No. _____

IN THE

Supreme Court of the United States

JEFFREY GLENN HUTCHINSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Can a defendant in a state capital sentencing proceeding voluntarily, knowingly, and intelligently waive a federal constitutional right that was both unknown to the defendant and unrecognized by the state courts at the time of the purported waiver?

2. Does a Florida capital defendant's waiver of an advisory penalty jury prior to *Hurst v. Florida*, 136 S. Ct. 616 (2016), impose a prospective waiver of the defendant's constitutional right to penalty-jury fact-finding under *Hurst*?

3. Where a Florida capital defendant accepted counsel's advice to waive a pre-*Hurst* advisory penalty jury, based on counsel's explanation of the advisory jury's diminished role under Florida's scheme, did the defendant prospectively waive the right to penalty-jury fact-finding later recognized by *Hurst*?

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Petitioner Jeffrey Glenn Hutchinson, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee.

DECISION BELOW

The decision of the Florida Supreme Court is reported at 243 So. 3d 880 (Fla. 2018), and reprinted in the Appendix (App.) at 1a.

JURISDICTION

The judgment of the Florida Supreme Court was entered on March 15, 2018. App. 1a. The Florida Supreme Court denied Petitioner's motion for rehearing on April 26, 2018. App. 13a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

I. Introduction

In *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), this Court reaffirmed that a state defendant cannot validly waive a federal constitutional right that was unknown to the defendant and not recognized by the state courts at the time of the purported waiver. *Halbert* was an application of this Court's longstanding precedent regarding waivers of federal constitutional rights, which requires that, in order for such waivers

to be valid, they must be voluntary, knowing, and intelligent, and the record in the specific case must establish an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).[1]

At issue in this petition is whether the Florida Supreme Court's automatic waiver rule for claims under *Hurst v. Florida*, 136 S. Ct. 616 (2016)—which holds that an entire class of Florida defendants automatically and prospectively waived a federal constitutional right at the penalty phase of their capital trials, even though that right was not known to the defendants or recognized by Florida's courts at the time of the purported waivers—violates *Halbert* and related decisions of this Court.

At its September 24, 2018 Conference, this Court will consider certiorari petitions addressing at least three categories of capital cases the Florida Supreme Court has targeted for the automatic denial of *Hurst* relief. In the "harmless error" category, certiorari petitions address the Florida Supreme Court's per se denial of *Hurst* relief in all cases where the defendant's pre-*Hurst* advisory jury voted unanimously, rather than by a majority, to recommend the death penalty to the judge. In the "retroactivity" category, certiorari petitions challenge the Florida Supreme Court's unusual rule applying *Hurst* retroactively on collateral review, but only to death sentences that became final after *Ring v. Arizona*, 536 U.S. 584 (2002).

This petition addresses a third category of cases the Florida Supreme Court holds must automatically be denied *Hurst* relief: those cases where the defendant,

[1] All emphasis in quotations is supplied in this petition unless otherwise indicated.

following the guilt phase of his pre-*Hurst* trial, elected to forgo an "advisory jury" for the penalty phase. The Florida Supreme Court's automatic *Hurst* waiver rule holds that, in declining an advisory jury under Florida's pre-*Hurst* law, a defendant thereby prospectively waived his right to penalty-jury fact-finding under *Hurst*, even though that right was not recognized by Florida's courts at the time of trial. The Florida Supreme Court applies this rule without considering whether the circumstances surrounding a particular defendant's decision to decline an advisory jury would render it unjust to deny him the right to pursue *Hurst* relief. Under the state court's rule, no Florida defendant who declined a pre-*Hurst* advisory jury has ever had, or will ever have, the opportunity for resentencing with a constitutional jury.

Petitioner Jeffrey Glenn Hutchinson is a combat veteran of the Gulf War who was convicted by a jury nearly 15 years before *Hurst*. After the guilt phase of trial, he accepted his attorney's advice to decline an advisory jury for his penalty phase. Counsel's advice was based on her experience that an advisory jury recommendation in a case like Petitioner's would be superfluous at best and potentially harmful given the dynamics of Florida's then-law. Petitioner accepted counsel's advice based on that explanation. After *Hurst*, Petitioner sought a new penalty phase on the ground that, during his original trial, he had waived only the right to an advisory jury under Florida's prior scheme, not the right to penalty-jury fact-finding recognized in Florida only after *Hurst*. Petitioner asked for the same opportunity to be resentenced before a constitutional jury that the Florida Supreme Court had granted to dozens of other defendants who were sentenced around the same time as him, but whose pre-*Hurst*

penalty phases, unlike his, featured an advisory jury recommendation in addition to judge fact-finding. Petitioner even proffered evidence, including a declaration from his trial attorney, indicating that trial counsel's advice was the sole reason that Petitioner declined an advisory jury, and that counsel's advice was based on the pre-*Hurst* scheme. The Florida Supreme Court rejected Petitioner's arguments, ignored his proffered evidence, and applied its automatic waiver rule to deny *Hurst* relief.

As this petition explains, the Florida Supreme Court's decision should be reversed as contravening *Halbert* and related "constitutional waiver" decisions of this Court. This Court's intervention is necessary here not only to correct the violation of Petitioner's constitutional rights, but also to prevent the Florida Supreme Court from continuing to apply per se *Hurst* waivers to every Florida defendant who declined an advisory jury before *Hurst*. This Court should also grant review to reaffirm, for the state and federal courts that have expressed confusion over the issue, that *Halbert* meant what it said: a state court is prohibited from holding that a defendant waived a federal constitutional right that was not known to the defendant or recognized by the state courts at the time of the purported waiver.

II. Factual and Procedural Background

A. Conviction and Death Sentence

In 2001, a Florida jury found Petitioner guilty of a quadruple murder. *See Hutchinson v. State*, 882 So. 2d 943, 949 (Fla. 2004). The State sought the death penalty. Florida law at the time afforded Petitioner the right to an "advisory jury" for the penalty phase. Under Florida's then-scheme, the advisory jury would be

comprised of the same jurors who had convicted Petitioner at the guilt phase, but those jurors would not make any findings of fact at the penalty phase. The advisory jurors would instead consider the evidence presented by the parties and then vote whether to recommend either the death penalty or life imprisonment to the judge. The jury's generalized recommendation would be determined by a majority vote and would not be accompanied by any findings of fact. After receiving the jury's recommendation, the trial judge alone would make the findings of fact required to impose a death sentence under Florida law, and the judge alone would render the final sentencing determination, notwithstanding the advisory jury' recommendation. *See Hurst v. Florida*, 136 S. Ct. 616, 620 (2016) (describing Florida's prior scheme).

Petitioner's lead counsel for the penalty phase of his pre-*Hurst* trial was attorney Kimberly Ward.[2] Following Petitioner's conviction at the guilt phase, Ms. Ward advised Petitioner to decline an advisory jury for the penalty phase and to instead present his sentencing evidence to the judge alone, who would be conducting the fact-finding anyway under Florida's then-law. App. 127a-130a (Decl. of K. Ward). As Ms. Ward later explained: "After seeing the jury at the guilt phase, we concluded we would not get a majority to vote for life; so we advised our client to waive a jury." *Id.* at 128a. Petitioner "accepted our advice to waive a jury after we explained that it was the judge who would be imposing the sentence and, thus, a non-unanimous jury recommendation would be pointless." *Id.* at 129a-130a.

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[2] At the time of Petitioner's trial, Ms. Ward's surname was Cobb.

At the conclusion of the penalty phase, the judge carried out his traditional fact-finding role under Florida's then-scheme, deciding (1) the specific aggravating circumstances that had been proven beyond a reasonable doubt,[3] (2) that those aggravating circumstances were "sufficient" to justify the death penalty, and (3) that the aggravation was not outweighed by the mitigation.[4] *See* Fla. Stat. § 921.141(3) (1996). Based on his fact-finding, the judge sentenced Petitioner to death.

B. Direct Appeal and Initial Collateral Proceedings

In 2004, the Florida Supreme Court affirmed Petitioner's convictions and sentence on direct appeal. *Hutchinson*, 882 So. 2d at 948. The court later affirmed the denial of post-conviction relief. *Hutchinson v. State*, 17 So. 3d 696 (Fla. 2009).

Petitioner did not receive federal habeas review because his appointed counsel filed his 28 U.S.C. § 2254 petition over three years beyond the one-year statute of limitations. *See Hutchinson v. Florida*, 677 F.3d 1097, 1099, 1103 (11th Cir. 2012).

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[3] The judge found three aggravating circumstances: (1) the offense multiple victims; (2) victims less than twelve years of age; and (3) heinous, atrocious, or cruel. *See Hutchinson*, 882 So. 2d at 959.

[4] The judge found more than 20 mitigating circumstances: Petitioner (1) had no criminal history; (2) was a decorated military veteran of the Gulf War; (3) is the father of a son for whom he has provided financial and emotional support; (4) has potential for rehabilitation and productivity in prison; (5) was intoxicated with a blood alcohol content of .21 to .26 on the night of the offense; (6) was a soldier for eight years and was honorably discharged; (7) provided financial and emotional support to his family; (8) has the ability to show compassion; (9) has a good employment history; (10) has family who support him; (11) has ability as a mechanic; (12) sought motorcycle patents; (13) was diagnosed with Gulf War illness; (14) was recognized as security officer of the year; (15) never abused drugs; (16) is a high school graduate; (17) was active in disseminating information about Gulf War illness; (18) has religious faith; (19) was distressed during the 911 call; (20) has friends who testified on his behalf; and (21) was diagnosed with ADD. *Id.* at 959-60.

C. *Hurst* Litigation

In 2017, Petitioner filed a state post-conviction motion seeking a new penalty phase in light of *Hurst*.[5] Petitioner noted that *Hurst* applies retroactively to his death sentence under settled state law, as explained by the Florida Supreme Court in *Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016) (applying *Hurst* retroactively to death sentences that became final on direct appeal after June 24, 2002).[6]

Regarding his decision to decline an advisory jury at the penalty phase of his pre-*Hurst* trial, Petitioner acknowledged that the Florida Supreme Court had created an automatic waiver rule for *Hurst* claims, whereby any defendant who declined an advisory jury under Florida's pre-*Hurst* scheme was automatically deemed to have prospectively waived their Sixth Amendment right to penalty-jury fact-finding under *Hurst*. *See Mullens v. State*, 197 So. 3d 16 (Fla. 2016).

Petitioner argued that the Florida Supreme Court's rule was facially unconstitutional because pre-*Hurst* defendants could have only voluntarily, knowingly, and intelligently waived the right to an advisory jury with no fact-finding role pursuant to Florida's prior law, as Florida's courts did not even recognize a federal constitutional right to penalty-jury fact-finding until after *Hurst*. Petitioner

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[5] Petitioner also sought relief on the basis of the Florida Supreme Court's later decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (holding that the Eighth Amendment requires penalty juries conducting the fact-finding mandated by *Hurst v. Florida* to make those findings unanimously).

[6] The Florida Supreme Court later confirmed that *Hurst* would apply retroactively to Petitioner's sentence under *Mosley*. *See* App. 7a; *Hutchinson v. State*, 243 So. 3d 880, 883 (Fla. 2018).

further argued that the Florida Supreme Court's rule is unconstitutional as applied to his specific case because his decision to decline an advisory jury was based solely on the advice of counsel, and counsel told Petitioner to decline an advisory jury based on her experience handling cases like his under Florida's advisory-jury, judge-fact-finding scheme. In support of his as-applied argument, Petitioner proffered declarations from trial counsel and himself indicating that (1) he declined an advisory jury based solely on counsel's advice, (2) counsel's advice was inextricably linked to Florida's pre-*Hurst* scheme, (3) counsel would not have advised Petitioner to waive a constitutional fact-finding jury, and (4) Petitioner would not have waived a constitutional jury absent counsel's advice. At a minimum, Petitioner argued, he should be afforded an evidentiary hearing to establish that the circumstances surrounding his decision to decline an advisory jury make it unjust to deny him the opportunity for resentencing with a constitutional jury. *See State v. Hutchinson*, No. 1998-CF-1382 (Okaloosa County, Mot. for Post-Conviction Relief, filed Jan. 11, 2017).

The Circuit Court for Okaloosa County summarily denied *Hurst* relief based on the Florida Supreme Court's automatic waiver rule. The circuit court declined to address Petitioner's proffered evidence regarding the circumstances of his decision to forgo an advisory jury, and the court did not allow a hearing. App. 16a-33a.[7]

[7] The court also concluded, even though Petitioner had not made any such assertion, that Petitioner was not entitled to relief based on ineffective assistance of counsel. *Id.* at 20a. However, Petitioner's arguments regarding counsel related solely to the basis for counsel's advice to decline an advisory jury: her experience trying cases like his under Florida's unconstitutional judge-fact-finding scheme.

On appeal to the Florida Supreme Court, Petitioner raised facial and as-applied federal constitutional challenges to the Florida Supreme Court's automatic *Hurst* waiver rule. In support of his facial challenge, Petitioner specifically emphasized this Court's decision in *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), which reaffirmed that a state defendant cannot waive a federal constitutional right that was unknown to him and not recognized by the state courts at the time of the purported waiver. Petitioner also pointed to this Court's other precedents regarding waivers of federal constitutional rights, which provide that, in order for a waiver to be valid, it must be voluntary, knowing, and intelligent, as reflected by the record in the defendant's specific case. Under that precedent, Petitioner argued, he and other defendants who declined an unconstitutional advisory jury could not have waived the Sixth Amendment right recognized in *Hurst* because they were unaware of that right, and Florida's courts did not recognize that right, at the time of the purported waivers. App. 53a-60a. Petitioner also challenged the circuit court's summary denial of a hearing despite the evidence he proffered. The interests of due process and reliability in death sentencing, Petitioner argued, favored a remand for a hearing on whether the circumstances surrounding his decision to decline an advisory jury weigh against precluding him from seeking resentencing with a constitutional jury. *Id.* at 42a-53a.

D. Florida Supreme Court's Decision Below

The Florida Supreme Court affirmed the denial of *Hurst* relief based on its automatic waiver rule. App. 1a-11a; *Hutchinson v. State*, 243 So. 3d 880, 881 (Fla. 2018). With respect to Petitioner's federal constitutional arguments, the Florida

Supreme Court explained only that its *Hurst* waiver rule did not violate *Halbert* because, "[u]nlike the right to first-tier postconviction counsel in *Halbert*, the right to a jury trial was well recognized before *Hurst*." App. 10a; *Hutchinson*, 243 So. 3d at 884. The Florida Supreme Court further ruled that no hearing was appropriate because, the court concluded, "the change of law under *Hurst* does not have any bearing on the evidence that a lawyer might choose to develop or that expert witnesses may present." App. 9a; *Hutchinson*, 243 So. 3d at 884.[8]

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's Automatic Waiver Rule for *Hurst* Claims Violates the United States Constitution

The Florida Supreme Court's automatic waiver rule for *Hurst* claims violates the United States Constitution. On its face, the Florida Supreme Court's per se rule is unconstitutional because it holds that an entire class of capital defendants prospectively waived a federal constitutional right that was unknown to the defendants and not recognized by Florida's courts at the time of the purported waivers. As applied to Petitioner specifically, the rule violates this Court's precedent by relying solely on Petitioner's decision to accept his trial counsel's pre-*Hurst* advice to decline an "advisory jury" for the penalty phase under Florida's unconstitutional

[8] Like the circuit court, the Florida Supreme Court noted that Petitioner was not entitled to relief based on ineffective assistance of counsel, App. 6a; *Hutchinson*, 243 So. 3d at 882, even though Petitioner had emphasized in his briefs that he had not raised an ineffectiveness claim in the lower court and was not raising one on appeal; *see* App. 50a, 99a-100a (explaining that Petitioner is "not arguing a claim that counsel was ineffective, but instead that counsel's advice . . . to waive a penalty jury would not have occurred in a constitutional proceeding."

capital sentencing scheme, even though counsel's advice to Petitioner was based on her experience trying cases like Petitioner's under Florida's judge-fact-finding law.

This Court's intervention is necessary not only to correct the violation of Petitioner's constitutional rights, but also to prevent the Florida Supreme Court from continuing to apply per se *Hurst* waivers to every Florida defendant who declined an advisory jury before *Hurst*. This Court should also grant review to reaffirm, for the state and federal courts that have expressed confusion over the issue, that *Halbert* meant what it said: a state court is prohibited from holding that a defendant waived a federal constitutional right that was not known to the defendant or recognized by the state courts at the time of the purported waiver.

A. The Florida Supreme Court's *Hurst* Waiver Rule Must Comply with this Court's Precedents Addressing Waivers of Federal Constitutional Rights

1. Whether a Defendant Waived a Federal Constitutional Right is a Federal Question Controlled by Federal Law

Although the Florida Supreme Court articulates its automatic *Hurst* waiver rule as a matter of state law, because that rule addresses the waiver of federal constitutional rights, the rule must comply with the minimum federal constitutional standards described in this Court's precedents. The Florida Supreme Court's automatic waiver rule for *Hurst* claims provides that Petitioner and other Florida defendants prospectively waived their Sixth Amendment rights during their pre-*Hurst* trial. The question of a defendant's waiver of a Sixth Amendment right, or any "federally guaranteed right is, of course, a federal question controlled by federal law." *Brookhart v. Janis*, 86 S. Ct. 1245, 1247 (1966); *see also Boykin v. Alabama*, 395 U.S.

238, 242 (1969) ("The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.").

2. In Order for the State to Overcome the Presumption Against Waiver, the Record Must Establish an Intentional Relinquishment of a Known Federal Constitutional Right

This Court enforces a presumption against finding that a criminal defendant waived of a federal constitutional right. State courts must "indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *see also Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937) ("[We] do not presume acquiescence in the loss of fundamental rights.").

To overcome the default presumption that a federal constitutional right has *not* been waived, the record must establish "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Whether such a relinquishment or abandonment has occurred depends "in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id*.

The State bears the burden of establishing, based on the record in each case, that a defendant's waiver of the Sixth Amendment's jury-trial right was made voluntarily, knowingly, and intelligently, and "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Johnson v. Ohio*, 419 U.S. 924, 925 (1974). The Court has declined to prescribe formulaic criteria for voluntary, knowing, and intelligent waivers, in order to allow for individualized, record-based determinations in each

case. *See Iowa v. Tovar*, 541 U.S. 77, 88 (2004).[9] However, the Court has made clear that, unless the constitutional right being waived was adequately explained to the defendant by the court, there can be no voluntary, knowing, and intelligent waiver. *See Dickerson v. United States*, 530 U.S. 428, 442 (2000).

An indeterminate record means no valid waiver. Where the record does not establish a valid waiver, courts may not infer one. *Boykin*, 395 U.S. at 243 ("We cannot presume a waiver . . . from a silent record."); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) ("Presuming a waiver from a silent record is impermissible.").

3. A State Defendant Cannot Validly Waive a Federal Constitutional Right that Was Unknown to the Defendant and Not Recognized by the State Courts at the Time of the Purported Waiver

In *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), this Court reaffirmed that a defendant cannot voluntarily, knowingly, and intelligently waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver. In *Halbert*, this Court rejected the state of Michigan's argument that a defendant's nolo contendere plea constituted a prospective waiver of his later-recognized constitutional right to the appointment of first-tier appellate counsel. Mr. Halbert's plea could not serve as a waiver of his federal rights, this Court explained, because there was "no recognized right to appointed appellate counsel he could elect to forgo" in the state of Michigan at the time of the purported waiver (the nolo

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[9] This Court has applied the same waiver standard in other contexts where the State bears the burden of showing that a valid waiver. *See Minnick v. Mississippi*, 498 U.S. 146, 159-60 (1990) (Scalia, J., dissenting) (collecting cases).

contendere plea). *Id.* Moreover, this Court ruled, because "the trial court did not tell Halbert, simply and directly" that he was waiving a federal constitutional right that was not yet recognized, the waiver could not have been knowing and intelligent. *Id.*

Halbert was an application of this Court's longstanding precedent regarding waivers of federal constitutional rights, as described above. *See, e.g.*, *Johnson*, 419 U.S. at 925 ("The accused can only waive a *known* right") (emphasis in original). Because the record in *Halbert* did not reflect an "intentional relinquishment of a known right," *Zerbst*, 304 U.S. at 464, this Court concluded that its default presumption against Mr. Halbert's waiver of his constitutional right was not overcome. Indeed, as *Halbert* recognized, it is difficult to conceive how a defendant could voluntarily, knowingly, and intelligently waive a right that was unknown to him and unrecognized by the state courts at the time of the plea. *See Halbert*, 545 U.S. at 623. As this Court made clear even before *Halbert*, unless the constitutional right being waived was adequately explained to the defendant by the court, there can be no voluntary, knowing, and intelligent waiver. *See Dickerson*, 530 U.S. at 442.

B. The Florida Supreme Court's *Hurst* Waiver Rule Violates this Court's Precedents

1. The Florida Supreme Court's Rule Ignores the Default Presumption Against Waiver, Precludes Individualized Review of the Record, and Relieves the State of its Burden

The Florida Supreme Court's rule ignores the presumption that a defendant's federal constitutional rights have *not* been waived, absent case-specific evidence otherwise, and forecloses individualized review of whether there was "an *intentional* relinquishment or abandonment of a *known* right or privilege." *Zerbst*, 304 U.S. at

464. The Florida Supreme Court's rule operates mechanically, rather than individually, to impose prospective *Hurst* waivers on *every* Florida defendant who elected to forego an advisory jury recommendation. There is no examination, beyond the advisory jury waiver, of whether the defendant voluntarily, knowingly, and intelligently waived, on a purely prospective basis, the right to penalty-jury fact-finding later recognized by *Hurst*. The state court's rule does not "depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* By its very nature, the Florida Supreme Court's per se *Hurst* waiver rule does not allow Florida's courts to "indulge in every reasonable presumption against waiver." *Brewer*, 430 U.S. at 404.

Under the state court's rule, no Florida defendant who declined a pre-*Hurst* advisory jury has ever had, or will ever have, the opportunity for resentencing with a constitutional jury. *See, e.g.*, *Hutchinson v. State*, 243 So. 3d 880, 884 (Fla. 2018); *Rodgers v. State*, 242 So. 3d 276, 277 (Fla. 2018); *State v. Silvia*, 235 So. 3d 349, 350-51 (Fla. 2018); *Allred v. State*, 230 So. 3d 412, 413 (Fla. 2017); *Dessaure v. State*, 230 So. 3d 411, 412 (Fla. 2017); *Twilegar v. State*, 228 So. 3d 550, 551 (Fla. 2017); *Covington v. State*, 228 So. 3d 49, 69 (Fla. 2017); *Wright v. State*, 213 So. 3d 881, 902-03 (Fla. 2017); *Davis v. State*, 207 So. 3d 177, 211-12 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016); *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016); *see also* App. 136a-143a.

The Florida Supreme Court's automatic *Hurst* waiver rule effectively relieves the State of Florida of its burden to establish, based on the record in each case, that

a defendant's waiver of the right to penalty-jury fact-finding was made voluntarily, knowingly, and intelligently, *see Johnson*, 419 U.S. at 925, and "with sufficient awareness of the relevant circumstances and likely consequences," *Brady*, 397 U.S. at 748. Instead, Florida's courts impermissibly "presume a waiver . . . from a silent record" in every case where an advisory jury was waived. *Boykin*, 395 U.S. at 243; *see also Carnley*, 369 U.S. at 516. The Florida Supreme Court presumes these waivers without analyzing whether the record reflects that the federal constitutional right being waived was adequately explained to the defendant. *See Dickerson*, 530 U.S. at 442. In Petitioner's case, the Florida Supreme Court refused to even consider evidence Petitioner had proffered regarding the circumstances surrounding his decision to decline an advisory jury. *See* App. 9a; *Hutchinson*, 243 So. 3d at 883-84. Such a per se approach to federal constitutional waivers in Petitioner's and other *Hurst* cases effectively leaves the State of Florida with no burden at all.

2. The Florida Supreme Court's Rule Violates *Halbert* and this Court's Other Decisions Prohibiting State Courts From Finding a Waiver of a Federal Constitutional Right that was Unknown to the Defendant and Not Recognized by the State Courts at the Time of the Purported Waiver

The Florida Supreme Court's *Hurst* wavier rule directly contravenes this Court's ruling in *Halbert* and earlier decisions that a state criminal defendant cannot voluntarily, knowingly, and intelligently waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver. *See Halbert*, 545 U.S. at 623; *see also Zerbst*, 304 U.S. at 464 (holding that defendants can only validly waive *known* constitutional rights). The Florida Supreme Court's rule

provides, without individualized review, that defendants automatically and prospectively waived their constitutional right to penalty-jury fact-finding if, before that right was even known to them or recognized by Florida's courts, the defendants declined an advisory penalty jury under Florida's prior scheme.

In Petitioner's case, the Florida Supreme Court held that his waiver of an advisory jury, nearly 15 years before the right to penalty-jury fact-finding was recognized in Florida, meant that Petitioner had also voluntarily, knowingly, and intelligently waived the right to penalty-jury fact-finding later described in *Hurst*. That must be wrong under *Halbert* because, at the time of Petitioner's advisory jury decision, there was "no recognized right" to penalty-jury fact-finding in Florida that Petitioner "could elect to forgo." *Halbert*, 545 U.S. at 623.

Moreover, contrary to *Halbert* and other decisions of this Court, the Florida Supreme Court held that Petitioner had waived his *Hurst* rights even though, at the time of his decision to forgo an advisory jury, he was not informed, "simply and directly," by the court that he was giving up the right to have a jury render the penalty fact-finding. *See Halbert*, 545 U.S. at 623; *Dickerson*, 530 U.S. at 442. Petitioner could not have been so informed because Florida's courts recognized no such right.

Rejecting Petitioner's argument that its *Hurst* waiver rule was contrary to *Halbert*, the Florida Supreme Court unreasonably explained that, "[u]nlike the right to first-tier postconviction counsel in *Halbert*, the right to a jury trial was well recognized before *Hurst*." App. 10a; *Hutchinson*, 243 So. 3d at 884. The court failed to recognize that, even though it may be true that "the right to a jury trial was well

recognized before *Hurst*," the right to *penalty jury fact-finding*—the federal constitutional *Hurst* right that Petitioner was held to have waived—was not recognized in Florida's courts until after *Hurst*. Under the Florida Supreme Court's logic, because the most basic constitutional right to a jury trial was recognized in Florida at the time of a defendant's capital penalty phase, the defendant's waiver of any federal constitutional right associated that penalty phase—even the waiver of an unconstitutional feature like Florida's advisory jury—constituted a waiver of *every* federal constitutional right relating to the capital penalty phase that may one day be addressed by this Court. That sort of waiver analysis is irreconcilable with *Halbert*.

The Florida Supreme Court also wrongly believed that "Hutchinson contends that this Court should follow *Halbert* in finding that *Hurst* created a new right to a jury trial distinct from the pre-*Hurst* right, and further find that his jury waiver does not preclude *Hurst* relief." App. 10a; *Hutchinson*, 243 So. 3d at 884. Petitioner did not contend that *Hurst* created a "new" right to a jury trial distinct from the pre-*Hurst* right—it was this Court that held in *Hurst* that Florida's scheme systematically denied capital defendants of their constitutional jury-trial rights by allocating the fact-finding decision-making at the penalty phase to the judge, rather than to the jury. As *Hurst* makes clear, at the time of Petitioner's waiver, Florida law did not recognize the right to jury fact-finding at the penalty phase. So, at that time, Petitioner could only waive the right to an advisory jury that would make a generalized recommendation to the judge. Under *Halbert*, he could not have waived a right to jury fact-finding that was not recognized at the time.

The Florida Supreme Court made the same mistake in originally articulating its automatic *Hurst* waiver rule in *Mullens v. State*, when it explained that to allow defendants who declined an advisory penalty jury to press *Hurst* claims "would encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death." *Mullens*, 197 So. 3d at 40 (citations omitted). It was inconsistent with *Hurst* for the Florida Supreme Court in *Mullens* to equate a pre-*Hurst* waiver of an advisory jury with "waiving the right to jury sentencing." *Hurst* makes clear that Florida's advisory jury scheme violated the Sixth Amendment. [10]

In addition to wrongly assuming that the same jury trial right that exists in Florida's death sentencing scheme today also existed before *Hurst*, the Florida Supreme Court's opinion in Petitioner's case attempted to cast aside *Halbert*'s relevance by citing *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), a case decided 35 years earlier, in which the Florida Supreme Court said "an argument similar to Hutchinson's" was rejected by this Court. App. 10a; *Hutchinson*, 243 So.

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[10] There are more reasons to doubt the Florida Supreme Court's original rationale in *Mullens* for creating its automatic *Hurst* waiver rule. For example, *Mullens* cites cases from other jurisdictions to show that "[o]ther states have reached similar conclusions in the context of capital sentencing. In states where defendants who pleaded guilty to capital offenses automatically proceeded to judicial sentencing, courts have held that *Ring* did not invalidate their guilty plea and associated waiver of jury factfinding." *Mullens*, 197 So. 3d at 38. But, in most of those cases, the defendants, unlike Petitioner and other Florida defendants, already had state rights to jury fact-finding at sentencing that they had explicitly waived. *See, e.g.*, *State ex rel. Taylor v. Steele*, 341 S.W.3d 634 (Mo. 2011); *State v. Piper*, 709 N.W.2d 783, 805 (S.D. 2006); *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004); *Lewis v. Wheeler*, 609 F.3d 291 (4th Cir. 2010); *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002).

3d at 884. But *McMann* presented entirely different circumstances. In *McMann*, this Court held "that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus." *McMann*, 397 U.S. at 771. The defendant in *McMann* argued that his guilty plea was not intelligent because counsel misjudged the admissibility of his confession. *Id.* at 770. Here, Petitioner does not seek invalidation of his advisory jury waiver on the ground that counsel gave him faulty advice, but simply asks for his *Hurst* claim to be considered notwithstanding his pre-*Hurst* advisory jury waiver, which cannot constitute a voluntary, knowing, and intelligent waiver of his federal constitutional right to penalty-jury fact-finding under *Hurst*.

The recent decision in *Class v. United States*, 138 S. Ct. 798 (2018), deepens the conflict between the Florida Supreme Court's rule and this Court's constitutional waiver precedents. In *Class*, the Court held that a guilty plea and related "waivers" do not, by themselves, bar a criminal defendant "from challenging the constitutionality of the statute of conviction on direct appeal." *Id.* at 803. *Class* rejected the argument that the defendant had "expressly waived" his right to appeal "constitutional" issues because the judge informed the defendant that he "was giving up his right to appeal his conviction." *Id.* at 806-07 (internal brackets and quotation marks omitted). The Court noted that the plea agreement did "not expressly refer to a waiver of the appeal right here at issue." *Id.* at 807. Absent an express waiver of prospective constitutional challenges, the Court explained, the defendant cannot be said to have waived those rights. Just as in *Class*, Petitioner's waiver of an advisory

jury does not forever bar him from raising constitutional claims arising under this Court's decision in *Hurst*, which found the advisory jury mechanism that Petitioner decided to forego unconstitutional. Petitioner is no less entitled to assert his constitutional right to jury fact-finding at a penalty phase than defendants who elected to present their case to an advisory jury under the pre-*Hurst* scheme.

At bottom, there is a fundamental unfairness in the disparity of results produced by the Florida Supreme Court's rule. Under Florida's prior, unconstitutional scheme, the trial judge was solely responsible for the penalty fact-finding in *every* Florida death case, regardless of whether there was an advisory jury present and regardless of what the advisory jury recommended to the judge. Although Petitioner listened to his attorney's advice and declined an advisory jury for his penalty phase, Petitioner's penalty-phase fact-finding unfolded no differently than pre-*Hurst* defendants who decided not to decline an advisory jury. Whether or not a defendant declined an advisory jury recommendation, the judge conducted each of the necessary findings of fact alone and made the final sentencing determination in every Florida case. The Florida Supreme Court's rule effectively rewards pre-*Hurst* defendants who embraced the advisory jury mechanism, while punishing those who declined it. Petitioner and similar Florida defendants should not be punished for choosing to decline an advisory jury that was unconstitutional in the first place.

A Florida defendant's pre-*Hurst* decision to decline an advisory jury involved giving up only the right to a jury that would make an advisory, generalized recommendation to the judge by a majority vote. At the time of his decision to decline

an advisory jury, Petitioner could only have validly waived his right to a generalized, majority-vote jury recommendation, not the right to binding jury fact-finding. Today, as the result of *Hurst*, the right to binding jury fact-finding in Florida capital sentencing has been recognized, and the Florida Supreme Court has made that right retroactive on collateral review to cases in the same posture as Petitioner's. *See Mosley*, 209 So. 3d 1248 at 1276. Under *Halbert*, the Florida Supreme Court cannot selectively withdraw that right under a waiver analysis.[11]

3. The Florida Supreme Court's Rule is Symptomatic of a Broader Confusion Over *Halbert*

The Florida Supreme Court's *Hurst* waiver rule is symptomatic of a broader confusion regarding *Halbert* and federal constitutional waiver analysis that should be resolved by this Court. Although the Florida Supreme Court's *Hurst* waiver rule is sui generis—applying to dozens of death row prisoners but only within Florida—nationwide, state and federal courts have also expressed confusion over the meaning

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[11] One might take the view that, although the Florida Supreme Court was free to make *Hurst* retroactive on collateral review to individuals like Petitioner, *see Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008), it was not required to do so, and therefore even the separate preclusion of *Hurst* relief on waiver grounds provides no basis for federal constitutional review. But this would require abandonment of the federalist principles underlying *Danforth*. Even when state retroactivity law is arguably not federally required, a state's denial of rights recognized by that law cannot be constitutionally sustained where it is based upon a concept of "waiver" that cuts against *Halbert*, *Zerbst*, and other foundational precedents of this Court. After all, the time has long since passed when limitations upon state-law grants of benefits were deemed immune from scrutiny for compatibility with basic federal constitutional guarantees. *See*, *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Evitts v. Lucey*, 469 U.S. 387 (1985). "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

and application of *Halbert*. *See, e.g.*, *United States v. Simpson*, 430 F.3d 1177, 1194 (D.C. Cir. 2005) (Silberman, J., concurring) (concluding that *Halbert* draws the "considered views of eight circuit courts" into question); *United States v. Burns*, 433 F.3d 442, 448-49 (5th Cir. 2005) (discussing uncertainty over whether *Halbert* addresses both implicit and explicit waivers); *United States v. Magouirk*, 468 F.3d 943, 948-50 (6th Cir. 2006) (same); *Nunley v. Bowersox*, 784 F.3d 468, 470 (8th Cir. 2015) (grappling with the intersection of *Halbert* and the retroactivity of the underlying federal constitutional right); *State v. Nunley*, 341 S.W. 611, 632 (Mo. 2011) (Stith, J., concurring in part and dissenting in part) (arguing that the majority opinion adopted Justice Thomas's dissent in *Halbert* rather than *Halbert*'s holding).

The Florida Supreme Court's automatic *Hurst* waiver rule is perhaps the most pernicious example of courts' general confusion over *Halbert*—but it has dire consequences for dozens of individuals who remain on Florida's death due solely to the Florida Supreme Court's waiver analysis. This Court should grant a writ of certiorari in Petitioner's case to reaffirm that *Halbert* meant what it said: a state court is prohibited from holding that a defendant waived a federal constitutional right that was not known to the defendant or recognized by the state courts at the time of the purported waiver.

II. The Florida Supreme Court's Application of its *Hurst* Waiver Rule to Petitioner Ignored Uncontested Evidence that Petitioner's Decision to Decline an Advisory Jury Resulted Entirely From Advice Counsel Gave in the Context of Florida's Prior Judge-Fact-Finding Scheme

In applying its automatic *Hurst* waver rule to Petitioner, the Florida Supreme Court ignored the uncontested evidence he proffered in the circuit court showing that

(1) he declined an advisory jury based solely on counsel's advice, (2) counsel's advice was inextricably linked to Florida's pre-*Hurst* scheme, (3) counsel would not have advised Petitioner to waive a constitutional jury, and (4) Petitioner would not have waived a constitutional jury absent counsel's advice.

Petitioner submitted a declaration by his trial counsel attesting to those facts and requested a hearing on whether his decision to decline an advisory jury under those circumstances could serve as a valid reason to deny him the same relief being afforded to dozens of other prisoners in the same posture as him but whose cases included an advisory jury recommendation. *See* App. 127a-130a. The Florida Supreme Court's only explanation for upholding the denial of a hearing on Petitioner's evidence was: "the change of law under *Hurst* does not have any bearing on the evidence that a lawyer might choose to develop or that expert witnesses may present." App. 9a; *Hutchinson*, 243 So. 3d at 884. This is ironic because it contradicts the very declaration by Petitioner's trial counsel the court ignored.

The declaration by Petitioner's counsel for the penalty phase of his trial, attorney Kimberly Ward, confirms that all of her decisions and advice to Petitioner "were affected by the Florida capital sentencing statute under which we operated." App. 127a. Counsel explained that her "advice to Mr. Hutchinson to waive a penalty phase jury was based on that statute," and that, "[h]ad this trial taken place under a sentencing scheme as required by *Hurst v. Florida* and *Hurst v. State*, we would have given different advice to Mr. Hutchinson." *Id.* at 128a-129a. Counsel stated that she "would not have advised him to waive a jury because the jury's role is different when

it is instructed that it is solely responsible for finding sufficient aggravating circumstances, considering mitigating factors and imposing a death sentence." *Id.* at 129a. And, she noted, "[t]his different advice would have affected Mr. Hutchinson's decision on whether to waive a penalty phase jury, and I believe that Mr. Hutchinson would not have waived a jury." *Id.*

Petitioner confirmed that counsel advised him to decline an advisory jury. App. 132a. Petitioner stated that his decision to forgo an advisory jury was based on the advice of counsel, and that counsel "convinced" him that he should decline an advisory jury. *Id.* Petitioner made it clear to counsel that he did not wish to receive a death sentence, and "accepted their advice to waive a jury after their explanation that it was the judge who would be imposing sentence and the jury was essentially superfluous." *Id.* at 133a. Petitioner would not have waived a jury with the knowledge that the jury's role was to make binding findings of fact on aggravating circumstances, mitigating factors, and whether to impose a death sentence. *Id.*

Despite this evidence, and despite Florida's presumption in favor of hearings under these circumstances, *see, e.g.*, *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), the Florida Supreme Court summarily concluded in Petitioner's case that "the change of law under *Hurst* does not have any bearing on the evidence that a lawyer might choose to develop or that expert witnesses may present." App. 9a; *Hutchinson*, 243 So. 3d at 884. Without remanding for a hearing or even acknowledging the relevant evidence in the record, however, the Florida Supreme Court could not reasonably

have reached that conclusion.[12] The Florida Supreme Court's per se *Hurst* waiver rule precluded the court from considering whether a defendant's pre-*Hurst* decision to decline an advisory jury on the advice of counsel, where that advice was based entirely on counsel's experience trying cases under the unconstitutional judge-sentencing scheme overruled in *Hurst*, can be a basis for precluding the defendant from seeking resentencing with a constitutional jury under *Hurst*.

As Petitioner informed the state courts, a constitutional jury would hear much mitigating evidence in his case, including his service and exposure to dangerous conditions and chemicals in the Gulf War, which greatly affected him both physically and mentally. A jury with the fact-finding role required by *Hurst* could be persuaded to vote for a life sentence rather than death.

Without this Court's intervention, Petitioner will never have the opportunity to present his case to a constitutional jury as a result of the Florida Supreme Court's automatic *Hurst* waiver rule. While the Florida Supreme Court continues to grant re-sentencings to dozens of other Florida prisoners, including those originally sentenced both before and after Petitioner, those prisoners like Petitioner who

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[12] As noted above, the Florida Supreme Court's ineffective-assistance-of-counsel analysis went outside the bounds of and contradicted Petitioner's arguments. *See* App. 6a; *Hutchinson*, 243 So. 3d at 882. Petitioner emphasized in his briefs that he had not raised an ineffectiveness claim in the lower court and was not raising one on appeal. *See* App. 50a, 99a-100a.

The point Petitioner has consistently made is not that his counsel was ineffective for advising him to decline an advisory jury, but that counsel's advice was inextricably linked with her experience trying cases like Petitioner's under the capital sentencing scheme held unconstitutional in *Hurst*, and therefore Petitioner's decision to accept that advice should not serve as a basis to preclude him from seeking resentencing with a constitutional jury under *Hurst*.

declined to accept an unconstitutional advisory jury, even based on counsel's advice, remain on death row and subject to execution. This Court should grant a writ of certiorari to decide whether the United States Constitution tolerates this reality.

CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Florida Supreme Court.

Respectfully submitted,

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