No. 19-8473

IN THE

Supreme Court of the United States

SHAWN ROGERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

In *Kansas v. Carr*, this Court expressed the view that "[i]t would mean nothing . . . to tell the jury that" certain "value call[s]"—like whether aggravators outweigh mitigators and whether the defendant deserves mercy—must be found "beyond a reasonable doubt." 136 S. Ct. 633, 642 (2016). Consistent with that view, Florida law does not require such determinations to be made beyond a reasonable doubt.

Petitioner Shawn Rogers was convicted of first-degree murder and sentenced to death. Although he did not object to the jury instructions at trial, Petitioner argued on appeal that the trial court committed "fundamental error" in not instructing the jury that its findings as to the sufficiency and weight of the aggravating circumstances must be made beyond a reasonable doubt. The Florida Supreme Court rejected that claim. Pet. App. 19. This Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the court explained, did not require that the determinations at issue here—that "sufficient aggravating factors exist" and that those factors "outweigh the mitigating circumstances"—be made beyond a reasonable doubt. Pet. App. 19-20.

Several months later, this Court confirmed that *Hurst* "did not require jury weighing of aggravating and mitigating circumstances." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020). *A fortiori*, *Hurst* did not require Petitioner's jury to find, beyond a reasonable doubt, that aggravators outweighed mitigating factors.

The question presented is: Whether the court below reversibly erred, as a matter of federal law, in rejecting Petitioner's claim of "fundamental error."

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STATEMENT OF THE CASE

1. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court held that Florida's capital sentencing scheme violated the Sixth Amendment in light of *Ring v. Arizona*, 536 U.S. 584 (2002). Under Florida law, the maximum sentence a capital felon could receive on the basis of a conviction alone was life imprisonment. *Hurst*, 136 S. Ct. at 620. Capital punishment was authorized "only if an additional sentencing proceeding 'result[ed] in findings by the court that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. § 775.082(1) (2010)). At that additional sentencing proceeding, a jury would render an advisory verdict recommending for or against the death penalty, and in making that recommendation was instructed to consider whether sufficient aggravating factors exist, whether mitigating circumstances exist that outweigh the aggravators, and, based on those considerations, whether death is an appropriate sentence. Fla. Stat. § 921.141(2)(a)-(c) (2010).

This Court struck down that scheme in *Hurst*. Observing that it had previously declared invalid Arizona's capital sentencing scheme because the jury there did not make the "required finding of an aggravated circumstance," which exposed a defendant to "a greater punishment than that authorized by the jury's guilty verdict," the Court held that that criticism "applie[d] equally to Florida's." *Hurst*, 136 S. Ct. at 621–22 (quoting *Ring*, 536 U.S. at 604). "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, [wa]s therefore unconstitutional." *Id.* at 624.

In response to *Hurst* and the Florida Supreme Court's subsequent interpretation of that decision, the Florida Legislature repeatedly amended Section 921.141 to comply with those rulings. As relevant here, the amended law requires the jury, not the judge, to "determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor." Fla. Stat. § 921.141(2)(a) (2017). If the jury concludes that no aggravating factor has been proven, the defendant is "ineligible" for the death penalty. *Id.* § 921.141(2)(b)1. If on the other hand the jury unanimously finds at least one aggravator, the defendant is "eligible for a sentence of death." *Id.* § 921.141(2)(b)2. In that event, the jury must make a sentencing recommendation based on a weighing of three considerations: *first*, "[w]hether sufficient aggravating factors exist";[1] *second*, "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist"; and *third*, based on the other two considerations, "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death." § 921.141(2)(b)2.a-c.

By assigning to the jury those latter three findings, the Florida Legislature granted capital defendants procedural protections beyond what *Hurst* required. *See*

[1] As construed by the Florida Supreme Court, "it has always been understood that . . . 'sufficient aggravating circumstances' means 'one or more.'" *State v. Poole*, No. SC18-245, 2020 WL 3116597, at *10 (Fla. Jan. 23, 2020) (citing cases). Any "suggestion that 'sufficient' implies a qualitative assessment of the aggravator—as opposed simply to finding that an aggravator exists—is unpersuasive and contrary to this decades-old precedent." *Id.* at 11 (disapproving prior case holding that "the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously," and explaining that, "[u]nder longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances").

Hurst, 136 S. Ct. at 624 (requiring a jury to find "the existence of an aggravating circumstance"); *see also id.* at 626 (Alito, J., dissenting) ("[T]he 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."). Neither Section 921.141 nor the standard jury instructions require that the jury undertake those determinations by any particular standard of proof.

2. In March 2012, Shawn Rogers murdered his cellmate, Ricky Dean Martin, while serving a life sentence at the Santa Rosa Correctional Institution for a 2002 conviction for robbery with a firearm. Pet. App. 1. Correctional officers discovered Martin lying on the floor of the cell with a prayer rug covering his head and most of his body down to his waist. *Id.* at 2. Petitioner had tied a string around Martin's neck, bound Martin's hands and feet, pulled his pants down, and placed a pair of boxers over his head. *Id.* at 3. Martin had severe facial injuries and was unresponsive, so he was transported to the prison's on-site emergency room. *Id.*

Martin had a seizure at the on-site emergency room and a nurse determined that he appeared to have severe brain damage. *Id.* Martin was gurgling blood in his mouth. *Id.* When he was turned on his side to have the blood suctioned out, matter or bodily fluids came out of his ear, and the nurse observed that part of one ear was missing. *Id.* 3–4. He died nine days later. *Id.* at 4.

Petitioner was charged in Martin's death with first-degree murder and kidnapping to terrorize or inflict bodily harm. *Id.* The State sought the death penalty. *Id.*

Petitioner chose to testify during the guilt phase and gave his version of the events surrounding the murder. *Id.* at 5. During a verbal disagreement with Martin over the cleanliness of their cell, Petitioner threw a combination of three or four punches at Martin, and when Martin fell down, Petitioner started kicking him in the face. *Id.* Petitioner stomped Martin's head into the concrete six or seven times. *Id.* Martin kept trying to get up, leaving bloody handprints on the cell wall. *Id.* at 6. Each time, Petitioner knocked him back down and continued kicking him. *Id.*

Petitioner described a portion of the attack:

> I kicked him in the face and said, [t]his is for Trayvon Martin, motherf***er. I kicked him in the face again and said, [t]his is for Trayvon Martin, motherf***er. I kicked him a third time and said, [t]his is for Trayvon Martin, you pussy-ass f*** boy. I kicked him in the face a fourth time and said, [t]his is for Martin Luther King. I kicked him in the face a fifth time and said, [t]his is for Emmett Till and all the other black people you crackers done killed.

Id. Martin never came at Petitioner or had a chance to fight back. *Id.* Petitioner told the jury that "Mr. Martin is everything I despised in life: A snitch, a coward, and a straight f*** boy. I got no love for [the] dude or no sympathy. I don't feel bad about it. I don't feel no remorse. I'm not losing any sleep over the death of Ricky Martin and neither is anybody else." *Id.* at 7.

The jury found Petitioner guilty as charged of first-degree premeditated murder or felony murder and kidnapping to terrorize or inflict bodily harm. *Id.* at 8.

3. At the penalty phase, the State presented records of Petitioner's prior felony convictions as well as his own admissions regarding those convictions, which were made during a prior proceeding. *Id.* at 8–9. When Petitioner was a minor, he was

convicted as an adult for armed robbery with a firearm of an individual at a train platform. *Id.* at 9. He was also convicted in 2002 of robbery with a firearm and aggravated battery with a firearm for robbing a cab driver, whom he struck with the firearm, knocking out a tooth. *Id.*

Martin's murder was also not the first instance of Petitioner assaulting a fellow inmate. In 2002, Petitioner tied up a cellmate and beat him; and he did the same to a different cellmate three years later because that man "disrespected" him. *Id.* at 11. In 2009, Petitioner stabbed an inmate in the head with a knife and kneed another in the face. *Id.*

As evidence of Petitioner's ability to plan and premeditate, one State expert referred to a letter written by Petitioner to a judge in which Petitioner admitted that he had decided to kill the next white man he came across. *Id.* In that letter Petitioner wrote that he intended to kill Martin in the cell that night and only stopped his attack because another inmate begged him to do so. *Id.* Petitioner bragged that he is a "ruthless, cold-blooded, cutthroat, gangsta, blood killer, and killer of any and everything that go against the Crips gang." *Id.* Petitioner also stated that he is a sociopath and has no remorse, regard, or regret for anything he has done in his life. *Id.* at 11–12.

In mitigation, Petitioner offered testimony from eight inmates. *Id.* at 9. They described Petitioner as "a humble soul," peaceful, "a straight-up dude" with "a good heart," a good friend who gives advice, encourages them to become educated, to work out, to eat healthy, and lends items to individuals who need them. *Id.* Those inmates

considered Petitioner a good friend and mentor. *Id.* Several experts also testified on Petitioner's behalf about his difficult upbringing and mental health, including his mother's drug addiction and his time in foster care. *Id.* at 9–10. Among other things, Petitioner exhibited impulse control issues and had been diagnosed with major depressive disorder, anxiety disorder, and antisocial personality disorder. *Id.* at 10.

4. At the charge conference, the defense made no objections to the aggravating factors, the relevant jury instructions, or the verdict form. *Id.* at 12. After the instructions were read to the jury, the judge asked if the parties had any objections to the instructions as read, and both parties stated that they did not. *Id.*

Consistent with Florida's post-*Hurst* statutory scheme, the jury was instructed that it must "unanimously determine whether the aggravating factors alleged by the State have been proven beyond a reasonable doubt." *Id.* It was told to consider five aggravating factors: (1) that Petitioner was previously convicted of a felony and under sentence of imprisonment at the time he committed the murder; (2) that Petitioner was previously convicted of felonies involving the use or threat of violence to another person, specifically robbery with a firearm, aggravated battery with a firearm, and attempted robbery; (3) that the murder was committed while Petitioner was engaged in the commission of a kidnapping; (4) that the murder was especially heinous, atrocious, or cruel (HAC); and (5) that the murder was committed in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal justification. *Id.* Ultimately, the jury found unanimously that all five aggravating factors were proven beyond a reasonable doubt. *Id.* The trial court also found that all

five aggravators were proven beyond a reasonable doubt and assigned significant weight to aggravator three—the murder was committed while Petitioner was engaged in the commission of a kidnapping—and great weight to the other four aggravators. *Id.* at 12–13.

The jury was also instructed to consider whether Petitioner had established by the greater weight of the evidence the existence of any of his proposed sixty-eight mitigating circumstances. *Id.* at 13. And it was told that before it could recommend a sentence of death it had to unanimously find that the aggravating factors existed, that the aggravators were sufficient to impose death, that the aggravators outweighed any mitigators, and that death was the appropriate sentence. *Id.* at 18.

After unanimously making those findings, the jury concluded that capital punishment was the appropriate sentence, *id.*, and the trial court sentenced Petitioner to death. *Id.* at 19.

5. On direct appeal to the Florida Supreme Court, Petitioner argued, among other things, that "the trial court erred in failing to instruct the jury that it must determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances." *Id.* As the Florida Supreme Court noted, however, Petitioner "concede[d] that he failed to request these instructions or object to the instructions," meaning its review was for "fundamental error," *id.*, a deferential standard of review applicable in cases of procedural default. The court rejected Petitioner's argument, holding that his claim of "fundamental error" was "without merit." *Id.*

In support of that ruling, the Florida Supreme Court explained that this Court's decision in *Hurst v. Florida* did not require that the determinations at issue here—that the aggravating factors are sufficient to impose death and that the aggravating factors outweigh the mitigating circumstances—be made beyond a reasonable doubt. Pet. App. 20. The Florida Supreme Court had itself taken up that question when considering amendments to the standard jury instructions in capital cases and "ultimately declined to include a standard of proof for those determinations." *Id.* Indeed, the sufficiency and weight of the aggravators "are not elements of the capital felony of first-degree murder," and thus need not be found beyond a reasonable doubt. *Id.* (quoting *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018)). The court affirmed.

6. Several months after the Florida Supreme Court's decision, this Court decided *McKinney v. Arizona*, 140 S. Ct. 702 (2020). There, the Court held that to render a defendant death-eligible, a jury need only find the fact of an aggravating factor; the jury need not perform the weighing of the aggravating and mitigating circumstances or make the ultimate sentencing decision. *Id.* at 706–07. Those determinations may instead constitutionally be performed by a judge. In other words, the weight of the aggravators, like the sufficiency of the aggravators, is not an element of capital murder under *Apprendi* and its progeny. *See id.*

REASONS FOR DENYING THE PETITION

I. This Case is a Poor Vehicle for Resolving Petitioner's Question Presented.

In the proceeding below, Petitioner "concede[d] that he failed to request" the jury instructions he now claims were constitutionally required, and similarly failed to object to the instructions that were read to the jury. Pet. App. 19. As a result, the issue here is whether the Florida Supreme Court erred in rejecting, as "without merit," Petitioner's "claim[] that the trial court's failure to instruct on the beyond a reasonable doubt standard for proof constitutes fundamental error" for purposes of Florida's procedural default doctrine. *Id*.

That question does not warrant this Court's review, and Petitioner does not argue otherwise. *See* Pet i (framing question presented without reference to the "fundamental error" standard applicable to unpreserved claims of instructional error); *id*. at 12–13 (omitting any discussion of the "fundamental error" standard in summary of reasons for granting the petition). Assuming that the separate question purportedly raised in the Petition would otherwise warrant this Court's review, the Court should have the opportunity to address that issue in a case where the issue was raised in the trial court and preserved for appellate review. What is more, it should take up that question in a case where the answer will affect the eventual outcome, and not where—as here—an unexcused procedural default renders the defendant ineligible for relief as a matter of state law.

1. Under Florida law, jury instructions "are subject to the contemporaneous objection rule and, 'absent an objection at trial, can be raised on appeal only if

fundamental error occurred.'" *Daniels v. State*, 121 So. 3d 409, 417 (Fla. 2013) (quoting *Garzon v. State*, 980 So. 2d 1038, 1042 (Fla. 2008)). Fundamental error, in the capital context, is that rare error which "reaches down into the validity of the trial itself to the extent that the jury's recommendation of death *could not have been obtained* without the assistance of the alleged error." *Smiley v. State*, 295 So. 3d 156, 172 (Fla. 2020) (citing *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001)) (emphasis added). Florida's appellate courts apply the State's fundamental error doctrine "very guardedly," *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970), and place upon the complaining party the "high burden" of establishing that the unpreserved error was fundamental. *Williams v. State*, 209 So. 3d 543, 558 (Fla. 2017) (quoting *Bailey v. State*, 998 So. 2d 545, 554 (Fla. 2008)).

Underlying Florida's procedural default doctrine are the State's important interests in preventing gamesmanship and ensuring trial judges are apprised of their mistakes before it is too late to correct them, thereby avoiding costly retrials. *See, e.g.*, *Harrell v. State*, 894 So. 2d 935, 940–41 (Fla. 2005) ("contemporaneous objection rule serves to avert the gamesmanship of allowing errors to go undetected and uncorrected and thus preventing the appellate court from reviewing an actual decision of the trial court"); *State v. T.G.*, 800 So. 2d 204, 210 (Fla. 2001). Both interests are implicated here.

At trial, Petitioner acquiesced to the jury instructions and failed to object on the ground he would later raise in the Florida Supreme Court. In discussing the instruction that jurors must unanimously find that the aggravators outweigh any

mitigators, defense counsel requested that the judge bold the word "unanimous" in the written instruction document but otherwise took no issue with the instruction. R. 6908–09. Then, asked at the close of the charge conference whether Petitioner was "good with the jury instructions," defense counsel responded "I am." R. 6918. And the trial judge repeated that inquiry after verbally instructing the jury, inquiring whether either party had any "objections to the instructions and verdict form." R. 7024. Petitioner again declined to object. *Id*.

Petitioner provides no justification for not raising his claim in the trial court. Notably, the principal cases on which Petitioner relies (*Winship* and *Apprendi*) were decided in 1970 and 2000—long before his own sentencing hearing in 2017. *See* Pet. 1–3, 13–14. Accordingly, it is undisputed that this case squarely implicates the policies underlying Florida's contemporaneous objection rule, which "prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second [sentencing hearing] if the first decision is adverse to the client." *See T.G.*, 800 So. 2d at 210.

Petitioner's conceded state-law procedural default, *see* Pet. App. 19, makes this case a poor vehicle for resolving the federal constitutional question Petitioner presents for this Court's review. Not only should Petitioner not be rewarded for his failure to object at trial, but the narrow issue in this case, as Petitioner conceded in the proceeding below, is whether the unobjected-to jury instruction was "fundamental error" under Florida law. *See* Pet. App. 19. Petitioner does not ask this Court to resolve that state-law issue; and in his Petition, he does not even attempt to argue

that his "sentence could not have been obtained without the assistance of the alleged error," *Smiley*, 295 So. 3d at 172; *see* Pet. 12–33. Accordingly, Petitioner offers no basis for disturbing the Florida Supreme Court's holding that his belated claim of "fundamental error" is "without merit." *See* Pet. App. 19.

2. Assuming *arguendo* that the state trial court erred in not *sua sponte* offering an instruction Petitioner did not ask for—and that no court has ever deemed necessary in this context—any such determination from this Court would not affect Petitioner's sentence. That is because Petitioner cannot meet his "high burden," under Florida law, of showing that "the jury's recommendation of death could not have been obtained without the assistance of the alleged error," *Smiley*, 295 So. 3d at 172; *see Williams*, 209 So. 3d at 558.

Of particular relevance, ample record evidence supports the jury's determination that Petitioner perpetrated a heinous, atrocious, and cruel murder, and that he carried out that crime in a cold, calculating, and premeditated manner. *See* Pet. App. 2–8; *cf. Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999) (calling HAC and CCP "two of the most serious aggravators set out in the statutory sentencing scheme"). In addition, it is undisputed that Petitioner expressed a total lack of remorse for the murder, Pet. App. 7, was motivated by racial animus, *id.* at 6, and had attacked other inmates, including cellmates, on at least three occasions. *Id.* at 11. In the years leading up to this murder, for instance, Petitioner had "tied up his cellmate and beat him up," "again tied up a [second] cellmate and beat him," and "stabbed another inmate in the head with a knife and kneed another inmate in the

face." *Id.* Each of these factors went directly to the five aggravating circumstances found by the jury, *see id.* at 12, and was relevant to the sufficiency and weighing questions.

Not only can Petitioner not demonstrate prejudice under his unique facts, the better view is that "[i]t would [have] mean[t] *nothing* . . . to tell the jury that" certain "value call[s]"—like whether aggravators outweigh mitigators and whether the defendant deserves mercy—must be found "beyond a reasonable doubt," *see Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (emphasis added), which is presumably why Petitioner focused on other aspects of the jury instruction—such as the unanimity requirement—in the trial court.

In short, Petitioner cannot show "fundamental error" under state law—and therefore would not be entitled to any relief even if his federal constitutional claim had merit. At a minimum, this Court should not be asked to resolve the constitutional question Petitioner presents in a case where the issue was not raised in the trial court or preserved for appellate review.

II. The Decision Below Does Not Conflict With This Court's Precedents.

1. Petitioner does not assert that his question presented implicates a division among the lower courts. *See* Pet. 12–13. Instead, he claims that "[t]he Florida Supreme Court's decision conflicts with this Court's decisions, including the *Apprendi* line of cases." *Id.* at 13 (alterations omitted); *see id.* at 13–23. Petitioner is incorrect.

As threshold matter, none of the cases Petitioner cites addressed, and none had any occasion to address, the precise question at issue in this case: whether a trial

court commits "fundamental error" within the meaning of Florida law when it does not *sua sponte* instruct the jury that it should apply the beyond-a-reasonable-doubt standard to the kind of normative sentencing factors at issue here. *See* Pet. App. 19. That consideration, standing alone, refutes Petitioner's claim that "the Florida Supreme Court's decision conflicts with this Court's decisions." Pet. 2.

2. Even putting aside the narrow holding of the decision below, the cases Petitioner cites did not conclude that the beyond-a-reasonable doubt standard applies to non-factual determinations intended to guide the jury's sentencing recommendation. *See* Pet. 13–18. To the contrary, those cases evince this Court's understanding that that standard of proof is limited to *factual* findings. By its terms, *Winship* applies the beyond-a-reasonable-doubt standard only to "the factfinder." 397 U.S. at 363–64 (quotation marks omitted); *see also id.* (referencing "the trier of fact"). The Due Process Clause, the Court there held, "protects the accused against conviction except upon proof beyond a reasonable doubt of every *fact* necessary to constitute the crime with which he is charged." *Id.* at 364 (emphasis added); *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

Consistent with *Winship*, this Court in *Apprendi* expressly and repeatedly explained that the beyond-a-reasonable-doubt standard of proof applies to "facts." For example, the Court:

- described the "novelty of a legislative scheme that removes the jury from the determination of a *fact* that, if found, exposes the criminal defendant to a

penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone," *Apprendi v. United States*, 530 U.S. 466, 482–83 (2000) (first emphasis added);

- required the States to "at least adhere to the basic principles undergirding the requirements to trying to a jury all *facts* necessary to constitute a statutory offense, and proving those *facts* beyond reasonable doubt," *id*. at 483–84 (emphases added);

- referenced the jury's "assessment of *facts*," *id*. at 490 (emphasis added) (quotation marks omitted); and

- explained that "constitutional limits exist to States' authority to define away *facts* necessary to constitute a criminal offense" and "a state scheme that keeps from the jury *facts* that 'expos[e] [defendants] to greater or additional punishment' may raise serious constitutional concern." *Id*. at 486 (emphases added; internal citation omitted).

In short, *Apprendi* did not hold that the beyond-a-reasonable-doubt standard should be extended to non-factual normative judgments of the kind at issue here, and this Court's statements concerning that standard of proof undermine rather than support Petitioner's claim.

3. This Court's cases applying *Apprendi* to the capital sentencing context likewise did not hold that the due process clause requires the jury to determine, beyond a reasonable doubt, that normative considerations support the imposition of the death penalty. In *Ring*, for example, this Court explained that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any *fact* on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589 (emphasis added). So too in *Hurst*, where this Court reiterated that the sentencing scheme in *Ring* violated the defendant's right to have "a jury find the *facts* behind his punishment." 136 S. Ct. at 621

(emphasis added); *see also id.* at 619 ("The Sixth Amendment requires a jury, not a judge, to find each *fact* necessary to impose a sentence of death." (emphasis added)).

In sum, the decision below does not conflict with this Court's precedents. None of the cases Petitioner cites held that a jury must find, beyond a reasonable doubt, that aggravating factors outweigh mitigating circumstances or are sufficient to warrant the imposition of capital punishment; and still less did those cases hold that a trial court commits "fundamental error" under Florida law insofar as it does not *sua sponte* provide some such instruction. What is more, the reasoning of those cases expressly ties the beyond-a-reasonable-doubt standard to factfinding of a kind not at issue here—and thus undermines rather than supports Petitioner's claim.

III. The Decision Below Is Correct.

In rejecting Petitioner's claim of "fundamental error," the Florida Supreme Court explained that Petitioner failed to show any instructional error—fundamental or otherwise. *See* Pet. App. 19-21. The court was right to hold that Petitioner's claim of "fundamental error" is "without merit," *see* Pet. App. 19, and its opinion correctly applied this Court's precedents to Florida's capital sentencing scheme.

1. As the Florida Supreme Court explained, "the *Hurst* penalty phase findings" at issue here—*i.e.*, whether the aggravators are sufficient and whether those aggravators outweigh the mitigators—"are not elements of the capital felony of first-degree murder." Pet. App. 20 (quoting *Foster*, 258 So. 3d at 1252). "Rather, they are findings required of a jury: (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree

murder has occurred." *Id*. (emphases in original). That is, they are sentencing factors intended to make the imposition of capital punishment less arbitrary by guiding the exercise of the jury's discretion within the applicable sentencing range.

The plain text of Florida's death-penalty statute supports that reading:

> If the jury . . . [u]nanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death.

Fla. Stat. § 921.141(2)(b)(2).

2. In light of this Court's recent decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), Petitioner's contrary argument fails on its own terms. Petitioner frames the constitutional question as whether the sufficiency and weighing of aggravators can be characterized as "elements" or their functional equivalents. *See* Pet. 14–18. But Petitioner does not address *McKinney*, which rejected the theory that a jury must weigh aggravators and mitigators, and thus made clear that a determination that aggravators outweigh mitigators is not an "element" of capital murder for purposes of *Apprendi* and its progeny. And, as explained below, the statutory sufficiency requirement adds nothing to Petitioner's argument. Accordingly, *McKinney* rejects an essential predicate of Petitioner's claim.

In *McKinney*, a capital defendant challenged his death sentence because the sentencing judge had failed to consider his posttraumatic stress disorder as a mitigating factor, thereby violating *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that a capital sentencer may not refuse as a matter of law to consider

relevant mitigating evidence). On remand from the Ninth Circuit, the Arizona Supreme Court performed its own *de novo* weighing of the aggravators and mitigators, including the defendant's PTSD, and upheld the sentence. *McKinney*, 140 S. Ct. at 706. In the state supreme court's independent judgment, the balance of the aggravators and mitigators warranted the death penalty. *Id.*

On certiorari review, the defendant argued that "a jury must resentence him" because a court "could not itself reweigh the aggravating and mitigating circumstances." *Id.* This Court rejected that claim. Though it recognized that "[u]nder *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible," it observed that neither decision requires that the jury make additional determinations necessary before a sentencer may exercise its discretion and impose death. *Id.* at 707. "[I]mportantly," the Court stressed, "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.*; *see also id.* at 708 (explaining that "*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances").

Because the Sixth Amendment permits the "weigh[ing] [of] aggravating and mitigating" evidence by judges, *id.* at 707, the determination that aggravators outweigh mitigators cannot be considered an "element" of the offense. And because that determination is not an element, it is not subject to the beyond-a-reasonable-doubt standard. *See Alleyne*, 570 U.S. at 107 ("The touchstone for determining

whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense."). In other words, *McKinney* rejects an essential premise of Petitioner's argument—that the weighing of aggravators and mitigators is either an "element" or the "functional equivalent" of an element. *See* Pet. i, 2, 13–14.

The outcome is not different simply because Florida has chosen to assign the weighing determination to the jury, rather than the judge as it constitutionally could have.[2] If the Sixth Amendment permits a judge to conduct the tasks of determining weighing, and further permits the judge to make that determinations by some lesser standard (or none at all), nothing prevents the State from re-allocating that task to the jury by the same standard of proof. Any contrary theory would punish States for being *more* generous in extending procedural protections to capital defendants by forcing them to extend *all* available procedural protections. But because the weight of the aggravators is not an element of a capital offense, that determination need not be found by a jury and, correspondingly, need not be found beyond a reasonable doubt. *See McKinney*, 140 S. Ct. at 707–08.[3]

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[2] That a handful of States have elected to go further—tasking a jury with finding the sufficiency and weighing beyond a reasonable doubt, *see* Pet. 29—does not alter the dictates of the Fifth and Sixth Amendment in capital cases.

[3] Even if it is unclear whether *McKinney* disposes of claims like Petitioner's, any such doubt provides an additional basis for denying review. Because *McKinney* post-dated the decision below, the Florida Supreme Court did not analyze its applicability. This Court therefore lacks the benefit of a reasoned lower court analysis of a critical issue germane to Petitioner's claim: whether and to what extent *McKinney*'s holding that a jury need not determine that aggravators outweigh mitigators impacts the related question whether such normative determinations must be made beyond a reasonable doubt. Thus, *McKinney*, at a minimum, shows

Finally, the statutory requirement that the jury weigh, among other considerations, "[w]hether sufficient aggravating factors exist," § 921.141(2)(b)(2)(a), adds nothing to Petitioner's argument. As construed by the Florida Supreme Court, "it has always been understood that . . . 'sufficient aggravating circumstances' means 'one or more.'" *State v. Poole*, SC18-245, 2020 WL 3116597, at *10 (Fla. Jan. 23, 2020) (citing cases). Put differently, "[u]nder longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances." *Id.* at 11. And it is undisputed that, in this case, that requirement was satisfied when the jury unanimously found *five* aggravating circumstances beyond a reasonable doubt. *See* Pet. App. 12-13.

3. For reasons this Court has already explicated, it would make little sense to apply the beyond-a-reasonable-doubt standard to normative determinations of the kind at issue here. In *Carr*, this Court "doubt[ed]" that it is "even possible to apply a standard of proof to the mitigating-factor determination." 136 S. Ct. at 642. The Court reasoned that "[i]t is possible to do so for the aggravating-factor determination," on the one hand, because the existence of an aggravator "is a purely factual determination." *Id.* Whether mitigation exists, on the other hand, "is largely a

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that further percolation is warranted before this Court steps in to resolve the claim Petitioner raised for the first time on appeal. *See California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (explaining that percolation "allow[s] . . . the issue [to] receive[] further study" in the lower courts "before it is addressed by this Court").

judgment call"—or "perhaps a value call"—just as the "ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Id.* Thus, "[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.*

In response, Petitioner contends that the sufficiency and weight determinations are amenable to the beyond-a-reasonable-doubt standard because the standard merely goes to a decisionmaker's "subjective state of certitude." Pet. 29 (quoting *Winship*, 397 U.S. at 364). But Petitioner plucks that quote out of context, and in doing so alters its import. The full sentence reads: "To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the *trier of fact* the necessity of reaching a subjective state of certitude *of the facts* in issue.'" *Winship*, 397 U.S. at 364 (emphasis added) (quotation marks omitted). Facts can be determined beyond a reasonable doubt; by contrast, whether to show mercy, or whether mitigators are outweighed by aggravators, is not susceptible to a quantum of proof. *See Carr*, 136 S Ct. at 642.

4. Contrary to Petitioner's urging, *Carr* is not in "analytical tension" with this Court's due-process precedents. *See* Pet. 4, 31–32. Historically and today, the beyond-a-reasonable-doubt standard ensures that the prosecution must "persuad[e] the factfinder at the conclusion of the trial of [the defendant's] guilt beyond a reasonable doubt." *Winship*, 397 S. Ct. at 364. This safeguard preserves the "moral force of the criminal law" because it does not "leave[] people in doubt whether innocent men are

being condemned." *Id.* at 364. But sufficiency and weighing do not go to whether the defendant is guilty of a capital offense—that question is answered when the jury finds the existence of an aggravated first-degree murder. *See McKinney*, 140 S. Ct. at 707; *Kansas v. Marsh*, 548 U.S. 163, 175–76 (2006). Sufficiency and weighing instead go to the appropriateness of the penalty.

Petitioner concedes that evaluating the sufficiency and weight of aggravators "involve[s] *normative* judgment." *E.g.*, Pet. 1, 31, 32 (emphasis added). Such "normative judgment[s]," of course, are not "facts." A fact is "something that has actual existence" or, perhaps more appropriately in this context, is "a piece of information presented as having objective reality." "Fact," Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/fact. Facts have their basis in observable truths about the world. A fact either is or isn't; although a person's perception of facts may be open to debate, facts are objectively discernable. By contrast, normative judgments are opinions. As such, they turn on the subjective proclivities of individual decisionmakers. In short, they are questions involving discretion.

As a consequence, a jury is not better situated to make normative determinations than a judge. Indeed, sufficiency and weighing no more need be conducted by a jury than the traditional in-range sentencing discretion performed by judges throughout the nation countless times each day. As *McKinney* recognized, *Apprendi* expressly reserved for judges the power to exercise that type of discretion. *McKinney*, 140 S. Ct. at 707 ("[T]his Court carefully avoided any suggestion that 'it is

impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute.'" (quoting *Apprendi*, 530 U.S. at 481)).

Petitioner invokes (Pet. 26–27) *United States v. Gaudin*, 515 U.S. 506 (1995), as an example of this Court categorizing as an "element" some non-factual determination. But the materiality element at issue in *Gaudin* was much more akin to a fact than a normative judgment. Whether a false statement under 18 U.S.C. § 1001 has "a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed" is capable of objective determination. *See Gaudin*, 515 U.S. at 509. By way of example, when a public company reports that its earnings have increased tenfold over last quarter, that is a statement that, in the course of human experience, investors have relied upon. *Cf. TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

Gaudin also has little to say about this issue because its holding was predicated on the view that juries have historically decided questions involving "application-of-legal-standard-to-fact." *Gaudin*, 515 U.S. at 512. But weighing does not involve the application of law to fact. Indeed, Florida law does not provide jurors a legal standard for making those determinations. Jurors are instead told merely that the weighing "is not a mechanical or mathematical process" and that "each individual juror must decide what weight is to be given to a particular factor or circumstance." Fla. Std. Jury Instr. (Crim.) 7.11.

5. Petitioner's substantial expansion of the *Apprendi* doctrine would have significant and troubling practical implications, including for non-capital sentencing. The federal statute governing criminal sentences, for example, provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with" certain statutorily enumerated sentencing factors. 18 U.S.C. § 3553(a). Given that a federal sentence must, by statute, be supported by a normative judgment that the chosen sentence is "not greater than necessary" to effectuate "the purposes set forth in" the statutory sentencing factors, *see id.*, must that "finding" be made by a jury beyond a reasonable doubt? And if not, why is that normative judgment any different than the moral determination at issue here—*i.e.*, that aggravating factors outweigh mitigating circumstances?

Notably, Petitioner himself appears unwilling to accept the practical consequences of his own theory. Petitioner asks this Court to rule that two determinations—sufficiency and weighing—must be made beyond a reasonable doubt. But the statute also provides that the trial court may not impose death unless the jury further determines, based on those two factors, that death is the appropriate sentence. *See* Fla. Stat. § 921.141(2)(b)(2)(c), (3)(a)(2) (requiring the jury to determine, based on sufficiency and weighing, "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death," and providing that the court may sentence the defendant to death if, and only if, "the jury has recommended a sentence of . . . [d]eath"). Petitioner nevertheless does not go so far as to say that that the jury's ultimate recommendation that "the defendant should be

sentenced to . . . death," § 921.141(2)(b)(2)(c), must be made beyond a reasonable doubt. And for good reason: "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); *see also McKinney*, 140 S. Ct. at 707.

Petitioner's proposed extension of the *Apprendi* doctrine need not redound to the benefit of criminal defendants. If state laws like the one Petitioner asks this Court to strike down—*i.e.*, laws that seek to *protect* criminal defendants by reducing the risk of arbitrariness and guiding a sentencing authority's discretion to impose particularly harsh punishments—give rise to otherwise non-existent due process problems, lawmakers may well respond by repealing, rolling back, or declining to create such protections in the first place. *Cf.* Pet. 2–3 (attempting to distinguish *Ring* by asserting that, under the Arizona statute at issue there, "*the court was required to impose death*" if a statutorily eligible capital defendant "failed to meet [his] burden" to "convince the sentencer to select a lesser punishment") (emphasis added). That is one reason why 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) (quotation marks omitted); *see Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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