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 Florida Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state prisoner whose death sentence became final before this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), has a federal right to seek postconviction relief in state court based on *Hurst*, even though (1) this Court has never held that *Hurst* applies retroactively as a matter of federal law, and (2) this Court has held that *Ring v. Arizona*, 536 U.S. 584 (2002)—the case on which *Hurst* was based—does not apply retroactively as a matter of federal law.

2. Whether federal law gives a state prisoner the right to seek postconviction relief in state court based on *Hurst*, even if the prisoner (1) did not ask for a jury to make any findings—advisory or mandatory—during the sentencing phase of the proceeding, (2) expressly asked for the trial court to make all sentencing determinations, and (3) waived the right to seek any future postconviction relief, while acknowledging that such a decision would effectively mean that "the case is over."

3. Whether, assuming Petitioner has a federal right to seek postconviction relief in state court based on *Hurst*, the denial of Petitioner's motion should be affirmed because this Court's caselaw forecloses any claim that the Sixth Amendment gives a defendant the right to insist that a jury find the fact of a prior conviction, that aggravators outweigh mitigators, or that death is the appropriate sentence.

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STATEMENT

1. When Petitioner Jeremiah Rodgers was sentenced to death in 2007, a defendant convicted of a capital crime in Florida could be sentenced to death only if the trial judge found both (1) the existence of at least one statutorily enumerated aggravating circumstance, and (2) that the aggravating circumstances outweighed the mitigating circumstances. *Spaziano v. Florida*, 468 U.S. 447, 451-52 & n.4 (1984) (citing § 921.141(2)(b), (3)(b), Fla. Stat. (1983)). A sentencing jury would render an advisory verdict, but the judge would make the ultimate sentencing determination. *See id.* (citing § 921.141(3), Fla. Stat. (1983)). This Court had upheld that regime as constitutional, including under the Sixth Amendment. *See Hildwin v. Florida*, 490 U.S. 638 (1989).

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court 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," even if the State characterizes the additional factual findings made by the judge as "sentencing factor[s]." *Id.* at 483, 490, 492. *Ring v. Arizona* extended *Apprendi* to findings on the aggravating factors necessary to impose a death sentence. 536 U.S. 584 (2002). The Court held that, "[b]ecause Arizona's enumerated aggravating factors [necessary to impose a death sentence] operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be

found by a jury." *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

Neither *Apprendi* nor *Ring* overruled *Hildwin*, 490 U.S. at 640-41, which until *Hurst* was this Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures." *Hurst v. State*, 147 So. 3d 435, 446-47 (Fla. 2014). Indeed, in *Ring*, the Court acknowledged—but did not address—"hybrid" capital sentencing procedures, like Florida's, in which the judge decides the ultimate sentence but the jury has an advisory role. *See Ring*, 536 U.S. at 608 n.6. The Court recognized that in both *Ring* and the case it overruled, *Walton v. Arizona*, 497 U.S. 639 (1990), the Court had analyzed Arizona's capital procedures, which differ considerably from those of other states.

Accordingly, in the years following *Ring*, both the Florida Supreme Court and the Eleventh Circuit declined to extend *Ring* to Florida's capital sentencing scheme, reasoning that the lower courts were bound by this Court's pre-*Ring* decisions, such as *Hildwin*, all of which had upheld Florida's procedures against Sixth Amendment attack. *See, e.g.*, *Hurst*, 147 So. 3d at 447; *Evans v. Secretary, Fla. Dep't of Corr.*, 699 F.3d 1249, 1264 (11th Cir. 2012), *cert. denied*, *Evans v. Crews*, 569 U.S. 994 (2013).

In 2016, this Court granted certiorari in *Hurst v. Florida* "to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." 136 S. Ct. 616, 621 (2016) (citations omitted) ("*Hurst*"). The Court held that Florida's capital sentencing scheme suffered from the same Sixth Amendment infirmity as did Arizona's scheme

in *Ring*. *Id.* at 621-22. It therefore expressly overruled its pre-*Ring* decisions upholding Florida's capital sentencing scheme to the extent that they allowed a sentencing judge, rather than a jury, to find an aggravating circumstance necessary to impose the death penalty. *Id.* at 624.

2. Shortly after this Court decided *Ring*, it held that *Ring* is not retroactive as a matter of federal law. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). This Court characterized its decision in *Hurst v. Florida* as a straightforward application of its holding in *Ring*, 136 S. Ct. at 622, and the Florida Supreme Court's decision in *Hurst v. State* purported to apply the teaching of *Hurst v. Florida*. 202 So. 3d at 50-69. Accordingly, the Florida Supreme Court has ruled that its decision in *Hurst v. State* does not apply retroactively as a matter of federal law. *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016). Petitioner does not ask this Court to review that ruling. *See* Pet. i.

This Court has never held that *Hurst* applies retroactively under federal law to postconviction applicants, like Petitioner, whose sentences were final on direct review when *Hurst* was decided. Such applicants thus are not currently entitled under federal law to a new sentencing hearing if a judge, not a jury, made the penalty-phase findings necessary to impose the death penalty.

3. Under *Florida* law, meanwhile, *Hurst* does apply retroactively in some cases. That is because the federal retroactivity test, the "much narrower *Teague* [*v. Lane*, 489 U.S. 288 (1989)] test," uses "completely different factors from Florida's" retroactivity test. *Asay*, 210 So. 3d at 15; *see Danforth v. Minnesota*, 552

U.S. 264, 282 (2008) ("*Teague* . . . does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*.").

In *Asay v. State*, the Florida Supreme Court concluded that, under *state* law, *Hurst* did not apply retroactively to cases in which the death sentence became final before *Ring* was decided in 2002. 210 So. 3d at 11, 22. Then, in *Mosley v. State*, the Florida Supreme Court addressed the question it had reserved in *Asay*—whether *Hurst* should apply retroactively under state law to death sentences that became final after *Ring*. 209 So. 3d 1248, 1274 (Fla. 2016). The court concluded that capital defendants falling into this category should normally benefit from *Hurst* because, "[f]or fourteen years after *Ring*, until the United States Supreme Court decided *Hurst v. Florida*, Florida's capital defendants attempted to seek relief based on *Ring*, both in this Court and the United States Supreme Court." *Id.* at 1275. In other words, *Hurst* made clear that "Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*," *id.* at 1281, so "[f]undamental fairness" compelled the court to hold, under state law, that "[d]efendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring*" should normally benefit from *Hurst*, *id.* at 1283.

4. Rodgers' death sentence became final in 2009, before *Hurst*, but after *Ring*. In 2000, Petitioner entered a plea of guilty as a principal to the first-degree murder of Jennifer Robinson; conspiracy

to commit murder; giving alcohol to a minor; and abusing a human corpse. *Rodgers v. State*, 934 So. 2d 1207, 1210 (Fla. 2006). Petitioner acknowledged the following in a statement to police:

> Rodgers . . . [took] Robinson on a date as part of a plan. Rodgers met Robinson's mother and then drove to [co-defendant] Lawrence's house to pick him up and use Lawrence's truck. Lawrence had already purchased Everclear grain alcohol, and they stopped at a gas station to pick up Mountain Dew and Dr. Pepper soft drinks to mix with the alcohol. They drove as far as they could into the woods and pretended to wait for Lawrence's girlfriend to arrive, although Lawrence and Rodgers knew that she was not coming. While pretending to wait, they mixed large portions of the alcohol with the soft drinks for Robinson, while drinking very little alcohol themselves. Rodgers and Robinson engaged in consensual sex. While this occurred, Lawrence walked into the woods to fix his handgun, which had jammed. When Lawrence returned, he handed the weapon to Rodgers. Rodgers convinced Robinson to go with him to look at a marijuana field, which did not exist, and as they were walking to Lawrence's truck, Rodgers shot her in the back of the head. The two men then placed Robinson's body in the back of the truck and drove to a place where they attempted to burn her clothes and then covered the body with debris.

Id. Rodgers also received a life sentence for a different murder committed with Lawrence, the stabbing

murder of Justin Livingston. *Id.* at 1210-11. The Florida Supreme Court affirmed the convictions but remanded for a new penalty phase based on excluded evidence regarding Lawrence's culpability. *Id.* at 1221-22.

At the second penalty phase, Rodgers waived the statutory right to empanel a penalty-phase jury and affirmatively requested that the trial court make all sentencing findings. *Rodgers v. State*, 3 So. 3d 1127, 1130 (Fla. 2009).[1] Explaining that decision, Rodgers explained that she "trust[ed] the Court's judgment better than people who I think are more against me than for me—more against me than neutral, I should say." *Id.* at 1130. Rodgers did not say or imply that she might have made a different decision if she had thought that the jury's findings would be binding on the court. To the contrary, she elected to "go without the jury" because she believed that death was the proper sentence and did not want any jury findings to bind the court's decision: "I can count on a death sentence with you [the judge] I feel, but with this jury, I mean, it could go six/six or I don't know how it's going to go." *Id.*

Following a bench trial, the judge found two aggravating circumstances: (1) the prior violent felony; and (2) cold, calculated, and premeditated. *Id.* at 1133. Rodgers appealed, but the Florida Supreme Court affirmed the death sentence on direct review. *Id.*

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[1] For purposes of this brief, the State adopts the pronoun used in the Petition. *See* Pet. at 4 n.1.

Petitioner subsequently wrote a letter to the state postconviction court, seeking to waive the right to postconviction counsel and to all postconviction proceedings. As required by state law, the court held a hearing to ensure that Petitioner's waiver was knowing and intelligent. *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993); *see* Fla. R. Crim P. 3.851(i). In a colloquy, the trial court warned that, absent a waiver, future developments could result in the commutation or invalidation of Petitioner's sentence. Tr. of Hearing on Waiver of Right to Postconviction Counsel & Right to Institute Postconviction Proceedings at 16-17. For example, a court "may find that you're entitled to relief either in the form of a new trial or a sentence from death to life imprisonment." *Id.* at 17. Similarly, there was "a possibility" that judicial rulings or new legislation could result in Petitioner's sentence being "commuted." *Id.* If Petitioner waived the right to seek further postconviction relief, however, that "basically means the case is over." *Id.* at 20. Petitioner responded: "I understand." *Id.*

The court also explained that "that would include a federal review of state claims. Do you understand that as well?" Petitioner responded: "Yes, I do." The trial court continued: "Do you also understand . . . that state postconviction motions and federal habeas corpus proceedings or petitions have time limitations? And that even if you wanted to reinstate the proceedings at a later date, you may waive those type [of] proceedings and it may be too late for you to do so in either state or federal or both courts?" Petitioner responded: "Yes, I do." Following the hearing, the court found that Petitioner was competent and had

"freely, voluntarily, and intelligently" waived all postconviction proceedings.

The Florida Supreme Court affirmed Petitioner's waiver, concluding that Petitioner "was fully aware of and understood the consequences of waiving postconviction counsel and proceedings." *Rodgers v. State*, 104 So. 3d 1087 (Fla. 2012) (Table). Petitioner did not ask this Court to review that ruling.

5. In 2017, Petitioner filed a new postconviction motion in the state trial court, seeking relief under *Hurst v. Florida* and *Hurst v. State* pursuant to Florida Rule of Criminal Procedure 3.851. Pet. App. 12a. The trial court denied Petitioner's motion. *Id.* Petitioner, the court stressed, had "waived" the right to a "second penalty phase jury," and had "discharged postconviction counsel and waived postconviction proceedings." *Id.* The trial court and the Florida Supreme Court had found both of those waivers "to be valid." *Id.* at 12a-13a (citing *Rodgers*, 3 So. 3d at 1132-33, & *Rodgers*, 104 So. 3d at 1087).

The Florida Supreme Court unanimously affirmed the denial of Petitioner's motion for postconviction relief. Pet. App. 1a. First, it explained that it has "consistently held that the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury." *Id.* (citing *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016), *cert. denied*, *Mullens v. Florida*, 137 S. Ct. 672 (2017) & *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016)). Second, the court rejected Petitioner's "attac[k] [on] the waiver itself," as the court "ha[d] long since affirmed Rodgers' waiver of a penalty phase jury" and Petitioner had not identified any reason that the court should revisit the

waiver's validity. Pet. App. 2a. The court also "agree[d] with the circuit court that the time for Rodgers to contest the prior competency determination has passed." *Id*. (citing Fla. R. Crim. P. 3.851(d)(1)).

REASONS FOR DENYING THE PETITION

I. THIS CASE IS AN UNSUITABLE VEHICLE FOR CONSIDERING THE QUESTION PETITIONER PRESENTS, AND THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS OR IMPLICATE A SPLIT BETWEEN THE LOWER COURTS.

A. Whether Petitioner has waived any federal constitutional right recognized in *Hurst v. Florida* is not properly before this Court because Petitioner's sentence was already final by the time *Hurst* was decided and *Hurst* does not apply retroactively as a matter of federal law.

1. This Court has not held that *Hurst* applies retroactively to sentences—like Petitioner's—that had already become final on direct review. What is more, Petitioner does not contend that *Hurst* applies retroactively under federal law. Thus, this Court's ruling in *Hurst* does not give Petitioner any *federal* right that Petitioner could assert in a state postconviction proceeding. And whether Petitioner has a "federal constitutional right" (Pet. i.) to begin with is necessarily a question antecedent to whether Petitioner has validly waived any such right. As a result, to reach the waiver question Petitioner presents, the Court would first have to hold that *Hurst* applies retroactively under federal law. *See Tyler v.*

Cain, 533 U.S. 656, 663 (2001) ("[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive" (quoting 28 U.S.C. § 2244(b)(2)(A))). This threshold question counsels strongly against granting the Petition, for several reasons.

First, the federal-law retroactivity issue is not fairly included within the question presented. Nowhere does Petitioner request that this Court consider the question of whether *Hurst* applies retroactively. And that is a distinct question of law—for example, in *Schriro v. Summerlin*, the Court granted certiorari to decide the sole question of whether *Ring* applied retroactively. 542 U.S. 348, 349 (2004). Considering whether Petitioner's 2007 jury waiver precludes her from seeking *Hurst* relief "would not assist in resolving whether" *Hurst* applies retroactively, *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992), so the *Teague* retroactivity analysis is simply a question distinct from the effectiveness of her 2007 jury waiver.

Second, the retroactivity issue was neither pressed nor passed on below. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). Although Petitioner argued in the state postconviction trial court that *Hurst* applied retroactively under federal law, Pet. App. 59a-62a, Petitioner did not argue as much before the Florida Supreme Court. *See* Pet. App. 14a-39a. Nor did the Florida Supreme Court address the issue. Pet. App. 1a-10a.

Third, the retroactivity issue is not certworthy: the courts of appeals are not divided on *Hurst*'s retroactivity. Each circuit faced with the issue has

either held that, like *Ring*, *Hurst* is not retroactive, or noted that only this Court can hold that *Hurst* is retroactive. *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir.), *cert. denied sub nom. Lambrix v. Jones*, 138 S. Ct. 217 (2017) ("[U]nder federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review." (citing *Schriro*, 542 U.S. at 358)); *Ybarra v. Filson*, 869 F.3d 1016, 1032 (9th Cir. 2017) (same); *see also Rhines v. Young*, 899 F.3d 482, 499 (8th Cir. 2018) ("The opinion in *Hurst* made no mention of retroactivity, and no subsequent Supreme Court decision has made *Hurst* retroactive."); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (same); *In re Jones*, 847 F.3d 1293, 1296 (10th Cir. 2017) (same). None has even expressed the view that *Hurst* is *likely* retroactive.

But even if the Court were inclined to consider whether *Hurst* applies retroactively, the Court's precedents make clear that *Hurst* does *not* apply retroactively under federal law. "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro*, 542 U.S. at 358. It merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death" and, as such, was a "prototypical procedural rul[e]." *Id.* at 353. *Hurst*, as a mere application of *Ring* to Florida's capital sentencing procedures, similarly announced only a prototypical procedural rule. 136 S. Ct. at 621-22. As the Ninth Circuit has explained, "[i]f neither *Ring* nor *Apprendi* apply retroactively, we fail to see why *Hurst* would apply retroactively." *Ybarra*, 869 F.3d at 1033. And "it is not clear that *Hurst* actually establishes a new rule of constitutional law at all. Instead, it may

be nothing more than a direct application of *Ring*." *Id.* at 1031.

In short, Petitioner has not asked this Court to decide whether *Hurst* is retroactive as a matter of federal law; that logically antecedent question is not independently certworthy; and the Court's precedents establish that *Hurst* is not retroactive. Thus, this case does not present the question whether, under *federal law*, Petitioner has made "a knowing and intelligent waiver of the federal constitutional right to have a jury make all requisite findings for the imposition of death," Pet. i.

2. It is no answer to argue that, under *state law*, the *Hurst* decisions should be deemed to be retroactively applicable to Petitioner's case. *See* Pet. 9. For purposes of Florida law, the Florida Supreme Court has held that the *Hurst* decisions are, in general, retroactively applicable to death sentences that became final after *Ring*. *Mosley*, 209 So. 3d at 1274. However, the Florida Supreme Court has also held that a prisoner whose sentence became final after *Ring* but who waived the right to a penalty-phase jury may not benefit from that state-law retroactivity ruling. *Brant*, 197 So. 3d at 1079; *see* Pet. App. 1a. Federal law does not give Petitioner the right to pick and choose only those aspects of the Florida Supreme Court's state-law retroactivity jurisprudence that are favorable to Petitioner's position, and this Court should not second-guess the extent to which a state court opts to make a new right retroactively applicable under state law. *See* 28 U.S.C. § 1257(a).

In short, *Schriro* forecloses any argument that *federal law* gives Petitioner a right to invoke the *Hurst*

decisions retroactively, and the Court lacks jurisdiction to decide whether *state law* gives Petitioner such a right.

Because this case does not raise the question Petitioner presents, this Court need not consider the various issues mentioned in the Petition and by Amici. Each puts the cart before the horse by asking whether the waiver of a "federal constitutional right" was effective (*e.g.*, Pet. i, 19, 23) while simply assuming the existence of the right to be waived. And each argues as if this Court has already held that the *Hurst* decisions are retroactive under federal law.

For the same reason, the purported split to which Amici point is not implicated here. Amici contend that "[n]umerous states have concluded that a defendant cannot knowingly relinquish a Sixth Amendment *Apprendi* right . . . before it is 'known' by the courts." Amici 16. But in each case that Amici cites for this proposition, the defendant benefited from *Apprendi* or *Blakely* because *Apprendi* or *Blakely* was decided while the defendant's case was pending *on direct appeal*. *State v. Dettman*, 719 N.W.2d 644, 648 (Minn. 2006) ("Because Dettman's direct appeal was pending before the court of appeals when *Blakely* was decided, the substantive rule of *Blakely* applies retroactively to Dettman's case."); *State v. Franklin*, 878 A.2d 757, 763 (N.J. 2005) (*Apprendi* decided during defendant's direct appeal); *State v. Curtis*, 108 P.3d 1233, 1234 (Wash. App. 2005) (*Blakely* decided during defendant's direct appeal); *State v. Meynardie*, 616 S.E.2d 21, 23 (N.C. App. 2005) (same); *People v. Montour*, 157 P.3d 489, 491 (Colo. 2007) (same); *People v. Isaacks*, 133 P.3d 1190, 1192 (Colo. 2006)

(same); *State v. King*, 168 P.3d 1123, 1127 (N.M. 2007) (same); *State v. Foster*, 845 N.E.2d 470, 483-84 (Ohio 2006), *abrogated by Oregon v. Ice*, 555 U.S. 160 (2009) (same); *State v. Schofield*, 895 A.2d 927, 931 (Me. 2005) (same); *State v. Williams*, 104 P.3d 1151, 1152 (Or. App. 2005) (same); *State v. Ward*, 118 P.3d 1122, 1125 (Ariz. Ct. App. 2005) (same); *see* Amici 16-18.

In other words, Amici cite only cases holding that defendants could benefit from either *Blakely* or *Apprendi*, which applied retroactively to cases pending on direct review, because they did not waive those rights before those cases were decided. Here, by contrast, it is undisputed that the *Hurst* cases on which Petitioner relies were decided long after Petitioner's sentence became final. Thus, the predicate for reaching the validity of Petitioner's 2007 jury waiver—the subsequent recognition of a federal constitutional right that Petitioner could waive—is absent here. Amici cite no case holding that, although this Court has not decided that a newly recognized federal constitutional right applies retroactively to cases on collateral review, a state convict is nevertheless entitled under federal law to assert that right in a state postconviction proceeding so long as she did not waive it.

Finally, this Court has recently and repeatedly denied petitions in other capital cases where the defendant waived a penalty-phase jury but later sought *Hurst* relief. *See Covington v. State*, 228 So. 3d 49, 69 (Fla. 2017), *cert. denied*, *Covington v. Florida*, 138 S. Ct. 1294 (2018) (No. 17-7400); *Twilegar v. State*, 228 So. 3d 550 (Fla. 2017), *cert. denied*, *Twilegar v. Florida*, 138 S. Ct. 2578 (2018) (No. 17-

8236); *Quince v. State*, 233 So. 3d 1017 (Fla. 2018), *cert. denied*, *Quince v. Florida*, No. 17-9401 (Oct. 1, 2018); *Hutchinson v. State*, 243 So. 3d 880 (Fla. 2018), *cert. denied*, *Hutchinson v. Florida*, No. 19-5377 (Oct. 1, 2018). Petitioner does not show why this case is any more certworthy than those petitions. If anything, and for the reasons set out below, this case is a much less suitable vehicle.

B. This Court should not decide how the federal constitutional rulings issued by the Florida Supreme Court in *Hurst v. State* apply to cases like this before deciding whether those rulings are correct.

This case arises out of the denial of a postconviction motion "seeking sentencing relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), *and Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017)." Pet. App. 1a (emphasis added); *see id.* at 12a. To the extent that Petitioner seeks relief under *Hurst v. State*—i.e., to the extent that she asks the Court to decide whether she waived "the federal constitutional right to have a jury" find that "the aggravating circumstances are sufficient to impose death," find that "the aggravating factors outweigh the mitigating circumstances," and "recommend a sentence of death," *see* Pet. i; *Hurst v. State*, 202 So. 3d at 57—that question is not cleanly presented here. That is because the Court has never recognized a federal constitutional right to have a jury make those determinations; and the Court should not decide whether a "federal constitutional right" is retroactive or whether it has been validly waived, *see*

Pet i, without first deciding whether it exists in the first place.

In *Hurst v. Florida*, this Court held that Florida's capital sentencing system violated the Sixth Amendment insofar as it authorized a judge to find an aggravating circumstance necessary to impose the death penalty. 136 S. Ct. at 619, 624.

On remand, the Florida Supreme Court extended *Hurst* in three ways. *First*, the court held that the Sixth Amendment gives defendants the right to have a jury make *non-factual* determinations required by state law before the death sentence may be imposed—including "that the aggravating factors are sufficient to impose death," "that the aggravating factors outweigh the mitigating circumstances," and that "a sentence of death" is appropriate. *Hurst v. State*, 202 So. 3d at 53, 57.

Second, as a matter of state law, the court held that a jury must make all these findings unanimously. *Id.* at 53-54, 57. The court was "mindful that a plurality of the United States Supreme Court, in a noncapital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment." *Id.* at 57 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)). But "in interpreting the Florida Constitution and the rights afforded to persons within this State," the court decided to "afford[] criminal defendants" more protection "than that mandated by the federal Constitution." *Id.*

Third, the court "conclude[d] that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment" to

the United States Constitution. *Id.* at 59. As the court saw it, this Court had "not ruled on whether unanimity is required in the jury's advisory verdict in capital cases." *Id.* In the court's view, however, "the foundational precept of the Eighth Amendment"—"the principle that death is different"—"calls for unanimity in any death recommendation that results in a sentence of death." *Id.*

The State filed a petition for a writ of certiorari challenging *Hurst II*'s federal law holdings. Specifically, the State sought review of whether the Sixth Amendment requires that a jury make determinations that are required by statute but are not factual in nature, and whether the Eighth Amendment requires jury sentencing in capital cases. Pet., *Florida v. Hurst*, No. 16-998, 2017 WL 656209 at *i. The Court denied the petition. *Florida v. Hurst*, 137 S. Ct. 2161, 2161 (2017).

Petitioner does not ask this Court to decide whether the federal constitutional holdings of *Hurst v. State* are correct. Instead, Petitioner simply assumes that there is a "federal constitutional right to have a jury make *all* requisite findings for the imposition of death" in Florida, Pet. i (emphasis added), including the normative judgment that aggravators outweigh mitigators and that death is the appropriate sentence. Based on that assumption, Petitioner asks this Court to decide whether the Florida Supreme Court erred in holding that Petitioner made "a knowing and intelligent waiver of the federal constitutional right to have a jury make *all* requisite findings," Pet. i (emphasis added).

This Court should not decide whether a "federal constitutional right" is retroactively applicable—and, if so, whether there has been "a knowing and intelligent waiver of [that] federal constitutional right," Pet. i—without first deciding whether a federal constitutional right exists in the first place. Just last year, moreover, this Court denied a petition squarely presenting that question, and Petitioner does not argue that the issue has become more certworthy since then. Indeed, while the State's cert petition was pending in *Hurst v. State*, the Florida Legislature amended the state's death penalty statute to require, as a matter of *state statutory* law, what the Florida Supreme Court mandated as a matter of *federal constitutional* law in *Hurst v. State*. Thus, the question whether *Hurst v. State* was correctly decided would have a direct impact only on those Florida cases in which a death sentence became final after *Ring* but before the Florida Legislature amended the statute in 2017. *See* Pet. 9-10 (asserting that, since the Florida Supreme Court's decision in *Mosley*, "the Florida courts have set aside 130 death sentences because the defendants were denied the jury trial right recognized in *Hurst*").

In short, this Court has never held that the additional rights posited by the Florida Supreme Court in *Hurst v. State* are based on a sound interpretation of the federal Constitution. To reach the question of whether Petitioner waived any "federal constitutional right[s]" under *Hurst v. State*, *see* Pet i, therefore, this Court would have to consider whether that case is correct as a matter of federal law *and* whether any such federal rights apply

retroactively under federal law. Neither of those questions is fairly included in the question presented.

II. PETITIONER'S INDEPENDENT WAIVER OF ALL POSTCONVICTION PROCEEDINGS BARS *HURST* RELIEF, AND THE VALIDITY OF THAT WAIVER IS NOT PRESENTED HERE.

Although the question Petitioner presents focuses exclusively on the effectiveness of her 2007 waiver of her right to a penalty-phase jury, the courts below also relied on a separate, broader waiver: Petitioner's 2011 waiver of *all postconviction proceedings*. Based on that waiver, the courts below concluded, Petitioner may not now invoke the *Hurst* decisions in seeking postconviction relief in state court under Florida Rule of Criminal Procedure 3.851. And although Petitioner contends—in a brief footnote—that her 2011 waiver is ineffective for the same reason that her 2007 waiver of a jury recommendation is purportedly ineffective, the distinct question of the 2011 waiver's effectiveness is neither fairly included within the question presented nor an independently certworthy question.

1. In 2011, Petitioner sought to discharge postconviction counsel and waive all postconviction proceedings pursuant to Florida Rule of Criminal Procedure 3.851(i). After receiving a letter explaining that Petitioner sought to discharge counsel and dismiss postconviction proceedings, the circuit court held an evidentiary hearing to determine Petitioner's competency and whether Petitioner was knowingly and intelligently waiving the right to seek postconviction relief. Two mental health experts examined Petitioner and determined that she was competent. Her discharged counsel stipulated to the

mental experts' reports. The court also conducted a colloquy to determine whether Petitioner's waiver was knowing and intelligent. Following the hearing, the court found that Petitioner was competent to discharge postconviction counsel and waive postconviction proceedings; the Florida Supreme Court affirmed that order.

Below, the circuit court explained that, in addition to waiving a second penalty-phase jury, Petitioner "also discharged postconviction counsel and waived postconviction proceedings." Pet. App. 12a (citing Fla. R. Crim. P. 3.850(i)). The circuit court and the Florida Supreme Court had previously upheld *both* of those waivers. *Id.* at 12a-13a. Petitioner is "now claiming that the waivers were not valid," but the circuit court concluded that "such claims are not properly before this Court because the instant motion (1) was filed beyond the time limitation provided in rule 3.851(d)(1) and (2) does not allege that the claims are predicated on facts that were unknown to [Petitioner] or his counsel and could not have been ascertained by the exercise of due diligence." *Id.* at 13a.

The State argued on appeal that both waivers required the dismissal of Petitioner's motion for postconviction relief under Florida Rule of Criminal Procedure 3.851, *e.g.*, Appellee Br. 11, *Rodgers v. State*, 242 So. 3d 276 (Fla. 2018), and the Florida Supreme Court unanimously "affirm[ed]" the circuit court's denial of Petitioner's motion. Pet. App. 3a. The court's per curiam opinion does not separately discuss the import of Petitioner's 2011 waiver, *see id.* at 1a-3a; but, as one member of the court made clear, "[t]he issue in this case is whether Rodgers' waivers of the

right to a penalty phase jury *and the right to postconviction proceedings* and counsel should be rendered invalid because Rodgers was suffering from undiagnosed and untreated gender dysphoria when he made the waivers." Pet. App. 3a (Pariente, J., concurring in result) (emphasis added). Notably, the full court "agree[d] with the circuit court that the time for Rodgers to contest the prior competency determination has passed," Pet. App. 2a; and Petitioner does not offer any basis for concluding that the state-law timeliness ruling applied only to Petitioner's challenge to the 2007 jury waiver. Consistent with those facts, Justice Pariente construed the court's opinion to address the validity of both waivers. *See* Pet. App. 3a ("I agree that Rodgers' waivers remain valid"); Pet. App. 9a ("I agree with the majority that Rodgers is not entitled to have his waivers set aside").

2. The effectiveness of Petitioner's 2011 waiver of all postconviction proceedings is not fairly included within the question presented. Petitioner asks this Court to decide whether "waiving a state-law right to have a jury make an advisory sentencing recommendation constitute[s] a knowing and intelligent waiver of the federal constitutional right to have a jury make all requisite findings for the imposition of death, particularly when the latter right did not exist at the time of the waiver." Pet. i. A waiver of "a state-law right to have a jury make an advisory sentencing recommendation," Pet. i, is substantially narrower than a waiver of the right to bring any further "postconviction proceedings," Pet. App. 12a; *see, e.g.*, Tr. of Hearing on Waiver of Right to Postconviction Counsel and Right to Institute

Postconviction Proceedings at 20 (Petitioner acknowledging that, if the court grants Petitioner's request, "you'll be barred from filing any further proceedings" and that "this basically means that this case is over"). Accordingly, even if the Court were to decide the question presented in Petitioner's favor, that would not resolve the distinct question whether the courts below reversibly erred in holding that Petitioner's separate waiver of postconviction proceedings independently barred the state trial court from granting Petitioner's successive motion for postconviction relief. *See* Pet. App. 1a, 12a.

3. Petitioner has made no showing at all on the certworthiness of whether a defendant may validly waive as-yet unrecognized procedural rights by waiving all postconviction proceedings. Likely because Petitioner does not present that question in the Petition, Petitioner identifies no split on the issue. And although several defendants may be similarly situated to Petitioner as to a waiver of a jury recommendation, Petitioner does not identify other defendants—in Florida or elsewhere—who knowingly and intelligently waived all postconviction proceedings but who now seek *Hurst* relief.[2]

4. Even if this Court were inclined to address Petitioner's postconviction waiver, the courts below did not err as a matter of federal law in holding that Petitioner's postconviction waiver bars Petitioner from seeking *Hurst* relief in the particular circumstances present here.

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[2] Counsel are aware of only one similarly situated defendant. *See Alston v. State*, 243 So. 3d 885 (Fla. 2018).

In assessing a capital defendant's waiver of postconviction proceedings, this Court considers only "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (per curiam); *see also Hammett v. Texas*, 448 U.S. 725, 725 (1980) (per curiam) ("In the absence of any issue as to petitioner's competence to withdraw the petition filed against his will, there is no basis under Rule 60 for denying this motion."); *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (terminating stay of execution because defendant "made a knowing and intelligent waiver of any and all federal rights he might have asserted"); *cf. Demosthenes v. Baal*, 495 U.S. 731, 734-37 (1990) (vacating stay where defendant was competent to waive postconviction proceedings). Although Petitioner argued before the Florida Supreme Court that her 2011 waiver was invalid for lack of competency, Pet. App. 21a-31a, and although the court rejected that fact-bound argument, she chose not to present it in the Petition. Thus, the effectiveness of the 2011 waiver—under federal law, a question *only* of her competency—is not fairly included within the question presented.[3]

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[3] Moreover, even if it were fairly included within the question presented, Petitioner waived her right to challenge the competency of her waiver. After the Florida Supreme Court upheld the waiver, Petitioner did not file a petition for certiorari in this Court.

And if this Court were to remand to the Florida Supreme Court to expressly decide the effectiveness of Petitioner's 2011 waiver under state law, that court would hold that the 2011 waiver "precludes [her] from claiming a right to relief under *Hurst*." *State v. Silvia*, 235 So. 3d 349, 351 (Fla. 2018). In *Silvia*—a case not mentioned in the Petition or by Amici—the Florida Supreme Court considered the precise question of whether a waiver of postconviction proceedings precluded retroactive *Hurst* relief, and concluded that it does. *Id.* The result here would be no different—particularly because the courts below found that Petitioner's challenge to the 2011 waiver was untimely as a matter of state law. *See* Pet. App. 2a, 13a (citing Fla. R. Crim. P. 3.851(d)(1)). Indeed, Petitioner's claim here is substantially weaker than Silvia's; unlike Silvia and "almost all" of Florida's other capital defendants whose death sentences became final after *Ring*, Petitioner did not raise "a Ring claim on direct appeal." 235 So. 3d at 351.

Thus, even if the Court were to hold that *Hurst* is retroactive under federal law and that the 2007 jury waiver was ineffective, Petitioner's 2011 waiver of postconviction proceedings bars Petitioner from obtaining *Hurst* relief. Under federal law, her waiver would be ineffective only if she were incompetent—but she failed to present that question here—and under state law, the waiver bars retroactive *Hurst* relief.

5. In a conclusory footnote, Petitioner asserts that "[f]or all the same reasons" that the 2007 jury waiver is supposedly ineffective, her 2011 waiver of all postconviction proceedings "could not constitute a

knowing waiver of the [purported] *Hurst* right." Pet. 21 n.11. But neither of Petitioner's two challenges to the 2007 jury waiver would resolve the 2011 waiver's effectiveness.

First, Petitioner argues that the 2007 jury waiver is ineffective because "a knowing and intelligent waiver of a limited state statutory right does not constitute a knowing and intelligent waiver of a related constitutional right." Pet. 17. But holding that a waiver of the jury recommendation right under Florida law does not waive *Hurst* rights plainly would not resolve whether a capital defendant's knowing and intelligent waiver of all postconviction proceedings, done with the knowledge that the death penalty is likely to be carried out as a result, constitutes a knowing and intelligent waiver of procedural rights recognized in the future.

Second, Petitioner contends that her 2007 jury waiver was ineffective because "a party can[not] constructively waive a right that does not yet exist." Pet. 21. But Petitioner's 2011 waiver did not involve a "constructive" waiver; it was an express, unequivocal, knowing, and intelligent waiver of Petitioner's right to pursue any further postconviction relief. Petitioner waived the right to postconviction proceedings "with a full awareness of both the nature of the right being abandoned," all postconviction proceedings; "and the consequences of the decision to abandon it," the imposition of the death penalty. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). In fact, Florida courts required an evidentiary hearing on those matters to ensure that Petitioner was fully aware of the nature

of the right and the consequences of expressly abandoning it.

In other words, Petitioner's 2011 waiver of the right to seek further postconviction relief applied, by its terms, to claims predicated on not-yet-decided cases. *See* Tr. 16-17 (reciting Petitioner's understanding of the trial court's explanation that "in the course of time, many things are possible" and that "a court of law" or the "Florida Legislature" might make determinations "that could end in the result" that Petitioner's death sentence should be "commuted"). And like plea agreements "intelligently made in the light of the then applicable law," Petitioner's waiver "does not become vulnerable because later judicial decisions" indicate that the decision "rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 757 (1970); *see McMann v. Richardson*, 397 U.S. 759, 773-74 (1970) (similar). After all, "the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *see also United States v. Simpson*, 430 F.3d 1177, 1192-93 (D.C. Cir. 2005) (Silberman, J., concurring) ("the Supreme Court has held that imperfect knowledge of future developments in the law has no bearing on the question of the validity of a waiver").

Even if Petitioner's broad waiver of the right to bring any future postconviction challenges could be ineffective as to later-recognized rights in some

circumstances, that waiver is plainly effective as to the specific claim at issue here. Petitioner invited the alleged error by waiving the right to a penalty-phase jury and affirmatively asking the trial court to make all sentencing determinations: As Petitioner explained, she waived the right to a jury trial because Petitioner "trust[ed] the Court's judgment better than people who I think are more against me than for me—more against me than neutral, I should say." 3 So. 3d at 1130. What is more, it is clear from the record that Petitioner would not have made a different decision if she had thought that the jury's findings would be binding on the court. To the contrary, Petitioner elected to "go without the jury" *because* Petitioner believed that death was the proper sentence and *did not want any jury findings to bind the court's decision*: "I can count on a death sentence with you [the judge] I feel, but with this jury, I mean, it could go six/six or I don't know how it's going to go." *Id.*

In granting Petitioner's explicit request for the trial judge to make all sentencing determinations, the trial court merely applied binding precedent of this Court. And unlike "almost all" other capital defendants in Florida, Petitioner did not challenge that ruling on direct appeal by arguing that the logic of *Ring* applied to Florida's capital sentencing scheme. *See Silvia*, 235 So. 3d at 351 (noting that *Ring* "provided the underpinnings for *Hurst v. Florida*," and that, following *Ring*, "almost all [capital] defendants . . . had raised a *Ring* claim on direct appeal"); *Mosely*, 209 So. 3d at 1275 ("For fourteen years after *Ring*, until the United States Supreme Court decided *Hurst v. Florida*, Florida's capital defendants attempted to seek relief based on *Ring*,

both in this Court and the United States Supreme Court."). Still less did Petitioner argue that she would have changed her mind and elected to empanel a penalty-phase jury—i.e., that she would not have "trust[ed] the Court's judgment better" than a jury's—if *Ring* applied and the jury's determinations had been binding on the court. *See Rodgers*, 3 So. 3d at 1130.

Petitioner's waiver of postconviction proceedings is even less vulnerable to attack based on later judicial decisions than are plea agreements. Under *Brady*, even if a defendant who pleads guilty would not have pleaded guilty had a later judicial decision existed at the time of the plea, the defendant's plea agreement remains intact. 397 U.S. at 757.

Here, even the defendant's change in calculus (which is insufficient to defeat the plea under *Brady*) is not present. Petitioner did not waive postconviction proceedings because she thought she had no chance, such that her decision might have changed had she known *Hurst* would have been decided. Instead, Petitioner waived postconviction proceedings because she had decided "to choose death over life." Pet. 8 n.3. Petitioner stated that she wanted to "face the consequences" of her crime, Tr. 7, and expressed concern that she might kill somebody else and wind up on death row again if she received a life sentence. *See* Tr. 17-18 ("since I have been on death row, I have erupted one time and almost killed somebody on the rec yard, you know. I broke his jaw, split his face open."); *id.* at 18 (explaining that Petitioner was "afraid" of the "violence," had "been in the prison population before" and knew she didn't "have much patience for foolishness," and was concerned that she

"could end up back on death row" if she were to kill someone else while serving a life sentence). Knowing that she was entitled to jury findings on her aggravating sentencing factors would not have affected that decision—and even if it might have, under *Brady*, the waiver would still be unaffected.

Petitioner might contend that if the Court were to broadly hold that a litigant cannot "knowingly and intelligently waiv[e] a right not yet recognized to exist," Pet. 14, that would necessarily mean that the 2011 waiver did not cover her purported *Hurst* right. But this Court has never issued such a broad holding; that holding would conflict with *Brady*, *McMann*, and *Ruiz*; and issuing such a broad holding would have sweeping adverse effects.

To begin with, in *Halbert v. Michigan*, 545 U.S. 605 (2005), this Court did not "squarely rejec[t]" (Pet. 14) the notion that a litigant can knowingly and intelligently waive a not-yet-recognized right. There, Michigan argued that the defendant waived his right to "appointed counsel for first-level appellate review . . . by entering a plea of *nolo contendere*." *Id.* at 623. The Court rejected that argument for two reasons: First, he "had no recognized right to appointed appellate counsel he could elect to forgo," and second, "the trial court did not tell [him], simply and directly, that in his case, there would be no access to appointed counsel." *Id.* at 623-24 (citing *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), & *Brady*, 397 U.S. at 748, for the proposition that waiver must be knowing and intelligent). In other words, the specific details of the trial court's colloquy (and the defendant's knowledge) were directly relevant, and the Court did

not issue any broad holding that waiving a not-yet-recognized right is categorically impossible.

Such a broad holding would conflict with *Brady*, 397 U.S. at 757, *Ruiz*, 536 U.S. at 629, and *McMann*, 397 U.S. at 773-74, in which the Court held that future judicial decisions undermining the premise for a defendant's plea do not affect whether a plea was knowing and intelligent when entered. In other words, when defendants enter into pleas, they are waiving rights that might be recognized in future decisions. *Brady* itself is a powerful demonstration of this principle. After Brady pleaded guilty, the Court held that the statute permitting the death penalty for his crime was unconstitutional; he therefore argued that had he known that, he would not have pleaded guilty, which he did "perhaps to ensure that he would face no more than life imprisonment or a term of years." 397 U.S. at 756. The Court rejected that argument, explaining that it was "intelligently made in the light of the then applicable law." *Id*. at 757. In so doing, the Court recognized that Brady had validly waived his right to go to trial without risking the death penalty, a right that did not exist when he pleaded guilty.

Not only would reading *Halbert* so broadly conflict with this Court's earlier precedents, it would also have broad and troubling implications. As Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) explained in dissent, the majority "cannot possibly [have] mean[t] that only rights that have been explicitly and uniformly recognized by statute or case law may be waived," because if so, "the majority has outlawed all conditional waivers (ones in which a defendant agrees that, if he has such a right, he

waives it)." 545 U.S. at 640 (Thomas, J., dissenting). As Justice Thomas further pointed out, such a rule would "wreak havoc" because it does not specify "which sources of law are to be considered in deciding whether a right is 'no[t] recognized.'" *Id*. at 641 n.2; *see Simpson*, 430 F.3d at 1194 (Silberman, J., concurring).

* * *

In sum, this case is not a suitable vehicle for resolving the question Petitioner presents—whether "waiving a state-law right to have a jury make an advisory sentencing recommendation constitute[s] a knowing and intelligent waiver of the federal constitutional right to have a jury make all requisite findings for the imposition of death," Pet. i—because Petitioner did not just waive a state-law right to empanel an advisory sentencing jury. Instead, Petitioner also waived all postconviction proceedings, including the right to raise federal claims based on future decisions on this Court, and that waiver independently bars the relief Petitioner now seeks. What is more, the enforceability of that waiver is not fairly included within the question presented, turns in part on disputed issues of state law, and is not independently certworthy. Finally, the courts below did not err as a matter of federal law insofar as they held that Petitioner validly waived the right to seek postconviction relief based on the trial court's decision not to empanel a penalty-phase jury: Petitioner expressly invited the alleged error of which she now complains by affirmatively requesting that the trial court make all sentencing determinations; unlike "almost all" other post-*Ring* capital defendants in

Florida, Petitioner did not raise a claim of alleged error under *Ring* on direct appeal; it is clear from the record that Petitioner would not have elected to empanel a penalty-phase jury if Petitioner had thought that the jury's determinations would be binding on the court; and the trial court's determination that Petitioner's postconviction waiver was valid was based on a straightforward application of this Court's precedents to the particular circumstances present here.

III. EVEN IF PETITIONER HAS A FEDERAL RIGHT TO SEEK RETROACTIVE APPLICATION OF THE *HURST* DECISIONS, PETITIONER IS NOT ENTITLED TO ANY RELIEF.

A. Petitioner is not entitled to any relief under this Court's decision in *Hurst v. Florida*.

In *Hurst v. Florida*, this Court held that Florida's capital sentencing statute violated the Sixth Amendment insofar as it "required the judge alone to find the existence of an aggravating circumstance." 136 S. Ct. at 624. That holding does not provide a basis for disturbing Petitioner's sentence.

In sentencing Petitioner to death, the trial court "found two aggravating circumstances: Rodgers was previously convicted of another capital felony or a felony involving the use of violence; and the murder was committed in a cold, calculating, and premeditated manner." *Rodgers*, 3 So. 3d at 1131. Only one aggravating circumstance was required for the court to impose the death penalty. § 921.141(2)(a), Fla. Stat.

Petitioner's recidivist aggravator was based on the murder of Justin Livingston, to which Petitioner

pleaded guilty, *see United States v. Rodgers*, No. 3:98-cr-00073 002 (N.D. Fla. June 30, 1999). Under the Sixth Amendment, a capital defendant is not entitled to a jury finding on the fact of a prior conviction. *See Apprendi*, 530 U.S. at 490; *Almendarez-Torres v. United States*, 523 U.S. 224, 239-46 (1998).

As for the cold, calculating, and premeditated aggravator, Petitioner "agreed that Robinson's murder"—in which Petitioner "shot Robinson in the back of the head"—"was premeditated," 3 So. 3d at 1131, and "Rodgers admitted to . . . key aspects of the prearranged plan, including inviting the victim on a date," having "'ill intentions' when he first picked her up from her home," "getting her drunk, killing her, and then taking pictures of the body." *Id*. at 1134, 1135. As to that same crime, moreover, Petitioner entered a guilty plea to first-degree murder as well as conspiracy to commit murder. *Rodgers*, 934 So. 2d at 1210. Because the trial court's finding that Robinson's murder was cold, calculating, and premeditated was supported by overwhelming and "uncontroverted evidence," the absence of a jury finding on that aggravator was harmless error. *See Neder v. United States*, 527 U.S. 1, 18 (1999).

In short, Petitioner would not be entitled to any relief under *Hurst v. Florida*, even if it applied retroactively, and even if Petitioner could bypass the two waivers on which the courts below relied.

b. Insofar as Petitioner relies on the federal constitutional rulings set out in *Hurst v. State*, those rulings contravene this Court's caselaw.

In *Hurst v. State*, the Florida Supreme Court held that a capital defendant has a Sixth Amendment right to insist that a jury make certain *normative* judgments required by statute before a sentence of death may be imposed—i.e., that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate sentence. That holding, along with the Florida Supreme Court's related decision that jury findings on such non-factual sentencing issues must be unanimous under the Eighth Amendment, cannot be reconciled with portions of *Spaziano* and *Hildwin* that remain good law. *See generally Hurst v. State*, 202 So. 3d at 80-82 (Canady, J., dissenting).

In *Hurst v. Florida*, this Court "overrule[d] *Spaziano* and *Hildwin in relevant part*," 136 S. Ct. at 623 (emphasis added)—that is, "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.* at 624. Accordingly, *Hurst v. Florida* left intact *Spaziano*'s holdings that the federal Constitution allowed the sentencing judge to make *non-factual* determinations supporting the imposition of the death penalty, including (1) that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and (2) that "a sentence of death should be imposed." 468 U.S. at 451-52, 458-65; *see* Pet., *Florida v. Hurst*, No. 16-998, 2017 WL 656209, at *18-33 (Feb. 13, 2017).

Because the federal constitutional rulings announced by the Florida Supreme Court in *Hurst v. State* are squarely foreclosed by this Court's precedents, federal law does not require that those rulings be applied to Petitioner's case. *See Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989) (explaining that lower courts are bound to "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). At a minimum, and as explained above, this Court should not be asked to determine whether Petitioner has a federal right to obtain retroactive relief based on the Sixth and Eighth Amendment rulings of *Hurst v. State* without first having the opportunity to determine whether those rulings are correct under federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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