No. _____

In the Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,

v.

TIMOTHY LEE HURST,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Sixth Amendment gives a defendant convicted of a capital crime the right to have a jury make statutorily mandated non-factual findings supporting the imposition of the death penalty, such as the determination that aggravating circumstances outweigh mitigating factors and the related moral judgment that the defendant should be sentenced to death.

Whether the Eighth Amendment requires jury sentencing in capital cases.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Florida Supreme Court:

1) The State of Florida, petitioner in this Court, was the appellee below.

2) Timothy Lee Hurst, respondent in this Court, was the appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The State of Florida (hereinafter "the State") respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court, Pet. App. 1a–94a, is reported at 202 So. 3d 40 (2016). The sentencing order of the state trial court, Pet. App. 95a–110a, is unreported.

JURISDICTION

The Florida Supreme Court entered judgment on October 14, 2016. Pet. App. 1a. On January 10, 2017, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including February 13, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a). Although the Florida Supreme Court's decision addresses some state-law issues, the judgment below does not rest on an adequate and independent state-law ground. *See infra* Part I; *Florida v. Powell*, 559 U.S. 50, 56–57 (2010).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional and statutory provisions are reproduced in Appendix C to this petition, Pet. App. 111a–118a.

STATEMENT

1. 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 opinion). By giving trial judges "specific and detailed" instructions, *id.*, those reforms sought to ensure that courts presiding over capital cases conduct "an informed, focused, guided, and objective inquiry" into the grave and difficult question whether a defendant convicted of first-degree murder should be sentenced to death. *Id.* at 259.

Under the statutory regime at issue here, a defendant convicted of a capital crime may not be sentenced to death unless the trial court makes certain specified findings—including the determination that at least one statutory aggravating circumstance exists and the determination that aggravating circumstances outweigh mitigating circumstances. *See* Fla. Stat. § 921.141(3) (2010); Pet. App. 114a. Pursuant to Florida's hybrid sentencing procedure, a sentencing jury renders an advisory verdict, but the judge makes the ultimate sentencing determinations. *See* Fla. Stat. § 921.141(2), (3); Pet. App. 113a–114a. For several decades following the enactment of that scheme, this Court repeatedly reviewed and upheld the constitutionality of Florida's capital sentencing procedures. *Hurst v. Florida*, 136 S. Ct. 616, 623 (2016); *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); *Dobbert v. Florida*, 432 U.S. 282 (1977).

2. On May 2, 1988, Cynthia Harrison was found dead at the Popeye's restaurant where she and respondent Timothy Hurst both worked. Pet. App. 5a. Harrison "had been bound and gagged and repeatedly cut and stabbed" with a box cutter found at the scene of the crime. *Id.* at 5a, 7a. She "suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, back, torso, and arms." *Id.* at 6a. "[S]ome of the wounds cut through the tissue into the underlying bone." *Id.* Harrison "also had blood stains on the knees of her pants," indicating that she had been forced to kneel in a pool of her own blood. *Id.*

Hurst was charged with killing Harrison and convicted of first-degree murder. *Id.* at 5a. The evidence adduced at trial included eyewitness testimony placing Hurst at the scene of the crime; testimony from two of Hurst's friends that Hurst admitted to killing Harrison; and an abundance of corroborating forensic and physical evidence. *Id.* at 5a–8a; *see also id.* at 58a ("The evidence of the circumstances surrounding this murder can be considered overwhelming and essentially uncontroverted.").

Following the conclusion of certain proceedings not relevant here, Pet. App. 8a–11a, the jury rendered an advisory sentence of death by a vote of 7 to 5. Pet. App. 95a. The trial court found that two aggravating circumstances were present—*i.e.*, that the capital felony was especially heinous, atrocious, or cruel; and that it was committed while the defendant was engaged in the commission of a robbery. *Id.* at 98a–100a. After "carefully weigh[ing]" the aggravating and mitigating factors, the trial court found that the former

predominated. *Id.* at 110a. Accordingly, the court sentenced Hurst to death. *Id.*

The Florida Supreme Court affirmed Hurst's conviction and sentence. *Hurst v. State*, 147 So. 3d 435 (Fla. 2014). Hurst argued that "constitutional error occurred in his case because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors, and [because] the jury was not required to make a unanimous recommendation as to the sentence." *Id.* at 445. The Florida Supreme Court rebuffed those contentions, noting that it had "'consistently rejected claims that Florida's death penalty statute is unconstitutional.'" *Id.* at 446.

Of particular relevance here, the Florida Supreme Court had "repeatedly held that *Ring* does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence." *Id.* Such precedent, the Court emphasized, was consistent with this Court's decision in *Hildwin*, which held that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.* (alterations omitted; quoting *Hildwin*, 490 U.S. at 640–41). This Court had "never expressly overruled *Hildwin*, and did not do so in *Ring*." *Id.* at 447. Accordingly, the Florida Supreme Court "reject[ed] Hurst's claim that Florida's capital sentencing scheme is unconstitutional under *Ring*." *Id.*

3. This Court "granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016) (citations omitted). The

Court answered that question in the affirmative. *Id.* *Ring* "concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Id.* (citing *Ring*, 536 U.S. at 591). "Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance." *Id.* (citing 536 U.S. at 592–593). "Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death." *Id.* In those circumstances, "[t]he Court had little difficulty concluding that the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Id.* (quoting 536 U.S. at 604; quotation marks omitted).

Florida's capital sentencing scheme, the Court concluded, suffered from the same Sixth Amendment infirmity as the Arizona statute struck down in *Ring*. *Id.* at 621–22 ("The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's."). In particular, and "[a]s with Ring, a judge increased Hurst's authorized punishment based on her own factfinding." *Id.* at 622.

In holding that Florida's capital sentencing scheme gave too much power to the judge, the Court was required to "overrule *Spaziano* and *Hildwin in relevant part*." *Id.* (emphasis added). The Court's opinion specified the part that was relevant: Those cases had "summarized earlier precedent to conclude that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" *Id.* at 623 (quoting *Hildwin*, 490 U.S., at 640–41). In light of *Apprendi* and

its progeny, that broad conclusion "was wrong." *Id.* Thus, the Court held that *Spaziano* and *Hildwin* were "overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.*

This Court did "not reach the State's assertion that any error was harmless." *Id.* at 624 (noting that this Court "normally leaves it to state courts to consider whether an error is harmless," and finding "no reason to depart from that pattern" in this case). Instead, it reversed the Florida Supreme Court's judgment and remanded the case "for further proceedings not inconsistent with this opinion." *Id.*

Justice Alito dissented. *Id.* at 624–26. The "Court's decision," he emphasized, "was based on a single perceived defect, *i.e.*, that the jury's determination that at least one aggravating factor was proved is not binding on the trial judge." *Id.* at 626. In Justice Alito's view, that aspect of Florida's hybrid sentencing procedure did not run afoul of the Sixth Amendment. *Id.* at 625–26. Even if it did, however, Justice Alito would have found such an error harmless beyond a reasonable doubt, because "overwhelming" record evidence supported the existence of two aggravating circumstances. *Id.* at 626–27.

4. On remand, the Florida Supreme Court addressed "the effect of the [U.S.] Supreme Court's decision in *Hurst v. Florida* on capital sentencing in Florida, as well as on issues raised by Hurst and other issues of import to [the] Court." Pet. App. 3a. The Court

issued a variety of rulings, four of which are particularly relevant for purposes of this petition.

First, as a matter of federal law, the Florida Supreme Court held that the Sixth Amendment to the U.S. Constitution, as construed by this Court in *Apprendi* and its progeny, gives capital defendants the right to have a jury make all findings statutorily required in order for the death penalty to be imposed. *Id.* at 24a. "Thus," the Court concluded, "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." *Id.* at 24a–25a. In addition, the jury must also "recommend a sentence of death," *id.* at 34a.

The holding that all statutorily required findings supporting the imposition of the death penalty must be made by a jury was based on federal law as explicated by this Court—*i.e.,* on the Florida Supreme Court's "review of [this Court's] decision in *Hurst v. Florida*, as well as the decisions in *Apprendi* and *Ring*." *Id.* at 24a; *accord id.* at 32a ("The Supreme Court in *Hurst v. Florida* has now made clear that the critical findings necessary for imposition of death are the sole province of the jury.").

Second, as a matter of state law, the Florida Supreme Court "conclude[d] that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements

that must be found unanimously by the jury." *Id.* at 25a ("This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven."). As the decision below made clear, however, that state-law juror-unanimity requirement comes into play only because the federal Constitution mandates that a jury make the relevant determinations in the first place. *See id.* at 33a ("[The U.S. Supreme Court's decision in] *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are 'elements' that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous.").

In articulating the unanimity portion of its ruling, the Florida Supreme Court was "mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution." *Id.* at 32a (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)). "[I]n interpreting the Florida Constitution and the rights afforded to persons within this State," however, the Florida Supreme Court could "require more protection be afforded criminal defendants than that mandated by the federal Constitution." *Id.* at 32a. "This is especially true," the Court reasoned, "in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime." *Id.*

Third, as a matter of federal law, the Florida Supreme Court "conclude[d] that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment" to the U.S.

Constitution. *Id.* at 38a; *see id.* at 38a–46a. As the majority saw it, this Court had "not ruled on whether unanimity is required in the jury's advisory verdict in capital cases." *Id.* at 38a. In the majority's view, however, "the foundational precept of the Eighth Amendment"—that is, "the principle that death is different"—"calls for unanimity in any death recommendation that results in a sentence of death." *Id.* at 38a–39a. In particular, the Court reasoned that "[i]f death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process." *Id.* at 39a.

Fourth, the majority below held that the Sixth Amendment error this Court identified was not harmless beyond a reasonable doubt. Pet. App. 53a–60a. Without addressing the specific evidence that Justice Alito found "overwhelming," 136 S. Ct. at 626, the majority stated it was unable to "conclude that Hurst's jury would without doubt have found [the existence of] both aggravating factors" identified by the trial judge. Pet. App. 57a. Just "as importantly," the Court added, it could not "determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances," *id.* at 57a–58a. In other words, the majority below concluded that the specific Sixth Amendment error this Court focused upon in *Hurst—i.e.*, that Florida's sentencing scheme "required the judge alone to find the existence of an aggravating factor," 136 S. Ct. at 624—was not harmless because that "single perceived defect," *id.* at 626 (Alito, J., dissenting), was *not* the only constitutional error

laid bare by this Court's opinion; and certain other alleged errors—including the requirement that the judge alone find that there were sufficient aggravators to outweigh mitigating circumstances—were not harmless.

Justice Canady wrote a dissenting opinion, which Justice Polston joined. Pet. App. 78a–93a. In Justice Canady's view, the Sixth Amendment, as construed by this Court in *Hurst*, "simply requires that an aggravating circumstance be found by the jury." *Id.* at 78a; *see id.* at 82a–90a. Because he "disagree[d] with the majority's expansive understanding of *Hurst v. Florida*," *id.* at 78a, he also disagreed with the legal standard underlying the majority's harmless-error analysis: "Although the jury may not have reached unanimous determinations regarding the sufficiency of the aggravating circumstances, whether they were outweighed by the mitigating circumstances, and whether a death sentence should be imposed, such determinations . . . are not required by *Hurst v. Florida* or the Sixth Amendment." *Id.* at 93a.

5. The decision below has already had a major impact on the administration of criminal justice in Florida.

a. Last year, after this Court announced its earlier decision in this case, the Florida legislature amended state law in order to bring the State's capital sentencing scheme into compliance with this Court's ruling. *See generally Perry v. State*, No. SC16-547, 2016 WL 6036982, at **3–6 (Fla. Oct. 14, 2016) (summarizing statutory changes). The amended statute, as construed by the Florida Supreme Court, works as follows:

> The amendments to section 921.141 clearly require the jury to explicitly find at least one aggravating factor unanimously. Additionally, they require unanimity as to each aggravating factor that may be considered by the jury and trial court in determining the appropriate sentence. The changes also require the jury to consider whether there are sufficient aggravating factors to outweigh the mitigating circumstances in order to impose death. The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death.

Id. at *6. The Florida Supreme Court acknowledged that those reforms, "enacted in response" to this Court's decision last term, "clearly place the jury in the all-important and constitutionally required factfinding role." *Id.* Nevertheless, the Court struck down the amended statute, because "the Act's requirement that only ten jurors, rather than all twelve, must recommend a death sentence is contrary to [the Florida Supreme Court's decision] in *Hurst*." *Id.* at *1.[1]

b. Since issuing the decision below, the Florida Supreme Court has held that this Court's decision in

[1] The State timely filed a motion for clarification in order to ascertain whether *Perry* bars application of Florida's reformed statute when the jury unanimously recommends death. *Compare Perry*, *supra*, at *1 (concluding that "most of the provisions of the Act can be construed constitutionally"), *with id.* at *8 (stating that, in light of the possibility of non-unanimous jury recommendations of death, the Act "cannot be applied to pending prosecutions"). As of the date of this filing, the Court has not ruled on that motion.

Hurst retroactively applies to "defendants whose sentences became final after [this Court] issued its opinion in *Ring*." *Mosley v. State*, Nos. SC14-436 & SC14-2108, 2016 WL 7406506, at *19 (Fla. Dec. 22, 2016). As a result, the sentences imposed in more than 200 death-penalty cases may have to be relitigated. *See Asay v. State*, Nos. SC16-102, SC16-223 & SC16-628, 2016 WL 7406538, at *12 (Fla. Dec. 22, 2016) (citing data showing that "there are 386 defendants on death row," and noting that "approximately 45 percent have sentences that were final before the Supreme Court issued *Ring*").

Justice Canady dissented, emphasizing that the majority's decision to apply *Hurst* retroactively frustrates the "State's weighty interest in the finality of these sentences." *Mosley*, *supra*, at *32 (Canady, J., dissenting). "The difficulties involved in conducting new penalty phase proceedings for such a large number of cases involving murders committed over such an extended period of time," he observed, "truly beggars description." *Id.* at *31. Such burdens, he stressed, are exacerbated by the majority's expansive interpretation of *Hurst*, *id.* at *27. To impose such extraordinary burdens on the State, he argued, was particularly inappropriate because "[t]he State's reliance on the old rule—as articulated in *Hildwin* and *Spaziano*—was undeniably immense and entirely in good faith." *Id.* at *32.

c. In subsequent cases, the Florida Supreme Court has continued to rely on its expansive reading of *Hurst v. Florida* to conclude that, "in cases where the jury makes a non-unanimous recommendation of

death, the *Hurst* error is not harmless," *Dubose v. Florida*, No. SC10-2363, 2017 WL 526506, at *12 (Fla. Feb. 9, 2017); *compare Hall v. State*, No. SC15-1662, 2017 WL 526509, at **22–23 (Fla. Feb. 9, 2017). Accordingly, death sentences that were imposed long ago in full compliance with this Court's then-controlling precedents may now be invalidated based on alleged *Hurst* error even if it is clear beyond a reasonable doubt that the jury would have found—or, for that matter, unanimously did find—the existence of an aggravating circumstance. *Compare Hurst*, 136 S. Ct. at 624 ("The Sixth Amendment . . . required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.").

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's Sixth and Eighth Amendment precedents, exacerbates two distinct but related splits among the lower courts on the scope of the Sixth Amendment's jury-trial right, creates a brand-new split on the Eighth Amendment's prohibition against cruel and unusual punishments, and—in conjunction with subsequent rulings based on the decision below—"plunges the administration of the death penalty in Florida into turmoil," *Mosley*, 2016 WL 7406506, at *32 (Canady, J., concurring in part and dissenting in part). This Court should grant certiorari and review both questions presented.

I. THE JUDGMENT BELOW DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE-LAW GROUND.

The court below held, *inter alia*, that findings required to be made by a jury must, as a matter of state law, be unanimous. *See supra* at 7–10. That state-law holding does not defeat this Court's jurisdiction to resolve the two questions presented.

First, the State asks this Court to review the Florida Supreme Court's holding that the Sixth Amendment to the U.S. Constitution gives capital defendants the right to have a jury make *all* findings statutorily required for the death sentence to be imposed—and not just the statutorily required *factual* finding that at least one of the enumerated aggravating circumstances exists. *See* Pet. App. 24a. The Florida Supreme Court expressly based that holding on "the Sixth Amendment right to a trial by jury," as informed by its "review of [this Court's] decision in *Hurst v. Florida*, as well as the decisions in *Apprendi* and *Ring*," *id.*; *see id.* at 12a–24a (providing an overview of the legal principles on which the Sixth Amendment holding was predicated, and omitting any citation to or discussion of state cases or state constitutional provisions).

Second, the State seeks review of the Florida Supreme Court's holding that "juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment" to the U.S. Constitution. Pet. App. 38a. The court below repeatedly framed that conclusion in terms of the Eighth Amendment, Pet. App. 38a–46a; the pertinent holding was set forth in a part of the opinion entitled "The Eighth

Amendment," Pet. App. 38a; the accompanying discussion did not invoke any independent state-law basis for the Court's Eighth Amendment holding, Pet. App. 38–45a; and the Florida Constitution expressly provides that the state constitutional prohibition against cruel and unusual punishments "shall be construed in conformity with decisions" of this Court interpreting the Eighth Amendment, Fla. Const. art. I, § 17; *see Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015).

This Court is not divested of jurisdiction to review the two questions presented just because the court below "also conclude[d]," as a matter of state law, that "all these findings necessary for the jury to essentially convict a defendant of capital murder . . . are also elements that must be found unanimously by the jury," Pet. App. 25a. The right to a *unanimous* jury determination presupposes the right to *a* jury determination; and the Florida Supreme Court's opinion makes it clear that the unanimous-jury requirement rooted in state law comes into play only because the Sixth Amendment to the U.S. Constitution creates a right to have a jury determine—unanimously or not—the matters in question:

> *Hurst v. Florida mandates that all the findings necessary for imposition of a death sentence are 'elements' that must be found by a jury*, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond

> a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Pet. App. 33a–34a (emphasis added); *see id.* at 32a ("*The [U.S.] Supreme Court has now made clear* that the critical findings necessary for imposition of a sentence of death are the sole province of the jury.") (emphasis added).

In other words, the decision below holds that state law *interacts* with the federal constitutional right to a jury trial such that, *if* a determination must be made by the jury as a matter of federal law, Pet. App. 12a–25a, that determination must *then* be unanimous as a matter of state law, *id.* at 26a–33a. But the state-law principle that jury verdicts must be unanimous is not triggered unless the jury-trial right applies in the first place; and the court below did not identify any independent state-law basis for holding that the findings in question must be made by a jury. *See Ohio v. Reiner*, 532 U.S. 17, 20 (2001) ("We have jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law.").

Indeed, the Florida Supreme Court acknowledged that "[s]ince 1972, until the [U.S.] Supreme Court's ruling in *Hurst v. Florida*, it has been the Florida judge who ultimately makes his or her own determination of the existence of the aggravating factors, the evidence of mitigation, and the weight to be given each in the sentencing decision before the sentence of death could

be imposed." Pet. App. 31a–32a. Until this Court's decision in *Hurst*, therefore, the Florida Supreme Court consistently and repeatedly affirmed death sentences, including the sentence imposed in this case, against state and federal constitutional challenges just like this one. *See* Pet. App. 11a.

Finally, any residual doubts concerning the basis for the judgment below must be resolved in favor of this Court's jurisdiction. *See Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). Notwithstanding its partial reliance on state law, a state court decision expressly adjudicating an issue of federal law will evade this Court's review only if that decision "clearly and expressly" indicates that the ruling in question "is alternatively based on bona fide separate, adequate, and independent grounds." *Florida v. Powell*, 559 U.S. 50, 57 (2010) (quotation marks omitted). The Florida Supreme Court's dramatic expansion of the constitutional jury-trial right—a ruling that was articulated for the first time on remand from this Court's Sixth Amendment decision, that effectuates a 180-degree reversal of that court's longstanding precedent, and that was announced in a part of its opinion entitled, "EFFECT of *HURST V. FLORIDA* ON FLORIDA'S CAPTIAL SENTENCING," Pet. App. 12a—does not come close to satisfying that demanding standard. *See, e.g.*, Pet. App. 12a–25a, 31a–32a, 33a–34a. Accordingly, the state-law requirement that jury verdicts be unanimous poses no bar this Court's jurisdiction.

II. THIS COURT SHOULD REVIEW THE FLORIDA SUPREME COURT'S HOLDING THAT THE SIXTH AMENDMENT GIVES A DEFENDANT CONVICTED OF A CAPITAL CRIME THE RIGHT TO HAVE A JURY MAKE STATUTORILY REQUIRED NON-FACTUAL DETERMINATIONS SUPPORTING THE IMPOSITION OF THE DEATH PENALTY.

In *Hurst*, this Court concluded that Florida's capital sentencing scheme violated the Sixth Amendment jury-trial right insofar as it "required the judge alone to find the existence of an aggravating circumstance." 136 S. Ct. at 624. On remand, the Florida Supreme Court broadly construed this Court's decision to require that a jury make *all* determinations that are statutorily required in order for the death penalty to be imposed—including the determination that aggravating circumstances outweigh mitigating factors, and the ultimate moral judgment that a sentence of death is warranted. This Court should review that holding.

A. The Florida Supreme Court's Decision Contravenes this Court's Sixth Amendment Jurisprudence.

The Florida Supreme Court's Sixth Amendment holding cannot be reconciled with undisturbed and still-binding aspects of this Court's holding in *Spaziano v. Florida*. There, the trial judge imposed a sentence of death after making certain statutorily required findings *other* than the existence of an aggravating circumstance; in particular, the trial court found that "sufficient aggravating circumstances existed to justify and authorize a death sentence," that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and that "a sentence of

death should be imposed," *Spaziano*, 468 U.S. at 451–52. This Court held that Spaziano's sentence did not violate the Sixth Amendment, *id.* at 458–65, even though the jury did not make any of those findings, *id.* at 451–52 (citing Fla. Stat. § 921.141(3) (1983)).

In *Hurst*, this Court "overrule[d] *Spaziano* and *Hildwin*," but only "in relevant part." 136 S. Ct. at 623. In particular, this Court overruled the Sixth Amendment holdings in those cases, *see id.* at 623–24, but only "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's fact-finding, that is necessary for imposition of the death penalty," *id.* at 624. Accordingly, this Court did not overrule *Spaziano* insofar as that case held that the Sixth Amendment allowed the sentencing judge alone to determine that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and that "a sentence of death should be imposed," *Spaziano*, 468 U.S. at 451–52, 458–65. Nevertheless, the decision below held that, in order for Florida's capital sentencing statute to be applied consistently with the Sixth Amendment, "a jury must find . . . that the aggravating factors outweigh the mitigating circumstances," Pet. App. 24a–25a, and must also "recommend a sentence of death," *id.* at 34a.

The decision below did not address the import of this Court's limited overruling of *Spaziano*. *See* Pet. App. 88a (Canady, J., dissenting) ("The point is met with total silence."). In light of certain language culled from this Court's opinion, however, the majority "reject[ed]" the argument "that *Hurst v. Florida* only requires the jury unanimously find the existence of one

aggravating factor." Pet. App. 25a n.7. The Florida Supreme Court's expansive interpretation of this Court's decision is wrong.

As a threshold matter, and assuming *arguendo* that certain language in *Hurst* is in tension with the parts of *Spaziano* that this Court did not expressly overrule, the court below was not licensed to set aside a binding precedent of this Court on the basis of seemingly inconsistent language. Instead, it was bound to "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989).

At any rate, there is no tension between the language from *Hurst v. Florida* that the decision below quoted, *see* Pet. App. 25 n.7, and the undisturbed portions of this Court's holding in *Spaziano*. This Court's cases hold 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." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added). Consistent with that well-settled Sixth Amendment principle, all but one of the statements on which the court below relied say that a jury must find any "fact" necessary to increase the maximum punishment allowable by law. Pet. App. 25a n.7. Such statements pose no problem for the State's position in this case, because the determinations at issue here—whether aggravating circumstances outweigh other factors deemed to mitigate culpability, and whether the accused is ultimately deserving of

death—are not "facts" in any meaningful sense of the word.

Just last Term, this Court made that clear. *See Kansas v. Carr*, 136 S. Ct. 633, 642 (2016); Pet. App. 89a–90a (Canady, J., dissenting). Determining the *existence* of an aggravating factor, this Court explained, is "a purely factual determination," to which a standard of proof may meaningfully be applied. *Carr*, 136 S. Ct. at 642. "Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not." *Id.* In any event, "*the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy*—the quality of which, as we know, is not strained." *Id.* (emphasis added). Accordingly, "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it," *id.*, since such discretionary determinations involve the exercise of judgment, not the finding of facts, *see id.*

As the majority below saw it, this Court in *Hurst* "made clear" that *all* "the critical findings"—factual or otherwise—"necessary for imposition of a sentence of death are the sole province of the jury," Pet. App. 32a. The court below cited only one fragment of a sentence in support of that proposition. *See* Pet. App. 25a n.7 ("The Supreme Court in *Hurst v. Florida* made clear that the jury must find . . . 'the *critical findings* necessary to impose the death penalty'") (quoting 136 S. Ct. at 622; emphasis added by the Florida Supreme Court). Reasonably construed, that sentence fragment cannot bear the weight that the court below put on it, for the following reasons.

First, the full text of the sentence in question does not say that a jury must make all critical findings—factual or otherwise—necessary to impose the death penalty. It says: "Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty," 136 S. Ct. at 622. On its face, that statement is descriptive rather than prescriptive, leaving open the possibility that some of the critical findings Florida law requires—e.g., non-factual determinations intended to guide the exercise of judicial discretion within the applicable statutory maximum—need not be found by a jury.

Second, consistent with well-established Sixth Amendment doctrine, this Court in *Hurst* repeatedly framed its conclusion in terms of factual determinations in general and one factual determination in particular—a finding that at least one of the statutorily enumerated aggravating circumstances exists. *See id.* at 621–24.[2] Considered in context, the language on

[2] *See, e.g.*, 136 S. Ct. at 622 ("As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."); *id.* at 624 (announcing that *Spaziano* and *Hildwin* are "overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty"); *id.* ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."); *see also id.* at 626 (Alito, J., dissenting) ("the Court's decision is based on a single perceived defect, i.e., that the jury's determination that at least one aggravating factor was proved is not binding on the trial judge").

which the Florida Supreme Court relied was most reasonably construed to refer back to that particular factual finding.

Third, this Court explained its ruling in *Hurst* as a straightforward application of *Ring*, *id.* at 621–22; and *Ring* invalidated the defendant's sentence because "the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the guilty verdict," *Ring*, 536 U.S. at 604 (quotation marks and alterations omitted). In applying *Ring* to Florida's sentencing scheme, this Court did not give any indication that it was, for the first time, extending the reach of *Apprendi* to indisputably non-factual determinations. Just as Congress does not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001), this Court cannot reasonably be thought to have hidden a major doctrinal development in a passing and solitary sentence that was fully consistent with—although framed at a slightly higher level of generality than—the much more limited formulations of its holding that the Court repeatedly employed elsewhere in its opinion.

Fourth, this Court has "warned against 'wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries,'" *Oregon v. Ice*, 555 U.S. 160, 172 (2009). As Justice Kennedy has emphasized, "that doctrine should not be extended "without caution," and the cases on which it is based "can be read as leaving in place many reforms designed to reduce unfairness in sentencing." *See Ring*, 536 U.S. at 613 (Kennedy, J., concurring) (noting that "the States' settled expectations deserve our respect"). Such

caution is particularly appropriate when, as here, the state reforms in question have the purpose and effect of constraining rather than expanding discretion to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252–53, 259 (1976) (plurality opinion).

Fifth, the caution this Court exercised when it limited the scope of its ruling in *Hurst* makes sense in light of the limited scope of the claim presented. In his merits brief to this Court, Hurst argued that Florida's capital sentencing scheme violates the Sixth Amendment as explicated in *Ring* "because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty.'" Brief for Petitioner at 18 (quoting *Ring*, 536 U.S. at 609). The ruling below "indisputably goes far beyond the Sixth Amendment argument that Hurst presented" to this Court. *See* Pet. App. 84a–85a & n.30 (Canady, J., dissenting).

In sum, the Sixth Amendment decision below contravenes this Court's holding in *Spaziano* and misconstrues this Court's ruling in *Hurst*. At a minimum, this Court should have the opportunity to review the Florida Supreme Court's substantial extension of this Court's ruling before any such doctrinal innovation becomes the law of the land in Florida.

B. The Decision Below Exacerbates Several Splits of Authority Among the Lower Courts Concerning the Scope of the Sixth Amendment Right to Trial by Jury.

The Florida Supreme Court's Sixth Amendment ruling deepens two distinct but related divisions of authority among the lower state and federal courts.

First, the decision below deepens a split between state courts of last resort on the narrower question whether the Sixth Amendment gives a capital defendant the right to have a jury make certain moral or subjective determinations—such as the finding that aggravating circumstances outweigh mitigating circumstances, and the ultimate moral judgment that the defendant is deserving of death—when the pertinent sentencing statute makes some such finding a precondition for imposing the death penalty.

The high courts of at least three states have held that the Sixth Amendment confers no such right. *See Ex parte Bohannon*, No. 1150640, 2016 WL 5817692, at *6 (Ala. Sept. 30, 2016) (adhering to prior holding that the Sixth Amendment "does not require that a jury weigh the aggravating circumstances and the mitigating circumstances because, rather than being a factual determination, the weighing process is a moral or legal judgment that takes into account a theoretically limitless set of facts") (quotation marks and citation omitted); *id.* ("*Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment."); *State v. Belton*, No. 2012-0902, 2016 WL 1592786, at *9 (Ohio Apr. 20, 2016) ("the weighing process amounts to a complex moral judgment about what penalty to impose upon a defendant who is already death-penalty eligible") (quotation marks omitted); *State v. Gales*, 694 N.W.2d 124, 145 (Neb. 2005) (rejecting argument that Sixth Amendment requires "that a jury must also conduct the weighing function of capital sentencing").

With the decision at issue here, the Florida Supreme Court has joined at least three states on the other side of that split. *See Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam), *overruling Brice v. State*, 815 A.2d 314 (Del. 2003); *State v. Whitfield*, 107 S.W.3d 253, 259–61 (Mo. 2003), *called into doubt by State v. Nunley*, 341 S.W.3d 611, 626 n.3 (Mo. 2011) (noting widespread disagreement with *Whitfield* in case where issue was waived); *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003); *see also Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003).

Second, the decision below exacerbates a conflict among the lower state and federal courts on the more general question whether moral or subjective judgments ancillary to assessing the propriety of imposing a particular sentence constitute "facts" within the meaning of *Apprendi* and its progeny—a question that frequently arises in the context of disputes as to whether the beyond-a-reasonable-doubt standard of proof applies to such determinations.

In litigation arising under the federal Death Penalty Act, the federal courts of appeals have uniformly held that such determinations are not factual findings within the meaning of the *Apprendi* doctrine, such that they need not be established beyond a reasonable doubt. As the Fourth Circuit explained, although "the Supreme Court has held that the Sixth Amendment requires juries to find aggravating factors necessary for the imposition of the death penalty beyond a reasonable doubt, . . . it has never extended this requirement to juries' weighing of aggravating and mitigating factors." *United States v. Runyon*, 707 F.3d 475, 516 (4th

Cir. 2013). That is because the process of weighing aggravating and mitigating factors is "not a factual determination, but a complex moral judgment." *Id.*; *accord United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir. 2013) (en banc); *United States v. Barrett*, 496 F.3d 1079, 1107–08 (10th Cir. 2007); *United States v. Fields*, 483 F.3d 313, 345–46 (5th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31–32 (1st Cir. 2007).

State courts have likewise concluded that weighing of aggravators and mitigators need not be governed by the beyond-a-reasonable-doubt standard. As Nevada's high court put it, the "weighing process is not a fact-finding one based on evidence but is instead purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine whether death is the appropriate punishment in the particular case." *Nunnery v. State*, 263 P.3d 235, 252 (Nev. 2011) (quotation marks omitted), *overruling Johnson v. State*, 59 P.3d 450 (Nev. 2002)); *accord State v. Fry*, 126 P.3d 516, 534 (N.M. 2005); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004); *Oken v. State*, 835 A.2d 1105, 1158 (Md. 2003). Other than Florida, it appears that only Delaware has reached a contrary result. *Rauf*, 145 A.3d at 434 (providing affirmative answer to question whether finding that aggravating circumstances outweigh mitigating circumstances must be made by a jury "beyond a reasonable doubt to comport with federal constitutional standards").

In sum, the decision below further entrenches at least two distinct but overlapping splits among the lower courts on the scope of the jury-trial right protected by the Sixth Amendment. This Court's review is

required to resolve those significant and deepening conflicts.

III. THIS COURT SHOULD REVIEW THE FLORIDA SUPREME COURT'S HOLDING THAT THE EIGHTH AMENDMENT REQUIRES JURY SENTENCING IN CAPITAL CASES.

The decision below holds that "a jury must unanimously recommend death in order to make a death sentence possible" under the Eighth Amendment. Pet. App. 40a. This Court does not take the same view: "Any argument that the Constitution requires that a jury impose the sentence of death," this Court has explained, "has been soundly rejected by prior decisions of this Court." *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990).

If the Eighth Amendment does not require *any* jury sentencing in capital cases, *see id.*, it assuredly does not require *unanimous* jury sentencing in capital cases. This Court should grant certiorari, reaffirm its exclusive prerogative to overrule its own precedents, resolve the new conflict created by the ruling under review, and reverse the judgment below.

A. The Decision Below Conflicts With this Court's Eighth Amendment Precedents.

This Court has held that Florida's capital sentencing scheme does not run afoul of the Eighth Amendment, notwithstanding the fact that "in Florida the sentence is determined by the trial judge rather than by the jury," *Proffitt v. Florida*, 428 U.S. 242, 252 (1976); *see id.* at 247–60; *Spaziano*, 468 U.S. at 457–65.

The court below had no warrant to ignore or set aside that still-binding precedent.

In *Proffitt*, this Court addressed "whether the imposition of the sentence of death for the crime of murder under the law of Florida violate[d] the Eighth and Fourteenth Amendments." 428 U.S. at 244. The petitioner in that case was found guilty of first-degree murder. *Id.* at 244–45. Following his conviction, and "as provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment." *Id.* at 245–46. Under Florida law, "that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist," *id.* at 246, and the sentence was "determined by the trial judge rather than by the jury," *id.* at 252. The jury returned an advisory verdict recommending death, "[t]he judge then sentenced the petitioner to death," and the Florida Supreme Court affirmed. *Id.* at 246–47.

This Court affirmed the Florida Supreme Court's judgment. *Id.* at 247–60 (plurality opinion); *id.* at 260–61 (White, J., concurring in the judgment). "[J]ury sentencing in a capital case," the plurality opinion acknowledged, "can perform an important societal function," *id.* at 252. Nevertheless, the plurality emphasized, this Court "has never suggested that jury sentencing is constitutionally required" in such cases. *Id.* In a separate opinion, three members of the Court agreed that Florida's sentencing scheme did not transgress the Eighth Amendment, even though state law

did not require the jury to make certain findings necessary to trigger the imposition of the death sentence. *See id.* at 260 (White, J., concurring in the judgment).

Consistent with the holding of *Proffitt*, this Court in *Spaziano* determined that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed," 468 U.S. at 465. The petitioner in *Spaziano* argued that Florida's capital sentencing scheme "violates the Eighth Amendment's proscription against 'cruel and unusual punishments'" by "allowing a judge to override a jury's recommendation of life." *Id.* at 457. More generally, petitioner urged that "the nature of the decision whether a defendant should live or die sets capital sentencing apart and requires that a jury have the ultimate word." *Id.* at 461. This Court rejected those arguments. *Id.* at 461–65. "[T]he purpose of the death penalty," the Court explained, "is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." *Id.* at 462–63.

Notably, this Court in *Spaziano* rejected a narrower Eighth Amendment claim than the argument approved by the Florida Supreme Court in this case. The trial court in *Spaziano* imposed "a sentence of death after the jury had recommended life imprisonment." *Id.* at 457. Accordingly, the issue before the Court was not whether the Eighth Amendment always requires jury sentencing in capital cases, but whether the Eighth Amendment allows a trial judge to override a jury's determination that life imprisonment is the appropriate sentence. *Id.* at 457. Here, by contrast, a

majority of the jury recommended that Hurst be sentenced to death. Pet. App. 10a. Thus, Hurst's Eighth Amendment claim is weaker than the already-weak-enough claim rejected by this Court in *Spaziano*.

The majority below was of the view that this Court "has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases." Pet. App. 38a. As the dissent pointed out, however, that misapprehends the import of this Court's Eighth Amendment precedents. *See* Pet. App. 86a–88a (Canady, J., dissenting). As explained above, this Court's cases hold that the death penalty may be imposed consistently with the Eighth Amendment even if a jury *does not recommend* that the defendant be sentenced to death. It follows, *a fortiori*, that the Eighth Amendment does not require the jury to *unanimously recommend* that the defendant be sentenced to death.

This Court has not overruled the Eighth Amendment precedents discussed above. In *Hurst*, this Court held that Florida's capital sentencing scheme violated the Sixth Amendment right to a jury trial insofar as it "required the judge alone to find the existence of an aggravating circumstance." 136 S. Ct. at 624. The Court did not pass on Hurst's Eighth Amendment claim; still less did it hold that the Eighth Amendment independently requires that the jury unanimously recommend death before capital punishment may be imposed. The Court partially overruled *Spaziano* and *Hildwin*, but only "*to the extent* they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.* at 624 (emphasis

added). That carefully crafted limitation left *Spaziano*'s Eighth Amendment holding untouched.

In short, this Court has held, in the context of a Florida convict's challenge to the same statutory scheme at issue in this case, that the Eighth Amendment is not violated when a judge imposes a death sentence over the jury's recommendation of life; and that holding is still the law of the land. Thus, this Court's caselaw compels the conclusion that Florida's capital sentencing scheme does not violate the Eighth Amendment insofar as it authorizes a judge to impose the death sentence in accordance with the jury's recommendation.

B. The Florida Supreme Court's Eighth Amendment Holding Creates a New Conflict Among the Lower Courts.

The decision below does not just contravene this Court's precedents; it also creates a new conflict among the lower courts. The Florida Supreme Court held that "a jury must unanimously recommend death in order to make a death sentence possible" under the Eighth Amendment. Pet. App. 40a. That holding is directly at odds with the decisions of at least four other state courts of last resort, which have held that the Eighth Amendment does not require *any* jury recommendation of death—unanimous or otherwise—in capital cases. *See State v. Mata*, 745 N.W.2d 229, 252 (Neb. 2008) ("We conclude that the Eighth Amendment similarly does not require jury sentencing."); *accord Ex parte Taylor*, 808 So. 2d 1215, 1217–19 (Ala. 2001); *State v. Gillies*, 691 P.2d 655, 659 (Ariz. 1984); *State v. Sivak*, 674 P.2d 396, 399 (Idaho 1983).

In the course of resolving distinct issues, some federal courts of appeals have also expressed the view that "the Eighth Amendment does not create an independent right to sentencing by jury." *United States v. Promise*, 255 F.3d 150, 159 (4th Cir. 2001); *accord Fields*, 483 F.3d at 331 ("When it comes to the ultimate selection of an appropriate punishment out of a range of available options, however, there is no constitutional right to jury sentencing in a noncapital or capital case."). The holdings of those cases do not squarely conflict with the Florida Supreme Court's decision below, but such pronouncements further evince the apparently uniform understanding of the lower courts that the Eighth Amendment does not require jury sentencing in capital cases.

* * *

The Eighth Amendment, as authoritatively construed by this Court in the context of a challenge to the same statutory regime at issue here, does not require jury sentencing in capital cases. *A fortiori*, the Florida Supreme Court erred in holding that the Eighth Amendment requires *unanimous* jury sentencing in capital cases. This Court should correct the error below, restore the nationwide uniformity of federal law, and reaffirm the principle that lower courts are bound by this Court's federal-law precedents unless and until this Court exercises its sole prerogative to overrule them.

CONCLUSION

The petition for a writ of certiorari should be granted.

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