No. 17-7545

In the
Supreme Court of the United States

STEVEN ANTHONY COZZIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

The Sixth Amendment right to jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination are "basic constitutional guarantees that should define the framework of any" determination of death-penalty eligibility, *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). Thus, error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty. And subjecting that error to harmless error review undermines multiple federal constitutional rights and conflicts with *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Finally, this case presents an ideal vehicle to clarify analytical tension in a critical area of this Court's structural error jurisprudence. This Court should grant review.

The State argues any federal constitutional error was limited to the jury's failure to return a verdict of guilty beyond a reasonable doubt as to a single element, and any such failure as to additional elements concerned state law. But those arguments ignore the interdependent relationship between a state's prerogative to define the substantive elements of state crimes and the federal constitution's prerogative to regulate the manner by which such elements are determined to exist at trial.

The State also attempts to manufacture vehicle problems by contending the question presented concerns state law and was not presented below. But those contentions ignore the question actually presented here, the explicit basis on which the

court below answered that question, and controlling jurisdictional principles.

The State further asserts elements do not have to be found beyond a reasonable doubt if they require adjudging more than the existence of historical facts. But that assertion fails to distinguish "elements" from "facts." Finally, the State claims the reliability of the process for determining death-penalty eligibility is never undermined if the jury's role is described consistently with local law. But that claim overlooks that, if the jury's role assigned by local law is inconsistent with the Constitution, such a description is irrelevant to the sentencing decision. And, regardless, the error below was structural because it always results in fundamental unfairness and its effects are simply too hard to measure.

I. The State's Arguments Are Premised On A Misapprehension of Basic Principles Underlying Our Federal Constitutional System.

The State claims the Florida Supreme Court's decision–that the error below is not structural–is based on adequate and independent state grounds because it rested on the court's determination in *Hurst v. State,* 202 So.3d 40 (Fla. 2016), that the elements necessary to impose the death penalty in Florida include whether sufficient aggravating factors existed for the imposition of the death penalty and whether the aggravating factors outweighed the mitigating circumstances. Opp.1-2, 9-10, 15. It also argues this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), categorically established that the Sixth Amendment requires a jury to return a verdict of guilty beyond a reasonable doubt *only* as to an aggravating factor. Opp.9.

The State's arguments fail to appreciate two binary federal principles: (1) a

state's prerogative to define the substantive elements of state crimes is generally *subject to* the federal constitution's prerogative to regulate the manner by which such elements are determined to exist at trial; *but* (2) the federal constitution's prerogative to regulate the manner by which substantive elements of state crimes are determined at trial generally does *not limit* the state's prerogative to define those elements in the first place.

On one hand, decisions about "what 'fact[s] [are] necessary to constitute the crime'...represent value choices more appropriately made in the first instance by a legislature." *Schad v. Arizona*, 501 U.S. 624, 638 (1991). This Court has stressed "the state legislature's definition of the elements of the offense is usually dispositive.'" *Id.* In particular, the "category of persons eligible for the death penalty" is "legislatively defined." *California v. Ramos*, 463 U.S. 992, 1008 (1983). And, because "state courts are the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), this Court is "not free to substitute [its] own interpretations of state statutes for those of a State's courts," *Schad*, 501 U.S. at 636.

On the other, where the mandates of the federal constitution apply, they prevail over conflicting state action. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324-25 (1816). In particular, this Court has "held that incorporated Bill of Rights protections 'are all to be enforced against the States.'" *McDonald v. Chicago*, 561 U.S. 742, 765 (2010). And this Court determines "the validity under the federal constitution of state action." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

1. Applying those general principles here, the Florida legislature has defined the elements necessary to impose, and thus, established the category of persons eligible for, the death penalty in Florida. *See* Pet. 16. And the Florida Supreme Court has construed those state laws to provide that such elements include (1) whether specific aggravating factors existed; (2) whether sufficient aggravating factors existed; and (3) whether those factors outweighed the mitigating circumstances. *See Hurst v. State*, 202 So.3d at 53. At the same time, the Sixth Amendment and the Due Process Clause entitle a defendant to a jury verdict of guilty beyond a reasonable doubt as to the critical elements necessary to impose the death penalty. *See* Pet. 15-16.

2. That being the case, the question–of whether structural error occurred here when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, including whether sufficient aggravating factors existed and whether those factors outweighed the mitigating circumstances–is a federal question. *Cf. Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) ("*Ring* [*v. Arizona*] held that, *because* Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators...were subject to the procedural requirements the Constitution attaches to trial of elements.").

3. At the same time, this Court's decision in *Hurst v. Florida* could not establish that, *as a categorical matter*, the Sixth Amendment requires a jury to return a verdict of guilty beyond a reasonable doubt only as to an aggravating factor. The "jury-trial

guarantee...has nothing to do with the range of conduct a State may criminalize." *Schriro*, 542 U.S. at 353. Instead, the critical elements necessary to impose the death penalty depend on state law. *Cf. id.* at 354 ("This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty."). And Florida law requires more than an aggravating factor.

II. The Question Was Properly Presented To the Florida Supreme Court.

The State asserts this Court lacks jurisdiction because Cozzie's argument–that "both the sufficiency of the aggravation and whether the aggravation outweighed the mitigation are elements that must be proven beyond a reasonable doubt"–was "never raised in state court." Opp.1, 7-8.

1. The essential question presented to this Court is whether the error below is structural. That claim was explicitly presented to the Florida Supreme Court. *See* Pet. 11. Regardless, Cozzie argued in the courts below that whether sufficient aggravating factors existed and whether those factors outweighed the mitigating circumstances were elements necessary to impose the death penalty under Florida law. *See* Pet. 6-7, 11. He also contended that such elements had to be submitted to the jury and proven beyond a reasonable doubt. *See id.*

2. To the extent the State's position is that Cozzie may be phrasing the question presented here in terms slightly different than below, "[n]o particular form of words or phrases is essential," *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928),

as long as the "the state court had 'a fair opportunity to address the federal question that is sought to be presented here,'" *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). And here, although the Florida Supreme Court did not expressly address the question presented to this Court, it had a fair opportunity to do so. *See* Pet. 32-34.

3. To the extent the State's position is that Cozzie may be advancing a slightly different *argument* here, than below, in support of his *claim* that the error was structural, this Court has declared: "Having raised a [federal] claim in the state courts..., petitioners [can] formulate[] any argument they like[] in support of that claim here." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). In the Florida courts, Cozzie raised a claim that, in light of the Sixth, Eighth, and Fourteenth Amendments, structural error occurred. *See* Pet. 6-7, 10-12. Thus, in this Court, he can formulate any argument he likes in support of that claim.

4. Finally, to the extent the State's position is that the Florida Supreme Court did not expressly address Cozzie's argument below because that argument was not properly preserved in the trial court, "this case does not involve the state procedural requirement of contemporaneous objection to the admission of evidence." *Chambers v. Mississippi* 410 U.S. 284, 290 n.3 (1973). More specifically, Cozzie's "constitutional claim–based as it is on [the nature of the error found to exist on appeal and the effect of that nature on the appellate court's ability to subject the error to harmless error review]–could not have been raised and ruled upon" in the trial court. *Id.*

III. The Florida Supreme Court's Decision Was Not Based On Independent and Adequate State Grounds.

The State claims this Court lacks jurisdiction because the decision in this case is based on adequate and independent state grounds. Opp.1-2, 9-10, 15.

1. The Florida Supreme Court's decision that the error below is not structural could not be based on independent and adequate state grounds because whether a sentence "for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied," *Chapman v. California*, 386 U.S. 18, 21 (1967). Here, during the process that led to his death sentence, the State failed to accord Cozzie rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments. *See* Pet. 15-18, 22-24. Thus, whether that federal constitutional error is structural or subject to harmless error review is a federal question.

2. Even if the Florida Supreme Court's decision that the error below is not structural could possibly be based on independent and adequate state grounds, it was explicitly based on federal grounds. When that court concluded the error, "in which the judge rather than the jury made all the necessary findings to impose a death sentence, is not structural error," it expressly relied on *Neder v. United States*, 527 U.S. 1 (1999), and *Washington v. Recuenco* 548 U.S. 212 (2006). *Hurst v. State*, 202 So.3d at 66-68.

3. Finally, the State's argument conflates the Florida Supreme Court's decision that error occurred with its decision that the error is not structural. And, as to the former, the State's argument is premised on a misapprehension of basic principles underlying our federal constitutional system. *See* discussion *supra* pp. 2-5.

IV. Error Occurred Below When The Jury Failed To Return A Verdict Of Guilty Beyond A Reasonable Doubt As To Multiple Critical Elements Necessary To Impose The Death Penalty.

The State argues the Sixth Amendment was satisfied because the jury necessarily found "at least one aggravating factor was proven beyond a reasonable doubt." Opp.9. It also contends whether sufficient aggravating factors existed and whether they outweighed the mitigating circumstances "are not facts which are required to be proven beyond a reasonable doubt." Opp.12. In that context, the State cites *Kansas v. Carr*, 136 S. Ct. 633 (2016), *Kansas v. Marsh*, 548 U.S. 163 (2006), and *Tuilaepa v. California*, 512 U.S. 967 (1994), and claims: "This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law." Opp.12. The State further asserts if a "finding" requires the exercise of "judgment," it is distinct from a "fact," and thus, does not have to be proven beyond a reasonable doubt. Opp.13-14.

1. If nothing else, the State's claim that the Sixth Amendment was satisfied because the jury necessarily found an aggravating factor is bold. This Court rejected that claim in *Hurst v. Florida*. *See* 136 S. Ct. at 622. Regardless, that claim is premised on a misapprehension of basic principles underlying our federal constitutional system. *See* discussion *supra* pp. 2-5.

2. In addition, this Court has never held that a jury does *not* have to return a verdict of guilty beyond a reasonable doubt as to elements necessary to render a defendant eligible for the death penalty *if* the determination of those elements involves

assigning or balancing weight. To the extent the cases cited by the State have any bearing on this issue, they weigh in Cozzie's favor.

Tuilaepa determined that certain factors–considered during the "selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence"–were not vague under the Eighth Amendment. 512 U.S. at 969-80. *Marsh* determined that Kansas' requirement–that death be imposed if, at the conclusion of the selection decision, the aggravating and mitigating evidence were "in equipoise"–did not violate the Eighth Amendment. 548 U.S. at 169-181. *Carr* determined that a *failure*–to instruct the jury, during the selection decision, that *mitigating* circumstances "need *not* be proven beyond a reasonable doubt"–did not violate the Eighth Amendment. 136 S. Ct. at 641-44 (emphasis added).

In contrast, the issue here concerns whether a jury's failure–to return, during the "eligibility decision," a verdict of guilty beyond a reasonable doubt as to critical elements necessary to impose the death penalty–violates the Sixth and Fourteenth Amendments. Further, in both *Marsh* and *Carr*, this Court specifically noted that Kansas law required the State to prove beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. 548 U.S. at 178; 136 S. Ct. at 643. Yet, this Court expressed no judgment as to that state-law requirement, much less held that it was "not required under federal law," Opp.12.

That said, in *Carr*, this Court reflected on whether, during the "selection phase,"

a standard of proof could be effectively applied "to the mitigating-factor determination." 136 S. Ct. at 642. This Court also mused that "the ultimate question whether mitigating circumstances outweigh the aggravating circumstances is mostly a question of mercy," as well as that it "would mean nothing...to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." *Id.*

But "[t]he Court's opinion on this point is pure dictum." *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in the judgment). In fact, prior to offering up those thoughts, this Court specifically noted that it was "[a]pproaching the question in the abstract, and without reference to our capital-sentencing case law." *Carr*, 136 S. Ct. 642. Further, those observations were offered in relation to "selection phase" factors, rather than "eligibility phase" elements.

In addition, this Court's dictum conflated a determination as to whether aggravating factors outweigh mitigating circumstances with whether a defendant deserves mercy from a death sentence. That is significant because, unlike as to whether a defendant deserves mercy, a juror could reasonably ask themselves if they have an "abiding conviction," 35Tr.2407, as to whether the aggravating factors outweigh the mitigating circumstances.

3. Finally, a jury is constitutionally required to return a verdict of guilty beyond a reasonable doubt at to every element necessary to impose the death penalty, even if the elements concern more than pure historical facts and their determination involves exercising judgment. Initially, it is critical to distinguish "elements" from "facts."

"Elements" are the "constituent parts" of a crime's legal definition–the

> things the "prosecution must prove to sustain a conviction." At trial, they are what the jury must find beyond a reasonable doubt to convict the defendant.... Facts, by contrast, are mere real-world things–extraneous to the crimes legal requirements.... They are "circumstance[s]" or "events[s]" having no "legal effect [or] consequence": In particular, they need n[ot] be found by a jury....

Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (internal citations omitted).

With that in mind, when considering the Sixth Amendment right to jury trial and the Due Process Clause requirement of proof beyond a reasonable doubt, the focus should be on the *elements* defined by substantive law. This Court has often referred to both "elements" and "facts." *See, e.g.*, *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013). But the root principle, on which this line of cases is founded, provides: "Taken together, these rights 'indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every *element* of the crime with which he is charged beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (emphasis added) (quoting *United States v. Gauldin*, 515 U.S. 506, 510 (1995)).

Further, a jury is often required to return a verdict of guilty beyond a reasonable doubt at to criminal elements, even if those elements concern more than pure historical facts and their determination involves exercising judgment. For instance, to convict a defendant of obscenity, a jury must return a verdict of guilty beyond a reasonable doubt as to whether the "material depicts or describes sexual conduct in a patently offensive way" and "taken as whole, lacks serious literary, artistic, political or scientific value." Fla. Std. Jury Instr. (Crim.) 24.5 (2017). Or to convict a defendant of various crimes, a jury may have to return a verdict of guilty beyond a reasonable doubt as to

whether the defendant did not commit the crime out of duress or necessity, including whether the "harm that the defendant avoided...outweighed the harm caused by committing the" crimes. *Id.* 3.6(k).

V. The Reliability Of The Process For Determining Death-Penalty Eligibility Was Undermined, But Regardless, Structural Error Occurred Below.

The State argues "this Court has already determined that *Hurst v. Florida* error" is not structural because it "remanded *Hurst* back to the Florida Supreme Court specifically to conduct a harmless error analysis." Opp.9. It also contends the present case does not conflict with *Sullivan*, 508 U.S. at 275,and is analogous to *Neder*, 527 U.S. at 1, because, here, the *only* "omitted element" concerned whether specific aggravating factors existed and the jury "was instructed that the aggravators must be proven beyond a reasonable doubt." Opp.11-12, 14-15. Finally, the State contends the reliability of the process for determining death-penalty eligibility was not undermined because the jury's sense of responsibility was not diminished and it "was properly instructed on its role as defined by Florida law." Opp. 16-18.

1. In *Hurst v. Florida*, this Court refused to "reach the State's assertion that any error was harmless." 136 S. Ct. at 624. If this Court did not even reach that issue, surely this Court has not "already determined" that the error is not structural.

2. And the State's claim regarding *Sullivan* and *Neder* is premised on a misapprehension of basic principles underlying our federal constitutional system. *See* discussion *supra* pp. 2-5. Florida law establishes *multiple* critical elements necessary

to impose the death penalty. *See Hurst v. State*, 202 So.3d at 53. With that in mind, similar to the jury in *Sullivan*, but unlike the jury in *Neder*, the jury here failed to return a verdict of guilty beyond a reasonable doubt as to *multiple* elements necessary to impose the death penalty.

3. Finally, the reliability of the process for determining death-penalty eligibility was undermined. As an initial matter, regardless of their accuracy, the instructions here diminished the jury's sense of responsibility regarding its role in the sentencing process. They insisted the trial judge bore ultimate responsibility for determining the appropriate sentence. *See* Pet. 23.

Further, even if the jury was properly instructed on its role as defined by Florida law, it was still misled regarding its role in the sentencing process. *See* Pet. 23-24. In particular, the jury's role during that process included finding "each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S. Ct. at 619. If the jury would have failed to find such an element, Cozzie would not have been eligible for death. That would have been "the final decision." Despite that reality, the jury was instructed that none of its input was binding and the judge would make "the final decision."

That said, this Court has stated: "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). And it is true that, under Florida's capital sentencing scheme, the jury's findings are not binding and the judge's findings determine a defendant's eligibility for the death

penalty. *Hurst v. Florida*, 136 S. Ct. 622.

But surely the general rule laid down in *Adams*, which arose from a concession during oral argument, 489 U.S. at 407, presumes that the role assigned to the jury by local law is otherwise consistent with "the supreme Law of the Land," U.S. Const. art VI, § 1, cl. 2. Critically, such a limiting principle is consistent with Justice O'Connor's *Caldwell* concurrence, which "is controlling," *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). There, Justice O'Connor wrote separately to essentially express her view that, contrary to the majority, she believed "giving *nonmisleading* and *accurate* information regarding the jury's role in the sentencing scheme" could be relevant "to the sentencing decision." *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

With that in mind, if jury instructions properly describe the jury's role assigned by local law, but that role is inconsistent with the Constitution, giving those instructions would not be relevant to the sentencing decision. The instructions would also be misleading. And, assuming the instructions diminish the jury's sense of responsibility, they would violate *Caldwell*. All that being the case, the opportunity to appropriately limit the general rule laid down in *Adams* provides an additional compelling reason to grant review.

Finally, even if the reliability of the process for determining death-penalty eligibility was not undermined, structural error still occurred here when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements

necessary to impose the death penalty because that failure always results in fundamental unfairness and its effects are simply too hard to measure, *see* Pet. 20-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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