

In the
Supreme Court of the United States

Scotty Garnell Morrow,
Petitioner,

v.

Benjamin Ford, GDCP Warden,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this Court should deny certiorari to review the state court's decision that was based solely upon adequate and independent state law grounds.

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STATEMENT

A. Facts of the Crimes

In the month leading up to the crimes, numerous witnesses testified at trial that Morrow physically and sexually abused and threatened Barbara Ann Young's life. (T. 3428, 3755-3756, 3902, 3975). On the day of the crimes, Young was at home with her two small children and her friends Tonya Woods and LaToya Horne. *Morrow*, 289 Ga. at 865. After a phone conversation in which Young told Morrow to leave her alone, Morrow kicked-in Young's door and entered her home with a loaded gun.¹ (T. 3532-3534, 3652-3654).

Upon entering the kitchen, Morrow exchanged words with Woods and yelled "shut your mouth bitch." (T. 3542-3545, 3547). Morrow then drew his gun from his waistband and shot Woods in her lower "left abdomen, severing her spine and paralyzing her." *Humphrey v. Morrow*, 289 Ga. at 865. He then shot Horne in the left arm. (T. 3545); *Humphrey v. Morrow*, 289 Ga. at 865. Morrow "possibly fired at Ms. Young as she fled from the kitchen" and ran down the hallway into her bedroom. (T.3546); *Humphrey v. Morrow*, 289 Ga. at 865. Morrow caught Young after he "kicked open her bedroom door" where they "struggled." *Humphrey v. Morrow*, 289 Ga. at 865. A shot was fired that "likely" injured Young's back, and Morrow "likely "smashed [Young's] head into the bedroom's doorframe, leaving behind, skin, hair, and blood." *Id.* Young broke free from Morrow, but as she ran away, Morrow grabbed her hair from behind and shot Young in the back of the head while

¹ Morrow states that he was "overwhelmed by the realization...that the woman and children he deeply cared for were no longer a part of his life." (Pet. at 4-5). But prior to murdering Ms. Young, he had also threatened her life, beaten her, and raped her. (T. 3894-98, 3902-908, 3963-67).

Young's five-year-old and eight-month-old sons watched from the closet where they were hiding. (T. 3632, 3638, 3645). Young's oldest son, Christopher Young, testified at trial that he watched Morrow reload his gun and fatally shoot his mother. *Id.* at 3645.

Morrow then returned to the kitchen and shot Woods on the left side of her chin "and into her head at close range," causing her death. *Humphrey v. Morrow*, 289 Ga. at 865-866. He then shot Horne, who was lying on the floor, in her right arm and her face. (T. 3638, 4057); *Humphrey v. Morrow*, 298 Ga. at 866. Morrow exited the home and cut the phone line. (T. 3554). Horne, "badly injured," "managed to walk from house to house down the street seeking someone to call for help before she eventually collapsed; she survived, but with permanent injuries, including deafness in one ear." *Humphrey v. Morrow*, 289 Ga. at 866.

B. Proceedings Below

1. Trial Proceedings

A Hall County grand jury indicted Morrow on March 6, 1995, for two counts of malice murder, two counts of felony murder, six counts of aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of felonies. (R. 6-10). Morrow was convicted of "malice murder, felony murder, aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of a felony." *Morrow v. State*, 272 Ga. 691, 691 (2000).

The jury found *ten aggravating circumstances and returned a mandatory sentencing verdict recommendation of death.* (R. 1980-1983, 2035-2036). Specifically, the jury found: 1) that the murder of Barbara Ann Young

was outrageously and wantonly vile, horrible or inhuman in that it involved depravity of mind; 2) that the murder of Barbara Ann Young was outrageously and wantonly vile, horrible or inhuman in that it involved torture to Barbara Ann Young prior to her death; 3) that the murder of Tonya Rochelle Woods was outrageously and wantonly vile, horrible or inhuman in that it involved depravity of mind; 4) that the murder of Tonya Rochelle Woods was outrageously and wantonly vile, horrible or inhuman in that it involved torture to Tonya Rochelle Woods prior to her death; 5) that the murder of Tonya Rochelle Woods was outrageously and wantonly vile, horrible or inhuman in that it involved aggravated battery to Tonya Rochelle Woods prior to her death; 6) that the murder of Tonya Rochelle Woods was committed while Morrow was engaged in the commission of another capital felony, that being the murder of Barbara Ann Young; 7) that the murder of Barbara Ann Young was committed while Morrow was engaged in the commission of an aggravated battery against LaToya Precal Horne; 8) that the murder of Tonya Rochelle Woods was committed while Morrow was engaged in the commission of an aggravated battery against LaToya Precal Horne; 9) that the murder of Barbara Ann Young was committed while Morrow was engaged in the commission of a burglary; and 10) that the murder of Tonya Rochelle Woods was committed while Morrow was engaged in the commission of a burglary. *Id.* The trial court merged the malice murder convictions of Ms. Woods and Ms. Young and imposed a single death sentence. *Morrow*, 272 Ga. at 691, fn. 1.

Morrow was also sentenced to consecutive sentences of twenty years for aggravated battery, twenty years for cruelty to a child, twenty years for burglary and five years for possession of a firearm during the commission of a

felony. *Id.* The felony murder convictions were vacated by operation of law, and the aggravated assault convictions merged with other convictions thereby leaving only five statutory aggravating circumstances. *Id.* at 691-92.

2. Direct Appeal Proceedings

Morrow appealed his convictions and sentences to the Georgia Supreme Court. The Georgia Supreme Court affirmed Morrow's convictions and sentences on June 12, 2000. *Morrow v. State*, 272 Ga. 691. Morrow did not raise a challenge to his sentencing verdict on appeal. *Id.* Morrow's motion for reconsideration was denied on July 28, 2000. D16-8. Morrow filed a petition for writ of certiorari in this Court, which was denied on March 26, 2001. *Morrow v. Georgia*, 532 U.S. 944, 121 S. Ct. 1408 (2001).

3. State Habeas Corpus Proceedings

Morrow filed a state habeas corpus petition in the Butts County Superior Court on October 30, 2001, and an amendment thereto on February 1, 2005. In Claim XXIV of his amended state habeas petition, Morrow alleged the trial court erred when it “constructively amended the State's death penalty case after the jury failed to designate for which murder it had returned a death verdict” and the verdict was unconstitutional because the trial court “found factors in imposing a death sentence that were not necessarily found by the jury.”

Post-hearing briefs were submitted by both parties over the course of the next year. Three years after the final post-hearing brief was submitted, Morrow filed a proposed final order—presumably pursuant to a verbal request from the habeas court, because there was no written or transcribed record of the request. Over a year later, on December 1, 2010, Morrow filed a

supplemental proposed order. The proposed order did not contain Claim XXIV challenging the sentencing verdict. Two months later, on February 4, 2011, the habeas court entered an order granting relief as to Morrow's sentence; specifically the court found trial counsel were ineffective during the sentencing phase in their investigation and presentation of mitigating evidence. With regard to Claim XXIV, the habeas court found that to the extent the claim was raised on direct appeal it was barred by res judicata and to the extent it was not raised on direct appeal it was procedurally defaulted. (Pet. App. G. at 25).

4. State Habeas Corpus Appeal

Respondent appealed the grant of relief and Morrow cross-appealed. In his cross-appeal, Morrow raised his current challenge to the sentencing verdict. Following briefing and oral argument, the Georgia Supreme Court *unanimously* reinstated Morrow's death sentence in a reasoned opinion. *Humphrey v. Morrow*, 289 Ga. 864 (2011). Regarding the verdict, the state court found the claim was procedurally defaulted and Morrow had not shown cause and prejudice to overcome the bar. *Id.* at 876-77. Morrow sought a writ of certiorari on his sentencing verdict claim. The Court denied the petition on April 23, 2012. *Morrow v. Humphrey*, 566 U.S. 964, 132 S. Ct. 1972 (2012).

5. Federal Habeas Corpus Proceedings

Morrow filed his federal petition for writ of habeas corpus on March 8, 2012. Morrow again raised his claim challenging the sentencing verdict and the district court determined it was procedurally defaulted. The district court ultimately denied relief on July 28, 2016. Morrow filed a motion to

expand the certificate of appealability with the Eleventh Circuit Court of Appeals requesting the opportunity to appeal his challenge to the sentencing verdict. The court of appeals denied Morrow's request. The court of appeals affirmed the district court's denial of relief on March 27, 2018. *Morrow v. Warden, Ga. Diagnostic Prison*, 886 F.3d 1138 (11th Cir. 2018). Morrow's petition for rehearing *en banc* was denied by the Eleventh Circuit on May 22, 2018. *Morrow v. Warden, Ga. Diagnostic Prison*, No. 17-10311-P, 2018 U.S. App. LEXIS 13920 (11th Cir. May 22, 2018). Thereafter, Morrow's petition for writ of certiorari in this Court was denied on February 19, 2019. *Morrow v. Ford*, 139 S. Ct. 1168 (2019).

6. Execution Order

On April 12, 2019, the trial court signed an order setting Morrow's execution for May 2, 2019 at 7:00 p.m. On April 30, 2019, Morrow filed this successive state habeas petition. The habeas court denied Morrow relief on May 1, 2019 finding his claim challenging the sentencing verdict was barred by res judicata. (Pet. App. B). The Georgia Supreme Court denied Morrow's application for certificate of probable cause to appeal on May 2, 2019—determining the claim was procedurally barred. (Pet. App. A).

REASONS FOR DENYING THE PETITION

I. Certiorari review should be denied as the state court’s finding of res judicata regarding the sentencing verdict form constituted an independent and adequate state law ground.

Two days before his scheduled execution, Morrow filed a successive habeas petition alleging that “[b]ecause the trial court, *not the jury*, made the necessary finding for death when it imposed a sentence that conformed to neither 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 and Article I, §1, ¶¶1, 2, 11 &17 of the Constitution of the State of Georgia.” (Pet. at 2). This claim was previously raised in Morrow’s amended petition in his first state habeas proceeding and was ultimately determined to be procedurally defaulted by the Georgia Supreme Court. Consequently, yesterday the habeas court, properly relying on Georgia’s procedural bars, dismissed Morrow’s second state habeas petition as his claim was barred by res judicata. (Pet. App. B). The Georgia Supreme Court agreed and denied Morrow’s application for a certificate of probable cause to appeal. (Pet. App. A). As Morrow’s claim was decided on an adequate and independent state law ground, he fails to present an issue worthy of this Court’s jurisdiction.

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state-law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. *See, e.g., Foster v. Chatman*, U.S. , 136 S. Ct. 1737, *10 (2016) (“This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment ‘if that judgment rests on a state law ground that is both ‘independent’ of the merits of the federal claim and an ‘adequate’ basis

for the court’s decision.”) (quoting *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038 (1989)). The state habeas court determined Morrow’s claim challenging his sentencing verdict was barred by the adequate and independent state law ground of res judicata. The Georgia Supreme Court denied Morrow’s application holding the claim was barred on the same grounds. (Pet. App. B). Additionally, Morrow’s claim was denied on another the adequate and independent state law ground—procedural default. Given the double bar, this Court lacks jurisdiction to review this claim.

Res judicata “prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action.” *Odom v. Odom*, 291 Ga. 811, 812 (1) (2012); *Bruce v. State*, 274 Ga. 432, 434 (2) (2001) (“[w]ithout a change in the facts or the law, a habeas court will not review an issue” already decided); *Hall v. Lance*, 286 Ga. 365, 687 (2010)). Absent a showing of new facts or new law or a miscarriage of justice the res judicata bar may not be removed. *Bruce v. Smith*, 274 Ga. 432, 434 (2001); *Gaither v. Gibby*, 267 Ga. 96, 97 (1996); *Gunter v. Hickman*, 256 Ga. 315 (1986); *Elrod v. Ault*, 231 Ga. 750 (1974). The state court correctly held Morrow failed to plead new facts or new law or a miscarriage of justice to overcome the bar to his claim.²

Morrow alleged in his first amended state habeas petition that:

THE TRIAL COURT ERRED WHEN IT CONSTRUCTIVELY AMENDED THE STATE’S DEATH PENALTY CASE AFTER THE JURY FAILED TO DESIGNATE FOR WHICH MURDER IT HAD RETURNED A DEATH VERDICT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE

² Moreover, he has not shown cause and prejudice to remove the Georgia Supreme Court’s determination that his claim was procedurally defaulted.

ANALOGOUS PROVISIONS OF THE GEORGIA CONSTITUTION

* * * *

The sentencing court thereby constructively amended the state's death penalty case and essentially changed, and in fact lessened the state's burden of proof.

"It is axiomatic that, 'in criminal prosecutions[,] the court's instructions ... must be tailored to fit the charge in the indictment and the evidence [adduced] at trial. This is particularly true when the offense charged may be committed in one of several ways, but the indictment charges one specific method.' ... Such averments 'must be proved as laid, or the failure to prove the same ... will amount to a [fatal] variance' and a violation of the defendant's right to due process of law." *Talton v. State*, 254 Ga.App. Ill, 112 (Ga. App. 2002).

In the instant case, the jury was authorized to find that either or both murders charged was deserving of a death sentence. The Court instructed the jury as such. However, the jury returned a general verdict of one death sentence and failed to specify for which murder the sentence was to be imposed. When the Court merged the two "death-eligible" counts into one for sentencing purposes, the Court's action "amount[ed] to a [fatal] variance and a violation of the defendant's right to due process of law." *Id.* (sic)

Further, the jury's verdict coupled with the Court's actions violated the Supreme Court's dictates in *Ring v. Arizona*, 536 U.S. 584 (2002) because the Court found factors in imposing a death sentence that were not necessarily found by the jury.

Clearly, Morrow's claim was identical to the claim he currently presents to this Court.

Morrow's arguments in his cross-appeal brief following the state habeas court's dismissal of this claim during his first state habeas proceeding further illustrate that his previous claims is the same as his current claim. On cross-appeal, Morrow argued that his sentencing verdict: 1) failed to show a

unanimous verdict because there was “no indication which capital offense the jury determined merited the death penalty”; 2) there was an improper aggregation of the aggravating factors; 3) the jury verdict did not comply with the trial court’s instructions; and 4) and the verdict violated *Ring v. Arizona* “because the Court found factors in imposing a death sentence that were not necessarily found by the jury.”

In his second state habeas petition, currently before this Court, Morrow argues that: 1) the jury’s verdict was not unanimous; 2); the jury improperly aggregated the aggravating factors; and 3) the trial court made findings regarding the aggravating and mitigating factors not found by the jury. (Pet. at 5-15).

The Georgia Supreme Court determined Morrow’s claim was procedurally defaulted as he failed to raise it on direct appeal. Specifically, the Court held:

As was noted above in the discussion of the alleged ineffective assistance of counsel, Morrow argues that the form of the jury’s sentencing verdict in his trial was improper in that it did not clearly indicate that the jury had unanimously recommended a death sentence for either of the two individual murders but, instead, simply found multiple statutory aggravating circumstances regarding each of the individual murders and recommended one unified death sentence. ...The bar to procedurally-defaulted claims can be overcome by satisfying the cause and prejudice test, and the showing of “cause” under that test can be made by demonstrating that counsel rendered ineffective assistance under constitutional standards. [] However, Morrow’s counsel cannot be regarded as having rendered deficient performance on appeal, because they could not have successfully raised a claim about the jury’s sentencing verdict on direct appeal in light of the fact that the issue had not been preserved by objection at trial. Likewise, as is discussed above, Morrow cannot show the ineffective assistance of his counsel at trial, because he has 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. Thus, Morrow's attempt to rely upon ineffective assistance of counsel to satisfy the cause and prejudice test fails, and this claim remains barred by procedural default.

Morrow, 289 Ga. at 876-77.

Obviously, Morrow raised this claim in his first state habeas petition so it is barred as res judicata absent a showing of new facts, new law, or a miscarriage of justice.³ Morrow concedes that his claim was previously considered by the state courts. (Pet. at 16). And Morrow has not argued that there are new facts or new law⁴ to overcome the procedural bar to his claim. Indeed, he conceded that the law he is relying upon—*Hurst v. Florida*, 136 S. Ct. 616 (2016)—is not new law. (CPC App. at 16, n. 2).

Instead he argues that *Hurst* proves that the Georgia Supreme Court's previous decision was "defective." (Pet. at 19). But *Hurst* does no such thing. The Georgia Supreme Court determined that Morrow's claim was procedurally defaulted and he failed to prove *cause and prejudice* to overcome the default with an allegation of ineffective assistance for not objecting to the sentencing verdict. *Hurst* did not involve a procedurally defaulted claim and, as admitted by Morrow, *Hurst* did not exist at the time of Morrow's trial. Trial counsel cannot be held ineffective for failing to object based upon law that did not exist at the time of their representation. *Lyman v. State*, 301 Ga.

³ Morrow has not suggested that he is innocent of the crimes.

⁴ Moreover, Morrow has failed to show *Hurst* is retroactive on collateral review. See, e.g., *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 2017 U.S. App. LEXIS 4574, *11, fn 2 (11th Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review").

312, 321 (2017) (“[i]n making litigation decisions, there is no general duty on the part of defense counsel to anticipate changes in the law”) (quoting *Williams v. Rudolph*, 298 Ga. 86, 89 (2015)).

Morrow argues that the ruling of procedural default cannot stand because the error is “structural.” (Pet. at 16). However, in *Hurst*, this Court left to the state courts to determine whether the error was “harmless.” *Hurst*, 136 S. Ct. at 624. As the error in *Hurst* was identified as subject to “harmless” error review, it could not be structural error. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (stating that structural errors were “not subject to harmless-error review”); *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 2551 (2006) (explaining that most constitutional errors were subject to harmless error review and noting that “[o]nly in rare cases has this Court held that an error is structural”).

Out of an abundance of caution, Respondent also points out that Morrow’s death sentence is not unconstitutional under *Hurst*. The jury found Morrow guilty of all charges presented in the indictment, including finding him guilty of the malice murder of Ms. Young and the malice murder of Ms. Woods. *Morrow*, 272 Ga. at 691, fn. 1. *The jury*, not the judge, then *found ten aggravating circumstances* and recommended a sentence of death. *Id.* Subsequently, “[b]ecause the jury did not specify on the jury form that it was recommending a death sentence for both murders, the trial court merged the malice murder conviction for the killing of Tonya Woods with the malice murder conviction for the killing of Barbara Ann Young and imposed a single death sentence.” *Id.* However, pursuant to O.C.G.A. § 17-10-31, the jury’s recommendation of death was “mandatory” and the trial court was required to impose the sentence. *Putman v. State*, 251 Ga. 605, 613 (1983) (holding

that under O.C.G.A. § 17-1-31 it was “difficult to imagine how a court might commit reversible error by refusing to allow defense comment on a sentence that, once the jury has rendered its verdict, is *mandatory*) (emphasis added); O.C.G.A. § 17-10-31 (Where a statutory aggravating circumstance is found and a recommendation of death is made, the court *shall* sentence the accused to death.”). The trial court’s merger and imposition of a death sentence does not violate the holdings of *Hurst*.

The *Hurst* Court held that Florida’s death penalty sentencing scheme—which is entirely different than Georgia’s sentencing scheme—was “unconstitutional.” *Hurst*, 136 S. Ct. at 619. The scheme was unconstitutional because Florida “require[d] a judge” “to make the critical findings necessary to impose the death penalty,” which resulted in the judge making findings that “increased [the] authorized punishment based on” these “factfindings.” *Id.* at 622. Notably, the Florida scheme provides that the jury only renders an “advisory” sentence whereas in Georgia a recommendation of death is “mandatory.” *Id.* at 620; *Putman*, 251 Ga. at 613.

Here, contrary to Morrow’s assertions, the trial court did not make any factfindings—either explicitly or implicitly. The court merely merged the malice murder convictions. The jury had already made the necessary fact and legal findings to impose a sentence of death when it found at least one statutory aggravating circumstance. O.C.G.A. § 17-10-31. Morrow argues that the jury failed to follow Georgia’s scheme. But according to the pertinent state statutory law, Georgia only requires the jury to find one aggravator to sentence a defendant to death.⁵ O.C.G.A. § 17-10-31. As the

⁵ The jury must unanimously find the statutory aggravators beyond a reasonable doubt. O.C.G.A. § 17-10-30(c); O.C.G.A. § 17-10-31.

jury found at least one aggravating factor exclusive to the murders of both Ms. Woods and Ms. Young murder, and unanimously voted for at least one death sentence, it is of no consequence how the jury considered the aggravating factors under Georgia law.⁶ Therefore, as the jury properly determined Morrow's sentence and as the trial court neither made the "critical findings necessary to impose the death penalty" nor "increased" Morrow's punishment beyond what the jury's verdict authorized, Morrow's argument is meritless.

Given that Morrow failed to prove new facts or new law warrants the removal of the procedural bar to his claim, the habeas court properly dismissed his claim, denied relief, and his motion to stay his execution. Morrow's application should be denied.

⁶ Notably, Georgia's death penalty scheme is not based upon weighing aggravating and mitigating circumstances. *Simpkins v. State*, 268 Ga. 219, 221-222 (1997) ("In this state, unlike in the 'weighing' states, the jury receives no instructions to give special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance the aggravating and mitigating circumstances pursuant to any special standard.").

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2019, I served this brief on all parties required to be served via email properly addressed upon:

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