No. 18-113

IN THE

Supreme Court of the United States

JEREMIAH RODGERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FLORIDA CENTER FOR CAPITAL REPRESENTATION AT FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The Florida Association of Criminal Defense Lawyers (FACDL) is a statewide organization with more than 1,700 members across Florida, including private attorneys, assistant public defenders, and judges. FACDL's mission is, *inter alia*, to "be the unified voice of an inclusive criminal defense community" and to "promote the proper administration of criminal justice."

The Florida Center for Capital Representation at Florida International University College of Law (FCCR) is a non-profit organization founded in 2014 to support defense attorneys representing Florida defendants facing, or sentenced to, the death penalty. To that end, FCCR offers case consultations and litigation-support services, as well as capital-litigation training programs, to defense attorneys and mitigation specialists across Florida.

The issue before the Court concerns the availability of the right announced by this Court in *Hurst v. Florida*. *Amici*, comprised of academics, judges, and attorneys who devote much of their time and efforts to safeguarding the constitutional rights of

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1 The parties in this case received timely notice under Rule 37.2(a) of the Rules of this Court and have consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

capital defendants, believe that they have a particular interest and expertise in the procedural question presented here, and that this brief may be of assistance to the Court.

SUMMARY OF ARGUMENT

On June 29, 2006, the Florida Supreme Court upheld Rodgers's conviction for capital murder but reversed her death sentence.[2] *Rodgers v. State*, 934 So. 2d 1207 (Fla. 2006). At her 2007 resentencing, Rodgers waived her right to an advisory jury recommendation. *Rodgers v. State*, 3 So. 3d 1127, 1132 (Fla. 2009). That right was afforded to her pursuant to the Florida sentencing law in place at the time, under which the jury rendered an advisory sentence by a majority vote, without specifying the factual basis for the sentence, and the trial judge alone found the necessary facts and made the ultimate determination of life or death. *Hurst v. Florida*, 136 S. Ct. 616, 620 (2016). At the time of her waiver, binding federal and state case law explicitly held that defendants in Rodgers's position did not have a right to have a jury find all facts necessary for the imposition of a death sentence. *E.g.*, *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) ("[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."); *Jones v. State*, 569 So. 2d 1234, 1238 (Fla. 1990) (rejecting the prisoner's constitutional claim that jurors must "unanimously

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2 *Amici* adopt the pronoun used in Rodgers's Petition for the reasons set forth in footnote one of the Petition. Pet. No. 18-113 at 4 n.1

agree upon the existence of the specific aggravating factors applicable in each case"). The right to a jury determination was not recognized until almost a decade after Rodgers waived her statutory right to a jury recommendation in *Hurst*. 136 S. Ct. 616. The Florida Supreme Court made *Hurst* retroactive, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and on January 11, 2017, Rodgers filed a timely motion for post-conviction relief. Pet. App. 40a-72a.

By that time, the Florida Supreme Court had already decided *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), *cert. denied*, 137 S. Ct. 672 (2017), a case involving a Florida death-row inmate sentenced before *Hurst*, who similarly had waived the statutory right to a jury recommendation on sentencing. The Florida Supreme Court held that Mullens's waiver of the jury recommendation right amounted to a constructive waiver of the subsequent *Hurst* constitutional right announced by the Supreme Court, and that Mullens therefore could not avail himself of the *Hurst* constitutional right. The Florida Supreme Court did not address the substantial differences between the statutory right that Mullens waived and the subsequent *Hurst* constitutional right. In a straight application of *Mullens*, the Florida Supreme Court rejected Rodgers's claim to *Hurst* relief. Pet. App. 1a-3a.

The question presented in Rodgers's petition—whether a criminal defendant can "knowingly" waive a right that this Court has not yet recognized (and indeed had expressly rejected at the time of the "waiver")—will continue to arise in numerous

contexts and, as here, can spell the difference between life and death. The answer to such a momentous question should not be determined by geographic accident. This Court should resolve the split between the states on this issue and find that Rodgers could not have knowingly waived a constitutional right not yet announced, simply by waiving an entirely distinct and ultimately unconstitutional statutory right the state provided at the time of her sentencing.

ARGUMENT

I. BECAUSE THE PRIOR FLORIDA SENTENCING SCHEME AND THE NEW *HURST* CONSTITUTIONAL RIGHT ARE FUNCTIONALLY AND PRACTICALLY DIFFERENT, WAIVER OF THE FORMER IS NOT WAIVER OF THE LATTER

Before *Hurst*, the death penalty was imposed in Florida by the court, not a jury, during a separate sentencing hearing following the guilt phase. Fla. Stat. §§ 775.082(1), 921.141 (2010). A jury could receive evidence relevant to aggravation and mitigation, but the jury's sentence was merely advisory. *See State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005). There was also no requirement of unanimity—a jury could recommend death after a bare majority of jurors found at least one aggravating circumstance present. Moreover, those jurors did not even have to agree on the same aggravator. Fla. Stat. § 921.141(2) (2010) (containing no requirement that jury specify the factual basis for the recommendation). Finally, after any advisory recommendation was rendered, the court exercised ultimate authority by independently weighing the aggravating and mitigating

circumstances and entering a sentence of life imprisonment or death. Fla. Stat. § 921.141(3) (2010) (requiring judge set forth findings in writing only when judge imposes death sentence). The judge was admonished to give the jury recommendation "great weight," *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), but the ultimate determination reflected "the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Blackwelder v. State*, 851 So.2d 650, 653 (Fla. 2003).

This Court granted certiorari in *Hurst v. Florida* and concluded that Florida's advisory, non-unanimous jury recommendation was equivalent to no jury at all. 136 S. Ct. 616. Because 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." *Id.* at 619. Applying this principle, the Court explicitly rejected the argument that an advisory jury recommendation was equivalent to the jury right guaranteed by the Sixth Amendment, holding that Florida could not "treat the advisory recommendation by the jury as the necessary factual finding that *Ring* [*v. Arizona*, 536 U.S. 584 (2002)] requires." *Id*. at 622. As the Court explained, Florida's advisory jury scheme was indistinguishable from a system with no jury at all—and just as unconstitutional. *Id*. ("Although Florida incorporates an advisory jury verdict that Arizona lacked [under its prior judicial death sentence scheme held unconstitutional by the Court in *Ring*], we have previously made clear that this distinction is immaterial.").

On remand from the United States Supreme Court in *Hurst*, the Florida Supreme Court transformed Florida's death sentencing scheme. *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016), *cert denied*, 137 S. Ct. 2161 (2017). It determined that the jury was required to "be the finder of every fact [beyond a reasonable doubt], and thus every element, necessary for the imposition of the death penalty," *id*., and held in a companion case that such findings must be unanimous under *Hurst*. *See Perry v. State*, 210 So. 3d 630, 639–40 (Fla. 2016).

The pre-*Hurst* advisory jury procedure provided by Florida statute bore no resemblance to the post-*Hurst* jury procedure required by the Constitution.

A. The jury must now unanimously find that the state has proven a particular aggravating circumstance beyond a reasonable doubt

Before *Hurst,* in order to recommend a sentence of death, the jury was required only to find by a *majority* vote that *some* aggravating circumstance was present. *Steele*, 921 So. 2d at 545. But as the Florida Supreme Court explained, "[n]othing in the statute, the standard jury instructions, or the standard verdict form, however, require[d] a majority of the jury to agree on *which* aggravating circumstances exist." *Id*. As judges and commentators alike observed:

> The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by

> majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt. The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any , or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible . . . where several aggravating and mitigating circumstances are submitted, that none of them received a majority vote.

Aguierre-Jarquin v. State, 9 So. 3d 593, 611–12 (Fla. 2009) (Pariente, J., specially concurring). In other words, it is entirely possible that before *Hurst*, juries recommending sentences of death were not even meeting the constitutional minimum required by *Zant v. Stephens*, 462 U.S. 862 (1983), which held that the existence of "statutory aggravating circumstances play a constitutionally necessary function . . . [by] circumscribe[ing] the class of persons eligible for the death penalty." *Id.* at 878.

Following *Hurst*, the jury must find that the State has proved at least one aggravating circumstance beyond a reasonable doubt—and the jury must identify that aggravator (or aggravators), and *unanimously* agree that the state has met its burden

on each particular aggravating circumstance it finds. Fla. Stat. §§ 921.141(2)(a)-(b), 921.141(3)(a).

B. The jury must now unanimously determine that the aggravating circumstance is sufficient to warrant a sentence of death

In addition to finding unanimously that a particular aggravating factor is present, the jury must also separately and unanimously determine that the aggravating circumstance(s) are *sufficient* to warrant the death penalty. *Perry*, 210 So. 3d at 638–40. Pre-*Hurst*, the advisory jury was admonished to "deliberate and render an advisory sentence . . . based upon the following matters: (a) whether sufficient aggravating circumstances exist. . . . [listing additional considerations]." Fla. Stat. § 921.1414(2) (2010). Importantly, the statute did not define "sufficient aggravating circumstances." It did not provide, for example, that a certain number of aggravating factors is sufficient or that the jury must make a judgment that the aggravating circumstances themselves are sufficient to warrant the death penalty. Rather the statute required only that the jury consider whether "sufficient aggravating circumstances exist" in its overall deliberation when rendering an advisory verdict by a majority vote. *See Steele*, 921 So. 2d at 545.

C. The jury must now unanimously find that the aggravating circumstances outweigh the mitigating circumstances

Previously the judge, not the jury, was assigned the responsibility of weighing the aggravating and mitigating circumstances. Because no special verdict form was required under the old scheme, the judge had no means of determining which aggravating circumstances the jury may or may not have found, and as a result, the judge simply considered whatever aggravators he or she (but not the jury) found had been established. *Bottoson v. Moore*, 833 So. 2d 693, 704-05 (Fla. 2002) (Anstead, C.J. concurring in the result) (noting that pre-*Hurst,* "A Florida trial judge . . . independently determines the *existence* of aggravators [and] is not limited to the aggravation that may have been submitted to the jury." (emphasis added)). Moreover, under the old scheme, the judge was required to determine whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Perry*, 210 So. 3d at 637. Now, the jury must find unanimously that the aggravating circumstances outweigh the mitigating ones before it may determine that a death sentence should be imposed. *Id.* at 640.

D. The jury must now unanimously decide to impose a death sentence

After the jury unanimously finds aggravating circumstances, finds that those circumstances are sufficient to warrant death, and finds that aggravating circumstances outweigh mitigating ones—the jury must then determine, rather than

recommend, whether the death penalty should be imposed. This final step is the greatest change from the pre-*Hurst* regime as it eliminates the advisory jury procedure, which, as the Court recognized, was nothing more than a brief and meaningless detour on the road to the true—and only—decision maker on a death sentence, the trial judge. *Hurst*, 136 S. Ct. at 622 ("'[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely.'" (quoting *Steele*, 921 So. 2d at 546)).

Before *Hurst*, even where the jury *unanimously* recommended a life sentence, the judge could still impose the death penalty. *See, e.g.*, *Bolender v. Singletary*, 16 F.3d 1547, 1552 (11th Cir. 1994) (observing that "[t]he jury unanimously recommended a sentence of life imprisonment for each murder, but the trial court overrode that recommendation and sentenced Bolender to death . . . ."). Now, the judge's only authority to override a sentencing jury verdict is to choose life imprisonment over a verdict of death—judges cannot disregard a jury's verdict of life. Fla. Stat. § 921.141(3)(a).[3] Thus, whereas before a judge could sentence a defendant to death over the objections of twelve jurors, now the objection of a *single juror* guarantees a sentence of life. *Hurst* thus did not merely change or modify an existing jury right—it created one that previously did not exist.

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3 And if the jury determines the death penalty should be imposed, the court now is only permitted to consider the aggravating circumstances unanimously found by the jury when it conducts its own independent review. § 921.141(3)(a)2.

Elevating the jury from a spectator into a true decision maker not only is of critical legal importance, but also profoundly affects the thought process and sense of responsibility of the jurors themselves. Not surprisingly, research has borne this out, demonstrating that individuals making a mere recommendation experience a diminished sense of responsibility for their decision. *See* William J. Bowers, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 954-62 (2006). The Capital Jury Project interviewed Florida jurors involved in capital sentencing proceedings pre-*Hurst* to assess their understanding of their role. The results indicated that jurors did not view themselves as responsible for any decision whatsoever. Jurors opined that under the pre-*Hurst* scheme, "[w]e don't really make the final decision . . . the choice would be up to the judge." *Id.* at 961. Even more troubling, one Florida juror noted, "that fact that you [a juror] could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that *let us feel off the hook*." *Id.* at 962 (emphasis added). Expressing a similar sentiment, the juror noted that the sentencing process was "not as traumatic as deciding [the defendant's] guilt because . . . the judge would make the final choice." *Id.* Another juror even expressed relief regarding the responsibility associated with making a mere recommendation stating, "I didn't want this on my conscience." *Id.; cf. Caldwell v. Mississippi*, 472 U.S. 320, 336-40 (1985) (rejecting conduct by prosecutor

that may lead jurors in capital sentencing to believe their responsibility is diminished).

* * *

The prior statutory right and the *Hurst* constitutional right are entirely distinct. Even Florida courts themselves recognize this difference. In addressing constitutional challenges to the pre-*Hurst* statutory scheme, the Florida courts simply held that an advisory jury recommendation was constitutionally sufficient. *Bottoson*, 833 So. 2d at 695. They did not hold, for example, that the statutory scheme was somehow equivalent to a unanimous jury determination of all of the facts necessary to impose the death penalty, or that it otherwise satisfied the requirements of the subsequently-declared *Hurst* constitutional right.

Because the *Hurst* constitutional right to have "a jury, not a judge, [] find each fact necessary to impose a sentence of death," 136 S. Ct. at 619, is distinct from the pre-*Hurst* advisory jury procedure in its theoretical underpinnings, practical application, and ultimate function, waiver of the former cannot be deemed a waiver of the latter. *See also* Pet., No. 18-113 (2018).

II. FLORIDA'S SUPREME COURT JOINED A DEEP SPLIT AMONG STATE COURTS REGARDING WHETHER A DEFENDANT CAN WAIVE NOT-YET-RECOGNIZED SIXTH AMENDMENT *APPRENDI* RIGHTS

In a series of seminal cases—*Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring*, 536 U.S. 584, and *Blakely v. Washington*, 542 U.S. 296 (2004)—this Court recognized that all criminal defendants—including capital defendants (*Ring*) and those who plead guilty and face an enhanced sentence (*Blakely*)—have a Sixth Amendment right to a jury determination of every fact necessary to support their sentence ("*Apprendi* rights"). After *Hurst* applied this right to Florida's capital sentencing scheme, Florida joined a long-standing state court split on whether newly recognized *Apprendi* rights could be waived *before* they were recognized. As detailed below, numerous state courts have held—correctly—that a defendant cannot prospectively waive an *Apprendi* right before it has been recognized by this Court. Florida has taken the opposite position. Agreeing with a handful of other state courts, the Florida Supreme Court has held that a defendant who "waived" the prior statutory right to a jury recommendation before *Hurst*, therefore necessarily waived the later recognized constitutional right to a jury determination of all facts necessary for the imposition of the death penalty.

A. State Courts Are Divided Over Whether Defendants Can Waive These *Apprendi* Rights Before They Are Recognized

Apprendi effected a landmark change in constitutional law when it held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Two years after *Apprendi*, this Court applied its rule to capital sentencing schemes, which *Apprendi* had not addressed. *See id*. at 496–97. The Court overruled prior precedent "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609.

Then, two years after *Ring*, the Court clarified "that the 'statutory maximum' for *Apprendi* purposes" is not necessarily the maximum statutory penalty, but "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (alteration in original). The Court held that a judge may not enhance a defendant's sentence based on facts not found by a jury—or stipulated to by a defendant, after a knowing waiver of his *Apprendi* rights—even if the statute of conviction allowed for such an enhancement. *Blakely* also clarified that *Apprendi* applies with equal force to defendants who plead guilty—that is, simply because a defendant pleads guilty does not mean the defendant automatically foregoes the right to a jury

determination of any sentence enhancement. *See id*. at 304 (plea *only* waives right to jury determination of "facts admitted in the guilty plea"). In practice, the Court's holding invalidated pre-*Blakely* sentencing regimes requiring defendants who pleaded guilty to forgo their right to a sentencing jury and instead consent to judicial factfinding for sentencing. *E.g.*, *People v. Montour*, 157 P.3d 489, 498-501 (Colo. 2007).[4]

Following each new decision applying *Apprendi*, state courts had to determine whether defendants who had already been sentenced could invoke these newly recognized rights. Even if the newly recognized Sixth Amendment right was held to be retroactively applicable, states still had to confront whether the right could be denied to a defendant based on his prior actions.[5] Thus, in the years following *Apprendi* and

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4 Although *Apprendi* itself involved a defendant who pleaded guilty—and thus, the decision extended Sixth Amendment sentencing rights to other defendants who likewise pleaded guilty—some state courts did not extend *Apprendi* rights to defendants who pleaded guilty until after the Court clarified this point in *Blakely*. *E.g.*, *Leone v. State,* 797 N.E.2d 743, 750 (Ind. 2003) (erroneously claiming *Apprendi* does not apply "when the defendant issues a guilty plea"); *see also Montour*, 157 P.3d at 498 (collecting cases so misinterpreting *Apprendi* pre-*Blakely*).

5 The new *Apprendi* rules applied to defendants whose convictions were not yet final at the time of decision, *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987), and applied retroactively under state law to some defendants whose convictions became final after *Ring*, *e.g., Mosley*, 209 So. 3d at 1276 (applying *Hurst* retroactively to "defendants whose sentences became final after . . . *Ring*").

its progeny, a deep split developed over a fundamental question: Could a defendant "waive" a Sixth Amendment *Apprendi* right, even if controlling caselaw had not yet recognized the right at the time of the purported waiver? The split shows no signs of abating.

1. The Majority of States That Addressed the Issue Have Held That Defendants Cannot Waive Sixth Amendment *Apprendi* Rights Which Have Not Yet Been Recognized

This Court has long held that a valid waiver of a constitutional right should be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Numerous states have concluded that a defendant cannot knowingly relinquish a Sixth Amendment *Apprendi* right—whether related to facts relied upon to enhance a sentence or access to a sentencing jury upon entry of a guilty plea—before it is "known" by the courts.

For example, courts found that if a defendant "was sentenced before *Blakely* was decided, he could not have known that he had a right to a jury determination of the facts used to enhance his sentence," and thus any factual admissions he made at a prior hearing or trial "did not knowingly waive that right." *State v. Dettman*, 719 N.W.2d 644, 654 (Minn. 2006)*; see also State v. Franklin*, 878 A.2d 757, 771 (N.J. 2005) ("In the pre-*Apprendi* days," a defendant who admitted to aggravating facts could not have "knowingly" waived unrecognized right to

require a jury find such facts); *State v. Curtis*, 108 P.3d 1233, 1236 (Wash. App. 2005) ("Curtis allocuted before *Blakely* was decided. . . . Thus, he could not knowingly, voluntarily, and intelligently waive his *Blakely* rights."); *State v. Meynardie*, 616 S.E.2d 21, 24 (N.C. App. 2005) ("Since neither *Blakely* nor [North Carolina's decision applying *Blakely*] had been decided at the time of defendant's sentencing hearing, defendant was not aware of his right to have a jury determine the existence of the aggravating factor. Therefore, defendant's stipulation to the factual basis for his plea was not a 'knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.'" (alterations adopted) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))), *aff'd and remanded*, 646 S.E.2d 530 (N.C. 2007).

Other courts similarly concluded that a defendant did *not* waive the constitutional right to jury sentencing by pleading guilty—even if they pleaded before *Blakely* when states treated such a plea as an automatic waiver of *Apprendi* rights. *E.g.*, *Montour*, 157 P.3d at 492 ("[A]lthough Montour understood that he was waiving his right to a jury trial on sentencing facts by entering a guilty plea, his waiver of his Sixth Amendment right was infected with the same constitutional infirmity as [Colorado's pre-*Blakely* scheme]—the waiver of his Sixth Amendment right was inextricably linked to his guilty plea."); *see also People v. Isaacks*, 133 P.3d 1190, 1191, 1196 (Colo. 2006) (holding that even a defendant who "expressly waive[d] [the] right to trial by jury on all issues . . . could not possibly have knowingly, voluntarily, and

intelligently waived his *Blakely* rights" a "full year before the Supreme Court handed down *Blakely*"); *State v. King*, 168 P.3d 1123, 1127 (N.M. 2007) ("Defendant's plea hearing was held before *Blakely* was decided . . . . and therefore neither Defendant nor the State was aware of Defendant's right to a jury determination of aggravating factors."); *State v. Foster*, 845 N.E.2d 470, 483 (Ohio 2006) ("Foster could not have relinquished his sentencing objections as a known right when no one could have predicted that *Blakely* would extend the *Apprendi* doctrine to redefine the 'statutory maximum'"), *abrogated on other grounds by Oregon v. Ice*, 555 U.S. 160 (2009); *State v. Schofield*, 895 A.2d 927, 931 (Me. 2005) (finding no waiver "[b]ecause Schofield, prior to *Blakely*, did not know that she had a right to have a jury determine, beyond a reasonable doubt, any facts necessary to increase her sentence"); *State v. Williams*, 104 P.3d 1151, 1152–53 (Or. App. 2005) (refusing to assume that a defendant who waived his jury rights under a pre-*Blakely* scheme necessarily waived the right after *Blakely*); *State v. Ward*, 118 P.3d 1122, 1127–28 (Ariz. Ct. App. 2005) (rejecting cases finding a defendant could have "knowingly waived his jury right pursuant to *Blakely* when he was unaware of the right" at the time of plea).

2. Florida Joined a Minority of States in Holding That *Apprendi* Rights Can Be Waived Before They Are Recognized

Florida, however, ultimately joined four state supreme courts that reached a contrary conclusion, holding that any waiver of jury sentencing—even

under a sentencing scheme later found unconstitutional—necessarily waives a later-recognized Sixth Amendment *Apprendi* right to jury sentencing. *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 647–48 & n.10 (Mo. 2011) (waiving jury right under unconstitutional sentencing scheme waived newly recognized constitutional right, "no matter under what statute or constitutional provision a right to jury sentencing existed" at the time of the waiver); *State v. Piper*, 709 N.W.2d 783, 807-08 (S.D. 2006) (same); *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004) (same); *Colwell v. State*, 59 P.3d 463, 474 (Nev. 2002) (same).[6]

The four courts' reasoning varied, but none articulated a convincing rationale for their disregard of the Court's holding that a right ordinarily must be "known" to be waived. *See Johnson*, 304 U.S. at 464. The Missouri Supreme Court's ruling in *Taylor* rests on an unsupported assumption that a defendant who waived a sentencing jury pre-*Blakely*—even under an unconstitutional scheme that linked guilty pleas to sentencing waivers—*must* have made a "strategic" choice to waive *any* jury right. *Taylor*, 341 S.W.3d at 647. Conducting a form of harmless error analysis—without describing it as such—the court assumed that any defendant who "*did not want to face a jury*" under

6 *Colwell* was decided before *Blakely*, but Nevada has never overruled it—suggesting *Colwell* reflects a holding about waiver itself, not merely a misunderstanding of whether *Apprendi* applies to defendants who pleaded guilty. *See* n. 4, *supra* (explaining that some courts incorrectly held that *Apprendi* did not apply at all to defendants who pleaded guilty).

an unconstitutional sentencing scheme would necessarily not choose to face a jury under a constitutional regime. *Id*. That reasoning cannot be squared with *Smith v. Yeager*, 393 U.S. 122, 126 (1968), in which this Court observed that whatever the reason for a waiver, a court cannot "examine the state of [] mind, or presume" intentional relinquishment of a knowing right or privilege.[7]

Two other courts—South Carolina and Nevada—made similar assumptions: If a defendant "was informed that by pleading guilty [under an unconstitutional scheme] he waived his right to a jury trial on both guilt and sentencing," then, according to these courts, he *must* have decided that *any* jury sentencing was undesirable. *Downs*, 604 S.E.2d at 380; *see also Colwell*, 59 P.3d at 474 (holding *Apprendi* rights waived merely because "Colwell was aware that if he pleaded guilty a three-judge panel would determine his sentence").

The South Dakota Supreme Court took a related tack, contending that well-established precedent already held that a defendant could waive "nonexistent" rights. Relying on a handful of pre-*Blakely* decisions, the divided court claimed "the law

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7 While Rodgers may have wished to die at the time she waived her statutory right to a jury recommendation, *Rodgers*, 3 So. 3d at 1130, that does not give rise to a presumption that she would have waived the *Hurst* right had it been available. Indeed, by filing for *Hurst* relief within a month of the Florida Supreme Court making the right retroactively available, and continuing to pursue that relief in her pending petition, she has confirmed her intent to invoke her *Hurst* constitutional right now that she knows it exists.

is quite settled" that a defendant's waiver of a "nonexistent" jury right is also "a valid waiver of his [later-recognized] constitutional right to jury sentencing." *Piper*, 709 N.W.2d at 808. *Contra* 709 N.W.2d at 821 (Sabers, J., joined by Meierhenry, J., dissenting) ("waiver of a substantive right presupposes the existence of the right in the first place"). It also erroneously claimed "[t]he United States Supreme Court has long held that a waiver of the right to a jury is valid even though the underlying right waived does not exist"—but its only support for this proposition was *Patton v. United States*, 281 U.S. 276 (1930), which merely held that defendants could waive their Sixth Amendment right to a jury (and which was issued long *after* the underlying jury right was known to "exist"). *See Piper*, 709 N.W.2d at 808. This Court has never held that one can waive a right that did not exist, and indeed has strongly implied the contrary. *See Yeager*, 393 U.S. at 126.

Despite ample authority holding that Sixth Amendment sentencing rights cannot be waived before they are announced, Florida's Supreme Court sided with the minority of states and concluded that such rights could be waived even when they have not yet been announced at the time of the waiver.

In *Mullens*, 197 So. 3d 16, the court held that any defendant who waived Florida's non-binding, non-unanimous, and unconstitutional "advisory" jury before *Hurst* also waived the Sixth Amendment right to a binding and unanimous sentencing jury. The court explicitly joined Missouri, South Dakota, South Carolina, and Nevada in holding that a "waiver" of an

unconstitutional jury "right" necessarily waived *any* later-recognized Sixth Amendment right. *Id*. at 39 (joining "[o]ther states [that] have reached similar conclusions in the context of capital sentencing") (citing, *inter alia*, *Taylor*, 341 S.W.3d at 646–47; *Piper*, 709 N.W.2d at 803–07; *Colwell*, 59 P.3d 463; *Downs*, 604 S.E.2d at 380). Relying on South Dakota's *Piper* opinion, the court concluded that, if its decision were otherwise, capital defendants could "abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death." *Id*. at 40.[8]

Florida's Supreme Court also relied erroneously on other state court cases that did not actually address the issue of waiver of sentencing rights. For example, although it cited *State v. Murdaugh*, 97 P.3d 844 (Ariz. 2004), several times, that case did not address waiver of *sentencing* rights—rather, it merely held that *Apprendi* and its progeny do not invalidate an earlier *guilty plea*. *Id.* at 854.[9] *Mullens* also cited

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8 As the petition explains, this claim is nonsensical. Pet. at 20–21 n.10. Mullens (and Rodgers) did not waive a binding, constitutional "right to jury sentencing" and they did not "abuse the judicial process" by later claiming that they were entitled to a right that had never been offered to them. Florida capital defendants did not look into the future, foresee *Hurst*, and plan their actions accordingly—and defendants cannot be faulted for being sentenced before Florida belatedly brought its capital sentencing scheme into constitutional compliance.

9 *Murdaugh* involved a straightforward application of *Brady*, 397 U.S. 742—which only holds that a guilty plea itself cannot be withdrawn based on a later change in law. *See*

Moore v. State, 771 N.E.2d 46 (Ind. 2002), but that case was not about the effect of a purported waiver after recognition by this Court of a new sentencing right—rather, it erroneously concluded that the rights provided for in *Apprendi* were inapplicable under Indiana law in effect at the time when the defendant pleaded guilty. And this holding was overruled by *Blakely* two years later. *See Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005) (applying *Blakely* after guilty plea). Similarly, *Lewis v. Wheeler*, 609 F.3d 291 (4th Cir. 2010), merely found that this Court's decisions *prior* to *Blakely* did not "necessarily forecast that a capital defendant who pleads guilty and waives his right to a jury trial can insist upon a jury trial on aggravating factors." *Id*. at 310 & n.6.

III. THE COURT SHOULD RESOLVE THE SPLIT

It is time to resolve this split—and to reject the flawed reasoning of the Florida Supreme Court and the other state courts on which it relied. Holding that defendants "knowingly" waived Sixth Amendment rights before they could even invoke them is inconsistent with the long-standing principle that

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Ward, 118 P.3d at 1129. *Murdaugh* and *Brady* have no bearing on whether a defendant can invoke a sentencing right that was not previously available. *Id.; see also Class v. United States*, 138 S. Ct. 798, 805 (2018) (guilty plea does "not include a waiver of the privileges which exist beyond the confines of the trial"(quotations omitted)); *Malvo v. Mathena*, 893 F.3d 265, 277 (4th Cir. 2018) ("[W]hile [the defendant's] convictions remain valid [under *Brady*]," nothing in his plea agreement precludes him from obtaining habeas relief under the new [sentencing] rule in *Miller [v. Alabama*, 567 U.S. 460 (2012)].").

defendants may only waive a "*known* right." *Johnson*, 304 U.S. at 464; *see also Halbert v. Michigan*, 545 U.S. 605, 623 (2005) (holding defendant could not waive unknown right to appellate counsel when, at the time of waiver he "had no recognized right to appointed appellate counsel he could elect to forgo"). This Court should grant *certiorari*, side with those courts that hold that a defendant cannot waive an unrecognized Sixth Amendment right, and reverse.

It is worth noting that the question whether a defendant can waive a not-yet-recognized *Apprendi* right is raised by the pending certiorari petition in *Hutchinson v. Florida*, No. 18-5377 (2018). Hutchinson waived an "advisory" jury, was sentenced to death based on judicial factfinding, sought post-conviction relief after *Hurst*, and was denied his Sixth Amendment rights solely on the basis of *Mullens*. *See Hutchinson v. State*, 243 So. 3d 880, 881– (Fla. 2018). The issue that both Hutchinson and Rodgers raise is important and recurring, and this Court should grant certiorari to clarify that only rights that have been recognized may be knowingly waived.

Rodgers is not the only defendant who has been or may be subject to the Florida Supreme Court's application of *Mullens*. There are 18 other defendants currently on death row in Florida who waived the prior statutory right, and eight of them have been denied *Hurst* relief. A grant and reversal here could

mean the difference between life and death for these defendants.[10]

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted.

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10 *Allred v. State*, 186 So. 3d 530, 532 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1057 (Fla. 2016); *Covington v. State*, 228 So. 3d 49, 52 (Fla. 2017); *Davis v. State*, 207 So. 3d 177, 186 (Fla. 2016); *Dessaure v. State*, 55 So. 3d 478, 482 (Fla. 2010); *Hutchinson v. State*, 243 So. 3d 880, 881 (Fla. 2018); *Mullens*, 197 So. 3d at 20; *Twilegar v. State*, 175 So. 3d 242, 246 (Fla. 2015).