No. 19-8341

In the

Supreme Court of the United States

RICHARD KNIGHT,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should revisit its recent conclusion in *McKinney v. Arizona* that *Hurst v. Florida*, 136 S. Ct. 616 (2016), "do[es] not apply retroactively on collateral review." 140 S. Ct. 702, 708 (Feb. 25, 2020).

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BRIEF IN OPPOSITION

Respondent State of Florida respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Richard Knight.

STATEMENT

1. When Petitioner Richard Knight was sentenced to death in 2006, a defendant convicted of a capital crime in Florida could be sentenced to death only if the trial judge found both (1) the existence of at least one statutorily enumerated aggravating circumstance, and (2) that the aggravating circumstances outweighed the mitigating circumstances. *Spaziano v. Florida*, 468 U.S. 447, 451-52 & n.4 (1984), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016) (citing § 921.141(2)(b), (3)(b), Fla. Stat. (1983)). A sentencing jury would render an advisory verdict, but the judge would make the ultimate sentencing determination. *See id.* (citing § 921.141(3), Fla. Stat. (1983)). This Court had upheld that regime as constitutional, including under the Sixth Amendment. *See Hildwin v. Florida*, 490 U.S. 638 (1989). Florida's hybrid sentencing regime, this Court concluded, was not just constitutionally permissible; it sought to afford 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 opinion) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level 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."); *Spaziano*, 468 U.S. at 460-65.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), 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 the State characterizes the additional factual findings made by the judge as "sentencing factor[s]." *Id.* at 483, 490, 492.

Ring v. Arizona extended *Apprendi* to findings on the aggravating factors necessary to impose a death sentence. 536 U.S. 584 (2002). The Court held that "[b]ecause Arizona's enumerated aggravating factors [necessary to impose a death sentence] operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

Shortly after this Court decided *Ring*, it held that *Ring* is not retroactive as a matter of federal law. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). The Court explained that *Ring* represented a "prototypical procedural rul[e]" and thus was not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989). *Summerlin*, 542 U.S. at 353.

Neither *Apprendi* nor *Ring* overruled *Hildwin*, 490 U.S. at 640-41, which until *Hurst* was this Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures." *Evans v. Sec'y, Fla. Dep't of Corr.*, 699

F.3d 1249, 1258 (11th Cir. 2012), *cert. denied*, *Evans v. Crews*, 569 U.S. 994 (2013). Indeed, in *Ring*, the Court acknowledged—but did not address—"hybrid" capital sentencing procedures, like Florida's, in which the judge decides the ultimate sentence but the jury has an advisory role. *See Ring*, 536 U.S. at 608 n.6. The Court recognized that in both *Ring* and the case it overruled, *Walton v. Arizona*, 497 U.S. 639 (1990), the Court had analyzed Arizona's capital procedures, which differ considerably from those of other states. *Ring*, 536 U.S. at 608 n.6.

Accordingly, in the years following *Ring*, both the Florida Supreme Court and the Eleventh Circuit declined to extend *Ring* to Florida's capital sentencing scheme, reasoning that the lower courts were bound by this Court's pre-*Ring* decisions, such as *Hildwin*, all of which had upheld Florida's procedures against Sixth Amendment attack. *See, e.g.*, *Hurst v. State*, 147 So. 3d 435, 447 (Fla. 2014); *Evans*, 699 F.3d at 1264.

In 2016, this Court granted certiorari in *Hurst v. Florida* "to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." 136 S. Ct. 616, 621 (2016). The Court held that Florida's capital sentencing scheme suffered from the same Sixth Amendment infirmity as did Arizona's scheme in *Ring*. *Id.* at 621-22. It therefore expressly overruled its pre-*Ring* decisions upholding Florida's capital sentencing scheme to the extent that they allowed a sentencing judge, rather than a jury, to find an aggravating circumstance necessary to impose the death penalty. *Id.* at 624.

Earlier this year, this Court determined that "*Ring* and *Hurst* do not apply retroactively on collateral

review." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (Feb. 25, 2020) (citing *Summerlin*, 542 U.S. at 358). Two months later, Petitioner asked this Court to decide whether "*Hurst v. Florida* [is] retroactive to Petitioner." Pet i.

2. In 2000, Petitioner shared an apartment with his cousin and his cousin's girlfriend, Odessia Stephens, and their four-year-old daughter, Hanessia Mullings. *Knight v. State*, 76 So. 3d 879, 881 (Fla. 2011). Following a verbal argument with Odessia, Petitioner "got a knife from the kitchen," and "began stabbing Odessia and continued his attack until she stopped resisting and curled up on the bedroom floor." *Knight v. Florida Dep't of Corr.*, 936 F.3d 1322, 1329 (11th Cir. 2019). Then, Petitioner "moved on to little Hanessia, stabbing her until his knife broke and cutting his hand in the process"; as he was leaving the bedroom, "he thought that the little girl was 'drowning in her own blood.'" *Id.* After "retriev[ing] a second knife from the kitchen," Petitioner returned to continue his attack on Odessia: he "turned her over, saw that she was still alive, and started stabbing her again." *Id.*

"In total, Odessia had 21 stab wounds, including 14 in the neck, 24 puncture or scratch wounds, bruising and ligature marks consistent with having been hit and strangled with a belt, defensive wounds, and bruises from being hit or punched in the mouth and head." *Id.* And "[l]ittle Hanessia had four stab wounds in her upper body and neck, a deep defensive wound on her hand, bruises on her neck consistent with manual strangulation, and bruises on her arms

consistent with having been grabbed." *Id.* "Both Odessia and Hanessia died that night." *Id.*

3. In 2006, Petitioner was convicted on two counts of first-degree murder. Pet. 3. The jury unanimously recommended the death penalty for both murders and, after finding the existence of five statutory aggravating factors (including a previous conviction of another violent capital felony), the trial court sentenced him to death. Pet. 6. On direct review, Petitioner contended that under *Ring*, Florida's capital sentencing scheme was unconstitutional, but the Florida courts rejected his argument. Pet. 7. His sentence became final in 2012. *Id.*

In 2013, Petitioner filed a state post-conviction motion and petition for a writ of habeas corpus. *Id.* The trial court denied both, and in 2017 the Florida Supreme Court affirmed. *Id.* As relevant here, the court first held that because *Hurst* applied retroactively to Petitioner under Florida law, Petitioner's sentence was unconstitutional. *Knight v. State*, 225 So. 3d 661, 682 (Fla. 2017). But the court rejected Petitioner's argument that his death sentence should be vacated or that he should receive a new penalty phase as a result, because the *Hurst* violation constituted harmless error. *Id.* at 682-84.

Petitioner then filed a habeas petition in federal court. Pet. 8. Holding that *Hurst* does not apply retroactively as a matter of federal law (a threshold requirement for habeas review), the district court denied his petition. *Id.* Petitioner appealed, and the Eleventh Circuit affirmed. *Knight*, 936 F.3d at 1341. The court first explained that whether or not Florida applies *Hurst* retroactively was irrelevant to the

court's analysis of whether *Hurst* applies retroactively under federal law. *Id.* at 1331-32. The court then held that "*Hurst* announced a new rule of constitutional law," and that the new rule does not apply retroactively because it "does not fit within either exception" set forth in *Teague. Knight*, 936 F.3d at 1336.

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS ALREADY CONCLUDED THAT *HURST* DOES NOT APPLY RETROACTIVELY ON COLLATERAL REVIEW.

The sole question Petitioner presents for this Court's review is whether "*Hurst v. Florida* [is] retroactive to Petitioner." Pet. i. Just a few months ago, this Court answered that question. In *McKinney v. Arizona*, the Court concluded that "*Ring* and *Hurst* do not apply retroactively on collateral review." 140 S. Ct. 702, 708 (Feb. 25, 2020) (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)).

McKinney, a petitioner on death row, "advanced an . . . argument based on *Ring* and *Hurst*." *Id.* He argued that he was entitled to relief because *Ring* and *Hurst* "now requir[e]" a jury to find aggravating circumstances that make a defendant eligible for the death penalty. *Id.* The Court rejected that argument, pointing out that his "case became final on direct review in 1996, long before *Ring* and *Hurst*." *Id.* Because "*Ring* and *Hurst* do not apply retroactively on collateral review," and because the Court held that *McKinney*'s case "[came] to [the Court] on state collateral review, *Ring* and *Hurst* do not apply." *Id.*

The Court's conclusion that *Hurst* does not apply retroactively cannot be dismissed as dictum. If it were an open question whether *Hurst* applied to cases on collateral review, the Court would have had to decide the further question whether *Hurst* provided a basis for McKinney to obtain his requested relief—"namely, a jury resentencing with a jury determination of aggravating circumstances." *See id.* Instead, the Court affirmed both of McKinney's death sentences on the ground that "*Ring* and *Hurst* do not apply retroactively on collateral review." *Id.*; *see also id.* (rejecting argument "that [McKinney] should receive the benefit of *Ring* and *Hurst*").

In short, Petitioner presents only the question whether *Hurst* is "retroactive to Petitioner" (Pet. i), and *McKinney* supplies the answer—no.

II. PETITIONER OFFERS NO GOOD REASON FOR REVISITING THE COURT'S RECENT RULING ON THE QUESTION PRESENTED.

The Petition in this case was filed two months after this Court issued its decision in *McKinney*. Petitioner, however, does not address the Court's recent determination that "*Ring* and *Hurst* do not apply retroactively on collateral review," *McKinney*, 140 S. Ct. at 708; still less does he offer any supportable justification for revisiting that ruling. Like the Eleventh Circuit below, the Court correctly concluded that *Hurst* does not apply retroactively, and the lower courts are not split on that question.

A. The Court correctly concluded in *McKinney* that *Hurst* does not apply retroactively.

Before this Court concluded that *Hurst* does not apply retroactively, the Eleventh Circuit correctly reached the same result in this case: under *Teague*, *Hurst* does not apply retroactively. 936 F.3d at 1334-37. Both the decision below and *McKinney* were correctly decided, further counseling against granting the petition.

Under *Teague*, new rules of constitutional law apply retroactively to cases on state collateral review only if they are "substantive," rather than "procedural," or if the Court announced a "watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S. at 352 (internal quotation marks omitted).

1. To begin with, for purposes of *Teague*, *Hurst* announced a new rule. "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. Thus, "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final," the case announced a new rule. *Id.* "And a holding is not so dictated, . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

Below, the Eleventh Circuit correctly concluded that *Hurst* was not dictated by *Ring*. For one thing, this Court had already specifically upheld Florida's

capital sentencing scheme in *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989). Until the Court overruled those cases in *Hurst*, *Ring* did not invalidate Florida's capital sentencing scheme. As the court below noted, "[i]t is hard to imagine that [this Court] overruled those cases in *Ring* but forgot to say so until *Hurst*," 14 years later. *Knight*, 936 F.3d at 1336.

What is more, it was not "apparent to all reasonable jurists" that *Hurst* was dictated by *Ring*. In *Ring* itself, the Court expressly distinguished Florida's capital sentencing scheme from Arizona's. *See Ring*, 536 U.S. at 607-08 & n.6. For example, in Arizona, the judge alone made the findings necessary to impose a death penalty, while Florida's "hybrid" system used an advisory jury to consider penalty-phase evidence and make a recommendation on whether to impose the death penalty. And, of course, in *Ring* the Court did not overrule *Spaziano* and *Hildwin*, which had specifically upheld Florida's hybrid scheme.

Before *Hurst* was decided, moreover, it was not apparent to the reasonable jurists on the Eleventh Circuit that *Hurst*'s holding was dictated by *Ring*. In *Evans v. Secretary, Florida Department of Corrections*, the Eleventh Circuit held that *Ring* did *not* invalidate Florida's capital sentencing scheme. 699 F.3d 1249, 1264-65 (11th Cir. 2012). There, the court highlighted the distinctions that the Court made in *Ring* between Arizona's system and hybrid systems like Florida, concluding that "such distinctions would not have been necessary if the Court had intended to

strike down both systems." *Knight*, 936 F.3d at 1335 (citing *Evans*, 699 F.3d at 1262).

The reasonable jurists on the Eleventh Circuit were not alone. In his dissenting opinion in *Hurst*, Justice Alito explained that the "decision in *Ring* did not decide whether [Florida's] procedure violates the Sixth Amendment." 136 S. Ct. at 626 (Alito, J., dissenting) (explaining that the Court had "extend[ed] *Ring* to cover the Florida system"). After all, "the Arizona sentencing scheme at issue in [*Ring*] was much different from the Florida procedure" in *Hurst*. *Id.* at 625.

In light of the Court's previous decisions upholding Florida's sentencing scheme, *Ring*'s distinguishing of Florida's sentencing scheme, and the reasonable jurists who concluded that *Hurst*'s invalidation of Florida's sentencing scheme did not ineluctably follow from *Ring*, *Hurst* announced a new rule for the purposes of *Teague*.

2. As a new rule, *Hurst* does not apply retroactively to cases on collateral review unless it constituted a substantive, rather than procedural, rule; or announced a watershed rule of criminal procedure. Neither exception applies.

Summerlin is instructive. There, in holding that the rule announced in *Ring* is not retroactive, the Court explained that *Ring* represented a "prototypical procedural rul[e]." 542 U.S. at 353. Rather than "alter[ing] the range of conduct or the class of persons that the law punishes," *Ring* "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death." *Id.* And

"[r]ules that allocate decisionmaking authority in this fashion are prototypical procedural rules." *Id.*

As in *Ring*, *Hurst* did not alter the range of conduct or the class of persons that the law punishes. Instead, like *Ring*, it changed only the procedure for sentencing in a capital case by requiring that a jury, not a judge informed by an advisory jury, find the facts necessary to impose the death penalty. In other words, it merely "allocate[d] decisionmaking authority." *Id.* Thus, like *Ring*, *Hurst* represents a prototypical procedural rule.

Like the respondent in *Summerlin*, Petitioner argues that *Hurst* announced a substantive rule because it purportedly modified the elements of capital murder. *See Summerlin*, 542 U.S. at 354 (respondent argued that *Ring* was substantive "because it modified the elements of the offense for which he was convicted"). But the Court rejected that precise argument in *Summerlin*. Just as "the range of conduct punished by death in Arizona was the same before *Ring* as after," the range of conduct punished by death in Florida is the same before *Hurst* as after. *Id.* Put another way, the Court did not "mak[e] a certain fact essential to the death penalty"; it held that "*because* [*Florida*] has made a certain fact essential to the death penalty, that fact must be found by the jury," which is "a procedural holding." *Id.*

As a procedural rule, *Hurst* thus does not apply retroactively unless it constituted a watershed rule of criminal procedure. Petitioner does not contend that it did. And for good reason. *Hurst* extended *Ring* to Florida's hybrid system for sentencing capital defendants. *See Hurst*, 136 S. Ct. at 621-22. This

Court has already determined that *Ring* is not the kind of watershed rule that should be applied retroactively. *See Summerlin*, 542 U.S. at 355-58.

In short, both this Court's conclusion in *McKinney* and the Eleventh Circuit's conclusion below that *Hurst* does not apply retroactively were correct, and Petitioner does not supply any persuasive reason to reconsider those rulings.

B. The lower courts are not split on whether *Hurst* applies retroactively.

The only two circuits to have addressed the issue have both concluded that *Hurst* does not apply retroactively. The Eleventh Circuit held in the decision below that *Hurst* does not apply retroactively, *Knight*, 936 F.3d at 1337; and the Ninth Circuit held the same in *Ybarra v. Filson*, 869 F.3d 1016, 1033 (9th Cir. 2017). Consistent with those rulings, Petitioner does not contend that the lower courts were split on the question presented *before* this Court resolved that issue in *McKinney*, *see* 140 S. Ct. at 708; nor does he assert that any purported conflict requires resolution *after* that decision.

Petitioner might contend that, due to the Florida-specific nature of the hybrid sentencing regime at issue in *Hurst*, the decision below does not address the type of retroactivity issue that would typically engender a split in the lower courts. *Ybarra*, however, demonstrates that other circuits may have occasion to consider the issue. In any event, the Florida-specific nature of the retroactivity issue in this case counsels against review, as the decision below will not have any impact on non-Florida sentences.

C. Petitioner's sentence does not violate *Hurst*.

Petitioner's case is also not worthy of review because even if *Hurst* applied retroactively, his death sentence did not violate *Hurst*. Two of the statutory aggravating circumstances that the trial court (rather than the jury) found, making Petitioner eligible for the death penalty, were previous convictions of a violent capital felony that need not have been found by the jury. Pet. 6; *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Thus, that *other* statutory aggravators that independently made Petitioner death-eligible were found by the court, not the jury, is irrelevant: Petitioner was death-eligible under Florida law because of the trial court's findings regarding his prior convictions, findings which need not be made by the jury. *Id.*; *see also Almendarez-Torres v. United States*, 523 U.S. 224, 243-48 (1998); *McKinney*, 140 S. Ct. at 705 ("Under this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found.").

A recent Florida Supreme Court decision further buttresses the conclusion that his sentence did not violate *Hurst*. In *State v. Poole*, the Florida Supreme Court held because prior convictions "formed the basis of one of the statutory aggravators found by the trial court," the "requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt" was "satisfied" even though other aggravators required to be found by a jury were found by the court. --- So. 3d ---, 2020 WL 3116597, at *2, *15 (Fla. Jan. 23, 2020). The same analysis applies here.

This point, illustrating that Petitioner would not be entitled to relief even if the Court agreed with him

that *Hurst* applies retroactively, can also be viewed through the lens of harmless error. As the Court explained in *Hurst*, the Court "normally leaves it to state courts to consider whether an error is harmless," and indeed in *Hurst* itself the Court saw "no reason to depart from that pattern." *Hurst*, 136 S. Ct. at 624. The Florida Supreme Court has already concluded that any *Hurst* violation here was harmless error. *Knight v. State*, 225 So. 3d 661, 682-84 (Fla. 2017). Petitioner's jury recommended a death sentence by a unanimous 12-0 vote, and his jury was not informed that the conclusion that aggravating circumstances outweighed the mitigating circumstances must be unanimous, and yet the jury in fact unanimously recommended death. The record provides ample support for the Florida Supreme Court's harmless error analysis, *see Knight*, 936 F.3d at 1328-30; *Knight*, 225 So. 3d at 682-83, and this Court has repeatedly declined to review comparable determinations that *Hurst* violations constituted harmless error.[1] If anything, it is particularly clear

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[1] *E.g.*, *Lowe v. State*, 259 So. 3d 23 (Fla. 2018), *cert. denied*, 139 S. Ct. 2717 (2019); *Anderson v. Florida*, 257 So. 3d 355 (Fla. 2018), *cert. denied*, 140 S. Ct. 291 (2019); *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), *cert. denied*, 139 S. Ct. 27 (2018); *Tanzi v. State*, 251 So. 3d 805 (Fla. 2018), *cert. denied*, 139 S. Ct. 478 (2018); *Johnston v. State*, 246 So. 3d 266 (Fla. 2018), *cert. denied*, 139 S. Ct. 481 (2018); *Crain v. State*, 246 So. 3d 206 (Fla. 2018), *cert. denied*, 139 S. Ct. 947 (2019); *Grim v. State*, 244 So. 3d 147 (Fla. 2018), *cert. denied*, 139 S. Ct. 480 (2018); *Guardado v. State*, 238 So. 3d 162 (Fla. 2018), *cert. denied*, 139 S. Ct. 477 (2018); *Philmore v. State*, 234 So. 3d 567 (Fla. 2018), *cert. denied*, 139 S. Ct. 478 (2018); *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017), *cert. denied*, 138 S. Ct. 1131 (2018); *Morris v. State*, 219 So. 3d 33 (Fla. 2017), *cert. denied*, 138 S. Ct. 452 (2017); *Oliver v. State*,

that any *Hurst* error in this case was harmless, because the jury unanimously convicted Knight of other violent offenses, which "satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt." *See Poole*, 2020 WL 3116597, at *15.

In short, even if this Court were to reverse course, reject its recent ruling in *McKinney*, and hold that *Hurst* applies retroactively, Petitioner still would not be entitled to a new sentencing proceeding. That consideration supplies another reason why this case is not worthy of the Court's review.

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214 So. 3d 606 (Fla. 2017*), cert. denied*, 138 S. Ct. 3 (2017); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), *cert. denied*, 138 S. Ct. 3 (2017).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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