No. 19-8845

In the

Supreme Court of the United States

CHARLES GROVER BRANT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Florida law bars a prisoner from relitigating an issue that was decided in one of his prior state postconviction cases. In Petitioner's first state postconviction case, he argued that his waiver of a penalty-phase jury does not preclude him from obtaining relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016). But the Florida Supreme Court found the waiver dispositive and denied relief. In this successive state postconviction case, Petitioner again seeks *Hurst* relief, but the Florida Supreme Court held that his claim is procedurally barred.

The question presented is:

Whether the Florida Supreme Court erred in concluding that Petitioner's request for *Hurst* relief is barred under state law.

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STATEMENT

1. When Petitioner Charles Brant was sentenced to death in 2007, a defendant convicted of a capital crime in Florida could be sentenced to death only if the trial court found at least one statutorily enumerated aggravating circumstance and determined that the defendant's aggravating circumstances outweighed his mitigating circumstances. *See Spaziano v. Florida*, 468 U.S. 447, 451-52 & n.4 (1984), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016). A sentencing jury would render an advisory verdict—which the trial court would "accord deference"—but the court would make the ultimate sentencing determination. *See Sochor v. Florida*, 504 U.S. 527, 533 (1992) ("[Under Florida's regime,] the trial judge does not render wholly independent judgment, but must accord deference to the jury's recommendation."); *Spaziano*, 468 U.S. at 451-52.

This Court upheld that regime as constitutional multiple times, including under the Sixth Amendment. *See Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989). Florida's hybrid regime, the Court concluded, was not just constitutionally sound—it afforded capital defendants the benefits flowing from jury involvement while still retaining the protections associated with judicial sentencing. *See, e.g.*, *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality op.) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition . . . of capital punishment, since a trial judge is more experienced in sentencing than a jury,

and therefore is better able to impose a sentence similar to those imposed in analogous cases.").

Later, in *Apprendi v. New Jersey*, this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," even if a state characterizes the facts as "sentencing factors." 530 U.S. 466, 490-91 (2000) (quotation marks omitted). *Ring v. Arizona* extended *Apprendi* to findings on the "aggravating factors" necessary to impose a death sentence under Arizona's capital sentencing scheme, holding that "the Sixth Amendment requires that [the factors] be found by a jury" because they "operate as 'the functional equivalent of an element of a greater offense.'" 536 U.S. 584, 609 (2002) (quoting *Apprendi*, 530 U.S. at 494 n.19).

Neither *Apprendi* nor *Ring* overruled *Hildwin*, but in 2016, this Court granted certiorari in *Hurst* "to resolve whether Florida's capital sentencing scheme violate[d] the Sixth Amendment in light of *Ring*." 136 S. Ct. at 621. The Court answered that question affirmatively, concluding that the scheme was unconstitutional because it did not require a jury to find a defendant's aggravating circumstances. *Id.* at 621-22. The Court therefore overruled its pre-*Ring* decisions upholding Florida's scheme "to the extent they allow[ed] a sentencing judge to find an aggravating circumstance . . . that is necessary for imposition of the death penalty." *Id.* at 624.

2. In the years since *Ring* and *Hurst*, this Court has held that neither decision applies retroactively. *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) ("*Ring* and *Hurst* do not apply retroactively on collateral review."); *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

Under Florida law, however, *Hurst* applies retroactively in some cases because Florida's retroactivity test uses "completely different factors" than the federal retroactivity test—the "much narrower *Teague* [*v. Lane*, 489 U.S. 288 (1989)] test." *See Asay v. State*, 210 So. 3d 1, 15 (Fla. 2016). In *Mosley v. State*, the Florida Supreme Court held that under Florida's test, *Hurst* should generally apply to prisoners whose sentences became final after *Ring*. *See* 209 So. 3d 1248, 1274 (Fla. 2016). "Applying *Hurst* retroactively" to those prisoners, the court concluded, "supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies" Florida's test. *Id.* at 1283.

Yet *Hurst* does not apply to all such prisoners under Florida law; the Florida Supreme Court held in *Mullens v. State* that *Hurst* does not apply to prisoners who waived their right to a penalty-phase jury. *See* 197 So. 3d 16, 39-40 (Fla. 2016).

3. Petitioner's death sentence became final in 2009, before *Hurst* but after *Ring*. *See Brant v. State*, 21 So. 3d 1276, 1277 (Fla. 2009). At his trial, he waived his right to a penalty-phase jury. *Id.*

In 2004, Petitioner raped and strangled his neighbor, Sara Radfar. *Id.*; Sentencing Order at 5-6 (included in App. G as Ex. 2). He went to her home and asked her if he could take pictures of her tile floor for his portfolio (he had installed the floor). *Brant*, 21 So. 3d at 1278. After she let him in, he grabbed her, dragged her into a bedroom, and raped her while she screamed for help. *See id.*; Sentencing Order at 5, 26-27. He stuffed a sock in her mouth to silence her and then choked and suffocated her. *Brant*, 21 So. 3d at 1278. When Petitioner thought she was dead, he looked around her house. *Id.* Radfar regained consciousness at some point and ran to the front door, but Petitioner dragged her back into the bedroom and again choked and suffocated her. *Id.* She kept breathing, though, so Petitioner took her to the bathroom and threw her in the tub, where he strangled her with a stocking, a dog leash, and an electrical cord. *Id.* Afterward, he left her dead body in the tub, cleaned up her home, changed his clothes, and then drove her car around. *See id.*

Petitioner eventually confessed to police and pleaded guilty to first-degree murder, sexual battery, kidnapping, grand theft of a motor vehicle, and burglary with assault or battery. *Id.* at 1277; *Brant v. State*, 197 So. 3d 1051, 1057 (Fla. 2016). By pleading guilty, he bypassed a guilt-phase proceeding, which would have scrutinized the details of his crimes. *See Brant*, 21 So. 3d at 1277.

At the start of his penalty phase, Petitioner wanted to proceed before a jury, so the parties

conducted jury selection. Tr. 1652.[1] On the second day of selection, a few jurors commented on Petitioner's guilt and the heinousness of his crimes; others noted that they agreed with the comments; and one remarked that he would "put [Petitioner] to death," which elicited laughter from several other jurors. *Id.* at 1803, 1816-17, 1830-32, 1952, 1954. At that point, Petitioner indicated that he was unsure whether he still wanted a jury trial, and he asked the court to give him a day to decide whether "to go jury or nonjury." *Id.* at 1954-62. In the meantime, Petitioner asked the court to strike the jury panel, which it did. *Id.* at 1965.

The next day, Petitioner told the court that he no longer wanted a jury trial. *See* App. E at 2. He wanted to waive his right to a jury and instead have the court make all sentencing determinations. *Id.*

Before accepting the waiver, the court engaged in a lengthy colloquy with Petitioner:

> Court
>
> [A]s you know, you pled guilty to these various offenses. And as you saw in the last two days the [next step is] to seat a jury of 12 people to hear evidence in aggravation . . . and evidence in mitigation.
>
> And as I know your lawyers have told you[,] under the law, what would happen is those 12 jurors would get some instructions from me.

[1] "Tr." refers to Petitioner's trial transcripts.

Then they'd go back to deliberate then they would come back with some recommendation.

If it turns out that recommendation were life imprisonment, although the statute says that I would still have the legal right to impose a death sentence, as a practical matter under the current status of the law, as decided by the Supreme Court, it's highly unlikely that I could or would do that. . . .

But if we do impanel a jury, as you heard me say many times yesterday to the panel, if they gave—if they came back with a recommendation of death, then it would fall upon me to really reweigh and reconsider all the evidence . . . .

And one of the factors I'd have to consider is their recommendation . . . . And the law provides that I would have to give that great weight. . . .

Now, your lawyers I know told you, and the statute provides that at this stage of the proceedings, if you want it, I must impose a jury to hear all what I just described. You have an absolute statutory right to . . . a jury recommendation on this question [or, alternatively] have the evidence presented to one person, myself. And I would do that . . . weighing, and then I would be the one to decide; and there would be no jury recommendation one way or the other. . . .

> Can you tell me in your own words what it is you want to do, how do you want to proceed[?]
>
> Petitioner
> I want your recommendation.
>
> Court
> I'm sorry?
>
> Petitioner
> I just—I don't want a jury.
>
> Court
> You do not want a jury? You're absolutely certain of that?
>
> Petitioner
> Yes.

App. E at 5-8.

Next, the court asked Petitioner a series of questions to assess whether he was "capable and competent to make [the waiver] decision." *Id.* at 10-12. After Petitioner satisfied the court, the court conducted another colloquy with him:

> Court
> [Y]ou understand that . . . this choice is yours and yours alone. . . . This choice of having a jury hear this evidence and then making a recommendation. . . . You understand that?

> Petitioner
>
> Yes, sir.
>
> Court
>
> But you know, once you've waived it and once we begin, I don't think there's any provision in the law which would allow you to say, I changed my mind; I want to have a jury here. . . . You're absolutely certain this is what you want to do?
>
> Petitioner
>
> Yes, sir.

App. E at 12-13. The court then accepted Petitioner's waiver. *Id.* at 15.

The penalty phase lasted three days. *Brant*, 21 So. 3d at 1277. Petitioner presented a broader range of mitigation evidence than he would have in a jury proceeding—he did not intend to present evidence of remorse to a jury, but he decided to do so once "[h]e went nonjury." Tr. 364-65; *see also id.* at 1197-98 (trial court noting that Petitioner argued remorse as a mitigating circumstance).

Based on the evidence, the trial court found two aggravating circumstances: Petitioner's murder of Radfar was heinous, atrocious, or cruel; and he killed her during a sexual battery. *Brant*, 21 So. 3d at 1283. The court determined that both aggravators were entitled to great weight and that they outweighed the mitigating circumstances. *Id.*; Sentencing Order at 43. As a result, the court sentenced Petitioner to death for the murder; life in prison for the sexual battery,

kidnapping, and burglary; and five years' imprisonment for stealing Radfar's car. *Brant*, 21 So. 3d at 1283.

On appeal, Petitioner argued only that his death sentence is disproportionate. *Id.* at 1283-84. He raised no claim that he is entitled to relief under *Ring*, even though Florida capital defendants routinely did so before *Hurst*. *Id.*; *Mosley*, 209 So. 3d at 1275 ("For fourteen years after *Ring*, until the United States Supreme Court decided *Hurst v. Florida*, Florida's capital defendants attempted to seek relief based on *Ring*, both in this Court and the United States Supreme Court."). The Florida Supreme Court affirmed in 2009, *Brant*, 21 So. 3d at 1277, and Petitioner did not seek review in this Court.

3. Petitioner filed his first state postconviction motion in 2011. *Brant*, 197 So. 3d at 1062-63. The trial court denied all his claims, and he appealed to the Florida Supreme Court. *Id.* This Court decided *Hurst* while the appeal was pending, so Petitioner sought leave to file a supplemental brief raising a *Hurst* claim. *Id.* at 1079. The Florida Supreme Court granted the request. *Id.*

In his supplemental brief, Petitioner argued that he is entitled to *Hurst* relief even though he waived a penalty-phase jury because his waiver cannot be considered a knowing and voluntary waiver of the Sixth Amendment right recognized in *Hurst*. Supp. Init. Br. 3-5, *Brant v. State*, No. SC14-2278 (Fla. Mar. 1, 2016).

The Florida Supreme Court unanimously rejected Petitioner's request for *Hurst* relief, finding his waiver dispositive. *Brant*, 197 So. 3d at 1079. A defendant, the court stated, "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.* (quoting *Mullens*, 197 So. 3d at 40); *see also Hutchinson v. State*, 243 So. 3d 880, 883 (Fla. 2018) ("In both *Mullens* and *Brant*, this Court found that the defendants' waivers were knowingly, intelligently, and voluntarily made based on their colloquies, even though those waivers were made with the advice of counsel based on pre-*Hurst* law.").

Petitioner did not seek review in this Court.

4. In 2017, Petitioner filed the state postconviction motion at issue here. *Brant v. State*, 284 So. 3d 398, 399 (Fla. 2019). He again claimed that he is entitled to *Hurst* relief and that his waiver does not bar relief because it is not valid as to *Hurst*. Postconviction Mot. at 9-13, App. G. The Florida Supreme Court's decision in his prior case, he added, does not foreclose his request for relief because in that case, his claim was based on the Sixth Amendment right recognized in *Hurst*, whereas he now seeks relief based on a Florida Supreme Court decision holding that under *Hurst*, the Eighth Amendment requires "a unanimous jury verdict recommending a death sentence." *Id.* at 6-7 (relying on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)).

In the State's response to Petitioner's motion, it argued that the law-of-the-case doctrine, collateral

estoppel, and res judicata bar his claim. State Resp. at 5-6, *Brant v. State*, No. 2004-CF-12631 (Fla. Cir. Ct. Jan. 29, 2018). In Florida, those doctrines prohibit a prisoner from relitigating a claim or issue that has already been decided in a postconviction case. *Id.* (citing *State v. McBride*, 848 So. 2d 287, 289-91 (Fla. 2003)). Therefore, the doctrines bar Petitioner from relitigating the Florida Supreme Court's conclusion that his waiver forecloses *Hurst* relief. *Id.* The State also argued, in the alternative, that Petitioner's claim fails on the merits. *Id.* at 6-9.

The trial court agreed with the State, holding that Petitioner's claim is procedurally barred and lacks merit. App. B at 4-5.

The Florida Supreme Court affirmed, again unanimously. *Brant*, 284 So. 3d at 400. It held that Petitioner's *Hurst* "claim is procedurally barred to the extent that it was raised in his earlier postconviction appeal." *Id.* at 399 (citing *Brant*, 197 So. 3d at 1079, the part of the court's earlier decision addressing Petitioner's waiver). The court then noted that the claim "additionally fails on the merits." *Id.* Petitioner, the court reiterated, "is among those defendants who validly waived the right to a penalty phase jury." *Id.* at 400 (again citing earlier decision).

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction because the decision below rests on an independent and adequate state ground.

"In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). It applies when a "state law determination" is "sufficient to support" a state court judgment. *Id.* The determination need not be the only basis for the judgment—it just needs to be sufficient to sustain the judgment. *Sochor*, 504 U.S. at 533-34 (applying the doctrine where the Florida Supreme Court held both that the prisoner's claim lacked merit and that it was procedurally barred under state law).

The decision below rests on an independent and adequate state law determination. The Florida Supreme Court rejected Petitioner's *Hurst* claim not only on the merits but also "on [an] alternative state ground"—the law-of-the-case doctrine, collateral estoppel, and res judicata. *See id.* The State argued below that, under those doctrines, Petitioner's *Hurst* claim is foreclosed by the Florida Supreme Court's prior ruling that his waiver precludes him from obtaining *Hurst* relief. And both the trial court and the Florida Supreme Court agreed, with the Florida Supreme Court expressly holding that Petitioner's claim is "procedurally barred to the extent it was raised in his earlier postconviction appeal." *Brant*, 284

So. 3d at 399; App. B at 4-5. The independent and adequate state ground doctrine therefore applies. *See Durley v. Mayo*, 351 U.S. 277, 284 (1956) (applying the doctrine where the Florida Supreme Court appeared to "have rested its denial of the [prisoner's] petition" on res judicata grounds).

II. This case presents no question that warrants review.

A. The question whether Petitioner's waiver of a penalty-phase jury is valid as to *Hurst* is not before the Court.

This case does not present the question whether Petitioner knowingly and voluntarily waived his rights under *Hurst*, because he never had any rights under *Hurst* to waive. Whether a defendant has a federal constitutional right is necessarily a question antecedent to whether he has validly waived the right—a defendant cannot waive a right that he never had in the first place. And Petitioner has never had any rights under *Hurst*: *Hurst* does not apply to him because his sentence was already final when *Hurst* was decided. *See McKinney*, 140 S. Ct. at 708 (*Hurst* does not apply retroactively).

Nor can Petitioner argue that the question is before the Court because *Hurst* applies to him under Florida law. The Florida Supreme Court has held that, under Florida's retroactivity test, *Hurst* generally applies to death sentences that became final after *Ring*. *Mosley*, 209 So. 3d at 1274. But the court has also held that a prisoner whose sentence became

final after *Ring* but who "waived the right to a penalty-phase jury is not entitled to relief under *Hurst*." *Brant*, 197 So. 3d at 1079. Federal law does not give Petitioner the right to pick and choose only those parts of Florida's retroactivity jurisprudence that are favorable to him, and this Court should not second-guess the extent to which a state court makes a new right retroactively applicable under state law. *See* 28 U.S.C. § 1257(a).[2]

But even if *Hurst* applied retroactively to Petitioner, this case would not present the question whether his waiver is valid as to *Hurst* because he does not seek to vindicate any *Hurst* rights. Although Petitioner references the right to jury factfinding recognized in *Hurst*, his claim for relief is based on a different right: the "right to a unanimous [jury] determination for death." Pet. 11; Postconviction Mot. at 6-8, App. G (explaining that Petitioner's claim is

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[2] What is more, Florida's retroactivity jurisprudence is in flux. The Florida Supreme Court has expressed an interest in revisiting its ruling that *Hurst* applies retroactively to some defendants. *See* Briefing Order, *Owen v. State*, No. SC18-810 (Fla. Apr. 24, 2019) (sua sponte directing parties to brief the issue). The court did not ultimately address the issue in *Owen*, *see Owen v. State*, ___ So. 3d ___, 2020 WL 3456746 (Fla. June 25, 2020), but "[t]he uncertain fate of Florida's current retroactivity doctrine" undercuts any claim by Petitioner that this Court should rely on state law to reach the waiver question, *see Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1332 n.3 (11th Cir. 2019).

based on an Eighth Amendment right to a "unanimous jury verdict recommending a death sentence"). *Hurst* did not recognize such a right. Indeed, Petitioner does not even claim that it did; he relies not on *Hurst* but on the Florida Supreme Court's now-defunct decision in *Hurst v. State*. Pet. 7; *State v. Poole*, 297 So. 3d 487, 2020 WL 3116597, at *12 (Fla. 2020) ("[We] erred in *Hurst v. State* when we held that the Eighth Amendment requires a unanimous jury recommendation of death."). Because Petitioner does not allege a violation of a right recognized in *Hurst*, whether his waiver is valid as to such a right is irrelevant.

B. In any event, the waiver question is not certworthy.

There is no "compelling reason" to consider the question whether a defendant who waived a penalty-phase jury pre-*Hurst* can still obtain *Hurst* relief. *See* Sup. Ct. R. 10. Petitioner has identified no split among the lower courts over the question; instead, he has asserted only that the decision below conflicts with *Halbert v. Michigan*, 545 U.S. 605 (2005) because under *Halbert*, a defendant can never validly waive a right that has not yet been recognized. Pet. 9-10. But no conflict exists; *Halbert* announced no such rule. It did not purport to dispense with the well-settled principle that guilty pleas and other waivers are valid as long as they are made knowingly and intelligently

"in light of the then applicable law." *See Brady v. United States*, 397 U.S. 742, 757 (1970).

In *Brady*, *McMann v. Richardson*, 397 U.S. 759 (1970), and *United States v. Ruiz*, 536 U.S. 622 (2002), this Court held that future developments undermining the premise for a plea have no bearing on whether the defendant knowingly and intelligently entered the plea. When a defendant enters a plea, he waives rights that might be recognized later.

In *Brady*, for example, this Court held that when the defendant pleaded guilty, he waived a not-yet-recognized right to a particular type of jury trial. The defendant pleaded guilty under a statute which provided that he could receive the death penalty if he went to trial but not if he pleaded guilty. 397 U.S. at 743, 756. A few years later, this Court struck down that part of the statute, finding it unconstitutional because it "made the risk of death the price of a jury trial." *Id.* at 745-46. Thereafter, defendants had a right to a trial that did not present a risk of death. *See id.* at 745-46, 756. According to the defendant in *Brady*, the Court's recognition of that right rendered his plea invalid. *Id.* at 756-57. His plea was not intelligently made, he argued, because he was unaware that he had a right to proceed to trial without risking death. *See id.* This Court disagreed. *Id.* at 757. It concluded that the plea was valid because it was "intelligently made in light of then applicable law." *Id.* ("[A] voluntary plea of guilty intelligently made in light of the then applicable law does not become

vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").

Halbert did not discard that longstanding rule. There, Michigan argued that the defendant waived his "right to appointed counsel for first-level appellate review . . . by entering a plea of nolo contendere." 545 U.S. at 623. Petitioner claims that this Court rejected that argument solely because the defendant had no right to appointed counsel when he pleaded, and therefore, the Court broke from *Brady* and its progeny and established a new categorical rule that defendants can never waive a not-yet-recognized right. *See* Pet. 9-10. But Petitioner misconstrues the decision. This Court's analysis did not turn solely on the status of the defendant's right to appointed counsel. The specific circumstances surrounding his plea were relevant. *See Halbert*, 545 U.S. at 623-24.

During the defendant's plea colloquy, the trial court misled him about the consequences of pleading nolo contendere. *Id.* at 614. Under Michigan law, pleading nolo contendere precluded the defendant from accessing appointed appellate counsel, yet the trial court suggested otherwise, indicating that he might be able to access counsel even if he entered such a plea. *Id.* ("The court . . . advised [the defendant] of certain instances in which, although the appeal would not be as of right, the court . . . 'must' or 'may' appoint appellate counsel. The court did not tell [the

defendant], however, that it could not appoint counsel in . . . [his] case.").

This Court's analysis turned in part on that misleading colloquy. *See id.* at 623-24. The Court held that the defendant did not knowingly and intelligently waive his right to appointed appellate counsel because (1) at the time of his plea, he "had no recognized right to appointed appellate counsel that he could elect to forgo" *and* (2) the trial court "did not tell [him], simply and directly, that in his case, there would be no access to appointed counsel." *Id.* (citing *Brady* and *Iowa v. Tovar*, 541 U.S. 77 (2004)).

Thus, the Court not only considered the defendant's knowledge of his then-existing rights but also cited *Brady* approvingly. It did not break from *Brady* and its progeny and broadly hold that defendants can never waive not-yet-recognized rights.

In claiming otherwise, Petitioner asks this Court to conclude that *Halbert*, in just a couple sentences, adopted a rule that would "wreak havoc" on state and federal criminal proceedings. *See Halbert*, 545 U.S. at 641 n.2 (Thomas, J., dissenting). As Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) explained in his *Halbert* dissent, the majority could not "possibly [have] mean[t] that only rights that have been explicitly and uniformly recognized by statute or case law may be waived," because if so, the majority opinion would "outlaw all conditional waivers (ones in which a defendant agrees that, if he has such a right, he waives it)." *Id.* at 640. Such a rule, moreover, would sow confusion because it is unclear "which sources of

law" would need "to be considered in deciding whether a right is not recognized." *Id.* at 641 n.2 (quotation marks omitted).

In short, Petitioner's broad reading of *Halbert* is misguided, and this case presents no conflict warranting review.

Indeed, this Court has repeatedly denied petitions where the defendant waived a penalty-phase jury but later sought *Hurst* relief, and Petitioner identifies no change in circumstance that makes review now appropriate. *See Covington v. State*, 228 So. 3d 49, 69 (Fla. 2017), *cert. denied*, *Covington v. Florida*, 138 S. Ct. 1294 (2018); *Twilegar v. State*, 228 So. 3d 550, 551 (Fla. 2017), *cert. denied*, *Twilegar v. Florida*, 138 S. Ct. 2578 (2018); *Quince v. State*, 233 So. 3d 1017, 1018 (Fla. 2018), *cert. denied*, *Quince v. Florida*, 139 S. Ct. 165 (2018); *Hutchinson v. State*, 243 So. 3d 880, 883 (Fla. 2018), *cert. denied, Hutchinson v. Florida*, 139 S. Ct. 261 (2018); *Rodgers v. State*, 242 So. 3d 276, 276-77 (Fla. 2018), *cert. denied*, *Rodgers v. Florida*, 139 S. Ct. 592 (2018).

III. Petitioner is not entitled to *Hurst* relief.

For several reasons, the Florida Supreme Court correctly denied Petitioner *Hurst* relief.

1. Petitioner is not, as a matter of federal law, entitled to any *Hurst* relief because the Sixth Amendment right that this Court recognized in *Hurst* does not apply retroactively to him. *See McKinney*, 140 S. Ct. at 708. Similarly, the Florida Supreme

Court has held that Petitioner is not entitled to *Hurst* relief as a matter of state law. *Brant*, 197 So. 3d at 1079.

2. Even if *Hurst* applied retroactively, Petitioner's waiver precludes him from attacking his sentence on Sixth Amendment grounds. When Petitioner waived a jury, he knew he was "fully forfeit[ing] [his] right to a jury trial." *See Mullens*, 197 So. 3d at 39. He had "a full awareness of both the nature" of his right to a jury "and the consequences of [his] decision to abandon" the right. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986) (describing the standard for whether a waiver is knowing and intelligent). Petitioner unequivocally and expressly waived the right after participating in two days of jury selection and after the trial court explained to him (1) the role of the jury in penalty-phase proceedings, (2) that if he waived his right to a jury, he would not be able to revive the right later, and (3) that waiving the right meant that the trial court alone would make all sentencing determinations. App. E at 5-8, 13-15.

In fact, Petitioner's decision to forgo a jury was not just knowing and intelligent but strategic. He decided that he did not want a jury to have any role in his sentencing after several jurors indicated that they would sentence him harshly, notwithstanding the trial court's decision to strike the original jury panel. *See* App. E at 2; Tr. 1965. Having made a strategic decision to avoid a jury, Petitioner cannot now argue that his sentence violates the Sixth Amendment because a jury did not have a sufficient role. *See Mullens*, 197 So. 3d at 39 ("[W]here defendants have

strategically chosen to proceed before a judge alone in order to avoid a death sentence, their jury waivers have been upheld.").

At the very least, Petitioner's waiver is dispositive as to the specific Sixth Amendment right recognized in *Hurst*. First, in 2007, when Petitioner waived a jury, he and other Florida capital defendants were on notice that a right to jury factfinding might exist. According to Petitioner, "*Hurst* followed *Ring*," and in 2007, *Ring* had already been decided and defendants were routinely raising *Ring* claims. Pet. 7; *Mosley*, 209 So. 3d at 1275. Second, it is clear from the record that Petitioner would have waived a jury even if *Hurst* had already been decided at the time of his trial. Petitioner balked at advisory jury findings because of his concerns about jurors' views of him. He certainly would not have proceeded before a jury if their findings on aggravating circumstances were *binding*, as is the case under *Hurst*.

3. Finally, even if *Hurst* applied retroactively to Petitioner and even if he could bypass his waiver, he still would not be entitled to relief because any *Hurst* error was harmless. *See Hurst*, 136 S. Ct. at 624 (noting that harmless-error analysis applies to *Hurst* violations). Had a jury been charged with finding aggravating circumstances, they plainly would have found "at least one." *See McKinney*, 140 S. Ct. at 705. They would have found that Petitioner murdered Radfar "while engaged in the commission of a sexual battery"—just as the trial court did. *See Brant*, 21 So. 3d at 1283. Petitioner admitted to police that he raped Radfar during the murder, police found his semen in

her vagina, he pleaded guilty to sexual battery, and the factual proffer for his plea explained that he raped Radfar just before choking her to death. *See id.* at 1278; Sentencing Order at 5-6, 16-17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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