No. 18-8016

In the Supreme Court of the United States

JAMES GOFF,

Petitioner,

v.

OHIO,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

Does an allocution error, which occurs before sentencing but after mitigation, entitle a capital defendant to reopen mitigation as part of a resentencing hearing?

LIST OF PARTIES

The Petitioner is James Goff, an inmate at the Chillicothe Correctional Institution. Goff is a capital prisoner, but has no currently scheduled execution date.

The Respondent is the State of Ohio.

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INTRODUCTION

James Goff murdered 88-year-old Myrtle Rutledge in 1995. A jury convicted him and recommended a death sentence, which the trial court imposed. Both the Ohio Court of Appeals and the Ohio Supreme Court affirmed Goff's conviction and sentence on direct appeal. *State v. Goff*, No. CA95-09-026, 1997 Ohio App. LEXIS 1554 (Ohio Ct. App. Apr. 21, 1997); *State v. Goff*, 82 Ohio St. 3d 123 (1998). After a lengthy post-conviction trip through state and federal court, the Sixth Circuit Court of Appeals eventually concluded that Goff's appellate counsel had been ineffective for failing to argue that he had been denied an opportunity to allocute. It instructed the state courts to reopen his appeal. *Goff v. Bagley*, 601 F. 3d 445, 450 (6th Cir. 2010). The state appellate court in turn remanded the case for a limited resentencing hearing—a hearing limited to the opportunity to allocute. Pet. App. 4.

Having failed to convince a jury of his peers or the Ohio courts that he should receive a sentence other than death, Goff alleges a constitutional defect. He argues that, under *Hurst v. Florida*, 136 S. Ct. 616 (2016), it was not enough to give him the right to allocute during his resentencing. Instead, he says, the trial court should have empaneled a new jury and conducted a new mitigation proceeding. He further argues that the Court should invalidate Ohio's death penalty scheme altogether.

The Court should decline to hear the case. Ohio's sentencing statutes are decidedly different from the Florida statutes at issue in *Hurst*. Most significantly, a jury, not a judge, must find all of the relevant facts at both the guilt and mitigation

stages of trial. Thus even if this case provided a good vehicle, there would be no reason for the Court to consider Goff's Question Presented.

But it is not a good vehicle. To the extent that an error may have occurred at Goff's trial, it did so only after the mitigation phase was over. At that point, *Hurst* is irrelevant; once a jury has made all of the necessary factual findings, *Hurst* has nothing left to say. If the Court were inclined to consider whether Ohio's sentencing scheme violates *Hurst* then it should do so in a case that raises that issue directly. But the Court has denied petitions on that very subject. *See, e.g.*, *Mason v. Ohio*, 139 S. Ct. 456 (2018).

For similar reasons, the decision below did not create a conflict with other decisions interpreting or applying *Hurst*. Goff cites several cases that he claims are in conflict with the decision below. *See* Pet. 6. But while the outcome of those cases may be different, the interpretation of *Hurst* is not. Any differences are explained by the unique facts of each individual case.

Finally, Goff does not even attempt to show that he was prejudiced by any alleged errors below. At his resentencing hearing Goff sought to introduce additional mitigating evidence. The trial court considered that evidence, but still re-imposed Goff's original capital sentence. Goff now argues that a jury, not a judge, should have reviewed his new evidence. But if any error occurred, it was that Goff was permitted to proffer new evidence in the first place. The Ohio Supreme Court held below that he should have never been allowed to add any new mitigation evidence. In light of that fact, Goff has no claim that he was prejudiced

by the trial court's decision to consider that evidence. After all, the trial court gave his new evidence *greater* consideration than Ohio law allowed.

STATEMENT

1. In September 1994, 88-year-old Myrtle Rutledge purchased furniture for her new home. *State v. Goff*, 82 Ohio St. 3d 123, 124 (1998). Goff helped deliver her furniture. *Id.* Because Rutledge had purchased a new mattress and box spring, Goff asked her if she wanted Goff and his co-worker, Manuel Jackson, to move the bedframe from her old farmhouse to her new home. *Id.* Rutledge agreed and the two men proceeded to disassemble and reassemble it. *Id.*

Rutledge's family saw or spoke to her on the day Goff delivered the furniture, and on the following day. *Id.* When Rutledge failed to arrive at a family reunion several days later, her daughter went to the farmhouse and found her bloody, naked body in the upstairs bedroom. *Id.* at 125. She had been stabbed multiple times. *Id.* Rutledge's daughter attempted to call authorities, but the telephone lines had been cut. *Id.*

2. Goff turned out to be the murderer. Following the delivery of the furniture to Rutledge's home, Goff and Jackson purchased and consumed crack cocaine. *Id.* at 125–26. Over the next day, Jackson and Goff consumed more crack cocaine. *Id.* at 126. Goff then met up with some other friends to consume still more drugs. *Id.* Goff attempted to have his friend, Timothy Shaffer, sign a document indicating that Shaffer assisted Goff in committing a crime on September 15, but Shaffer refused. *Id.* Shaffer, however, did let Goff stay in his trailer with him for several days. *Id.*

While at Shaffer's trailer, Goff asked Shaffer what Shaffer would do if Shaffer killed someone. *Id.* Goff told Shaffer how he choked and "stabbed a lady" bending the knife blade. *Id.* Goff then described stealing the woman's car, wiping the steering wheel of prints, and then leaving it in front of an apartment complex before he went to purchase more crack cocaine. *Id.*

Shaffer kicked Goff out after reading about Rutledge's murder in the newspaper. *Id.* Goff sent Shaffer a letter a couple of weeks later stating that Shaffer held Goff's life in his hands and asking him not to tell anyone. *Id.* Shaffer did the opposite; he called the authorities. *Id.*

After Goff was arrested on unrelated drug charges, he admitted he had delivered furniture to Rutledge. *Id.* at 126–27. Goff requested an attorney when questioning turned to the murder, however. *Id.* at 127. At trial, the state presented testimony from inmates that Goff had talked to while in jail. One inmate testified that Goff told him he had gone to rob Rutledge and that she had called him "Jimmy" so he "had to get rid of" her because she could identify him. *Id.* Goff told the same inmate that he stole Rutledge's car and went to buy crack cocaine with the money he stole from her home. *Id.*

3. An Ohio jury convicted Goff of aggravated murder with capital specifications, aggravated burglary, aggravated robbery, and grand theft. *Id.* The case proceed to the mitigation phase, and the jury recommended Goff receive a sentence of death. *Id.* After independently reweighing the aggravating circumstances and the mitigating factors, the trial court imposed a death sentence.

Id. At the sentencing hearing, the trial court failed to permit Goff an opportunity for allocution as provided by Ohio law. Pet. App. 3. The state court of appeals and the Ohio Supreme Court affirmed Goff's conviction and death sentence on direct appeal. *State v. Goff*, No. CA95-09-026, 1997 Ohio App. LEXIS 1554 (Ohio Ct. App. Apr. 21, 1997); *Goff*, 82 Ohio St. 3d at 128.

Goff unsuccessfully pursued state-postconviction relief. *See State v. Goff*, No. CA2000-05-014, 2001 Ohio App. LEXIS 781 (Ohio Ct. App. Mar. 5, 2001) (petition for state postconviction relief); *State v. Goff*, No. CA2000-10-026, 2001 Ohio App. LEXIS 2609 (Ohio Ct. App. June 11, 2001) (motion for relief from judgment under Ohio R. Civ. Pro. 60(B)(5)); *State v. Goff*, 98 Ohio St. 3d 327 (2003) (application to reopen direct appeal pursuant to Ohio R. App. Pro. 26(B)). His luck turned in federal court. The District Court for the Southern District of Ohio denied his request for habeas relief. *Goff v. Bagley*, No. 1:02-cv-307, 2006 U.S. Dist. LEXIS 87211 (S.D. Ohio Dec. 1, 2006). But on appeal, the Sixth Circuit Court of Appeals determined Goff's appellate counsel was constitutionally ineffective for failing to raise the claim that the trial court erred by failing to afford Goff an opportunity for allocution. *Goff v. Bagley*, 601 F.3d 445, 464-467 (6th Cir. 2009). The Sixth Circuit did not upset his conviction, but it did grant a conditional writ effective 120 days later "unless the Ohio courts reopen Goff's direct appeal . . . to allow Goff to raise his allocution argument." *Id.* at 473.

4. In accordance with the Sixth Circuit's directive, the state court of appeals reopened Goff's direct appeal and allowed him to raise his allocution claim. *State v.*

Goff, No. CA95-09-026, 2012 Ohio App. LEXIS 992, *6 (Ohio Ct. App. Mar. 19, 2012). The appellate court again affirmed Goff's convictions but, due to the trial court's failure to afford Goff his right to allocution, vacated its prior affirmance of Goff's sentence and remanded the matter for a resentencing hearing. *Id.* at *8–9 ("because we find the trial court erred by failing to afford appellant with his right to allocution at his August 18, 1995 sentencing hearing, we reverse and vacate our prior judgment affirming appellant's sentence and *remand this matter for the sole purpose of resentencing*.") (emphasis added). The court of appeals instructed the trial court, "[u]pon remand, . . . to personally address [Goff] and afford him his right to allocution before imposing its sentence." *Id.* at *9.

On remand, the trial court denied Goff's motion to either bar the reimposition of the death penalty or to empanel a new mitigation phase jury. Pet. App. 20. It did, however, grant his motion to proffer new mitigation evidence and awarded him funds to hire a consulting psychologist. *Id.*

At the resentencing hearing, Goff proffered the report prepared by psychologist Dennis Eshbaugh, Ph.D., as representative of testimony Dr. Eshbaugh would have given had he been permitted to testify at the hearing. Pet. App. 21. Goff's attorneys urged the trial court to impose a life sentence, "emphasizing Goff's difficult childhood, his youth at the time of the offenses, his substance abuse at the time of the offenses, and his positive adjustment to prison life." Pet. App. 4. The State advocated for the imposition of a death sentence. *Id.* Goff then made a statement in allocution. *Id.* Goff told the trial court that he had not been violent in

prison, referred to his difficult childhood, and asked the judge for leniency. *Id.* The trial court again sentenced Goff to death. *Id.*

5. The court of appeals affirmed the reimposition of the death penalty. Pet. App. 18–34. So did the Supreme Court of Ohio. Pet. App. 1. Goff argued that the trial court violated *Hurst v. Florida* by independently reweighing the mitigating evidence in his case. Pet. App. 8–11. The Supreme Court of Ohio rejected that argument. Pet. App. 11–12. It explained, relying on its decisions in *State v. Mason*, 153 Ohio St. 3d 476 (2018) and *State v. Belton*, 149 Ohio St. 3d 165 (2016), that Ohio law complies with *Hurst*. Pet. App. 9–11. More specifically, it explained that *Hurst* forbids the imposition of a death sentence when a judge alone has the power to find the existence of aggravating circumstances justifying such a penalty. Pet. App. 9–10. Ohio law satisfies *Hurst* because it "requires the critical jury findings that were not required by the laws at issue" in that case or in *Ring*. Pet. App. 10 (quotation omitted). The court further explained that Ohio law did not permit the trial court to consider the new mitigating evidence that Goff proffered. Pet. App. 5–7. The Ohio Supreme Court further rejected Goff's contention that the remand order for resentencing required that he receive an entirely new mitigation hearing. Pet. App. 9.

REASONS FOR DENYING THE WRIT

I. OHIO'S CAPITAL SENTENCING SYSTEM IS MEANINGFULLY DIFFERENT FROM THE FLORIDA SYSTEM AT ISSUE IN *HURST*.

The Court should decline Goff's invitation for review in this case. Ohio's capital sentencing system does not suffer from the same flaws as the one that the

Court struck down as unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016). In that case the Court applied—but did not extend—the principles previously announced by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). It invalidated Florida's capital-sentencing system because a judge, rather than a jury, was allowed to find the existence of aggravating circumstances necessary to support a capital sentence. *Hurst*, 136 S. Ct. at 620–22. Ohio's sentencing process is significantly different.

A. Under the invalidated Florida 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.* (statutory citation omitted).

In this additional sentencing proceeding, the judge made "'the ultimate sentencing determinations.'" *Id.* (quoting *Ring*, 536 U.S. at 608 n.6). 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).

Hurst analyzed Florida's system against the backdrop of *Apprendi* and *Ring*. *Id.* at 620–21. This 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.*

In *Hurst*, this 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 verdict that Arizona lacked," this 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. *See id.* at 625 (Alito, J. dissenting) (noting that Florida judges could override a jury recommendation of a life sentence in limited circumstances); *see also Belton*, 149 Ohio St. 3d at 176.

B. There are stark differences between Florida's system described above and Ohio's system. Under Ohio's capital-sentencing system, 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 any mitigating factors. To that end, Ohio capital jury trials have three stages: a guilt phase, a mitigation phase, and a sentencing hearing.

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." Ohio Rev. Code § 2929.03(B); *see* Ohio Rev. Code § 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. Ohio Rev. Code § 2929.03(B); Ohio R. Crim. Pro. 31. 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. Ohio Rev. Code § 2929.03(C)(2).

Mitigation Phase—Jury. The case then goes to the mitigation phase, where the prosecution has the burden of proving, beyond a reasonable doubt, that the aggravating circumstances the jury found the defendant guilty of committing at the guilt phase outweigh any mitigating factors. Ohio Rev. Code § 2929.03(D)(1). The defendant may present "evidence of any factors in mitigation of the imposition of the sentence of death." *Id.*; *see* Ohio Rev. Code § 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. Ohio Rev. Code § 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 in spite of the life-imprisonment recommendation by the jury. *Id.*

Sentencing Hearing—Judge. If, and only if, the jury recommends a death sentence, the court must proceed to conduct an independent review pursuant to Ohio Rev. Code § 2929.03(D)(3). The court may consider any mitigating factors, but may only consider the aggravating circumstances that were part of the jury's guilty verdict. *Id.* The court must impose a death sentence if it agrees with the jury's finding that, by proof beyond a reasonable doubt, the aggravating circumstances outweigh the mitigating factors. *Id.* 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. *Id.* If the court imposes death, it must explain its reasoning in a separate sentencing opinion. Ohio Rev. Code § 2929.03(F).

C. 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 concludes, beyond a reasonable doubt, that the aggravating circumstances that *the jury* found outweigh any mitigating factors.

This scheme does not violate *Hurst*. Most significantly, by placing all fact-finding responsibilities with the jury, it eliminates any concern that a defendant could be sentenced to death on the basis of facts found by a judge. In Ohio, a jury must find that aggravating circumstances exist *and* decide whether those circumstances outweigh any mitigating evidence. *See* Ohio Rev. Code § 2929.03. This setup ensures that, unlike in Florida, every capital sentence in Ohio is based solely upon facts found by a jury.

Sentencing judges in Ohio also play a more limited role than the Florida judges did in *Hurst*. Ohio's scheme does not permit a judge to increase a capital defendant's sentence at all, let alone increase it on the basis of judicial fact finding. In Florida, judges had the option of sentencing a defendant to death even when a jury had not recommended that sentence. *See Hurst*, 136 S. Ct. at 625 (Alito, J. dissenting) (noting that Florida judges could override a jury recommendation of a life sentence in limited circumstances). Ohio judges do not. They have only two choices at sentencing: they may either (1) impose the jury's recommended sentence, or (2) impose a *lesser* sentence. *See* Ohio Rev. Code § 2929.03(D)(3). This limited judicial role makes it impossible for an Ohio judge to make any finding that will expose a defendant to *greater* punishment than the one already supported by the jury's verdict. And it makes Ohio's scheme decidedly different from the Florida scheme that the Court invalidated in *Hurst*.

II. THIS CASE PROVIDES A POOR VEHICLE TO CONSIDER THE QUESTION PRESENTED BECAUSE ANY ERROR OCCURRED AFTER MITIGATION.

Unlike *Hurst*, this case involves events that occurred after both the guilt and mitigation phases of trial. That is, they occurred only after the jury completed its work. The case therefore does not implicate *Hurst* and provides a poor vehicle with which to address the constitutionality of Ohio's capital sentencing system.

After the Sixth Circuit ordered the Ohio state courts to reopen Goff's direct appeal, his case was remanded so that the trial court could correct an allocution error. Pet. App. 3–4. That error occurred, however, only after the jury found the existence of the aggravating factors (which occurred during the guilt phase) and after the jury conducted the weighing of the aggravating factors and mitigating circumstances (which occurred during the mitigation phase). The trial court on resentencing correctly concluded that the remand was a limited one and that the case must proceed from the point the error occurred—a point at which the jury was no longer involved. *See State v. Filiaggi*, 86 Ohio St. 3d 230, 240 (1999) ("Upon remand, the trial panel is required to proceed from the point at which the error occurred.") (citing *Commrs. of Montgomery Cty. v. Carey*, 1 Ohio St. 463, syl. ¶ 1 (1853)); *see also State ex rel. Stevenson v. Murray*, 69 Ohio St. 2d 112, 113, (1982)) (same).

Because the only error to be corrected on remand occurred after the jury had made all of the necessary findings of fact, this case does not implicate *Hurst*. *Hurst* held that Florida's capital sentencing scheme, which permitted a judge, not a jury, to make the factual findings necessary to justify a capital sentence was

unconstitutional. 136 S. Ct. at 622. But here, the jury made the necessary factual findings, and determined that a sentence of death was appropriate, before any error occurred. *See* Pet. App. 8–9.

The fact that the alleged error in this case has nothing to do with the jury's usual role in capital cases makes it a poor vehicle to consider if or how *Hurst* applies to Ohio's capital sentencing statutes generally. If the Court wishes to address that question, it should do so in a case that raises the issue directly. Thus far, at least, the Court has chosen not to do so. *See Mason v. Ohio*, 139 S. Ct. 456 (2018) (cert denied).

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER COURTS.

Goff is wrong when he argues that the Ohio Supreme Court created a conflict with other courts over the meaning and application of *Hurst*. *See* Pet. 6 and 10–11. To begin with, none of the cases that Goff cites involved the type of sentencing error at issue here. This case does not involve a dispute over whether a judge or jury must find certain facts; it asks instead whether a resentencing that is held to correct a trial error that occurred after the mitigation phase concluded entitles a defendant to reopen the mitigation proceedings. The difference in legal question is, by itself, sufficient to rebut his suggestion that a conflict exists.

Even if this case *did* involve questions about the scope of a jury's role in capital sentencing, there would still be no conflict between this case and the ones Goff cites. Among other things, most of the decisions that Goff relies on predate *Hurst*. Pet. 6. Only two of his cited cases actually interpreted that decision. *See*

McLaughlin v. Steele, 173 F.Supp.3d 855 (E.D. Mo. 2016) and *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016). And of those two decisions, one was issued by a federal district court during habeas proceedings—which does not create a split of authority necessitating this Court's review.

Goff offers no significant analysis of *Rauf*, the only state supreme court decision to actually apply *Hurst*. *See* Pet. 10–11. Even if he had, there is no conflict between that decision and the one below. The Delaware Supreme Court in *Rauf* invalidated that state's capital sentencing scheme because it permitted a judge, not a jury, to determine that aggravating circumstances warranting a capital sentence exist. *Rauf*, 145 A.3d at 433. Its decision was based on the specific sentencing provisions of Delaware law which, among other things, provided that a jury's recommendation with respect to the existence of aggravating circumstances was not binding upon the trial court. *Id.; see also* 11 Del. C. § 4209(d)(1). As discussed above, Ohio law is different. Unlike in Delaware, in Ohio juries, not judges, make all of the factual findings necessary to qualify a defendant for a capital sentence. Any difference in outcome is readily explained by differences in the laws at issue, not in the interpretation or application of *Hurst*.

For similar reasons, there is no conflict between the decision below and the other decisions that Goff cites. As with *Rauf,* any difference in outcome in those cases was driven by the facts of each specific case, or the specific state law at issue, *not* by a different interpretation of this Court's decisions. Far from demonstrating a

conflict, the cases that Goff cites reflect a consistent understanding of this Court's decisions in *Apprendi*, *Ring*, and *Hurst*.

Several of the decisions involved important factual differences too. In *McLaughlin v. Steele*, for example, the district court granted habeas relief because the jury verdict form was ambiguous with respect to the findings that it made. 173 F.Supp.3d at 896. And in *State v. Whitfield*, 107 S.W.3d 253, 261–62 (Mo. 2003), the jury was unable to reach agreement on the appropriate punishment, so the judge did so instead. Others involved entirely different sentencing schemes. In Colorado, for example, a three-judge panel, not a jury was responsible for finding the facts necessary to support a capital sentence. *Woldt v. People*, 64 P.3d 256, 263–67 (Colo. 2003). Another case did not raise the issue at all. That case, *Nunnery v. State*, 263 P.3d 235 (Nev. 2011), dealt instead with the standard of proof that a jury must apply when weighing aggravating and mitigating factors. *See id.* at 250–51.

IV. GOFF CANNOT SHOW THAT HE WAS PREJUDICED BY THE TRIAL COURT'S DECISION TO REVIEW HIS PROFFERED EVIDENCE.

Goff alleges his rights were violated when the trial court reviewed and considered additional mitigation evidence that he had proffered at his resentencing and that no jury had considered. But even if an error occurred, Goff fails to explain how it prejudiced him.

First, any error benefited Goff. In the decision below, the Ohio Supreme Court determined that Goff should not have been permitted to introduce new mitigation evidence at resentencing at all. Pet. App. 6–7. That the trial court considered Goff's newly proffered mitigation evidence anyway may have been in

error, but it was an error that caused him no harm. The Ohio Supreme Court said as much. It noted that Goff "fail[ed] to explain how the [trial] court's consideration of the . . . new mitigation evidence prejudiced him." Pet. App. 11–12. Goff's certiorari petition similarly lacks any explanation on that point.

Second, to the extent the trial court erred, Goff invited that error. It was Goff, after all, who sought to introduce additional mitigation evidence at the resentencing hearing. And when the trial court declined to empanel a new jury, it was Goff who specifically requested that he be permitted to proffer that evidence anyway. *See* Resent. Trans., pg. 36-37, 43 (June 30, 2015). Presumably, he made that request in an attempt to receive a sentence other than death. His real complaint now appears to be that his attempt failed.

Finally, the lack of prejudice confirms that this case provides a poor vehicle to consider Goff's Question Presented. It shows that the case involves a unique set of facts that are unlikely to reoccur. After all, the number of cases in which an allocution error will require a capital defendant to be resentenced, and in which the defendant then insists that the resentencing court consider new mitigation evidence, is likely to be small. The Court need not, and should not, dedicate resources to reviewing a question that is unlikely to arise again.

CONCLUSION

For the above reasons, the Court should deny Goff's petition for writ of certiorari.

Respectfully submitted,

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