No. 20-6515

IN THE

Supreme Court of the United States

ANTHONY PONTICELLI,

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 bars imposition of the death penalty unless a jury has unanimously determined that death is the appropriate sentence.

3. Whether *Hurst v. Florida*, 577 U.S. 92 (2016), applies retroactively to Petitioner's case.

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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.* at 253, 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.); *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 late Fall of 1987, Petitioner was invited to watch movies at Keith Dotson's house, having met Dotson earlier that day at a store. *Ponticelli v. State*, 593 So. 2d 483, 485 (Fla. 1991), *cert granted, vacated & remanded by Ponticelli v. Florida*, 506 U.S. 802 (1992), *conviction affirmed by Ponticelli v. State*, 618 So. 2d 154 (Fla. 1993). Petitioner told someone at the house that he planned to kill two people in a car outside for money and drugs and showed off the gun he planned to use. *Id.* However, Petitioner said that he would need a ride home after the killing. *Id.*

Petitioner then left the house and went to Ralph and Nick Grandinetti's home. *Id.* To repay debts he owed to the Grandinetti brothers, Petitioner agreed that he would sell cocaine on their behalf. *Id.* The three set out to sell the drugs.

Petitioner was next seen by his best friend, to whom he returned a gun and confessed that he "did Nick," meaning that he had killed Nick Grandinetti. *Id.* at 486. Petitioner asked what he should do with the body. *Id.*

Later that night, Petitioner returned to Dotson's house. *Id.* at 485. He told the people there that he had killed two people for cocaine and $2,000. *Id.* He also asked whether "a person would live after being shot in the head" and worried that he had heard his victims "moaning." *Id.* He then washed blood stains out of his clothes. *Id.*

The Grandinetti brothers were found in their blood-spattered car the next morning. *Id.* Nick was found gasping for air, kicking his foot, and with his head covered in blood. *Id.* He survived for two more

weeks, but then died from his wounds. *Id.* Ralph was found dead in the backseat, having been shot in the back of the head at close range. *Id.*

The next day, Petitioner spoke again with his best friend. *Id.* at 486. He told him that the Grandinetti brothers had been harassing him about the debt he owed. *Id.* In response, Petitioner shot them both in the head. *Id.* Petitioner also went to another friend's house, burned clothes in the backyard, and told the friend that he had shot two men. *Id.*

After Petitioner's arrest, Petitioner told his cellmate about the murders, and that he shot the victims for cocaine and money. *Id.*

Petitioner was charged with two counts of first-degree murder and one count of robbery with a deadly weapon. *Id.* A judgment of acquittal was entered on the robbery count following the State's case-in-chief, but Petitioner was convicted on the two murder charges. *Id.* The jury recommended a death sentence for each murder. *Id.* And, finding two aggravating factors applicable to both murders, and an additional aggravating factor for Nick's murder, the trial court imposed a death sentence. *Id.*

The Florida Supreme Court affirmed. *Id.* at 491. This Court vacated and remanded in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992), which held that vague aggravators cannot support a death sentence. *Ponticelli*, 506 U.S. at 802. But on remand, the Florida Supreme Court found that any *Espinosa* error was waived. *Ponticelli*, 618 So. 2d at 154–55. This Court denied certiorari, and thus, Petitioner's conviction

and sentence became final in 1993. *Ponticelli v. Florida*, 510 U.S. 935 (1993).

3. Since then, 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. 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 50–63. 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 circumstances, 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 81–82.

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. The court concluded that it had "clearly erred" in *Hurst II* "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 post-conviction relief. He argued that his capital sentence was erroneous under *Hurst I* and *Hurst II* both because, on his view, these decisions were retroactive and because, he claimed, *Hurst II* (even though it purported to issue a constitutional ruling) had in fact rewritten Florida's statutory capital-sentencing framework. *See* Pet. App. 1. The Florida Supreme Court rejected both arguments. As it noted, "the United States Supreme Court's precedent and our precedent foreclose relief as to Ponticelli's claims." *Id.* More specifically, the court noted that this Court's decision in *McKiney v. Arizona*, 140 S. Ct. 702, 707–08 (2020) and its decision in *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), had already concluded that neither *Hurst I* nor *Hurst II* were retroactive to prisoners like Petitioner.

Petitioner sought a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. Petitioner's claim that *Hurst II* 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. Pet. 7–15. 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 the Savings Clause of the Florida Constitution. Pet. 13. 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. 13–16 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. This Court should not grant review because Petitioner's theory turns entirely on state law. This Court has jurisdiction to review final judgments from state courts of last resort "by writ of certiorari" only "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up

or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257. And even when this Court has jurisdiction, it does "not normally grant petitions for certiorari solely to review what purports to be an application of state law," *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996), which makes sense because this Court's pronouncements on state law are not binding on state courts. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law.").

But here, Petitioner's theory turns entirely on state law. Petitioner's 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. Pet. 7–13. From there, Petitioner reasons that the Florida Constitution required Florida to apply *Hurst II*'s statutory change to his long-final case. Pet. 13–14.

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). And even if that question rested in part on federal law (it does not), Petitioner grounds his

remedy in the Florida Constitution, not federal law. Pet. 13.

But those state-law questions have been answered. The Florida Supreme Court has already concluded that *Hurst II* did not change state statutory law. *See infra* pp. 14–15. And therefore, Petitioner's case turns entirely on an already-decided question of state law.

It is no answer for Petitioner to argue that he ultimately brings a due process claim, and therefore raises a federal issue (although it is not even clear if Petitioner does that). 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 Petitioner's theory rests on state law all the way down, and thus, this Court should deny certiorari.

2. In any event, 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 is one reason no split among state courts of last resort exists. Nor could there be 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—he does not, for example argue that he has a retroactively applicable Sixth Amendment right to have the jury find an aggravator. In short, Petitioner advances no split because the legal issue he presents cannot give rise to one.

Petitioner likewise does not raise an important question of federal law. He asks whether the Florida Supreme Court recognized new substantive elements in its capital-sentencing statute on remand from *Hurst I*. That may explain why this Court has repeatedly rejected petitions raising claims like Petitioner's. *E.g.*, *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).

3. Regardless, 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 claims *Hurst II* was a substantive ruling about what Florida's death-penalty statute had always meant. 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.

But that argument fails for a basic reason: *Hurst II* did not change Florida statutory law—it simply changed procedure—and Petitioner presents no due process argument for why a procedural change should apply retroactively to his case.

a. 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. But even so, that would not mean that all

state statutory decisions must apply retroactively. On the contrary, though 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 so, as a threshold matter, 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 v. State*, 285 So. 3d 872, 885 (Fla. 2019); *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 because *Hurst* did not announce new elements needed to establish a capital crime. *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 (emphasis omitted)).

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. 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 federal and state constitutional law, 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. 8. But those findings were all made in Petitioner's case. The trial judge found three aggravators: that the murders were committed for pecuniary gain; that the murders were cold, calculated, and premeditated; and that one of the

murders was especially heinous and cruel. *Ponticelli*, 593 So. 2d at 486 & n.1–2. 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. *Ponticelli v. Sec'y, Fla. Dept. of Corr.*, 690 F.3d 1271, 1289 (11th Cir. 2012). Thus, as a matter of substance, every finding required after *Hurst II* was found in Petitioner's case.

Fifth, Petitioner's theory is inconsistent with *Schriro v. Summerlin*. There, the defendant, like Petitioner here, argued that *Ring* was "substantive because it modified the elements of the offense for which he was convicted." *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004). 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. 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. Petitioner next argues that due process precludes the application of *Poole* to his case. Pet. 13–15. But that theory was not raised below, is irrelevant, and otherwise lacks merit.

To begin, Petitioner never raised in the Florida Supreme Court his argument that applying *Poole* here violates due process because *Poole* is an unjustifiable

change to Florida law. In fairness, *Poole* was decided between when Petitioner's briefs were filed and when the decision was issued. But Petitioner had every opportunity to address *Poole* when he filed a petition for rehearing in the Florida Supreme Court. In that petition, Petitioner did not make the due process argument he now makes, instead arguing that *Poole* was wrong as a matter of statutory interpretation. This Court should not consider Petitioner's new-found theory in the first instance. *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))).

In any event, *Poole* has little bearing on Petitioner's case. The Florida Supreme Court rejected Petitioner's claims because neither *Hurst I* nor *Hurst II* is retroactive to prisoners like Petitioner. Pet. App. 1-2. In doing so, the court cited *Poole* as a *see also* citation, noting that it had receded from *Hurst II*. *Id*. But nothing in the opinion suggests that the court's decision turned on the application of *Poole*. On the contrary, the Florida Supreme Court cited other cases that independently supported its retroactivity ruling. *Id*. And indeed, Justice Labarga concurred in the result even though he rejected the application of *Poole*. *Id*. at 2. Thus, there is no reason to think that applying *Poole* affected the outcome below, and thus, no reason to reach Petitioner's due process claim.

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 murders, 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.* at 292. 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. The same is true 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. 15 ("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. And this Court denied certiorari in *Poole* itself. *Poole v. Florida*, --- S. Ct. ---, 2021 WL 78099 (Jan. 11, 2021).

II. 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. 16–17. The Court should decline the invitation.

Petitioner's exact Eighth Amendment rationale is hard to discern because Petitioner spends much of his Petition faulting the Florida Supreme Court for relying on *McKinney*. But the Florida Supreme Court cited *McKinney* only for its holding that *Hurst* is not retroactive, which Petitioner does not dispute. Pet. App. 2. Instead, Petitioner's theory appears to be that he has an "Eighth Amendment right to a unanimous jury finding of each element necessary to make him eligible for a death sentence." Pet. 17. That theory does not merit review.

1. 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").

2. 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. *See* Pet. 18 (discussing new developments in the law). 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. Consistent with *Spaziano*, Florida courts have held that the Eighth Amendment 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.

Moreover, Florida's current 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. 15–16 (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. 16–18. 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, 1217–19 (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, 251–52 (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). None holds otherwise.

III. Petitioner's claim that a unanimous jury was required for his sentencing does not merit review.

Finally, Petitioner argues that this Court should grant him relief because the jury in his case did not find "any aggravator unanimously or beyond a reasonable doubt." Pet. 20. But that is just a plea to

treat *Hurst I* and *II* as retroactive, and this Court recently rejected that view in *McKinney* when it concluded that "*Ring* and *Hurst* do not apply retroactively on collateral review." 140 S. Ct. at 708 (citing *Schriro*, 542 U.S. at 358). Petitioner offers no persuasive reason to revisit *McKinney*.

Petitioner appears to argue that the facts of his case require retroactive application of *Hurst I*. But Petitioner offers no doctrinal reason for why retroactivity should turn on the facts of his individual case. And it should not.

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 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 generally an insufficient reason to deny application of new rules, then all new constitutional rules, whether procedural or substantive, and whether watershed or not, would need to be retroactive. But this Court has rejected that approach. And 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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