**CASE NO. 17-7400**

**IN THE SUPREME COURT OF THE UNITED STATES**

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**EDWARD ALLEN COVINGTON,**

***Petitioner*,**

**vs.**

**STATE OF FLORIDA,**

***Respondent*.**

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**ON PETITION FOR A WRIT OF CERTIORARI**
**TO THE SUPREME COURT OF FLORIDA**

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# RESPONDENT'S BRIEF IN OPPOSITION


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## QUESTION PRESENTED FOR REVIEW

[Capital Case]

WHETHER PETITIONER COULD WAIVE HIS SIXTH AMENDMENT RIGHT TO HAVE A JURY DETERMINE THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE THAT QUALIFIED HIM FOR A DEATH SENTENCE?

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## CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at Covington v. State, 228 So. 3d 49 (Fla. 2017).

## JURISDICTION

The judgment of the Florida Supreme Court was entered on August 31, 2017. A motion for rehearing was denied on October 11, 2017. (Pet. App. B). Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

## STATEMENT OF CASE

Petitioner was indicted for the brutal murders of his girlfriend and her two small children, mutilation of their dead bodies, and cruelty to an animal for beating his girlfriend's dog to death with a hammer. (Pet. Ex. A, pgs. 5-7, 9-14). On the first day of trial testimony, Petitioner announced his intention to plead guilty to the charges and to waive a jury for the

penalty phase. The trial court appointed two experts to evaluate Petitioner's competency to plead guilty. The evaluations and experts' reports were completed the same evening. (Pet. Ex. A, pg. 6).

> When court reconvened the next day, Covington was given time to meet with his attorneys and his family. Covington then reaffirmed his desire to plead guilty and waive a penalty phase jury. Covington's counsel supported his decisions to plead guilty and waive a penalty phase jury. The court then conducted a comprehensive plea colloquy with Covington during which the court thoroughly informed him about the rights he was waiving. *** The trial court accepted Covington's pleas of guilty to all seven counts as charged in the indictment. Covington reaffirmed his desire to waive a penalty phase jury, and the trial court accepted his waiver.

(Pet. Ex. A, pg. 7).

After hearing the evidence presented at the penalty phase, the trial judge sentenced Petitioner to death for all three murders and to concurrent sentences of fifteen years for each of the three counts of mutilation of a dead body and five years for cruelty to an animal. (Pet. App. A, pg. 21-25).

On appeal, Petitioner claimed, *inter alia*, that he was entitled to relief based on this Court's ruling in Hurst v. Florida, 136 S. Ct. 616 (2016). Petitioner argued that although he waived his right to a jury during the penalty phase, he did not waive his rights under Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000). He asserted that his waiver was not knowing, voluntary, and intelligent because he

waived a penalty phase jury without having been "specifically" informed that he had a right to have a unanimous jury determination on each aggravator. The Florida Supreme Court rejected this claim, reasoning:

> A defendant like Covington who has waived the right to a penalty phase jury is not entitled to relief under Hurst. See Mullens v. State, 197 So. 3d 16, 40 (Fla. 2016) (concluding that defendant who waived penalty phase jury was not entitled to relief under *Hurst* because a 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"), cert. denied, 137 S. Ct. 672 (2017); see also Brant v. State, 197 So. 3d 1051, 1079 (Fla. 2016) (relying on Mullens to deny Hurst relief in a postconviction context where the defendant waived a penalty phase jury).

(Pet. App. A, pg. 42).

In reviewing the validity of Petitioner's guilty pleas, the lower court opined:

> Before accepting Covington's guilty pleas, the trial court conducted a thorough plea colloquy with Covington during which the court informed him of all the rights he was waiving by pleading guilty. Covington indicated both orally and in writing that he understood the ramifications of his pleas, that although he was on psychiatric medications, there was nothing that would impair his understanding of his decision, and that he was not being threatened or coerced into entering the pleas. We have held that in a capital case where the trial court explained to the defendant that he "was entitled to a jury in both phases of the trial, that if he elected to waive his right to a jury, the judge alone would determine his sentence, and that the only sentencing options were life or death" and the defendant "stated that he understood the ramifications of his plea, that he was not threatened or coerced, and that he was not on any medication that would impair his understanding of his decision," the defendant "knowingly and voluntarily entered his plea, and the trial court properly accepted it." Winkles, 894 So. 2d

> at 847. We therefore conclude that Covington's pleas were knowingly, intelligently, and voluntarily entered.

(Pet. App. A, pgs. 38-39).

Petitioner now seeks certiorari review of the Florida Supreme Court's decision.

## REASONS FOR DENYING THE WRIT

**CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) PETITIONER HAS NOT ESTABLISHED CONFLICT AMONG COURTS OR PRESENTED AN UNSETTLED QUESTION OF FEDERAL LAW; AND (2) PETITIONER WAIVED ALL JURY INVOLVEMENT—CONSTITUTIONALLY MANDATED OR NOT—IN DETERMINING THE PENALTY FOR HIS CRIMES.**

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.

Petitioner does not provide any compelling reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in Covington v. State, 228 So. 3d 49 (Fla. 2017), in which the court determined that a defendant may not abuse the judicial process by waiving the right to a jury sentencing and then claiming reversible error upon a judicial sentence of death. 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.

This Court has specifically recognized that "[l]egal rights, even constitutional ones, are presumptively waivable." Halbert v. Michigan, 545 U.S. 605, 637 (2005) (Thomas, J., dissenting) (citing United States v. Mezzanatto, 513 U.S. 196, 200-01 (1995) (additional citations omitted)); see also Boykin v. Alabama, 395 U.S. 238 (1969). Criminal defendants can waive their constitutional rights so long as they knowingly, intelligently, and voluntarily do so. Iowa v. Tovar, 541 U.S. 77, 78 (2004). It is enough that an individual understands the waived right "in general . . . even though the defendant may not know the specific detailed consequences of invoking it." Tovar, 541 U.S. at 92. To escape the consequence of waiving one's constitutional rights there must be affirmative indications that, under the relevant circumstances, the waiver was unknowing or involuntary. Mezzanatto, 513 U.S. at 209. Here, the Florida Supreme Court found Petitioner knowingly, voluntarily, and intelligently waived a penalty phase jury. The court found that the trial court conducted a full and adequate colloquy ensuring the validity of Petitioner's waiver. (Pet. App. A, pgs. 38-39).

Petitioner suggests that it would have been impossible for

him to waive a penalty phase jury prior to this Court's decision in Hurst v. Florida, 135 S. Ct. 1531 (2015) (applying Ring v. Arizona, 536 U.S. 584, 609 (2002), to Florida's capital sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty). Petitioner 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 does not reach as far as Petitioner claims. In Halbert, this Court held that an indigent defendant, convicted on a plea in Michigan, was entitled to counsel appointed by the appellate court for assistance in preparing his application for leave to appeal. Halbert, 545 U.S. at 623. Even though the defendant in Halbert had waived his right to appeal, he had not waived his right to file an application for leave to appeal and had been instructed that he had this right. Id., at 617. Relying on Douglas v. California, 372 U.S. 353 (1963), this Court held that the appellate court should have appointed counsel to aid the indigent defendant in the preparation and review of his application for leave to appeal, even though he had waived the separate right to a full appeal. Id.

Petitioner relies on this Court's rejection of Michigan's

waiver argument. This Court stated that "at the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forego." Halbert, 545 U.S. at 623. In relying on this single sentence of the opinion, Petitioner fails to recognize critical distinguishing factors that make Halbert inapplicable to his case. First, the "waiver" asserted in Halbert was, at best, an implicit waiver of appellate counsel that flowed from his plea rather than an explicit waiver of a jury's participation in sentencing. Second, Halbert was not informed that his plea would result in a complete denial of appointed appellate counsel for the purpose of assisting with an application for leave to appeal. While there were some circumstances in which Michigan courts could appoint counsel, the statute operated in a way that did not provide indigent defendants equal access to the courts. Therefore, this Court concluded, any alleged "waiver" was not knowingly and intelligently given and Halbert was not sufficiently aware of the relevant circumstances surrounding any such waiver.

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.

It is beyond dispute that, at the time of Petitioner's waiver, it was "unsettled" whether Florida's capital sentencing statute violated defendants' Sixth Amendment right to a jury trial. In fact, Petitioner himself filed a pretrial motion challenging the statute and claiming that it violated his Sixth Amendment right to a jury trial. (Pet., pg. 3). This is the very right Petitioner now claims he did not know existed at the time of his waiver. Petitioner could have preserved his right to argue the unconstitutionality of Florida's procedure by subjecting himself to it and challenging its validity on appeal. Claims based on Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 135 S. Ct. 1531 (2015), are available to defendants who are deprived of requested penalty phase jury findings of sufficient aggravators.

Petitioner waived all jury involvement—constitutionally mandated or not—in determining his penalty. Petitioner claims that, had he known this Court in Hurst was going to agree with his pretrial contention, he might have asked for a penalty phase jury. The fact that Florida's pre-*Hurst* statutory scheme did not provide for binding jury findings regarding aggravating factors is irrelevant to the question of whether capital defendants had a federal constitutional (and waivable) right to binding jury

findings prior to this Court's *Hurst* decision. See Halbert, 545 U.S. at 641. See also Blakely v. Washington, 542 U.S. 296, 300 (2004) ("[N]othing prevents a defendant from waiving his Apprendi rights. 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) (citing Apprendi, 530 U.S. at 488; Duncan v. Louisiana, 391 U.S. 145, 158 (1968)).

Furthermore, even guilty pleas—which encompass waivers of the right to a jury trial, the right to confront one's accusers, and the right to put the government to its burden of proof beyond a reasonable doubt—are valid even if "later judicial decisions indicate that the plea rested on a faulty premise." Brady v. United States, 397 U.S. 742, 757 (1970). In Brady, the defendant claimed that this Court's decision in United States v. Jackson, 390 U.S. 570 (1968), rendered his pre-Jackson plea invalid. This Court disagreed, holding:

> The fact that Brady did not anticipate United States v. Jackson . . . does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Brady, 397 U.S. at 757.

Likewise, assuming Petitioner did not anticipate this

Court's decision in Hurst, that fact does not impact the knowing, intelligent, and voluntary nature of his penalty phase jury waiver. Petitioner's explicit waiver of a penalty phase jury is a waiver of his pre-trial Ring (and, by extension, Hurst) claim. Moreover, the sentence imposed in this case complies with this Court's Hurst decision. Petitioner's guilty plea alone established beyond a reasonable doubt the existence of three contemporaneous first-degree murders. Therefore, even if Petitioner had not waived his penalty phase jury, his sentence does not violate this Court's decision in Hurst.

Finally, Petitioner points to the Florida Supreme Court's opinion in Hurst on remand as "further evidence of the impossibility of waiver." (Pet., pg. 9) In Hurst v. State, 202 So. 3d 40 (Fla. 2016), the state supreme court invalidated the portion of Florida's post-Hurst statute that permitted the imposition of a death sentence on a jury vote of ten-to-two or more and, instead, held that unanimity is required not only for the aggravating circumstances, but also as to the question of whether the aggravating circumstances outweigh the mitigating circumstances. In the lower court's decision on remand in Hurst v. State, the court stated that "[w]e are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States

Constitution." Hurst v. State, 202 So. 3d at 57 (citing Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion)). The court also noted that "the United States Supreme Court has not ruled on whether unanimity is required under the Eighth Amendment." Id. at 59. Arguably, the state court's decision in Hurst v. State is an improper expansion of this Court's Sixth and Eighth Amendment jurisprudence. It is, however, inapplicable to Petitioner's case and to the waiver issue presented in this Petition.

Because the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law, this Court should decline to exercise its certiorari jurisdiction in this case.

## CONCLUSION

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

Respectfully submitted,
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 12th day of February, 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: Julius Aulisio, Assistant Public Defender, Tenth Judicial Circuit, State of Florida, Polk County Courthouse, P.O. Box 9000 - Drawer PD Bartow, Florida 33831. All parties required to be served have been served.

S/ Candance M. Sabella
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