

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

SCOTTY GARNELL MORROW,

Petitioner,

v.

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison.

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA*

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CAPITAL CASE
QUESTIONS PRESENTED

“The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.” *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Morrow’s jury returned a verdict that imposed a single sentence of death, but failed to establish that it had unanimously found that either of the underlying murder offenses merited such a sentence, as required by Georgia law. Acknowledging the jury’s error, Mr. Morrow’s trial judge tried to correct the defective verdict by choosing the underlying crime that he thought merited that sentence and imposing it accordingly.

The questions presented are this:

1. Does a death sentence imposed by a judge who made fact-findings not made unanimously by the jury who recommended a death sentence comport with *Hurst* and *Ring*?
2. Do the Eighth and Fourteenth Amendments require a unanimous jury determination in order to impose a death sentence?

TABLE OF CONTENTS

CAPITAL CASE	I
QUESTIONS PRESENTED	I
TABLE OF AUTHORITIES.....	III
JURISDICTION AND OPINIONS BELOW.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE	3
A. Introduction.....	3
B. Brief Factual and Procedural History	4
REASONS FOR GRANTING THE WRIT	7

TABLE OF AUTHORITIES

CASES

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No.

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“The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough” to comport with this requirement. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016); *see also Ring v. Arizona*, 536 U.S. 584 (2002). In spite of this Court’s clear command, the State of Georgia intends to execute Scotty Garnell Morrow at 7:00 p.m. pursuant to a death sentence imposed by a judge who made independent additional findings after the jury returned a verdict that failed to comply with the Georgia capital sentencing scheme. The lower courts,

however, have dismissed Mr. Morrow's claim through procedural rulings that misunderstand this Court's precedent. Mr. Morrow accordingly petitions this Court for a writ of *certiorari* to review the Supreme Court of Georgia's denial of his application for a certificate of probable cause to appeal the judgment of the Superior Court of Butts County, Georgia.

JURISDICTION AND OPINIONS BELOW

Mr. Morrow invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257 (a). Petitioner has asserted violations of his Sixth, Eighth and Fourteenth Amendment rights in the proceedings below.

The final judgment and decree rendered by the Supreme Court of Georgia on May 2, 2019, denying Petitioner's Application for a Certificate of Probable Cause to Appeal the decision of the Superior Court of Butts County, Georgia, is filed as Attachment A, hereto. The unpublished order of the Superior Court of Butts County, Georgia dismissing the Petition for Writ of Habeas Corpus, entered on May 1, 2019 is attached hereto as Attachment B.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution:

In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense. U.S. CONST. Amendment VI;

The Eighth Amendment to the Constitution:

[N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. Amendment VIII;

The Fourteenth Amendment to the Constitution:

[N]o State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amendment. XIV.

STATEMENT OF THE CASE

A. Introduction

In *Hurst v. Florida*, this Court held that, per *Ring v. Florida*, 536 U.S. 584 (2002) and its progeny, the “Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.” 136 S. Ct. 616, 619 (2016). The penalty-phase jury in Mr. Morrow’s case, however, never unanimously reached the ultimate fact necessary to impose a sentence of death. The jury’s verdict fails to reflect whether they found that a death sentence was warranted for the murder of Barbara Ann Young or for the murder of Tonya Woods. The jury’s

verdict imposed only a single death sentence. Some jurors may have believed that Ms. Young's murder was the more mitigated offense but that Ms. Woods's murder was deserving of death, while other jurors may have selected a sentence of death for Ms. Young's murder.

Because the trial court, not the jury, made the necessary finding for death when it imposed a sentence that conformed neither to the indictment, the evidence, the instructions given to the jury, nor the jury's verdict, the death sentence in Mr. Morrow's case violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. Brief Factual and Procedural History

On the morning of December 29, 1994, Mr. Morrow went to the home of his former girlfriend, Barbara Ann Young, in an attempt to save their faltering relationship. Ms. Young was in the kitchen with two friends, Tonya Woods and LaToya Horne. As he begged Ms. Young to take him back, her friends interjected, telling him that he had been used for financial support and companionship for Ms. Young and her five children while her "real man" served a prison term. Mr. Morrow was overwhelmed by the realization that the woman and children he

deeply cared for were no longer a part of his life. Mr. Morrow drew the gun he carried from the waistband of his pants and began firing, killing Ms. Young and Ms. Woods and wounding Ms. Horne.

Mr. Morrow was convicted of two counts of malice murder and related offenses in the Superior Court of Hall County, Georgia on June 26, 1999. Following the sentencing phase, the jury entered a verdict form that did not make the findings necessary for a legal sentence of death. The jury indicated that the State had proven the existence of ten aggravating factors:¹ Six pertained to the murder of Ms. Woods, while four pertained to the murder of Ms. Young. But the jury failed to render a sentencing decision as to each of the malice murder counts, instead recommending a single death sentence without determining whether that sentence should be imposed for any one crime. After dismissing the jurors, the trial court independently amended the jury verdict to consist of a single murder conviction, upon which it then imposed a new death sentence. Trial counsel objected, but failed to move for a new trial or to raise this claim on direct appeal.

¹ Five of the ten were permutations of the same aggravating circumstance, O.C.G.A. § 17-10-30(b)(7).

Mr. Morrow's conviction and death sentence were affirmed by the Supreme Court of Georgia on direct review, *Morrow v. State*, 532 S.E.2d 78 (Ga. 2000), and this Court denied certiorari, *Morrow v. Georgia*, 532 U.S. 944 (2001).

Mr. Morrow then filed a petition for writ of habeas corpus in the Superior Court of Butts County. The state habeas court held an evidentiary hearing on April 25-26, 2005, and subsequently entered an order granting relief upon a finding that Morrow's trial counsel rendered ineffective assistance at the sentencing phase of his trial by failing to adequately investigate and present mitigating evidence and by failing to utilize an independent crime scene analyst to support Mr. Morrow's testimony in his own defense. On appeal and cross-appeal of the state habeas court's determination, the Supreme Court of Georgia reversed the grant of sentencing phase relief. *Humphrey v. Morrow*, 717 S.E.2d 168 (Ga. 2011). This Court denied Mr. Morrow's petition for certiorari. *Morrow v. Humphrey*, 132 S. Ct. 1972 (2012).

Mr. Morrow then filed a petition for federal habeas corpus relief in the United States District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 2254. The federal habeas court denied relief on

each of Mr. Morrow's claims on July 28, 2016. Mr. Morrow timely appealed, and the Eleventh Circuit Court of Appeals affirmed the denial of relief on March 27, 2018. *Morrow v. Warden*, Georgia Diagnostic Prison, 886 F.3d 1138 (11th Cir. 2018). This Court denied Mr. Morrow's petition for certiorari on February 19, 2019. *Morrow v. Ford*, 586 U.S. ___, 139 S. Ct. 1168 (2019).

REASONS FOR GRANTING THE WRIT

MR. MORROW'S EXECUTION WILL VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HIS JUDGE, AND NOT HIS JURY, MADE THE FINDINGS NECESSARY UNDER GEORGIA LAW TO IMPOSE A SENTENCE OF DEATH.

The record establishes that Mr. Morrow's jury did not find all of the facts necessary to impose the death penalty. Critically, the jury never separately weighed the aggravating and mitigating circumstances as to each of the underlying crimes and never unanimously found that the death penalty was justified as to either victim. Because the trial court, and the trial court alone, made those findings, Mr. Morrow is entitled to a new sentencing-phase under the United States Constitution.

A. The Verdict Form Is Facially Defective and Invalid

The verdict form used at Mr. Morrow’s capital sentencing simply provided the jury with a laundry list of potential aggravating circumstances that the prosecution alleged existed in connection with all of the underlying crimes. See Attachment C. These aggravators were categorized by the statutory sub-section in which they appear, but were not separated according to the murder offense to which they applied. In other words, potential aggravators concerning the murder of Ms. Young were intermingled with potential aggravators concerning the murder of Ms. Woods. From this list, jurors marked those aggravators that they found existed beyond a reasonable doubt. *Id.* at 2-4. They also marked the line to indicate that they fixed Mr. Morrow’s sentence at death. *Id.* at 1.

The jury’s verdict form, however, offered no indication of which single capital offense they had determined merited the death penalty. It instead reflected only that Mr. Morrow’s sentence of death was the product of their aggregating the separate aggravating factors—from both offenses—and viewing the available mitigating evidence in light of this compounded, “double aggravation.”

Moreover, the verdict does not reflect a unanimous agreement by the jurors that death was the appropriate punishment for Ms. Young's murder; nor that death was the appropriate punishment for Ms. Woods's murder. Some number of the jurors might have believed that a death sentence was appropriate for the murder of Ms. Young, but not Ms. Woods; while others might have believed that a death sentence was only appropriate for the murder of Ms. Woods. The evidence presented at trial would have authorized the jury to draw starkly different conclusions as to the mitigating factors, and Mr. Morrow's mental state and level of culpability with respect to the murder of each victim. For example, some jurors might have found that Mr. Morrow's murder of Ms. Woods, committed in an immediate and impulsive reaction to Ms. Woods's words, was more mitigated than the murder of Ms. Young, who was killed a moment later after Mr. Morrow followed her down the hall. In the view of other jurors, the murder of Ms. Young, Mr. Morrow's former girlfriend and the ultimate source of his psychological pain, may have been the more mitigated offense.

Put simply, the jury's verdict does not reflect a unanimous consensus that a sentence of death was warranted for any one of the underlying crimes.

B. The Trial Court Imposed Mr. Morrow's Death Sentence on a Fictional Murder Count.

Recognizing that the jury's sentence was defective, the trial court convened a hearing on July 15, 1999, "as a result of the need to present Mr. Morrow with an order announcing and amending sentence." Attachment D at 1. The trial court conceded on the record that the jury's death verdict "was not fully compliant with the statute." *Id.* Rather than reconvene the jury, order a new trial, or otherwise take corrective action, the trial court compounded the error yet further. Confronted with the absence of a unanimous jury determination as to the sentence for either murder offense, the court arbitrarily "determine[d]" for which count the jury had imposed a death sentence. *Id.* at 3. The trial court then proceeded to pronounce a death sentence upon this single, fictional murder count. *Id.* See also Order Pronouncing and Amending Sentence, July 7, 1999 (Attachment E) at 3 ("Although the jury found defendant Scotty Garnell Morrow guilty of the murder of [Ms.] Young in Count One of the indictment and guilty of

the murder of [Ms.] Woods in Count Two of the indictment, the Court determines that the sentence of death fixed by the jury and pronounced as the sentencing judgment of the Court is as to Count One. Thus, the Defendant, Scotty Garnell Morrow, is hereby sentenced to death pursuant to the terms and conditions set forth in this order as to Count One, Murder. Count Two, Murder, Count Three, Felony Murder and Count Four, Felony Murder, of the indictment merge for the purposes of sentencing.”).

C. This Court Should Grant *Certiorari* To Examine Whether A Jury’s Deviation From The State’s Capital Sentencing Scheme In Order to Arrive at a Verdict, and A Judge’s Imposition of Sentence Thereupon, Violates the Sixth Amendment.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. CONST. amend. VI. The right of a criminal defendant to trial by jury is “fundamental to the American scheme of justice.” *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

In *Hurst*, this Court analyzed Florida’s capital sentencing scheme, which directed the penalty-phase jury to deliberate and render “an ‘advisory sentence’ of life or death.” 136 S. Ct. 616, 620 (2016) (quoting Fla. Stat. § 921.141 (2) (2010)). The scheme further provided that the

jury would give a generalized, up-or-down recommendation, “without specifying [its] factual basis.” *Id.* The judge then independently “weigh[ed] the aggravating and mitigating circumstances” and determined the sentence. *Id.*

This Court held that this scheme—which simply formalized in state statute what Mr. Morrow’s jury and trial court did—violated the Constitution. The Court emphasized that “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.” *Id.* at 619 (emphasis added). Thus, where a judge makes “the critical findings necessary to impose the death penalty,” rather than the jury, that death sentence violates the defendant’s constitutional rights. *Id.* at 622. On remand, moreover, the Florida Supreme Court in *Hurst v. State* (“*Hurst II*”), has held that “*Hurst v. Florida* requires that all the critical findings necessary ... must be found unanimously by the jury” including “the finding that the aggravating factors outweigh the mitigating circumstances.” 202 So. 3d 40, 53 (Fla. 2016).

Georgia’s capital sentencing scheme does not suffer from the same facial constitutional deficiencies as Florida’s. See O.C.G.A. § 17-10-31.

However, as in Florida’s advisory verdict scheme, when the jury finished its work after the penalty-phase in this case, Mr. Morrow did not have a lawful death sentence. Only after the trial court “determine[d]” that the death sentence was “fixed” for the fictional murder count was the “critical finding[] necessary to impose the death penalty” finally made. *Hurst*, 136 S. Ct. at 622.

The verdict imposed by the court involved an independent judicial factual determination that, when all the relevant aggravating and mitigating factors were considered, death was the appropriate sentence for the murder of Ann Young. Nothing in the record establishes that the jurors had previously made that determination. Indeed, the fact that the trial court imposed a death sentence upon a single murder count, never presented to the jury, compels the conclusion that the jury did not, and could not, make the necessary, critical findings.

The non-unanimous advisory verdict rendered by Mr. Morrow’s penalty-phase jury is no more a verdict under the Sixth Amendment than the jury findings in *Hurst*. Since the jury’s verdict here was not compliant with the statute, the trial court simply “ha[d] no jury findings on which to rely.” *Hurst I*, 136 S. Ct. at 622 (emphasis added).

D. This Court Should Grant *Certiorari* To Consider Whether the Eighth Amendment Also Requires A Unanimous Jury Determination And Compliance With a State's Capital Sentencing Scheme In Order To Impose a Sentence of Death.

In *Hurst*, Justice Breyer concluded that the “Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.” *Hurst*, 136 S. Ct. at 624 (Breyer, J., concurring). Juries, not judges, more faithfully “express the conscience of the community on the ultimate question of life or death” in a given case. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). Yet, Mr. Morrow’s jury never made a determination on that ultimate question—whether the aggravating factors outweighed the mitigating factors for either the murder of Ms. Young or Ms. Woods. The trial court’s after-the-fact assumption of the ultimate sentencing decision cannot be reconciled with the Constitution. To countenance this error in even in a single capital case undermines the reliability of the death penalty as a reflection of contemporary moral values and, therefore, violates the Eighth Amendment. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (“[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity

that the only adequate response may be the penalty of death.”) (emphasis added); *Solem v. Helm*, 463 U.S. 277, 284 (1983) (the Eighth Amendment prohibits excessive or disproportionate punishment).

Moreover, this Court has long held that the Eighth Amendment requires states to apply special procedural safeguards in order to carry out the death penalty. *Id.* Otherwise, the constitutional prohibition against “cruel and unusual punishments” would forbid its use. *Furman v. Georgia*, 408 U.S. 238 (1972). And yet, it is impossible to discern whether the jury here carried out its penalty-phase duties in compliance with Georgia’s capital sentencing scheme. The verdict rendered by Mr. Morrow’s penalty-phase jury neither reflects nor guarantees their unanimity. *See* O.C.G.A. § 17-10-31(c) (“If the jury is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole.”). Indeed, no inference can be drawn from the jury’s generalized determination of the existence of aggravating circumstances—six aggravators found by the jury pertaining to the murder of Ms. Woods and four pertaining to the murder of Ms. Young—to suggest that all twelve jurors believed such

circumstances outweighed the mitigating factors as to any single victim. *See supra*. The jury verdict in this case, which the trial court recognized as “not fully compliant with [Georgia’s sentencing] statute,” is, therefore, arbitrary and unconstitutional.

E. This Court Should Grant *Certiorari* To Examine Whether A Judge-Imposed Death Sentence Is Subject to Prejudice Analysis or Harmlessness Review.

In *Chapman v. California*, this Court adopted a general rule that constitutional error does not automatically require reversal of a conviction. 386 U.S. 18 (1967). But the Court recognized that some errors should not be deemed harmless. *Id.* at 23, n.8. Such errors, known as structural errors, “affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Nevertheless, the decision upon which the lower court pinned its *res judicata* finding—the 2011 decision of the Supreme Court of Georgia—employed a prejudice analysis to excuse the error, simply concluding that, absent the defect, the jury presumably would have imposed two death sentences. *Morrow v. Humphrey*, 717 S.E.2d 168, 178 (Ga. 2011).

That is not the proper analysis. In *Weaver v. Massachusetts*, this Court identified “at least three” categories of errors that are structural. 137 S. Ct. 1899, 1907-08 (2017). An error is “structural” if 1) “the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,” 2) “the effects of the error are simply too hard to measure” and 3) “the error always results in fundamental unfairness.” *Id.* at 1908. The error at issue here implicates all three categories of structural error.

First, the right protected by *Hurst*—the right to have a jury, not a judge, decide whether a defendant should be sentenced to death—is worth protecting independent of its impact on the accuracy of a given proceeding. “The right to trial by jury reflects ... ‘a profound judgment about the way in which law should be enforced and justice administered.’” *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (quoting *Duncan*, 391 U.S. at 155). The trial court’s error here completely deprived Mr. Morrow of that right.

Second, the effect of the *Hurst* error here is “too hard to measure.” *Weaver*, 137 S. Ct. at 1908. The Sixth Amendment requires more than a reviewing court’s “speculation about a hypothetical jury’s action.”

Sullivan, 508 U.S. at 280. Here, where the trial court’s death verdict was based upon a fictional murder count, there is, simply put, no valid verdict. And because there is no valid jury verdict sentencing Mr. Morrow to death, “the question whether the same verdict [] would have been rendered absent the constitutional error is utterly meaningless.” *Id.*

Third, the *Hurst* error here directly implicates the “framework within which the trial proceeds” and the fairness of the system. Mr. Morrow was deprived of the right to a jury trial in the penalty-phase of his capital trial. Here, unlike in *Ring v. Arizona*, 536 U.S. 584 (2002), Mr. Morrow was not simply deprived of the right to have his jury consider one element critical to the imposition of the death penalty. Rather, because the trial court substituted its own independent “determin[ation]” as to which count supported a death sentence, Mr. Morrow was deprived of the right to have his jury consider every element and every fact that the Sixth Amendment requires.

In adopting Respondent’s proposed order, the Superior Court of Butts County² dismissed Mr. Morrow’s claim as *res judicata* without addressing its merits. The Order pointed out that Mr. Morrow sought redress for the verdict error in his previous state habeas proceeding, and identified the Supreme Court of Georgia’s 2011 ruling on appeal of those proceedings as the relevant prior decision adjudicating the claim. Order at 1. But the Order contains no discussion of how the Supreme Court of Georgia actually analyzed those claims. As Respondent conceded in the courts below, the Supreme Court of Georgia premised its prior procedural-default analysis on its belief that Mr. Morrow could not establish prejudice from the faulty verdict because he “failed to show that an objection at trial would have in reasonable probability led to anything other than the imposition of two death sentences, one for each of the murders.” *Morrow*, 717 S.E.2d at 178.

But this Court now can clarify whether that analysis is constitutionally defective. *Hurst*, *Ring*, and *Apprendi v. New Jersey*,

² The Supreme Court of Georgia below simply dismissed and denied Mr. Morrow’s Application of a Certificate of Probable Cause to Appeal as lacking arguable merit. Accordingly, the relevant decision for the purposes of this Court’s review is the May 1, 2019 ruling of the Superior

530 U.S. 466 (2000), establish that the trial court’s error here should not be subject to the prejudice analysis employed by the Supreme Court of Georgia in this case, no matter how certain the probability that the jury would have made the same findings later entered by the judge.

The trial court’s usurpation of the jury’s constitutional role cannot be excused by a reviewing court’s “speculation about a hypothetical jury’s action”; indeed “the question [of] whether the same verdict [] would have been rendered absent the constitutional error”—the question on which the Supreme Court of Georgia premised its entire analysis in its 2011 decision—“is utterly meaningless.” *Sullivan*, 508 U.S. at 280. Contrary to the ruling of the Superior Court of Butts County below, Mr. Morrow’s claim is the opposite of “a matter judged.” This Court must make clear that, after *Hurst*, the error here—a facially invalid death verdict—is not subject to a prejudice or harmlessness analysis.

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court stay his execution, issue a writ of *certiorari* to the Supreme Court

Court of Butts County. *Ylst v Nunnemaker*, 501 U.S. 797 (1991).

of Georgia, reverse the decision of that court and vacate his sentence of death. In the alternative, Petitioner asks that this Court stay his execution, issue a writ of *certiorari* and remand his case to the Supreme Court of Georgia.

Dated, this the 2nd day of May, 2019.

Respectfully submitted,

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