CASE NO. 21-6387

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD BARRY RANDOPLH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A 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 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 the Eighth Amendment requires jury sentencing in capital cases.

PARTIES TO THE PROCEEDINGS

Petitioner, Richard Barry Randolph, was the Movant in the trial court and the Appellant in the Florida Supreme Court.

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

NOTICE OF RELATED CASES

Per Rule 14.1(b)(iii) of the Rules of the Supreme Court of the United States, the following cases relate to this petition:

Underlying Trial
Circuit Court of Putnam County, Florida
State of Florida v. Richard Barry Randolph, Case No. 88-1357-CF-M
Judgment Entered: April 5, 1989

Direct Appeal
Florida Supreme Court, Case No. SC60-74083
Randolph v. State, 562 So.2d 331 (Fla. 1990)
Judgment Entered: May 3, 1990

Supreme Court of the United States, Case No. 90-5949
Randolph v. Florida, 498 U.S. 992 (1990)
Judgment Entered: November 26, 1990

Initial Postconviction Proceedings
Circuit Court of Putnam County, Florida
State of Florida v. Richard Barry Randolph, Case No. 88-1357-CF-M
Judgment Entered: April 2, 1993 (Claim 5); February 24, 1998 (Claims 1-19); and May 14, 1998 (Claim 20)

Florida Supreme Court, Case No. SC60-81950
Randolph v. State, 676 So.2d 369 (Fla. 1996)
Judgment Entered: March 7, 1996

Florida Supreme Court, Case No. SC60-93675
Randolph v. State, 853 So.2d 1051 (Fla. 2003)
Judgment Entered: April 24, 2003

State Habeas Proceedings
Florida Supreme Court, Case No. SC01-2855
Randolph v. Crosby, 853 So.2d 1051 (Fla. 2003)
Judgment Entered: April 24, 2003

Second State Habeas Proceedings
Florida Supreme Court, Case No. SC03-1056
Randolph v. Crosby, 861 So.2d 430 (Fla. 2003)
Judgment Entered: November 21, 2003

Federal Habeas Proceedings
United States District Court for the Middle District of Florida
Randolph v. McNeil,
No. 3:04-CV-1206-J-33, 2008 WL 11438125 (M.D. Fla. Feb. 19, 2008)
Judgment Entered: February 19, 2008

United States Court of Appeals for the Eleventh Circuit, Case No. 08-12854-P
Randolph v. McNeil, 590 F.3d 1273 (11th Cir. 2009)
Judgment Entered: December 22, 2009

Supreme Court of the United States, Case No. 10-5601
Randolph v. McNeil, 131 S. Ct. 506 (2010)
Judgment Entered: November 1, 2010

First Successive Postconviction Proceedings
Circuit Court of Putnam County, Florida
State of Florida v. Richard Barry Randolph, Case No. 88-1357-CF-M
Judgment Entered: March 3, 2011

Florida Supreme Court, Case No. SC11-725
Randolph v. State, 91 So.3d 782 (Fla. 2012)
Judgment Entered: April 26, 2012

Second Successive Postconviction Proceedings
Circuit Court of Putnam County, Florida
State of Florida v. Richard Barry Randolph, Case No. 88-1357-CF-M
Judgment Entered: December 31, 2019

Florida Supreme Court, Case No. SC20-287
Randolph v. State, 320 So.3d 629 (Fla. 2021)
Judgment Entered: February 4, 2021
Rehearing Denied: June 22, 2021

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OPINION BELOW

Petitioner challenges the Florida Supreme Court's decision to affirm the denial of his motion for postconviction relief; that decision appears as *Randolph v. State*, 312 So.3d 59 (Fla. 2021).

JURISDICTION

This capital case is before this Court upon the affirmance of the denial of a successive Rule 3.851, Fla. R. Crim. P. postconviction relief motion affirmed by the Florida Supreme Court in *Randolph v. State*, 320 So.3d 629 (Fla. 2021).

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, this Court should decline to exercise jurisdiction in this case because the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a court of appeal of the United States, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10.

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

I. LEGAL BACKGROUND

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.).

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

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 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.

In between *Hurst II* and *Poole*, Petitioner filed a state court petition for postconviction review, arguing that his capital sentence was erroneous under *Hurst I* and *Hurst II*. The Florida Supreme Court rejected the argument.

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

Petitioner, Richard Barry Randolph, was convicted of First-Degree Murder, Armed Robbery, Sexual Battery and Grand Theft of a Motor Vehicle on February 23, 1989. *Randolph v. State*, 562 So.2d 331, 332-34 (Fla. 1990). The facts established that Minnie Ruth McCollum managed a Handy–Way store in Palatka, and Randolph was a former employee of the same store. *Id.* at 332. Randolph had ridden his bicycle to the Handy–Way store. He planned to enter the store unseen, open the safe, remove the money, and leave while the manager was outside checking the gas pumps. However, the manager returned and saw him. He rushed her, she panicked, and a struggle ensued. Randolph indicated that she was "a lot tougher than he had expected," but that finally he forced her into the back room where he hit her with his hands and fists until she "quieted down." *Id.*

Randolph tried unsuccessfully to open the store safe. When Mrs. McCollum started moving again, he approached her. He said that she pulled the draw string out of his hooded sweatshirt, which he then wrapped around her neck until she stopped struggling. At this point, the victim started screaming. Randolph again struck her until "she hushed." Because she continued to make noises, Randolph grabbed a small

knife and stabbed her. He again grabbed the string and "tried to cut her wind." To make it appear as if "a maniac" had committed the crime, Randolph said he then raped her. He put on a Handy–Way uniform, grabbed the store video camera out of its mount and put it into the garbage. He took Mrs. McCollum's keys and locked the store before leaving in her car. *Id.* at 333.

Dr. Kirby Bland, a general surgeon, testified that Mrs. McCollum arrived at the emergency room comatose, and with her head massively beaten and contused. She had multiple skin breaks and skin lacerations about the scalp, face, and neck and her left jawbone was fractured. Dr. Bland indicated that Mrs. McCollum had knife lacerations to the left side of her neck that caused a hematoma around the heart. There was also a stab wound in the area of the left eye. Dr. Albert Rhoten, Jr., a neurologist, testified that in twenty years of neurosurgical practice he had not seen brain swelling so diffuse, and he likened it to someone who had been ejected out of a car or thrown from a motorcycle and received multiple hits on the head. Mrs. McCollum died at the hospital six days after the assault. *Id.* at 332-33.

The jury found Randolph guilty of first-degree murder, armed robbery, sexual battery with force likely to cause serious personal injury or with a deadly weapon, and grand theft of a motor vehicle. The jury recommended the death penalty by a vote of eight to four. The judge accepted the jury recommendation and imposed the death penalty, finding four aggravating circumstances,[1] no statutory mitigating

[1] Murder during commission or flight after commission of a sexual battery, section 921.141(5)(d), Florida Statutes (1987); murder committed to avoid or prevent lawful arrest, section 921.141(5)(e), Florida Statutes (1987); murder committed for pecuniary

circumstances, and two nonstatutory mitigating circumstances.[2] *Randolph v. State*, 562 So. 2d 331, 332-34 (Fla. 1990). Randolph filed an appeal, and his Judgment and Sentence were affirmed with a Mandate on September 14, 1990. *Randolph v. State*, 562 So.2d 331, 332 (Fla. 1990). Following the denial of certiorari on November 26, 1990, Randolph's case became final. *Randolph v. Florida,* 498 U.S. 992 (1990).

Petitioner continued seeking relief from his conviction and sentence through postconviction litigation. On April 6, 1992, Petitioner filed a motion to vacate judgments of conviction and sentence, which was amended several times. *Randolph v. State*, 853 So.2d 1051, 1055 (Fla. 2003). He also sought relief by writ of habeas corpus. Both requests were denied. *Id.*

On June 16, 2003, Randolph filed a habeas petition with the Florida Supreme Court, specifically raising a claim pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). This claim was also denied in an unpublished opinion. *Randolph v. Crosby*, 861 So.2d 430 (Fla. 2003). Randolph subsequently sought federal habeas relief with the United States District Court for the Middle District of Florida, which denied the petition. *Randolph v. McNeil*, 590 F.3d 1273, 1275 (11th Cir. 2009). The United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Randolph's petition. The Supreme Court of the United States denied the Defendant's Petition for Writ of Certiorari. *Randolph v. McNeil*, 562 U.S. 1006 (2010).

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gain, section 921.141(5)(f), Florida Statutes (1987); murder especially heinous, atrocious, or cruel, section 921.141(5)(h), Florida Statutes (1987).

[2] Randolph possesses an atypical personality disorder and expressed shame and remorse for his conduct.

On November 23, 2010, Randolph filed a successive motion for postconviction relief. On March 7, 2011, the circuit court denied the motion for being untimely, successive, procedurally barred, and for failing to present any new basis for relief that applied retroactively. Randolph appealed to the Florida Supreme Court and on April 26, 2012, the Florida Supreme Court affirmed the denial. *Randolph v. State*, 91 So.3d 782 (Fla. 2012) (mem.).

On January 10, 2017, Randolph filed his Second Successive 3.851 Motion to Vacate, raising four claims arising from the change in Florida law that followed in the wake of *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst I*), *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*), and Chapter 2017-1, Laws of Florida.[3] Randolph amended his motion to add a fifth claim, asserting that his sentence violated the Eighth Amendment. On December 31, 2019, the trial court entered an order denying relief summarily and Randolph appealed. The Florida Supreme Court affirmed the denial of postconviction relief and with respect to the *Hurst v. State* claim stated:

> Randolph's primary argument on appeal is that this Court's decision in *Hurst v. State* established a new criminal offense—capital first-degree murder—and that the jury sentencing determinations described in *Hurst* are "elements" of that new offense. From that assertion, Randolph insists that *Hurst* created a substantive rule of law that dates back to Florida's original capital sentencing statute, thereby requiring Randolph's death sentence to be vacated on the ground that certain elements of his crime were never found by a jury.
>
> We rejected a similar argument in *Foster v. State*, 258 So.3d 1248, 1251 (Fla. 2018). As we explained in *Foster*, there is no independent crime of "capital first-degree murder"; the crime of first-degree murder

[3] Chapter 2017-1, Laws of Florida was a legislative enactment by which Florida's capital sentencing statute was amended to require jury sentencing determinations of the kind described in *Hurst v. State*.

> is, by definition, a capital crime, and *Hurst v. State* did not change the elements of that crime. *Id.* at 1251-52 (holding that when a jury makes *Hurst* determinations, "it only does so after a jury has unanimously convicted the defendant of the capital crime of first-degree murder").
>
> Moreover, "[w]e have consistently applied our decision in *Asay* [*v. State*, 210 So.3d 1 (Fla. 2016)], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002)." *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017). Randolph echoes other pre-*Ring* defendants who have advanced myriad legal theories that, in the end, turn on pleas for a retroactive application of *Hurst*. But this Court has rejected such arguments, however styled. *See, e.g., Lambrix v. State*, 227 So.3d 112, 113 (Fla. 2017) (rejecting arguments based on "the Eighth Amendment," "denial of due process and equal protection," and "a substantive right based on the legislative passage of chapter 2017-1, Laws of Florida"). Randolph's argument that his death sentence was insufficiently reliable to satisfy the Eighth Amendment is similarly unavailing.
>
> Finally, Randolph offers an extensive critique of this Court's decision in *State v. Poole*, 297 So.3d 487 (Fla. 2020), where we partially receded from *Hurst*. We need not address *Poole* here, however, because Randolph's claims fail even under our pre-*Poole* jurisprudence on *Hurst* and retroactivity.

Randolph v. State, 320 So.3d 629, 631 (Fla. 2021).

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). Randolph's petition for certiorari followed. This is the State's brief in opposition.

REASONS FOR DENYING THE WRIT

I. Petitioner's Claim that *Hurst II* Should Apply to Him Does Not Warrant Review

In his first question presented, Petitioner argues 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 United States 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. 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.

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.[4] Petitioner presents no persuasive or compelling reasons to accept review of his case.

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[4] *See, e.g.*, *Wright v. Florida*, No. 21-5356 (Oct. 18, 2021) (denying petition that argued that *Hurst II* imposed new substantive elements); *Lamarca v. Florida*, No. 18-5648 (Oct. 29, 2018) (same).

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 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 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 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.

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 four 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 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*, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020) (mem.), and *cert. denied sub nom. Poole v. Florida*, 141 S. Ct. 1051 (2021)). 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. 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"). In Petitioner's case, the jury made the required finding of an aggravating (or "eligibility") factor (a prior violent felony based on the contemporaneous conviction in that the murder was committed in the course of a sexual battery), and that is all either the United States or Florida Constitution requires.

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.

II. The Eighth Amendment Does Not Require Jury Sentencing

Petitioner asks this Court to address whether the Eighth Amendment requires jury sentencing in capital cases. Just recently, however, this Court clearly answered

that question in the negative. *See McKinney*, 140 S. Ct. at 707 ("Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, 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 circumstance ultimate sentencing decision within the relevant sentencing range."). Therefore, this Court need not revisit it.[5]

The constitution provides a right to trial by jury, not to sentencing by jury. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the constitution does not prohibit the trial judge from "impos[ing] a capital sentence").

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[5] In Florida, the jury actively participates in both the eligibility and selection phases of the capital sentencing process. While the finding of at least one aggravating factor beyond a reasonable doubt concludes the jury's role in the eligibility phase, it marks the beginning of the jury's role in the selection phase. *See Poole*, 297 So.3d at 502. In performing its role during the selection phase, the jury must consider: "[w]hether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." Fla. Stat. § 921.141(2)(b)2.a.-b. After considering whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigating circumstances, the jury must recommend to the trial court "whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death." Fla. Stat. § 921.141(2)(b)2. If the jury recommends death, then the trial court may impose either a death sentence or a sentence of life imprisonment without the possibility of parole. Fla. Stat. § 921.141(3)(a)2. If, however, the jury recommends a sentence of life without the possibility of parole, then the trial court can only impose a life sentence. Fla. Stat. § 921.141(3)(a)1.

CONCLUSION

Based on the foregoing Respondent respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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