No. 20-6043

IN THE

Supreme Court of the United States

ROBIN LEE ARCHER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which has since been receded from, made substantive clarifications to Florida's capital-sentencing scheme that must apply to all defendants on collateral review.

2. Whether, contrary to this Court's holding in *Spaziano v. Florida*, 468 U.S. 447 (1984), the Eighth Amendment requires the jury to make the ultimate decision to impose the death sentence.

3. Whether it violates the Eighth Amendment to deny defendants whose sentences were final when *Hurst v. Florida*, 577 U.S. 92 (2016) was announced relief under that decision.

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STATEMENT

1. In late 1972, 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.*, these 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.

Over the next few decades, this Court repeatedly reviewed and upheld the constitutionality of Florida's capital-sentencing scheme. *See, e.g.*, *Hildwin v. Florida*, 490 U.S. 638 (1989); *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). It concluded that Florida's hybrid regime, in which juries issued advisory verdicts but a trial judge ultimately found sentencing facts and issued a sentence, 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.).

2. That was the state of the law—advisory juries with judicial sentencing—when Petitioner committed, was convicted of, and was sentenced for, his crimes.

In 1990, Petitioner was fired from his job at an auto parts store. *Archer v. State*, 613 So. 2d 446, 447 (Fla. 1993). In response, he offered to pay his 17-year-old cousin to kill the clerk whom he blamed for his firing. *Id.* Petitioner gave his cousin a gun to assist in the murder scheme. *Id.* To hide his motive, Petitioner told his cousin to rob the store.

As directed by Petitioner, in January 1991, Petitioner's cousin and two friends went to the store to murder the clerk. *Id.* On that night, however, the trio did not go through with the murder. *Id.* That angered Petitioner, who "got after" his cousin for the failure. *Id.*

So, the next day, the same trio went back to the store and after taking the money from the cash boxes, "shot the clerk in the head twice as he lay on the floor begging for his life." *Id.* On learning of the killing, Petitioner refused to pay his cousin because he killed the wrong clerk. *Id.*

Petitioner's cousin confessed to several people, leading to Petitioner's arrest. *Id.* At trial, the jury unanimously convicted Petitioner of first-degree murder, armed robbery, and grand theft. *Id.*; *see also Archer v. State*, 673 So. 2d 17, 18 (Fla. 1996). The jury recommended a death sentence, and the trial judge imposed the death sentence. *Archer*, 613 So. 2d at 447.

On his initial direct appeal, the Florida Supreme Court affirmed the convictions but reversed the penalty-phase verdict for instructional error. *Id.* at 448.

A new penalty-phase jury was empaneled, which again recommended the death penalty by a vote of

seven to five. *Archer*, 673 So. 2d at 18. Again, the trial judge agreed, finding two aggravating circumstances (that the murder was committed during the commission of robbery and that the murder was committed in a cold, calculated, and premeditated manner), which outweighed the mitigating circumstances. *Id.* at 18 & n.1. This time, the Florida Supreme Court affirmed. *Id.* at 18. And in 1996, this Court denied certiorari. 519 U.S. 876 (1996).

3. Since Petitioner's sentence became final, much has changed in how Florida implements capital punishment. The changes were sparked by *Apprendi v. New Jersey*, where 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).

Nonetheless, neither *Apprendi* nor *Ring* overruled this Court's precedents approving the validity of Florida's hybrid sentencing procedure. *See id.* (holding that Arizona's capital-sentencing scheme was unconstitutional because it allowed a "judge, sitting without a jury, to find an aggravating

circumstance necessary for imposition of the death penalty"); *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1335 (11th Cir. 2019) ("*Ring* did not dictate the Supreme Court's later invalidation of Florida's death penalty sentencing scheme in *Hurst*."); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1261–62 (11th Cir. 2012) (concluding that Florida's capital-sentencing scheme survived *Ring*).

That change did not come until *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst I*), when 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 based on a conviction alone was life imprisonment. *Hurst I*, 577 U.S. 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. That verdict would recommend for or against the death penalty. In making that recommendation the jury was instructed to consider whether sufficient aggravating factors existed, whether mitigating circumstances existed that outweigh the aggravators, and, based on those considerations, whether death was an appropriate sentence. Fla. Stat. § 921.141(2)(a)-(c) (2010).

This Court struck down that scheme. Observing that it had previously declared Arizona's capital-sentencing scheme invalid 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, [was] therefore unconstitutional." *Id.* at 103. Having found Florida's capital-sentencing scheme unlawful, this Court remanded to the Florida Supreme Court to determine whether the error was harmless. *Id.* at 102–03.

On remand, the Florida Supreme Court addressed the scope of *Hurst I*. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (*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, relying not only on the Sixth Amendment but also the Eighth Amendment and the Florida Constitution, 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. As the court explained, "[t]hese same requirements" had always existed in Florida law, they were simply previously "consigned to the trial judge." *Id.* at 53.

Justice Canady, joined by Justice Polston, dissented. As he explained, *Hurst I* required only "that an aggravating circumstance be found by the jury." *Id.* at 77 (Canady, J., dissenting). Justice Canady would have held that once a jury finds an aggravator beyond a reasonable doubt, the Sixth Amendment is satisfied, even if a judge later weighs that aggravator against mitigators and imposes a death sentence. *Id.* at 82.

Four years later, Justice Canady's dissent was adopted by a majority of the Florida Supreme Court in *State v. Poole*. 297 So. 3d 487 (Fla. 2020). There, the court receded 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 501. As the court explained, it had "clearly erred" in *Hurst I* "by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances." *Id.* at 503.

4. In between *Hurst II* and *Poole*, Petitioner filed a state court petition for a writ of habeas corpus, arguing that his capital sentence was erroneous under *Hurst I* and *Hurst II*. *See Archer v. Jones*, No. SC16-2111, 2017 WL 1034409 (Fla. Mar. 17, 2017). The Florida Supreme Court rejected the argument. As the court noted, Petitioner's "death sentence became final in 1996." *Id.* at *1. Thus, Petitioner was barred from receiving *Hurst* relief under Florida law, which held

that *Hurst* was not retroactive to sentences that were final before *Ring*. *Id*. (citing *Asay v. State*, 210 So. 3d 1 (Fla. 2016)).[1] Similarly, this Court had already determined that *Ring* does not apply retroactively as a matter of federal law. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Consistent with *Schriro*, this Court has confirmed that "*Ring* and *Hurst* do not apply retroactively on collateral review." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020).

5. Facing a wall of adverse retroactivity caselaw barring his *Hurst* claim, Petitioner filed a new petition for state post-conviction review. This time, instead of directly raising *Hurst I*, Petitioner argued that *Hurst II* (even though it purported to issue a constitutional ruling) had in fact rewritten Florida's statutory capital-sentencing framework. Pet. App. 3. The Florida Supreme Court affirmed the trial court's dismissal of the claim, finding that the claim failed on the merits because the court had previously held that *Hurst II* did not substantively alter the requirements to impose the death penalty, but instead allocated the pre-existing requirements from the judge to the jury. Pet. App. 5 (citing *Rogers v. State*, 285 So. 3d 872, 885–86 (Fla. 2019)).

Petitioner sought a writ of certiorari.

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[1] In *Mosley v. State*, the Florida Supreme Court concluded that *Hurst II* should generally apply retroactively to defendants whose sentences were not final when *Ring* was decided. 209 So. 3d 1248, 1283 (Fla. 2016).

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to review Petitioner's claims because the decision below is based on adequate and independent state-law grounds.

1. This Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). The reason is jurisdictional and fundamental: "Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (citing *Herb*, 324 U.S. at 125–26).

Because the decision below was based on independent and adequate state-law grounds, the Court should deny the petition.

2. Some background is helpful. At the Florida Supreme Court, Petitioner tried to raise *Hurst* as two separate claims: one alleging Sixth and Eighth Amendment errors based on the constitutional holdings in *Hurst I* and *Hurst II* and one statutory claim based on purported interpretive changes to Florida's statutory law based on *Hurst II*'s reasoning. Pet. App. 3–5.

a. The Florida Supreme Court found that the first claim was procedurally barred. As the court explained, the constitutional claim was "procedurally barred" because the court had "denied this same claim when [Petitioner] raised it in a petition for a writ of habeas corpus." Pet. App. 3. Petitioner does not dispute that this procedural-bar holding rests on

state-law grounds, and therefore, precludes review of his constitutional claims (including an Eighth Amendment claim).

b. Instead, Petitioner argues that this Court can review his statutory claim. As to that claim, the Florida Supreme Court reasoned that "[e]ven if this claim is not procedurally barred, it is without merit[.]" Pet. App. 5. Petitioner argues that this second claim is not procedurally barred because, in his view, the Florida Supreme Court's holding was equivocal. But even if Petitioner were correct, it would not solve the jurisdictional problem because the Florida Supreme Court's substantive holding rests on state-law grounds alone.

Petitioner's second *Hurst* theory is that in *Hurst II* the Florida Supreme Court did not simply effectuate *Hurst I*'s procedural constitutional holding; rather, on Petitioner's telling, the court substantively interpreted Florida's criminal law to impose novel requirements on death eligibility. From there, Petitioner reasons that this Court's retroactivity law required Florida to apply *Hurst II*'s "substantive" change to his long-final case.

That theory, however, necessarily raises a state-law issue about what *Hurst II*—a state court decision—purportedly found to be the elements in a state statute. "States possess primary authority for defining . . . criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). Therefore, defining the elements of a crime is "essentially a question of state law." *Hankerson v. North Carolina*, 432 U.S. 233, 244–45 (1977).

The court below rejected Petitioner's theory on state-law grounds, citing a state court case—*Rogers*, Pet. App. 5—which itself relied on state-law authorities to reject the argument that *Hurst II* created new substantive elements that needed to be proved beyond a reasonable doubt. *See Rogers*, 285 So. 3d at 885 (citing *In re Standard Crim. Jury Instructions in Cap. Cases*, 244 So. 3d 172, 191–92 (Fla. 2018); *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018)).

It is no answer for Petitioner to argue that he ultimately brings a due process claim, and therefore, raises a federal issue. After all, the determination that *Hurst II* made no alteration to Florida's capital-sentencing statute conclusively resolves Petitioner's due process claim absent any federal analysis. *Cf. Graves v. Ault*, 614 F.3d 501, 512 (8th Cir. 2010) ("[W]e are bound by the Supreme Court of Iowa's holding that a change, rather than a mere clarification, occurred."). Indeed, when this Court has confronted claims that a prisoner's due process rights were violated because a subsequent state court decision clarified that the conduct the prisoner was convicted of was simply not criminal, this Court has certified questions about the content of state law to the relevant state supreme court. *E.g.*, *Fiore v. White*, 531 U.S. 225, 228 (2001); *see also Bunkley v. Florida*, 538 U.S. 835, 840–41 (2003) (remanding to state court to determine when change in law occurred). Implicit in that certification is the view that whether a state law has been altered is itself a state-law question. And here, when that state-law answer fully resolves the case, there is no federal jurisdiction. *E.g.*, *Gladney v. Pollard*, 799 F.3d 889, 898 (7th Cir. 2015) (finding "no

federal constitutional issue" and only "perceived error of state law" when habeas petitioner argued that a new state-law statutory interpretation had to be applied to him, but the state courts found that the petitioner had been convicted under the proper law at the time of his trial).

In short, the opinion below rests on state law all the way down, and thus, this Court lacks jurisdiction.[2]

II. Petitioner's claim that *Hurst* should apply to him does not warrant review.

In his first question presented, Petitioner argues that in *Hurst II*, the Florida Supreme Court construed Florida law to create new substantive statutory requirements that needed to be found before imposing the death penalty (although he never says what precisely those new requirements are). Pet. 10–13. Petitioner reasons that because those unnamed, new requirements were grounded in the statutory text, they must have always existed, and therefore, should apply to his case as a matter of due process. Pet. 13–

[2] At a minimum, the fact that Petitioner says nothing about this substantial jurisdictional question counsels against granting certiorari. After all, before it could reach the merits of Petitioner's claims, this Court must assure itself of jurisdiction. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1975 (2016) ("Before we reach the merits, we must assess our jurisdiction."). Doing so, however, would require the Court to delve into what is, at least, a complicated jurisdictional dispute. But even Petitioner does not argue that the jurisdictional question is itself cert-worthy, and therefore, there is no reason for the Court to take this case to decide the jurisdictional question.

15. And, even though the Florida Supreme Court receded from *Hurst II* in *Poole*, Petitioner asserts that *Hurst II*'s now erroneous description of the law should apply to his case to avoid due process problems. Pet. 15–19. Petitioner is not only wrong on the merits at each step of his claim—*Hurst II* had no new statutory holding and applying *Poole* here does not violate due process—but even if he were correct, review is not warranted.

1. Petitioner does not even try to identify any traditional basis for certiorari under Supreme Court Rule 10. He points to no split among the lower courts, no conflicts with this Court's decisions, and no issues of great federal importance. Nor could he.

Petitioner's claim turns on how Florida interprets its own death-penalty statute. No other state would have reason to interpret Florida's statute, which explains why no split among state courts of last resort exists. Nor is there a split with this Court's decisions or with a lower federal court because "[s]tate courts . . . alone can define and interpret state law," and thus, the Florida Supreme Court's interpretation of its own capital-sentencing statute is the last word. *Schlesinger v. Councilman*, 420 U.S. 738, 755 (1975). Finally, no split on any constitutional question exists because, to avoid adverse retroactivity rulings, Petitioner abandons any direct constitutional theory. In short, Petitioner advances no split because the legal issue he presents cannot give rise to one.

Nor does Petitioner raise an important question of federal law. Petitioner asks whether the Florida Supreme Court recognized new substantive elements in its capital-sentencing statute on remand from

Hurst I. That is a state-law question, which may explain why this Court has repeatedly rejected petitions raising it. *See Lamarca v. Florida*, No. 18-5648 (Oct. 29, 2018) (denying petition that argued that *Hurst II* imposed new substantive elements); *Geralds v. Florida*, No. 18-5376 (Oct. 9, 2018) (same).

2. In any event, the decision below was correct. Petitioner argues that he should benefit from *Hurst II* even though his sentence was final well before *Hurst II* was decided. In doing so, Petitioner does not argue that either *Hurst I* or *Hurst II* is retroactive as a matter of federal or state law. Instead, Petitioner presents a due process claim. On his telling, *Hurst II* was a substantive ruling about what Florida's death-penalty statute had always meant. And thus, on Petitioner's theory, because *Hurst II* discovered a new element in the death-penalty regime that should have applied when he was sentenced, he should be entitled to *Hurst II* relief as a matter of due process.

But that argument fails for two independent reasons. *First*, *Hurst II* did not change Florida substantive law, it simply changed procedure, and Petitioner presents no due process argument for why a procedural change should apply retroactively to his case. *Second*, Petitioner's sentence is undeniably proper under current Florida law (as announced in *Poole*), and Petitioner presents no reason why he should benefit from *Hurst II* but not suffer from *Poole* when both cases were decided long after his sentence became final.

a. Start with Petitioner's argument that *Hurst II* wrought a substantive change to Florida law that must apply to his long-final conviction. For purposes

of assessing the petition, the Court may assume that, if a state court "clarifie[s]" its law to render a defendant's conduct non-criminal, then due process requires that defendants on collateral review benefit from the clarification. *See Fiore*, 531 U.S. at 228–29. Even if that is so, however, it does not mean that all state statutory decisions must apply retroactively. On the contrary, although some "clarifications" of state law may apply to already-final convictions (because the clarification shows what the law always was), true "changes" in interpretation need not apply retroactively. *See Wainwright v. Stone*, 414 U.S. 21, 24 (1973); *see also Volpe v. Trim*, 708 F.3d 688, 703 (6th Cir. 2013) (declining to allow a defendant to benefit from a judicial change to Ohio sentencing law); *Graves*, 614 F.3d at 509–12 (declining to allow a defendant to benefit from a judicial "change" in Iowa law); *Henry v. Ricks*, 578 F.3d 134, 140 (2d Cir. 2009) ("[T]he Constitution does not require a state's highest court to make retroactive its new construction of a criminal statute." (quotation mark and alteration omitted)).

But this Court need not dive into the thorny question of whether *Hurst II* wrought a change or merely a clarification of the requirements to impose the death penalty in Florida because Petitioner's theory fails for a more basic reason: *Hurst II* did not say anything new about the substantive requirements needed to impose a capital sentence, and therefore, there is no arguable due process problem with Petitioner's pre-*Hurst II* sentence. *See Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005) (declining to apply *Fiore* to claimed *Apprendi* error because *Apprendi* changed only who determined the facts

needed to enhance a sentence, not the substance of the facts); *Lukehart v. Sec'y, Fla. Dep't of Corr.*, No. 3:12-CV-585-J-32PDB, 2020 WL 2183150, at *58 (M.D. Fla. Apr. 28, 2020) (rejecting the claim Petitioner makes here because *Hurst II* "does not raise the Due Process concern that a person was convicted for doing something the law did not make a crime, or that the punishment he received did not apply to his conduct," that is, *Hurst II* "concerns" only "procedures").

For five reasons, *Hurst II* neither clarified nor changed Florida's substantive law.

First, the Florida Supreme Court has so held, and Petitioner offers no basis for second-guessing that court's interpretation of state law. The Florida Supreme Court has consistently rejected the argument that *Hurst II* substantively changed Florida law to create a new capital-murder offense with elements beyond those required for a first-degree murder conviction. *E.g.*, *Thompson v. State*, 261 So. 3d 1255 (Fla. 2019); *Rogers*, 285 So. 3d at 885; *Foster v. State*, 258 So. 3d 1248, 1251–52 (Fla. 2018); *Duckett v. State*, 260 So. 3d 230, 231 (Fla. 2018); *Finney v. State*, 260 So. 3d 231 (Fla. 2018). For example, in *Rivera v. State*, 260 So. 3d 920 (Fla. 2018), the defendant argued, as Petitioner does here, that under *Fiore* and *Winship*, *Hurst II* should have applied to his case because it announced a substantive clarification of Florida law. *Id.* at 928. The Florida Supreme Court rejected the claim. *Id.* Although Petitioner may contest these holdings, the Florida courts' determination that *Hurst II* did not create new elements is entitled to conclusive weight because "state courts are the final arbiters of state law." *Agan*

v. Vaughn, 119 F.3d 1538, 1549 (11th Cir. 1997); *see also Graves*, 614 F.3d at 512 (federal court is "bound" to accept state court determination that law was "changed" rather than "clarified").

Second, *Hurst II* itself makes clear that it neither clarified nor changed the substance of Florida law. Indeed, the decision did not purport to change the findings needed to impose a death sentence; it simply transferred the responsibility for making those pre-existing findings from the trial judge to the jury. As the court explained, the "same" statutory "requirements" that it held a jury must find "existed in Florida law when Hurst was sentenced . . . although they were consigned to the trial judge." *Hurst II*, 202 So. 3d at 53. Or, to quote the part of the decision Petitioner relies on, the imposition of death in Florida "ha[d] in the past required, and continues to require, additional fact finding that now must be conducted by the jury." Pet. 11 (quoting *Hurst II*, 202 So. 3d at 53). Thus, *Hurst II* was clear that it was not changing the substance of the findings needed to impose a death sentence.

Similarly, the reasoning the *Hurst II* court employed belies the claim that it discovered new statutory requirements. *Hurst II*'s reasoning did not depend on a new interpretation of the text of the capital-sentencing statute, but on "the mandate of [*Hurst I*] and on Florida's constitutional right to jury trial, considered in conjunction with [Florida's] precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." 202 So. 3d at 44. That is why, when *Hurst II* explained its holding, it grounded the decision in the

constitution, not the statutory text. *Id.* at 59 (requiring jury unanimity under the Sixth and Eighth amendments and the Florida right to a jury trial); *id.* at 69 (finding a "Sixth Amendment right to a jury determination of every critical finding necessary for imposition of the death sentence"). *Hurst II* did not purport to reach a new interpretation of Florida's capital-sentencing law.

Third, it is clear that *Hurst II* did not alter the statutory requirements to impose a death sentence because the same factors *Hurst II* pointed to were also discussed in *Hurst I*. In *Hurst I*, this Court noted that to impose a death sentence in Florida, the trial judge was required to find '"that sufficient aggravating circumstances exist' and 'that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" 577 U.S. at 100 (alterations omitted) (quoting Fla. Stat. § 921.141(3) (2010)). The Florida Supreme Court found the same requirements. *Hurst II*, 202 So. 3d at 53 ("[B]efore a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.").

Fourth, Petitioner's own case shows that *Hurst II* could not have altered substantive law because every finding required by *Hurst II* was also found in Petitioner's pre-*Hurst II* case; the findings were just made by a judge, not a jury. As Petitioner notes, under *Hurst II*, to impose the death penalty a finding was needed that (1) sufficient aggravating circumstances

existed and (2) that aggravators outweighed mitigators. Pet. 11. But those findings were all made in Petitioner's case. The trial judge found two aggravators: that the murder was committed during the robbery and the murder was cold, calculated, and premeditated. *Archer*, 673 So. 2d at 18 & n.1. Those aggravators were sufficient because longstanding Florida law had held that a single aggravator provides a sufficient ground for death eligibility. *E.g.*, *Poole*, 297 So. 3d at 502–03; *Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010); *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). And the trial judge found that the aggravators outweighed mitigators. *Archer*, 673 So. 2d at 18. Thus, as a matter of substance, every finding required after *Hurst II* was found in Petitioner's case.

Fifth, holding that *Hurst II* wrought no substantive change is consistent with *Schriro*. There, the defendant, like Petitioner here, argued that *Ring* was "substantive because it modified the elements of the offense for which he was convicted." 542 U.S. at 354. In doing so, he relied on this Court's statement in *Ring* that Arizona's aggravating factors were the "functional equivalent of an element of a greater offense" because they exposed a defendant to the death penalty. *Id.* But this Court rejected the argument, explaining that:

> [T]he range of conduct punished by death in Arizona was the same before *Ring* as after. *Ring* held that, because Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so

> were subject to the procedural requirements the Constitution attaches to trial of elements. This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

Id. (internal citation omitted). So too here. Both before and after *Hurst II* the same factors "restricted (as a matter of state law) the class of death-eligible defendants." The only change was that following *Hurst II* those factors had to be found by a jury. As *Schriro* made clear, that change is not a substantive shift.

In short, Petitioner's view that *Hurst II* found new substantive elements finds no support in the opinion itself, subsequent Florida law, or this Court's cases. Instead, *Hurst II* procedurally changed *who* was required to make certain findings, not the content of those findings. But with only a procedural change, Petitioner cannot even get to the first step of a due process analysis—whether *Hurst II* changed or clarified Florida substantive law—and therefore cannot state a viable due process claim. *E.g.*, *Lukehart*, 2020 WL 2183150, at *58 (rejecting claim materially similar to Petitioner's).

b. Even if Petitioner were right that *Hurst II* clarified substantive law (as opposed to altered procedure or changed substantive law), he would still not be entitled to relief. That is because, as Petitioner recognizes, the Florida Supreme Court has receded

from *Hurst II*, "to the extent its holding requires anything more than the jury to find an aggravating circumstance." *Poole*, 297 So. 3d at 501. In Petitioner's case, however, a jury did find an aggravating circumstance beyond a reasonable doubt when it convicted Petitioner of the robbery that occurred at the same time as his murder. *Archer*, 673 So. 2d 18 & n.1. And for that reason, under current Florida law, Petitioner would not be entitled to resentencing even if his interpretation of *Hurst II* were correct. *See* Pet. App. 4 (finding that Petitioner was not entitled to relief under *Poole*).

Faced with this problem, Petitioner argues that due process precludes the application of *Poole* and requires that his already-final sentence be vacated based on an erroneous state-law ruling that occurred after his sentence became final and has since been rejected by the Florida Supreme Court. Pet. 15–19. But that theory was not raised below, and it lacks merit.

To begin, Petitioner never raised in the Florida Supreme Court the argument that applying *Poole* to his case violates due process. In fairness, *Poole* was decided between when Petitioner's briefs were filed and when the decision was issued. But if Petitioner believed that it violated his due process rights for the court to rely on *Poole*, he could, and should, have made that argument to the court in either a request to file a supplemental brief or in a rehearing petition so that the Florida court could have considered Petitioner's argument in the first instance. *See* Fla. R. App. P. 9.330 (permitting rehearing petitions). That Petitioner did not do so counsels against review here.

Adams v. Robertson, 520 U.S. 83, 86 (1997) ("With 'very rare exceptions,' [this Court has] adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court." (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992))).

Regardless, Petitioner is wrong that due process precludes application of *Poole*. Petitioner relies on *Rogers v. Tennessee*, 532 U.S. 451 (2001), to argue that *Poole* was an unexpected and indefensible change to substantive law that cannot be applied retroactively. Pet. 15.

As a threshold matter, the *Rogers* line of cases has no application here. That is because *Rogers* grounds in the "basic . . . principle of fair warning." 532 U.S. at 459. Thus, the *Rogers* line concerns "retroactive application of judicial interpretations of criminal statutes . . . that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.* at 461 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)). That is, *Rogers* applies when a change in law leads to a new judicial interpretation being applied to criminal conduct that occurred before the new interpretation was announced.

Here, *Poole*'s decision to recede from *Hurst II* could not have affected Petitioner's decision to commit his crimes, which were committed long before *Hurst II* was decided. When Petitioner committed his murder, the law was clear that the death penalty in Florida could be imposed if a judge found a statutory aggravator and found that the aggravator outweighed

any mitigators. *E.g.*, *Hildwin*, 490 U.S. at 640. Petitioner can therefore hardly be said to have been unfairly surprised that *Poole* receded from *Hurst II* to restore the trial judge to some role in capital sentencing long after Petitioner's sentence became final on direct review; after all, when Petitioner's primary conduct occurred, the trial judge had the dispositive role in capital sentencing. This case, then, unlike the *Rogers* line, involves a change in law after the defendant's conduct and after his sentence became final on direct review—*and then* a second change back towards what the law was when the defendant acted. That second type of change does not deprive a defendant of fair warning and cannot have impacted the defendant's conduct. Thus, it does not violate due process under any conceivable interpretation of *Rogers* and its progeny. *E.g.*, *United States v. Barton*, 455 F.3d 649, 655 (6th Cir. 2006) ("If, however, the change in question would not have had an effect on anyone's behavior, notice concerns are minimized.").

Even beyond that, applying the *Rogers* line (which is less restrictive than the Ex Post Facto Clause) here would be inconsistent with this Court's decision in *Dobbert v. Florida*, which held that procedural changes to how capital sentences are imposed are not subject to the Ex Post Facto Clause. 432 U.S. 282 (1977). In *Dobbert*, the defendant committed a capital crime. *Id.* at 284. In between the crime being committed and trial, Florida changed its death penalty scheme to align with *Furman*. *Id.* at 288. Namely, at the time Dobbert committed his crime, a person convicted of a capital felony would be sentenced to death unless a majority of the jury recommended mercy, but by the time of trial, a person

could only be sentenced to death if, after weighing aggravators and mitigators, the trial judge imposed the sentence. *Id.* at 289. Dobbert argued that the statutory "change in the role of the judge and jury" was an ex post facto violation. *Id.* This Court disagreed, explaining that the change was not an ex post facto violation because the change was procedural. *Id.* And by procedural, the Court meant that the change "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293–94. So too here—the change from *Hurst II* to *Poole* changed the method for "determining whether the death penalty [would] be imposed," not "the quantum of punishment attached to the crime." And given that, it would not make sense to find a due process violation here, when *Rogers* found that due process requirements were less stringent than ex post facto ones. *Rogers*, 532 U.S. at 458–60.

Even if *Rogers* applies, Petitioner would still not state a due process claim based on application of *Poole*. *Rogers* bars only retroactive application of "unexpected and indefensible" changes in law. 532 U.S. at 461. *Poole* was neither (much less both, as Petitioner must show).

Petitioner spends exactly four words arguing that *Poole* was unexpected. Pet. 16 ("Certainly, *Poole* was unexpected."). In truth, *Poole* was hardly groundbreaking. Indeed, *Poole*'s holding that, under the Sixth Amendment, a jury had to find one aggravator beyond a reasonable doubt (but nothing more) was predicted in 2005 when the Florida

Supreme Court explained that "if *Ring* did apply in Florida . . . we read it as requiring only that the jury make the finding . . . that at least one aggravator exists—not that a specific one does." *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005).

Regardless, *Poole* was not indefensible. Notably, this Court has recently confirmed *Poole*'s holding by explaining that "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." *McKinney*, 140 S. Ct. at 707.

Petitioner's criticisms of *Poole* are misplaced.[3]

First, Petitioner faults *Poole* because *Hurst II* "has been applied to a number of cases where the crime was committed pre-*Ring*." Pet. 16, 18. But that criticism reflects a misunderstanding of retroactivity—the relevant date is not the date of the crime, but the date direct review ends. *E.g.*, *Chaidez v. United States*, 568 U.S. 342, 347 (2013) ("When we announce a 'new rule,' a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding."); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1419 (2020) (Kavanaugh, J., concurring) ("[N]ew constitutional rules apply on direct review, but generally do not apply retroactively on habeas corpus review."). The Florida Supreme Court has determined

[3] There is a pending petition for certiorari in *Poole v. Florida*, No. 20-250. The State's Brief in Opposition there explains in more detail why *Poole* was correctly decided.

that the *Hurst* decisions are not retroactively applicable, under state law, to cases that became final before *Ring*, *see Asay*, 210 So. 3d 1, and both cases Petitioner points to were on direct review when *Ring* was decided on June 24, 2002. In *White v. State*, the defendant's sentence was overturned in 1999, 729 So. 2d 909, 916 (Fla. 1999), and following a resentencing, his new death sentence became final on December 16, 2002, when this Court denied certiorari on his direct appeal from the resentencing, *White v. Florida*, 537 U.S. 1091 (2002). Likewise in *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). There, the defendant's death sentence (which also followed a resentencing) became final when this Court "denied [his] petition for writ of certiorari on June 28, 2002." *Id.* at 48. Thus, these two cases reflect a straightforward application of well-settled principles to the non-final sentences there at issue.

Second, Petitioner claims that *Poole* must be wrong because the legislature did not overturn *Hurst II* when it amended the capital-sentencing scheme in 2017. Pet. 16. But the legislature could not have overturned *Hurst II*, because it was a constitutional decision. *See* 202 So. 3d at 59 (requiring jury unanimity under the Sixth and Eighth amendments and the Florida right to a jury trial); *id.* at 69 (finding a "Sixth Amendment right to a jury determination of every critical finding necessary for imposition of the death sentence").

III. The Court should not address Petitioner's Eighth Amendment claim.

Petitioner next asks the Court to grant review to decide whether the Eighth Amendment requires jury

unanimity before imposing a death sentence. Pet. 19–21. The Court should decline the invitation.

1. To begin, in the Florida Supreme Court Petitioner did not make argument he now presses. Instead, Petitioner's only reference to the Eighth Amendment in his argument section below was in a heading discussing harmless error. *See* Appellant's Br., *Archer v. Florida*, 2019 WL 3804167, at *62–63 (Fla. 2019), ("The Sixth and/or Eighth Amendment error cannot be harmless beyond a reasonable doubt in light of 7–5 death recommendations that Archer's prior juries returned."). Nowhere below did Petitioner make the evolving standards of decency or national consensus arguments he now presses. *See id.* And although Petitioner's passing reference to the Eighth Amendment was sufficient for the Florida Supreme Court to conclude that any Eighth Amendment argument was procedurally barred as having been previously raised and denied, *see* Pet. App. 3; *see also supra* Part I, it was not sufficient for the court to otherwise engage in any Eighth Amendment discussion. Accordingly, the specific Eighth Amendment theory Petitioner now raises was neither raised nor discussed on the merits below, and thus, should not be reviewed now. *See Adams*, 520 U.S. at 86.

2. In any event, Petitioner's claim assumes that a favorable ruling would be retroactive. Petitioner seeks retroactive application of a new right barring the trial court from imposing the death sentence absent a jury recommendation of death. But although this retroactivity question raises a threshold issue that must be decided before the merits, Petitioner says

nothing of it. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim.").

For a variety of reasons, any such decision would not be retroactive. In *Schriro*, for example, this Court held that a Sixth Amendment right for a jury to find aggravating factors in Arizona's capital-sentencing scheme was not retroactive. 542 U.S. at 358. That decision supports the conclusion that an Eighth Amendment right to a unanimous jury recommendation in capital sentencing would not be retroactive either. For one thing, *Schriro* dictates that any such right would be procedural because rules about how a sentence is imposed do "not alter the range of conduct" that can be subjected to the death penalty. *Id.* at 353. Likewise, *Schriro* strongly suggests that any jury-unanimity sentencing rule would not be a watershed rule of procedure. *Id.* at 356–57 (citing *DeStefano v. Woods*, 392 U.S. 631, 633–34 (1968)). At the very least, that Petitioner assumes away a substantial antecedent question to his relief is reason to deny the petition. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145 (2009) (Kennedy, J., respecting denial of writ of cert.) (explaining that certiorari was properly denied because answering the question presented would have required the Court to answer "antecedent questions under state law and trademark-protection principles").

3. Regardless, this Court has already rejected Petitioner's claim that the Eighth Amendment requires a unanimous jury recommendation of death.

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.

Spaziano's Eighth Amendment holding remains good law. In *Hurst*, this Court overruled *Spaziano* "to the extent" that it "allow[ed] 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.

It is no answer to assert that standards have evolved since *Spaziano* was decided. Pet. 19. This Court "has already considered arguments based upon 'national consensus' in its analysis of this precise issue." *Poole*, 297 So. 3d at 509 (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. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment" is violated by a challenged practice. 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.

Spaziano, 468 U.S. at 464 (internal citations omitted).

Nor does the decision below put Florida outside the "overwhelming consensus." Pet. 19. Consistent with *Spaziano*, Florida does not bar a trial court from imposing a sentence of death absent a unanimous jury recommendation of death. Petitioner points to no other court that takes a different view.

As a matter of policy, moreover, Florida's capital-sentencing procedures are squarely within the mainstream of contemporary state practice. As Petitioner notes, current Florida law requires a unanimous jury recommendation of death. Pet. 16 (noting that the legislature amended the capital-sentencing statute to include *Hurst II*'s unanimity

requirement). Petitioner is not entitled to retroactive application of Florida's current statute, but that "does not make Florida an 'outlier.'" *Poole*, 297 So. 3d at 509 (Lawson, J., concurring).

4. Last, 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. 19–21. 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.*, *State v. Wood*, 580 S.W.3d 566, 589 (Mo. 2019); *Ex parte Taylor*, 808 So. 2d 1215, 1217–18 (Ala. 2001); *Connecticut v. Cobb*, 743 A.2d 1, 99 (Conn. 1999); *State v. Smith*, 705 P.2d 1087, 1106 (Mont. 1985); *Arizona v. Gillies*, 691 P.2d 655, 659 (Ariz. 1984); *State v. Sivak*, 674 P.2d 396, 398–99 (Idaho 1983); *see also Nebraska v. Mata*, 745 N.W.2d 229, 252 (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).

IV. Petitioner's claim that *Poole* makes Florida's administration of the death penalty arbitrary does not warrant review.

Finally, Petitioner argues that Florida has arbitrarily administered the death penalty because it has granted some prisoners *Hurst* relief while denying the same relief to others (sometimes because of *Poole*) based on "the arbitrariness of a date." Pet. 22–23. In doing so, Petitioner essentially asks for full retroactivity of all capital decisions—unless there is full retroactivity some capital defendants will be

denied the benefits of new rules based on "the arbitrariness of a date."

But Petitioner's full-retroactivity theory cannot be reconciled with *McKinney*. If the Eighth Amendment compels the retroactive application of Florida's new, *Hurst*-compliant statutory regime, it stands to reason that the Eighth Amendment also requires the retroactive application of *Hurst I* itself. But *McKinney* makes clear that *Hurst* is not retroactive. *See McKinney*, 140 S. Ct. at 708 ("*Hurst* do[es] not apply retroactively on collateral review.").

And in any event, Florida has good reason to treat final sentences differently from non-final ones; namely, once a conviction is secured and the sentence becomes final, states have "a strong interest in preserving the integrity of the judgment." *Lackawanna Cty. Dist. Att'y v. Coss*, 532 U.S. 394, 403 (2001). Consistent with that strong state interest, this Court has recognized that "the principle of finality . . . is essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality op.). "Without finality," this Court has explained, "the criminal law is deprived of much of its deterrent effect." *Id.*

Indeed, were finality not a sufficient reason to deny application of new rules, then all new constitutional rules would need to be retroactive. Of course, this Court has rejected that approach, even in capital cases. *E.g.*, *Schriro*, 542 U.S. at 357. In keeping with that settled law, this Court has recently and repeatedly denied petitions challenging the Florida Supreme Court's conclusion that *Hurst* does not apply retroactively to sentences, like Petitioner's,

that became final before *Ring*. *E.g.*, *Peede v. Florida*, No. 18-6378 (Jan. 22, 2019); *Kelley v. Florida*, No. 17-1603 (Oct. 1, 2018). Petitioner's claim is no more cert-worthy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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