No. _____

In the
Supreme Court of the United States

RODNEY RENARD NEWBERRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under the Due Process Clause, determinations as to both elements and their "functional equivalents" must be made beyond a reasonable doubt. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 476-85, 490, 494 n.19 (2000). Further, in ascertaining which determinations are the functional equivalents of elements, the appropriate analysis concerns the operation and effect of the statutory scheme at issue. *See, e.g.*, *id.* at 494-96. For instance, in *Ring v. Arizona*, 536 U.S. 584, 603-05, 609 (2002), this Court concluded that, considering the operation and effect of Arizona's capital sentencing scheme, the determination as to whether one or more aggravating circumstances existed was the functional equivalent of an element.

The crucial statutory provision in *Ring* provided that, in addition to finding "one or more aggravating circumstances," the factfinder had to determine whether "there are no mitigating circumstances sufficiently substantial to call for leniency," Ariz. Rev. Stat. Ann. § 13-703(F) (2001). In contrast, the crucial statutory provision in the present case provides that, in addition to finding "at least one aggravating factor," the factfinder has to determine (1) whether "sufficient aggravating factors exist," and (2) whether "aggravating factors exist which outweigh the mitigating circumstances," Fla. Stat. § 921.141(2) (2017). The question presented is:

Whether, considering the operation and effect of Florida's capital sentencing scheme, the Due Process Clause requires those latter two determinations to be made beyond a reasonable doubt.

STATEMENT OF RELATED PROCEEDINGS

Newberry v. State, No. SC18-1133 (Fla. opinion and judgment issued Dec. 12, 2019; order denying rehearing issued Feb. 11, 2020; mandate issued Feb. 28, 2020).

Newberry v. State, No. SC14-703 (Fla. opinion and judgment issued Apr. 6, 2017; mandate issued Apr. 27, 2017).

State v. Newberry, 162012CF009296AXXXMA (Fla. 4th Cir. Ct. judgment entered Apr. 14, 2014, and June 22, 2018).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

This case presents a fundamental question concerning the Due Process Clause requirement of proof beyond a reasonable doubt: do determinations that are not purely factual and involve normative judgment have to be made beyond a reasonable doubt where a capital sentencing scheme operates so as to demand them before a defendant is *eligible* for death? Here, after Rodney Newberry was convicted of first-degree murder, the jury determined certain aggravating factors had been proven beyond a reasonable doubt. It also determined (1) those factors were sufficient to warrant a possible death sentence and (2) they outweighed the mitigating circumstances. But, in making those additional determinations, the jury did not reach a particular subjective state of certitude, such as beyond a reasonable doubt.

On appeal, Newberry argued fundamental error occurred when the court failed to instruct the jury to make those latter two determinations beyond a reasonable doubt. He contended that, under the Due Process Clause and this Court's *Apprendi* line of cases, those determinations were the functional equivalents of elements because, considering the operation and effect of Florida's capital sentencing scheme, they increase the penalty for first-degree murder.

The Florida Supreme Court rejected Newberry's argument and held the determinations at issue "are not subject to the beyond a reasonable doubt standard of proof." It essentially reasoned those determinations "'are not elements of the capital felony of first-degree murder,'" but rather sentencing factors. App.12.

This Court should grant review and address the question presented for the

following four reasons. First, the Florida Supreme Court's decision conflicts with this Court's decisions. It is well-established that determinations as to both elements and their functional equivalents must be made beyond a reasonable doubt. And in ascertaining which determinations are the functional equivalents of elements because they increase the penalty for a crime, the appropriate analysis concerns the operation and effect of the statutory scheme at issue.

With that in mind, under Florida's capital sentencing scheme, the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements because they increase the penalty for first-degree murder. In short, a sentence of death becomes available, and the trial court is permitted to select a sentence within a range of life without parole to death, only if the jury makes the two determinations at issue. As a result, though the Florida death penalty statute states an aggravating factor renders a defendant eligible for death, it "'authorizes a maximum penalty of death [based on such a factor] only in a formal sense,'" *Ring v. Arizona*, 536 U.S. 584, 604 (2002).

On that note, in a crucial respect, Florida's scheme operates differently than the Arizona capital sentencing scheme considered by this Court in *Ring* and *Walton*. Under the latter, a sentence of death became available *solely* on the basis of determinations that the defendant was guilty of first-degree murder and at least one aggravating factor existed. At that point, the burden was on the defendant to convince the sentencer to select a lesser punishment by proving mitigating circumstances sufficiently substantial to call for leniency. And if the defendant failed to meet that

burden, the court was required to impose death.

In contrast, for a sentence of death to become available under Florida's scheme, the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are also necessary. And unlike the determination as to whether there are no mitigating circumstances sufficiently substantial to call for leniency, those two determinations concern whether–in the first place–to increase the maximum punishment from life without parole to death. Further, if the jury makes those determinations, it must still reach a separate decision as to whether to select life without parole or death.

Second, the Florida Supreme Court's decision is wrong. The Florida first-degree murder statute explicitly cross-references statutory provisions that require the determinations at issue before imposition of the death penalty. As a result, though that statute may specify first-degree murder is a "capital felony," it also "'authorizes a maximum penalty of death only in a formal sense,'" *id.* at 604.

In addition, even if the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are not purely factual and involve normative judgment, they are "subject to" proof beyond a reasonable doubt. That is, those determinations are susceptible to a "'subjective state of certitude,'" *In re Winship*, 397 U.S. 358, 364 (1970). Stated differently, jurors could reasonably ask themselves if they have an "abiding conviction," Fla. Std. Jury Instr. (Crim.) 3.7 (2018), that the aggravating factors are sufficient and outweigh the mitigating circumstances.

Third, the question presented has considerable practical impact. Multiple

appellate courts have essentially reasoned that determinations similar to the ones at issue here do not have to be made beyond a reasonable doubt because only purely factual determinations, as opposed to determinations involving normative judgment, are susceptible to proof beyond a reasonable doubt. But a number of determinations as to both elements and their functional equivalents are not purely factual and involve normative judgment. Is there an exception to the general requirement of proof beyond a reasonable doubt for those determinations?

Finally, the question presented offers this Court an opportunity to clarify analytical tension in a critical area of this Court's Due Process Clause jurisprudence. More specifically, with respect to determinations that are not purely factual and involve judgment, this Court's abstract statements in *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016), are hard to square with this Court's decision and reasoning in *United States v. Gaudin*, 515 U.S. 506, 510-12, 522-23 (1995).

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 288 So.3d 1040 and reproduced at App.1-20.

JURISDICTION

On December 12, 2019, the Florida Supreme Court entered its judgment. On February 11, 2020, a timely motion for rehearing was denied. App.21. On March 19, 2020, in "light of the ongoing public health concerns relating to COVID-19," this Court issued a general order, which extended the time for filing the petition to and including July 10, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

A. Florida's Capital Sentencing Scheme

1. Florida statutes lay out the following scheme. To establish first-degree murder, the following elements must be proven: (1) the victim is dead; (2) the death was caused by the defendant; and (3) the killing was premeditated or committed during a felony." Fla. Stat. § 782.04(1)(a) (2017).[1] First-degree murder is a "capital felony, punishable as provided in s. 775.082." *Id.*

Section 775.082, in turn, provides that "a person who has been convicted of a capital felony shall be punished by death *if* the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that such

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[1] Newberry was sentenced to death in June 2018. As relevant here, the then-applicable versions of the statutes at issue are indistinguishable from the current versions. *Compare* Fla. Stat. §§ 775.082(1), 782.04(1), 921.141 (2017) *with* Fla. Stat. §§ 775.082(1), 782.04(1), 921.141 (2019).

That said, in 2016 and 2017, significant legislative changes were made to Florida's capital sentencing scheme. *See* Act effective March 7, 2016, §§ 1, 3, 2016 Fla. Laws ch. 2016-13 (codified as amended at Fla. Stat. § 775.082(1) (2017) and Fla. Stat. § 921.141 (2017)); Act effective March 13, 2017, §§ 1, 3, 2017 Fla. Laws ch. 2017-1 (codified as amended at Fla. Stat. § 775.082(1) (2017) and Fla. Stat. § 921.141 (2017)). Thus, in crucial respects, the 2018 scheme under which Newberry was sentenced to death is different from Florida's pre-2016 capital sentencing scheme.

In particular, in crucial respects, the 2018 scheme is different from the 2010 scheme considered by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Compare* Fla. Stat. §§ 775.082(1), 782.04(1), 921.141 (2010) *with* Fla. Stat. §§ 775.082(1), 782.04(1), 921.141 (2017).

The same is true as to the 2011 scheme recently considered by the Florida Supreme Court in *State v. Poole*, SC18-245, 2020 WL 3116597 (Fla. Jan. 23, 2020). *Compare* Fla. Stat. §§ 775.082(1), 782.04(1), 921.141 (2011) *with* Fla. Stat. §§ 775.082(1), 782.04(1), 921.141 (2017).

person shall be punished by death, *otherwise* such person shall be punished by" life without parole. Fla. Stat. § 775.082(1)(a) (2017) (emphasis added).

Finally, in relevant part, section 921.141 provides:

> (2) **Findings and recommended sentence by the jury**. . . .
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor . . . .
> (b) . . . If the jury:
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
> 2. Unanimously 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. The recommendation shall be based on a weighing of all of the following:
> a. Whether sufficient aggravating factors exist.
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.
> . . . .
> (3) **Imposition of sentence of life imprisonment or death**.--
> (a) If the jury has recommended a sentence of:
> 1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
> 2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death.

Fla. Stat. § 921.141(2)-(3) (2017).

2. In effect, Florida's capital sentencing scheme operates as follows. Florida's standard second-phase jury instruction informs the jury that it must determine whether at least one aggravating factor exists, and if it does determine such a factor

exists, the defendant is eligible for the death penalty. Fla. Std. Jury Instr. (Crim.) 7.11(a) (2018). But the standard instruction proceeds to advise the jury that, in that case, it must make additional determinations before engaging in a weighing process. *Id.*[2] Those additional determinations include (1) whether the aggravating factors are "sufficient to justify the death penalty," and (2) whether the aggravating factors outweigh the mitigating circumstances. *Id.*[3]

Most critically, the standard verdict form expressly instructs the jury that, absent either of those two determinations, the *only possible* sentence is life without parole. Fla. Std. Jury Instr. (Crim.) 3.12(e) (2018). In fact, the portion of the verdict form in which the jury documents its determination as to whether the aggravating factors outweigh the mitigating circumstances is titled: "D. *Eligibility* for the Death Penalty for Count ___." *Id.* (emphasis added).[4]

In relevant part, the standard verdict form reads:

> **A. Aggravating Factors as to Count ___:**
> We the jury unanimously find the State has established beyond a reasonable doubt the existence of (aggravating factor),
> YES_____

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[2]Newberry's second-phase trial occurred in March 2018. The standard instruction at issue was amended in May 2018. *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d 172 (Fla. 2018). Though, in most relevant respects, the amended version is indistinguishable from the version applicable at Newberry's trial, the instruction no longer refers to the jury engaging in a weighing process. *Compare* Fla. Std. Jury Instr. (Crim.) 7.11(a) (2018) *with* Fla. Std. Jury Instr. (Crim.) 7.11 (2020).

[3]The standard second-phase jury instruction was utilized in the present case. 1R.620-30.

[4]The standard verdict form at issue was also amended in May 2018. *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d at 172. But, as relevant here, it is indistinguishable from the version applicable at Newberry's trial. *Compare* Fla. Std. Jury Instr. (Crim.) 3.12(e) (2018) *with* Fla. Std. Jury Instr. (Crim.) 3.12(e) (2020).

NO_____

. . . .

If you answer YES to at least one of the aggravating factors listed, please proceed to Section B. If you answered NO to every aggravating factor listed, do not proceed to Section B; (Defendant) **is not eligible for the death sentence and will be sentenced to life in prison without the possibility of parole.**

B. Sufficiency of the Aggravating Factors as to Count ___:

Reviewing the aggravating factors that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find that the aggravating factors are sufficient to warrant a possible sentence of death.

YES_____

NO_____

If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed to Section C; (Defendant) **will be sentenced to life in prison without the possibility of parole.**

C. Statutory Mitigating Circumstances:

. . . .

D. Eligibility for the Death Penalty for Count ___:

We the jury unanimously find that the aggravating factors that were proven beyond a reasonable doubt (Section A) outweigh the mitigating circumstances established (Section C above) as to Count ___.

YES_____

NO_____

If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; (Defendant) **will be sentenced to life in prison without the possibility of parole.**

E. Jury Verdict as to Death Penalty.

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt (Section A), that the aggravating factors are sufficient to warrant a sentence of death (Section D), and the aggravating factors outweigh the mitigating circumstances (Section D), we the jury unanimously find that (Defendant) should be sentenced to death.

YES_____

NO_____

Id.[5]

B. Factual Background

1. One of nine children, Newberry grew up in a three-bedroom house. 2R.942. At age eight, he achieved a full-scale IQ score of 81. App.5. He was repeatedly held back in school and placed in special education classes. 2R.971-72, 1023-24.

Newberry also struggled with emotional problems, including emotional immaturity and a tendency to behave impulsively. 2R.971, 998, 1015-16. His struggles went untreated. 2R.972.

As an adult, Newberry suffered from a low IQ. App.10. He achieved full-scale IQ scores of 65 and 66. App.5. Those scores placed him in the first percentile–lower than "99 percent of people." 2R.978.

Newberry completed math at a third grade level, read at a fourth grade level, and spelled at a sixth grade level. 2R.980-81. Though able to function in society, he was "intellectually impaired." App.5-6, 10.

In the early to mid-1990s, Newberry pled no contest to an aggravated battery involving a man who was shot six times. App.4. He also plead guilty to an aggravated assault involving the mother of his four children. App.4.

2. In 2009, Newberry, James Phillips, and Robert Anderson set out to commit an armed robbery. App.1-2. They ultimately confronted Terrese Stevens in a nightclub parking lot. App.2-3. Newberry shot Stevens and took money from him.

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[5]The standard verdict form was utilized in the present case. 1R.1119-29.

App.3.

Months later, Newberry was involved in a struggle with two police officers in which shots were fired. App.4. Prior to trial in the present case, he was convicted of two counts of attempted murder. App.4.

C. Procedural Background

1. In 2014, Newberry was convicted of first-degree murder and sentenced to death. App.4. On appeal, the Florida Supreme Court affirmed his conviction, but vacated his sentence and remanded for a new second-phase trial. App.4.

During the subsequent second-phase trial, a psychologist explained that "intellectually impaired" individuals are "immature and naive for their age"; struggle to conceptualize and think abstractly; and tend to act impulsively and make poor decisions. 2R.978, 986.

In its closing, the State argued aggravating factors existed; they were entitled to great weight; and they outweighed any mitigating circumstances. 2R.1282-1309. In response, Newberry argued any aggravating factors were not entitled to great weight, and further, any such factors were outweighed by the mitigating circumstances. 2R.1315-34.

The court then instructed the jury that it had to "'determine whether the aggravating factors alleged by the State have been proven beyond a reasonable doubt.'" 1R. 620. The court also informed the jury that it had to determine whether "'the aggravating factors are sufficient to impose death'" and whether the aggravating factors outweigh the mitigating circumstances.'" 1R.623, 626. But the court did not

advise the jury that, to make those additional determinations, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt.

In its verdict, the jury determined the following aggravating factors had been proven beyond a reasonable doubt: (1) Newberry was previously convicted of a violent felony; and (2) he committed the murder at issue while engaged in robbery/for pecuniary gain.[6] App.6. It also determined that "the aggravating factors were sufficient to warrant a death sentence" and "the aggravating factors outweighed the mitigating circumstances argued by Newberry." App.7. And it concluded Newberry should be sentenced to death. App.7. The court later imposed a death sentence. App.10-11.

2. Newberry appealed to the Florida Supreme Court. As relevant here, he argued fundamental error occurred when the trial court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. App.11-12. In particular, Newberry contended that, under the Due Process Clause and this Court's *Apprendi* line of cases, those determinations were the functional equivalents of elements because, considering the operation and effect of Florida's capital sentencing scheme, they increase the penalty for first-degree murder. App.27-40, 53-55.[7]

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[6]The engaged-in-robbery and pecuniary-gain factors merged and were considered "as only one aggravating factor." 1R.625.

[7]As part of that contention, Newberry maintained that, even if the determinations at issue were not purely factual and involve normative judgment, they were subject to the constitutional requirement

The Florida Supreme Court affirmed Newberry's death sentence. App.1, 19. As relevant here, the court held that the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances "are not subject to the beyond a reasonable doubt standard of proof." App.12. In support of that holding, the court cited *Rogers v. State*, 285 So.3d 872 (Fla. 2019), *petition for cert. filed* (U.S. May 11, 2020) (No. 19-8473). App.12. There, the court reasoned the determinations at issue "'are not elements of the capital felony of first-degree murder.'" *Id.* at 885. Instead, according to the court, they are simply determinations "'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.*

REASONS FOR GRANTING THE PETITION

First, the Florida Supreme Court's decision conflicts with this Court's decisions. Under Florida's capital sentencing scheme, the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements because they increase the penalty for first-degree murder. On that note, in a crucial respect, Florida's scheme operates differently than the Arizona capital sentencing scheme considered by this Court in *Ring* and *Walton*.

Second, the Florida Supreme Court's decision is wrong. Though the Florida first-degree murder statute may specify first-degree murder is a "capital felony," it "'authorizes a maximum penalty of death only in a formal sense,'" *Ring v. Arizona*, 536

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of proof beyond a reasonable doubt. App.56-61.

U.S. 584, 604 (2002). Further, even if the determinations at issue are not purely factual and involve normative judgment, they are susceptible to proof beyond a reasonable doubt.

Third, the question presented has considerable practical impact. Finally, the question presented offers this Court an opportunity to clarify analytical tension in a critical area of this Court's Due Process Clause jurisprudence.

I. The Florida Supreme Court's Decision Conflicts With This Court's Decisions, Including the *Apprendi* Line of Cases.

In the decision below, the Florida Supreme Court held that the determinations as to (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances "are not subject to the beyond a reasonable doubt standard of proof." App.12. But the Due Process Clause requires that determinations as to both elements and their functional equivalents be made beyond a reasonable doubt. And this Court has repeatedly made clear that, in ascertaining which determinations are the functional equivalents of elements because they increase the penalty for a crime, the appropriate analysis concerns the operation and effect of the statutory scheme at issue.

With that in mind, considering the operation and effect of Florida's scheme, the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements because they increase the penalty for first-degree murder. On that note, in a crucial respect, Florida's scheme operates differently than the Arizona scheme considered by this Court

in *Ring* and *Walton*. Finally, in light of this Court's prior decisions, requiring the determinations at issue to be made beyond a reasonable doubt furthers interests underlying the constitutional requirement of proof beyond a reasonable doubt.

A. Determinations As To Both Elements and Their Functional Equivalents Must Be Made Beyond a Reasonable Doubt.

1. The Due Process Clause "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." *In re Winship*, 397 U.S. 358, 364 (1970). Stated differently, "[t]aken together" with the Sixth Amendment right to jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt "indisputably entitle[s] 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) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)) (emphasis added).

2. But at the time of the founding, "the concept of a 'crime' was a broad one linked to punishment, amounting to . . . those 'element[s] in the wrong upon which the punishment is based.'" *United States v. Haymond*, 139 S.Ct. 2369, 2376 (2019). Thus, the "safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and might lead to a significant impairment of personal liberty." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

Instead, "due process and associated jury protections extend, to some degree, 'to

determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484. And those protections apply to "[c]apital defendants, no less than noncapital defendants." *Ring*, 536 U.S. at 589.

All that being the case, any circumstance that gives rise to "an increase beyond the maximum authorized statutory sentence . . . is the *functional equivalent of an element* of a greater offense than the one covered by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494 n.19 (emphasis added). In short, "[a]ny 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." *Alleyne v. United States*, 570 U.S. 99, 102 (2013).

B. In Ascertaining Which Determinations Are the Functional Equivalents of Elements Because They Increase the Penalty for a Crime, the Appropriate Analysis Concerns the Operation and Effect of the Statutory Scheme at Issue.

In that context, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative." *Ring*, 536 U.S. at 605. Rather, the analysis "looks to the 'operation and effect of the law as applied and enforced by the state.'" *Mullaney*, 421 U.S. at 699. Thus, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

C. Under Florida's Capital Sentencing Scheme, the Determinations As To Whether the Aggravating Factors Are Sufficient and Outweigh the Mitigating Circumstances Are the Functional Equivalents of Elements Because They Increase the Penalty for First-degree Murder.

1. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence

[that may be] impose[d] *solely on the basis of the facts reflected in the jury verdict*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). "In other words, the relevant 'statutory maximum' is not the maximum sentence [that may be] impose[d] after finding additional facts, but the maximum [that may be] impose[d] *without* any additional findings." *Id.* at 303-04. And again, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

2. Applying those principles to Florida's scheme, solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists, life without parole is the maximum sentence that may be imposed. That is, if the jury fails to determine "the aggravating factors are sufficient to warrant a possible sentence of death," a sentence of death is unavailable and the maximum (and only possible) sentence is life without parole. *See* Fla. Std. Jury Instr. (Crim.) 3.12(e) (2018). Similarly, if the jury fails to determine the aggravating factors outweigh the mitigating circumstances, a sentence of death is unavailable and the maximum (and only possible) sentence is life without parole. *See id.*

By the same token, the latter two determinations expose the capital defendant to a greater punishment than that authorized by the former four determinations. That is, a sentence of death becomes available, and the trial court is permitted to select a sentence within a range of life without parole to death, only if the jury itself selects

death. *See* Fla. Stat. § 921.141(3) (2017). And the jury itself cannot select death unless it first determines (1) the aggravating factors are sufficient to justify the death penalty, and (2) the aggravating factors outweigh the mitigating circumstances. *See* Fla. Std. Jury Instr. (Crim.) 3.12(e). As a result, a death sentence "comes into play *only* as a result of," *Haymond*, 139 S.Ct. at 2381, those two determinations.

3. In terms of form, section 921.141 does provide that, if the jury determines the existence of "at least one aggravating factor, the defendant is eligible for a sentence of death." Fla. Stat. § 921.141(2)(b)(2). But, in effect, section 921.141 requires the jury to also determine (1) whether sufficient aggravating factors exist, and (2) whether the aggravating factors outweigh the mitigating circumstances. *Id.*

Further, "'as applied and enforced by the state,'" *Mullaney*, 421 U.S. at 699, section 921.141 operates so as to demand those two determinations before a sentence of death is even available. *See* discussion *supra* pp. 16-17. In other words, section 921.141 operates so as to demand those determinations before a capital defendant is even eligible for death. As a result, though section 921.141 states an aggravating factor renders a defendant eligible for death, it "'authorizes a maximum penalty of death [based on such a factor] only in a formal sense,'" *Ring*, 536 U.S. at 604.

D. In a Crucial Respect, Florida's Capital Sentencing Scheme Operates Differently Than the Arizona Capital Sentencing Scheme Considered by This Court in *Ring* and *Walton*.

1. In *Ring*, this Court recognized the following general rule: "Capital 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." *Id.* at 589. This Court then applied that rule to Arizona's specific capital sentencing scheme and held: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

In support of that holding, this Court reasoned:

> In effect, "the required finding [of an aggravating circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." The Arizona first degree-murder statute "authorizes a maximum penalty of death only in a formal sense," for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13-1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment *as provided by § 13-703*." (emphasis added)).

Id. at 604. (some internal citations omitted).

Thus, as this Court emphasized, section 13-703 of the Arizona Revised Statutes Annotated was the crucial statutory provision. In relevant part, that provision stated: the trial court "*shall* impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that *there are no mitigating circumstances sufficiently substantial to call for leniency*." Ariz. Rev. Stat. Ann. § 13-703(F) (2001) (emphasis added); *see also Ring*, 536 U.S. at 593.

However, this Court had previously recognized that section 13-703(F) "places on [the defendant] the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton v. Arizona*, 497 U.S. 639, 650 (1990), *overruled on other*

grounds, *Ring*, 536 U.S. at 609.[8] Stated differently, "once the State has met its burden," section 13-703(F) "tasks the defendant with the burden of proving sufficient mitigating circumstances to overcome the aggravating circumstances and that a sentence less than death is therefore warranted." *Kansas v. Marsh*, 548 U.S. 163, 173 (2006).

2. That particular feature of Arizona's capital sentencing scheme helps explain why "Ring's claim [wa]s tightly delineated: He contend[ed] only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him," *Ring*, 536 U.S. at 597 n.4. More specifically, considering the operation and effect of that scheme, the determination–as to whether there were no mitigating circumstances sufficiently substantial to call for leniency–was not the functional equivalent of an element because it did not increase the penalty for first-degree murder.

On one hand, under Arizona's scheme, a determination as to whether at least one aggravating factor existed was a determination "on which the legislature condition[ed] *an increase* in [capital defendants'] maximum punishment," *id.* at 589 (emphasis added). On the other, a determination as to whether there were no mitigating circumstances sufficiently substantial to call for leniency was essentially designed to "induce a sentencer to give a lesser punishment," *id.* at 611 (Scalia, J.,

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[8] In *Walton*, 497 U.S. at 642-44, this Court addressed the 1989 version of the statute at issue. But, as relevant here, the 1989 version was indistinguishable from the 2001 version addressed in *Ring*. *Compare* Ariz. Rev. Stat. Ann. § 13-703(F) (1989) *with* Ariz. Rev. Stat. Ann. § 13-703(F) (2001).

concurring).

As a result, under Arizona's scheme, a sentence of death became available *solely* on the basis of determinations that (1) the victim was dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor existed. At that point, the burden was on the defendant to convince the sentencer to select a "lesser punishment"–life without parole. And if the defendant failed to meet that burden, the court did not even get to decide what sentence to select; it was required to impose death. *Marsh*, 548 U.S. at 172-73.

3. Florida's capital sentencing scheme operates differently. Like under Arizona's scheme, for a sentence of death to become available under Florida's scheme, the four determinations mentioned immediately above are necessary. But unlike under Arizona's scheme, under Florida's scheme, those determinations are not sufficient for death to become available. Instead, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are also necessary. *See* discussion *supra* pp. 16-17.

Further, unlike the determination as to whether there are no mitigating circumstances sufficiently substantial to call for leniency, those latter two determinations are not designed to "induce a sentencer to give a lesser punishment." Rather, those two determinations concern whether–in the first place–to increase the maximum punishment from life without parole to death.[9]

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[9]That is particularly true of the determination as to whether "the aggravating factors are sufficient to warrant a possible sentence of death," Fla. Std. Jury Instr. (Crim.) 3.12(e) (2018). By its own

Moreover, unlike under Arizona's scheme, under Florida's scheme, the determination as to whether the aggravating factors outweigh the mitigating circumstances is *not* "merely a means to reaching a decision," *Marsh*, 548 U.S. at 179, as to whether to impose death. Instead, that determination itself is "an end," *id.*; if the jury decides the aggravating factors outweigh the mitigating circumstances, the defendant is eligible for the death penalty. Fla. Std. Jury Instr. (Crim.) 3.12(e) (2018). At that point, the jury must reach a separate decision as to whether to select life without parole or death. *Id.*

On that note, at least historically, the "final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the 'mercy' recommendation." *Perry v. State*, 210 So.3d 630, 640 (Fla. 2016), *receded from on other grounds by Rogers*, 285 So.3d at 885-86. Thus, unlike under Arizona's scheme, under Florida's scheme, it is at that final stage where the defendant has an opportunity to convince the sentencer to select a sentence less than death.

E. Requiring the Determinations As To Whether the Aggravating Factors Are Sufficient and Outweigh the Mitigating Circumstances To Be Made Beyond a Reasonable Doubt Furthers Interests Underlying The Constitutional Requirement of Proof Beyond a Reasonable Doubt.

In addressing the constitutional requirement of proof beyond a reasonable doubt,

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terms, how could such a determination be concerned with anything other than deciding whether a sentence of death should be available? Or, stated differently, whether a capital defendant should be eligible for a possible sentence of death?

this Court has "emphasized the societal interests in the reliability of jury verdicts." *Mullaney*, 421 U.S. at 699. And those interests are even greater where the death penalty is concerned because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

Further, this Court has explained that the beyond-a-reasonable-doubt standard promotes fairness by requiring the jury to reach a subjective state of certitude as to the elementary determinations at issue.

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . . "Where one party has at stake an interest of transcending value–as a criminal defendant his liberty–th[e] margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. . . ." 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."

In re Winship, 397 U.S. at 363-64 (internal citations omitted).

In addition, this Court has made clear that the beyond-a-reasonable-doubt standard increases the wider community's confidence in the criminal law by requiring such a state of subjective certitude.

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal

> offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

Applying those principles here, requiring the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt. First, such a requirement promotes reliability by decreasing the odds that a defendant not deserving death would be condemned to that punishment. Second, it advances fairness by reducing the margin of error as to a capital defendant, who has at stake the most extraordinary interest of all–their life. Finally, it increases confidence in the criminal law by assuring the wider community that a defendant condemned to death deserved that punishment.

II. The Florida Supreme Court's Decision Is Wrong.

1. The Florida Supreme Court rejected Newberry's argument that the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances were the functional equivalents of elements because they increase the penalty for first-degree murder, App.27-40, 53-55. The court held that those determinations "are not subject to the beyond a reasonable doubt standard of proof." App.12.

In support of that holding, the court cited *Rogers*, 285 So.3d at 872. App.12. There, the court reasoned the determinations at issue "'are not elements of the capital felony of first-degree murder.'" *Id.* at 885. Instead, according to the court, they are

simply determinations "'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.*

2. Thus, the Florida Supreme Court essentially calculated: (1) first-degree murder is a "capital felony"; (2) as a result, the death penalty may, by definition, be imposed on any defendant convicted of first-degree murder; and (3) the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are simply sentencing factors. That reasoning is wrong.

As an initial matter, it overlooks that, in ascertaining which determinations increase the penalty for a crime, "the characterization of a fact or circumstances as an 'element' or a 'sentencing factor' is not determinative." *Ring*, 536 U.S. at 605. Instead, the appropriate analysis "looks to the operation and effect of the law as applied and enforced by the state." *Mullaney*, 421 U.S. at 699. Thus, the "the relevant inquiry is one not of form, but of effect," *Apprendi*, 530 U.S. at 494.

Beyond that, in *Ring*, this Court rejected the foundational premise of the Florida Supreme Court's reasoning–that first-degree murder is a "capital felony," and thus, the death penalty may, by definition, be imposed on any defendant convicted of that offense. In short, there, the Arizona first-degree murder statute "specifie[d] 'death or life imprisonment' as the only sentencing options." *Ring,* 536 U.S. at 603-04. But this Court concluded the statute "'authorizes a maximum penalty of death only in a formal sense,' for it explicitly cross-references the statutory provision requiring the finding of

an aggravating circumstance before imposition of the death penalty." *Id.* at 604.

Similarly, in Florida, section 782.04 specifies that first-degree murder is a "capital felony, punishable as provided in s. 775.082." Fla. Stat. § 782.04(1)(a) (2017). However, section 775.082, in turn, provides that "a person who has been convicted of a capital felony shall be punished by death *if* the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death, *otherwise* such person shall be punished by" life without parole. Fla. Stat. § 775.082(1)(a) (2017) (emphasis added). And section 921.141 operates so as to demand not only the finding of at least one aggravating factor, but also determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances, before a capital defendant is eligible for death. *See* discussion *supra* pp. 16-17.

That being the case, similar to the Arizona statute in *Ring*, the Florida first-degree murder statute explicitly cross-references statutory provisions that require additional determinations before imposition of the death penalty. As a result, though the Florida statute may specify first-degree murder is a "capital felony," it "'authorizes a maximum penalty of death only in a formal sense,'" *Ring,* 536 U.S. at 604.

3. On a separate note, in its decision, the Florida Supreme Court specified that the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances "are not *subject to* the beyond a reasonable doubt standard of proof." App.12 (emphasis added). Moreover, the State essentially argued

below that, even if those determinations are the functional equivalents of elements, they do not have to be made beyond a reasonable doubt because only purely factual determinations, as opposed to determinations involving normative judgment, are susceptible to proof beyond a reasonable doubt. *See* Answer Brief of Appellee at 22, 24-26, *Newberry v. State*, 288 So.3d 1040 (Fla. 2019) (No. SC18-1133). Any such reasoning is also wrong.[10]

As an initial matter, this Court has distinguished between "'ultimate' or 'elemental' fact[s]" and "'evidentiary' or 'basic' facts," and made clear that "the factfinder's responsibility at trial" is "to find the *ultimate facts* beyond a reasonable doubt." *Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156 (1979) (emphasis added). And some elements, or "ultimate facts," have multiple components, such as a purely factual component and an application-of-a-standard-to-facts component.

For instance, in *United States v. Gaudin*, 515 U.S. 506, 511 (1995), the Government argued that "materiality" was "a 'legal' question, and that although [this Court] has sometimes spoken of 'requiring the jury to decide 'all the elements of a criminal offense,' the principle actually applies to *only factual components* of the essential elements.'" But this Court rejected that argument, *id.* at 522-23, and reasoned:

Deciding whether a statement is "material" requires the determination

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[10] In its recent decision in *State v. Poole*, which addressed Florida's *pre-2016* capital sentencing scheme, the Florida Supreme Court employed such reasoning with respect to a determination as to whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." SC18-245, 2020 WL 3116597, at *11 (Fla. Jan. 23, 2020) (quoting Fla. Stat. § 921.141(3)(b) (2011)).

> of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was [the entity to which the statement was made] trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts. What the government apparently argues is that the Constitution requires only that (a) and (b) be determined by the jury, and that (c) may be determined by the judge. [But] the application-of-legal-standard-to-fact sort of question posed by (c), commonly called a "mixed question of law and fact," has typically been resolved by juries. Indeed, our cases have recognized in other contexts that the materiality inquiry, *involving as it does "delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those inferences to him* . . . [is] peculiarly on[e] for the trier of fact."

Id. at 512 (emphasis added) (internal citations omitted).

Further, some elements, or "ultimate facts," have both a purely factual component and an application-of-a-*normative*-standard-to-facts component. For instance, to convict a defendant of obscenity, the jury must determine 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 (2020). Or, to convict a defendant of various crimes, the jury may have to determine whether the defendant committed the crime out of duress or necessity, including whether the "harm that the defendant avoided . . . outweighed the harm caused by committing the" crimes. Fla. Std. Jury Instr. (Crim.) 3.6(k) (2020). Or, to determine whether the especially heinous, atrocious, or cruel aggravating factor exists, the jury must determine whether "the crime was conscienceless or pitiless." Fla. Std. Jury Instr. (Crim.) 7.11 (2020).

Similarly, determinations as to whether the aggravating factors are sufficient

and outweigh the mitigating circumstances have both a purely factual component and an application-of-a-normative-standard-to-facts component. In the context of the former component, a juror must determine the historical facts underlying particular aggravating factors and mitigating circumstances. In the context of the latter, the juror has to determine whether the existing aggravating factors are sufficient and whether they outweigh the existing mitigating circumstances. That inquiry, similar to the inquiry in *Gaudin*, asks the juror to "'draw [inferences] from a given set of facts,'" conduct "'delicate assessments of'" those inferences, and determine "'the significance of those inferences to him,'" 515 U.S. at 512.

With all that in mind, the determinations at issue are susceptible to proof beyond a reasonable doubt. In this situation, "proof beyond a reasonable doubt" can be interpreted to mean two different things. "[O]ne interpretation focuses on *measuring the balance* between the aggravating factors and the mitigating factors." *State v. Rizzo*, 833 A.2d 363, 377 (Conn. 2003). The "other interpretation focuses on the *level of certitude* required of the jury in determining that the aggravating factors outweigh the mitigating factors." *Id.*

Considering those two interpretations, the "fallacy of the argument [that the determinations at issue are not susceptible to proof beyond a reasonable doubt] lies in the failure to perceive the standard of proof in terms of the level of confidence which the factfinder should have in the accuracy of his finding." *Ford v. Strickland*, 696 F.2d 804, 879 (11th Cir. 1983) (Anderson, J., dissenting). More specifically, assume "'the

relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof,'" *Ex parte Bohannon*, 222 So.3d 525, 529-30 (Ala. 2016). Even then, the determinations at issue are susceptible to a "'subjective state of certitude,'" *In re Winship*, 397 U.S. at 364. In short, jurors could reasonably ask themselves if they have an "abiding conviction," Fla. Std. Jury Instr. (Crim.) 3.7 (2018), that the aggravating factors are sufficient and outweigh the mitigating circumstances.

Reflecting that fact, numerous states require determinations beyond a reasonable doubt as to whether the aggravating factors are sufficient, they outweigh the mitigating circumstances, or both. *See, e.g.*, Ark. Code Ann. § 5-4-603(a) (2019); N.Y. Crim. Proc. Law § 400.27(11)(a) (2019); Ohio Rev. Code Ann. § 2929.03(D)(2) (2019); Tenn. Code Ann. § 39-13-204(g)(1)(B) (2019); Utah Code Ann. § 76-3-207(5)(b) (2019); *see also Rauf v. State*, 145 A.3d 430, 481-82 (Del. 2016).

III. The Question Presented Has Considerable Practical Impact.

Multiple state courts of last resort and federal courts of appeal have essentially reasoned that determinations similar to the ones at issue here do not have to be made beyond a reasonable doubt because only purely factual determinations, as opposed to determinations involving normative judgment, are susceptible to proof beyond a reasonable doubt. *See, e.g.*, *Poole*, 2020 WL 370302, at *11; *Ex parte Bohannon*, 222 So.3d at 529-33; *United States v. Gabrion*, 719 F.3d 511, 532-33 (6th Cir. 2013) (en banc); *United States v. Sampson*, 486 F.3d 13, 31-32 (1st Cir. 2007).

For instance, in *Poole*, 2020 WL 370302, at *11, the Florida Supreme Court

indicated that, for a determination to be susceptible to proof beyond a reasonable doubt, it had to "lend itself to being objectively verifiable." In *Ex parte Bohannon*, 222 So.3d at 530, the Alabama Supreme Court indicated that, for a determination to be susceptible to such proof, it had to be capable of being "'reduced to a scientific formula or the discovery of a discrete, observable datum.'" In *Gabrion*,719 F.3d at 532, the Sixth Circuit indicated that, for a determination to be susceptible to such proof, it had be "binary–whether a particular fact existed or not."

But where is the limit on that general principle? To take one example, most jurisdictions require "the prosecution to prove the absence of self-defense beyond a reasonable doubt." *Mullaney*, 421 U.S. at 702, 702 n.30; *see also Dixon v. United States*, 548 U.S. 1, 24 (2006) (Breyer, J., dissenting). And the determination as to whether a defendant acted in self-defense is not purely factual and involves normative judgment.

> Imagine a trial where the government presents testimony from eyewitnesses who describe a confrontation between the defendant and the victim. All agree that the defendant shot the victim, and all give the same general account of the victim's actions preceding the shooting. The defendant takes the stand and testifies that he thought the victim was about to shoot him and therefore shot the victim first, in self-defense. During deliberations, the jury's focus would not be on the type of binary yes-or-no fact finding contemplated by the majority. Rather, the jury would be required to engage in a balancing of the objective facts with personal and moral judgment to determine if it was reasonable for the defendant to think that the force he used was necessary to defend himself against an immediate threat. . . . These judgments are not binary yes-or-no decisions that depend on which version of the facts a jury believes. Rather, they entail value-laden balancing of the sort involved when a jury is asked to recommend life or death.

Gabrion,719 F.3d at 548-49 (Moore, J. dissenting).

Further, a number of determinations as to both elements and their functional equivalents are not purely factual and involve normative judgment. For instance, the crime of obscenity requires determinations as to whether "material depicts or describes sexual conduct in a patently offensive way" or "taken as whole, lacks serious literary, artistic, political or scientific value," Fla. Std. Jury Instr. (Crim.) 24.5 (2020). The especially heinous, atrocious, or cruel aggravating factor requires the determination as to whether "the crime was conscienceless or pitiless," Fla. Std. Jury Instr. (Crim.) 7.11 (2020). And "to increase the statutory maximum nonstate prison sanction to a state prison sentence" in certain instances in Florida, the factfinder is required to determine whether "a nonstate prison sanction could present a danger to the public." *Brown v. State*, 260 So.3d 147, 149-51 (Fla. 2018).

Is there an exception to the general requirement of proof beyond a reasonable doubt for determinations, such as these, that are not purely factual and involve normative judgment? This Court should grant review and address that question.

IV. The Question Presented Offers This Court an Opportunity To Clarify Analytical Tension in a Critical Area of This Court's Due Process Clause Jurisprudence.

In *Gaudin*, 515 U.S. at 510, this Court applied the general rule that "criminal convictions [must] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." In the process, this Court rejected the State's argument that, in essence, there is an exception to that general rule for determinations that are not purely factual. *Id.* at 511-12, 522-23. By the same token, this Court basically indicated that the general rule applies

even to determinations that ask a juror to "'draw [inferences] from a given set of facts,'" conduct "'delicate assessments of'" those inferences, and determine "'the significance of those inferences to him.'" *Id.*

On the other hand, in *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016), this Court expressed "doubt" as to whether it is "even possible to apply a standard of proof" to determinations that are not "purely factual." By the same token, this Court appeared to suggest any determinations that ask jurors to exercise judgment are not susceptible to proof beyond a reasonable doubt. *Id.*[11]

As a result, where determinations as to both elements and their functional equivalents are concerned, there is analytical tension within this Court's Due Process Clause jurisprudence. More specifically, it is unclear whether the Due Process Clause requires such determinations to be made beyond a reasonable doubt where the respective determinations are not purely factual and involve judgment. This Court should grant review and clarify that matter.

[11] The statements at issue in *Carr* appear to be dicta. Immediately prior to those statements, this Court indicated it was "[a]pproaching the question in the abstract, and without reference to our capital-sentencing case law." *Carr*, 136 S. Ct. at 642.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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