No. 25-5923

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY WAYNE FLETCHER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should exercise its certiorari jurisdiction to review a claim, which was not properly developed and would not affect the defendant's sentence, alleging that the inclusion of additional aggravators and the exclusion of proportionality review in Florida's death sentencing system violates the Eighth Amendment where federal courts of appeals, state courts of last resort, and this Court have either expressly rejected or failed to entertain similar claims?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

OPINION BELOW

Fletcher seeks certiorari review of a decision from the Florida Supreme Court, which appears as *Fletcher v. State*, 415 So. 3d 147 (Fla. 2025).

JURISDICTION

Fletcher seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257. The State agrees that this is the correct statute but denies that this is the right case for this Court to exercise its discretionary jurisdiction, as the Florida Supreme Court's decision does not conflict with any decision by this Court, nor does it decide any important or unsettled question of federal law. *See* Sup. Ct. R. 10(a), (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State accepts Fletcher's recitation of the constitutional and statutory provisions involved in this matter.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Timothy Wayne Fletcher was sentenced to death because, on April 15, 2009—after he had just escaped from jail—he strangled Ms. Helen Googe to death in her own home while trying to steal less than $40 and a credit card PIN number from her. *Fletcher v. State*, 168 So. 3d 186, 193–199 (Fla. 2015). A jury found him guilty and subsequently recommended he be sentenced to death. *Id.* at 199. His case was later remanded for re-sentencing and, after hearing all the evidence, the new penalty phase jury unanimously recommended Fletcher receive a death sentence. *Fletcher v. State*, 415 So. 3d 147, 155 (Fla. 2025). On appeal, Fletcher challenged Florida's death sentencing system on well-worn grounds, but the Supreme Court of Florida rejected his arguments. *Id.* at 157; 162–64.

I. Facts of the Crime.

Timothy Fletcher, along with his cellmate, escaped from the Putnam County Jail while he was under a ten-year prison sentence on four burglary charges. *Fletcher v. State*, 168 So. 3d 186, 193–94 (Fla. 2015). After stealing a vehicle from a local business, Fletcher and his cellmate traveled to the residence of the elderly Helen Googe, the former wife of Fletcher's grandfather. *Id.* at 194. Fletcher had devised a scheme to rob Googe. *Id.* In the early morning hours of April 15, 2009, they stealthily entered Googe's residence, armed themselves with an unloaded revolver which was on display in the residence, and then used the revolver to threaten Googe if she did not open her safe and divulge her credit card PIN. *Id.* 194–96. Ms. Googe eventually opened her safe, but there was no money in it; she told Fletcher and his accomplice that she only had about $40 in her purse. *Id.* at 195.

Fletcher recounted that, on multiple occasions, he and his accomplice physically attacked Ms. Googe while, at other times, one of them threatened to shoot her if she did not comply. *Id.* at 195–96. At one point, Fletcher struck Ms. Googe three times in the head, once near her upper eye and twice on the right side of her scalp. *Id.* at 196; 198–99. Both Fletcher and his accomplice then engaged in a prolonged effort to try to kill Ms. Googe using different methods. *Id.* at 196. Eventually, Fletcher climbed on top of Ms. Googe. *Id.* Fletcher then used both of his hands to strangle Ms. Googe's neck. *Id.* at 196; 198. He applied such force to Ms. Googe's neck that it fractured the cartilage in her larynx and thyroid while creating many other contusions and hemorrhages around her neck *Id.* at 198. Although Ms. Googe frantically fought back, Fletcher choked her until she lost consciousness. *Id.* at 196.

Trial testimony from the medical examiner established Ms. Googe died from asphyxia from manual strangulation and that Ms. Googe was conscious when she sustained all her injuries. *Id.* at 198–99.

After Fletcher killed Ms. Googe, they collected Ms. Googe's purse and fled the property with Fletcher driving Ms. Googe's vehicle and his accomplice driving the original stolen vehicle. *Id.* at 196. They then stopped, abandoned the original stolen vehicle, and discarded evidence of their murder in a nearby retention pond. *Id.* Both men continued flight through three states before returning to Florida, where they were eventually apprehended. *Id.* By the time Fletcher was arrested, officers had already discovered Ms. Googe's corpse in her residence where Fletcher had abandoned it hours before. *Id.* at 197.

During a law enforcement interrogation, Fletcher voluntarily provided an account of what he and his accomplice had done, but the story changed multiple times. *Id.* at 194–97. Ultimately, Fletcher settled on an account that was mostly consistent with the forensic evidence, except for his claim that his accomplice was the one who strangled Ms. Googe; Fletcher claimed that he had merely held her legs down. *Id.* at 196. Evidence presented at trial, however, established that Fletcher had visible scratch wounds on his arms whereas his accomplice had no similar injuries. *Id.* at 194. Additionally, scrapings from Ms. Googe's fingernails contained a partial DNA profile which was consistent with Fletcher's profile, not his accomplice's profile. *Id.* at 198.

II. Trial and Subsequent Proceedings.

A. First Trial and Appeal.

On May 25, 2012, the jury convicted Fletcher of first-degree murder, home-invasion robbery, two counts of burglary, two counts of grand theft of a motor vehicle, and escape. *Id.* at 199. During the penalty phase of the trial, the State presented evidence proving Fletcher's previous conviction and prison sentence and provided victim impact testimony from Ms. Googe's relatives. *Id.* Fletcher presented extensive testimony about his family's dysfunctional relationship, the physical and emotional abuse he suffered during his childhood, and his chronic drug and alcohol abuse. *Id.* at 199–201. Multiple experts testified that Fletcher suffered from a variety of psychological disorders. *Id.* at 200–01. The jury recommended Fletcher be sentenced to death by an eight to four vote. *Id.*

The trial court found that the State had proven four aggravators and assigned each great weight: (1) the murder was committed while the defendant was under sentence for a prior felony conviction; (2) the murder was committed while the defendant engaged in the commission or attempted commission of a robbery; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel. *Id.* at 201; *see also* § 921.141(6)(a), (d), (f), (h), Fla. Stat. (2012). The trial court also found one statutory and sixteen non-statutory mitigating circumstances had been proven. *Fletcher*, 168 So. 3d at 201.[1] The trial court also found

[1] The mitigating circumstances and weights assigned were that Fletcher: (1) was twenty-five years old at the time of the crime (minimal weight); (2) was physically abused by his father (little weight); (3) suffered from chronic addiction to drugs (moderate weight); (4) suffered from depression (little weight); (5) was treated for

that the aggravating circumstance far outweighed the mitigation presented and duly sentenced Fletcher to death. *Id*. at 202. Fletcher appealed his death sentence, but the Florida Supreme Court affirmed the conviction and sentence. *Id.* at 222. The court also found the sentence was proportional and withstood relative culpability review even though Fletcher's accomplice received a life sentence because Fletcher was the dominant planner and actor in the escape scheme and murder of Ms. Googe. *Id.* at 220–21.

B. New Penalty Phase and Appeal.

Later, Fletcher was granted a new penalty phase trial to correct a *Hurst*[2] error. *Fletcher*, 415 So. 3d at 152. During the new penalty phase, which commenced in April 2022, the State sought to prove the same four statutory aggravators that had been proven during Fletcher's previous penalty phase. *Id.* The State's penalty phase presentation mirrored what it had presented during the previous penalty phase. *Id.* Fletcher's mitigation presentation covered the same themes as his prior claims, but

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PTSD (slight weight); (6) as a child, witnessed domestic violence (some weight); (7) had attempted suicide (little weight); (8) responded well to counseling while incarcerated (little weight); (9) claimed he was awake all night before the escape and consumed methamphetamines (very little weight); (10) obtained his GED while incarcerated (some weight); (11) came from a dysfunctional family (some weight); (12) had a close relationship with his mother but she died when he was eighteen (little weight); (13) had artistic ability (slight weight); (14) expressed remorse (some weight); (15) displayed good behavior during the court proceedings (some weight); (16) cooperated with police after his arrest (moderate weight). *Id*. at 201. The trial court also found that (17) Fletcher's accomplice pled guilty to the same offenses and received a life sentence (great weight). *Id.*

[2] *Hurst v. Florida*, 577 U.S. 92 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), receded from, in part, in *State v. Poole*, 297 So. 3d 487 (Fla. 2020).

he numbered them differently and tried to argue he was under the influence of extreme mental or emotional disturbance at the time of the murder based on his allegation that he had consumed methamphetamines before the murder. *Id.* at 154. Neither the jury nor the trial court found Fletcher had proven this new mitigating circumstance. *Id.* at 155–56.

The jury unanimously found the four statutory aggravators had been proven and recommended that Fletcher be sentenced to death. *Id.* at 155. The trial court agreed with the jury's finding that all the State's aggravators had been proven, but merged two for weighing purposes finding: (1) Fletcher was previous convicted of a felony and under a sentence of imprisonment, (2) the murder was committed during a robbery/for pecuniary gain, and (3) the murder was especially heinous, atrocious, and cruel. *Id.* at 156. The trial court assigned each aggravator great weight. *Id.* The trial court also found forty-five of the fifty-two proposed mitigating circumstances were proven and cumulatively gave them moderate weight. *Id.*[3] Ultimately, the trial court agreed with the jury's unanimous death recommendation and sentenced the defendant to death. *Id.*

Fletcher appealed his new death sentence arguing, among other things, that Florida's proportionality review should be reinstated, that the aggravators applied to his case were unconstitutional both facially and as applied, and that the inclusion of

[3] *See id.* at 154 n.3; *Id.* at 154 for a full list of mitigating circumstances considered. Although more voluminous in enumeration, the content was largely the same as the mitigating circumstances argued during the first penalty phase. *Compare with Fletcher*, 168 So. 3d at 201.

additional aggravators ("aggravator drift") in the statute rendered Florida's death sentencing system unconstitutional. *Id.* at 157. The Florida Supreme Court denied Fletcher's claim about proportionality review because it had repeatedly rejected identical arguments. *Id.* at 157 n.12; *Id.* at 163. Similarly, the court summarily rejected his claim about "aggravator drift" was because it had, many times before, rebuffed similar claims and none of Fletcher's arguments came close to compelling the court to revisit those decisions. *Id.* at 164.

The court then addressed each of the challenges Fletcher raised about the aggravators applied in his case. Fletcher complained that the "committed while under sentence" aggravator was vague and overbroad, but the court found that claim meritless because Fletcher had escaped from jail; thus, this aggravator clearly applied to him. *Id.* at 163–64. Next, Fletcher suggested the "pecuniary gain" aggravator impermissibly doubled the felony murder aggravator, yet the court found this argument meritless because the trial court merged both aggravators. *Id.* at 164. Fletcher also complained that the felony murder aggravator applied to so many offenses that it was "essentially automatic." *Id.* The court had previously rejected this challenge and found no reason to revisit its previous decisions. *Id.* Finally, Fletcher argued the especially heinous atrocious and cruel aggravator was vague and overbroad. *Id.* The court again found that this challenge had been rejected many times before and the prolonged torture and strangulation of an elderly victim would qualify for this aggravator. *Id.*

III. Florida's Death Sentencing System.

For the sake of clarity, Respondent offers this brief description of how Florida structured its death sentencing system when Fletcher was sentenced in 2023. The defendant's trial is bifurcated into the guilt phase and the penalty phase. In the penalty phase, the jury decides between recommending a life without the possibility of parole or death sentence by weighing of aggravating factors ("aggravators") against mitigating circumstances ("mitigators"). § 921.141(1), Fla. Stat. (2022).[4]

During the penalty phase, the State can only present evidence and make arguments on aggravators that are enumerated in the statute. § 921.141(6), Fla. Stat. The State's evidence is also limited to aggravators that were pled in a notice of intent to seek the death penalty. Fla. R. Crim. P. 3.181. The Defendant's presentation of mitigators, by contrast, is not limited to factors enumerated in the statute and the jurors are instructed that they need not reach a unanimous decision on whether each mitigator had been proven for them to weigh it in their deliberations. § 921.141(7)(h), Fla. Stat.; Fla. Std. Jury Instr. (Crim) 7-11.

A defendant only becomes death eligible if the jury unanimously finds, beyond a reasonable doubt, at least one aggravator exists. § 921.141(2)(b), Fla. Stat. If the defendant is death eligible, then the jury can only recommend a death sentence if they unanimously (1) determine the aggravators the State proved outweigh the mitigating circumstances that exist, and (2) decide that the sentence of death is

[4] All future citations to § 921.141, Fla. Stat. will be the 2022 version of the statute unless otherwise noted.

appropriate. § 921.141(2)(b)–(c), Fla. Stat. If the jurors do not unanimously recommend a death sentence, then the defendant must be sentenced to life imprisonment without the possibility of parole. § 921.141(2)(c), Fla. Stat.[5] The trial court cannot override a jury's life sentence recommendation. § 921.141(3)(a)1, Fla. Stat.

If the jury recommends a death sentence, the trial court must then independently review of the evidence weighing only the aggravators which the jury unanimously decided were proven against any mitigation circumstances that the record supports. § 921.141(4), Fla. Stat. Unlike a jury's life recommendation, a judge may override a jury's death recommendation. § 921.141(4), Fla. Stat.

All death sentences are subject to automatic review in the Florida Supreme Court. § 921.141(5), Fla. Stat. Regardless of whether the defendant raises the issue, the Florida Supreme Court reviews the sufficiency of the evidence to ensure there is competent, substantial evidence to support the defendant's conviction. Fla. R. App. P. 9.142(a)(5); *see also Blake v. State*, 972 So. 2d 839, 850 (Fla. 2007).

[5] Fletcher complains about Florida's current death sentencing system allowing a death recommendation based on a supermajority of jurors, Pet. at 25–26, but his criticism is ultimately irrelevant because it was not the scheme under which Fletcher was sentenced.

REASONS FOR DENYING THE WRIT

This Court should deny the writ because neither a federal court of appeals, a state court of last resort, nor this Court has ever held the inclusion of additional of aggravators in a statute and the exclusion of proportionality review in a death sentencing system violates the Eighth Amendment and, even if any court had, the claim was not properly developed below and it would not have changed the sentence imposed.

The Eighth Amendment of the United States Constitution is flexible enough to accommodate different models for administering death sentences; there is no one-size-fits-all. *See Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) (explaining that "there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority"); *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (noting that review of death sentencing systems must be conducted on an individual basis); *Pulley v. Harris*, 465 U.S. 37, 44–45 (1984) ("To endorse the statute as a whole is not to say that anything different is unacceptable."). Fletcher's petition presents a well-worn theory that the aggregate number of aggravators and absence of proportionality review in Florida's death sentencing system renders it unconstitutional. Yet this theory has failed to garner support from this Court, any federal court of appeals, or any state of court of last resort. Even if Fletcher could show that the question presented merits this Court's attention, his case would be an exceptionally poor vehicle for review because he failed to properly develop his claim about the scope of Florida's aggravators in the court below and his theory would not have affected the sentence he received. This Court has repeatedly denied certiorari

on similar challenges to Florida's death sentencing system.[6] Fletcher provides no persuasive reason why his case warrants a different outcome.

I. The Decision Below Does Not Conflict with Any Decision of a Federal Court of Appeals or a State Court of Last Resort.

This Court has noted that cases which have not divided the federal courts of appeals or state courts of last resort do not warrant this Court's review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). Fletcher's petition fails to identify any federal court of appeals or state court of last resort decision which conflicts with the decision below. More specifically, he has identified no federal court of appeals or state court of last resort that has ever held that the lack of proportionality review, the number of aggravators in a death penalty statute, or a combination of these two issues contravenes the Eighth Amendment.

The theory that Fletcher advances here is almost identical to those presented in failed challenges to the Federal Death Penalty Act (FDPA). Federal defendants have often argued that the FDPA is constitutionally defective because it allows prosecutors to plead a theoretically unlimited number of non-statutory aggravators yet does not require any comparative proportionality review. Every federal circuit that has considered this question has resoundingly rejected these claims. *United States v. Aquart*, 912 F.3d 1, 52 (2d Cir. 2018) (finding that the FDPA "sufficiently safeguard[ed] against arbitrary and capricious death sentences to satisfy the Eighth

[6] *See, e.g., Cruz v. Florida*, 144 S. Ct. 1016 (2024); *Bevel v. Florida*, 144 S. Ct. 2570 (2024); *Wells v. Florida*, 144 S. Ct. 385 (2023); *Joseph v. Florida*, 143 S. Ct. 183 (2022); *Johnson v. Florida*, 553 U.S. 1007 (2008); *Blanco v. Florida*, 525 U.S. 837 (1998).

Amendment" even though the statute allows for a jury to consider non-statutory aggravators and the statute does not require proportionality review), *cert. denied,* 140 S. Ct. 511 (2019); *United States v. Lawrence*, 735 F.3d 385, 419 (6th Cir. 2013) (rejecting a claim that the prosecutors "unbridled discretion" in choosing aggravators rendered the FDPA unconstitutional), *cert. denied,* 574 U.S. 1055 (2014); *United States v. Mitchell*, 502 F.3d 931, 980 (9th Cir. 2007) (rejecting a claim that proportionality review was constitutionally necessary to sufficiently balance the number of aggravators available in the FDPA), *cert. denied,* 553 U.S. 1094 (2008); *United States v. Higgs*, 353 F.3d 281, 320–21 (4th Cir. 2003) (holding that proportionality review is not required in a system which allows for non-statutory aggravators), *cert. denied,* 543 U.S. 999 (2004); *United States v. Allen*, 247 F.3d 741, 758 (8th Cir. 2001) (rejecting a claim that allowing non-statutory aggravators fails to "adequately limit and guide [the jury's] sentencing discretion"), *vacated on other grounds,* 536 U.S. 953 (2002); *United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998) (rejecting an argument that proportionality review was constitutionally necessary due to the scope of aggravators available under the FDPA), *aff'd on other grounds,* 527 U.S. 373 (1999). Since the FDPA lists sixteen statutory aggravators for homicide offenses and allows for any number of non-statutory aggravators, Fletcher offers no sound rationale for why this Court should find the Florida death sentencing system is constitutionally suspect when his exact argument has been soundly rejected in the FDPA context.

State courts have also been unsympathetic to arguments that the aggregate

number and collective scope of aggravators in a state statute are so broad as to constitute an Eighth Amendment violation. *See, e.g.*, *State v. Hidalgo*, 390 P.3d 783, 789–91 (Ariz. 2017); *Lawlor v. Commonwealth*, 738 S.E.2d 847, 893 (Va. 2013); *Thomas v. State*, 148 P.3d 727, 735–36 (Nev. 2006); *People v. Carter*, 117 P.3d 544, 588 (Cal. 2005); *People v. Ballard*, 794 N.E.2d 788, 818 (Ill. 2002); *Steckel v. State*, 711 A.2d 5, 12–13 (Del. 1998); *State v. Rhines*, 548 N.W.2d 415, 437 (S.D. 1996) *State v. Young*, 853 P.2d 327, 336–38 (Utah 1993); *State v. Wagner*, 305 Or. 115, 148, 752 P.2d 1136, 1157 (Or. 1988), *judgment vacated on other grounds*, 492 U.S. 914 (1989). The Florida Supreme Court's decision below, therefore, conflicts with neither the federal courts of appeals nor any state court of last resort. The lack of support for Fletcher's position illustrates that this Court need not entertain his petition.

II. The Decision Below Does Not Involve an Important and Unsettled Question of Federal Law Nor Does It Conflict with Any Decision of This Court.

While conflict among the lower courts is one of the main reasons this Court grants certiorari review, this Court also will review cases where a lower court decides an important questions of federal law "that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Fletcher's case presents neither scenario. While Fletcher's argument is not entirely clear, he appears to be advancing three competing claims: (1) proportionality review is itself a necessary component of Florida's death sentencing system, *see* Pet at 22, (2) Florida's expanded number of aggravators constitutes a *per se* Eighth Amendment violation, *see* Pet. at 18–22, or (3) because Florida has expanded the number of aggravators in its death penalty

statute, the Eighth Amendment now requires that Florida have comparative proportionality review, *see* Pet. at 24–25. All three of these claims fail to present any important and unsettled question of federal law. This Court does not require States to include comparative proportionality review in their death sentencing systems and the quantity of aggravators included in a state's death penalty statute has never been important to this Court's jurisprudence on rationally narrowing the class of defendants subjected to the death penalty.[7]

A. This Court Has Already Decided That the Eighth Amendment Does Not Require Comparative Proportionality Review.

This Court already made it clear that a death sentencing system need not have comparative proportionality review to pass Eighth Amendment muster. *Pulley v. Harris*, 465 U.S. 37, 50–51 (1984) (stating that there is "no basis in our cases for holding that comparative proportionality review by an appellate court is required in every [death penalty] case"). This petition is also far from the first time that this Court has evaluated whether Florida's death penalty system comports with the requirements of the Eighth Amendment. In *Proffitt v. Florida*, 428 U.S. 242 (1976), the plurality of justices noted the key features which made Florida's death sentencing system constitutionally acceptable were that it: (1) channeled and guided the sentencing court's discretion by requiring weighing of aggravating against mitigating

[7] Fletcher's argument relies upon an expansive and unsupported interpretation of the Eighth Amendment. As this Court recently explained, the Eighth Amendment is concerned with the quantum of punishment imposed for a criminal offense, not the process by which it is derived. *See City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520, 542 (2024) (the Eighth Amendment focuses on the "method or kind" of punishment a government "may impose after a criminal conviction").

factors, (2) required the sentencer to focus on the individual circumstances of the murder and the characteristics of defendant, (3) made the judge the ultimate sentencer, and (4) subjected the sentence to automatic appellate review. *Id.* at 250–52 (plurality). The other concurring judges, in approving of Florida's system, never even mentioned the availability of any appellate review. *Id.* at 260–61 (White, Rehnquist, JJs.; Burger, CJ., concurring). While the plurality in *Proffitt* also favored Florida's comparative proportionality review, this Court later clarified that such review was not a necessity for Florida's system to be constitutional. *Pulley*, 465 U.S. at 46–48. Rather, "where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). Since Florida's system continues to channel the sentencer's discretion with certain aggravators weighed against any mitigation presented—no matter how many aggravators are added to the statute—proportionality review is not constitutionally required.

Fletcher attempts to brush this Court's jurisprudence aside by claiming the Florida Supreme Court's decision to abandon—judicially created—comparative proportionality review "is a misapplication of *Pulley*." Pet. at 22. But his criticism entirely misunderstands what happened. The State of Florida has a unique state constitutional provision, referred to as a "conformity clause," which treats this Court's jurisprudence as both the floor and the ceiling of any protection against cruel and unusual punishment. *See, e.g., Smithers v. State*, No. SC2025-1507, 2025 WL 2837399, at *5 (Fla. Oct. 7, 2025), *cert. denied*, No. 25-5829, 2025 WL 2908776 (Oct.

14, 2025). In *Lawerence v. State*, 308 So. 3d 544 (Fla. 2020), the Florida Supreme Court held that the Florida Constitution's conformity clause did not permit the judiciary to require comparative proportionality review when the statute does not contemplate such review. *Id.* at 551.[8] Florida's decision was, therefore, entirely a consequence of state law. To the extent that Fletcher is inviting this Court to disagree with the Supreme Court of Florida's decision in *Lawrence*, this Court should decline to do so because, as this Court has long recognized, this Court lacks jurisdiction to review matters of state law. *See Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945). Fletcher cites no other grounds for this Court to conclude Florida's system must include comparative proportionality review. Therefore, his argument is foreclosed by this Court's precedent.

B. The Quantity of Aggravators in a Statute Has Little Constitutional Significance.

Fletcher also takes issue with Florida's death penalty statute adding multiple aggravators since this Court decided *Proffitt*. Pet. at 19–22. His arguments fail to appreciate how this Court determines an aggravator rationally narrows the class of death-eligible defendants. This Court's overriding concern with death sentencing schemes is to avoid "unguided juries [] imposing the death penalty in an inconsistent and random manner on defendants." *Blystone v. Pennsylvania*, 494 U.S. 299, 303

[8] The state court, however, made it clear that its decision to forgo judicially created comparative proportionality review did not preclude the state legislature from requiring it. *Id.* at 551 n.4. Fletcher's argument is a matter of political policy and should therefore be directed at Florida's state legislature rather than bringing it before this Court disguised as a constitutional claim.

(1990) (citing *Furman v. Georgia,* 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring)). Thus, a death sentencing system must: "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006) (citing *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality)); *see also Tuilaepa v. California*, 512 U.S. 967, 971 (1994) (referring to the former as "the eligibility decision" and the latter as the "selection decision"). This Court has explained that

> the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Lowenfield v. Phelps, 484 U.S. 231, 246 (1988). If a state wishes to use aggravators to accomplish constitutional narrowing, the individual aggravators enumerated by the legislature: (1) "may not apply to every defendant convicted of a murder," and (2) "may not be unconstitutionally vague." *Tuilaepa*, 512 U.S. at 972. The purpose of this narrowing is to "direct and limit the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious actions." *Arave v. Creech*, 507 U.S. 463, 470 (1993) (citation modified). This Court has never looked at cumulative number of aggravators in a statute when assessing narrowing functions; what matters is how the individual aggravator helps channel the sentencer's discretion. *See, e.g., Arave*, 507 U.S. at 470–78 (1993) (evaluating whether an individual aggravating circumstance sufficiently

narrowed eligibility for the death penalty); *Walton v. Arizona*, 497 U.S. 639, 654–56 (1990) (considering whether Arizona's definition of a single aggravator was sufficient to provide some guidance to the sentencer); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) ("To avoid this constitutional flaw, *an aggravating circumstance* must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.") (emphasis added); *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (assessing whether an individual aggravator could be applied to every murder).

A careful reading of *Pulley* and its progeny confirms that, provided the individual aggravators in a statute are constitutionally sound, the total number of aggravators in a statute has little constitutional significance. In *Pulley*, this Court evaluated California's death sentencing system wherein a defendant becomes eligible for the death penalty if the jury finds the defendant guilty of a capital crime and finds at least one special circumstance applied to the capital crime committed. *Pulley*, 465 U.S. at 51. This Court approved of California's system because it required "the jury to find at least one special circumstance beyond a reasonable doubt" which meant "the statute limits the death sentence to a small sub-class of capital-eligible cases." *Id.* at 53. The number of special circumstances in the statute was not an important consideration. The fact that recent legislation in California had "greatly expanded" the number of special circumstances that could be applied to a defendant was not concerning for this Court. *Id.* at 51 n.13. Several decades later, the number of special circumstances that could be applied to capital offenses had expanded from seven to

nineteen. Cal. Penal Code Ann. § 190.2 (1988). If the total number of aggravators in a statue is constitutionally significant, then the tripling of special circumstances would have at least warranted a concerned comment from this Court. But when this Court examined California's system, the expanded number of special circumstances was of no constitutional importance. *Tuilaepa*, 512 U.S. at 969 (making only a passing mention of the fact that California's system has nineteen enumerated special circumstances).

In the court below, Fletcher raised specific objections to the individual aggravators applied to him. Before this Court, however, he has abandoned these challenges and now simply argues that "the sheer number of aggravating factors" in Florida's statute is constitutionally suspect. Pet. at 21–22. Yet this Court has never employed his crude method of speculating that a statute's aggravators might, collectively, apply to a significant number of murders. Simply because the total number of aggravators could be applied in a variety of contexts does not mean the individual aggravators apply to "every defendant convicted of a murder." *Tuilaepa*, 512 U.S. at 972. Therefore, the fact that Florida's legislature has added more aggravators to Florida's death penalty statute since this Court decided *Proffitt* bears little weight.

Fletcher also complains that there is "virtually no narrowing of death eligibility before the conclusion of a capital trial" because Florida does not require that aggravating factors be pled in an indictment. Pet. at 19. But this criticism misses the mark in two respects. First, it is misleading because, while aggravators need not

be pled in the indictment, the State must plead the intended aggravators in a notice that must be filed within forty-five days of the defendant's arraignment. Fla. R. Crim. P. 3.181. Second, this Court has held that the narrowing function required by the Eighth Amendment may be performed "at either the sentencing phase of the trial or the guilt phase." *Lowenfield*, 484 U.S. at 245. Thus, Fletcher's complaint is unavailing. Ultimately, none of Fletcher's criticisms about the number of aggravators available in Florida's statute present an important and undecided question of federal law nor do his arguments show how the opinion below contradicts any decisions of this Court.

III. Fletcher's Case Would Be a Poor Vehicle for This Court's Review.

Even if any members of this Court find Fletcher's argument intriguing, his case would be a poor vehicle for this Court's review because: (1) the record below was not sufficiently developed, and (2) embracing any permutation of Fletcher's "aggravator drift" theory would not affect the outcome of Fletcher's sentence. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (noting that "if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do"); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (explaining that "if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

A. The Factual Claims Fletcher Asserts Here Were Not Properly Developed Below.

To support his contention that nearly every murder in Florida is death eligible, Fletcher cites not an expert, not even self-collated statistics he presented in the lower

court, but a comment published in a law review claiming that "more than 90% of murders are death eligible in many states." *See* Pet. at 21 (quoting Chelsea Creo Sharon, comment, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv. C.R.-C.L.L. Rev. 223–24 (2011)).[9] Fletcher did not develop these claims further below and he provides no information specific to Florida, let alone which aggravators are responsible for this supposed expansion of death eligibility.

Back in 2018, a defendant from Arizona presented a petition to this Court advancing the same type of claim about aggravators that Fletcher is making here. Unlike Fletcher, however, the Arizona defendant presented unrebutted empirical evidence in the lower court that approximately 98% of first-degree murders committed in Arizona were death eligible. *See Hidalgo v. Arizona*, 138 S. Ct. 1054, 1057 (2018) (Breyer, J., statement respecting the denial of certiorari, joined by Ginsburg, Sotomayor, and Kagan, JJs.). Still, this Court denied certiorari review. Justice Breyer explained that, even though he was personally disposed to considering the legal argument presented, the case was unworthy of certiorari review because "the record as it has come to us is limited and largely unexamined by experts and the courts below in the first instance." *Id.* Fletcher's claim is a far cry from the one

[9] The portion of the law review comment that Fletcher cites references another law review article which generally discusses various states, including Florida, adding aggravators to their statutes but provides no statistics about how many murders would fall under those added aggravators. *Sharon* at 223 n.4, 233 n.67. The law review comment also cites additional studies from Georgia, Missouri, and California. *Id.* at 234 n.72–73. The "more than 90%" statistics appears to be derived from public testimony a professor gave about California's death penalty. *See id.* at 234.

presented in *Hidalgo*. If a petitioner armed with unrebutted empirical evidence about the number of death eligible murders in his state did not warrant this Court's attention, then Fletcher's perfunctory citation to a law review article which simply references statistics about other states is far less deserving of this Court's consideration.

B. Fletcher's Claimed Constitutional Deficiencies Would Not Change His Sentence.

This Court has recognized that even if some aggravators are deemed impermissible, if the factfinder also found there were other valid aggravators that applied, then the death sentence does not have to be vacated. *See, e.g.*, *Zant v. Stephens*, 462 U.S. 862, 884 (1983); *see also Wainwright v. Goode*, 464 U.S. 78, 87 (1983) (finding that there was no need to vacate the death sentence because the consideration of an impermissible aggravator did not the render Florida's death penalty system so "arbitrary or freakish" as to violate the Eighth Amendment); *Barclay v. Florida*, 463 U.S. 939, 958 (1983) (plurality) (holding that, given Florida's method of weighing and reviewing aggravators, relying on an impermissible aggravator does not necessarily mean that the Defendant's sentence violated the Eighth Amendment). Fletcher tacitly concedes that his sentence would not be different because he now only criticizes some of the aggravators applied in his sentence. Pet. at 22.

Even accepting Fletcher's criticism at face value and assuming his argument about aggravators is correct, this Court's precedent under *Proffitt* and *Pulley* would mean that Fletcher could only roll back Florida's aggravators to what existed when

Proffitt was decided. When viewed through this lens, Fletcher's criticisms apply to none of the four aggravators that were found in Fletcher's sentence. While Fletcher acknowledges that the "committed while under sentence" aggravator existed when the statute was first enacted, he complains that the aggravator now covers defendants placed on community control or on felony probation. Pet at 20. Fletcher, however, was under a lawful prison sentence when he murdered Ms. Googe. *Fletcher*, 168 So. 3d at 194. Thus, this aggravator would have applied to Fletcher even before its scope was expanded. Fletcher also disapproves of the addition of other felonies to the felony murder aggravator. Pet. at 20–21.[10] But the offense which qualified Fletcher for this aggravator was home-invasion robbery, *Fletcher*, 415 So. 3d at 156, which has been in the statute since it was first enacted. *See* § 921.141(6)(d), Fla. Stat. (1972). Both the especially heinous, atrocious, and cruel and pecuniary gain aggravators applied in Fletcher's case were in the statute when *Proffitt* was decided. *See Proffitt*, 428 U.S. at 251. Thus, applying only the aggravators that this Court approved of in *Proffitt* would exclude none of the aggravators that were found in Fletcher's sentence.

Moreover, even if Fletcher were to somehow convince this Court that comparative proportionality review was constitutionally necessary, it is apparent Fletcher's sentence would have been proportional. In 2015, the Florida Supreme

[10] Fletcher refers to it as the "prior violent felonies" aggravator but cites to § 921.114(6)(d), Fla. Stat. *See* Pet. at 20. Since the prior violent felony aggravator is listed as § 921.114(6)(b), Fla. Stat., the aggravator does not list any specific felonies, and that aggravator was not applied to Fletcher, the State presumes this reference is a scrivener's error.

Court *already* found that Fletcher's death sentence was both comparatively proportional and satisfied relative culpability review because Fletcher was the dominant actor in the murder where he not only escaped from prison but also brutally strangled an elderly, terrified victim to death over a paltry sum of money and a credit card PIN. *See Fletcher*, 168 So. 3d at 220–21. There was no meaningful distinction in the mitigation evidence presented during the new penalty phase compared to what was offered during the previous penalty phase. *Compare Fletcher,* 415 So. 3d at 154 n.3; *Id.* at 154 *with Fletcher*, 168 So. 3d at 201.[11] Thus, any decision from this Court regarding the constitutionality of Florida's death sentencing system would amount to no more than an advisory opinion. This Court should decline review of this petition on that basis alone.

CONCLUSION

Fletcher comes to this Court armed with nothing more than untenable readings of this Court's jurisprudence supported by underdeveloped claims about Florida's death sentencing system. This Court has denied certiorari on claims like the one Fletcher argues here yet fails to explain why his petition should escape the same fate. For all the reasons explained above, Fletcher's petition for a writ of certiorari should be denied.

[11] In his new penalty phase, Fletcher did attempt to establish that he was under extreme mental or emotional distress, but that argument would have made no difference because neither the trial court nor the jury found that mitigating circumstance had been proven. *Fletcher,* 415 So. 3d at 155–56.

Respectfully submitted,

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