelfth District Court of Appeals and argued that he was entitled to a jury at resentencing under *Ring v. Arizona,* 536 U.S. 584, 112 S.Ct. 2428 (2002). The state court of appeals affirmed the trial court's decision. The Supreme Court of Ohio next reviewed Goff's appeal. The Supreme Court of Ohio upheld the trial court's decision despite its finding that the trial court "improperly considered" new mitigation evidence at the sentencing determination. *State v. Goff*, 154 Ohio St.3d 218 (2018). Additionally, the court determined that the weighing process is not fact-finding subject to the Sixth Amendment.

This Court in *Hurst* explicitly held that the trial judge is constitutionally prohibited from independently making the ultimate decision as to whether the aggravating

circumstances outweigh the mitigating factors and the defendant should be sentenced to death. Given the *Hurst* decision, the following question is presented:

> Is a trial judge's independent weighing of new mitigation evidence and imposition of the death penalty at a resentencing hearing unconstitutional under *Hurst v. Florida*?

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James Goff respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

PARTIES TO THE PROCEEDINGS

Petitioner, James Goff, a death-sentenced Ohio prisoner, was the appellant in the Supreme Court of Ohio.

Respondent, the State of Ohio, was the appellee in the Supreme Court of Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at *State v. Goff*, 2018-Ohio-3763 and is reproduced in the Appendix at A-1. The opinion of the Twelfth District Court of Appeals, *State v. Goff*, CA 2015-08-017, 2016-Ohio-7834 (12th Dist. Nov. 21, 2016), is included as A-18. The sentencing entry of the trial court is reproduced in the Appendix at A-36. The decision of the trial court is reproduced in the Appendix at A-40.

JURISDICTION

The Supreme Court of Ohio rendered its opinion on September 20, 2018. Goff timely-filed a Motion for Reconsideration with the Supreme Court of Ohio on September 28, 2018. The Supreme Court of Ohio denied that motion on November 21, 2018. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

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

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to have the Assistance of Counsel for his defense.

Eighth Amendment:

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

Fourteenth Amendment:

No State shall make or enforce any law which shall ...deny any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

James Goff appealed the decision reinstating the death penalty to the Twelfth Appellate District and later to the Supreme Court of Ohio. In 1995, a jury initially convicted Goff on two counts of aggravated murder with death penalty specifications, three counts of aggravated burglary, two counts of aggravated robbery, and one count of grand theft with specifications. The jury recommended that Goff be sentenced to death. On August 18, 1995, the trial court accepted the jury's recommendation and sentenced Goff to death.

The Twelfth District Court of Appeals subsequently affirmed appellant's conviction and death sentence. *State v. Goff,* No. CA 95-09-026, 1997 WL 194898 (12th Dist. Apr. 21, 1997). The Supreme Court of Ohio also affirmed Goff's conviction and death sentence. *State v. Goff*, 82 Ohio St.3d 123, 694 N.E.2d 916 (1998). This Court denied his petition for certiorari on June 24, 1999, *Goff v. Ohio*, 527 U.S. 1039, 119 S.Ct. 2402 (1999).

On April 26, 2000, the trial court denied Goff's motion for post-conviction relief. The Twelfth Appellate District affirmed the trial court's decision on March 5, 2001. *State v. Goff*, No. CA2000-05-014, WL 208845 (12th Dist. Mar. 5, 2001). The Supreme Court of Ohio declined review on June 27, 2001. *State v. Goff*, 92 Ohio St.3d 1430, 2001-Ohio-188, 749 N.E.2d 756 (2001).

On September 13, 2000, the trial court denied Goff's 60(B)(5) motion for relief from judgment. The Twelfth Appellate District affirmed the trial court's decision on June 11, 2001. *State v. Goff*, No. CA2000-10-026, 2001 WL 649830 (12th Dist. June 11, 2001). The Supreme Court of Ohio declined review on September 5, 2001. *State v. Goff*, 93 Ohio St.3d 1414, 2001-Ohio-1329, 754 N.E.2d 261.

On May 1, 2002, Goff filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Ohio alleging twenty-five constitutional errors. The District Court denied all of Goff's claims and dismissed the action. *Goff v. Bagley*, S.D. Ohio No. 1:02-CV-307, 2006 WL 35900369 (Dec. 1, 2006). Goff, however, filed a motion requesting a certificate of appealability and seventeen claims were certified for appellate review.

On April 6, 2010, the Sixth Circuit Court of Appeals issued its decision finding that Goff received ineffective assistance of appellate counsel due to counsel's failure to raise the issue of allocution. *Goff v. Bagley*, 601 F.3d. 445, 467 (6th Cir. 2010). The Sixth Circuit then granted Goff's petition for a writ of habeas corpus unless the Ohio court reopened Goff's direct appeal.

As a result, the Twelfth District Court of Appeals reopened Goff's direct appeal. The appellate court affirmed its prior judgment but remanded the case to the trial court to afford Goff his right to allocution. *State v. Goff*, 12th Dist. CA95-95-09-026, 2012-Ohio-1125 (Mar. 19, 2012).

Appointed counsel filed several motions prior to Goff's resentencing hearing. On June 20, 2014, counsel filed a motion to preclude imposition of the death penalty. In the alternative, counsel requested the empanelment of a new jury or at a minimum the opportunity to offer new mitigation testimony at the resentencing hearing. Counsel cited *Ring v. Arizona*, 536 U.S. 584, 112 S.Ct. 2428 (2002) and the Sixth Circuit case of *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007) in support of his arguments.

On August 13, 2014, the trial court issued its decision and entry allowing Goff to proffer his new mitigation evidence. Goff was denied the opportunity to allow his expert

witness to testify or update previous mitigation testimony. The trial court also denied Goff's motions to preclude imposition of the death penalty and to empanel a jury for resentencing.

On June 30, 2015, the trial court conducted Goff's resentencing hearing. At the hearing, Goff proffered a report of Dr. Dennis Eshbaugh, a forensic psychologist, as representative of what Dr. Eshbaugh would have said had he been permitted to testify at the hearing. (Tr. Vol. IV, p. 36-37). Defense counsel then briefly discussed Goff's youth at the time of the offense, his substance abuse at that time, his very difficult childhood, and his positive adjustment to prison life, post-sentencing. (Tr. Vol. IV, p. 39-42).

The state responded to Goff's mitigation of sentence argument by stating that Goff rejected an opportunity to enter a plea that would have spared him the death penalty. (Tr. Vol. IV, p. 44-45). The trial court then provided Goff with the opportunity to make a statement. Goff offered a brief statement in allocution. (Tr. Vol. IV, p. 45-46).

The trial court ruled that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt and sentenced Goff to death. In its opinion, the trial court stated that it "reviewed and considered all of the trial transcripts of this matter, as well as all of the mitigating factors presented at the original trial, *in addition to those that were presented or re-presented with regard to the sentencing hearing.*" (Decision, June 30, 2015, p. 1) (Emphasis added) (Appx. A-35). In the accompanying sentencing entry, the trial court repeated that it "*ha[d] found additional mitigating evidence as of the date of the hearing which it ha[d] considered,* including the statement the Defendant made in allocution." (Sentencing Entry, August 4, 2015, p. 1) (Appx. A-36). After weighing all the

factors, the judge determined that the aggravating factors outweighed any mitigating factors and imposed the death penalty.

Goff raised four assignments of error on direct appeal, specifically arguing that he was constitutionally guaranteed to a jury at his resentencing hearing. Goff was entitled to have a jury, not a single judge, weigh aggravating and mitigating factors and decide whether to impose the death penalty. On January 12, 2016, this Court decided *Hurst v. Florida*, _U.S. _, 136 S.Ct. 616 (2016). On November 21, 2016, the Twelfth District Court of Appeals issued its decision overruling each of Goff's assignments of error and affirming the judgment and sentence of the trial court. *State v. Goff*, No. CA2015-08-017, 2016-Ohio-7834 (12th Dist. Nov. 21, 2016).

Goff filed his notice of appeal with the Supreme Court of Ohio on January 5, 2017. The Supreme Court of Ohio decided, in light of *Hurst*, that it was improper for the trial judge to consider newly presented mitigation evidence but that his weighing of aggravating and mitigating circumstances and imposition of the death penalty was not fact-finding protected by the Sixth Amendment. *State v. Goff,* 154 Ohio St.3d 218, 2018-Ohio-3763.

The decision issued by the Supreme Court of Ohio is in direct conflict with this Court's decision in *Hurst v. Florida*, supra, and leaves undisturbed single-judge imposition of the death penalty in Ohio. The decision also conflicts with both federal and state courts in Missouri, Colorado, Delaware and Nevada. Compare, *McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D. Mo. Mar. 22, 2016); *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (en banc); *Woldt v. People*, 64 P.3d 256 (Colo. 2003 (en banc); *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016); *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (Nev. 2011).

REASON FOR GRANTING THE WRIT

I. The Issues Presented Are of Importance in The Constitutional and Uniform Administration of the Death Penalty.

Denying capital defendants a jury at resentencing is unconstitutional under *Hurst v. Florida* because it vests sentencing authority in the trial judge who makes specific, independent findings that are required to sentence a defendant to death. In *Hurst,* 136 S.Ct. at 624, this Court held Florida's death penalty statute unconstitutional because all factual findings necessary to impose the death sentence were found by the judge, not the jury.

Here, Goff was sentenced to death by a single judge after his case was reversed and remanded for a new sentencing hearing. After denying Goff the jury he requested, the trial judge proceeded to consider new mitigation evidence that was never presented to Goff's original jury. In the trial judge's decision of June 30, 2015, he stated:

> The Court has reviewed and considered all of the trial transcripts of this matter as well as all of the mitigating factors presented at the original trial, in addition to those that were presented or re-presented with regard to the sentencing hearing. The Court has further searched the entire record for any further evidence as to mitigation. Although parts of this opinion are similar to the Court's original opinion herein, it has considered anew, the evidence, testimony, arguments of counsel as well as Defendant's allocution.

(Appx. A- 40).

Later, in the same decision, the trial judge expanded on the mitigating factors that he considered without a jury:

> This Court has considered the statements of counsel as well as the allocution of the Defendant. The Court has also reviewed the proffered evidence [recent report of Dr. Eshbaugh, Ph.D.] by the Defendant. As a result, the Court has fund that certain mitigating factors exist, as outlined above, and has weighed them against the aggravating circumstances.

(Appx. A- 47).

The Court weighed both Goff's new and previously submitted mitigation evidence. In the August 4, 2015 sentencing entry, the trial judge reiterated:

> The Court has considered all of the evidence, testimony, all of the evidence raised in mitigation and arguments that counsel have made during each phase of this proceeding, including this proceeding, all of which the Court has considered significant prior to pronouncing sentence. The Court has found additional mitigating evidence as of the date of this hearing which it has considered, including the statement of the Defendant made in allocution.

(Appx. A-36).

The findings in Goff's trial court decision and sentencing entry necessarily constitute judicial fact-finding, thus offending the Sixth Amendment mandate that "a jury, not a judge, ... find *each fact necessary* to impose a sentence of death." *Hurst,* 136 S.Ct. at 622 (because the trial court made the final critical findings, Florida's death penalty scheme was unconstitutional).

II. The Supreme Court of Ohio is seeking to distance itself from *Hurst*.

Hurst announced that a jury - not a judge - must make the critical findings in support of a death sentence. *Hurst,* 136 S.Ct. at 622. Applying this rule to Florida's statute, this Court noted that although a Florida jury recommends a sentence "it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." *Id.* The *Hurst* Court held Florida's death penalty statute unconstitutional because the statute placed the judge in the "central and singular role" of making a defendant eligible for death by requiring the judge independently to find " 'the facts ... [t]hat sufficient aggravating circumstances exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. (quoting ...Fla. Stat. § 921.141(3)). The fact that a Florida judge was

required to afford "great weight" to the jury's recommendation did not cure the statute's unconstitutional mandate that the trial court exercise "independent judgment" and make fact-findings. *Hurst,* 136 S.Ct. at 620, 622.

Ohio courts have long-aligned its capital sentencing scheme with Florida's, characterizing the two as "remarkably similar." *State v. Broom,* 40 Ohio St.3d 277, 291-92 n.5, 533 N.E.2d 682, 698 (1988) (comparing Ohio's statute to Florida's); *State v. Buell, 22* Ohio St.3d 124, 139-41, 489 N.E.2d 795, 808-10 (1986) (same). In Ohio, the defendant has "the burden of going forward with the evidence of any factors in mitigation of the imposition of the death sentence." O.R.C. §2929.03(D)(1). Ohio law requires a jury to render a unanimous verdict that the aggravating circumstances (alleged in the indictment and proven beyond a reasonable doubt in the penalty phase) outweigh the mitigating factors beyond a reasonable doubt before it may recommend death. *Id.*

The Ohio statute, however, does not require the jury to make any specific findings of fact about mitigating factors, nor does it ask the jury to make any specific findings about the balancing of mitigating and aggravating factors. The judge implements a sentence without these critical determinations. Thus, the role of the Ohio trial judge is far more than ministerial; it is crucial. The judge must make and articulate specific findings according to the statutory scheme. This requirement of judicial findings above and beyond the jury's advisory verdict places the judge in the· "central and singular role" of the sentencer.

The removal of the jury from the final critical findings is how the Supreme Court of Ohio excuses what occurred in Goff's case. Specifically, while Goff's trial judge "improperly" considered new evidence in imposing the death penalty "the weighing that occur[ed] in the sentencing phase 'is not a fact-finding process subject to the Sixth Amendment." *State v. Goff*,154 Ohio St.3d 218 (2018), quoting *State v. Mason*, 153 Ohio

St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56, at ¶29; *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶60. According to the Supreme Court of Ohio, "[t]he Sixth Amendment was satisfied once the jury found [Goff] guilty of aggravated murder and a felony-murder capital specification." *Goff* at ¶36, quoting *Mason* at ¶29. But, under *Hurst*, the Sixth and Fourteenth Amendments require that a jury, rather than a judge, find every fact necessary to impose a death sentence. *Hurst*, 136 S.Ct. at 619. Thus, Goff was denied a full and fair sentencing proceeding in a capital case just as the defendant was in *Hurst*.

III. The weighing of aggravating and mitigating factors implicates *Hurst*.

Both federal and state courts have concluded that weighing determinations are factual findings that must be made by juries. The number of jurisdictions so holding is only likely to increase because of the broad language of *Hurst*.

A Missouri Federal District Court concluded the Missouri statutory scheme violated the Sixth Amendment in light of *Hurst* and *Ring*. *McLaughlin v. Steele*, 173 F.Supp.3d 855, 896 (E.D. Mo. Mar. 22, 2016). The court found that "the weighing of mitigating and aggravating circumstances is a finding of fact." *Id*. *See also State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (en banc) (finding Missouri's requirement that capital jurors determine whether evidence in mitigation was sufficient to outweigh the evidence in aggravation before sentencing defendant to death was a factual finding properly made by a jury). The *McLaughlin* Court reasoned "all we know from the special interrogatory is what [the jury] did not find." *Id*. "[B]ecause the judge could not have known what the jury decided, he could not have relied upon it in imposing the death penalty, and so he must have made the factual findings himself." *Id*. This violated the Sixth Amendment. *Id*.

In *Woldt v. People*, the Supreme Court of Colorado found its state statute's requirement that the sentencing body decide "whether the mitigating factors outweighed the aggravating factors" was "fact-finding" that rendered the defendant eligible for a death sentence and must be made by a jury. 64 P.3d 256, 265-66 (Colo. 2003) (en banc). *See also Rauf v. Delaware*, 145 A.3d 430 (Del. 2016) (a sentencing judge, independent of a jury, may not find the existence of any aggravating circumstance for weighing in a capital sentencing proceeding.) Additionally, while the Supreme Court of Nevada has considered weighing "mostly a question of mercy," the process is thereby regarded as retaining some factual inquiry. *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (Nev. 2011).

Thus, the independent weighing process and the consideration of new mitigation evidence, amounted to fact-finding that is to be performed by a jury under *Hurst*. *Hurst* expressly forbids *Goff's* holding that there is no Sixth Amendment right to have a jury ultimately decide whether the death penalty should be imposed. Goff's case presents this Court with the perfect opportunity to ensure the constitutional and uniform application of the death penalty.

CONCLUSION

For the foregoing reasons, Petitioner James Goff respectfully request this Court grant this petition for certiorari.

Respectfully submitted,

/s/Angela Miller

ANGELA MILLER -0064902
Counsel of Record
awmillerlaw@att.net

258 Starling Lane South
Jupiter, Florida 33458
(561) 529-0545 (Telephone)
(561) 422-4820 (Facsimile)

Counsel for James Goff