No. 18-5641

IN THE

Supreme Court of the United States

PRESSLEY BERNARD ALSTON,

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

ROBERT A. NORGARD
Norgard, Norgard, & Chastang
310 East Main Street
Bartow, Florida 33830
Tallahassee, Florida 32301
(863) 354-0508
norgardlaw@verizon.net

BILLY H. NOLAS
Counsel of Record
SEAN GUNN
KATHERINE A. BLAIR
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org

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I. Respondent Fails to Meaningfully Address Petitioner's Argument that the Constitutionality of the *Silvia* Rule Should be Reviewed and, if *Silvia* is Found Constitutional, it Should be Held Inapplicable to Petitioner's Case

Respondent's brief makes no more than fleeting mention of *State v. Silvia*, 235 So. 3d 349 (Fla. 2018), and that mention is unresponsive to Petitioner's arguments. Rather than address Petitioner's argument that the constitutionality of the *Silvia* rule must be reviewed, or Petitioner's argument that the *Silvia* rule is inapplicable in this case, Respondent simply paraphrases the holding of *Silvia*. Brief in Opposition ("BIO") at 7.

This Court should address Petitioner's unanswered argument that *Silvia* violates the federal constitution because a state post-conviction waiver cannot forever bar a defendant from challenging the federal constitutionality of the statute underlying his conviction or sentence. Granting certiorari review will enable the Court to clarify its precedent regarding whether a state defendant can validly waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver.

In the alternative, this Court should address Petitioner's unanswered argument that his case is factually distinguishable from Mr. Silvia's based on the lack of clarity in Petitioner's waiver as compared to Silvia's and that, unlike Petitioner, Mr. Silvia was aware of the *Ring v. Arizona*, 536 U.S. 584 (2002) issue at the time of his waiver, having raised it in the trial court and on direct appeal.

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 not recognized by the state courts at the time of the purported waiver. *Id.* at 623. Respondent argues that *Halbert* "do[es] not conflict with the ruling below because Alston's waiver applied to the known, well-established right to postconviction litigation." BIO at 12. In Respondent's view, *Halbert* and *Malvo v. Mathena*, 254 F. Supp. 3d 820, 833-34 (E.D. Va. 2017) are irrelevant because they involve "unknown right[s]", whereas Respondent claims Alston's case turns on his waiver of "his known right to postconviction litigation." BIO at 11.

Respondent's view is wrong for three reasons. First, the issue here is not whether Petitioner knew he had a right to postconviction litigation, it is whether he knew he had a right to unanimous jury findings. Second, 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. Third, 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 v. Florida*, 136 S. Ct. 616 (2016) 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. 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's misinterpretation of *Halbert* and *Class* reflects a broader confusion among courts and parties that should be resolved by this Court. State and federal courts have struggled over the meaning of *Halbert* and its application to

different constitutional rights. 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 Can be Waived

Respondent mistakenly insists that certiorari is inappropriate because the Florida Supreme Court's waiver ruling is "not in conflict with this Court's precedent, nor the precedent of any federal appellate court or state court of last resort." BIO at 6, 17. As explained above, and in the petition itself, there is broad uncertainty among state and federal courts over the meaning of *Halbert* and related cases, and its applicability.

Moreover, Respondent overlooks the deepening split among state courts regarding whether not-yet-recognized Sixth Amendment rights, such as those stemming from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), can be waived prior to their recognition.

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 an 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 in Petitioner's case, holding that because Petitioner waived his right to appeal certain post-conviction claims prior to the decision in *Hurst*, he is subject to an automatic waiver rule, and cannot vindicate later-recognized Sixth Amendment rights.

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.

IV. Respondent Incorrectly Asserts that the Florida Supreme Court's *Hurst* Retroactivity Cutoff and Waiver Ruling are Immune From this Court's Review

Contrary to Respondent's suggestion, this Court has jurisdiction to review whether the *Hurst* retroactivity cutoff created by the Florida Supreme Court, and that court's waiver ruling, are consistent with the United States Constitution. In suggesting that the Florida Supreme Court's *Ring*-based retroactivity cutoff and waiver ruling are immune from this Court's review, Respondent misreads the

adequate-and-independent-state-ground doctrine, which is inapplicable here. *See* BIO at 7.

Although "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," *Coleman v. Thompson*, 501 U.S. 722 (1991), this does not mean that all state court rulings that claim a state-law basis are immune from this Court's federal constitutional review. A state court ruling is "independent" only when it has a state-law basis for the denial of a federal constitutional claim that is separate from "the merits of the federal claim." *Foster v. Chatman*, 136 S. Ct. 1737, 1759 (2016); *see also Florida v. Powell*, 559 U.S. 50, 56-59 (2010); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

The federal questions here are (1) whether the Florida Supreme Court's *Ring*-based retroactivity cutoff for *Hurst* claims violates the Eighth and Fourteenth Amendments to the United States Constitution, and (2) whether a pre-*Hurst* waiver of specific state post-conviction claims can prohibit Petitioner from vindicating newly recognized federal rights. The Florida Supreme Court's application of its state-law *Ring*-based cutoff to Petitioner cannot be "independent" from Petitioner's federal Eighth and Fourteenth Amendment claims. Nor can the Florida Supreme Court's waiver ruling be independent from Petitioner's argument that the state court's automatic waiver rule violates the federal Constitution. The state court's rulings are inseparable from the merits of the federal constitutional arguments Petitioner has raised throughout this litigation. *See Foster*, 136 S. Ct. at 1759.

Under Respondent's mistaken interpretation of the adequate-and-independent doctrine, this Court could not have granted certiorari in *Hurst* itself, given the Florida Supreme Court's upholding of Florida's prior capital sentencing scheme as a matter of state law. According to Respondent's logic, so long as any state retroactivity scheme is articulated as a matter of state law, this Court is powerless to consider cutoffs drawn at *any* arbitrary point in time, or even state rules providing retroactivity to defendants of certain races or religions but not others. Further, according to Respondent, a state court waiver made prior to the recognition of a federal right is sufficient to bar any federal review of that new right.

To avoid a confused understanding such as Respondent's, this Court has offered a simple test to determine whether a state ruling rests on adequate and independent state grounds: would this Court's decision on the federal constitutional issue be an advisory opinion, i.e., would the result be that "the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws"? *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985). In the case of the Florida Supreme Court's *Hurst* retroactivity formula and waiver rulings, the answer is "no." If this Court were to hold that the *Ring*-based cutoff violated the Constitution and Petitioner did not validly waive his *Hurst* rights, the Florida Supreme Court surely could not re-impose its prior judgment denying relief based on the *Ring* cutoff and waiver.[1]

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[1] Petitioner also notes that Respondent's adequate-and-independent argument is undercut by the fact that the state retroactivity doctrine, according to the Florida Supreme Court, was adopted from a *federal* retroactivity test. *See Asay v. State*, 210 So. 3d 1, 16 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016) (both citing *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)).

Whether the Florida Supreme Court's retroactivity cutoff exceeds the bounds of the Eighth and Fourteenth Amendments is a federal question controlled by federal law. Additionally, whether the Florida Supreme Court's ruling that a state court waiver can preclude review of a newly established federal constitutional right is a federal question controlled by federal law. This Court should grant a writ of certiorari to review these issues.

V. Respondent's Brief Highlights the Florida Supreme Court's Continued Failure to Meaningfully Address Whether its *Ring*-Based Cutoff Violates the Eighth and Fourteenth Amendments

Respondent reiterates the Florida Supreme Court's original rationale for creating the *Ring*-based retroactivity cutoff as a matter of state law, *see* BIO at 16-17, but fails to identify a case in which the Florida Supreme Court has meaningfully addressed whether its cutoff violates the Eighth and Fourteenth Amendments. Respondent's insistence that *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), addressed Petitioner's federal constitutional arguments, *see* BIO at 18, is wrong because *Asay* and *Mosley*, issued on the same day in 2016, created the state-law *Ring* cutoff in the first place. Neither case discusses the Eighth and Fourteenth Amendment arguments Petitioner has raised.

Contrary to Respondent's suggestion, the Florida Supreme Court's subsequent decision in *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), did no more to address the *Ring* cutoff's federal constitutional implications, as *Hitchcock* said little more than *Asay* and *Mosley* had continuing validity of as a matter of state law.

In Respondent's flawed view, because the Florida Supreme Court provided at least *some* rationale in *Asay* and *Mosley* for creating the *Ring* cutoff, the Eighth and Fourteenth Amendments have not been violated. But as Respondent's own brief shows, the rationale provided by the Florida Supreme Court in *Asay* and *Mosley*—in essence, *Ring* was the point at which Florida's courts *should have known* that Florida's scheme was unconstitutional, *see Mosley*, 209 So. 3d at 1279-81; *Asay*, 210 So.3d at 15-16—was based entirely on a *state* retroactivity analysis. The state court's "should have known" rationale has no basis in federal retroactivity law and does not immunize the *Ring* cutoff from Eighth and Fourteenth Amendment scrutiny.

Respondent is also wrong that Petitioner's arguments have been implicitly rejected by prior decisions upholding *traditional* retroactivity rules. *See* BIO at 19. This argument fails to recognize the unusual nature of the Florida Supreme Court's rule, which grants relief *on collateral review* to some but not others. Traditional retroactivity rules draw a cutoff at the date this Court announced the relevant constitutional ruling. As Petitioner recognized, such lines have been deemed acceptable. Here, however, the Florida Supreme Court has drawn its retroactivity line at a date years earlier than *Hurst*. This unusual and perhaps unprecedented line drawing by a state court warrants this Court's federal constitutional review.

VI. Respondent's Brief Actually Supports, Rather than Diminishes, the Certiorari-Worthiness of the Questions Presented

Respondent's arguments in its brief in opposition demonstrate the certiorari-worthiness of the questions presented. Respondent takes the position that the Eighth and Fourteenth Amendments do not operate where a state court creates a rule of

retroactivity under state law, no matter where the cutoff is drawn and no matter why similarly-situated prisoners are separated into classes. Respondent provides no relevant defense of the Florida Supreme Court's decision to set a retroactivity cutoff that separates collateral-review cases into two categories for different treatment is acceptable under this Court's Eighth and Fourteenth Amendment precedents, or the decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Respondent emphasizes the absence of a conflict between the Florida Supreme Court's retroactivity formula and those of other states and federal appellate courts. *See* BIO at 15, 21. But this is only because no other state or federal court has created a partial retroactivity rule, much less a rule that imposes a cutoff based not on the date of a conviction's finality relative to the implicated constitutional decision of this Court, but rather on the conviction's finality relative to the date this Court rendered some other decision years earlier in a case from another state. Neither party in this case has been able to identify another example of a state-created "partial retroactivity" rule, much less a rule that imposes a cutoff based not on the date of a conviction's finality relative to the actual constitutional decision of this Court, but on the conviction's finality relative to the date this Court rendered some other decision years earlier in a case from another state. Nor is it conceivable that such a rule can exist in the capital setting, where there is a constitutional responsibility to avoid "the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

That is why former jurists of the Florida Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and Florida's trial courts, as well as respected legal academics, have urged this Court to address the important federal constitutional issues regarding the Florida Supreme Court's *Hurst* retroactivity framework. *See*, *e.g.*, Brief for Amicus Curiae, Retired Florida Judges and Jurists, *Branch v. Florida*, 138 S. Ct. 1164 (filed Feb. 15, 2018); *see also* Petition for Writ of Certiorari, *Kelley v. Florida*, Case No. 17-1603 (filed May 25, 2018) (Lawrence Tribe, Counsel of Record). Dissenting current members of the Florida Supreme Court have also explained that Petitioner's arguments have merit. *See* Pet. at 29 (discussing dissenting opinions of Justices Perry, Pariente, and the opinion of Justice Lewis).

If this Court does not act, the Florida Supreme Court's out-of-step framework may result in the unconstitutional execution of Petitioner and other Florida prisoners in the "pre-*Ring*" and "waiver" categories. This Court should grant a writ of certiorari in Petitioner's case to address these issues now.

VII. Conclusion

For the reasons above and in the petition, the Court should grant a writ of certiorari and review the decision of the Florida Supreme Court.

Respectfully submitted,

/s/ Billy H. Nolas

ROBERT A. NORGARD
Norgard, Norgard, & Chastang
310 East Main Street
Bartow, Florida 33830
Tallahassee, Florida 32301
(863) 354-0508
norgardlaw@verizon.net

BILLY H. NOLAS
Counsel of Record
SEAN GUNN
KATHERINE A. BLAIR
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
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