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Case No. 16-1170

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

v.

RICHARD P. FRANKLIN,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In this case, the Florida Supreme Court vacated Franklin's death sentence based on its decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)("*Hurst II*"), decided on remand from *Hurst v. Florida*, 136 S. Ct. 616 (2016)("*Hurst I*"). The Florida Supreme Court concluded Mr. Franklin's death sentence was imposed in violation of the Sixth Amendment "because the jury that recommended death did not find the facts necessary to sentence him to death." Pet. 14a-15a. The lower court further concluded that the error was not harmless in light of the non-unanimous jury recommendation. Pet. 14a-15a.

The State's arguments for seeking certiorari review in the present case are the same arguments asserted in the State's petition for a writ of certiorari to review *Hurst II,* filed on February 13, 2017. Accordingly, the State has requested that this Court hold the certiorari petition in the present case pending its disposition of the State's petition in *Florida v. Hurst*, No. 16-998, "and dispose of this case accordingly." Pet. at 5-6.

Petitioner makes the same arguments here as those made in the Brief in Opposition to the Petition for Certiorari in *Hurst*, as follows:

The State's certiorari petition seeks review of two rulings by the Florida Supreme Court in *Hurst II*. The first of these

rulings rests upon an adequate and independent state-law ground. In addition, it has no operational consequences for the disposition of Mr. Franklin's case because the State is not asking this Court to review the portion of *Hurst II* which grants Richard Franklin a new penalty trial; his new trial will be conducted under supervening Florida legislation; and the new legislation moots the aspects of *Hurst II* that the State *is* asking this Court to review.

The second ruling was articulated by the Florida Supreme Court as an alternative ground for the same disposition that the first ruling explicitly placed on state-law grounds. Thus, it, too, does not affect in any way the relief granted Mr. Franklin under *Hurst II*, and its review by this Court would constitute an advisory opinion beyond the scope of the Court's case-or-controversy jurisdiction under Article III.

PERTINENT FACTS

In *Hurst I*, this Court remanded Mr. Hurst's case to the Florida Supreme Court to consider whether the Sixth Amendment violation was harmless.

Here is what the Florida Supreme Court in *Hurst II* did on remand: *One*. It meticulously examined *Hurst I* and concluded that what *Hurst I* required as a federal Sixth Amendment matter was that every factual finding which is the necessary predicate for

the imposition of a death sentence be found by a jury. 202 So. 3d at 48-52.

Two. It meticulously examined Florida statutory law and concluded that what section 921.141 of the Florida Statutes requires as the necessary predicate for a death sentence is a set of three findings: that one or more specified aggravating circumstances exist; that this aggravation be sufficient to warrant a death sentence; and that the aggravation outweigh any mitigating circumstances. 202 So. 3d at 52-53.

Three. It meticulously, exhaustively reviewed Florida's long-established rules requiring unanimity of jury verdicts and it explicitly relied on those state-law rules as the basis for holding that each of the three statutory prerequisites and the recommendation for a death sentence must be found by a unanimous jury. 202 So. 3d at 53-59.

Four. As an alternative ground for the latter holding, it found that, "In addition," the federal Eighth Amendment requires "juror unanimity in any recommended verdict resulting in a death sentence." 202 So. 3d at 59-63.

Five. It considered and rejected the State's contention that any violation of these rules in Mr. Hurst's trial was harmless error; thus, it found that he was entitled to a retrial on the issue of penalty. 202 So. 3d at 66-69.

Meanwhile, the Florida Legislature also reacted to *Hurst I*. It enacted a new statute effective March 7, 2016, providing that in capital penalty trials:

> (2) Findings and recommended sentence by the jury.--
>
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:
>
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
>
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.
>
> (c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.
>
> (3) Imposition of sentence of life imprisonment or death.--
>
> (a) If the jury has recommended a sentence

> of:
>
> 1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
>
> 2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

s. 921.141, Fla. Stat. (2016).

Effective: March 13, 2017, the preceding subsection (2)(c) was amended to require jury unanimity, rather than a 10-juror plurality, in order to support a death-sentence recommendation:

> (c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

THE STATE'S ASSERTED GROUNDS FOR CERTIORARI ARE BASELESS

The State's Question Presented Number One:

> Whether the Sixth Amendment gives a defendant convicted of a capital crime the right to have a jury make statutorily mandated non-factual findings supporting the imposition of the death penalty, such as the determination that aggravating circumstances out-weigh mitigating factors and the related moral judgment that the defendant should be sentenced to death.

Pet. Cert. in *Hurst*, i.

This Question presents no remotely colorable case for invoking the certiorari jurisdiction. It fails on at least two counts. First, the Florida Supreme Court's ruling in *Hurst II* that Florida capital defendants have these rights was explicitly based on state-law grounds, not on the Sixth Amendment. Second, when Richard Franklin is retried (as the Florida Supreme Court has ordered in a portion of its opinion that is not challenged by the State's certiorari petition), he will be retried under the now-twice-amended Florida legislation and will have a statutory right to the jury findings which the State is presently requesting this Court to hold are not required by the Sixth Amendment. It understates the case to say that this is a classic plea for a non-case-or-controversy advisory opinion.

First.

Hurst I "requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. This is what *Hurst I* requires as a federal constitutional matter. This is all that the Florida Supreme Court on remand treated *Hurst I* as requiring as a federal constitutional matter. *See Hurst II,* 202 So. 3d at 53: "Upon review of the decision in *Hurst v. Florida,* as well as the decisions in *Apprendi* and *Ring,* we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury - not the judge - must be the finder of every fact, and thus

every element, necessary for the imposition of the death penalty." In its *Hurst II* opinion, the Florida Court repeatedly distinguishes between the limited edict of *Hurst* I and the state-law implications of that edict. *See, e.g.*, 202 So. 3d at 57: "*Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are 'elements' that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous."

The State brushes these careful distinctions aside. It is compelled to concede that the Florida Supreme Court's holding that, "just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder - thus allowing imposition of the death penalty - are also elements that must be found unanimously by the jury" was announced "as a matter of state law." Pet. Cert in *Hurst*, 7-8. But it undertakes to evade the obvious consequences of this concession - this Court's lack of jurisdiction to review that state-law holding - by observing that: "As the decision below made clear, however, that state-law juror-unanimity requirement comes into play only because the federal Constitution mandates that a jury make the relevant determinations in the first place." *Id.; see also, e.g.*, "The right to a *unanimous* jury determination pre-supposes the right to *a* jury determination; and the Florida Supreme Court's opinion

makes it clear that the unanimous-jury requirement rooted in state law comes into play only because the Sixth Amendment to the U.S. Constitution creates a right to have a jury determine - unanimously or not — the matters in question." Cer. Pet. in *Hurst,* 15 (original emphasis).

This gambit conflates what the Florida Supreme Court understood *Hurst* I to *require* with what the Florida Supreme Court understood *Hurst* I to *entail.* The consequences of the gambit would be to federalize every issue of state law that arises in a state-court trial (or, for that matter, in a state administrative proceeding) if the trial or proceeding is one that the federal Constitution requires "in the first place." Manifestly, any particular form of legal proceeding - a jury trial, a bench trial, an administrative hearing - is regulated in detail by a host of procedural rules. Even where the need to conduct the proceeding in the first place arises from a federal constitutional command, it has never been supposed that these ancillary rules are anything but creatures of local law.

For example, in Florida capital penalty trials, Florida evidentiary law provides that "Any . . . evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." § 921.141(1), Fla. Stat. (effective March 7, 2016).

Victim impact evidence is admissible, but "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence." § 921.141(8), Fla. Stat. (effective March 7, 2016). In capital trials - but not in noncapital trials, "once the jurors have retired for consideration of their verdict, they must be sequestered until such time as they have reached a verdict or have otherwise been discharged by the court." Fla. R. Crim. P. 3.370(c), promulgated by *Amendment to Rules of Criminal Procedure - Rule 3.370(c)*, 596 So. 2d 1036 (Fla. 1992). After the jury has returned its verdict, a defendant "who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine." Fla. R. Crim. Pro. 3.575, promulgated by *Amendments to the Florida Rules of Criminal Procedure*, 886 So. 2d 197, 209 (2004); *see Phelps v. State*, 186 So. 3d 598 (Fla. 5th DCA 2016).

All of these rules come into play *post Hurst I* but not *propter Hurst I*. They arise because Florida law chooses to make them incidents of Florida jury trials, not because *Hurst* commands them.

Exactly the same is true of the specific rulings by the Florida Supreme Court that Petitioner's Question Presented Number One asks this Court to review: the rulings that a Florida jury's death verdict must rest upon findings that include the

sufficiency of aggravation and its preponderance over mitigation, so that a death sentence should be recommended. The opinion below is explicit regarding the state-law basis for these two rulings. The opinion relies on *Hurst I* only for the first step in the reasoning that leads eventually to both rulings - namely, for the proposition that "the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury - not the judge - must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty." 202 So. 3d at 53.

The opinion then proceeds to a second step: "A close review of Florida's sentencing statutes is necessary to identify those critical findings that underlie imposition of a death sentence, which is a matter of state law." 202 So. 3d at 51. This review produces an intermediate conclusion that is strictly a product of Florida law: "[B]efore a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." 202 So. 3d at 53 (footnote omitted). The third and final step follows and is expressly stated as being based on Florida Law, not on any federal obligation imposed by *Hurst I*:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these

> findings necessary for the jury to essentially convict a defendant of capital murder – thus allowing imposition of the death penalty – are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the "final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'" *Ford v. State,* 802 So. 2d 1121, 1134 (Fla. 2001)(quoting *Campbell v. State,* 571 So. 2d 415, 420 (Fla. 1990), receded from on other grounds by *Trease v. State,* 768 So. 2d 1050, 1055 (Fla. 2000)).

202 So. 3d at 53-54 (footnote omitted); *see also id.* at 54-59, tracing Florida's historical commitment to jury trial and including such passages as:

> [T]his Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution. This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

Id. at 57, and

> "Put simply, the United States Constitution generally sets the 'floor' – not the 'ceiling' – of personal rights and freedoms that must be afforded to a defendant by Florida law. . . . As we explained in [*State v.] Kelly,* [999 So. 2d 1029, 1043 (Fla. 2008)], 'we have the duty to *independently* examine and determine questions of state law so long as we do not run afoul of federal constitutional protections or the provisions of the Florida Constitution that require us

> to apply federal law in state-law contexts.' . . . Our Court reemphasized what we previously stated in [*State v.*] *Traylor* [596 So. 2d 957, 962 (1992)]: '[w]hen called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein....'
>
> *State v. Horwitz,* 191 So. 3d 429, 438 (Fla. 2016)."

Id. (original emphasis).

Respect for Federalism and common sense alike preclude this Court's review of a decision "founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven." *Id.* at 54. "It is well settled in this court that where a state court decides a case upon an independent ground not within the Federal objections taken, and that ground is sufficient to maintain the judgment, this court will not review the case." *Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 112, 116-17 (1909)(citations omitted).

Second.

Rejecting "the State's contention that any *Ring*- or *Hurst v. Florida*-related error is harmless, Pet. 15a, the Florida Supreme Court issued this order:

> [W]e vacate Franklin's death sentence and remand for a new penalty phase proceeding.

Id. The State's petition for certiorari does not ask this Court to review that harmless-error ruling, so nothing that the Court

could decide within the scope of the petition would result in a reversal of the penalty retrial ordered below. The penalty retrial will necessarily be conducted under the 2017 amendment to the Florida capital-sentencing statute. And that statute gives Richard Franklin all of the procedural rights which the State is asking this Court to declare that the Sixth Amendment does not. Such a Sixth Amendment ruling would be altogether academic.

But "[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn,* 324 U.S. 117, 126 (1945); *see also Hall v. Beals,* 396 U.S. 45, 48 (1969)("The 1968 election is history, and it is now impossible to grant the appellants the relief they sought in the District Court. Further, the appellants have now satisfied the six-month residency requirement of which they complained. But apart from these considerations, the recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in light of the Colorado statute as it now stands, not as it once did.... And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract

propositions of law."); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina v. Rice* 404 U.S. 244, 246 (1971), a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'"); *accord Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Alabama State Fed'n of Labor, Local Union No. 103, United Bhd. of Carpenters and Joiners of America v. McAdory*, 325 U.S. 450, 461 (1945).

The State's Question Presented Number Two:

> Whether the Eighth Amendment requires jury sentencing in capital cases.

Cert. Pet. in *Hurst*, i.

This Question invites this Court to review a purported Eighth Amendment ruling below which produced no different outcome than the state-law ruling challenged by Question Presented Number One. Thus, "the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our

jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

CONCLUSION

Neither of the two issues proffered by the State is fit for the provident exercise of this Court's jurisdiction. Certiorari should be denied.