CAPITAL CASE

No. 20-5072

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 FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim of fundamental error in the state's standard penalty phase jury instructions and holding that neither sufficiency of the aggravating factors nor weighing of the aggravating factors against the mitigating circumstances are elements of the crime of capital murder.

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Newberry v. State*, 288 So.3d 1040 (Fla. 2019).

JURISDICTION

On December 12, 2019, the Florida Supreme Court affirmed the death sentence imposed following the resentencing. *Newberry v. State*, 288 So.3d 1040 (Fla. 2019) (SC18-1133).[1] On December 27, 2019, Newberry filed a motion for rehearing. On February 11, 2020, the Florida Supreme Court denied the rehearing. On July 9, 2020, Newberry filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d).[2] This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1, U.S. Const. Amend. XIV.

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[1] The Florida Supreme Court's docketing is available online under case number SC18-1133.

[2] This Court, in response to the COVID-19 outbreak, extended the deadline to timely file a petition from 90 days to 150 days.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Newberry and two younger co-perpetrators targeted the victim at a local club in Jacksonville, Florida. *Newberry v. State*, 214 So.3d 562, 563-65 (Fla. 2017). Newberry shot the victim twelve times with a AK-47 before the victim even had the opportunity to give his property to Newberry, as Newberry had ordered him to do. *Id.* at 564. The jury convicted Newberry of both first-degree premeditated and first-degree felony murder, as well as armed robbery with a firearm and found that Newberry had personally discharged the firearm. *Id.* at 565. The first jury recommended the death penalty by a vote of eight to four. *Id.* at 566. The trial court originally found two aggravating factors, including the prior violent felony aggravator based on Newberry's four prior violent felony convictions, and sentenced Newberry to death. *Id.* at 566 & n.6

Newberry appealed his convictions and death sentence to the Florida Supreme Court. The Florida Supreme Court affirmed the convictions but vacated the death sentence and remanded for resentencing. *Newberry*, 214 So.3d at 563, 568. The Florida Supreme Court found that the evidence was sufficient to support the first-degree murder conviction and affirmed the convictions. *Id.* at 567. Newberry raised several penalty phase issues including an argument that his death sentence violated *Hurst v. State*, 202 So.3d 40 (Fla. 2016). The Florida Supreme Court agreed and vacated the sentence based on *Hurst v. State*. *Newberry*, 214 So.3d at 567-68. The Florida Supreme Court found that the *Hurst v. State* error was not harmless because the jury's recommendation of death was not unanimous. *Id.*

At the second penalty phase, the State presented numerous witnesses including the four victims of Newberry's prior crimes to establish the prior violent felony aggravating factor. *Newberry v. State*, 288 So.3d 1040, 1044 & n.3 (Fla. 2019). The State presented the victim of an aggravated battery who Newberry had shot six times. *Id.* at n.3. The State also presented the mother of Newberry's four children who was

the victim of Newberry's aggravated assault conviction. *Id.* at n.3. The State additionally presented two police officers who were the victims of Newberry's two attempted first-degree murder convictions, both of whom Newberry had shot. *Id.* The defense presented six witnesses — four lay witnesses and two expert witnesses. *Id.* at 1044. The two experts were Dr. Stephen Bloomfield, an expert in forensic and clinical psychology, and Dr. Steven Gold, a psychologist who specializes in trauma psychology. *Id.* at 1044-45. The jury unanimously found three aggravating factors beyond a reasonable doubt. *Id.* at 1045. The jury unanimously recommended a death sentence.

At the *Spencer*[3] hearing, which is a second bench penalty phase, during which both parties may present additional evidence to the judge alone, the defense presented Newberry's medical records to support Dr. Gold's testimony. The "trial court made its own findings with respect to the aggravation and mitigation." *Id.* at 1045. The trial court found two statutory aggravating factors: 1) prior violent felony based on Newberry's prior violent felony convictions, and 2) in the course of a robbery merged with pecuniary gain, both of which it gave great weight. *Id.* The trial court considered 36 mitigating circumstances. *Id.* at 1045-46. The trial court concluded that the aggravation "heavily" outweighed the mitigation and sentenced Newberry to death. *Id.* at 1046.

Following the resentencing, Newberry appealed his death sentence to the Florida Supreme Court. *Newberry v. State*, 288 So.3d 1040 (Fla. 2019). Newberry raised six issues on appeal including a claim that Florida's standard jury instructions in capital cases do not inform the jury that the sufficiency of the aggravating factors and the weighing of the aggravating factors against the mitigating circumstances must be established beyond a reasonable doubt. *Id.* at 1047. Newberry raised the jury instruction claim as a claim of fundamental error due to the lack of any

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[3] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

contemporaneous objection to the penalty phase jury instructions in the trial court. The Florida Supreme Court concluded that there was no error in the standard jury instructions, much less fundamental error. The Florida Supreme Court reasoned that the determinations of sufficiency and weighing are not elements and therefore, were "not subject to the beyond a reasonable doubt standard of proof." *Id.* (citing *Rogers v. State*, 285 So.3d 872, 878-79 (Fla. 2019)). The Florida Supreme Court concluded that the "trial court did not err in instructing the jury." *Newberry*, 288 So.3d at 1047.

On December 27, 2019, Newberry filed a motion for rehearing. On February 11, 2020, the Florida Supreme Court denied the rehearing.

On July 9, 2020, Newberry, represented by Assistant Public Defender Richard Bracey, filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT REJECTING A CLAIM OF FUNDAMENTAL ERROR IN THE STATE'S STANDARD PENALTY PHASE JURY INSTRUCTIONS AND HOLDING THAT NEITHER SUFFICIENCY OF THE AGGRAVATING FACTORS NOR WEIGHING OF THE AGGRAVATING FACTORS AGAINST THE MITIGATING CIRCUMSTANCES ARE ELEMENTS OF THE CRIME OF CAPITAL MURDER.

Petitioner Newberry seeks review of a decision of the Florida Supreme Court holding Florida's standard jury instructions in capital cases are not fundamental error. Newberry asserts that Florida's new death penalty statute makes both the sufficiency of the aggravating factors and the weighing of the aggravating factors against the mitigating circumstances elements of the crime of capital murder and that the failure to instruct the jury that both sufficiency and weighing are elements is fundamental error. But Florida's concept of fundamental error, especially as it relates to jury instructions, is a matter of state law over which this Court lacks jurisdiction. Furthermore, the Florida Supreme Court has repeatedly held that sufficiency or weighing are not elements. This Court is bound by the Florida Supreme Court's interpretation of a state statute including its determination of the elements of a crime. *Johnson v. United States*, 559 U.S. 133, 138 (2010). The Florida Supreme Court has held that sufficiency or weighing are not elements, which ends the matter.

The argument that sufficiency and weighing are elements is contrary to the actual text of Florida which explicitly defines eligibility as the jury's finding of one aggravating factor. Once the jury finds an aggravator, the sentencing range includes death and a judge alone may make factual findings that increase the sentence within the range, as this Court explained in *Alleyne v. United States*, 570 U.S. 99 (2013). So, sufficiency and weighing are sentencing considerations, not elements of capital murder. And, indeed, under the reasoning of this Court in *Kansas v. Carr*, 136 S.Ct. 633 (2016),

sufficiency and weighing are not even facts, much less elements of capital murder. It is only facts and elements that must be proven beyond a reasonable doubt and sufficiency and weighing are neither.

Furthermore, there is no conflict between this Court's Sixth Amendment jurisprudence and the Florida Supreme Court's decision in this case. The Florida Supreme Court's decision in this case mirrors this Court's decisions in *Kansas v. Carr*, 136 S.Ct. 633 (2016), and *McKinney v. Arizona*, 140 S.Ct. 702 (2020). The petition ignores *McKinney*. Nor is there any conflict between the federal circuit courts and the state courts of last resort and the Florida Supreme Court's decision in this case. There are no decisions from any lower appellate courts holding that weighing is an element of capital murder after *McKinney*. There is no conflict. For all these reasons, the petition should be denied.

The Florida Supreme Court's decision in this case

Newberry raised a claim in the Florida Supreme Court that the trial court erred in failing to instruct the jury that it must determine beyond a reasonable doubt that the aggravating factors were sufficient and that aggravating factors outweighed the mitigating circumstances. *Newberry v. State*, 288 So.3d 1040, 1047 (Fla. 2019) (No. SC18-1133). The Florida Supreme Court explained that Newberry had not objected to the jury instructions in the trial court and was raising the claim as a claim of fundamental error. *Id.* at 1047. The Florida Supreme Court rejected the claim of fundamental error, finding no error at all. *Id.* (concluding that "the trial court did not err in instructing the jury"). The Florida Supreme Court reasoned that there was no error because the determinations of sufficiency and weighing are not elements subject to the beyond a reasonable doubt standard of proof. The Florida Supreme Court relied on its prior decision in *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019), in which the

Florida Supreme Court previously held that sufficiency, weighing, and the final recommendation were not elements that must be determined by the jury beyond a reasonable doubt.[4]

Issues are solely a matter of state law

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

The issue of fundamental error being raised in the petition is not interwoven with federal law. Rather, the issue is purely an issue of state law. Florida's concept of fundamental error is a matter of state law. While there certainly is some overlap between this Court's concept of structural error and Florida's concept of fundamental error, Florida's concept is significantly broader, especially in the area of jury instructions issues. *Roberts v. State*, 242 So.3d 296 (Fla. 2018) (concluding that an error in a lesser included jury instruction was fundamental error); *Knight v. State*, 286 So.3d 147 (Fla. 2019) (limiting the concept of fundamental error to errors in the jury instruction regarding the crime of conviction). Under this Court's view, an omission

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[4] *Rogers* is currently pending in this Court. *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019), *pet. for cert. filed* May 15, 2020, *Rogers v. Florida*, No. 19-8473. The petition in *Rogers* and the petition in this case raise the same issue and present the same arguments.

or flaw in the jury instructions regarding an element is not structural error. *Neder v. United States*, 527 U.S. 1, 8-20 (1999). Rather, it is subject to harmless error analysis. But, in Florida, fundamental error is not subject to harmless error analysis. *Ramroop v. State*, 214 So.3d 657, 665 (Fla. 2017) (stating that fundamental error is not subject to harmless error review citing *Reed v. State*, 837 So.2d 366, 369-70 (Fla. 2002)). Due to the differences in the federal concept of structural error and the state concept of fundamental error, the issue of fundamental error in the jury instructions being raised in the petition is solely a matter of state law. This Court lacks jurisdiction over the claim of fundamental error.

Florida's death penalty statute

Florida's new death penalty statute, section 921.141, enacted by the Florida legislature in the wake of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), provides that it is the finding of one aggravating factor that makes a defendant eligible for a death sentence. Chapter 2017-1, LAWS OF FLA.; *Hannon v. Sec'y, Fla. Dep't of Corr.*, 716 Fed. Appx. 843, 844 (11th Cir. 2017) (noting the Florida legislature passed Chapter 2017-1, amending Florida's death penalty statute, in response to *Hurst v. State*). Florida's new death penalty statute limits the eligibility finding to one aggravating factor in two different subsections. § 921.141(2)(b)(1), Fla. Stat. (2020) (providing that if the jury does "not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death"); § 921.141(2)(b)(2), Fla. Stat. (2020) (providing that if the jury unanimously "finds at least one aggravating factor, the defendant is eligible for a sentence of death . . ."). The sole factual finding determining eligibility for a death sentence under Florida's statute is the finding of one aggravating factor. So, it is one aggravator, and one aggravator only, that is an element of capital murder that must be found by the jury beyond a

reasonable doubt. Neither sufficiency nor weighing are elements under the text of Florida's current death penalty statute.

Opposing counsel insists that Florida's current death penalty statute makes both sufficiency and weighing elements of the crime of capital murder. Not only is that assertion directly contrary to the actual text of Florida's statute, but the Florida Supreme Court has repeatedly held that sufficiency or weighing are not elements of capital murder.[5] The Florida Supreme Court has explained that weighing is a "subjective determination" which "does not lend itself to being objectively verifiable" and that "cannot be analogized to an element of a crime." *State v. Poole*, 297 So.3d 487, 503 (Fla. 2020), *pet. for cert. filed* August 28, 2020, *Poole v. Florida*, No. 20-250. Instead, weighing is a "discretionary judgment" that neither the state nor the federal constitution require the jury make. *Id.* at 503 (citing *State v. Wood*, 580 S.W.3d 566, 585 (Mo. 2019)). Sufficient aggravating factors, according to the Florida Supreme Court, is one. *Id.* at 502 ("it has always been understood" that "sufficient aggravating circumstances means one or more" citing cases).

Federal courts do not tell state courts how to construe the elements of state criminal statutes. *Johnson v. United States*, 559 U.S. 133, 138 (2010) (noting that

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[5] *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019) (holding that sufficiency and weighing were "not elements of the capital felony of first-degree murder" and stating that "these determinations are not subject to the beyond a reasonable doubt standard of proof"), *pet. for cert. filed* May 15, 2020, *Rogers v. Florida*, No. 19-8473; *State v. Poole*, 297 So.3d 487 (Fla. 2020) (stating that "because the section 921.141(3)(b) selection finding is not a 'fact' that exposes the defendant to a greater punishment," it "is not an element" and "because it is not an element, it need not be submitted to a jury" citing *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016)); *Doty v. State*, ___ So.3d ___, ___, 2020 WL 717815, *3 (Fla. Feb. 13, 2020) (explaining that the determinations of sufficiency and weighing are "not subject to the beyond a reasonable doubt standard of proof" citing *Newberry* and *Rogers*); *Bright v. State*, ___ So.3d ___, ___, 2020 WL 1592942, *8 (Fla. Apr. 2, 2020) (holding that the argument that sufficiency and weighing were elements had "no merit" citing *State v. Poole* and *Rogers*); *Archer v. State*, 293 So.3d 455, 457 (Fla. 2020) (holding the argument that sufficiency and weighing were elements to be "without merit" citing *Rogers*); *Santiago-Gonzalez v. State*, ___ So.3d ___, ___, 2020 WL 3456751, *15 (Fla. June 25, 2020) (holding the argument that weighing was an element to be "without merit" citing *State v. Poole* and *Rogers*). Petitions in both *Rogers* and *State v. Poole* are currently pending in this Court. *Rogers v. Florida*, No. 19-8473; *Poole v. Florida*, No. 20-250.

federal courts are "bound" by the Florida Supreme Court's interpretation of a state statute "including its determination of the elements" citing *Johnson v. Fankell*, 520 U.S. 911, 916 (1997)). "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson*, 520 U.S. at 916 (citing cases). This Court is bound by the Florida Supreme Court's holdings in *Rogers* and *State v. Poole* that sufficiency and weighing are not elements under Florida's death penalty statute.

Opposing counsel insists that the Florida Supreme Court's reading of Florida's death penalty statute is "wrong." Pet. at 23. But this Court is not free to tell the Florida Supreme Court that its reading of a state statute is wrong due to federalism. *Johnson*, 520 U.S. at 916 (observing that the proposition that a state supreme court's interpretation of a state statue is binding on federal courts is "fundamental to our system of federalism"). The Florida Supreme Court has held that neither sufficiency nor weighing are elements of capital murder in Florida, which ends the matter.

No conflict with this Court's Sixth Amendment jurisprudence

There is no conflict between this Court's Sixth Amendment or Due Process jurisprudence and the Florida Supreme Court's decision in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). The Florida Supreme Court's reasoning in its recent decisions in *Rogers, State v. Poole*, and this case exactly mirrors the reasoning of this Court's decisions in *Kansas v. Carr*, 136 S.Ct. 633 (2016), and *McKinney v. Arizona*, 140 S.Ct. 702 (2020). As the Florida Supreme Court recently observed, *McKinney* confirms its recent holding in *State v. Poole* that sufficiency is not an element was a correct reading of the Sixth Amendment. *Owen v. State*, ___ So.3d ___, ___, 2020 WL 3456746, *3, n.2 (Fla. June 25, 2020).

This Court in *Kansas v. Carr* held that the Eighth Amendment did not require

that the jury in a capital case be informed that mitigation was not required to be proven beyond a reasonable doubt. *Carr*, 136 S.Ct. at 642. The *Carr* Court explained that standards of proof associated with elements do not apply to value judgments. *Id.* (expressing doubt whether it is "even possible to apply a standard of proof" to the determination of mitigation because it is "largely a judgment call" rather than a factual determination). The *Carr* Court, in a decision issued after *Hurst v. Florida*, explained that weighing was not a fact, much less an element. Rather, weighing was "mostly a question of mercy." *Id.* The Florida Supreme Court's decision in this case concluding that sufficiency of the aggravation and weighing are not elements completely comports with this Court's reasoning in *Carr*.

And this Court recently in *McKinney* stated that the Sixth Amendment only requires the jury to find one aggravating factor, it does not require the jury to perform weighing. The *McKinney* Court explained that, under *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, "a jury must find the aggravating circumstance that makes the defendant death eligible." *McKinney*, 140 S.Ct. at 707. The *McKinney* Court noted, that under "this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found." *Id.* at 705 (citing cases). The Court in *McKinney* stated that *Ring* and *Hurst v. Florida* do "not require jury weighing of aggravating and mitigating circumstances." *Id.* at 708. Rather, states, like Florida, that leave the ultimate sentencing decision to the judge may continue to do so in the wake of *Hurst v. Florida*. *Id.* at 708 (quoting *Ring*, 536 U.S. at 612 (Scalia, J., concurring)). The *McKinney* Court reaffirmed its prior holding in *Clemons v. Mississippi*, 494 U.S. 738 (1990), which permitted appellate reweighing of the aggravation and mitigation in the wake of *Hurst v. Florida*. *McKinney*, 140 S.Ct. at 708 ("*Ring* and *Hurst* did not overrule *Clemons*").

So, according to both this Court and the Florida Supreme Court, the only

element of capital murder is the finding of one aggravating factor. *McKinney*, 140 S.Ct. at 705; *State v. Poole*, 297 So.3d at 502-03 (stating that under "longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances" and that "under longstanding Florida law, it is the finding of an aggravating circumstance that exposes the defendant to a death sentence"). Both this Court and the Florida Supreme Court agree that sufficiency and weighing are not elements under the Sixth Amendment.

Opposing counsel does not cite, discuss, or distinguish this Court's recent decision in *McKinney*, despite that opinion being issued over four months before the petition in this case was filed. To establish any present conflict with this Court's Sixth Amendment jurisprudence, Newberry must account for *McKinney* but he does not do so in the petition. Instead, Newberry points to the tension between *United States v. Gaudin*, 515 U.S. 506, 510 (1995), and *Kansas v. Carr*, 136 S.Ct. 633 (2016), in an attempt to establish conflict. Pet. at 31. But the Florida Supreme Court did not address that tension in its opinion in this case. Rather, the Florida Supreme Court read a state statute to determine the elements of capital murder and rejected a claim of fundamental error in Florida's standard jury instructions. Even if there is some tension between *Gaudin* and *Carr*, this case would not be the proper case to resolve that tension.[6]

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[6] Moreover, there is little, if any, real tension between *Gaudin* and *Carr*. This Court in *Gaudin* decided that materiality was an element of a federal criminal statute, in a case where the Government conceded that it was an element. *Carr*, on the other hand, concerned whether the Eighth Amendment required that the jury instructions in capital cases inform a jury that mitigating circumstances do not have to be proven beyond a reasonable doubt. *Gaudin* involved the false statements statute, 18 U.S.C. § 1001, but *Carr* involved Kansas' death penalty jury instructions regarding the standard of proof. The *Carr* Court openly acknowledged that mitigation often has a factual aspect to it but thought that any jury instruction that split mitigation into its component parts would only cause confusion. *Carr*, 136 S. Ct. at 642 ("It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof"). But surely opposing counsel is not suggesting that mitigation is an element under this Court's *Apprendi v. New Jersey*, 530 U.S. 466 (2000), line of cases. Elements are facts that the

Nor does the Florida Supreme Court rejecting the claim as a matter of fundamental error conflict with this Court's holdings in *Neder v. United States*, 527 U.S. 1 (1999), or *Washington v. Recuenco*, 548 U.S. 212 (2006). The *Neder* Court held that the jury's failure to find an element was not structural error. *Neder*, 527 U.S. at 8-13. Rather, that failure was subject to harmless error analysis and was harmless in the case, given the evidence. *Neder*, 527 U.S. at 19-20. And the *Recuenco* Court also concluded that violations of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), were not structural error. Rather, they were subject to harmless error analysis as well. *Recuenco*, 548 U.S. at 220-22. Even if viewed as a federal question rather than a state law matter, there is no conflict between this Court's structural error jurisprudence and the Florida Supreme Court's decision in this case rejecting the claim of fundamental error.

There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with the federal circuit courts or state courts of last resort

There is also no conflict between the decision of any federal appellate court or any state supreme court and the Florida Supreme Court decision in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme

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prosecution proves but mitigation is proven by the defense. And, if proven, mitigation operates to decrease the sentence. To be an element under *Apprendi*, the fact must increase or aggravate the sentence. Any determination, even if viewed as a fact, that decreases the sentence cannot be an element under *Apprendi* and its progeny. Mitigation is not an element of capital murder. There cannot be any real tension between a case about elements and a case that is not about elements. There is no serious tension between *Gaudin* and *Carr*.

courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

There is no conflict between the federal appellate courts or the state courts of last resort and the Florida Supreme Court's decision in this case. Opposing counsel points to no federal circuit court decision or state supreme court decision holding that sufficiency or weighing are elements in the wake of this Court's recent decision in *McKinney*.

Prior to *McKinney*, the Tenth Circuit had rejected an argument that *Hurst v. Florida* requires the jury to perform the weighing function. *Underwood v. Royal*, 894 F.3d 1154, 1185-86 (10th Cir. 2018), *cert. denied*, *Underwood v. Carpenter*, 139 S.Ct. 1342 (2019) (No. 18-7442). There certainly is no conflict between the Tenth Circuit and the Florida Supreme Court's decision in this case.

Opposing counsel improperly relies on a dissenting opinion from the Sixth Circuit to establish conflict. Pet. at 30 (quoting *United States v. Gabrion*, 719 F.3d 511, 548-49 (6th Cir. 2013) (en banc) (Moore, J., dissenting)).[7] The majority in the Sixth Circuit's en banc decision in *Gabrion*, first observed that, contrary to the dissent's view, mitigation was a "moral concept" and then rejected the argument that anything other than one aggravating factor had to be found by the jury at the beyond a reasonable doubt standard. *Id.* at 522, 531-33. The Sixth Circuit en banc rejected the argument the jury had to determine weighing at the beyond a reasonable doubt standard of proof

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[7] Judge Moore believes that a federal capital jury must find that the aggravating factors "substantially" outweigh the mitigating factors beyond a reasonable doubt standard for a defendant to be sentenced to death, despite the text of the Federal Death Penalty Act not including the phrase "substantially" outweigh or that standard of proof. *Gabrion*, 719 F.3d at 545. The Federal Death Penalty Act provides that the aggravating factors must "sufficiently" outweigh the mitigating factors. 18 U.S.C. § 3593(e). The Federal Death Penalty Act only requires that aggravating factors be established beyond a reasonable doubt. 18 U.S.C. § 3593(c).

explaining that weighing was a "moral judgment," not "a finding of fact." *Id.* at 531-33 (citing six other circuit cases). But the en banc majority opinion in *Gabrion* agrees with the logic of the Florida Supreme Court's decisions in *Rogers*, *State v. Poole* and this case. There is no conflict between the Sixth Circuit's decision in *Gabrion* and the Florida Supreme Court's decision in this case. Indeed, the Florida Supreme Court in *State v. Poole* relied on the Sixth Circuit's decision in *Gabrion*. *State v. Poole*, 297 So.3d at 503 (quoting *Gabrion*, 719 F.3d at 533). And *Gabrion* was decided by the Sixth Circuit before either *Hurst v. Florida* or *McKinney* were decided anyway. There certainly is no conflict between the Sixth Circuit and the Florida Supreme Court's decision in this case.

Other state supreme courts had also rejected arguments that *Hurst v. Florida* required jury weighing prior to *McKinney*.[8] Indeed, the Florida Supreme Court relied on the Missouri Supreme Court's decision in *State v. Wood*, 580 S.W.3d 566, 582-88

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[8] *Ex parte Bohannon*, 222 So.3d 525, 532-33 (Ala. 2016) (rejecting a *Hurst v. Florida* challenge and explaining that weighing is a "moral or legal judgement," not a factual determination citing *California v. Ramos*, 463 U.S. 992, 1008 (1983), and *Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring)), *cert. denied, Bohannon v. Alabama*, 137 S.Ct. 831 (2017) (No. 16-6746); *Leonard v. State*, 73 N.E.3d 155, 168-69 (Ind. 2017) (concluding that *Hurst v. Florida* does not require weighing be made beyond a reasonable doubt, in a non-capital case); *Evans v. State*, 226 So.3d 1, 39 (Miss. 2017) (noting the *Hurst v. Florida* decision "did not rest upon or even address" the beyond a reasonable doubt standard of proof), *cert. denied, Jordan v. Mississippi*, 138 S.Ct. 2567 (2018) (Nos. 17-7153, 17-7245); *State v. Wood*, 580 S.W.3d 566, 582-88 (Mo. 2019) (en banc) (holding Missouri's deadlock statute allowing the judge to sentence the defendant to death did not violate the Sixth Amendment right to a jury trial under *Hurst v. Florida* provided the jury finds at least one statutory aggravating circumstance beyond a reasonable doubt), *cert. denied, Wood v. Missouri*, ___ S.Ct. ___, 2020 WL 1906578 (2020) (No. 19-967); *State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018) (noting that most federal and state courts agree that *Hurst v. Florida* did not hold that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances), *cert. denied, Lotter v. Nebraska*, 139 S.Ct. 2716 (2019) (No. 18-8415); *Jeremias v. State*, 412 P.3d 43, 54, 57-59 (Nev. 2018) (describing weighing as "part of the individualized consideration" of the selection phase to determine an appropriate sentence, not a factual determination, and observing that ascribing a burden of proof to that determination "would be pointless" citing *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016), and rejecting an argument that *Hurst v. Florida* required the jury be instructed that weighing must be found at the beyond a reasonable doubt standard of proof), *cert. denied, Jeremias v. Nevada*, 139 S.Ct. 415 (2018) (No. 18-5331); *State v. Mason*, 108 N.E.3d 56, 59-68 (Ohio 2018) (rejecting an argument that Ohio's death penalty statute was unconstitutional in the wake of *Hurst v. Florida* and noting that nearly "every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision"), *cert. denied, Mason v. Ohio*, 139 S.Ct. 456 (2018) (No. 18-5303).

(Mo. 2019) (en banc), *cert. denied*, *Wood v. Missouri*, ___ S.Ct. ___, 2020 WL 1906578 (2020) (No. 19-967), in its decision in *State v. Poole*. *State v. Poole*, 297 So.3d at 503 (citing *State v. Wood*, 580 S.W.3d at 585). There is certainly is no conflict with these state supreme courts and the Florida Supreme Court's decision in this case.

The Delaware Supreme Court held that *Hurst v. Florida* required a jury, not a sentencing judge, to perform the weighing and to do so beyond a reasonable doubt in *Rauf v. State*, 145 A.3d 430 (Del. 2016). But *Rauf* was decided prior to *McKinney*. This Court clarified in *McKinney* that the only element for Sixth Amendment purposes in a capital case is the finding of one aggravator. *McKinney*, 140 S.Ct. at 705-06.[9]

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[9] While some state supreme courts have held that weighing is an element that must be proven beyond a reasonable doubt, those courts have done so mostly as a matter of state statutory law, not as a matter of the Sixth Amendment and those decisions were issued many years prior to *McKinney*. In most of these states, that standard of proof was established long before *Hurst v. Florida* was decided in 2016. Indeed, those standards were established before *Ring v. Arizona* was decided in 2002, as well as before *Apprendi* was decided in 2000. *See, e.g., Hill v. State*, 713 S.W.2d 233, 238 (Ark. 1986) (addressing the 1977 version of the state statute that requires aggravation to outweigh mitigation beyond a reasonable doubt); *People v. Tenneson*, 788 P.2d 786, 790 (Col. 1990) (holding that the jury must be convinced beyond a reasonable doubt that any mitigation does not outweigh aggravation); *State v. McDougall*, 301 S.E.2d 308, 327 (N.C. 1983) (stating that the jury must be persuaded beyond a reasonable doubt that aggravation outweighs mitigation); *State v. Biegenwald*, 524 A.2d 130, 158 (N.J. 1987) (citing to the state statute that requires the State prove beyond a reasonable doubt that aggravation outweighs mitigation); *People v. Harris*, 676 N.Y.S.2d 458, 459 (N.Y. 1998) (citing the state statute that requires the jury unanimously find beyond a reasonable doubt that aggravation "substantially" outweighs mitigation); *State v. McKinney*, 74 S.W.3d 291, 319-20 (Tenn. 2002) (citing the 2000 state statute that requires that the aggravation outweigh mitigation beyond a reasonable doubt); *State v. Wright*, 90 P.3d 644, 647 (Utah Ct. App. 2004) (citing the 2003 state statute that the jury be persuaded beyond a reasonable doubt that aggravation outweighs mitigation); *State v. Jenkins*, 473 N.E.2d 264, 275 (Ohio 1984) (citing the state statute that requires that the State prove beyond a reasonable doubt that aggravation outweighs mitigation). These states were probably attempting to avoid the equipoise problem that occurs when the aggravation is equal to the mitigation that ultimately was resolved by this Court in *Kansas v. Marsh*, 548 U.S. 163, 173 (2006). The *Marsh* Court held that a death sentence may constitutionally be imposed where the aggravating circumstances and mitigating circumstances are equal in weight. But referring to the equipoise problem in standard of proof terms is a misnomer. Instead, to avoid the equipoise problem, these states' statutes and jury instructions should be worded to provide that the jury should not impose a death sentence unless the jury concludes that the aggravation outweighs the mitigation or even substantially outweighs the mitigation. And, while it is certainly proper for a state to make a policy decision to limit the death penalty to cases where the aggravation outweighs the mitigation or even substantially outweighs the mitigation, that concept should not be expressed in standard of proof language which should be reserved for factual determinations. Standards of proof do not apply to value judgments, such as sufficiency and weighing as this Court explained in *Kansas v. Carr*. *Carr*, 136 S.Ct. at 642 (2016) (expressing doubt whether it is "even possible to apply a standard of proof" to the determination of mitigation because it is "largely a

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state court of last resort in the wake of *McKinney*. Because there is no conflict among the lower appellate courts, review in this Court should be denied.

Elements of capital murder

Opposing counsel is asserting that because Florida's death penalty statute requires the jury determine sufficiency and weighing before recommending a sentence, both those determinations automatically become elements. The mistake that opposing counsel is making is viewing any consideration in sentencing as an element that must be found by a jury. But this Court in *Alleyne v. United States*, 570 U.S. 99 (2013), addressed that matter, explaining that the ruling regarding minimum mandatory sentences did "not mean that any fact that influences judicial discretion must be found by a jury." *Id.* at 116. Instead, this Court has "long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Id.* The *Alleyne* Court explained that, while juries must find facts that increase or aggravate the penalty, a judge may find all other facts. *Id.* at 113 n.2. While such judicial factfinding "may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." *Id.* at n.2. The *McKinney* Court also noted that this Court in *Apprendi* had been careful to avoid "any suggestion" that it was impermissible for a judge in sentencing to take into consideration various factors relating both to offense and offender when determining a sentence "*within the range.*" *McKinney*, 140 S.Ct. at 707 (citing *Apprendi*, 530 U.S. at 481) (emphasis in original).

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judgment call" rather than a factual determination). But, regardless of the proper terminology, these cases do not establish conflict with the Sixth Amendment *Apprendi* line of cases in the wake of *McKinney*. Rather, these are pre-*McKinney* cases involving state statutory law.

Once the jury finds one aggravator, the sentencing range in a capital case is increased to death and a judge alone may make all other determinations including the sufficiency and weighing determinations. Constitutionally, it is the finding of one aggravating factor that increases the sentence to death. A Florida judge in determining the sentence in a capital case, may make factual findings regarding sufficiency, mitigation, and weighing because all those findings are "within the range." Under the logic of *Alleyne*, because sufficiency and weighing do not increase or aggravate the sentence to death, they are sentencing considerations, not elements. The Florida legislature made a policy decision to have a jury recommendation of death in capital cases and provided guidance to the jury on how to arrive at that recommendation but that does not turn any and all determinations made by the jury to arrive at that recommendation, such as sufficiency and weighing, into elements.

Opposing counsel is claiming, in effect, that the Florida legislature expanded the eligibility phase to include any and all determinations the penalty phase jury makes during the process of arriving at its final recommendation regarding a sentence. But, again, that claim is directly contrary to the actual text of the statute where the legislature explicitly defined eligibility as the jury's finding of at least one aggravator. § 921.141(2)(b)(1), Fla. Stat. (2020); § 921.141(2)(b)(2), Fla. Stat. (2020). This view expands the eligibility phase to include the entire penalty phase and has the selection phase only start with the *Spencer* hearing. Additionally, such a definition of the eligibility phase would include mitigation and mercy, as well as sufficiency and weighing, because they are steps in the process too. Before a jury can weigh aggravation against mitigation, it must find mitigation. And the penultimate step before the jury make its final recommendation is consideration of mercy. *Reynolds v. State*, 251 So.3d 811, 816, n.5 (Fla. 2018) (explaining the mercy instruction is the portion of Florida's standard jury instructions in capital cases, instruction 7.11, "that

informs a jury that they are 'neither compelled nor required to recommend' death"), *cert. denied, Reynolds v. Florida*, 139 S.Ct. 27 (2018). But both mitigation and mercy act to decrease the sentence. It turns the definition of eligibility on its head to consider either mitigation or mercy to be eligibility factors. *Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998) (contrasting the eligibility phase, which "narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances," with the selection phase). Mitigation and mercy are not eligibility factors, they are selection factors. Sufficiency, mitigation, weighing, and mercy are all selection factors, not eligibility factors.

More practically, opposing counsel does not attempt to explain how either sufficiency or weighing could be proven at any standard of proof, much less at the beyond a reasonable doubt standard required of elements. *In re Winship*, 397 U.S. 358, 364 (1970) (holding that due process requires proof beyond a reasonable doubt of every fact necessary to constitute the crime). A prosecutor may not simply argue in closing that the aggravation is sufficient or that aggravation outweighs the mitigation, if those additional determinations are viewed as elements. *Special v. W. Boca Med. Ctr.*, 160 So.3d 1251, 1260 (Fla. 2014) (plurality) (stating that the "commentary of counsel in closing is not evidence, nor may the jury consider the mere argument as evidence when it deliberates and renders a verdict"). In fact, Florida's standard jury instructions tell the jury that what the lawyers say is not evidence. *In re Standard Jury Instructions in Criminal Cases - Report No. 2010-01 & Standard Jury Instructions in Civil Cases - Report No. 2010-01*, 52 So.3d 595, 599 (Fla. 2010) ("What the lawyers say is not evidence, and you are not to consider it as such."). A prosecutor must have actual evidence to establish an element. What witness may the prosecutor call to testify as a fact witness to establish sufficiency and weighing? And what questions may the prosecutor ask that witness? There is no possible eyewitness to either sufficiency or

weighing. And, regardless of what witness the prosecutor presented, that witness' testimony about sufficiency or weighing by its very nature would be opinion testimony, not fact testimony. There is no evidence available to meet any standard of proof, much less the highest standard of proof because neither sufficiency nor weighing are facts. For this reason, simply as a practical matter, sufficiency and weighing cannot possibly be elements.

Opposing counsel is not truly attempting to have this Court treat sufficiency and weighing as actual elements in the sense of having the prosecution prove either of them. Rather, opposing counsel is attempting to have this Court rewrite Florida's new death penalty statute to require the jury determine that the aggravation "substantially" outweighs the mitigation at a high "level of certitude" before recommending a death sentence, as some other states' statutes provide. Pet. at 28-29 (citing Arkansas' statute, New York's statute, Ohio's statute, Tennessee's statute and Utah's statute); *see also United States v. Gabrion*, 719 F.3d 511, 545 (6th Cir. 2013) (en banc) (Moore, J., dissenting) (advocating the Federal Death Penalty Act be interpreted to require that aggravation "substantially" outweigh mitigation and by the beyond a reasonable doubt standard). But this Court does not rewrite state statutes. And this Court would have to overrule its holding in *Kansas v. Marsh*, 548 U.S. 163 (2006), to do so. *Id.* at 173 (holding that a state death penalty statute may direct imposition of the death penalty where the aggravating circumstances and mitigating circumstances are in equipoise).

The Federal Death Penalty Act (FDPA) would be constitutionally suspect as well under opposing counsel's view of due process and the elements of capital murder. The FDPA does not require that aggravating factors "substantially" outweigh the mitigating factors; it only requires that aggravating factors "sufficiently" outweigh the mitigating factors. 18 U.S.C. § 3593(e). And the FDPA does not require weighing be

established beyond a reasonable doubt; it only requires that aggravating factors be established beyond a reasonable doubt. 18 U.S.C. § 3593(c). A jury in a federal capital case is not instructed that aggravation must "substantially" outweigh mitigation or that weighing must be established beyond a reasonable doubt, just as the jury in this Florida capital case was not.

Opposing counsel also attempts to distinguish Arizona's death penalty statute, which was at issue in *Ring v. Arizona*, 536 U.S. 584 (2002), and *McKinney v. Arizona*, 140 S.Ct. 702 (2020), from Florida's death penalty statute. Pet. at 17-21. But, in *McKinney*, this Court stated, under "this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found" and cited a California capital case and two Georgia capital cases in support of that statement. *McKinney*, 140 S.Ct. at 705-06 (citing *Tuilaepa v. California*, 512 U.S. 967 (1994); *Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976)). This Court's statement that the only element for purposes of the Sixth Amendment was one aggravator was not dependent on the particulars of Arizona's death penalty statute.

Furthermore, it is only facts and elements that must be proven beyond a reasonable doubt under *In re Winship*, 397 U.S. 358, 364 (1970). *In re Winship* is not a "level of certitude" case regarding questions of mercy, such as weighing; it is a standard of proof case regarding elements. If a determination is not an element, then *In re Winship* does not apply.

Florida's death penalty statute does not violate the Sixth Amendment or due process. Jury plus judge sentencing where the judge is bound by the jury's findings regarding aggravation and recommendation of life but is free to ignore those findings and the jury's recommendation of death and impose a life sentence does not violate the Sixth Amendment or due process. *Newberry*, 288 So.3d at 1045 (stating "the trial court

made its own findings with respect to the aggravation and mitigation"). In Florida, under the current death penalty statute, a judge is bound by the jury's findings and recommendation if the findings and recommendation favor the defendant but the judge is not bound by the jury's findings or recommendation of death that are adverse to the defendant. Under Florida's current statute, the jury could find a dozen aggravators and recommend a death sentence but the judge is free to ignore the jury's findings regarding aggravation and find no aggravation instead and impose a life sentence. The jury could find no mitigation and recommend a death sentence but the judge is free to ignore the jury's findings regarding mitigation and find extensive mitigation instead and impose a life sentence. The jury could find the aggravation outweighs the mitigation and recommend a death sentence but the judge is free to ignore the jury's weighing, and find the mitigation outweighs the aggravation instead and impose a life sentence. And none of those three scenarios is even reviewable on appeal under double jeopardy principles. Florida's capital sentencing statute is a one-way street in the defendant's favor. Such a statute does not violate due process.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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