No. 18-5377

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 FLORIDA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court holding that the petitioner waived any right to relief based on *Hurst v. State*, 202 So.3d 40 (Fla. 2016), by waiving his right to a jury during the penalty phase.

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BRIEF IN OPPOSITION

OPINION BELOW

The Florida Supreme Court's opinion is available at *Hutchinson v. State*, 243 So.3d 880 (Fla. 2018) (No. SC17-1229).

JURISDICTION

On March 15, 2018, the Florida Supreme Court affirmed the state trial court's denial of the successive postconviction motion. On March 28, 2018, Hutchinson filed a motion for rehearing. On April 26, 2018, the Florida Supreme Court denied the rehearing. On July 19, 2018, Hutchinson filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(c). Jurisdiction

exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

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

U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution, section one, which

provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Hutchinson murdered his live-in girlfriend, Renee Flaherty, and her three young children: Logan, Amanda, and Geoffrey. *Hutchinson v. State*, 882 So.2d 943, 948-49 (Fla. 2004), *abrogated on other grounds*, *Deparvine v. State*, 995 So.2d 351 (Fla. 2008). A 911 call from 410 John King Road, the victims' home, was received at 8:41 p.m. (XXII 728,750). The 911 caller stated: "I just shot my family." (XXII 701). Hutchinson had been living with Renee and three her children at 410 John King Road. Two close friends of Hutchinson identified the voice on the 911 tape as Hutchinson's voice. (XXII 673-674; XXIV 1148). The deputies arrived at the residence within ten minutes of the 911 call and found Hutchinson on the ground in the garage with the cordless phone receiver eight inches from his hand. (XXII 768-769). The phone was still on. (XXII 769). *See Hutchinson*, 882 So.2d at 948.

The jury convicted Hutchinson of four counts of first-degree murder with a firearm. *Hutchinson*, 882 So.2d at 948. Hutchinson waived his right to a penalty phase jury but presented mitigation to the trial judge at the bench penalty phase. *Id.* The trial court conducted a colloquy, found the waiver voluntary, and excused the jury. *Id.* at 949. There was no jury recommendation regarding sentencing due to the waiver.

Following the bench penalty phase, the trial court sentenced Hutchinson to life imprisonment for the murder of Renee Flaherty and to death for the murder of each of the three children. *Hutchinson*, 882 So.2d at 949. The trial court found two aggravating circumstances for the murders of Logan and Amanda: 1) previously convicted of another capital felony for the murders of the other children and 2) the victim was less than 12 years of age. *Id.* at 959. The trial court found three aggravating circumstances for the murder of Geoffrey Flaherty: 1) previously convicted of another capital felony for the murders of the other children; and 2) the victim was less than 12 years of age; and 3) heinous, atrocious, or cruel (HAC). *Id.*

On appeal to the Florida Supreme Court, Hutchinson raised ten issues. *Hutchinson*, 882 So.2d at 949-50. The Florida Supreme Court affirmed the four convictions of first-degree murder and affirmed the three death sentences for the murders of the three children. *Id.* at 961.

In October of 2005, Hutchinson filed a 3.851 motion for postconviction relief in state trial court. *Hutchinson v. State*, 17 So.3d 696, 699 (Fla. 2009). Hutchinson's original postconviction counsel withdrew and the trial court appointed new postconviction counsel. *Id.* at 699. On August 15, 2007, new postconviction counsel filed an amended postconviction motion. Following an evidentiary hearing on some of the claims, the trial court denied the motion for postconviction relief. *State v. Hutchinson*, 2008 WL 8948638 (Fla. Cir. Ct. Jan. 3, 2008).

In his postconviction appeal to the Florida Supreme Court, Hutchinson raised three issues. *Hutchinson v. State*, 17 So.3d 696, 700 (Fla. 2009). The Florida Supreme Court affirmed the trial court's denial of postconviction relief. *Id.* at 704.

On July 24, 2009, Hutchinson filed a *pro se* federal habeas petition in district court. *Hutchinson v. Florida*, 5:09-cv-RS (N.D. Fla.) (Doc. #1). On November 23, 2009, habeas counsel Todd Doss, filed an amended habeas petition. (Doc. #19). The amended petition raised five grounds for relief. On December 13, 2009, Respondent filed a motion to dismiss the petition as untimely. The district court granted the motion and dismissed the amended petition as untimely. *Hutchinson v. Florida*, 2010 WL 3833921 (N.D. Fla. Sept. 28, 2010).

The Eleventh Circuit affirmed the district court's dismissal of Hutchinson's habeas petition as being untimely, finding that equitable tolling did not apply. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012).

Hutchinson then filed a petition for a writ of certiorari in this Court from the Eleventh Circuit's opinion raising three issues related to equitable tolling. On October

9, 2012, this Court denied the petition. *Hutchinson v. Florida*, 133 S.Ct. 435 (2012) (No. 12-5582).

In 2014, Hutchinson filed a *pro se* rule 60(b)(6) motion to reopen his capital federal habeas case based on *Martinez v. Ryan*, 566 U.S. 1 (2012). The federal district court then appointed the Capital Habeas Unit of the Office of the Public Defender of the Northern District of Florida (CHU-N) as federal habeas counsel of record. The 60(b)(6) motion is still pending in federal court awaiting additional discovery.

On January 11, 2017, represented by registry counsel Clyde M. Taylor and Billy Nolas of the CHU, filed a successive rule 3.851 postconviction motion in state trial court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). The State filed an answer to the successive postconviction motion asserting that the motion should be summarily denied because Hutchinson waived his right to any *Hurst* relief by waiving his right to a penalty phase jury citing to the Florida Supreme Court controlling precedent of *Mullens v. State*, 197 So.3d 16, 48-40 (Fla. 2016), *cert. denied*, *Mullens v. Florida*, 137 S.Ct. 672 (2017) (No. 16-6773). The trial court summarily denied the successive postconviction motion based on Hutchinson's waiver of the penalty phase jury relying on *Mullens*.

Hutchinson appealed the state trial court's denial of his successive postconviction motion to the Florida Supreme Court. The Florida Supreme Court affirmed the trial court's summary denial of the postconviction motion rejecting the *Hurst* claim based on the waiver of the right to a penalty phase jury. *Hutchinson v. State*, 243 So.3d 880 (Fla. 2018) (SC17-1229). The Florida Supreme Court explained that "*Hurst* relief is not available to individuals who waived their right to a penalty phase jury." *Id.* at 884. The Florida Supreme Court relied on their prior decision in *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016), and *Mullens v. State*, 197 So.3d 16,

38-40 (Fla. 2016). *Id.* at 881, 883. The Florida Supreme Court explained that they refused to permit capital defendants to "abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death." *Hutchinson*, 243 So.3d at 884 (quoting *Mullens*, 197 So.3d at 40).

Hutchinson, represented by the CHU, then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's opinion. This is the State's brief in opposition.

REASON FOR DENYING THE WRIT

ISSUE

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE PETITIONER WAIVED ANY RIGHT TO RELIEF BASED ON *HURST V. STATE*, 202 SO.3D 40 (FLA. 2016), BY WAIVING HIS RIGHT TO A JURY DURING THE PENALTY PHASE.

Petitioner Hutchinson seeks review of the Florida Supreme Court's decision holding that he waived his rights under *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), by waiving his right to a penalty phase jury. There is no conflict between this Court's waiver decisions and the Florida Supreme Court's decision in this case. Under this Court's waiver jurisprudence, subsequent developments in the law do not render a prior waiver involuntary. *Hurst* did not render Hutchinson's waiver of his right to a penalty phase jury involuntary. A waiver of a known, established right remains valid regardless of later expansions of the right. Nor is there any conflict between that of any other federal appellate court or state supreme court and the Florida Supreme Court's decision in this case. Federal appellate courts and state supreme courts follow this Court's precedent and hold that subsequent developments in the law do not render a prior waiver involuntary. Opposing counsel does not cite any decision from any federal circuit or state supreme court holding that a prior waiver of a jury became invalid due to *Hurst*. Additionally, regardless of the waiver, Hutchinson is not entitled to any relief based on *Hurst v. Florida*. One of the aggravating circumstances was found by the jury during the guilt phase when the jury convicted Hutchinson of the other murders. *Hurst v. Florida* was satisfied in the guilt phase. This Court should deny the petition.

The Florida Supreme Court's decision in this case

The Florida Supreme Court rejected the *Hurst v. State* claim. *Hutchinson v. State*, 243 So.3d 880 (Fla. 2018) (SC17-1229). The Florida Supreme Court rejected the claim because Hutchinson had waived his right to a jury during the penalty phase. *Id.* at 881 (noting that "Hutchinson waived his right to a penalty phase jury and presented mitigation to the trial judge"); *id.* at 884 ("Hutchinson is not entitled to relief on this *Hurst* claim where he waived his right to a jury trial"). The Florida Supreme Court explained that "*Hurst* relief is not available to individuals who waived their right to a penalty phase jury." *Id.* at 884. The Florida Supreme Court relied on its prior decision in *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016), and *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016). *Id.* at 881, 883. The Florida Supreme Court explained that they refused to permit capital defendants to "abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death." *Hutchinson*, 243 So.3d at 884 (quoting *Mullens*, 197 So.3d at 40).

The Florida Supreme Court rejected the claim on ineffectiveness for advising Hutchinson to waive the penalty phase jury explaining that counsel's recommending a jury waiver "was not deficient performance" because counsel properly advised Hutchinson "of the law at the time." *Hutchinson*, 243 So.3d at 882.

The Florida Supreme Court additionally rejected the argument that the waiver became invalid as a result of the change in the law of *Hurst*. *Hutchinson*, 243 So.3d at 883. The Florida Supreme Court rejected any attempt to distinguish their precedent based on Hutchinson challenging the validity of his waiver, noting that *Brant* also involved a challenge to the validity of the waiver. *Id.* "A defendant's ability to waive a penalty phase jury did not change after *Hurst*." *Id.* at 884.

The Florida Supreme Court rejected Hutchinson's reliance on *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), noting that this Court had rejected an argument

similar to Hutchinson's in *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970). *Hutchinson*, 243 So.3d at 884. The Florida Supreme Court explained, that unlike the new right in *Halbert*, "the right to a jury trial was well recognized before *Hurst*." *Id.*

The Florida Supreme Court's precedent on the waiver of a penalty phase jury

The Florida Supreme Court relied on its precedent regarding the waiver of a penalty phase jury established in *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016), *cert. denied*, *Mullens v. Florida*, 137 S.Ct. 672 (2017) (No. 16-6773), to deny the *Hurst* claim in this case. In *Mullens*, the Florida Supreme Court rejected a *Hurst* claim in a case where the defendant had waived his penalty phase jury. The Florida Supreme Court noted that Mullens waived his right to a penalty phase jury. *Id.* at 20. The Florida Supreme Court concluded that, in light of the fact that Mullens waived his right to a jury, his argument that his sentence must be commuted to life imprisonment failed. *Id.* at 38. The Florida Supreme Court, relying on this Court's caselaw, explained that nothing prevents a defendant from waiving his right to a jury and that even "a defendant who stands trial may consent to judicial factfinding as to sentence enhancements." *Id.* at 38 (quoting *Blakely v. Washington*, 542 U.S. 296, 310 (2004)). The Florida Supreme Court noted that this Court has long "recognized that defendants may entirely waive their right to a jury trial." *Id.* at 38 (citing *Singer v. United States*, 380 U.S. 24, 32-35 (1965); and *Patton v. United States*, 281 U.S. 276, 308 (1930)). The Florida Supreme Court also relied on a number of cases from other state supreme courts, as well as a Fourth Circuit case, holding that *Ring v. Arizona*, 536 U.S. 584 (2002), did not invalidate a prior waiver of a jury. *Id.* at 38-39 (citing other state cases and *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010)). The Florida Supreme Court explained that a "subsequent change in the law regarding the right to jury sentencing

did not render that initial waiver involuntary." *Id.* at 39 (citing *State v. Murdaugh*, 97 P.3d 844, 853 (Ariz. 2004) (citing *Brady v. United States*, 397 U.S. 742 (1970)). The Florida Supreme Court noted that the trial court conducted a thorough colloquy before permitting Mullens to waive the penalty phase jury. *Id.* at 39. The Florida Supreme Court observed that accepting such an argument 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. *Id.* at 40. The Florida Supreme Court wrote that Mullens cannot "subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Id.* The Florida Supreme Court denied *Hurst* relief based on the waiver.

The Florida Supreme Court has followed its *Mullens* precedent in several other capital cases where the defendant waived his penalty phase jury to reject *Hurst* claims, just as it did in this case. *See, e.g., Covington v. State*, 228 So.3d 49, 69 (Fla. 2017) (rejecting a *Hurst* claim where the defendant waived the penalty phase jury citing *Mullens*), *cert. denied*, *Covington v. Florida*, 138 S.Ct. 1294 (2018) (No. 17-7400); *Twilegar v. State*, 228 So.3d 550 (Fla. 2017) (rejecting a *Hurst* claim where the defendant waived the penalty phase jury citing *Mullens*), *cert. denied*, *Twilegar v. Florida*, 138 S.Ct. 2578 (2018) (No. 17-8236); *Quince v. State*, 233 So.3d 1017 (Fla. 2018) (rejecting a *Hurst* claim where the defendant waived the penalty phase jury citing *Mullens*), *petition for cert. filed* (June 15, 2018) (No. 17-9401)[1]; *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (rejecting a *Hurst* claim where the defendant waived the penalty phase jury citing *Mullens*), *petition for cert. filed* (July 23, 2018) (No. 18-113).

This Court has denied petitions for writ of certiorari in several of these cases.

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[1] The petition in *Quince v. Florida*, No. 17-9401 is scheduled for conference on September 24, 2018.

Mullens v. Florida, 137 S.Ct. 672 (2017) (No. 16-6773); *Covington v. Florida*, 138 S.Ct. 1294 (2018) (No. 17-7400); *Twilegar v. Florida*, 138 S.Ct. 2578 (2018) (No. 17-8236). Review should be denied in this case as well.

No conflict with this Court's waiver jurisprudence

Alternatively, there is no conflict between the Florida Supreme Court's decision in this case and this Court's waiver jurisprudence. See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review).

A capital defendant may waive his Sixth Amendment right to a jury trial. *Blakely v. Washington*, 542 U.S. 296, 300 (2004) (explaining that nothing prevents a defendant from waiving his right under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and when "a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or ***consents*** to judicial factfinding") (emphasis added); *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution" citing numerous constitutional waiver cases); *Singer v. United States*, 380 U.S. 24, 34 (1965) (holding a defendant can waive his right to a jury trial and employ a bench trial instead with the consent of the judge and the prosecutor). When a capital defendant waives a penalty phase jury, he is consenting to judicial factfinding regarding his sentence.

This Court has held that pleas are not rendered involuntary due to later changes in the law. *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970). Richardson argued his plea was involuntary when a new decision regarding coerced confessions was issued by this Court. Richardson argued that he could now challenge his confession under the new decision regardless of his guilty plea. This Court rejected the argument that

subsequent changes in the law rendered an earlier plea involuntary. The Court explained that when a defendant waives his right to a jury trial "he does so under the law then existing." *Id.* at 774. This Court observed that, regardless of whether a defendant might have "pleaded differently" had the later decided case been the law at the time of the plea, "he is bound by his plea." *Id.* The Court noted the damage that would be wrought on the finality of pleas if courts permitted later changes in the law to be a basis for claiming a plea was involuntary. *See also Brady v. United States*, 397 U.S. 742, 757 (1970) (rejecting an argument that the plea was involuntary because it was based in part on a statute that was declared unconstitutional years later because the fact the defendant did not anticipate a change in the law "does not impugn the truth or reliability of his plea"); *United States v. Ruiz*, 536 U.S. 622, 630 (2002) (stating that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor including a defendant's failure "to anticipate a change in the law"). Voluntariness is determined under the law that exists at the time.

The same rationale expressed by this Court in *Richardson*, *Brady*, and *Ruiz* applies to Hutchinson's waiver of a penalty phase jury. Hutchinson was not required to foresee *Hurst* for his waiver of the penalty phase jury to be valid. The validity of a waiver is not dependent on subsequent changes in the law.

Opposing counsel's reliance on *Class v. United States*, 138 S.Ct. 798 (2018), and *Halbert v. Michigan*, 545 U.S. 605 (2005), is misplaced. Neither *Class* nor *Halbert* conflict with either *Richardson*, *Brady*, or *Ruiz*. Subsequent developments in the law, that modify or expand an established right, do not render prior waivers involuntary.

This Court in *Class* held that a defendant's negotiated guilty plea did not, by

itself, bar a defendant from challenging the constitutionality of the statute of conviction in the direct appeal. *Class*, 138 S.Ct. at 803. Class entered a written negotiated plea that did not contain an appellate waiver provision. *Id.* at 802, 807. The issue in *Class* was what type of issues does a defendant ***implicitly*** waive on appeal simply by pleading guilty. *Id.* at 805 (emphasis added). The Court concluded that Class had neither expressly nor implicitly waived his right to appeal his constitutional claims. *Id.* at 807.

But, here, Hutchinson explicitly waived the right to a penalty phase jury after an on-the-record colloquy regarding that exact right. The waiver in this case was an explicit waiver of that particular right. *Class* does not apply to cases involving explicit waivers of particular rights.

Halbert does not apply either. This Court in *Halbert* held that the Equal Protection and Due Process clauses required the appointment of counsel for defendants seeking first-tier review of a conviction based on a plea or nolo contendere. The State contended that *Halbert* had waived the newly-created right to appellate counsel by entering a plea of nolo contendere and the Court rejected the waiver argument. *Halbert*, 545 U.S. at 623. The *Halbert* Court, however, observed, at the time he entered his plea, Halbert "had no ***recognized*** right to appointed appellate counsel he could elect to forgo." *Id.* (emphasis added). In a footnote to that observation, this Court stated that a "conditional waiver," which it defined, as one in which a defendant agrees that, if he has a right, he waives it was not at issue in the case because nothing in the plea colloquy indicated that Halbert waived the "unsettled" right to appellate counsel. *Id.* at n.7. This Court noted that the trial court, during the plea colloquy, did not tell Halbert, simply and directly, that there would be no access to appointed counsel. *Id.* at 624. The Court wrote that a waiver must be a "knowing, intelligent act done with sufficient awareness of the relevant circumstances." *Id.* (quoting *Iowa v. Tovar*, 541

U.S. 77, 81 (2004), and citing *Brady*).

Halbert does not apply to this case because this case involves a known, well-established, settled right. Opposing counsel is missing the distinction between a totally unknown right and a known, established right that is later expanded. *Halbert* involved a totally new right, not a well-established right.

In Florida, capital defendants have had a statutory right to a penalty phase jury since the enactment of the death penalty statute in 1972. Chapter 72-724, Laws of Fla. (1972); *Proffitt v. Florida*, 428 U.S. 242, 248 (1976) (describing the death penalty statute that the Florida legislature adopted in response to *Furman v. Georgia*, 408 U.S. 238 (1972), which provided that "if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge ***and jury*** to determine his sentence" and holding Florida's death penalty statute did not violate the Eighth Amendment) (emphasis added). The right to a penalty phase jury was established by the Florida Legislature nearly 30 years before Hutchinson waived his penalty phase jury in 2001.

Not only was the statutory right to a jury during the penalty phase well established in Florida at the time of the waiver of the penalty phase jury, it was a significant right under the Florida Supreme Court precedent at the time of the waiver in 2001. It was nearly impossible for a trial judge to override a jury's recommendation of life under the Florida Supreme Court's established precedent of *Tedder v. State*, 322 So.2d 908 (Fla. 1975), and *Keen v. State*, 775 So.2d 263 (Fla. 2000). Under the *Tedder* and *Keen* standards, if there is any reasonable basis in the record to support the jury's recommendation of life, a trial court must impose a life sentence. As the Eleventh Circuit observed years ago, the Florida Supreme Court's "stringent application" of the *Tedder* standard meant that the last override affirmed on appeal in Florida was over 20 years ago. *Evans v. Sec'y, Fla. Dept. of Corr.*, 699 F.3d 1249, 1258 (11th Cir. 2012)

(citing *Washington v. State*, 653 So.2d 362 (Fla. 1994)). So, many years before Hutchinson's waiver of a penalty phase jury, the established precedent in Florida was a jury recommendation of life would have almost guaranteed him a life sentence.

As explained above, Hutchinson waived an established and significant right to a penalty phase jury that would have nearly guaranteed him a life sentence if six jurors had voted for a life sentence. He did not waive some minor right that later turned out to be of great significance. At the time of the waiver, a jury's recommendation mattered a great deal. Hutchinson waived an established and significant right to a penalty phase jury. Subsequent developments in the law, that modify or expand an established right, do not render prior waivers involuntary. Neither *Class* nor *Halbert* overruled *Richardson*, *Brady*, or *Ruiz*.

In this case, at the start of the penalty phase, counsel filed a motion to waive the jury's recommendation regarding sentencing. (XXX 2308). The motion was accompanied by an affidavit signed by the defendant. (XIII 2408-2409). The trial court conducted a waiver colloquy, during which the defendant stated that he had discussed the waiver with his attorney and family and he personally agreed that a jury recommendation should be waived. (XXX 2311). The trial court found Hutchinson competent to waive and found the waiver voluntary. (XXX 2316). The trial court then excused the jury. (XXX 2321). Nothing the trial court said during the waiver colloquy could have misled Hutchinson as to the significance of a penalty phase jury. Opposing counsel points to nothing in the waiver colloquy that would have made Hutchinson underestimate the value of a penalty phase jury.

There is no conflict between the Florida Supreme Court's decision and this Court's waiver jurisprudence. Because there is no conflict with this Court, review should be denied.

No conflict with any federal appellate court or state supreme court

There is also no conflict with that of any federal appellate court or state supreme court either. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The federal appellate courts naturally follow the logic of *Richardson* regarding pleas. *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005) (stating the possibility of a favorable change in the law occurring after a plea agreement is "one of the normal risks that accompanies a guilty plea"); *United States v. Lockett*, 406 F.3d 207, 214 (3rd Cir. 2005) (observing that "the possibility of a favorable change in the law occurring after a plea agreement is merely one of the risks that accompanies a guilty plea"); *United States v. Cardenas*, 230 Fed. Appx. 933, 935 (11th Cir. 2007) (rejecting a claim that the plea was rendered involuntary due to this Court's later decision in *United States v. Booker*, 543 U.S. 220 (2005), explaining that a guilty plea is not invalidated by a later change in the law citing *Brady*). As the Seventh Circuit explained, if the law allowed the defendant to get off scot free in the event an argument later is shown to be a winner, then every plea would become a conditional plea, with the (unstated) condition that the defendant obtains the benefit of favorable legal developments, while the prosecutor is stuck with the original bargain no matter what happens later. *Young v. United States*, 124 F.3d 794, 798 (7th Cir. 1997).

Several federal circuits have also followed the logic of *Richardson* regarding appellate waivers. *United States v. Vela*, 740 F.3d 1150 (7th Cir. 2014) (holding a defendant's waiver of his right to appeal was not rendered involuntary by subsequent

Supreme Court ruling citing *Brady* and *Richardson*); *United States v. Copeland*, 707 F.3d 522, 529 (4th Cir. 2013) (stating that a criminal defendant "cannot invalidate his appeal waiver now to claim the benefit of subsequently issued caselaw"); *United States v. Grinard-Henry*, 399 F.3d 1294, 1295 (11th Cir. 2005) (refusing to reconsider the dismissal of an appeal based on an appellate waiver in a plea in light of a later decision of *United States v. Booker*, 543 U.S. 220 (2005)); *United States v. Green*, 405 F.3d 1180, 1190 (10th Cir. 2005) (rejecting a claim that an appellate waiver was involuntary because the Supreme Court has made it clear that a defendant's decision to give up some of his rights "remains voluntary and intelligent or knowing despite subsequent developments in the law" citing *Brady* and *Ruiz*).

In *Lewis v. Wheeler*, 609 F.3d 291 (4th Cir. 2010), the Fourth Circuit affirmed the denial of habeas relief. Lewis entered a plea in Virginia to, among other charges, two counts of capital murder for hire for the murder of her husband and her stepson and was sentenced to death for both murders. *Id.* at 293. Under Virginia law at the time, if a defendant pled guilty to capital murder, the trial judge conducted the sentencing proceeding without a jury. *Id.* at 297. After the sentencing bench trial, the state trial judge imposed the two death sentences. *Id.* at 298. The Virginia Supreme Court affirmed the death sentences. *Id.* at 299. In the state postconviction proceedings, Lewis raised a constitutional attack on the Virginia statute that mandated a bench trial for sentencing in cases involving a guilty plea arguing that the statute violated *Ring v. Arizona*, 536 U.S. 584 (2002), and asserting it rendered her plea involuntary. *Id.* at 300. She then filed a federal habeas petition raising the *Ring* claim which the federal district court denied. *Id.* She argued that her guilty plea was not knowingly and intelligently made because the trial judge's plea colloquy failed to advise her rights under *Ring* to have a jury determine the aggravators. *Id.* at 308. The Fourth Circuit noted that *Ring* did not hold that a defendant who pleads guilty and waives a jury trial

retains a constitutional right to have a jury determine aggravating factors. *Id.* at 309. The Fourth Circuit noted that the defense strategy was to have Lewis plead guilty to obtain a bench trial instead of a jury trial. *Id.* at 311. Experienced counsel, based upon their knowledge of typical juries in the area and the assigned trial judge, believed that a death sentence by a jury was a virtual certainty and that Lewis stood a better chance of obtaining a life sentence from the trial judge. *Id.* The trial judge had never imposed a death sentence before. Lewis voluntarily signed a letter stating that she "wished to plead guilty and be sentenced by the Judge." *Id.* at 312. The Fourth Circuit found that her claim that she would have insisted on having a jury determine her sentence, if she was aware of her constitutional rights under *Ring* was "wholly inconsistent with this reasonable and agreed-upon strategy." *Id.* at 312-13. The Fourth Circuit observed that Lewis had to plead guilty in order "to take advantage of the very statute she now seeks to challenge." *Id.* at 313. The Fourth Circuit rejected the claim that *Ring* had rendered her waiver invalid.

There is no conflict with any state supreme court either. *Mullens*, 197 So.3d at 38-39 (citing other state supreme court cases). The Missouri Supreme Court in *State ex rel. Taylor v. Steele*, 341 S.W.3d 634 (Mo. 2011), rejected a claim that a waiver of the right to a jury in a capital case was invalid due to the change in law occasioned by *Ring*. In 1991, before *Ring*, Taylor pled guilty and waived jury sentencing. Under the statute in effect at the time, if a defendant pled guilty, he waived his statutory right under Missouri law to jury factfinding at sentencing. *Id.* at 641, n.10. "Taylor sought to be sentenced by the trial judge, rather than by a jury, because he believed that the trial judge was less likely to sentence him to death." *Id.* at 637. The Missouri Supreme Court concluded that his decision "to plead guilty and be sentenced by a judge, rather than by a jury, precludes his ability now to claim the Sixth Amendment entitles him to jury sentencing." *Id.* at 641. The Missouri Supreme Court determined that Taylor

"understood that a consequence of his plea was that he would not have his guilt or sentence determined by a jury." *Id.* The Missouri Supreme Court quoted the colloquy in which Taylor stated that he understood that if he pled guilty it would "be up to the judge to decide the sentence"; that "the judge could impose death"; and it would "all be up to one man." *Id.* at 641-42. The Missouri Supreme Court found with "unmistakable clarity" that Taylor "purposefully and strategically sought to avoid jury sentencing." *Id.* at 645. The Missouri Supreme Court rejected the claim that the plea was invalid because it was entered before the Sixth Amendment right to jury sentencing was established by *Ring*. *Id.* at 646-47. The Missouri Supreme Court reasoned that the waiver was valid because "courts do not require a defendant to know if the source of the right being waived is the constitution or a statute." *Id.* at 647. It "did not matter whether his right to jury sentencing at that time stemmed from the constitution or a statute." *Id.* The Missouri Supreme Court found that his jury waiver "was not motivated by the source of his right" but "by his strategic choice to avoid jury sentencing." *Id.* Taylor's "purposeful, strategic" agreement to be sentenced by a judge, instead of by a jury, "did not evaporate in light of future case law that clarified a Sixth Amendment right for capital defendants to be sentenced by a jury." *Id.* at 648. The Missouri Supreme Court rejected any reliance on *Halbert v. Michigan*, 545 U.S. 605 (2005), explaining that, unlike *Halbert*, the trial court did "simply and directly" tell Taylor that the judge, not a jury, would determine his sentence. *Id.* at 648. The Missouri Supreme Court observed that nothing in "*Ring* or its progeny extends Sixth Amendment jury sentencing protections to defendants who strategically plead guilty and purposefully waive jury sentencing." *Id.* at 649.

Opposing counsel does not cite any decision from any federal circuit or state supreme court holding that either *Ring* or *Hurst* rendered a prior waiver of a penalty phase jury invalid. There is no conflict between that of any federal appellate court or

state court of last resort and the Florida Supreme Court's decision.

Hurst v. Florida

On the merits, regardless of the waiver, Hutchinson is not entitled to any relief based on *Hurst v. Florida*.

This Court's decision in *Hurst v. Florida* does not apply retroactively under the federal retroactivity test of *Teague v. Lane*, 489 U.S. 288 (1989). *Cf. Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), was not retroactive under *Teague*). Hutchinson's death sentences became final in 2004, when the Florida Supreme Court issued the mandate from the direct appeal (Hutchinson did not file a petition in this Court from the direct appeal). Because Hutchinson's death sentences were final years before this Court's decision in *Hurst v. Florida*, *Hurst v. Florida* does not apply retroactively to him, under federal law. While, absent the waiver, Hutchinson would be entitled to retroactive benefit of the Florida Supreme Court's more expansive decision in *Hurst v. State* under the state test for retroactivity, as determined in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), that is a matter of state law. *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (holding that state courts are free to give broader retroactive effect to new rules of criminal procedure than is required Teague). In federal court, the *Hurst v. Florida* claim is *Teague*-barred.

Moreover, there was no *Hurst v. Florida* error in this case. This Court's decision in *Hurst v. Florida* was limited to a right to jury findings on the aggravating circumstances. *Hurst v. Florida*, 136 S.Ct. at 624 (holding "Florida's sentencing scheme, which required the judge alone to find the existence of ***an aggravating circumstance***, is therefore unconstitutional") (emphasis added). But, here, one of the aggravating circumstances was found by the jury during the guilt phase jury. *Jenkins*

v. Hutton, 137 S.Ct. 1769, 1771 (2017) (noting that the jury had found the existence of two aggravating circumstances during the guilt phase by convicting Hutton of aggravated murder and that "each of those findings rendered Hutton eligible for the death penalty"). In this case, the trial court found two aggravating circumstances for the murders of Logan and Amanda: 1) previously convicted of another capital felony for the murders of the other children and 2) the victims were less than 12 years of age. *Hutchinson*, 882 So.2d at 959. But the guilt phase jury had convicted Hutchinson of murdering all three children. *Id.* at 949. So, the guilt phase jury, in effect, found the previously-convicted-of-another-capital-felony aggravating circumstance by convicting Hutchinson of the murders of all three children. One of the two aggravating circumstances for two of the death sentences was, in fact, found by the jury. *Hurst v. Florida* was satisfied in the guilt phase. There was no *Hurst v. Florida* error in the first place in this case.

Ineffectiveness of trial counsel

Hutchinson also asserts that his trial attorney was ineffective for advising him to waive his right to a penalty phase jury in light of the subsequent legal developments in *Hurst*. The Florida Supreme Court rejected this claim of ineffectiveness and finding the advice was a strategic decision and therefore, was not deficient performance. *Hutchinson*, 243 So.3d at 882.

Claims of ineffectiveness of counsel are analyzed under the law at the time the advice as given, not decades later. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (explaining that a fair assessment of attorney performance requires that courts make every effort to eliminate the distorting effects of ***hindsight*** and to evaluate the attorney's conduct from counsel's perspective ***at the time***) (emphasis added). Claims of ineffectiveness regarding advice must be premised on the law at the time the advice

was given. *McMann v. Richardson*, 397 U.S. 759, 773 (1970) (stating that counsel "cannot be faulted" for not anticipating a change in law where the attorney advised the defendant to enter a guilty plea under the law at the time). Counsel is not required to have a legal crystal ball to be effective. Trial counsel's advice to Hutchinson in 2001 cannot be attacked based on legal developments that occurred in 2016 when *Hurst v. Florida* was decided. Such a claim of ineffectiveness is, as a matter of law, invalid.

Furthermore, Hutchinson cannot establish that his attorney was ineffective for advising him to waive the penalty phase under the law at the time. Counsel's advice to waive the jury in a case involving the murder of three young children in a conservative area to prevent the judge from following what was likely to be an unanimous or nearly unanimous jury recommendation of death was sound advice at that time and for that place.

Accordingly, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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