No. 18-8432

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2016

KELLY FOUST,

Petitioner,

v.

STATE OF OHIO

Respondent.

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

REPLY BRIEF FOR PETITIONER

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I. OHIO'S CAPITAL PUNISHMENT SCHEME VIOLATES THE SIXTH AMENDMENT RIGHT TO A JURY AS EXPLAINED AND APPLIED IN *HURST V. FLORIDA*.

When it decided *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616 (2016), this Court made clear that before a judge may impose a death sentence a jury must make specific findings. The Sixth Amendment requires more of a jury than a recommendation to a sentencing judge that death should be imposed. "It is true that in Florida the jury recommends a sentence, but 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.* at 622. "A jury's mere recommendation," this Court said, "is not enough." *Id.* at 619.

Respondent State of Ohio disagrees. Assuming that this Court did not mean what it said, the State says that as long as the jury finds at least one aggravating circumstance, its "mere recommendation" *is* sufficient. That its recommendation is not binding is an irrelevant quibble.

* * * * *

Under Ohio's statutory scheme, there are four steps before a defendant can be sentenced to death:

1. The grand jury charges aggravated murder and at least one aggravating circumstance;
2. The trial jury finds at least one charged aggravating circumstance proved beyond a reasonable doubt;
3. The trial jury at the penalty phase finds beyond a reasonable doubt that the previously proved aggravating circumstance outweighs whatever unspecified mitigating factors the jurors find and recommends death;

4. The judge, independently, finds beyond a reasonable doubt that the proved aggravating circumstance outweighs whatever mitigating factors he or she finds and imposes a death sentence.

See, generally, Ohio Rev. Code §§ 2929.03.

Respondent argues that only the second of those steps matters. Once the jury has found an aggravating circumstance, a "mere recommendation" is just fine. After all, Respondent says, in *State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 58 (2018), ¶ 36, the Ohio Supreme Court held that weighing a jury-determined aggravating circumstance against a judge-determined mitigating factors does not involve the judge finding any facts. (Brief in Opposition at 7-8) The assertion is patently nonsense. Even if the weighing itself is not a cognizable finding,[1] the determination of which mitigating factors have been presented and proved surely is. Ohio law mandates that the judicial determination, the judge's finding of those facts is a necessary precondition to the judge's determination of

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[1] Though the Ohio statutes providing for that weighing first by the jury and then the judge specifically describe the process as making findings:

> 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 one of the [life sentences]. . . .
>
> [I]f, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court *finds*, by proof beyond a reasonable doubt, or if the panel of three judges unanimously *finds*, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a *finding* by the court or panel, the court or the panel shall impose one of the [life sentences].

Ohio Rev. Code §§ 2929.03(D)(2)-(3) (emphasis added).

whether to impose a death sentence. The jury's "mere recommendation is not enough." *Hurst*, at 619.

II. THIS IS EXACTLY THE RIGHT CASE TO ADDRESS THESE QUESTIONS.

Respondent suggests that this case is ill-suited for addressing the questions it raises and offers four reasons. The first two apply to every case. If they had merit, there would be no appropriate vehicle for this Court to address any question. The third is not a reason at all, but insofar as it offers one is flatly contradicted by the fourth.

First, Respondent asserts that this is not the right case to address *Hurst* because it asks not just whether Ohio's law conflicts with *Hurst* but also what the effect of a conflict would be. But that's always an issue when this Court is asked to overrule a lower court: What will be the effect of a remand?

Second, Respondent asserts that because the issue arose in "the specific context of this case," the case is a poor vehicle in which to resolve it. But litigation does not arise in a vacuum. Every issue comes to this Court in a specific context.

Third, Respondent asserts without explanation that although the petition arises from a final order per 28 U.S.C. § 1257, there are other and better cases to resolve these issues. Implicit in that claim is that the issues are worthy of consideration and that in a better case this Court should take them up. But as Respondent also observes this Court has denied certiorari in every case where they have been raised. If the questions should be resolved, there must be a case in which to resolve them. If not now, when? If not this case, which one?

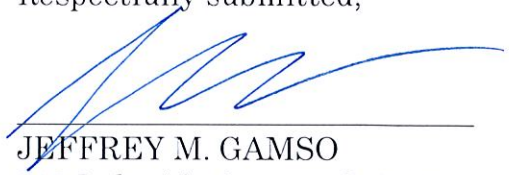
Fourth, and in direct contrast with the third reason, Respondent asserts that there is no reason to resolve these questions. There is, Respondent wrongly asserts, no conflict in the lower courts. And as further support for the claim that there is nothing to decide, it points out that this Court has denied certiorari in every other relevant case.

Respondent, then, wants to have things both ways – to argue that there is no reason for granting certiorari as to these questions at all and to argue that the Court should absolutely grant certiorari as to these questions but not in this case. To spell out the argument is to see that it fails.

CONCLUSION

For the reasons above as well as those set forth in Mr. Foust's Petition for Writ of Certiorari, this Court should grant the writ.

Respectfully submitted,



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