No. 20-250

IN THE

Supreme Court of the United States

MARK ANTHONY POOLE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

In 2005, a jury unanimously convicted Petitioner of first-degree murder and four other violent felonies. Upon resentencing, and consistent with the sentencing-phase jury's 11-1 recommendation, the trial court sentenced Petitioner to death.

After his sentence became final, this Court held that Florida's pre-2016 capital-sentencing law violated the Sixth Amendment because it "required the judge alone to find the existence of an aggravating circumstance." *Hurst v. Florida*, 577 U.S. 92, 103 (2016). Petitioner then sought post-conviction relief. The court below held that (1) *Hurst* did not require a jury to weigh aggravators and mitigators or determine the appropriate sentence, and (2) Petitioner's other convictions satisfied *Hurst*'s holding that a jury must find the existence of an aggravating circumstance.

Since then, this Court has concluded that "*Hurst* did not require jury weighing of aggravating and mitigating circumstances," and—in any case—does "not apply retroactively on collateral review." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020). The Court also explained that, in capital as in non-capital cases, "a jury . . . is not constitutionally required to . . . make the ultimate sentencing decision within the relevant sentencing range." *Id.* at 707.

The question presented is: Whether Petitioner's sentence is retroactively invalid under the Sixth or Eighth Amendment because the law under which he was sentenced, which is no longer in effect, did not require a unanimous jury to find that the aggravating circumstances outweigh the mitigating circumstances and that Petitioner should be sentenced to death.

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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.

For several decades following the enactment of those reforms, this Court repeatedly reviewed and upheld the constitutionality of Florida's capital-sentencing scheme. *Hurst v. Florida*, 577 U.S. 92, 101 (2016) (*Hurst I*); *see, e.g., Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality op.); *Enmund v. Florida*, 458 U.S. 782 (1982); *Dobbert v. Florida*, 432 U.S. 282 (1977). 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 (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.").

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, 490–94 (2000). *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).

In *Hurst I*, 577 U.S. 92, this Court held that Florida's capital-sentencing scheme violated the Sixth Amendment in light of *Ring*. Under Florida law at the time, the maximum sentence a capital felon could receive on the basis of a conviction alone was life imprisonment. *Id.* at 95. Capital punishment was authorized "only if an additional sentencing proceeding 'result[ed] in findings by the court that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. § 775.082(1) (2010)). At that additional sentencing proceeding, a jury would render an advisory verdict recommending for or against the death penalty, and in making that recommendation was instructed to consider whether sufficient aggravating factors exist, whether mitigating circumstances exist that outweigh the aggravators,

and, based on those considerations, whether death is an appropriate sentence. Fla. Stat. § 921.141(2)(a)-(c) (2010).

This Court struck down that scheme in *Hurst I*. Observing that it had previously declared invalid Arizona's capital-sentencing scheme because the jury there did not make the "required finding of an aggravated circumstance"—a finding which exposed a defendant to "a greater punishment than that authorized by the jury's guilty verdict"—the Court held that this criticism "applie[d] equally to Florida's." *Hurst I*, 577 U.S. at 98 (quoting *Ring*, 536 U.S. at 604). "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, [wa]s therefore unconstitutional." *Id.* at 103.

On remand, the Florida Supreme Court addressed the scope of *Hurst I*. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (per curiam) (*Hurst II*). Though by its terms *Hurst I* faulted Florida's scheme only for permitting a judge "to find the existence of an aggravating circumstance," 577 U.S. at 103, the Florida Supreme Court extended that holding to several additional findings relevant to the ultimate sentencing determination. *Hurst II*, 202 So. 3d at 50–57. It announced the following rule:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must [1] unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, [2] unanimously find that the aggravating factors are

> sufficient to impose death, [3] unanimously find that the aggravating factors outweigh the mitigating factors, and [4] unanimously recommend a sentence of death.

Id. at 57.[1] As that summation of its holding makes clear, the Florida Supreme Court in *Hurst II* interpreted the Sixth Amendment to require that the jury make all four of the specified "findings," but it required only one of those four findings—the existence of a statutory aggravating circumstance—to be established "beyond a reasonable doubt." *See id.* The court did not explain why, insofar as its conclusion was predicated on *Apprendi* and its progeny, it apparently exempted some of the requisite jury "findings" from the requirement that such facts be found beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490.

In response to *Hurst I* and *Hurst II*, the Florida Legislature repeatedly amended its capital-sentencing scheme to comply with those rulings. As relevant here, the post-*Hurst* law requires the jury, not the judge, to "determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor." Fla. Stat. § 921.141(2)(a) (2017). If the jury concludes that no aggravating factor has been proven, the defendant is "ineligible" for the death penalty. *Id.* § 921.141(2)(b)1. If on the other hand the jury unanimously finds at least one

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[1] As described below, the Florida Supreme Court would later recede from this expansion of *Hurst I* in Petitioner's case.

aggravator, the defendant is "eligible for a sentence of death." *Id.* § 921.141(2)(b)2. In that event, the jury must make a sentencing recommendation based on a weighing of three considerations: *first*, "[w]hether sufficient aggravating factors exist"; *second*, "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist"; and *third*, based on the other two considerations, "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death." *Id.* § 921.141(2)(b)2.a-c. As discussed below, this case arose before both *Hurst* decisions and this statutory change.

2. a. Petitioner Mark Anthony Poole was convicted of the first-degree murder of Noah Scott, attempted first-degree murder of Loretta White, armed burglary, sexual battery of Loretta White, and armed robbery. Pet. App. 2a. On the evening of October 12, 2001, Scott and White went to bed sometime around midnight. *Id.* at 2a–3a. White awoke sometime later with a pillow over her face and Petitioner sitting on top of her. *Id.* at 3a. Petitioner began to rape her as she begged him not to hurt her because she was pregnant. *Id.* To stop her struggling, Petitioner repeatedly struck her with a tire iron, severing two of her fingers. *Id.* As Scott tried to intervene, Petitioner struck him in the head until he died of blunt force trauma. *Id.*

During the attack, Petitioner demanded to know where the money was. *Id.* He then left the bedroom and White managed to get dressed before passing out. *Id.* Petitioner came back in the bedroom, touched her vaginal area, and said "thank you." *Id.* White did not fully regain consciousness until the morning. *Id.*

Evidence at the crime scene and in the surrounding area linked Petitioner to the crimes. *Id.* at 4a. Several witnesses told police officers that they saw Petitioner near the victims' trailer on the night of the crimes, and Petitioner's live-in girlfriend testified that he left his house sometime in the evening and did not return until 4:50 a.m. *Id.* Witnesses also identified Petitioner as the person selling video game systems owned by Scott and stolen during the crime, some of which had blood on them when they were recovered. *Id.* at 4a–5a. DNA analysis of those items and clothing Petitioner wore that night revealed that they contained Scott's blood. *Id.* at 5a. The vaginal swab from White revealed a DNA mixture consistent with Petitioner's genetic profile at 8 loci. The possibility of anyone randomly matching this profile was 1 in 350 trillion Caucasians, 1 in 84 trillion African-Americans, and 1 in 550 trillion Southeastern Hispanics. SC05-1770 R. Vol. 21 at 2700–01.

At trial in 2005, the jury convicted Petitioner of the first-degree murder of Scott, attempted first-degree murder of White, armed burglary, sexual battery of White, and armed robbery. Pet. App. 6a. The jury unanimously recommended a sentence of death. *Id.*

In a memorandum to the trial court, Petitioner lauded the role of the judge in Florida's hybrid sentencing scheme. "One of the inherent dangers in death penalty sentencing schemes," Petitioner argued, "is that a jury comprised of laypersons might inappropriately recommend death." 2005 Memo in Support of Life Sentence, at 3 ("2005 Memo"). Florida's capital-sentencing process, he explained,

"addresses this danger" by vesting the trial court with the duty to determine the appropriate sentence:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

Id. (quoting *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973)).

In Petitioner's view, his own case offered an object lesson in "[t]he dangers inherent in jury sentencing." *Id.* at 4; *see id.* at 5 ("This is a 'classic' case where 'the inflamed emotions of jurors can . . . sentence a man to die.'"). The jury, Petitioner complained, "deliberated less than an hour before recommending that [he] be sentenced to die." *Id.* at 1. Petitioner urged the court "to impose the balanced perspective of the law and reason upon the emotion-driven viewpoint of the jury." *Id.* The court, Petitioner observed, did not owe any deference to the jury's findings, be they factual or non-factual. *Id.* Instead, it was required to make "its own independent determination of the applicable aggravating and mitigating circumstances, and

conduct its own independent balancing of the circumstances in order to arrive at the correct legal sentence to be imposed." *Id.*

Consistent with the jury's unanimous recommendation, the trial court imposed a sentence of death.

b. On direct appeal Petitioner raised a number of challenges to his convictions and death sentence, including that his death sentence violated the Sixth Amendment under *Ring* because Florida's statutory sentencing scheme did not require the jury to unanimously find all the aggravators necessary to impose a death sentence. Pet. App. 6a. The Florida Supreme Court rejected that argument, holding that Florida's capital-sentencing scheme was not unconstitutional because the jury could not have reached its advisory verdict of death had it not found an aggravator, and thus, the finding required by *Ring* inhered in that advisory verdict. *Id.* at 6a–7a (citing *Poole v. State*, 997 So. 2d 382 (Fla. 2008)); *Poole*, 997 So. 2d at 396. Alternatively, it held that Petitioner's case fell outside the scope of *Ring* because the jury had unanimously found that he committed other violent felonies during the murder—specifically attempted first-degree murder, sexual battery, armed burglary, and armed robbery. Pet. App. 7a. Those convictions—prior violent felony convictions under Florida law—constituted a statutory aggravating factor. *Id.* This case therefore fell "outside the scope of *Ring*." *Id.*

The court nevertheless determined that Petitioner was entitled to a new penalty phase proceeding due to

the erroneous introduction of evidence at Petitioner's first penalty phase. *Id.*

In 2011, following a new penalty phase, the jury recommended death by a vote of 11 to 1. *Id.* The trial court found four aggravating circumstances: (1) the contemporaneous conviction for the attempted murder of Loretta White; (2) the capital felony occurred during the commission of burglary, robbery, and sexual battery; (3) the capital felony was committed for financial gain; and (4) the capital felony was committed in a heinous, atrocious, or cruel manner. *Id.*

The trial court found that the aggravating factors "far outweighed" the mitigating circumstances and sentenced Petitioner to death. *Id.* at 9a. The Florida Supreme Court affirmed. *Poole v. State*, 151 So. 3d 402 (Fla. 2014). On direct appeal from the sentence at issue here, Petitioner did not claim that Florida's sentencing statute violated the Eighth Amendment by allowing the trial judge to impose a death sentence without requiring a unanimous jury recommendation of death. *See id.* at 408–09, 419.

Prior to the 2011 sentencing, Petitioner again warned of the "dangers inherent in jury sentencing," 2011 Memo in Support of Life Sentence, at 6 ("2011 Memo"), including his fears that the jury's "emotions may have been inflamed" and that "[t]he jury lacks the perspective to weigh the Defendant's crime proportionately," *id.* at 6, 8. Citing *Proffitt*, Petitioner argued that "a judge is better able to impose a sentence similar to those imposed in analogous cases." *Id.* at 6.

Petitioner's sentence became final in 2015, when this Court denied his petition for a writ of certiorari. *Poole v. Florida*, 135 S. Ct. 2052 (2015).

c. In 2016, Petitioner filed a postconviction motion in state court, arguing that he was entitled to resentencing because the jury did not make the required findings under *Hurst II.* Pet. App. 9a. The trial court granted the motion, vacated Petitioner's death sentence, and stayed its order pending the State's appeal to the Florida Supreme Court. *Id.*

3. On appeal, the State asked the Florida Supreme Court to recede from *Hurst II* "to the extent its holding requires anything more than the jury to find an aggravating circumstance—what *Hurst* [*I*] requires." *Id.* at 24a. The court did so.

It began by distinguishing between "two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." *Id.* (quoting *Tuilaepa v. California*, 512 U.S. 967, 971 (1994)); *see id.* at 24a–25a. "*Hurst* [*I*]," the court concluded, "is about eligibility, not selection." *Id.* at 25a. That was evident for four reasons. First, the "face of the Court's opinion" in *Hurst I* noted that "*Ring* required a jury to find every fact necessary to render *Hurst eligible* for the death penalty." *Id.* (quoting *Hurst I*, 577 U.S. at 99). Second, *Hurst I* exhibited an "exclusive focus on aggravating circumstances, the central object of the Court's death eligibility jurisprudence." *Id.* Third, "Hurst's counsel conceded [] at oral argument" that Hurst's challenge addressed eligibility. *Id.* (citing Transcript of Oral Argument at 12, *Hurst I*, 577 U.S. 92 (2016) (No. 14-7505)). And

fourth, *Apprendi* held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* (quoting *Apprendi*, 530 U.S. at 490).

The court then construed Florida's capital-sentencing law in light of the eligibility/selection distinction. *Id.* at 26a–27a. "[F]or many decades," the court explained, Florida's eligibility criteria have been set out by Section 921.141(3)(a), Florida Statutes, which requires a finding that "[t]hat sufficient aggravating circumstances exist." Pet. App. 26a (quoting Fla. Stat. § 921.141(3)(a) (2010)). And "it has always been understood that, for purposes of complying with section 921.141(3)(a), 'sufficient aggravating circumstances' means 'one or more.'" *Id.* at 27a (citing cases). By contrast, the finding required by Section 921.141(3)(b)—that the aggravators outweigh any mitigators—makes up the "selection finding." *Id.* at 26a–27a.

Applying this Court's caselaw to its interpretation of the capital-sentencing scheme in place at the time of Petitioner's resentencing, the Florida Supreme Court found that *Hurst II* was wrongly decided for two principal reasons.

First, the Florida Supreme Court explained that "[o]nly . . . 'facts' are 'elements' that must be found by a jury" for purposes of the Sixth Amendment's jury-trial right. *Id.* at 28a (citing *Apprendi*, 530 U.S. at 490). But the weighing finding required by Section 921.141(3)(b) cannot be characterized as a "fact." *Id.* at 29a. Indeed, the comparative weight of aggravators

and mitigators "does not lend itself to being objectively verifiable" and is instead a "discretionary judgment call that neither the state nor the federal constitution entrusts exclusively to the jury." *Id.* The process of weighing—like the jury's ultimate recommendation of death—is "mostly a question of mercy." *Id.* at 28a (quoting *Kansas v. Carr*, 577 U.S. 108, 119 (2016)). Because that finding involves "not a finding of fact, but a moral judgment," the Sixth Amendment and *Hurst I* are inapplicable. *Id.* at 29a; *see also id.* at 31a.

Second, even if the Section 921.141(3)(b) finding could be considered a "fact," it "still would not implicate the Sixth Amendment" because weighing "does not 'expose' the defendant to the death penalty by increasing the legally authorized range of punishment." *Id.* at 29a. Based on its interpretation of the state law at issue, the Florida Supreme Court concluded, it was the eligibility finding of an aggravator that exposed Petitioner to the death penalty, not the selection finding. *Id.*; *see also id.* at 25a–27a.

In short, because "*Hurst* [*II*] was based on a mistaken view of what constitutes an element," *id.* at 32a, the Florida Supreme Court receded from that decision "except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt," *id.* at 2a, 38a–39a.

Turning to the facts of Petitioner's case, the court held that the Sixth Amendment was satisfied because "[t]he jury in Poole's case unanimously found that,

during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery." *Id.* at 39a. Those "prior violent felonies," the court explained, were an aggravating circumstance found by the jury beyond a reasonable doubt. *See id.* at 32a, 39a; *see also* Fla. Stat. § 921.141(5)(b) (2010). As this sufficed under *Hurst I* to render Petitioner eligible for the death penalty, the court reversed the trial court's order vacating Petitioner's sentence. *Id.* at 39a.

Petitioner then sought a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. Petitioner's Sixth Amendment Claim Does Not Warrant Review.

A. The decision below does not conflict with this Court's decision in *Hurst v. Florida*.

Petitioner does not ask this Court to overrule or extend any of its Sixth Amendment precedents. Instead, his first question presented is predicated on the assumption that the decision below "conflicts with"—because it contravenes the "holding" of—*Hurst v. Florida*. Pet. i; *see id.* at 14–26. There, Petitioner claims, this Court held that capital sentences imposed under Florida's pre-2016 law "violate the Sixth Amendment" because the jury was not required to determine whether "aggravating circumstances outweigh mitigating circumstances." Pet. i.

The premise of Petitioner's first question presented is incorrect. As this Court recently confirmed, "*Hurst* did *not* require jury weighing of aggravating and mitigating circumstances." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) (emphasis added). Petitioner's argument to the contrary does not just misapprehend this Court's caselaw; it turns that law on its head. Far from "holding" that the Sixth Amendment requires jury weighing of aggravators and mitigators (Pet. i), *Hurst* declined to disturb precedents holding that the Sixth Amendment does not require such weighing.

1. This Court in *Hurst* had no occasion to decide whether the Sixth Amendment, as applied to the pre-2016 Florida law there at issue, required the jury to weigh aggravators and mitigators. Hurst not only failed to raise any such claim; he expressly repudiated the argument on which Poole's petition is based.

In his opening brief to this Court, Hurst argued that Florida's capital-sentencing scheme violated *Ring* "because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty.'" Br. for Petitioner at 18, *Hurst I*, 577 U.S. 92 (2016) (No. 14-7505) (quoting *Ring*, 536 U.S. at 609); *id.* at 19 ("Florida law, therefore, violates the principle set down in *Ring* that States may not entrust the judge with finding any aggravating circumstances necessary to authorize a death sentence.").

At oral argument, Hurst went even further: he conceded that the Sixth Amendment did not require the jury to weigh aggravators and mitigators or to

determine the appropriate sentence. *See, e.g.*, Tr. at 18, 21–22, *Hurst I*, 577 U.S. 92 (2016) (No. 14-7505). Like the Florida Supreme Court's opinion in this case, Hurst distinguished between "the selection decision" and the "eligibility decision." *Id.* at 21. The "selection decision," Hurst explained, included the choice of "life or death *and the weighing of ags and mits*," while "the eligibility decision" required that all of the elements of capital murder be found by the jury beyond a reasonable doubt. *Id.* (emphasis added). In Hurst's view, "there's no violation of the Sixth Amendment" when the jury is told that it must find the existence of a statutory aggravating circumstance beyond a reasonable doubt, even if "the judge can say . . . I'm the one who does the sentence, *so I can weigh the ags and the mits.*" *Id.* at 18 (emphasis added).

2. Consistent with longstanding principles of judicial restraint, this Court in *Hurst* carefully tailored the scope of its holding to the claim that Hurst had raised—and that the parties had briefed and argued. As noted, Hurst argued that "Florida law . . . violates the principle set down in *Ring* that States may not entrust the judge with finding any aggravating circumstances necessary to authorize a death sentence." Br. for Petitioner at 19, *Hurst I*, 577 U.S. 92 (2016) (No. 14-7505). This Court agreed. *See Hurst I*, 577 U.S. at 97–102. Accordingly, the Court held that Florida's capital-sentencing scheme violated the Sixth Amendment to the extent it "required the judge alone to find the existence of an aggravating circumstance." *Id.* at 103.

Petitioner's broader reading of *Hurst* cannot be reconciled with the Court's limited overruling of

Spaziano v. Florida. *See id.* at 101–02. In *Spaziano*, the trial judge imposed a sentence of death notwithstanding the jury's recommendation of life imprisonment. The trial court's sentence was based on certain statutorily required findings other than—and in addition to—the existence of an aggravating circumstance. In particular, the trial court found that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances" and that "a sentence of death should be imposed," *Spaziano*, 468 U.S. at 451–52. This Court held that Spaziano's sentence did not violate the Sixth Amendment, *id.* at 458–65, even though the jury did not make any of those findings, *id.* at 451–52 (citing Fla. Stat. § 921.141(3) (1983)).

In *Hurst*, this Court "overrule[d] *Spaziano* and *Hildwin*," but only "in relevant part." 577 U.S. at 101. And the Court specified the "relevant part" it had in mind: It overruled those earlier cases "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.* at 102. Accordingly, this Court did not overrule *Spaziano* insofar as that case held that the Sixth Amendment allowed the sentencing judge alone to determine that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and that "a sentence of death should be imposed," *Spaziano*, 468 U.S. at 451–52, 458–65; *accord State v. Wood*, 580 S.W. 3d 566, 584 (Mo. 2019).

Petitioner's contrary argument misapprehends certain language in *Hurst*. For example, Petitioner asserts that this Court's decision in *Hurst* "held that

Florida's weighing finding is one of the 'facts' that '[t]he Sixth Amendment requires a jury, not a judge, to find . . . to impose a sentence of death." Pet. 14 (quoting *Hurst*, 577 U.S. at 94, 98–99). But Petitioner manufactures that purported holding by stitching together fragments from two different sentences, neither of which addressed whether the Sixth Amendment requires a jury determination that aggravators outweigh mitigators. The first sentence sets forth the general principle that "[t]he Sixth Amendment requires a jury, not a judge, to find each *fact* necessary to impose a sentence of death." 577 U.S. at 94 (emphasis added). But that part of the Court's opinion does not address—much less resolve—whether the value-laden determination that aggravators outweigh mitigators is a "fact" that must be found by the jury beyond a reasonable doubt. *See id.*

Six pages down, the Court observed that, under the pre-2016 law at issue, "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* at 100 (quoting Fla. Stat. § 921.141(3) (2010)). On its face, however, that language is descriptive rather than prescriptive. It quotes the part of the state statute that required a trial court imposing a sentence of death to set forth its finding as to whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances"; but it does not say that, under the Sixth Amendment, that finding must be made by a jury.

In short, "[a]lthough *Hurst* contains some preliminary discussion of Florida judges' authority to both find and weigh aggravating circumstances independently of the jury in capital cases, it invalidated Florida's scheme specifically 'to the extent [it] allow[s] a sentencing judge to find an aggravating circumstance . . . that is necessary for imposition of the death penalty.'" *Underwood v. Royal*, 894 F.3d 1154, 1186 (10th Cir. 2018) (quoting *Hurst*, 577 U.S. at 102), *cert. denied sub nom. Underwood v. Carpenter,* 139 S. Ct. 1342 (2019).

B. As confirmed by this Court's recent ruling in *McKinney*, the decision below is correct.

1. Just last Term, this Court confirmed that "*Hurst* did not require jury weighing of aggravating and mitigating circumstances." *McKinney*, 140 S. Ct. at 708. In *McKinney*, a capital defendant challenged his death sentence because the sentencing judge had failed to consider his posttraumatic stress disorder as a mitigating factor, thereby violating *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that a capital sentencer may not refuse, as a matter of law, to consider relevant mitigating evidence). Following the Ninth Circuit's ruling, the Arizona Supreme Court independently weighed the aggravators and mitigators, including the defendant's PTSD, and upheld the sentence. *McKinney*, 140 S. Ct. at 706. In the state supreme court's judgment, the balance of the aggravators and mitigators warranted the death penalty. *Id.*

McKinney sought review in this Court, arguing that "a jury must resentence him" because a court

"could not itself reweigh the aggravating and mitigating circumstances." *Id.* This Court rejected that claim. *Hurst*, the Court explained, "applied *Ring* and decided that Florida's capital sentencing scheme impermissibly allowed 'a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.'" *Id.* at 707 (quoting 577 U.S. at 102). "But importantly," this Court stressed, "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.*

In short, Petitioner's first question presented assumes that this Court did not mean what it said when it concluded, just last Term, that jury weighing is "not constitutionally required."

2. Petitioner's efforts to evade *McKinney* (Pet. 24) are unavailing. As Petitioner sees it, *McKinney*'s explication of *Hurst* may be cast aside because the Court in *McKinney* "did not purport to analyze Florida's pre-2016 statutory scheme." Pet. 24. But that misses the point. *Hurst* itself assessed Florida's pre-2016 statutory scheme, *see* 577 U.S. at 95–96 (citing Fla. Stat. § 921.141 (2010)),[2] and *McKinney* interprets *Hurst*. That understanding tracks this Court's formulation of its holding in *Hurst*, as well as

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[2] *See* Pet. App. 12a (discussing "the familiar statutory framework that governed Florida's capital sentencing proceedings from 1973 until 2016").

the explication of the Florida Supreme Court in the decision below. *Compare* Pet. App. 39a (construing *Ring* and *Hurst* to establish "the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt"), *with McKinney*, 140 S. Ct. at 707 ("Under *Ring* and *Hurst*, . . . a jury . . . is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

Similarly, it is not persuasive to argue that *McKinney* did not "grapple with (much less overrule) the portion of *Hurst I* striking down that scheme on the ground that '[t]he trial court alone must find the fact[] . . . [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances' before imposing the death penalty." Pet. 24. As *McKinney* confirms, *Hurst* did not "strik[e] down" Florida's pre-2016 scheme on the ground that it tasked the trial court with determining whether mitigators outweigh aggravators. 140 S. Ct. at 708 ("*Hurst* did not require jury weighing of aggravating and mitigating circumstances").

Finally, it is also no answer to say that "*McKinney* is explicitly directed to the 'narrow' issue of whether, following a determination on collateral review that the sentencer failed to consider relevant mitigating evidence, 'the Arizona Supreme Court could not itself reweigh the aggravating and mitigating circumstances.'" Pet. 24. *McKinney*'s assessment of *Hurst* was germane to that issue because it supplied the basis for the Court's conclusion that "*Hurst* did not overrule *Clemons* so as to prohibit appellate

reweighing of aggravating and mitigating circumstances." 140 S. Ct. at 708.

3. Petitioner's substantial expansion of the *Apprendi* doctrine would have significant and troubling doctrinal and practical implications, including for non-capital sentencing.

The federal statute governing criminal sentences, for example, provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with" certain statutorily enumerated sentencing factors. 18 U.S.C. § 3553(a). That normative judgment "is just as necessary to the selection of a sentence under § 3553(a) as the 'outweighs' determination is to the selection of a sentence under" federal and state laws requiring that aggravators outweigh mitigators. *United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (en banc). "The two determinations are therefore indistinguishable for purposes of *Apprendi*." *Id.* Accordingly, Petitioner's theory would seem to require that a jury determine the appropriateness of the sentence in all federal cases. *See id.*

Treating weighing and other normative judgments as "facts" for purposes of the Sixth Amendment's jury-trial right would make a mess of this Court's caselaw. Under *Apprendi*, "[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*." *Apprendi*, 530 U.S. at 490 (emphases added). As this Court has explained, however, "the ultimate question whether mitigating

circumstances outweigh aggravating circumstances is mostly a question of mercy," and "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." *Kansas v. Carr*, 577 U.S. 108, 119 (2016).

In other words, Petitioner's mechanical extension of *Apprendi* to non-factual sentencing judgments would spawn a serious doctrinal anomaly: courts either would have to instruct juries to apply the beyond-a-reasonable-doubt standard of proof in a way that does not make sense and may not be "even possible," *see id.*, or else they would have to sever that standard of proof from the jury-trial right on which Petitioner's claim is based. *See, e.g.*, *Hurst I*, 577 U.S. at 97; *Apprendi*, 530 U.S. at 490.

Petitioner's theory is not just doctrinally unsound, it also threatens to deter valuable reforms and thwart the administration of criminal justice. If state laws like the one Petitioner asks this Court to strike down—i.e., laws that concededly seek to "protect[]" criminal defendants by reducing the risk of arbitrariness and guiding a sentencing authority's discretion to impose particularly harsh punishments—give rise to otherwise non-existent Sixth Amendment problems, lawmakers might well respond by repealing, rolling back, or declining to create such protections in the first place. *See* Pet. 24 ("[N]ot all states have elected to provide a weighing-finding protection to capital defendants. But once states do, they cannot avoid the strictures of the Sixth Amendment."). That is one reason why this Court has "warned against wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its

necessary boundaries." *Oregon v. Ice*, 555 U.S. 160, 172 (2009) (quotation marks and citation omitted); *see Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

C. Review is not warranted to resolve any meaningful conflict between the lower courts.

As of the date of this filing, courts have cited this Court's decision in *Hurst I* in at least 765 cases. *Hurst I*, moreover, was an application of *Ring*, *see* 577 U.S. at 98–99; and courts have cited *Ring* in 5,183 cases. Out of those thousands of cases, Petitioner identifies only one—*Rauf v. Delaware*, 145 A.3d 430 (Del. 2016)—that "breaks with" the decision below. Pet. 18; *see id.* at 18–20. For several reasons, this Court's review is not required to resolve any such disagreement.

First, the Delaware Supreme Court decided *Rauf* four years before this Court's decision in *McKinney*, which demonstrates that *Rauf* misapprehended the requirements of the Sixth Amendment. In *Rauf*, the Delaware Supreme Court held that "the Sixth Amendment . . . require[d] a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist because, under 11 Del. C. § 4209, this is the critical finding upon which the sentencing judge 'shall impose a sentence of death.'" 145 A.3d at 434 (per curiam). As *McKinney* now shows, however, "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." 140 S. Ct. at 707. At a minimum, the Nation's court of last resort should not be asked to decide whether the Delaware Supreme Court's view survives *McKinney* before the Delaware Supreme Court has had the opportunity to consider that question in the first instance.

Second, *Rauf* is an outlier. It does not appear that any federal court of appeals or other state court of last resort takes the same view as the Delaware Supreme Court, and Petitioner does not argue otherwise. *See* Pet. 18–20.

Even before *McKinney*, "[n]early every court that [had] considered the issue [had] held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances." *State v. Mason*, 108 N.E.3d 56, 64 (Ohio 2018) (citing cases).[3] Similarly, "[e]very [federal] circuit" that had addressed the argument that *Apprendi* requires jury weighing of aggravators

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[3] *See State v. Wood*, 580 S.W.3d 566, 582–88 (Mo. 2019) (correcting *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003)); *Evans v. State*, 226 So. 3d 1, 38–39 (Miss. 2017); *Ex Parte Alabama*, 223 So. 3d 954, 966 (Ala. 2016); *State v. Belton*, 74 N.E.3d 319, 337 (Ohio 2016); *Nunnery v. State*, 263 P.3d 235, 250–51 (Nev. 2011); *State v. Fry*, 126 P.3d 516. 534 (N.M. 2005); *Commonwealth v. Roney*, 866 A.2d 351, 361 (Pa. 2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004); *Oken v. State*, 835 A.2d 1105, 1147 (Md. 2003); *State v. Gales*, 658 N.W.2d 604, 626 (Neb. 2003).

and mitigators had "rejected" that claim. *Gabrion*, 719 F.3d at 533 (en banc) (joining six other federal courts of appeals).[4]

In light of *McKinney*, it is now "crystal clear [that] *Hurst* addressed only the finding of aggravating facts and had nothing to do with the weighing process." *United States v. Tsarnaev*, 968 F.3d 24, 89 (1st Cir. 2020) (explaining that "*McKinney* helps sink Dzhokhar's claim that *Hurst* requires the jury to make the weighing determination beyond a reasonable doubt"); *see also People v. Suarez*, 471 P.3d 509, 565 (Cal. 2020) (quoting *McKinney* for the proposition that *Hurst* "did not require jury weighing of aggravating and mitigating circumstances"). Accordingly, it does not appear that any court has held, post-*McKinney*, that the Sixth Amendment requires jury weighing of aggravators and mitigators, even if the pertinent sentencing statute provides that a sentence of death may not be imposed unless the sentencing authority determines that aggravators outweigh mitigators.

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[4] *See United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013); *United States v. Fields*, 516 F.3d 923, 950 (10th Cir.2008); *United States v. Mitchell*, 502 F.3d 931, 993–94 (9th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31–32 (1st Cir. 2007); *United States v. Fields*, 483 F.3d 313, 345–46 (5th Cir. 2007); *cf. United States v. Purkey*, 428 F.3d 738, 749–50 (8th Cir. 2005) (holding that an indictment need not allege weighing).

II. Petitioner's Eighth Amendment Claims Do Not Warrant Review.

Petitioner raises two claims under the Eighth Amendment. Pet. i, 26–34. Neither merits review.

A. This Court should not grant certiorari to decide whether the Eighth Amendment requires a unanimous jury recommendation of death.

1. As the Florida Supreme Court recognized, this Court has already rejected Petitioner's claim that the Eighth Amendment requires a unanimous jury recommendation of death. 297 So. 3d at 504. In *Spaziano*, the trial court imposed "a sentence of death after the jury had recommended life imprisonment." 468 U.S. at 457. Spaziano "urge[d] that allowing a judge to override a jury's recommendation of life violates the Eighth Amendment's proscription against 'cruel and unusual punishments.'" *Id.* This Court rejected that claim. *Id.* at 457–65. If, as *Spaziano* holds, the Eighth Amendment allows a trial judge to impose death in the face of a jury recommendation of life, it follows that the Eighth Amendment does not require a unanimous jury recommendation of death.

In *Hurst*, this Court overruled *Spaziano* "to the extent" that it "allow[e]d a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." 577 U.S. at 102. That carefully cabined ruling left *Spaziano*'s Eighth Amendment holding untouched.

2. Petitioner does not argue that the lower courts are divided on whether the Eighth Amendment requires a death sentence to be supported by a unanimous jury recommendation of death. Pet. 26–30. And they are not. Consistent with *Spaziano*, at least six other state courts of last resort have held that the Eighth Amendment does not require a unanimous jury recommendation of death. *See, e.g.*, *Wood*, 580 S.W.3d at 589; *Ex parte Taylor*, 808 So. 2d 1215, 1217–18 (Ala. 2001); *State v. Cobb*, 743 A.2d 1, 99 (Conn. 1999); *State v. Smith*, 705 P.2d 1087, 1106 (Mont. 1985); *State v. Gillies*, 691 P.2d 655, 659 (Ariz. 1984); *State v. Sivak*, 674 P.2d 396, 398–99 (Idaho 1983); *see also State v. Mata*, 745 N.W.2d 229, 250–52 (Neb. 2008); *United States v. Promise*, 255 F.3d 150, 159 (4th Cir. 2001); *United States v. Fields*, 483 F.3d 313, 331 (5th Cir. 2007).

3. Under *Spaziano*, the Florida Supreme Court correctly rejected Petitioner's Eighth Amendment claim. Indeed, Petitioner's sentence stands on firmer ground than the sentence this Court upheld in *Spaziano*. In Petitioner's case, the trial court imposed a sentence consistent with the resentencing jury's 11-1 recommendation (and the original sentencing jury's 12-0 recommendation). In *Spaziano*, this Court approved the trial court's decision to impose the death sentence notwithstanding the jury's recommendation of life.

The decision below does not make Florida an "absolute outlier" (Pet. 26). Consistent with *Spaziano*, the Florida Supreme Court held that the Eighth Amendment does not bar a trial court from imposing a sentence of death absent a unanimous jury

recommendation of death. No other court takes a different view, and Petitioner does not argue otherwise.

As a matter of policy, moreover, Florida's capital-sentencing procedures are squarely within the mainstream of contemporary state practice. As Petitioner concedes, "current Florida law still requires a unanimous jury recommendation of death." Pet. 28 n.4. The decision below holds that Florida's old law did not violate the Eighth Amendment, but that ruling "does not make Florida an 'outlier.'" Pet. App. 43a (Lawson, J., concurring).

Petitioner does not overcome the reasoning of *Spaziano* by asserting that standards have evolved since that case was decided (Pet. 29). As Justice Lawson explained, this Court "has already considered arguments based upon 'national consensus' in its analysis of this precise issue." Pet. App. 42a (Lawson, J., concurring). In *Spaziano*, the Court upheld the validity of a law allowing a judge to override a jury recommendation of life even though only three states had such laws. 468 U.S. at 463. The Court's reasoning is instructive:

> The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. . . . In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death

> penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Id. at 464 (internal citations omitted).

The same analysis applies here. Now, as then, "the Sixth Amendment does not require jury sentencing," *id.*; *see McKinney*, 140 S. Ct. at 707–08. Nor is jury sentencing required by "the demands of fairness and reliability in capital cases." *Spaziano*, 468 U.S. at 464. Indeed, Petitioner himself, at an earlier stage of this same case, argued that "[t]he jury lacks the perspective to weigh the Defendant's crime proportionately," 2011 Memo at 8, and urged that "a judge is better able to impose a sentence similar to those imposed in analogous cases," *id.* at 6.

It does not help Petitioner's cause to say that his position now is that "the death penalty cannot be imposed absent a unanimous jury *recommendation*"—and not that the Constitution requires "jury sentencing." Pet. 29. If a "jury lacks the perspective to weigh the Defendant's crime proportionately," and if "a judge is better able to impose a sentence similar to those imposed in analogous cases," the Constitution should not make the validity of a judicial sentence turn on whether that sentence is supported by a unanimous jury recommendation.

At any rate, Petitioner's distinction between requiring jury sentencing and requiring a unanimous jury recommendation of death creates more problems than it solves. If the jury's weighing and sentencing

recommendation are "facts" for purposes of the Sixth Amendment, why should a court be free (as Petitioner urges) to set those "factual findings" aside even if a reasonable jury could have made such findings based on evidence in the record? *See* 2005 Memo at 1, 3, 5. And if a court, by virtue of its superior experience and judgment, should be empowered (as Petitioner has also urged) to *override* a reasonable and unanimous jury recommendation of death, why would the Eighth Amendment bar a state from authorizing a court, like the court in this case, to *approve* a reasonable and almost-unanimous jury recommendation of death? Of course, states are and should be free to extend such protections to capital defendants as a matter of social policy—just as Florida has already done. *See* Fla. Stat. § 921.141 (2020). But the Constitution does not require States to make unanimous jury "recommendations" *binding* only when those recommendations are favorable to the accused.

B. This Court should not grant certiorari to review Petitioner's *Caldwell* claim.

1. This case is a poor vehicle for considering Petitioner's *Caldwell* claim. Petitioner did not clearly raise such a claim until his petition for rehearing, and the Florida Supreme Court did not address whether Petitioner was entitled to postconviction relief on the ground that the jury was misled as to its role in the sentencing decision. *See* Pet. App. 31a–32a; *see, e.g.*, *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984) ("Since this type of claim was not passed upon by the Court of Appeals, we do not consider it here.").

2. Petitioner does not allege that the decision below implicates any disagreement among the lower courts as to his Eighth Amendment/*Caldwell* claim. *See* Pet. 30–34; *Cabrera v. State*, 840 A.2d 1256, 1272–74 (Del. 2004) (rejecting *Caldwell* claim when, following *Ring*, the jury's guilt-phase verdict was used to establish an aggravator at the penalty phase).

3. The court below did not commit any error, reversible or otherwise, in declining to *sua sponte* address whether Petitioner's jury lacked awareness of the capital-sentencing ramifications of its decision.

In *Caldwell v. Mississippi*, this Court explained that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. 320, 328–29 (1985). "[T]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quotation marks omitted).

Petitioner does not and cannot make that showing. As Petitioner sees it, his guilt-phase jury was misled as to its role because it was told that "'the death penalty may *become* an issue . . . [i]f and only if the jury returns a verdict of guilty of first-degree murder'; the jury would then 'reconvene for the purpose' of considering punishment; and '*at that hearing*, evidence of aggravating and mitigating circumstances w[ould] be presented.'" Pet. 34 (citing Trial Tr. 32 (Apr. 11, 2005)). But all of that was true. Capital

defendants, like non-capital defendants, are subject to punishment only if they are convicted of a crime; a sentencing-phase jury did convene "'for the purpose' of considering punishment"; and, at Petitioner's sentencing-phase hearing, "evidence of aggravating and mitigating circumstances" was presented to, and considered by, his sentencing-phase jury.

Petitioner does not establish a *Caldwell* violation by observing that, under the decision below, the guilt-phase jury's finding that Petitioner committed other violent felonies satisfies the requirement that a jury find the existence of an aggravating circumstance. Pet. 34. That finding did not require the sentencing-phase jury to recommend, or the trial court to impose, a sentence of death; and the guilt-phase jury was never misinformed that Petitioner could be sentenced to death if and only if his sentencing-phase jury independently found the existence of a statutory aggravating circumstance.

4. This Court has recently and repeatedly declined to consider claims for post-conviction relief predicated on *Hurst* and related *Caldwell* arguments. *See, e.g.*, *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017), *cert. denied*, 138 S. Ct. 1131 (2018) *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), *cert. denied*, 138 S. Ct. 3 (2017); *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), *cert. denied*, 139 S. Ct. 27 (2018); *Anderson v. State*, 257 So. 3d 355 (Fla. 2018), *cert. denied*, 140 S. Ct. 291 (2019). Petitioner's *Caldwell* claim is no more cert-worthy.

III. Additional Prudential and Equitable Considerations Militate Against Granting Certiorari.

1. Petitioner asks this Court to "grant certiorari to resolve" the validity of the pre-2016 statute under which Petitioner was sentenced. Pet. 36 (emphasis added). But that law is no longer on the books. In 2017, the Florida Legislature amended Florida's capital-sentencing scheme to require, as a matter of state policy, just what Petitioner says is required as a matter of federal constitutional law. *See* Pet. 28 n.4. In particular, Florida law now provides that a trial court may sentence a defendant to death only if the sentencing-phase jury unanimously determines that the aggravators outweigh the mitigators and that death is the appropriate sentence. Fla. Stat. § 921.141(2)–(4) (2020). Hence, granting review in this case will not impact pending or future capital proceedings in Florida.

2. Granting review will also have little to no impact on already-final sentences. Petitioner's Sixth Amendment claim is based on *Hurst* (Pet. i, 14–26), which does "not apply retroactively on collateral review" under federal law. *McKinney*, 140 S. Ct. at 708 (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)). Accordingly, an inmate like Petitioner may not obtain post-conviction relief based on *Hurst* unless *Hurst* retroactively applies to his case under state law.

Under Florida law, it is now "clear" that "*Hurst v. Florida* . . . should not be applied retroactively." *Brown v. State*, Nos. SC19-704 & SC19-1419, 2020 WL

5048548, at *26 (Fla. Aug. 27, 2020) (Canady, C.J., concurring in result). It is settled that *Hurst* does not apply retroactively to cases "in which the death sentence became final before the issuance of *Ring*" in 2002. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016). In *Mosley v. State*, a case decided shortly after *Hurst II*, the Florida Supreme Court initially held that the *Hurst* decisions should generally apply retroactively to post-*Ring* sentences. 209 So. 3d 1248, 1274 (Fla. 2016). But the decision below "dismantled the foundation for the majority's analysis in *Mosley*," which is now only "the ghost of a precedent." *Brown*, 2020 WL 5048548, at *26 (Canady, C.J., concurring in result).

Even if *Mosley* had any life left in it, a ruling from this Court accepting Petitioner's claims would not affect the many inmates for whom the grant of *Hurst* relief has already become final. At the time the Petition was filed, this was disputed as to inmates who had been afforded *Hurst* relief but had not yet been resentenced. *See* Pet. 35–36. Since then, however, the Florida Supreme Court has conclusively resolved the issue in favor of inmates for whom the grant of *Hurst* relief has already become final. *See State v. Okafor*, No. SC20-323, 2020 WL 6948840 (Fla. Nov. 25, 2020); *State v. Jackson*, No. SC20-257, 2020 WL 6948842 (Fla. Nov. 25, 2020).

All that leaves is the bare possibility that the Florida Supreme Court might cling to the "ghost" of a recently discredited precedent and choose to afford retroactive *Hurst* relief, as a matter of state law, to a narrow category of inmates—i.e., those (1) whose sentences became final after *Ring* but before *Hurst*,

(2) who timely sought *Hurst* relief by December 2017 (i.e., within one year of *Mosely*),[5] (3) for whom the grant or denial of such relief has not yet become final, and (4) who can show *Hurst* error that is not harmless. Notably, Petitioner does not identify any inmate, other than himself, who arguably satisfies all those conditions. *See* Pet. 35–36.

3. Equitable considerations support the conclusion that Petitioner's already-final sentence should not be relitigated—much less retroactively invalidated. The hybrid sentencing procedure Petitioner asks this Court to strike down was designed to implement this Court's decision in *Furman*. *See, e.g.*, *Proffitt*, 428 U.S. at 247 (plurality op.); *Ring*, 536 U.S. at 610 (Scalia, J., concurring). For decades, this Court upheld that procedure against Sixth and Eighth Amendment challenges, *see supra* at 1 (citing cases), and the State's reliance on those precedents was "undeniably immense and entirely in good faith," *Mosley*, 209 So. 3d at 1291 (Canady, C.J., dissenting).

Indeed, Petitioner's own arguments show that the pre-2016 statute reasonably balanced the competing interests at stake. Petitioner now claims that the Eighth Amendment requires that a unanimous jury recommend the death penalty. Pet. 26. At his original sentencing, however, a unanimous jury did

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[5] Fla. R. Crim. P. 3.851(d)(2); *Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2018) ("The relevant time in which to file a claim based on a new fundamental constitutional right is one year from the date of the decision announcing that the right applies retroactively.").

recommend the death penalty. At that time, Petitioner warned of the "inherent danger[]" that "a jury comprised of laypersons might inappropriately recommend death," urged the court "to impose the balanced perspective of the law and reason upon the emotion-driven viewpoint of the jury," stressed the real-world reasons why judges are in a better position to assess whether the death sentence should be imposed, and argued that the court was required to exercise "independent" judgment and owed no deference to the jury's unanimous recommendation. 2005 Memo at 1, 3, 5.

Similarly, at the time of his resentencing, Petitioner complained that "[t]he jury lacks the perspective to weigh the Defendant's crime proportionately," 2011 Memo at 8, and cited this Court's decision in *Proffitt* for the proposition that "a judge is better able to impose a sentence similar to those imposed in analogous cases," *id.* at 6. Consistent with those views, Petitioner did not claim that the Eighth Amendment requires a unanimous jury recommendation on direct appeal from his resentencing.

* * *

As explained above, Petitioner's constitutional claims are foreclosed by this Court's precedents, and those precedents were correctly decided. Even if that were debatable, however, this Court should not "grant certiorari to resolve *once again*" the validity of a state law that has already been amended to cure the alleged constitutional infirmities of which Petitioner complains (Pet. 36, emphasis added); and still less

should it do so when, as here, any such ruling would not and should not provide a basis for disturbing Petitioner's already-final sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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