CASE NO. 18-9363

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEE ROBINSON
Petitioner,

v.

STATE OF FLORIDA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

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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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at *Robinson v. State*, 260 So.3d 1011 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on December 20, 2018. This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(g)(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF CASE AND FACTS

On July 26, 1994, Jane Silvia was reported missing by her co-workers when she failed to show up for work. On August 8, 1994, Robinson's mother called the police, and told them that Robinson confessed to her that he killed Ms. Silvia, who was romantically involved with Robinson. Officers responded to Robinson's residence, and observed two large blood stains on the carpet. Officers spoke with a witness who advised them that Robinson confessed to killing someone and disposing

of the body. Robinson was subsequently arrested on unrelated charges. While in custody, Robinson advised police officers that he killed Ms. Silvia and buried her remains. Robinson later escorted police to the location where Ms. Silvia was buried. Robinson was indicted on August 22, 1994 for the first-degree murder of Ms. Silvia.

The following facts are drawn from the Florida Supreme Court's opinion affirming Robinson's direct appeal:

> On January 23, 1995, appellant pled guilty to the first-degree murder of Jane Silvia. Prior to the plea colloquy, appellant's counsel explained that appellant did not wish to proceed to trial, did not wish to present any defense, did not want his attorneys to file any motions on his behalf, and did not want to present any mitigation at the penalty phase. Appellant expressed that he desired to die and was "seeking the death penalty in this case."
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> On March 30, 1995, appellant waived his right to a penalty phase jury and the cause proceeded to sentencing before the trial court. The State called as its sole witness Detective David Griffin, who was the lead homicide investigator in the case and had taken two taped statements from appellant. At the penalty phase, Detective Griffin played the second taped interview in which appellant admitted to killing Jane Silvia. Relying on *Koon v. Dugger,* 619 So. 2d 246 (Fla.1993), the defense proffered mitigating evidence which it had received from a psychologist, Dr. Berland, and appellant's mother. The State also presented brief testimony from the victim's brother who told the court that Robinson "destroyed my family." In addition to the evidence presented at the hearing, the court directed that a presentence investigation be conducted as to the circumstances of the crime and the defendant's background. A presentence report was subsequently completed and filed with the court.
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> On April 12, 1995, the trial court sentenced appellant to death. The court found three aggravating circumstances: (1) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, *see* § 921.141(5)(e), Fla. Stat. (1995); (2) the capital felony was committed

> for pecuniary gain, *see id.* § 921.141(5)(f); and (3) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, *see id.* § 921.141(5)(i). The court concluded that the aggravating circumstances could not be outweighed by any potential mitigating circumstances and sentenced appellant to death.

Robinson v. State, 684 So. 2d 175, 176 (Fla. 1996).

On direct appeal,[1] the Florida Supreme Court vacated Robinson's death sentence and ordered a new penalty phase proceeding, finding that the trial judge was required to weigh and consider mitigating evidence even though Mr. Robinson had requested the death penalty and asked that no mitigating factors be considered. *Id.* at 180. The remand opinion also specified that the new penalty phase proceeding was to be held "before the judge alone . . . ." *Id.* Upon remand, Robinson attempted to withdraw his plea, but counsel's oral motion to this effect was denied. After a second penalty phase hearing[2], the trial court again imposed the death penalty on

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[1] These claims were: (1) the trial court erred by not considering valid mitigation in violation of *Farr v. State,* 621 So. 2d 1368 (Fla. 1993); (2) the trial court erred in finding that the pecuniary gain aggravator was proven beyond a reasonable doubt; (3) the trial court erred in finding that the avoid-arrest aggravator was proven beyond a reasonable doubt; (4) the trial court erred in finding that the cold, calculated, and premeditated aggravator was proven beyond a reasonable doubt; and (5) this Court should recede from *Hamblen v. State,* 527 So. 2d 800 (Fla. 1988).

[2] The State presented the same testimony during the second penalty phase as it had in the first, and the defense presented extensive testimony regarding Robinson's mental health, chronic drug use, and difficult childhood. *Robinson v. State* (*Robinson II*), 761 So. 2d 269, 271-72 (Fla. 1999). At no point did Robinson attempt to withdraw his prior waiver of a penalty-phase jury; indeed, the record reflects that he told the trial court he was "really comfortable with the fact that the

August 15, 1997. On his second direct appeal, Robinson argued that the trial court erred in denying his counsel's oral motion to withdraw his guilty plea. The Florida Supreme Court affirmed, holding:

> In order to show cause why the plea should be withdrawn, mere allegations are not enough; the defense must offer proof that the plea was not voluntarily and intelligently entered. *See Gore v. State,* 552 So. 2d 1185, 1186 (Fla. 5th DCA 1989); *Brown v. State,* 428 So. 2d 369, 371 (Fla. 5th DCA 1983) ("[M]ere naked allegations contained in a motion to withdraw, unsupported by any proof, can never constitute a basis for withdrawal of a plea."). Further, on appeal from the denial of the motion to withdraw the plea, the burden rests on the defendant to show the trial court abused its discretion in denying the defendant's motion. *See Hunt v. State,* 613 So. 2d 893, 896 (Fla.1992); *Porter v. State,* 564 So. 2d 1060, 1063 (Fla.1990) (quoting *Lopez v. State,* 536 So. 2d 226, 228 (Fla.1988)).
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> At the new penalty phase proceeding, Robinson's counsel orally moved to withdraw Robinson's guilty plea on the ground that "Robinson was not able to form an intelligent waiver of his rights." No further explanation was offered as to why Robinson could not form an intelligent waiver. The trial judge denied the motion, stating, "I can remember the plea, where he told us why he did what he did and he appeared very confident to me." Robinson did not move for rehearing or attempt to further argue to the court reasons why his initial plea was not intelligently made.
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> We find no error in the trial court's denial of Robinson's motion. Indeed, the record conclusively refutes Robinson's claim that he was unable to form an intelligent waiver of his right to a trial.

Robinson v. State, 761 So. 2d 269, (Fla. 1999), *cert. denied*, 529 U.S. 1057 (2000).

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state supreme court remanded [the case] back without a jury again the second time." The trial court found the same three aggravating factors as it had during the first penalty phase. *Id.* at 272-73.

On October 3, 2001, Robinson filed a motion for postconviction relief, raising seventeen claims, which was denied by the trial court after an evidentiary hearing. *Robinson v. State* (*Robinson III*), 913 So. 2d 514, 518 (Fla. 2005). Of these claims, Robinson argued his trial counsel was ineffective for failing to properly inform him of his right to a jury trial and for failing to assert Robinson's desire to have a jury determine his sentence. *Id.* at 523. The postconviction court denied the motion, and the Florida Supreme Court affirmed that denial. *Id.* at 517. The Florida Supreme Court explained that during the second penalty phase Robinson's trial counsel was "following this Court's express mandate" that resentencing would proceed without a jury. *Id.* at 523; *see Robinson I*, 684 So. 2d at 180 (remanding for a second penalty phase "before the judge alone"). The Florida Supreme Court also held this claim was procedurally barred because it could have been raised either in a motion for rehearing in *Robinson I* or on direct appeal from the second penalty-phase hearing in which the circuit court re-imposed a sentence of death, but it was not. *Robinson III*, 913 So. 2d at 523 n.8.

Robinson III also addressed a petition for writ of habeas corpus Robinson filed in the Florida Supreme Court while his motion for postconviction relief was pending. In his petition, Robinson argued that the Florida Supreme Court erred in *Robinson I* by remanding for a new penalty phase before the trial judge alone, that appellate counsel was ineffective for failing to raise that issue with the Court, and that his

death sentence was unconstitutional under *Ring v. Arizona,* 536 U.S. 584 (2002). *Robinson III*, 913 So. 2d at 528. The Florida Supreme denied the petition for writ of habeas corpus. *Id.* In denying the petition, the Florida Supreme Court stated:

> Robinson claims that this Court erred in precluding Robinson from seeking a penalty phase jury. We reject this claim on the merits. Further, however, this claim is procedurally barred because it was also raised in the 3.850 proceeding. *See Porter v. Crosby,* 840 So. 2d 981, 984 (Fla. 2003) ("[C]laims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition.").
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> Robinson also claims that appellate counsel was ineffective for failing to raise this issue on direct appeal. However, appellate counsel cannot be deemed ineffective for failing to raise a meritless issue. *See Johnson v. Singletary,* 695 So. 2d 263, 266 (Fla. 1996). In light of this Court's decision that the new penalty phase was to be before the judge alone, appellate counsel had no reason to challenge whether this Court had considered the nature of the proceedings to be conducted on remand. *Cf. Spencer v. State,* 842 So. 2d 52, 70 (Fla. 2003) (denying habeas claim that this Court's order on remand was ambiguous as to whether a new jury should be impaneled where remand specifically directed "reconsideration of the death sentence *by the judge*").
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> Robinson argues further that he is entitled to relief under *Ring.* However, this claim is foreclosed because we have previously determined that Robinson lawfully waived the right to a penalty phase jury. *See Dessaure v. State,* 891 So. 2d 455, 471-72 (Fla. 2004).

Robinson v. State, 913 So. 2d 514, 528 (Fla. 2005).

Following his unsuccessful state court litigation, Robinson filed a federal writ of habeas corpus to the United States Circuit Court for the Middle District of Florida. *Robinson v. Secretary Department of Corrections*, District Court Case No. 6:05-cv-

01808-JA-KRS. The District Court denied his habeas petition on November 26, 2008. He filed a timely Notice of Appeal and Certificate of Appealability before the United States Court of Appeals for the Eleventh Circuit on May 6, 2009, which was subsequently denied.

Robinson attempted to resurrect his claims after this Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016) and the Florida Supreme Court issued *Hurst v. State*, 202 So.3d 40 (Fla. 2016) and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016). Robinson filed a successive motion for post-conviction relief seeking to set aside his death sentence and receive a new penalty phase, or, in the alternative, a life sentence. After the postconviction court denied relief, the Florida Supreme Court ordered the parties to files briefs "addressing why the lower court's order should not be affirmed based on this Court's precedent in *Mullens v. State*, 197 So.3d 16 (Fla. 2016), *cert. denied*, 137 S. Ct. 672 (2017). The Florida Supreme Court denied *Hurst* relief on September 20, 2018. *Robinson v. State*, 260 So.3d 1011 (Fla. 2018). Robinson filed the instant petition on May 17, 2019. This is the State's brief in opposition.

REASONS FOR DENYING THE WRIT

THERE IS NO BASIS FOR CERTIORARI REVIEW OF THE FLORIDA SUPREME COURT'S RULING THAT A VALID WAIVER OF A PENALTY PHASE JURY IS ALSO AN EFFECTIVE WAIVER OF ANY RIGHT TO RELIEF UNDER *HURST V. STATE,* 202 So.3d 40 (Fla. 2016), BECAUSE THERE IS NO CONFLICT BETWEEN STATE COURTS OF LAST RESORT OR UNITED STATES COURTS OF APPEAL NOR DOES THE CASE PRESENT AN IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW.

Petitioner requests that this Court review the Florida Supreme Court's opinion affirming his death sentence, arguing that he is entitled to relief under this Court's decision in *Hurst v. Florida*, 135 S. Ct. 1531 (2015), even though he waived his right to a penalty phase jury. Petitioner contends that his waiver was not knowing, voluntary, and intelligent because at the time of his waiver, the Sixth Amendment right to unanimous jury factfinding on aggravating circumstances did not exist in Florida and therefore he cannot have waived such "nonexistent" right. The Petition further alleges that the Florida Supreme Court's refusal to retroactively apply *Hurst* to pre-*Ring* cases is in violation of the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection.

Robinson does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Robinson cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in

Robinson v. State, 260 So.3d 1011 (Fla. 2018), in which the court determined that Robinson was not entitled to relief under *Hurst v. State* because (1) his valid waiver of a penalty phase jury also served as an effective waiver of any right to relief under *Hurst v. State*, and (2) under Florida Law *Hurst* was not retroactive to his death sentence which became final more than two years before *Ring* was decided. Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. *Rockford Life Insurance Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 184, n.3 (1987). No conflict or unsettled question of federal law is presented in the instant petition. The petition for writ of certiorari should be denied.

I. Petitioner waived his right to a penalty phase jury.

A. Petitioner's claim that he never waived his right to a penalty jury was procedurally barred from review in state court.

Petitioner appears to seek review of the Florida Supreme Court's rejection of his claim that he never waived his right to a penalty jury. However, the Florida Supreme Court expressly found this claim untimely and procedurally barred from review.[3] *Robinson v. State*, 260 So.3d 1011 (Fla. 2018). ("Even if *Hurst* were to

[3] This untimely and procedurally barred claim is also meritless. The error found on direct appeal by the Florida Supreme Court dealt with the trial court's error in failing to weigh and consider mitigating evidence even though Robinson had requested the death penalty and asked that no mitigating factors be considered. The case was remanded "to the trial court to conduct a new penalty phase hearing before the judge alone". Consequently, the judge reweighed all of the aggravation and mitigation.

apply to Robinson's sentence, the present claim regarding his right to a penalty-phase jury is procedurally barred because it "could and should have been raised on direct appeal."). To the extent Petitioner seeks review of that decision here, he is asking this Court to accept his case to review the Florida Supreme Court's application of Florida's procedural and time limits on post-conviction applications. This is no federal constitutional violation; certiorari review by this Court would involve nothing more than an examination of Florida's application of its own state law with regard to procedural bar.

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on

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Robinson, 684 So. 2d at 180. Accordingly, it was not error for the Florida Supreme Court to order a remand for reweighing and resentencing by the trial court. *See Cf. Spencer v. State,* 842 So. 2d 52, 70 (Fla. 2003) (denying habeas claim that this Court's order on remand was ambiguous as to whether a new jury should be impaneled where remand specifically directed "reconsideration of the death sentence *by the judge*").

separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010). Accordingly, certiorari should be denied.

B. The Florida Supreme Court properly applied *Mullens v. State,* 197 So.3d 16 (Fla. 2016) to deny Robinson's *Hurst* claim.

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*, 137 S. Ct. 672 (2017), 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 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 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 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., Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State,* 211 So.3d 1, n. 2 (Fla. 2016); *Davis v. State*, 207 So.3d 177, 212 (Fla. 2016); *Covington v. State*, 228 So.3d 49, 69 (Fla. 2017), *cert. denied*, 138

S. Ct. 1294 (2018); *Twilegar v. State*, 228 So.3d 550 (Fla. 2017), *cert. denied*, 138 S. Ct. 2578 (2018); *Quince v. State*, 233 So.3d 1017 (Fla. 2018), *cert. denied*, 139 S. Ct. 165 (2018); *Rodgers v. State*, 242 So.3d 276 (Fla. 2018), *cert. denied*, 139 S. Ct. 592 (2018). This Court has denied petitions for writ of certiorari in all of these cases. Review should be denied in this case as well.

II. The Florida Supreme Court's ruling that a valid waiver of a penalty phase jury is also an effective waiver of any right to relief under *Hurst v. State* does not violate the United States Constitution.

No conflict or unsettled question of federal law is presented in Robinson's petition. Instead, he seeks certiorari review of the Florida Supreme Court's fact-based determination regarding the validity of his knowing and voluntary waiver of a penalty phase jury. He asserts that his waiver was invalid because Florida has made procedural changes that did not exist at the time of his waiver. Specifically, Robinson argues that his waiver was not knowing, voluntary, and intelligent because at the time of his waiver, the Sixth Amendment right to unanimous jury factfinding on aggravating circumstances did not exist in Florida and therefore he cannot have waived such "nonexistent" right. The Florida Supreme Court has determined, however, that the changes in question do not apply to a defendant who waived his right to jury fact-finding, a determination that does not rise to the level of a federal constitutional violation.

A. A defendant may not claim a waiver is "unknowing" based on future changes in the law under the Florida Supreme Court's precedent.

1. Robinson waived all jury involvement—constitutionally mandated or not—in determining his penalty.

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.

A defendant who waives a jury trial has waived his Sixth Amendment right to a jury trial, which is the basis for *Hurst v. Florida* and *Hurst II* in the first place. *Cf. Shepard v. United States*, 544 U.S. 13, 16 (2005) (noting that sentencing a defendant based on facts that the defendant assented to during the plea colloquy does not

violate *Apprendi*).

2. Robinson knowingly, voluntarily, and intelligently waived a penalty phase jury.

Despite his argument to the contrary, the Florida Supreme Court found Robinson knowingly, voluntarily, and intelligently waived a penalty phase jury and Florida's own precedent precluded a grant of relief. *Twilegar v. State*, 228 So.3d 550 (Fla. 2017). *See also Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016), *cert. denied*, 137 S. Ct. 672 (2017). In 1995, Robinson pled guilty to the first-degree murder of Jane Silvia. During the plea colloquy, Robinson specifically expressed his desire to "seek the death penalty in this case" and defense counsel explained to the court that Robinson did not want to present any mitigating evidence in his defense. Robinson waived his right to a jury and the cause proceeded to sentencing. On April 12, 1995, the trial court sentenced appellant to death. *Robinson v. State*, 761 So. 2d 269, 270 (Fla. 1999). The record reflects that Robinson's plea was only accepted after an extensive inquiry. At the plea colloquy, the trial court asked Robinson whether he intended to plead guilty to first-degree murder and informed Robinson that the only possible sentences upon conviction for first-degree murder were death and life in prison. The trial court then questioned Robinson extensively about his background and the factual circumstances of the murder. Robinson explained to the trial court that he would rather be punished by death than sentenced to life in prison. Further, defense counsel notified the court that Robinson had been examined by medical

experts and it was their opinion that Robinson was competent to proceed. In addition, both defense counsel and the State questioned Robinson to make sure that he understood that defense counsel had investigated mitigating evidence and that counsel was prepared to present such evidence on his behalf. Robinson stated that he understood but that he did not want to present any mitigating evidence. Finally, the state attorney told Robinson that he intended to seek the death penalty in this case. The record thus indicates that Robinson voluntarily and intelligently waived his right to a trial. *Robinson v. State*, 761 So. 2d 269, 274–75 (Fla. 1999).

3. The right announced in *Hurst* was not a new right that did not previously exist.

Robinson's cites to *Halbert v. Michigan*, 545 U.S. 605 (2005) in support of his proposition that at the time he waived the penalty phase jury, he had no recognized Sixth Amendment right to binding jury findings that he could elect to forego. The decision in *Halbert* is inapplicable to his case. *Halbert* is distinguishable because it involved the prohibition of the appointment of counsel to indigent defendants who pleaded guilty or no contendere. This Court noted that when Halbert entered his plea, he had no recognized right to appointed counsel that he could elect to forgo. *Id.* at 623. The waiver in *Halbert* was an implicit waiver of appellate counsel that flowed from his plea rather than an explicit waiver to have a jury participate in sentencing as is the case with Robinson, who emphatically did not

want a jury penalty phase. Furthermore, Halbert was not informed that his plea would result in a complete denial of appointed appellate counsel whereas Robinson was told by the trial court that his waiver would prevent him from appealing the issue. Robinson was fully aware of what he was doing when he knowingly waived the right to have a jury take part in any of the sentencing procedure. The *Hurst* decision does not change the fact that Robinson did not want a jury present for the penalty phase.

Moreover, as the dissent in *Halbert* points out, this Court's cryptic statement implying that rights that are "not recognized" cannot be waived "cannot possibly mean that only rights that have been explicitly and uniformly recognized by statute or case law may be waived." *Halbert*, 545 U.S. at 640 (Thomas, J. dissenting). Instead, defendants can and do waive rights whose existence is unsettled. *Id.*

Robinson's argument is premised on the notion that the "right" announced in *Hurst* is one that did not previously exist, as in *Halbert*. However, that is not the case, because Robinson always possessed the right to have a jury render an advisory recommendation as to what the appropriate sentence should be in his case. *See* § 921.141(2), Fla. Stat. (1980) (requiring the jury to render an advisory sentence based upon whether sufficient aggravating circumstances exist to justify imposition of the death penalty). Thus, the right announced in *Hurst* was not a new right that did not previously exist. Instead, *Hurst* reflected a mere change in procedure, and held that

a defendant could not be sentenced to death based upon a judge's factfinding alone. *See Hurst*, 136 S. Ct. at 624 (holding Florida's death sentencing scheme unconstitutional, because it allowed the judge alone to find the existence of an aggravating circumstance).

B. The Florida Supreme Court's decision comports with this Court's precedents.

1. Robinson's waiver is a sufficient bar to *Hurst* relief, regardless of any future changes in the law, under both the Florida Supreme Court and this Court's precedent.

If this Court were to accept review, the resolution of the case would turn upon whether the state court correctly interpreted the facts surrounding Robinson's waiver. In other words, this case is strongly fact-based and does not implicate any broad questions of constitutional law that have not already been resolved long ago. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 309 (2004) (Sixth Amendment right to jury fact finding is waivable). Indeed, the question raised by Robinson may only be resolved by assessing the correctness of the trial court's factual findings. Accordingly, certiorari review is inappropriate here.

2. Subsequent developments in the law, that modify or expand an established right, do not render prior waivers involuntary.

Even if for arguments sake, it was believed that Robinson acted only because he did not know he was entitled to unanimity, this does not mandate a conclusion that his waiver was invalid. Subsequent changes in the law do not render a prior

waiver invalid. As this Court has explained, a defendant who waives a proceeding or right does so under the current law, and those waivers remain valid regardless of later developments in the law.

A defendant who voluntarily waives his Sixth Amendment right to jury trial is bound by his choice, even where his decision was made in reliance on a procedural rule later found to be unconstitutional. In *Brady v. United States*, 397 U.S. 742 (1970) the defendant was charged under a federal law (18 U.S.C. § 1201(a)) that authorized a death sentence if the jury recommended it. Because § 1201(a) gave the judge no authority to impose death in the absence of a jury's specific findings, it naturally encouraged defendants to waive jury trial, and Brady did exactly that- he waived his Sixth Amendment right to a jury and entered a plea. One year later, after this Court struck down § 1201(a) as unconstitutional, Brady sought to withdraw his plea and argued that his waiver could not have been voluntary under the circumstances. This Court disagreed—the record showed that Brady might have had other, unrelated reasons for entering a waiver, and Brady's voluntary waiver of a constitutional right was consistent with the law in effect at the time. Such a plea, "does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Id.* at 757.

Similarly, in *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), the defendant argued that his plea was involuntary when a new decision regarding

coerced confessions was issued by this Court. This Court rejected the argument that subsequent changes in the law rendered an earlier plea involuntary and 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 cases been the law at the time of the plea, "he is bound by his plea." *Id.* This 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. *Id. See also 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 regarding relevant punishments").

A defendant may not claim a waiver is "unknowing" based on future changes in the law under the Florida Supreme Court's precedent. *Mullens*, 197 So.3d at 16; *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (holding that the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury). This Court has rejected it as well. *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970). The

validity of a waiver is not dependent on subsequent changes in the law.[4]

Opposing counsel's reliance on *Class v. United States*, 138 S. Ct. 798 (2018) is also misplaced. This Court in *Class* held that a defendant's negotiated guilty pleas 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 or implicitly waived his right to appeal his constitutional claims. *Id.* at 807. But, here, Robinson explicitly waived the right to a penalty phase jury after an on-the-record colloquy regarding that exact right. The

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[4] 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.3d207, 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).

waiver in this case was an explicit waiver of that particular right. *Class* does not apply to cases involving explicit waivers of particular rights.

3. No conflict or unsettled question of federal law is presented in the instant petition.

The waiver of the penalty phase jury remains valid in the wake of *Hurst* and consequently, Robinson's waiver was not rendered involuntary due to the subsequent decision in *Hurst.* Here, Robinson waived the right to a sentencing jury and requested that the trial judge decide the appropriate sentence in his case. Like the situation in *Mullens and Rodgers,* Robinson should not be able to subvert the right to jury factfinding by knowingly waiving that right and then, *twenty-one years* later, complain that subsequent developments in the law have undermined his sentence. Robinson's explicit waiver of a penalty phase jury is a waiver of his pre-trial *Ring* (and, by extension, *Hurst*) claim.

Robinson does not provide any compelling reason for this Court to review his case. U.S. Sup. Ct. R. 10. Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. *Rockford Life Insurance Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 184, n.3 (1987). He challenges only the application of this Court's well-established principles to the Florida Supreme Court's decision. As Robinson does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10, this Court should deny the petition.

III. The Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which relied on state law to provide that the *Hurst* cases are not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, does not violate the Eight Amendment's Prohibition against arbitrary and capricious capital punishment and the Fourteenth Amendment's guarantee of Equal Protection.

A. Florida's partial retroactive application of *Hurst v. State* is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

Assuming for a moment that Robinson could overcome the waiver of his penalty phase jury, his underlying claim for the retroactivity of *Hurst* to his case is meritless. Florida's retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari in this case. There is no conflict between the Florida Supreme Court's decision and this Court's Sixth, Eighth or Fourteenth Amendment jurisprudence. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate or state supreme court. Certiorari review should be denied.

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond

a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So.3d at 57. This Court did not rule Florida's death penalty to be unconstitutional, but simply mandated that imposition of the sentence be supported by jury fact-finding. In response, Florida adopted **new procedural requirements** that, among other things, mandated that all factual findings necessary to impose death be found by a unanimous jury. The Florida Supreme Court's interpretation of *Hurst v. Florida* in *Hurst v. State* greatly expanded that procedural rule. Nevertheless, it remained a procedural rule and not a "definition" of Florida's death penalty statute. However, Florida was not required to grant retroactive application of *Hurst v. Florida* to all death sentenced murderers regardless of the date their convictions and sentences became final.

In *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See also Mosley v. State*, 209 So.3d 1248, 1272-73 (Fla. 2016) (holding that, as a matter of state law, *Hurst v. State* does apply retroactively to defendants whose sentences were not yet final when this Court issued *Ring*). Robinson's sentence became final nearly twenty years before

Ring was decided. That alone denies him any *Hurst* relief. Moreover, the Florida Supreme Court subsequently held that the new procedure did not apply to all capital cases; specifically, it excluded them from applying to any capital defendant who, like Robinson, waived his penalty phase jury. *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016). For these two reasons, Robinson foregoes any entitlement to a *Hurst* claim.

B. State courts may fashion their own retroactivity tests, including partial retroactivity tests.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1067 (1980). *See Asay*, 210 So.3d at 15 (noting that Florida's *Witt* analysis for retroactivity provides "more expansive retroactivity standards" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989) (emphasis in original; citation omitted).

Despite the Florida Supreme Court's clear mandate, Robinson argues that the Florida Supreme Court's partial retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* violates the Eighth Amendment and the Equal Protection

Clause of the Fourteenth Amendment. To the contrary, Floridas' decision to grant limited retroactivity to its new capital procedural statutes is wholly consistent with Federal constitutional law. *Schiro v. Summerlin*, 542 U.S. 348 (2004).

New rules of law such as the rule announced in *Hurst v. Florida* do not usually apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (explaining the normal rule of nonretroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not retroactive). When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. This Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 498 U.S. 288, 310-13 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002);

Butler v. McKellar, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990)). Moreover, certain matters are not retroactive at all.

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Under this "pipeline" concept, only those cases still pending direct review or not yet final would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. Under *Teague,* if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in *Teague* applies. Again, finality is the critical date-based test under *Teague.*

What is more, if partial retroactivity violated the United States Constitution or this Court's retroactivity jurisprudence, this Court would not have given partial retroactive effect to a change in the penal law in *Dorsey v. United States*, 567 U.S. 260 (2012). In *Dorsey*, this Court held that the Fair Sentencing Act was partially retroactive in that it would apply to those offenders who committed applicable offenses prior to the effective date of the act, but who were sentenced after that date. *Id.* at 273. *See United States v. Abney*, 812 F.3d 1079, 1097-98 (D.C. Cir. 2016) (noting that prior to the decision in *Dorsey*, this Court had not held a change in a

criminal penalty to be partially retroactive).

C. The Florida Supreme Court's retroactivity decision does not exceed Eighth and Fourteenth Amendment limits.

1. There is nothing in the Florida Supreme Court's decision that shows an arbitrariness or capriciousness in violation of the Eighth Amendment in fashioning its retroactivity decision.

Robinson additionally claims that he should receive *Hurst* relief in the name of fundamental fairness and due process. A violation of the Eighth Amendment as it relates to death sentencing schemes requires a showing of arbitrariness or capriciousness in the sentencing process. *Jones v. United States*, 527 U.S. 373, 381 (1999). In *Hurst v. State*, the Florida Supreme Court explained that the "requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly and expresses the values of the community as they currently relate to imposition of death as a penalty." *Hurst*, 202 So. 3d at 60. Again, this is an alteration in the procedure necessary to obtain a death sentence. Neither the range of conduct nor the class of persons has been altered. Florida's death penalty sentencing scheme still applies to the same persons engaging in the same conduct.

Ultimately, what Robinson appears to suggest is that any new development in the law should be applied to all cases. However, that is untenable. Inherent in the concept of non-retroactivity is that some defendants will get the benefit of a new development, while other defendants will not, depending on a date. Drawing a line

between newer cases that will receive a benefit and older, final cases that will not receive a benefit is part of the landscape of retroactivity analysis. If it were not this way, cases would never be resolved. With every new development in the law, capital defendants would get a new trial or a new penalty phase. Given that litigation in capital cases can span decades, there would never be finality. This is not arbitrary and capricious in violation of the Eighth Amendment; it is simply a fact inherent in any retroactivity analysis.

Robinson's Equal Protection argument is equally unconvincing. It is based on the fatally flawed contention that the Florida Supreme Court's ruling discriminates between similarly situated individuals. The law is well-settled that the Equal Protection Clause prohibits disparity of treatment by a State between classes of individuals whose situations are debatably the same. *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008). "Of course, most laws differentiate in some fashion between classes of persons." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Thus, "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.*

However, Robinson is not similarly situated with the defendants who are entitled to *Hurst* relief, because those defendants were sentenced to death under an unconstitutional sentencing scheme. At the time Robinson's sentence became final,

a defendant could, consistent with the Sixth Amendment, be sentenced to death based on a judge's factfinding alone. Hence, contrary to his proclamation, he is not similarly situated with "post-*Ring*" defendants, and thus his Equal Protection claim must fail. *See also Lambrix v. Sec'y, Florida Dep't. of Corr.*, 872 F.3d 1170 (11th Cir. 2017) (rejecting Lambrix's argument that this Court's retroactivity decisions violate the Equal Protection Clause, because Lambrix, whose death sentence was final prior to *Ring*, was not similarly situated with the defendants who are entitled to *Hurst* relief.) What's more, unlike "post-Ring" defendant's, Robinson waived his right to a penalty phase jury, precluding any *Hurst* relief.

Moreover, a criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). A "'[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 298. Clearly, Robinson has failed to demonstrate how he himself is being treated differently from similarly situated defendants. See *Asay*, 210 So.3d at 28 ("Asay does not demonstrate how he was treated differently from similarly situated defendants.")

2. The Florida court's partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants in general, and Robinson in particular, relief under *Hurst v. State*.

The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Since *Asay*, the Florida Supreme Court has continued to apply *Hurst* retroactively to all post-*Ring* cases and declined to apply *Hurst* retroactively to all pre-*Ring* cases. It should also be noted that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Jones v. State,* 234 So.3d 545 (Fla. 2018), *cert. denied,* 138 S.Ct. 2686 (2018); *Cole v. State,* 234 So.3d 644 (Fla. 2018), *cert. denied,* 138 S.Ct. 2657 (2018); *Branch v. State,* 234 So.3d 548 (Fla. 2018), *cert. denied,* 138 S. Ct. 1164 (2018); *Zack v. State,* 228 So.3d 41 (Fla. 2017), *cert. denied,* 138 S.Ct. 2653 (2018); *Kaczmar v. State*, 228 So.3d 1 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018); *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So.3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So.3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017).

There is no conflict between the Florida Supreme Court's decision and this

Court's Sixth, Eighth or Fourteenth Amendment jurisprudence. Florida's decision to limit retroactive application to its new procedural rules is consistent with this Court's precedent. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate or state supreme court. Irrespective of retroactivity, Robinson's waiver of the right to a jury penalty phase proceeding presents a bar to *Hurst* relief. Certiorari review should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully request that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

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