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 Supreme Court of Florida*

**REPLY BRIEF FOR PETITIONER**

***THIS IS A CAPITAL CASE***

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## I. Respondent Fails to Recognize that Florida's Prior Statutory "Advisory Jury" Right, and the Later-Recognized Constitutional *Hurst* Rights, are Not the Same Rights For Waiver Purposes

Respondent's primary argument against granting certiorari rests on the mistaken premise that Florida's prior statutory "advisory jury" right, and the later-recognized constitutional rights stemming from *Hurst v. Florida*, 136 S. Ct. 616 (2016), are the same rights for purposes of waiver analysis. In Respondent's (and the Florida Supreme Court's) view, because both the pre-*Hurst* statutory right, and the constitutional post-*Hurst* rights, can each be said to broadly concern Florida capital jury proceedings, a Florida defendant's pre-*Hurst* waiver of the statutory right automatically enacted a prospective post-*Hurst* waiver of the later-recognized constitutional rights. *See* Brief in Opposition ("BIO") at 8, 11-13.

Contrary to Respondent's view, the statutory right to an advisory jury recommendation that Petitioner waived at his 2001 penalty phase, and the constitutional rights stemming from *Hurst*, are functionally and practically different. Before *Hurst*, the court, not the advisory jury, made each of the findings of fact required for a death sentence under state law. Fla. Stat. § 921.141 (1996). The jury could receive evidence relevant to aggravation and mitigation, but the jury's generalized recommendation to the judge, for either life or death, was merely advisory. *See State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005). There was also no requirement of unanimity before *Hurst*—a jury could recommend death after a bare majority of jurors voted to do so. And individual jurors were not even required to base their votes to recommend death on the same aggravating circumstances.

Although the trial judge was required to give the jury's recommendation great weight, *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), the ultimate fact-finding and sentence reflected "the trial judge's independent judgment about the existence of aggravating and mitigating factors," *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003).

In *Hurst*, this Court explicitly rejected the argument that an advisory jury recommendation was equivalent to the jury right guaranteed by the Sixth Amendment, holding that Florida could not "treat the advisory jury recommendation by the jury as the necessary factual finding that *Ring [v. Arizona*, 536 U.S. 584 (2002)] requires." 136 S. Ct. at 622. In order to comply with the Sixth Amendment, this Court held, juries must make all of the findings of fact required for a death sentence under state law: (1) the specific aggravating circumstances that have been proven beyond a reasonable doubt, (2) whether those aggravating circumstances were "sufficient" to justify the death penalty, and (3) whether the aggravation was not outweighed by the mitigation. *See id.*; *see also* Fla. Stat. § 921.141(3) (1996).

On remand from this Court's decision in *Hurst*, the Florida Supreme Court added an additional constitutional dimension to Florida's new scheme, holding that the Eighth Amendment requires capital juries to be unanimous in each of their findings of fact and in any ultimate recommendation of death. *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). In other words, after *Hurst*, the jury must unanimously find as fact that specific aggravators were proven beyond a reasonable doubt, unanimously find that those aggravators are "sufficient" for the

death penalty, unanimously find that the aggravators are not outweighed by the mitigation, and unanimously agree to recommend the death penalty to the judge.

Because the prior statutory right and the *Hurst* constitutional rights are entirely distinct, waiver of the former cannot be deemed an automatic and prospective waiver of the latter. In order for a defendant to waive his constitutional *Hurst* rights, the record must establish "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In deciding whether such a relinquishment or abandonment has occurred, state courts must "indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977). In endorsing the Florida Supreme Court's automatic waiver approach developed in *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016), BIO at 11-12, and treating Petitioner's waiver of his pre-*Hurst* statutory rights as a presumptive waiver of his constitutional *Hurst* rights, Respondent's brief runs afoul of those standards.

Respondent's attempt to conflate statutory pre-*Hurst* waivers with constitutional post-*Hurst* waivers rings hollow. Respondent observes that a capital defendant "may waive his Sixth Amendment right to a jury trial," BIO at 12, a proposition that is obviously true, but ignores the salient fact that Florida courts did not recognize a Sixth Amendment right to capital jury fact-finding before *Hurst*. Respondent also correctly notes that "pleas are not rendered involuntary due to later changes in the law," BIO at 13 (citing *McMann v. Richardson*, 397 U.S. 759, 773 (1970)), but Respondent overlooks that (1) Petitioner's statutory advisory jury waiver was not the equivalent to a guilty plea in terms of his knowing and voluntary waiver

of his Sixth Amendment rights, because Florida courts did not recognize a Sixth Amendment right to capital jury fact-finding before *Hurst*, and (2) Petitioner does not argue that *Hurst* makes his earlier statutory waiver involuntary, but rather that the waiver, while still valid as to his pre-*Hurst* statutory right to an advisory jury, does not constitute any waiver of his constitutional rights under *Hurst*. It is true, as Respondent says, that "voluntariness is determined under the law that exists at the time," but that does not mean that later-recognized constitutional rights have been voluntarily waived by virtue of a prior waiver of an entirely distinct statutory right.

It should be noted that the distinction between the statutory advisory jury right and post-*Hurst* constitutional rights, as well as other issues directly relevant to the questions presented by Petitioner's case, are addressed in the certiorari petition and brief of amicus curiae currently pending on this Court's paid docket in *Rodgers v. Florida*, No. 18-113.[1]

## II. Respondent's Misreading of *Halbert* Reflects a Broader Confusion Among Courts and Parties That Should Be Resolved By This Court

Respondent compounds its erroneous conflation of the statutory and constitutional rights at issue here by advancing a misreading of *Halbert v. Michigan*, 545 U.S. 605 (2005), that is unworkable and has no basis in this Court's waiver precedent. In *Halbert*, this Court ruled that a state criminal defendant cannot voluntarily, knowingly, and intelligently waive a federal constitutional right that was

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[1] Counsel in *Rodgers* include Jeffrey Fisher of Stanford Law School and David Cole of the ACLU for the petitioner, and Caitlin Halligan of Gibson, Dunn & Crutcher LLP for amicus curiae in support of the petitioner. The Solicitor General of Florida has entered an appearance on behalf of the respondent in *Rodgers*.

not recognized by the state courts at the time of the purported waiver. *Id.* at 623. Respondent argues that "*Halbert* does not apply to this case because this case involves a known, well-established, settled right," which Respondent identifies as the "statutory right to a penalty phase jury." BIO at 14. In Respondent's view, *Halbert*'s rule applies only to "a totally unknown right," and not "a known, well-established right that is later expanded." *Id.* at 15. Respondent asserts that *Halbert* involved a totally new right to first-tier appellate counsel following a guilty plea, while *Hurst* merely expanded upon the statutory right to a jury at capital sentencing that has long existed in Florida. *Id.* ("The right to a penalty phase jury was established by the Florida Legislature nearly 30 years before Hutchinson waived his jury in 2001.").

Respondent's view of *Halbert* is wrong for two reasons. First, there is no basis in *Halbert* or this Court's other waiver decisions for the "totally unknown right" vs. "known, well-established right that is later expanded" dichotomy that Respondent treats as law. Second, if such a distinction did exist, it would be unworkable because practically any constitutional decision of this Court could be viewed as merely an "expansion" of a previously-established constitutional principle. Respondent's own brief shows how. Respondent characterizes *Hurst* as an expansion because of the previously-established right to have a jury *present* for the penalty phase of trial, while ignoring that *Hurst*'s requirement of jury *fact-finding* is totally new in Florida. Respondent then proceeds to characterize *Halbert*'s right to first-tier appellate counsel following a guilty plea as totally new, even though, as *Halbert* itself

recognizes, the right to first-tier appellate counsel has been well established for decades. *See Halbert*, 545 U.S. at 621 (citing *Evitts v. Lucey*, 469 U.S. 387 (1985)).

Notably, Respondent does not seem to dispute that *Halbert* prohibits courts from finding a waiver of a constitutional right that did not exist and was not recognized by the state courts at the time of the purported waiver. Instead, Respondent applies its malleable "totally unknown" vs. "known and later expanded" analysis to dismiss the applicability of *Halbert* to Petitioner's case. If anything, Respondent's problematic analysis and arguments show the chaos that would result in Florida if constitutional rights were held waived in such a subjective manner, and support the argument for granting certiorari to review the *Halbert* issues in this case.

Respondent also misses the relevance of *Class v. United States*, 138 S. Ct. 798 (2018). *See* BIO at 13-14. Respondent acknowledges that *Class* addressed invalid "implicit" waivers of constitutional rights, while failing to recognize that the Florida Supreme Court's automatic *Hurst* waiver rule effectively provides for such implicit waivers. Respondent dismisses *Class* on the ground that "Hutchinson explicitly waived the right to a penalty phase jury." BIO at 14. However, Respondent omits the fact that Petitioner waived only the statutory right to an *advisory* penalty phase jury *with no fact-finding role*. What the Florida Supreme Court held, and what Respondent argues, is that in waiving an advisory jury Petitioner implicitly waived the later-recognized right to penalty jury fact-finding now required by *Hurst*. Respondent's own brief provides the record citations showing that the only explicit

waiver Petitioner entered was regarding an advisory jury, not jury fact-finding. *See* BIO at 16 (recounting Petitioner's waiver of his statutory right to an advisory jury).

Respondent's misinterpretation of *Halbert* and *Class* reflects a broader confusion among courts and parties that should be resolved by this Court. As explained in the petition, state and federal courts have struggled over the meaning of *Halbert* and its application to different constitutional rights. *See* Pet. at 22-23 (citing cases). The Florida Supreme Court and Florida Attorney General have joined in that morass with the creation and application of the automatic *Hurst* waiver rule. Rather than undermining the appropriateness of granting a writ of certiorari on these issues, Respondent has only strengthened the case for this Court's intervention.

## III. Respondent Overlooks the Deepening Split Among State Courts Regarding Whether Not-Yet-Recognized Sixth Amendment Rights Stemming From *Apprendi* Can be Waived

Respondent mistakenly insists that certiorari is inappropriate because there is no "conflict between that of any other federal appellate court or state supreme court and the Florida Supreme Court's decision in this case." BIO at 8, 17. As explained above, and in the petition itself, there is broad uncertainty among state and federal courts over the meaning of *Halbert* and its applicability. Pet. at 22-23 (citing cases).

Moreover, Respondent overlooks the deepening split among state courts regarding whether not-yet-recognized Sixth Amendment rights stemming from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), can be waived under circumstances similar to those presented here. This split is described in detail in the amicus brief recently filed by this Court in support of the pending certiorari petition in *Rodgers v.*

*Florida*, a case that presents similar *Hurst*-related "waiver" questions as Petitioner's case. *See* Brief of Amicus Curiae of Florida Association of Criminal Defense Lawyers and Florida Center for Capital Representation at Florida International University College of Law, *Rodgers v. Florida*, No. 18-113, at 13-25 (filed Aug. 24, 2018) (counsel of record Caitlin Halligan of Gibson, Dunn & Crutcher LLP).

As recounted by the amicus brief in *Rodgers*, Florida has joined a long-standing state court split on whether newly recognized rights stemming from *Apprendi* could be waived *before* they were recognized. A majority of state courts have held—correctly—that a defendant cannot prospectively waive an *Apprendi*-related right before it has been recognized by this Court. *See, e.g.*, *State v. Dettman*, 719 N.W.2d 644, 654 (Minn. 2006) (holding that if a defendant "was sentenced before *Blakely [v. Washington*, 542 U.S. 296 (2004)] was decided, he could not have known that he had a right to a jury determination of the facts used to enhance his sentence," and therefore any factual admissions he made at a prior hearing or trial "did not knowingly waive that right."); *see also State v. Franklin*, 878 A.2d 757, 771 (N.J. 2005) ("In the pre-*Apprendi* days," a defendant who admitted to aggravating facts could not have "knowingly" waived unrecognized right to require a jury to find such facts); *State v. Curtis*, 108 P.3d 1233, 1236 (Wash. App. 2005) ("Curtis allocated before *Blakely* was decided. . . . Thus, he could not knowingly, voluntarily, and intelligently waive his *Blakely* rights."); *State v. Meynardie*, 616 S.E. 21, 24 (N.C. App. 2005) ("Since neither *Blakely* nor [North Carolina's decision applying *Blakely*] had been decided at the time of the defendant's sentencing hearing, defendant was not aware of his right

to have a jury determine the existence of the aggravating factor. Therefore, defendant's stipulation to the factual basis for his plea was not a "knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.") (alterations adopted) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))), *aff'd & remanded*, 646 S.E.2d 530 (N.C. 2007).

Other courts similarly concluded that a defendant did not waive the constitutional right to jury sentencing by pleading guilty—even if he or she pleaded guilty before *Blakely v. Washington*, when states treated such a plea as an automatic waiver of *Apprendi* rights. *See, e.g.*, *People v. Montour*, 157 P.3d 489, 492 (Colo. 2007) ("[A]lthough Montour understood that he was waiving his right to a jury trial on sentencing facts by entering a guilty plea, his waiver of his Sixth Amendment right was infected with the same constitutional infirmity as [Colorado's pre-*Blakely* scheme]—the waiver of his Sixth Amendment right was inextricably linked to his guilty plea."); *People v. Isaacks*, 133 P.3d 1190, 1191, 1196 (Colo. 2006) (holding that even a defendant who "expressly waive[d] [the] right to trial by jury on all issues . . . could not possibly have knowingly, voluntarily, and intelligently waived his *Blakely* rights" a "full year before the Supreme Court handed down *Blakely*"); *State v. King*, 168 P.3d 1123, 1127 (N.M. 2007) ("Defendant's plea hearing was held before *Blakely* was decided . . . . and therefore neither Defendant nor the State was aware of Defendant's right to a jury determination of aggravating factors."); *State v. Foster*, 845 N.E.2d 470, 483 (Ohio 2006) ("Foster could not have relinquished his sentencing objections as a known right when no one could have predicted that *Blakely* would

extend the *Apprendi* doctrine to redefine the 'statutory maximum'"); *State v. Schofield*, 895 A.2d 927, 931 (Me. 2005) (finding no waiver "[b]ecause Schofield, prior to *Blakely*, did not know that she had a right to have a jury determine, beyond a reasonable doubt, any facts necessary to increase her sentence"); *State v. Williams*, 104 P.3d 1151, 1152–53 (Or. App. 2005) (refusing to assume that a defendant who waived his jury rights under a pre-*Blakely* scheme necessarily waived the right after *Blakely*); *State v. Ward*, 118 P.3d 1122, 1127–28 (Ariz. Ct. App. 2005) (rejecting cases finding a defendant could have "knowingly waived his jury right pursuant to *Blakely* when he was unaware of the right" at the time of plea).

Florida has taken the opposite position. Agreeing with a cadre of other state courts, the Florida Supreme Court has held that a defendant who waived their prior statutory right to a jury recommendation before *Hurst* thereby necessarily waived the later-recognized constitutional right to jury determinations of all of the facts necessary for the imposition of death. Florida joined four other state courts which hold that any waiver of jury sentencing—even under a sentencing scheme later found unconstitutional—necessarily waives a later-recognized Sixth Amendment *Apprendi* right to jury sentencing. *See State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 647–48 & n.10 (Mo. 2011) (waiving jury right under unconstitutional sentencing scheme waived newly recognized constitutional right, "no matter under what statute or constitutional provision a right to jury sentencing existed" at the time of the waiver); *State v. Piper*, 709 N.W.2d 783, 807-08 (S.D. 2006) (same); *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004) (same); *Colwell v. State*, 59 P.3d 463, 474 (Nev. 2002) (same).

This Court should grant a writ of certiorari in this case to resolve the split and reject the flawed reasoning of the Florida Supreme Court and the minority of other state courts. The Court should ultimately side with those courts that correctly hold that a defendant cannot waive an unrecognized Sixth Amendment right, and reverse.

Petitioner is not the only defendant who has been or may be subject to the Florida Supreme Court's automatic waiver rule. As noted above, the Florida Supreme Court's rule is currently pending before this Court in *Rodgers*, No. 18-113, and other cases. There are at least 18 other defendants currently on death row in Florida who waived the prior statutory right, and eight of them have been denied *Hurst* relief. Review here could mean the difference between life and death for these defendants.[2]

## IV. Respondent Misconstrues the Significance of Trial Counsel's Advice to Petitioner While Providing No Relevant Defense of the Florida Supreme Court's Failure to Address Petitioner's Uncontested Proffer

As the petition notes, there is a history in this litigation of the state courts and the Florida Attorney General misconstruing the significance of trial counsel's pre-*Hurst* advice that Petitioner waive his statutory right to an advisory jury. Petitioner does not assert here, and has never asserted during this litigation, that his trial attorney's waiver advice constituted ineffective assistance of counsel. *See* Pet. at 8 n.7, 10 n.8, 26 n.12. In fact, the opposite is true. The point Petitioner has consistently made in this litigation is not that his counsel was ineffective for advising him to waive

[2] *See, e.g.*, *Allred v. State*, 186 So. 3d 530, 532 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1057 (Fla. 2016); *Covington v. State*, 228 So. 3d 49, 52 (Fla. 2017); *Davis v. State*, 207 So. 3d 177, 186 (Fla. 2016); *Dessaure v. State*, 55 So. 3d 478, 482 (Fla. 2010); *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016); *Rodgers v. State*, 242 So. 3d 276, 277 (Fla. 2018); *Twilegar v. State*, 175 So. 3d 242, 246 (Fla. 2015).

his statutory right to an advisory jury, but that counsel's advice, while reasonable at the time, was inextricably linked with her experience trying cases like Petitioner's under the capital sentencing scheme held unconstitutional in *Hurst*. As a result, Petitioner's decision to accept that advice should not serve as a basis to preclude him from seeking resentencing with a constitutional jury post-*Hurst*. *Id.* at 26 n.12.

Nevertheless, Respondent again argues to this Court that Petitioner cannot succeed on an ineffectiveness claim. *See* BIO at 22-23. These arguments should not form part of this Court's decision on certiorari because the petition raises no ineffective assistance of counsel claim.

Noticeably absent from Respondent's brief, however, is any relevant defense of the Florida Supreme Court's failure to address Petitioner's uncontested evidentiary proffer in the trial court, which included a declaration from trial counsel attesting to the influence of Florida's unconstitutional sentencing scheme on her advice to Petitioner to waive an advisory jury and his decision to accept that advice. *See* Pet. at 23-26; App. 122a (Declarations of Kimberly Ward and Jeffrey Hutchinson). In applying its automatic waiver rule to Petitioner, the Florida Supreme Court ignored this evidence and Petitioner's request for a hearing so that he could show 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. Respondent ignores the significance of

this evidence and says nothing about the Florida Supreme Court's failure to consider whether an evidentiary hearing on the evidence was appropriate.

## V. Respondent's Alternative Positions That (1) This Court Should Second-Guess the Florida Supreme Court's Permissible Grant of Retroactivity Under *Danforth*, and (2) *Hurst* Can Be "Satisfied" at the Guilt Phase, Provide Further Justification for Certiorari Review

Respondent makes two alternative arguments for the denial of *Hurst* relief in the event that the Florida Supreme Court's automatic waiver rule does not survive constitutional scrutiny. Neither of these arguments are correct, much less persuasive as to the question of whether certiorari should be granted or denied.

First, Respondent argues that, even though the Florida Supreme Court concluded that *Hurst* applies to Petitioner retroactively under state law, *see Hutchinson v. State*, 243 So. 3d 880, 883 (Fla. 2018), federal law would require this Court to overrule that determination and deny relief on retroactivity grounds. This argument is untenable under this Court's decisions regarding the intersection of retroactivity and federalism. Under *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008), state courts may apply their own retroactivity rules so long as those rules provide at least the protections applicable under federal standards. *See Danforth*, 552 U.S. at 266. Respondent explicitly recognizes that the Florida Supreme Court's retroactivity holding in Petitioner's case was permissible under *Danforth*. *See* BIO at 21. Therefore, the only issue for this Court is whether the Florida Supreme Court, having properly held that *Hurst* applies retroactively to Petitioner, violated the United States Constitution by applying its automatic *Hurst* waiver rule.

As a result, there is no retroactivity question before this Court. If this Court grants certiorari review, holds that the Florida Supreme Court's application of its automatic *Hurst* waive rule was unconstitutional, and remands for a proper analysis, the Florida Supreme Court's retroactivity ruling will remain sound on remand.

This Court's decision in *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), does not suggest that this Court should reconsider the Florida Supreme Court's retroactivity ruling with a separate federal retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989). *Summerlin* was a federal habeas corpus case and, unlike in this case, there had been no prior retroactivity ruling regarding *Ring* in the petitioner's favor by the Arizona Supreme Court. In addition, *Lambrix v. Secretary*, 872 F.3d 1170 (11th Cir. 2017), does not suggest that the Florida Supreme Court's retroactivity ruling needs federal reconsideration. In *Lambrix*, the Eleventh Circuit declined to apply *Hurst* retroactively under federal law only after the Florida Supreme Court had held that *Hurst* was *not* retroactive under state law. *Id.* at 1175. Here, the Florida Supreme Court properly held that *Hurst was* retroactive under state law. Contrary to Respondent's suggestion, *Teague* does not swallow *Danforth*.

Finally, Respondent wrongly argues that "there was no *Hurst v. Florida* error in this case at all," because the aggravators found by the trial judge at Petitioner's sentencing included those based on prior convictions stemming from jury findings at the guilt phase, and, according to Respondent, this "Court's decision in *Hurst v. Florida* was limited to a right to jury findings on the aggravating circumstances." BIO at 21-22. *Hurst*'s holding was not nearly as narrow as Respondent describes.

As even the Florida Supreme Court recognized in *Hurst v. State*, this Court held in *Hurst* that the Sixth Amendment requires jury fact-finding as to *each and every* element of a Florida death sentence: (1) the aggravating circumstances that were proven beyond a reasonable doubt; (2) whether the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and (3) whether the aggravating circumstances outweighed the mitigation beyond a reasonable doubt. *See Hurst v. State*, 202 So. 3d at 53-59; *Hurst v. Florida*, 136 S. Ct. at 620-22. Unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact-finding not just as to the aggravators, but also as to *their sufficiency to warrant the death penalty*. Accordingly, the fact that a guilt-phase jury rendered convictions upon which certain aggravators were based is not sufficient. *Hurst* entitles Petitioner to jury fact-finding on the other elements of a death sentence as well. Because the guilt-phase jury did not include a jury finding on the "sufficiency" of the other convictions to justify the death penalty, the requirements of *Hurst* were not satisfied. Even the Florida Supreme Court has rejected the notion *Hurst* can be "satisfied at the guilt phase." *See, e.g.*, *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting the State's contention that prior convictions for other violent felonies "insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*.").

## VI. Conclusion

For the reasons above and in the petition, the Court should grant a writ of certiorari, review the decision of the Florida Supreme Court, and ultimately hold that the Florida Supreme Court's automatic *Hurst* waiver rule is unconstitutional.

Respectfully submitted,

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