IN THE

SUPREME COURT OF THE UNITED STATES

No. 18-9117

SCOTTY GARNELL MORROW,

Petitioner,

v.

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison.

Respondent.

REPLY IN SUPPORT OF 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?

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PETITIONER'S REPLY IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI

Comes now Petitioner, Scotty Garnell Morrow, and files this, his reply to Respondent's Brief in Opposition to *Certiorari*. In support, Petitioner shows the following:

Mr. Morrow demonstrated that he is facing execution in the absence of a valid jury determination that death is the appropriate punishment. Nevertheless, Respondent continues to assert procedural obstacles to this Court's review of that facially invalid verdict. This Court should grant *certiorari* to hold that such errors are not subject to

a prejudice analysis, and to provide Mr. Morrow with the reliable jury determination as to sentence to which he is constitutionally entitled.

A. The State Court's Ruling Is Not Independent of Federal Constitutional Law.

The state court's *res judicata* ruling is explicitly premised upon a finding that *Hurst* permits the prejudice analysis deployed by the Supreme Court of Georgia in resolving the question of procedural default. If *Hurst* does not, as Petitioner contends, then the claim is not the "same claim" for which an adjudication has previously been entered.

Respondent, citing to this Court's decision in *Foster v. Chatman,* 136 S. Ct. 1737 (2016), claims that this Court has no jurisdiction in the instant case because the judgement below rests upon state law grounds that are both adequate to bar review and independent of the federal question. But as this Court made plain in *Foster*, "[w]hen application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.'" 136 S. Ct. at 1746 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)). This Court accordingly concluded in *Foster* that the state court's finding of *res judicata*—turning on the state court's evaluation of the facts underlying his federal claim—was "not

independent of the merits of his federal constitutional challenge." *Id.* Here, the state court's *res judicata* ruling turns precisely upon its evaluation of the impact of this Court's decision in *Hurst*.

B. The Georgia Sentencing Scheme—and the Sixth and Eighth Amendments—Require That the Jury, Not A Judge, Determine Whether a Given Offense Warrants Death.

Respondent contends that "the trial court did not make any factfindings—either explicitly or implicitly." BIO at 13. The record plainly reflects that the trial judge did just that. By his own admission, the trial judge "amend[ed]" the jury's verdict and "*determin[ed]*" that a death sentence was warranted on the basis of Count 1 of the indictment. App. D at 1, 3. But the law explicitly requires a unanimous determination that death is the appropriate punishment for "*an* offense." O.C.G.A. § 17-10-31(a).

Respondent notes that Georgia's death penalty scheme is "entirely different" from the Florida scheme struck down by *Hurst*. BIO at 13. That would be relevant had Mr. Morrow's trial court and jury followed Georgia's scheme. As detailed in Mr. Morrow's Application, however, the jury deviated from it completely, and the scheme that the trial judge devised to compensate for those mistakes mirrors precisely what Hurst

forbids. Respondent defends the trial court's scheme, claiming that "the jury's recommendation of death was 'mandatory,'" and that it was "required to impose the sentence." BIO at 14 (citing O.C.G.A. § 17-10-31). But the court is not required to impose an illegal sentence[1] that comports in no way with the statute Respondent cites, in that it did not make the findings it was require to make for each underlying offense. See O.C.G.A. § 17-10-31(a) (upon conviction of "*an offense* which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed).

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[1] Respondent complains that, because the *Hurst* Court remanded the claim to the Florida courts for a harmlessness analysis, this Court has explicitly resolved the questions presented here. But, unlike in *Hurst,* no valid verdict was ever entered by the jury in Mr. Morrow's case. Such questions of "whether the same verdict [] would have been rendered absent the constitutional error [are] utterly meaningless." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). Moreover, the Supreme Court of Georgia did not perform an analysis of whether the error was harmless beyond a reasonable doubt. Rather, the Court evaluated whether there was a reasonable probability of a different result had trial counsel objected to the faulty verdict. *Morrow,* 717 S.E.2d at 178. Thus, even if this Court determines that harmlessness analysis is appropriate, this Court must grant the Petition, vacate the judgement below and remand to the Supreme Court of Georgia.

Hurst confirms that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." But Mr. Morrow's death sentence was imposed by a judge who made his own fact-findings after the jury returned a verdict which failed to establish that it had unanimously found either of the underlying crimes merited such a sentence.

C. Conclusion

For the foregoing reasons and for each of those in his Petition for Writ of *Certiorari*, Petitioner respectfully asks that this Court stay his execution, issue a writ of *certiorari* to the Supreme Court 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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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the Petitioner's REPLY IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI upon counsel for Respondent by mail:

Sabrina Graham
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40 Capitol Square SW
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Dated, this the 2nd day of May, 2019.

/s/ S. Jill Benton
S. Jill Benton (Ga. Bar No. 053659)