No. 20-6218

IN THE

Supreme Court of the United States

TERANCE VALENTINE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Supreme Court

BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General of Florida

AMIT AGARWAL
Solicitor General
* *Counsel of Record*

JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
amit.agarwal@myfloridalegal.com

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

After his first penalty-phase jury recommended death, Petitioner waived the right to a jury at resentencing and was sentenced to death. That sentence became final in 1997, before *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Since then, this Court has held that "*Ring* and *Hurst* do not apply retroactively on collateral review," *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020), and the Florida Supreme Court has held that *Hurst* does not apply retroactively to cases, like this one, "in which the death sentence became final before the issuance of *Ring*." *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016). In addition, "[u]nder *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible," *McKinney*, 140 S. Ct. at 707, and that requirement is met where, as here, a jury has convicted the defendant of a violent felony that counts as a statutory aggravating circumstance. *State v. Poole*, 297 So. 3d 487, 508 (Fla. 2020).

In 2017, Petitioner sought postconviction relief based on *Hurst*. The trial court denied relief, holding that Petitioner's motion was untimely, that *Hurst* did not apply retroactively to his sentence, and that a prisoner may not obtain *Hurst* relief after waiving his right to a penalty-phase jury. The Florida Supreme Court affirmed the denial of postconviction relief.

The question presented is: Whether the court below erred, as a matter of federal law, in holding that Petitioner is not entitled to relief under *Hurst*.

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STATEMENT

1. Prompted by this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the Florida legislature enacted statutory reforms intended "to assure that the death penalty will not be imposed in an arbitrary or capricious manner." *Proffitt v. Florida*, 428 U.S. 242, 252–53 (1976) (plurality op.). By giving trial judges "specific and detailed" instructions, *id.*, such reforms sought to ensure that courts presiding over capital cases would conduct "an informed, focused, guided, and objective inquiry" in determining whether a defendant convicted of first-degree murder should be sentenced to death. *Id.* at 259.

Accordingly, when Petitioner Terance Valentine was sentenced to death in 1997, 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 aggravating circumstances outweighed the mitigating circumstances. *See Spaziano v. Florida*, 468 U.S. 447, 451–52 & n.4 (1984), *overruled in part by Hurst v. Florida*, 136 S. Ct. 616 (2016). A sentencing jury would render an advisory verdict—to 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 repeatedly upheld that regime as constitutional, including under the Sixth Amendment. *See, e.g.*, *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*, 428 U.S. at 252 ("[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.").

In *Apprendi v. New Jersey*, the 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, 490–94 (2000) (quotations omitted). In *Ring v. Arizona*, the Court extended *Apprendi* to findings on the "aggravating factors" necessary to impose a death sentence under Arizona's capital sentencing scheme. 536 U.S. 584, 609 (2002). The Court held that "the Sixth Amendment requires that [the aggravating factors] be found by a jury" because they "operate as 'the functional equivalent of an element of a greater offense.'" *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19).

Neither *Apprendi* nor *Ring* overruled *Spaziano* or *Hildwin*, but in 2016, the 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 an aggravating circumstance. *Id.* at 621–22. The Court therefore overruled its pre-*Ring* decisions "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; *id.* at 623 (stating that the Court "overrule[d] *Spaziano* and *Hildwin* in relevant part").

2. In the years since *Ring* and *Hurst*, this Court has held that neither decision applies retroactively under federal law. *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). As a matter of state law, the Florida Supreme Court has held that *Hurst* does not apply retroactively to cases, like this one, "in which the death sentence became final before the issuance of *Ring*." *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016).

Subsequent case law has also clarified the scope of this Court's decision in *Hurst*. Three rulings are of particular relevance here.

First, this Court has explained that *Hurst* does not require a jury to weigh aggravators and mitigators or to choose the appropriate sentence. "Under *Ring* and

Hurst, a jury must find the aggravating circumstance that makes the defendant death eligible." *McKinney*, 140 S. Ct. at 707. "But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.*

Second, the Florida Supreme Court has explained that *Hurst*'s requirement that a jury find the existence of a statutory aggravating circumstance is satisfied where, as here, a jury has convicted the defendant of a violent felony that counts as an aggravating circumstance. *State v. Poole*, 297 So. 3d 487, 508 (Fla. 2020).

Third, the Florida Supreme Court has held that *Hurst* does not apply to prisoners who waived their right to a penalty-phase jury. *See Mullens v. State*, 197 So. 3d 16, 39–40 (Fla. 2016). A contrary ruling, the court has explained, "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. Accordingly, the Florida Supreme Court has concluded that a capital defendant "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.*

3. Petitioner's death sentence became final in 1997, well before *Ring* and *Hurst* were decided. Pet.

App. 12.[1] At his resentencing, Petitioner waived his right to a penalty-phase jury, and the trial court found, among other aggravating circumstances, that a jury had previously convicted him of a violent felony.

In 1988, Petitioner kidnapped, tortured, and shot his ex-wife, Livia Romero, and her husband, Ferdinand Porche. *Valentine v. State*, 688 So. 2d 313, 315 (Fla. 1996). At the time, the couple had a baby, and Romero was pregnant. *Id.*

On an afternoon when Porche was away from the family's home, Petitioner "forced his way into" the home and attacked, bound, and gagged Romero in front of her baby. *Id.* at 314–15. Petitioner then waited for Porche to return home, with Romero tied up and the baby "crying and covered in blood." *Id.* at 315.

When Porche returned, Petitioner shot him in the back while sneering, "this is my revenge." *Id.* The shot immediately paralyzed Porche "from the waist down." *Id.* Petitioner then pistol-whipped him multiple times, breaking his jaw and knocking out several of his teeth, before telling him, "I'm gonna kill you, but you're gonna suffer. This is not going to be easy." *Id.* At that point, Petitioner stabbed Porche in the buttocks, with "the knife stopping only because it struck bone"; kicked him in the chest; bound him with metal wire; and dragged him around the house. *Id.* All the while,

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[1] Petitioner's Appendix is not Bates stamped, so the cited page numbers are the Appendix's PDF page numbers.

Porche remained conscious, enduring not only excruciating pain but also the trauma of watching his pregnant wife and baby suffer. *Id.* at 315–16 (summarizing facts and observing that "[t]he horror, terror and helplessness that Ferdinand Porche experienced prior to being shot in the eye at point blank range are evident").

After torturing Porche, Petitioner drove him and Romero to a remote area. *Id.* at 314–15. During the "nine-mile trip," Porche "lost control of his bowels and was covered in his own excrement." *Id.* at 315. At the end of the trip, Petitioner shot both Romero and Porche in the head. *Id.* at 315–16; Pet. App. 82. Porche died, but Romero survived and "told police [Petitioner] was her assailant." *Valentine*, 688 So. 2d at 315.

Petitioner was charged with armed burglary, two counts of kidnapping, grand theft, attempted murder, and first-degree murder. *Id.* A jury convicted him of all the offenses and, after a penalty-phase proceeding, recommended the death penalty for his murder of Porche "by a ten-to-two vote." *Id.* The Florida Supreme Court, however, "reversed the conviction[s] and vacated the sentence due to a jury selection error." *Id.*

On remand, a jury again convicted Petitioner of all the offenses. *Id.* But rather than proceed before the jury during his penalty phase—as he did in his first trial—he told the trial court that he wanted to waive the jury and instead have the court make all sentencing determinations. *See id.*

Before accepting the waiver, the trial court engaged in a colloquy with Petitioner and had counsel examine him about his decision to waive his right to a jury. Tr. 1801–15.[2] Counsel explained to Petitioner (1) that if he proceeded before a jury and "the jury were to return a recommendation of life," the court "in most circumstances" would be "obligated to follow that recommendation"; (2) "that by waiving the jury," he would "giv[e] up his right" to the jury participating in his sentencing; and (3) that the "only person" who would decide his sentence would be "the court." Tr. 1804. Petitioner testified that he understood and that before deciding to waive his right, he had "fully discussed the consequences of" a waiver with his counsel. Tr. 1802–04.

Then, during his colloquy with the court, Petitioner explained his decision:

> We just really don't want anything to do with that jury anymore. I feel like our case was proven. We proved what we never had to prove, and it never did any good, so I believe the jury has it set already in what their recommendation would be, and I definitely would like to have an unbiased court listen to what we have to say.

Tr. 1807.

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

The court determined that Petitioner had decided to waive a jury "knowingly, intelligently, freely, and voluntarily," and it accepted the waiver. Tr. 1815.

During the penalty phase, Petitioner presented three witnesses, while the State presented none. Pet. App. 81. Based on "the evidence presented in both the guilt phase and penalty phase," Pet. App. 82, the trial court found four aggravating circumstances: (1) Petitioner "had been convicted of a prior violent felony"; (2) Petitioner murdered Porche "during the course of a burglary and kidnapping"; (3) the murder "was heinous, atrocious, or cruel"; and (4) the murder was "cold, calculated, and premeditated." *Valentine*, 688 So. 2d at 316 n.4. The court also found four mitigating circumstances but gave each only "slight weight." *Id.* at 316 n.5

After "carefully consider[ing] and weigh[ing] the aggravating and mitigating circumstances" and "being ever mindful that human life [was] at stake," the court concluded that the aggravating circumstances outweighed the mitigating circumstances, and it sentenced Petitioner to death. Pet. App. 90.

On appeal, the Florida Supreme Court vacated Petitioner's conviction for attempted murder, holding that the jury was not properly instructed on the offense, but the court did not disturb his remaining convictions or his death sentence. *Valentine*, 688 So. 2d at 317–18. Vacating the attempted-murder conviction, the court held, had "no effect on the sentence of death since [Petitioner] was convicted of

three other violent felonies (i.e., armed burglary and two counts of kidnapping)," any one of which "support[s] the 'prior violent felony' aggravating circumstance" underlying his sentence. *Id*.

This Court denied certiorari in 1997. *Valentine v. Florida*, 118 S. Ct. 95 (1997).

4. In his first state postconviction motion, Petitioner raised "fourteen claims and numerous subclaims," most of which asserted error during the guilt phase. *Valentine v. State*, 98 So. 3d 44, 50 & n.8 (Fla. 2012). The trial court denied the motion, and the Florida Supreme Court affirmed. *Id*. at 48.

Petitioner then applied for the writ of habeas corpus under 28 U.S.C. § 2254 and challenged the validity of his state conviction for murder. *Valentine v. Sec'y, Dep't of Corr.*, 2015 WL 3671606, at *1 (M.D. Fla. June 12, 2015). That proceeding is still pending. Pet. App. 31.

5. In 2017, Petitioner filed a successive state postconviction motion—the motion at issue here. Pet. App. 28. He claimed that, as a matter of state law, he is entitled to relief under *Hurst*. Pet. App. 32 ("On the basis of new Florida law arising from *Mosley v. State*, *Bevel v. State*, and the enactment of Chapter 2017-1, Valentine files this successive motion [seeking *Hurst* relief.]").

The trial court found that Petitioner's claim is both time-barred and meritless. First, under the Florida Rules of Criminal Procedure, postconviction claims

must be raised within one year "after the [prisoner's] judgment and sentence become final," unless an enumerated exception applies. Fla. R. Crim. P. 3.851(d)(1). And none of the exceptions apply to Petitioner's claim. Although he alleged that his claim relies on a new "fundamental constitutional right" that "has been held to apply retroactively" to him, *see* R. 3.851(d)(2)(B), *Hurst* has not been held to apply retroactively to him, so the exception is inapplicable, Pet. App. 12–13. Second, Petitioner is not entitled to *Hurst* relief under Florida law, the court held, because (1) his sentence became final well before *Hurst* was decided and (2) he waived a penalty-phase jury. Pet. App. 11–13.

The Florida Supreme Court affirmed in a short, unanimous opinion. *See Valentine v. State*, 296 So. 3d 375, 375 (Fla. 2020). It stated that *Hurst* does not apply to Petitioner under Florida law "because he waived . . . a penalty phase jury." *Id.* at 376.

REASONS FOR DENYING THE PETITION

I. This Case Presents No Question that Warrants Review.

A. The question whether Petitioner knowingly and voluntarily waived rights under *Hurst* is not before the Court.

Petitioner asserts that this case is certworthy because it presents the question whether his "waiver to an advisory . . . jury verdict" serves as a "knowing and voluntary" waiver of the rights recognized in

Hurst. Pet. i. But this case does not present that question because Petitioner 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* because his sentence became final decades before it was decided. *See McKinney*, 140 S. Ct. at 708 (holding that *Hurst* does not apply retroactively).

Nor does *Hurst* apply retroactively to him under Florida law. Not only did he waive a penalty-phase jury but his sentence became final five years before *Ring*. *See Mullens*, 197 So. 3d at 39–40; *Asay*, 210 So. 3d at 22.

Petitioner recognizes that this case does not present the waiver question unless *Hurst* applies retroactively to him, so he argues that *Hurst* should apply to him under Florida law, asserting that Florida's "*Hurst* retroactivity cutoff at *Ring*" is unconstitutional because the Eighth and Fourteenth Amendments forbid "partial-retroactivity scheme[s]." *See* Pet. 15–16. As a threshold matter, this Court should not grant certiorari to consider that argument for at least three reasons.

First, the Florida Supreme Court did not address that issue in the decision below, *see Valentine*, 296 So. 3d at 376, and this Court generally "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Petitioner does not offer any basis for disregarding that principle in this case. Indeed, in his Petition, Petitioner does not even identify the issue as a question presented. Pet. i (stating that the only question presented is the waiver question).

Second, Petitioner's federal constitutional claim concerning Florida's "*Hurst* retroactivity cutoff at *Ring*" proceeds on the assumption that Florida law still applies *Hurst* retroactively to sentences that became final after *Ring*, *see* Pet. 15–16, and recent developments in Florida law cast doubt on the validity of that assumption.

Under Florida law, it is now "clear" that "*Hurst v. Florida* . . . should not be applied retroactively" to any sentences that became final before *Hurst*. *Brown v. State*, 304 So. 3d 243, 281 (Fla. 2020) (Canady, C.J., concurring in result). It is settled that *Hurst* does not apply retroactively to cases, like this one, "in which the death sentence became final before the issuance of *Ring*" in 2002. *Asay*, 210 So. 3d at 22. In *Mosley v. State*, the Florida Supreme Court initially held that *Hurst* should generally apply retroactively to post-*Ring* sentences. 209 So. 3d 1248, 1274 (Fla. 2016). But the Florida Supreme Court's recent ruling in *Poole* "dismantled the foundation for the majority's analysis in *Mosley*," which is now only "the ghost of a precedent." *Brown*, 304 So. 3d at 281 (Canady, C.J., concurring in result); *see also Poole*, 297 So. 3d at 501–05.

Third, even if this Court were to hold that it violates the federal Constitution to make *Hurst*

partially retroactive to post-*Ring* sentences, any such holding would not benefit Petitioner. Petitioner invited the alleged error of which he now complains by insisting that he did not want a penalty-phase jury to make any findings statutorily required to support his sentence; it is now "clear" that "*Hurst v. Florida* . . . should not be applied retroactively" to any sentences that became final before *Hurst*, *Brown*, 304 So. 3d at 281 (Canady, C.J., concurring in result); and even if *Hurst* applied retroactively to Petitioner, his prior conviction for a violent felony satisfies *Hurst*'s Sixth Amendment holding. *See McKinney*, 140 S. Ct. at 708; *Poole*, 297 So. 3d at 498, 508.

At any rate, Petitioner's attack on Florida's *Hurst*-retroactivity ruling fails on the merits.

First, the Constitution does not require states to adopt an all-or-nothing approach to retroactivity. *See Danforth v. Minnesota*, 552 U.S. 264, 276 (2008); *id.* at 284 (approving of *Com. v. McCormick*, 519 A.2d 442 (Pa. Super. Ct. 1986), where the court applied *Batson* retroactively to only certain defendants). States "are free to choose the degree of retroactivity" that they conclude is "appropriate to the particular rule under consideration, so long as [they] give federal constitutional rights at least as broad a scope as th[is] Court requires." *Id.* at 276 (quotations omitted). And Florida has done just that; it applies *Hurst* at least as broadly as this Court.

Second, contrary to Petitioner's claim, the Florida Supreme Court's decision not to apply *Hurst* retroactively to sentences that became final before

Ring does not "involve[] a kind and degree of arbitrariness" that offends the Eighth and Fourteenth Amendments. Pet. 19. Even assuming *Mosley* still has any life left in it, the decision not to extend *Mosley* to pre-*Ring* sentences is a rational exercise of the court's authority to provide greater protection for capital defendants than federal law requires.

While *Ring* does not apply retroactively, *Schriro*, 542 U.S. at 358, it does apply prospectively, like any other procedural rule. As the Florida Supreme Court explained in *Mosley*, "[f]or fourteen years after *Ring*, until . . . *Hurst*, Florida's capital defendants" sought "relief based on *Ring*, both in [state court] and the United States Supreme Court." 209 So. 3d at 1275. But the defendants were rebuffed because *Ring* did not address hybrid capital sentencing regimes like Florida's and it left intact this Court's pre-*Ring* decisions specifically upholding the constitutionality of Florida's regime. *Id.* at 1279. The Florida Supreme Court had "doubt" about the continued viability of those decisions in light of *Ring* but adhered to them because it is solely "within the purview of the United States Supreme Court to overrule" its own precedents. *Id.* at 1279–80. But in *Hurst*, this Court did just that, overruling the precedents and applying *Ring* to Florida's regime. Because *Hurst*, as the Florida Supreme Court saw it, made clear that "Florida's capital sentencing statute was unconstitutional from the time that [this] Court decided *Ring*," *id.* at 1281, the court held that as a matter of "fundamental fairness," "[d]efendants who were sentenced to death under Florida's former, unconstitutional capital

sentencing scheme after *Ring* should not suffer due to the" delay "in applying *Ring* to Florida," *id.* at 1283.

Assuming *arguendo* that such reasoning survives the Florida Supreme Court's subsequent decision in *Poole*, that is not an "arbitrary and capricious" ruling. Pet. 14. The Florida Supreme Court remedied its inability, until *Hurst*, to apply *Ring* prospectively like any other decision of this Court. The ruling is not unconstitutional merely because it does not benefit all of Florida's capital defendants. All retroactivity decisions, including those of this Court, must draw a line somewhere, and as Petitioner acknowledges, such cutoffs "are accepted as constitutional despite some features of unequal treatment." Pet. 14. Petitioner's assertion that *Hurst* should apply to him under state law is unfounded.

In sum, *Hurst* does not apply retroactively to Petitioner under federal or state law, so he has never had any rights under *Hurst* to waive and the waiver question that he claims this case presents is not before the Court. Instead, the only question presented is whether the Florida Supreme Court erred in holding that *Hurst* does not apply to Petitioner.

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

There is no "compelling reason" to consider the question whether a Florida defendant who waived a penalty-phase jury before *Hurst* knowingly and voluntarily waived rights under *Hurst*. *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. No conflict exists, however, as *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 in *United States v. Jackson*, 390 U.S. 570 (1970), 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 at which the most severe penalty they could receive was imprisonment. *See id.* at 745–46, 756. According to the defendant in *Brady*, the Court's recognition of

that right in *Jackson* rendered his pre-*Jackson* 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." *Halbert*, 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 misapprehends *Halbert*. This Court's analysis did not turn solely on the status of the defendant's right to appointed counsel. Rather, the specific circumstances surrounding his plea were relevant. *See Halbert*, 545 U.S. at 623–24.

During the *Halbert* 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's 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 (quotations omitted).

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

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 Brant v. State*, 284 So. 3d 398, 400 (Fla. 2019), *cert. denied*, *Brant v. Florida*, No. 19-8845 (U.S. Oct. 5, 2020); *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); *Covington v. State*, 228 So. 3d 49, 69 (Fla. 2017), *cert. denied*, *Covington v. Florida*, 138 S. Ct. 1294 (2018).

II. Petitioner Is Not Entitled to *Hurst* Relief.

For several reasons, the Florida Supreme Court correctly denied Petitioner's request for *Hurst* relief.

First, as discussed above, *Hurst* does not apply retroactively to him under federal or state law. *See McKinney*, 140 S. Ct. at 708; *Asay*, 210 So. 3d at 22.

Second, even if *Hurst* applied retroactively to him, he would not be entitled to relief because his death sentence does not violate *Hurst*. The sentence is supported by "at least one aggravating circumstance" that complies with the Sixth Amendment—his convictions for kidnapping and armed burglary. *See McKinney*, 140 S. Ct. at 705. Those convictions, which were found by a guilt-phase jury, qualify as aggravating circumstances under Florida law, *Valentine*, 688 So. 2d at 317, and the Sixth Amendment did not require a penalty-phase jury to find the "simple fact of [the] conviction[s]," *see Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016); *Almendarez-Torres v. United States*, 523 U.S. 224, 243–48 (1998).

Finally, even if *Hurst* applied retroactively to Petitioner, and even if his kidnapping and armed-burglary convictions did not support his death sentence, his waiver would preclude 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 having proceeded before a

penalty-phase jury in his first trial and after the trial court and counsel 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 it later, and (3) that waiving the right meant that the trial court would make all sentencing determinations. Tr. 1802–07.

In fact, Petitioner's decision to forgo a jury was not just knowing and intelligent—it was strategic. He chose to bypass a jury recommendation, to which the trial court would have had to "accord deference," because he believed the jury would recommend death. *See Sochor*, 504 U.S. at 533. In explaining his decision to waive a jury, Petitioner stated: "We just really don't want anything to do with that jury anymore. . . . I believe the jury has it set already in what their recommendation would be." Tr. 1807.

Consequently, Petitioner's waiver is at the very least dispositive as to the specific Sixth Amendment right recognized in *Hurst*. Based on Petitioner's own representations to the court, it is clear that he would have waived a jury even if *Hurst* had already been decided at the time of his trial. After all, Petitioner balked at advisory jury findings because he didn't "want anything to do" with the jury, and because he thought the jury was likely to once again recommend a sentence of death. *See id.* Petitioner offers no basis for concluding that those concerns would have evaporated if the jury had been required to find the existence of a statutory aggravating circumstance—particularly since a jury had already found, beyond a

reasonable doubt, that Petitioner committed violent felonies that rendered him death-eligible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida

AMIT AGARWAL
Solicitor General
* *Counsel of Record*

JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
amit.agarwal@myfloridalegal.com

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