CASE NO. 20-7228

IN THE UNITED STATES SUPREME COURT

LEROY POOLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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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 it has since receded from, made substantive clarifications to Florida's capital-sentencing scheme which must apply to all defendants on collateral review.

2. 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.

PARTIES TO THE PROCEEDINGS

Petitioner Leroy Pooler was the Movant in the trial court and the Appellant in the Florida Supreme Court.

Respondent State of Florida was the Respondent in the trial court and the Appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:

Circuit in and for Palm Beach County, Florida,
State of Florida v. Leroy Pooler, No. 1995-CF001117AXXXMB
Judgment Entered: March 29, 1996

Direct Appeal:

Florida Supreme Court
Pooler v. State, 704 So. 2d 1375 (Fla. 1997) (*Pooler I*)
Judgment Entered: November 6, 1997

Supreme Court of the United States
Pooler v. Florida, 525 U.S. 848 (1998)

First Post-conviction Proceeding:

Circuit in and for Palm Beach County, Florida,
State of Florida v. Leroy Pooler, No. 1995-CF001117AXXXMB
Judgment Entered: November 4, 2005

Florida Supreme Court
Pooler v. State, 980 So. 2d 460 (Fla. 2008) (*Pooler II*)
Judgment Entered: Jan. 31, 2008

Second Post-conviction Proceeding:

Circuit in and for Palm Beach County, Florida,
State of Florida v. Leroy Pooler, No. 1995-CF001117AXXXMB
Judgment Entered: Oct. 12, 2018

Florida Supreme Court
Pooler v. State, 302 So. 3d 744 (Fla. 2020) (*Pooler III*)
Judgment Entered: July 2, 2020

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The decision of which Petitioner, Leroy Pooler ("Pooler"), seeks discretionary review is reported as *Pooler v. State*, 302 So. 3d 744 (Fla. 2020), and was issued on July 2, 2020, by the Florida Supreme Court.

The direct appeal is *Pooler v. State*, 704 So. 2d 1375 (Fla. 1997), and the opinion denying post-conviction relief in that case is found at *Pooler v. State*, 980 So. 2d 460 (Fla. 2008).

JURISDICTION

Petitioner, Pooler, is seeking jurisdiction pursuant to 28 U.S.C. § 1254(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

FACTS AND PROCEDURAL BACKGROUND

This capital case is before this Court upon the affirmance of the denial of a successive Rule 3.851, Fla. R. Crim. P. post-conviction relief motion affirmed by the Florida Supreme Court in *Pooler v. State*, 302 So. 3d 744 (Fla. 2020) ("*Pooler IV*").

Leroy Pooler ("Pooler"), is in state custody and under a sentence of death pursuant to a valid judgment and sentence. *Pooler v. State*, 704 So. 2d 1375, 1377 (Fla. 1997), *cert. denied*, *Pooler v. Florida*, 525 U.S. 848 (1998) ("*Pooler I*"). On February 23, 1995, Pooler was indicted for the January 30, 1995, first-degree murder

of Kim Brown, attempted first-degree murder of her brother, Alvonza Colson, and armed burglary of their apartment. Trial commenced on January 9, 1996, and the jury returned on January 17, 1996, with a guilty verdict for all counts. Following the penalty phase, the jury recommended death by a nine to three vote. The trial court imposed life sentences for the attempted first-degree murder and armed burglary convictions but sentenced Pooler to death for Kim Brown's murder based on the finding of three aggravators: "(1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder of Alvonza); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or cruel." *Pooler I*, 704 So. 2d at 1377.

Pooler was involved with Kim Brown and, after discovering that she was seeing another man, told a friend that he was going to kill her because if he could not have her, no one else would. Two days later, after cutting the telephone lines, Pooler knocked on the front door of the apartment where Kim and her younger brother lived with their mother. Pooler brandished a gun and forced his way into the apartment, shooting the brother in the back as he tried to escape. Kim begged Pooler not to kill her brother or her and began vomiting into her hands. Kim managed to lock Pooler out and she ran out the back door. Pooler gave chase, catching her and pulling her toward his car as she screamed and begged him not to kill her. When she fought against going in the car, Pooler pulled her back toward the apartment building and shot her several times, pausing once to say, "You want some more?" Pooler shot Kim

a total of five times, including once in the head. Pooler then got into his car and drove away. *Pooler I*, 704 So. 2d at 1377.

The jury recommended death by a vote of nine to three. In sentencing Pooler to death, the trial court found the following aggravators: (1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or cruel. *Pooler I*, 704 So. 2d at 1377.

Following the denial of certiorari, on September 17, 1999, Pooler's case became final and he sought collateral relief in state court. He was granted an evidentiary hearing on several post-conviction claims, including the issue of ineffective assistance of counsel. The trial court denied relief and the Florida Supreme Court affirmed. *See Pooler v. State*, 980 So. 2d 460 (Fla. 2008) ("*Pooler II*"). Among the multiple issues of ineffective assistance and other challenges to his conviction and sentence, Pooler raised a constitutional challenge to his sentence based on *Ring v. Arizona*, 536 U.S. 584 (2002). This was denied based on the Florida Supreme Court's conclusion that *Ring* was not retroactive to cases on collateral review. *Pooler II*, 980 So. 3d at 473.

Having been denied relief by the state courts, on May 19, 2008, Pooler filed a petition for habeas corpus under 28 U.S.C. § 2254, Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Habeas relief was denied and on December 17, 2012, that decision was affirmed by the Eleventh Circuit Court of Appeals. *See Pooler v. Sec'y, Fla. Dept. of Corr.*, 702 F.3d 1252 (11th Cir. 2012), *cert. denied, Pooler v. Crews*, 134 S. Ct. 191 (2013) ("*Pooler III*").

In 2015, Pooler filed a successive post-conviction motion raising a claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). *See Pooler IV*, 302 So. 3d at 745. Subsequently, in 2017, he added a claim under *Hurst v. Florida*, 577 U.S. 92 (2016) ("*Hurst I*"), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*"), and sought relief under an alleged *Hurst*-induced *Caldwell v. Mississippi*, 472 U.S. 320 (1985), claim. *Pooler IV*, 302 So. 3d at 745. On October 12, 2018, the trial court entered an order denying relief summarily and Pooler appealed.

There he asserted that *Hurst II* created a new crime of capital murder requiring that *Hurst II* be applied retroactively to all capital defendants under the Eighth Amendment and due process. Also, he claimed that the Florida Supreme Court's reliance upon *Witt v. State*, 387 So. 2d 922 (Fla. 1980), conflicts with *Bunkley v. Florida*, 538 U.S. 835 (2003), which he asserted had addressed the treatment of those defendants following a state court's redefining of a necessary element of a crime. Pooler also took issue with the fact that some capital defendants who had committed their murders before Pooler committed his received *Hurst II* relief whereas Pooler did not. Further, Pooler claimed his jury was not instructed that it has to find the aggravation beyond a reasonable doubt.[1] Finally, he argued that his jury was not instructed that the aggravators and "every element" must be proven beyond a

[1] Pooler's jury was instructed that the aggravation had to be found beyond a reasonable doubt. The jury was told "each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." (Record on Direct Appeal – ROA.21 1624). The balance of the instructions followed the standard instruction at the time of sentencing. (ROA.21 1620-27).

reasonable doubt. The Florida Supreme Court affirmed the denial of post-conviction relief and with respect to the *Hurst v. State* claim and stated:

> Pooler is not entitled to *Hurst* relief. *See State v. Poole*, 297 So. 3d 487, 508 (Fla. Jan. 23, 2020) ("The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona*, [536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)] and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt."); *Pooler*, 704 So. 2d at 1377 ("[Pooler] was convicted of burglary and attempted first-degree murder with a firearm."). We also reject Pooler's *Hurst*-induced *Caldwell* claim. *See Reynolds v. State*, 251 So. 3d 811, 825 (Fla. 2018) (stating that, because it did not violate *Caldwell* to refer to the jury's role as advisory prior to the *Hurst* decisions, "a *Caldwell* claim . . . cannot [now] be used to retroactively invalidate the jury instructions that were proper at the time under Florida law").

Pooler IV, 302 So. 3d at 745-46. Pooler's petition for certiorari followed.

REASONS FOR DENYING THE WRIT

I, II

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

Petitioner next claims that the Florida Supreme Court's denial of a new penalty phase trial, under *Hurst v. Florida*, 577 U.S. 92 (2016) ("*Hurst I*"), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*"), violates the due process clause of the U.S. Constitution. He contends that in *Hurst II* the Florida Supreme Court conducted a statutory interpretation of Florida's death-penalty statute which resulted in the necessity of the State to prove new "elements" of the offense of capital murder, a

higher degree of murder than first-degree murder. In his estimation, that was a substantive change in the law which, under *Fiore v. White*, 531 U.S. 225 (2001), must reflect back to the enactment of the statute; since no such findings or "elements" were found in his trial, he is entitled to a new penalty phase. He argues that the Florida Supreme Court's reliance on *State v. Poole*, 297 So. 3d 487 (Fla. 2020), is essentially an *ex post facto* violation.

Petitioner's entire analysis of *Hurst II* is incorrect and his claim is without merit. Further, the decision below rests upon the Florida Supreme Court's interpretation of state law. This Court has consistently rejected certiorari review based upon the Florida Supreme Court's application of *Hurst* in Florida.[2] Petitioner presents no persuasive or compelling reasons to accept review of his case.

Petitioner essentially presents this Court with a question of state, not federal law. Of course, this Court does not review claims that are based exclusively upon state law. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (explaining that respect for the "independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground" for the decision). The reason is 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 v. Pitcairn*, 324 U.S. 117, 125-26 (1945)). Since

[2] *See, 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).

the decision below was based upon an interpretation of state law by the highest court in Florida, this Court should decline certiorari review.

Petitioner's theory for relief 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). However, the Florida Supreme Court has stated that *Hurst II* did not create new substantive elements to a higher degree of murder, contrary to Petitioner's stance:

> [W]e explained in *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018), the *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) before the court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred.

Rogers v. State, 285 So. 3d 872, 885 (Fla. 2019) (emphasis omitted), *cert. denied sub nom. Rogers v. Florida*, 141 S. Ct. 284, 208 L. Ed. 2d 43 (2020). *Hurst II* did not say anything new about the substantive requirements needed to impose a capital sentence.

Petitioner cannot 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*, 531 U.S. at 228; *see also Bunkley*, 538 U.S. at 840-41 (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 basis for review. *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 should deny certiorari review.

Further, 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. 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.

The Florida Supreme Court's decision denying the *Hurst* claim was correct. Petitioner wants *Hurst II* requirements to benefit him even though his sentence was final well before that case was decided. The predicate question of retroactivity has already been answered by both this Court and the Florida Supreme Court. *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) ("*Ring* and *Hurst* do not apply retroactively on collateral review.") (citing *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)); *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017) (We have consistently denied retroactive application of *Hurst* "to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).") (citations omitted). Petitioner avoids arguing that either *Hurst I* or *Hurst II* is retroactive as a matter of federal or state law. Instead, he addresses his claim as a due process one, arguing incorrectly that *Hurst II* established new elements required for a death sentence and was thus a substantive ruling on what Florida's death-penalty statute had always meant. However, *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.

In any case, Petitioner's sentence is undeniably proper under current Florida law (as announced in *Poole*, 297 So. 3d 487, *reh'g denied, clarification granted, State v. Poole*, SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020), and *cert. denied sub nom. Poole v. Florida*, 141 S. Ct. 1051 (2021). Petitioner was convicted by a unanimous jury of attempted first-degree murder and armed burglary in addition to the first-degree murder charge. Those convictions were the basis for the aggravators of prior violent felony and the murder was committed during the commission of an armed burglary. There was no *Hurst/Poole* error. *See McKinney*, 140 S. Ct. at 705 (holding that "a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found"); *Poole*, 297 So. 3d at 508 (jury's conviction of Poole for qualifying contemporaneous violent felonies "satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt").

Hurst II did not change the substantive law in Florida's death penalty scheme. The Florida Supreme Court in *Foster* specifically stated that there was no new capital-murder offense with additional elements; rather, *Hurst II* established necessary jury findings for sentencing. *Foster*, 258 So. 3d at 1251-52; *Thompson v. State*, 261 So. 3d 1255 (Fla. 2019); *Rogers*, 285 So. 3d at 885; *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*, *Hurst II* should have applied to his case because it announced a substantive clarification of Florida law. The Florida Supreme Court rejected the claim because *Hurst* did not announce new elements needed to establish a capital crime. *Id.* at 928. That determination 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).

Hurst II itself makes clear that it neither clarified nor changed the substance of Florida law. It only transferred the necessary findings from the judge to the jury. *Hurst II*, 202 So. 3d at 53. *Hurst II* involved no new statutory requirements; the decision's focus was 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." *Id.* at 44. The decision was grounded 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.

Further, 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. The trial judge found three aggravators in this case. 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). Thus, as a matter of substance, every finding required after *Hurst II* was found in Petitioner's case. 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.

Even if Petitioner could have benefitted from *Hurst II*, he would still not be entitled to relief since 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, the jury did find aggravating circumstances beyond a reasonable doubt when it convicted him of the attempted murder and armed burglary which occurred at the same time as this murder. 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 id.* (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. That theory lacks merit.

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*, 432 U.S. 282 (1977), which held that procedural changes to how capital sentences are imposed are not subject to the Ex Post Facto Clause. *Id.* 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 v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). *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." *Id.* 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 the 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. 37) ("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*, 141 S. Ct. 1051.

Finally, 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 v. New Jersey*, 530 U.S. 466 (2000), error because *Apprendi* changed only who determined the facts needed to enhance a sentence, not the substance of the facts). The petition should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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