No. 24-6932

In the
Supreme Court of the United States

MICHAEL TANZI,

Petitioner,

v.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

BRIEF IN OPPOSITION
EXECUTION SCHEDULED FOR APRIL 8, 2025, AT 6:00 P.M.

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Tanzi brings two questions to this Court for review on the eve of his pending execution for the April 2000 kidnapping, rape and heinous, atrocious and cruel murder of Janet Acosta. Both questions involve this Court's established precedent in capital sentencing and the requirements of *Hurst v. Florida*, 577 U.S. 92 (2006). This case now comes to the Court following the rejection of this claim on successive postconviction review from the Florida Supreme Court. Tanzi has twice unsuccessfully sought review in this Court on his *Ring v. Arizona,* 536 U.S. 584 (2002) and *Hurst*-based claims. For, this, his third attempt, the State frames the two intertwined questions as follows:

> Whether this Court should grant certiorari to review a decision of the Florida Supreme Court rejecting a claim of fact-finding error under *Hurst* and *Erlinger* where that claim was procedurally barred from review in state court and without merit in a case that presents no conflict or unsettled question of law for review.

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OPINION BELOW

The decision below of the Florida Supreme Court appears as *Tanzi v. State/Sec'y, Dept. of Corr.*, No. SC2025-0371, 2025 WL 971568 (Fla. Apr. 1, 2025).

STATEMENT OF JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent agrees that the statutory provision sets out the scope of this Court's certiorari jurisdiction. However, this case is inappropriate for the exercise of this Court's discretionary jurisdiction because the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, nor does it conflict with another state court of last resort, a United States court of appeals, or any relevant decisions of this Court. Sup. Ct. R. 10. Additionally, the Florida Supreme Court's opinion is based on adequate and independent state grounds.

CONSTITUTIONAL PROVISIONS INVOLVED

The State accepts the Petitioner's statement of the constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

On April 25, 2000, around lunchtime at the Japanese Gardens in Miami, Tanzi approached the rolled-down window of Janet Acosta's vehicle. *Tanzi v. State*, 964 So. 2d 106, 110 (Fla. 2007). Tanzi requested Acosta provide him the time and a cigarette. When Acosta was distracted, Tanzi began repeatedly punching her in the face until he gained control of the vehicle. He then threatened Acosta with a razor blade and drove off holding Acosta hostage. *Tanzi,* 964 So. 2d at 110.

Tanzi then drove to Homestead, Florida where he stopped at a gas station to bind and gag Acosta. While he was restraining her, Tanzi threatened that he would "cut her from ear to ear" if she resisted. Tanzi also stole fifty-three dollars in cash from Acosta and used it to purchase cigarettes and soda. Tanzi then forced Acosta to perform oral sex on him, again threatening to kill her if she injured him. He stopped, however, because Acosta's teeth had been knocked loose due to his previous battering of her jaw. *Tanzi,* 964 So. 2d at 110.

At approximately 5:15 p.m., Tanzi stopped in Tavernier in the Florida Keys to withdraw money from Acosta's bank account. *Tanzi,* 964 So. 2d at 111. Tanzi then used the ill-gotten gains to purchase duct tape and more razors. At approximately 6:30 p.m., Tanzi drove to an isolated area of Cudjoe Key. Tanzi informed Acosta he intended to kill her. He believed he needed to kill her because she was slowing his progress, and he knew he would get caught if he let her go. Tanzi began to strangle Acosta with a rope, but stopped to cover her mouth, nose, and eyes with duct tape to muffle her agonized screams. Tanzi continued asphyxiating Acosta until he was certain she was dead. He then dumped her corpse in a secluded area where he was

certain that no one would discover her. *Tanzi,* 964 So. 2d at 111.

After he strangled Acosta to death, Tanzi stopped in Key West where he used Acosta's ATM card to shop and eat. He also visited with friends and smoked some marijuana. By April 27, 2000, law enforcement had located Acosta's at-the-time-unoccupied van after her friends and co-workers reported her missing. Law enforcement saw Tanzi get into Acosta's van and intercepted him. When they approached Tanzi, he stated he "knew what this was about" and he was willing to talk about "some bad things he had done." Post-*Miranda*[1], Tanzi confessed to the crime multiple times (these confessions were recorded in various formats) and even showed law enforcement where he disposed of Acosta's body. *Tanzi,* 964 So. 2d at 111.

Tanzi was indicted for the murder and was also charged with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon, and two counts of sexual battery with a deadly weapon. Ultimately, Tanzi pled guilty to the first-degree murder, kidnapping, and armed robbery counts. The sexual battery counts were severed. *Tanzi,* 964 So. 2d at 111.

Following a penalty phase, the jury unanimously recommended a death sentence. The trial court followed the jury's unanimous recommendation, finding in aggravation: "(1) that the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation; (2) that the murder was committed during the commission of a kidnapping; (3) that the murder

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

was committed during the commission of two sexual batteries[2]; (4) that the crime was committed for the purpose of avoiding arrest; (5) that the murder was committed for pecuniary gain; (6) that the murder was especially heinous, atrocious, or cruel (HAC); and (7) that the murder was committed in a cold, calculated, and premeditated (CCP) manner." *Tanzi,* 964 So. 2d at 111 n.1.

Notably, two aggravators were directly related to Tanzi's guilty plea, kidnapping, and pecuniary gain based upon Tanzi's plea to armed robbery and carjacking. The Florida Supreme Court affirmed Tanzi's convictions and sentences on direct appeal. *Tanzi,* 964 So. 2d at 121. His case became final when this Court denied his petition for writ of certiorari on February 19, 2008. *Tanzi v. Florida*, 552 U.S. 1195 (2008).

Tanzi continued to seek relief from his convictions and sentences through postconviction litigation. Those attempts were all unsuccessful. *See Tanzi v. State*, 94 So. 3d 482 (Fla. 2012) (affirming denial of postconviction relief); *Tanzi v. Secretary, Fla. Dept. of Corr.*, 772 F.3d 644 (11th Cir. 2014), *cert. denied*, *Tanzi v. Jones*, 577 U.S. 865 (2015) (affirming denial of federal habeas corpus petition).

In a successive postconviction motion, Tanzi claimed he was entitled to relief under *Hurst v. Florida*, 577 U.S. 92 (2016), as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), The Florida Supreme Court affirmed the postconviction court's

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[2] In addition to evidence presented regarding the sexual battery by oral penetration, the State presented evidence that Acosta suffered injuries to her labia shortly before her death and Tanzi's blood was found inside the pocket of the victim, consistent with Tanzi forcibly penetrating the victim's vagina. *Tanzi v. State*, 94 So. 3d 482, 497 (Fla. 2012).

denial of relief, finding that any *Hurst*-related error was harmless:

> As we stated in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), *cert. denied*, ___ U.S. ___ 137 S. Ct. 2218, 198 L.Ed.2d 663 (2017):
>
>> [T]he jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. . . . The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death.

Tanzi v. State, 251 So. 3d 805, 806 (Fla. 2018). On November 13, 2018, this Court denied Tanzi's petition for a writ of certiorari. *Tanzi v. Florida*, 586 U.S. 1004 (2018).

On March 10, 2025, Florida Governor Ron DeSantis signed Tanzi's death warrant, and his execution is scheduled for April 8, 2025, at 6:00 p.m.

Second Successive Proceedings Under Warrant

Following the signing of the death warrant, the Florida Supreme Court issued a scheduling order directing that any successive postconviction proceedings be completed in the trial court by Wednesday, March 20, 2025. The Honorable Timothy Koenig, Monroe County Circuit Judge, issued a scheduling order to proceed in accordance with the Florida Supreme Court's order.

Tanzi filed a motion for a transport order for an MRI on March 15, 2025. In support, he submitted a report from Dr. Charles Howard, who desired the MRI to reveal the source and origin of Tanzi's spinal pain. (3PCR:707). The State filed an objection to the motion for transport the following day. (3PCR:836-41). On March 17, the postconviction court denied the motion to transport for an MRI. (3PCR:898-902). The court found that the motion to transport was untimely and not related to a

cognizable Eighth Amendment claim.

Following public records requests and a hearing on those requested records, the court issued an order on public records objections on March 13, 2025. Tanzi also filed a motion for stay of his execution (3PCR:691-95), which the lower court denied on March 15, 2025. (3PCR:903-04).

Tanzi filed his Second Successive Motion to Vacate Judgment of Conviction and Sentence with Request for Leave to Amend on March 15, 2025. Following the State's response and a *Huff*[3] hearing, the court summarily denied Tanzi's successive motion on March 19, 2025. (3PCR:957-70). Tanzi submitted an affidavit from Dr. Joel Zivot and moved for rehearing that same day. On March 20, 2025, the court denied the (corrected) motion for rehearing. (3PCR:1020-24).

Tanzi appealed to the Florida Supreme Court raising four issues: 1) due process claim based upon the length of the warrant period; 2) denial of public records requests under warrant; 3) an as applied lethal injection challenge; and 4) a challenge to the Florida Governor's discretion in selecting defendants for warrant. On March 20, 2025, Tanzi also filed a state habeas petition alleging that his prior *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) claims should be revisited in light of this Court's decision in *Erlinger v. United States*, 602 U.S. 821 (2024).

On April 1, 2025, the Florida Supreme Court affirmed the summary denial of Tanzi's successive motion. *Tanzi v. State/Sec'y, Dept. of Corr.*, 2025 WL 971568 (Fla.

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[3] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

Apr. 1, 2025). The court found Tanzi's claims without merit and/or otherwise untimely. The court also found Tanzi's attempt to re-litigate his *Hurst*-based claims "both meritless and procedurally barred." (citation omitted). *Tanzi,* 2025 WL 971568, at *6.

Federal Proceedings Under Warrant

Tanzi also filed late on the afternoon of April 2, 2025, a Section 1983 Complaint and a motion to stay his execution in the Northern District of Florida, alleging that the clemency process as applied to him, violated his due process rights. On April 3, 2025, the district denied the stay of execution finding that Tanzi had no substantial likelihood of success on the merits. Tanzi then filed an emergency motion to stay in the Eleventh Circuit Court of Appeals, which the court denied on April 5, 2025. The Eleventh Circuit agreed with the lower court that Tanzi had not shown any likelihood of success on the merits of his challenge to the clemency process.

ARGUMENT

> This Court should decline certiorari review of the Florida Supreme Court decision rejecting a claim of fact-finding error under *Hurst* and *Erlinger* where that claim was procedurally barred from review in state court and without merit in a case that presents no conflict or unsettled question of law for review.

Tanzi argues that his death sentence is unconstitutional under *Hurst v. Florida*, 577 U.S. 92 (2016) ("*Hurst I*"), and *Erlinger v. United States*, 602 U.S. 821 (2024). This is Tanzi's third attempt to obtain certiorari review of his *Ring*[4]/*Hurst*-based claims. And, while Tanzi's first and second attempts at review in this Court

[4] *Ring v. Arizona*, 536 U.S. 584 (2002).

were meritless and unsuccessful[5], this attempt has the added hurdle of a procedural bar. It is also plainly meritless. Accordingly, certiorari should be denied.

A. Adequate and independent state law grounds

Tanzi's successive habeas petition raising the *Hurst/Erlinger* claim was found procedurally barred by the Florida Supreme Court under Florida's well-established re-litigation bar precedent. "His claim is both meritless and procedurally barred." *Tanzi v. State*, No. SC2025-0371, 2025 WL 971568, at *6 (Fla. Apr. 1, 2025) (citing *Barwick v. State*, 361 So. 3d 785 at 793 ("[U]sing 'a different argument to relitigate the same issue' ... is inappropriate."); *See also Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (holding that a claim was barred where it was merely a "variation" of a prior postconviction claim).

This Court lacks jurisdiction over cases that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court explained that it lacks jurisdiction over a case if a state court's decision rests upon two grounds: a state law ground and a federal ground, provided the state law ground is independent and adequate itself. *Id*. at 1038, n.4 (quoting *Fox Film Corp. v Muller*, 296 U.S. 207, 210 (1935)). Provided the state law is not "interwoven" with federal law, this Court's jurisdiction "fails." *Id*. (citing *Enter.*

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[5] Tanzi sought certiorari of the *Ring* claim by this Court but this Court declined to grant review. *Tanzi v. Florida*, 552 U.S. 1195 (2008). *Tanzi v. State*, 251 So. 3d 805, 806 (Fla. 2018), *cert denied*, *Tanzi v. Florida*, No. 586 U.S. 1004 (2018).

Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917)); *see also Foster v. Chatman*, 578 U.S. 488, 497 (2016) (noting that this Court lacks jurisdiction to review a state court judgment if that judgment rests on state law citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

The Florida Supreme Court found the *Hurst* claim procedurally barred. The court was interpreting Florida law which prohibits re-litigation of previously rejected claims. There is no federal constitutional aspect to such determination. S*ee Johnson v. Lee*, 578 U.S. 605, 609 (2016) (acknowledging that state postconviction court is generally not used to litigate claims that were or could have been raised at trial or direct appeal, and finding that the procedural bar "qualifies as adequate to bar federal habeas review"). The procedural bar determination was not interwoven with federal constitutional law.[6] This is an independent and adequate ground to deny review and this Court should decline certiorari.

B. No conflict with this Court's jurisprudence

Tanzi attempts to revitalize his claim by citing this Court's recent decision in *Erlinger*. However, the Florida Supreme Court noted that that while Tanzi cited *Erlinger* in his state petition, it was merely a repackaged *Ring/Hurst* claim. Tanzi's

[6] Tanzi references this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), to suggest that the Florida Supreme Court's decision was dependent on an "antecedent ruling on federal law." (Petition at 33). In *Ake*, however, this Court clarified "antecedent" refers to when "resolution of the state procedural law question depends on a federal constitutional ruling." *Ake*, 470 U.S. at 75. This is not the case here. Florida's procedural bar disallowing re-litigation of claims applies regardless of what grounds were used to resolve the original litigation.

claims were plainly meritless. The court stated:

> Second, *Erlinger* did not overrule *Davis* or *Tanzi IV*. *Davis* held that when a jury "unanimously f[inds] all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendation," that is "precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death." 207 So. 3d at 175. Tanzi claims this holding is irreconcilable with *Erlinger*. He argues that an advisory jury is incapable of checking governmental power and is thus unconstitutional. *Erlinger*, Tanzi says, means that even unanimous recommendations are void because they cannot substantively limit executive and judicial power.
>
> If Tanzi is correct, then a unanimous, non-advisory jury would be necessary to impose a death sentence. But in *Poole*, this Court held that
>
> > our state constitution's prohibition on cruel and unusual punishment, article I, section 17, does not require a unanimous jury recommendation–or any jury recommendation–before a death sentence can be imposed….Binding Supreme Court precedent in *Spaziano* holds that the Eighth Amendment does not require a jury's favorable recommendation before a death penalty can be imposed.
>
> 297 So. 3d at 505 (emphasis added) (footnote omitted) (citing *Spaziano v. Florida*, 468 U.S. 447, 464-65, 104 S. Ct. 3154, 82 L.Ed.2d 340 (1984)). More recently, in *Ford v. State*, this Court denied a capital defendant's attempt to bring a *Hurst* claim by relabeling it as an *Erlinger* claim. 50 Fla. L. Weekly S22, S25, —So. 3d —, —, 2025 WL 428394, *5 (Fla. Feb. 7, 2025) (rejecting capital defendant's argument that "*Erlinger* is a reminder that [his] death sentences are contrary to *Hurst [v. Florida*] and *Hurst v. State*"). Thus, this Court has rejected the legal principles upon which Tanzi relies to assail *Davis* and *Tanzi IV*. His claim is both meritless and procedurally barred. *See Barwick*, 361 So. 3d at 793 ("[U]sing 'a different argument to relitigate the same issue' ... is inappropriate." (quoting *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990))).
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> Third, *Erlinger* does not apply to this case, which is before us now on postconviction review. As this Court explained in *Ford*:
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> > *Erlinger* does not apply to this case. It involved the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), which imposes enhanced, lengthy, mandatory minimum prison terms on certain defendants who have committed three violent felonies or serious drug offenses on separate occasions. *Erlinger*,

> 602 U.S. at 825, 144 S. Ct. 1840. The question presented in *Erlinger* was "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury to make that determination beyond a reasonable doubt." *Id.* The Court concluded that a jury must resolve the "ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Id.* at 835, 144 S. Ct. 1840. But *Erlinger* was a direct-appeal case–not a postconviction case ... and it involved required jury findings regarding an element.
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> 50 Fla. L. Weekly at S24-25, — So.3d at — – —; see also *Hurst v. Florida*, 577 U.S. at 97, 136 S. Ct. 616 (defining an "element" that must be submitted to the jury as "any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict" (citation and internal quotation marks omitted)). Because of "these fundamental distinctions, it is clear that *Erlinger* provides no support for vacating" Tanzi's death sentence. *Ford*, 50 Fla. L. Weekly at S24-25, — So.3d at — – —.

Tanzi v. State/Sec'y, Dept. of Corr, No. SC2025-0371, 2025 WL 971568, at *5-6 (Fla. Apr. 1, 2025). The Florida Supreme Court correctly interpreted *Erlinger* and *Hurst*.

Tanzi asserts that *Erlinger* mandates another look at his previously rejected *Hurst* claim. However, as the Florida Supreme Court found, his reliance on *Erlinger* is misplaced. *In Erlinger* this Court addressed the federal Armed Career Criminal Act (ACCA), which provides for an enhanced prison sentence when a defendant has three or more prior convictions for qualifying offenses that were "committed on occasions different from one another." *Erlinger*, 602 U.S. at 825 (quoting 18 U.S.C. § 922(g)). Finding that the case was "as nearly on all fours with *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000),] and *Alleyne* [*v. United States*, 570 U.S. 99 (2013),] as any we might imagine," this Court held that whether the prior offenses "occurred on at least three separate occasions" is a factual issue that must be decided by a jury,

rather than a judge, before an ACCA enhancement can be applied. *Id.* at 834-35. That conclusion, this Court explained, flowed from *Apprendi*'s holding that "[v]irtually 'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." *Id.* at 834 (quoting *Apprendi*, 530 U.S. at 490). *Erlinger* did not address capital sentencing. Indeed, this Court expressly limited its holding to the ACCA, stating, "While recognizing Mr. Erlinger was entitled to have a jury resolve the ACCA's occasions inquiry unanimously and beyond a reasonable doubt, *we decide no more than that*." (quoting *Erlinger*, 602 U.S. at 835) (postconviction court's emphasis).

Notably, Tanzi's second attempt to raise fact-finding error in state court failed on the basis of harmless error. His attempt to revisit this claim is even less persuasive now as later developments in the law revealed that there was no *Ring/Hurst* error in the first place. Assuming for a moment Tanzi can properly revisit this procedurally barred claim, it would fail on the merits. In *State v. Poole*, 297 So. 3d 487, 507-08 (Fla. 2020), the Florida Supreme Court receded from *Hurst II* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." The court upheld Poole's death sentences, despite his jury's 11-to-1 recommendation in favor of death, because the same jury during the guilt phase had found Poole guilty of other crimes that satisfied the contemporaneous violent felony aggravator. *Poole,* 297 So. 3d at 493, 508. The court explained in *Poole*, the Supreme Court has never receded from its holding in *Spaziano*

v. Florida, 468 U.S. 447, 465 (1984) that "the Sixth Amendment . . . does not require any jury recommendation of death, much less a unanimous one." *Poole*, 297 So. 3d at 504. Rather, the Supreme Court in *Hurst I* "overruled *Spaziano* only to the extent it allows a judge, rather than a jury, to find a necessary aggravating circumstance." *Id.* Tanzi's guilty plea to a qualifying contemporary felony aggravator satisfied the dictates of *Hurst.* He therefore became eligible for a death sentence.

The explicit text of Florida's death penalty statute provides that a Florida capital defendant is "eligible" for a death sentence if the penalty phase jury unanimously finds "at least one aggravating factor." § 921.141(2)(b)(2), Fla. Stat. (2021). The Florida Supreme Court has read the state's death penalty statute to require only that the jury find one aggravating factor unanimously at the beyond a reasonable doubt standard of proof for a Florida capital defendant to be eligible for the death penalty. *State v. Poole*, 297 So. 3d 487, 505 (Fla. 2020); *cert denied, Poole v. Florida*, 141 S. Ct. 1051 (2021); *McKenzie v. State*, 333 So. 3d 1098, 1105 (Fla. 2022) (declining to revisit what was settled in *State v. Poole* which was "only the existence of a statutory aggravating factor must be found beyond a reasonable doubt"), *cert. denied, McKenzie v. Florida*, 143 S. Ct. 230 (2022). The Florida Supreme Court has also interpreted the statutory phrase "whether sufficient aggravating factors exist," to mean "one or more" aggravators. *Poole*, 297 So. 3d at 502 (citing § 921.141(3)(a), Fla. Stat. and quoting prior cases).

There was no *Hurst* fact-finding error. Tanzi pled guilty to qualifying violent felonies, kidnapping and carjacking with a weapon. The Florida Supreme Court has

consistently held that a defendant is eligible for the death penalty when the jury, during the guilt phase, unanimously finds the defendant guilty of other crimes that satisfy the prior or contemporaneous violent felony aggravator. See *Herard v. State,* 390 So. 3d 610, 622-23 (2024); *see* § 921.141(5)(b), Fla. Stat. (1997) (identifying as an aggravator: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.").

Tanzi's Petition embarks on a confusing blend of the Sixth and Eighth Amendment arguments and asks this Court to grant review because the law "remains complicated and unclear to many lower courts and practitioners." (Petition at 17). However, it seems only Tanzi is confused. He cites no lower court conflict that is worthy of this Court's consideration, much less one that merits a stay on the eve of an execution in a long final case. [7]

Tanzi asserts that the Florida Supreme Court has "blatant[ly]" ignored this Court's overruling of *Spaziano*. (Petition at 17). Tanzi is wrong. This Court's long-standing precedent is that the Eighth Amendment does not require jury sentencing in capital cases. *Spaziano v. Florida*, 468 U.S. 447 (1984); *Harris v. Alabama*, 513 U.S. 504 (1995). As an Eighth Amendment claim, it is meritless under this Court's

[7] This case would also present a very poor vehicle to address this issue as it comes to this Court in the postconviction context and therefore this Court would have to address the predicate issue of retroactivity. *Hurst*, like *Ring* before it is not retroactive on federal review. Certainly, any new procedural rule expanding the requirements of *Hurst* to include additional, findings as Tanzi suggests, would not be retroactive. *Edwards v. Vannoy*, 593 U.S. 255 (2021) (abolishing the watershed exception*); Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (stating that *Ring v. Arizona*, 536 U.S. 584 (2002) was "properly classified as procedural and holding *Ring* was not retroactive).

decisions in *Spaziano,* and *Harris*. In *Spaziano*, this Court rejected an Eighth Amendment challenge to a judge overriding a penalty phase jury's recommendation of a life sentence. *Id*. at 459-65. This Court was not persuaded that a judge having the ultimate responsibility to impose a death sentence in a capital case was "so fundamentally at odds with contemporary standards of fairness and decency" that Florida must be required to "give final authority to the jury to make the life-or-death decision." *Id*. at 465. This Court concluded that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Id*.

While this Court's decision in *Hurst,* overruled the Sixth Amendment aspects of *Spaziano*, it did not overrule the Eighth Amendment aspects of *Spaziano*. *Hurst*, 577 U.S. at 101. The *Hurst* Court overruled both *Spaziano* and *Hildwin v. Florida*, 490 U.S. 638 (1989), but only "to the extent" they allowed "a sentencing judge to find an aggravating circumstance." *Hurst*, 577 U.S. at 102; *see also Poole*, 297 So. 3d at 497 (explaining that this Court retreated from the Sixth Amendment concept of aggravators being sentencing factors rather than elements of capital murder starting with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), then in *Ring v. Arizona*, 536 U.S. 584 (2002), and finally in *Hurst v. Florida*, 577 U.S. 92 (2016)); *Poole*, 297 So. 3d at 500 (noting *Hurst v. Florida* "overruled *Spaziano* and *Hildwin* 'to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty'" but noting that the United States Supreme Court did not address the Eighth Amendment arguments

raised by the petitioner in its *Hurst* decision). Furthermore, this Court's decision in *Hurst* did not speak to the holding of *Harris* at all. Indeed, *Harris* was never even cited in the *Hurst* decision.

Spaziano remains good law regarding the issue of the Eighth Amendment not requiring jury sentencing in capital cases. And the view that *Spaziano* remains good law was reinforced by the reasoning of this Court's recent decision in *McKinney*, albeit on Sixth Amendment grounds. *Spaziano* and *Harris* remain valid Eighth Amendment precedent. Tanzi's misguided and confusing attempt to blend this Court's Sixth and Eighth Amendment precedent offers no significant or unsettled question for review.

Among Tanzi's many complaints, he asserts the Florida Supreme Court's previous harmless error analysis violates the dictates of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was instructed that its death recommendation was advisory. (Petition at 29). However, this claim was inadequately raised below and was not decided by the Florida Supreme Court. This Court ordinarily does not review claims not raised and decided below. Moreover, there was no error. Tanzi's jury was not misled as to its role under the law as it existed at the time of his trial. Indeed, in closing argument, defense counsel emphasized that it was the jury's "responsibility" to determine the sentence because the judge would give "great weight" to the recommendation and in "only the rarest of circumstances would he not follow it. . . ." (T27/1757). A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* § 921.141(2)(c), Fla. Stat. (2017) (providing that if a "jury determines that

the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death") (emphasis added). Thus, there was no violation of *Caldwell* because there were no comments or instructions to the jury that "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

There is no conflict between this Court's Sixth Amendment or Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case. As a Sixth Amendment claim, it is meritless under this Court's decision in *McKinney*. As this Court explained, the Sixth Amendment right-to-a-jury trial provision only requires jury findings regarding the aggravating circumstances, not performing the weighing or making the final decision. This Court stated that capital defendants are entitled to a jury determination of at least one aggravating circumstance for the defendant to be eligible for a death sentence. *Id.* at 141, 144. But this Court also explained that defendants are not constitutionally entitled to a jury determination of weighing or to a jury determination of the "ultimate sentencing decision." *Id.* at 144. This Court stated that "States that leave the ultimate life-or-death decision to the judge may continue to do so." *Id.* at 145. Neither *Ring* nor *Hurst*, requires jury weighing of the aggravation against the mitigation. *McKinney*, 589 U.S. at 145. Constitutionally, judges, including appellate judges, may perform the weighing function and may also be the ultimate sentencer.

Not surprisingly, this Court has repeatedly denied review of similar challenges

to the role of the jury in weighing and recommending death in Florida post-*Hurst*.[8] This Court has repeatedly observed that it is aggravators that are elements of the greater offense of capital murder. *Ring*, 536 U.S. at 609 (stating that because aggravating factors "operate as the functional equivalent of an element of a greater offense" of capital murder, "the Sixth Amendment requires that they be found by a jury"); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality opinion) (explaining, that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances'" which "increases the maximum permissible sentence to death" and therefore, a jury, and not a judge, must find the existence of any aggravating circumstances beyond a reasonable doubt). So, because it is the aggravator that increases the penalty to death, it is only the aggravating factor that must be found by the jury, under this Court's Sixth Amendment jurisprudence.

Tanzi's petition does not cite, acknowledge, or attempt to distinguish *McKinney*. Petitions for writ of certiorari that do not account for this Court's most relevant decisions do not warrant this Court's serious consideration.

The Sixth Amendment does not require jury sentencing in capital cases

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[8] *Randolph v. Florida*, 142 S. Ct. 905 (2022); *Craft v. Florida*, 142 S. Ct. 490 (2021); *Doty v. Florida*, 142 S. Ct. 449 (2021); *Wright v. Florida*, 142 S. Ct. 403 (2021); *Craven v. Florida*, 142 S. Ct. 199 (2021); *Santiago-Gonzalez v. Florida*, 141 S. Ct. 2828 (2021); *Bright v. Florida*, 141 S. Ct 1697 (2021); *Newberry v. Florida*, 141 S. Ct. 625 (2020); *Rogers v. Florida*, 141 S. Ct. 284 (2020). This Court has also denied certiorari review in a case presenting the underlying question of whether the Sixth and Eighth Amendments require that a jury find that the aggravators outweighed the mitigators. *See Poole v. Florida*, 141 S. Ct. 1051 (2021).

according to this Court's decision in *McKinney*. There is no conflict between this Court's Sixth Amendment jurisprudence and the Florida Supreme Court's decision in this case. Accordingly, certiorari should be denied.

CONCLUSION

Accordingly, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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