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

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR THE PETITIONERS

This case presents a simple but fundamental federal question: can a defendant knowingly waive a federal constitutional right that she did not know existed, where the courts had consistently held the right did not exist?

As the petition and the amici brief of the Florida Association of Criminal Defense Lawyers and the Florida Center for Capital Representation at Florida International University (Amici) make clear, whether a defendant can knowingly waive a Sixth Amendment jury right without knowing that the right even exists is an important question on which the lower courts are deeply divided. Pet. 13-16; Amici Br. 13-23 (citing ten state-court decisions finding one cannot knowingly waive sentencing rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), before those right have been recognized, and four state-court decisions that join Florida in holding such waivers valid). Florida does not dispute the existence of this split. But it argues that the federal question is either not properly presented, or that this case is a poor vehicle for deciding it. None of its objections withstands scrutiny. This Court should grant review and hold that one cannot knowingly waive a right that one does not know one has.

I. THIS CASE PRESENTS A FEDERAL QUESTION, REGARDLESS OF WHETHER *HURST* IS RETROACTIVE AS A MATTER OF FEDERAL LAW.

Florida first maintains that "this Court's ruling in *Hurst* [*v. Florida*, 136 S. Ct. 616 (2016)] does not give Petitioner any federal right that Petitioner could assert in a state postconviction

proceeding," and that therefore "to reach the waiver question Petitioner presents, the Court would first have to hold that *Hurst* applies retroactively under federal law. BIO 9. This is incorrect. Whether Rodgers waived a federal constitutional right is itself a federal question.

In *Danforth v. Minnesota*, 552 U.S. 264 (2008), this Court made clear that when it announces a new constitutional rule, as it did in *Hurst*, it is not creating a right that did not previously exist, but simply recognizing a right whose source always lay "the Constitution itself." 552 U.S. at 271. The "underlying right necessarily pre-exists [the Court's] articulation of the new rule." *Id.* Thus, when Rodgers was sentenced to death without a jury finding the facts necessary to impose such a sentence, her federal constitutional right was violated. The Florida Supreme Court has held, as *Danforth* permits, that relief for such a federal constitutional violation is available under Florida law. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). But the Florida Supreme Court denied Rodgers relief because it concluded that she validly waived her constitutional right, long before this Court or the Florida Supreme Court had even recognized the right, by waiving a distinct and lesser state statutory right to a jury recommendation. Pet. App. 1a-2a.

Florida seeks to repackage the Florida Supreme Court's holding as an application of state retroactivity law. BIO 12. But the court's waiver ruling below, and the decision on which it relied, *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), have nothing to do with state retroactivity law. Rather, they both rest on a determination that defendants

constructively waived their federal constitutional right. Indeed, *Mullens*, the first case in which the Florida Supreme Court held that waiving a state statutory right to a jury recommendation amounted to a constructive waiver of the Sixth Amendment right recognized in *Hurst*, was itself a direct appeal, in which retroactivity was not even an issue. *Mullens*, 197 So. 3d at 39-40; *see also Covington v. State,* 228 So. 3d 49, 69 (Fla. 2017) (citing *Mullens* to reject *Hurst* claim on direct appeal based on statutory jury waiver); *Davis v. State*, 207 So. 3d 177, 212 (Fla. 2016) (same).[1] Under Florida law, there is no difference between *Mullens*, on direct appeal, and *Rodgers*, on postconviction review, because in both cases the court's decision rests on its understanding of waiver, not on the law of retroactivity.

Florida similarly errs in contending that *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016), held "that a prisoner whose sentence became final after *Ring* [*v. Arizona,* 536 U.S. 584 (2002)] but who waived the right to a penalty-phase jury may not benefit from that state-law retroactivity ruling." BIO 12. Like the court in this case, *Brant* merely applied the *Mullens* waiver rationale to deny relief in a postconviction posture, and drew no distinction between the direct appeal setting of *Mullens* and postconviction. *Brant*, 197 So. 3d at 1079 ("We have previously held in a direct appeal that a defendant who has waived the right to a penalty-phase jury is not entitled to relief under *Hurst*. . . A similar claim in postconviction

[1] When this Court announces new constitutional rules, they automatically apply to all cases then pending on direct appeal. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

proceedings is necessarily precluded.") (citing and quoting *Mullens*).

Because the Florida Supreme Court rested its decision on a determination that a federal constitutional right had been waived, its decision presents a federal question. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), governs the waiver of constitutional rights, and the Florida Supreme Court's waiver decision squarely conflicts with that decision by finding a knowing waiver where the right could not have been known. As a result, this case presents precisely 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. '" BIO 12 (quoting Pet. i.) (emphasis added in BIO).

Moreover, as amici point out, the split in authority on this waiver question is extensive, as "numerous states have concluded that a defendant cannot knowingly relinquish a Sixth Amendment *Apprendi* right … before it is 'known' by the courts." Amici 16. Florida points out that many of these cases arose on direct appeal. BIO 14. But that is of no moment, because the Florida Supreme Court's decision turned not on whether Rodgers' case was on direct appeal or postconviction review, but simply on its (erroneous) understanding of what constitutes a waiver of the Sixth Amendment jury right.

II. THIS COURT HAS ALREADY RECOGNIZED THE SIXTH AMENDMENT RIGHTS PETITIONER SEEKS TO VINDICATE.

Florida argues that the Court should not grant certiorari to decide the important constitutional waiver question presented because this Court has "never recognized a federal constitutional right to have a jury" determine whether "'the aggravating circumstances are sufficient to impose death'" and that "'the aggravating factors outweigh the mitigating circumstances[.]'" BIO 15 (quoting *Hurst v. State*, 202 So. 3d 50, 57 (Fla. 2016)). In the State's view, this Court decided only that the jury must find the *existence* of aggravating factors, and nothing more. BIO15-17, 34-35.

But that is wrong. The Court in *Hurst* held that all factual findings that are required, under state law, to impose a death sentence must, as a matter of federal constitutional law, be found by a jury. The Court further recognized that those facts under Florida law include a factual finding that the aggravating factors outweigh the mitigating circumstances: "[T]he Florida sentencing statute does not make a defendant eligible for death . . . [unless] 'sufficient aggravating circumstances exist' and . . . 'there are insufficient mitigating circumstances to outweigh the aggravating circumstances. '" *Hurst*, 136 S. Ct. at 622 (quoting Fla. Stat. § 921.141(3) (2010)). Thus, *Hurst* made clear that all factual findings, including that "sufficient aggravating circumstances exist," and that "there are insufficient mitigating circumstances to outweigh them," must be made by the jury.

On remand from this Court in *Hurst*, the Florida Supreme Court confirmed that, under then-applicable Florida law, a death sentence required each of these facts to be found: 1) that sufficient aggravating circumstances exist; and 2) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *Hurst*, 202 So. 3d at 57. In the wake of this confirmation, there can be no doubt that the sufficiency of aggravating circumstances and their weight relative to mitigating circumstances are factual findings in Florida that the Sixth Amendment reserves for the jury. Absent a valid waiver, a death sentence predicated on judicial findings of facts the Sixth Amendment requires the jury to find cannot stand.[2]

III. THE FLORIDA SUPREME COURT DID NOT RELY ON RODGERS' PURPORTED POST-CONVICTION WAIVER IN 2011 TO DENY HER RELIEF, AND THAT DISPUTED WAIVER IS NOT A BASIS TO DENY REVIEW.

Florida next contends that a different purported waiver altogether—of postconviction review in 2011—provides an independent ground for the decision below, and therefore makes review of the 2007 waiver improper. It argues that the "courts below also relied on a separate, broader waiver: Petitioner's 2011 waiver of all postconviction

[2] While the Florida Supreme Court on remand in *Hurst* imposed additional requirements based on the Eighth Amendment and the Florida Constitution, BIO 16-17, those requirements are not at issue here because Rodgers' death sentence lacks the precise factual findings this Court has held must, under the Sixth Amendment, be made by the jury. *Hurst*, 136 S. Ct. at 622.

proceedings. Based on that waiver, the courts below concluded, Petitioner may not now invoke the *Hurst* decisions in seeking postconviction relief." BIO 19.

But Florida's premise is mistaken. The Florida Supreme Court decision under review here relied entirely on Rodgers' purported "waiver of a penalty phase jury" in 2007, and did not even *mention* the 2011 waiver, much less rely on it as an independent ground for decision. Pet. App. 1a-2a. The unaddressed 2011 waiver therefore provides no basis for denying review. Indeed, Florida does not contend that the 2011 waiver is an independent state-law ground supporting the Florida Supreme Court's decision. Having not even mentioned the purported postconviction waiver, "it is clear that the court did not rest its decision on an independent state ground." *Washington v. Chrisman*, 455 U.S. 1, 5 n. 2 (1982); *see also Michigan v. Long*, 463 U. S. 1032, 1041 (1983) (no independent state ground unless decision "clearly and expressly" cites such a ground).

Florida nonetheless points to the Florida Supreme Court's conclusion that the time for challenging competency with respect to the 2007 waiver had passed, and argues that "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." BIO 21. But the basis is obvious: the 2007 jury waiver was the *only* waiver the court mentioned. Pet. App. 1a-2a.[3] The

[3] Rodgers' *Hurst* claim was filed within weeks of *Mosley*, 209 So. 3d at 1283, and was therefore timely, as based on new precedent from this Court providing a fundamental constitutional right made retroactively available. *See* Fla. R. Crim. P. 3.851 (d)(2)(B). Rule 3.851 has a one-year period of limitations, running from the time a conviction becomes final,

decision cannot be read to impose a time bar concerning a claim the decision never mentioned.[4]

Accordingly, there is no vehicle problem here. If the Court grants relief to Rodgers on her claim that her 2007 waiver was invalid, the case would be remanded to the Florida courts. Florida would then be free to pursue its argument – not accepted to date – that Rodgers' purported postconviction waiver in 2011 precludes relief.

Furthermore, it is far from clear that such an argument would succeed. As described in her petition, Rodgers' 2011 postconviction waiver was rendered involuntary by the suicidal effects of her gender dysphoria, diagnosed while she was in state custody but wholly untreated by the state. Pet. 8.

Florida cites *State v. Silvia*, 235 So. 3d 349, 351 (Fla. 2018), to support its contention that *Hurst* relief would be barred by Rodgers' 2011 postconviction waiver. But *Silvia* is plainly distinguishable. The defendant in that case did not challenge the validity of his original postconviction waiver, but merely argued that in light of *Hurst,* he should no longer be bound by the waiver. *Silvia*, 235 So. 3d at 350 ("Silvia does not dispute in this case the validity of his original waiver."), 351 ("In this case,

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Fla. R. Crim. P. 3.851 (d)(1), but contains an exception for claims in which "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively[.]" Fla. R. Crim. P. 3.851 (d)(2)(B).

[4] Florida notes that in a lone concurrence, one justice mentioned the postconviction waiver. BIO 21. But the judgment on which review is sought is that of the court, not the concurring justice.

Silvia does not challenge the validity of his postconviction waiver."). Here, by contrast, Rodgers attacked the validity of her purported postconviction waiver as involuntary. She sought an evidentiary hearing on this claim, and presented powerful expert reports supporting it. Pet App. 15a-16a, 73a-84a.[5]

In any event, if this Court rules that Rodgers did not knowingly waive her Sixth Amendment jury right when she could not know that the right even existed, its decision would effectively overrule *Mullens*, and provide cause for the Florida Supreme Court to reconsider *Silvia*. *Silvia*, like the decision below, relied solely on *Mullens*. *See Silvia*, 235 So. 3d at 351 (calling Mullens an "analogous case," and discussing and quoting it at length).

Finally, citing a series of guilty plea decisions, Florida contends that waivers of postconviction review are "even less vulnerable to attack based on later judicial decisions than are pleas agreements." BIO 28. But those cases simply bar defendants from collaterally attacking guilty pleas under specific circumstances; none remotely stands for the proposition that one can knowingly waive a constitutional right that one does not know exists.[6]

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[5] Florida argued below that *Silvia* barred Rodgers' claim, but the Florida Supreme Court chose not to accept Florida's argument. *See* Feb. 1, 2018, Notice of Supplemental Authority, *Rodgers v. State*, 242 So. 3d 276 (Fla. 2018) (No. SC 17-1050).

[6] Florida speculates that Rodgers would have waived her jury right if she knew of it in 2007. BIO 27. But as this Court has stated, a court cannot "examine the state of . . . [one's] mind, or presume" the knowing waiver of a right. *Smith v. Yeager*, 393 U.S. 122, 126 (1968).

IV. THE STATE'S HARMLESS ERROR ARGUMENT DOES NOT PRECLUDE REVIEW.

Florida argues that even if Rodgers' Sixth Amendment rights were violated, she is not entitled to relief because the error was harmless. BIO 32-33. In *Hurst*, however, this Court declined to engage in harmless-error review, and instead remanded that issue to the Florida Supreme Court. 136 S. Ct. at 624. This Court should follow the same course here, as is its custom when the state courts have not yet addressed the issue. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 139 (1999).

In any event, Florida's argument lacks merit. It contends that "[b]ecause 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." BIO 33 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). But as the Florida Supreme Court has explained, the harmless-error test in this context "is not limited to consideration of only the evidence of aggravation, . . . it is not an 'overwhelming evidence' test[,]" and must account for mitigation." *Hurst*, 202 So. 3d at 69. Reviewing the significant mitigation evidence and the split jury vote, the Florida Supreme Court in *Hurst* found that the State had not proven the error harmless beyond a reasonable doubt. *Id.* Here, too, given Rodgers' powerful case for mitigation—including Rodgers' history of abuse and trauma, institutionalization, suicidality, and untreated gender dysphoria—it is impossible to say the Sixth Amendment error was harmless. *See*, *e.g.*, Pet. 4-5.

That leaves Florida's contention that only one aggravating factor is needed, and it is enough that Rodgers pleaded guilty to a prior conviction that so qualifies. BIO 32-33. But the Florida Supreme Court has rejected the argument that "prior convictions for other violent felonies insulate [a defendant's] death sentence from *Ring* and *Hurst v. Florida*." *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016). That is because, as shown above, the factual findings required for a Florida death sentence are *both* that the aggravating circumstances are sufficient and that they outweigh the mitigating circumstances. *Hurst*, 136 S. Ct. at 622 (quoting Fla. Stat. § 921.141(3) (2010)). These factual findings must be made by the jury, regardless of whether a prior violent felony aggravator has been proven in accord with constitutional rules. Because no jury made the required findings in support of Rodgers' death sentence, and she did not knowingly waive her jury right, Florida's argument here too fails.

CONCLUSION

For the foregoing reasons and those set forth previously, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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