No. 20-6824

IN THE

Supreme Court of the United States

RAYMOND BRIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner Raymond Bright was convicted of first-degree murder. The penalty-phase jury unanimously found the existence of an aggravating factor beyond a reasonable doubt; it also unanimously determined that that the aggravating factors were sufficient to warrant death, that those factors outweighed the mitigating circumstances, and that Petitioner should be sentenced to death. The trial judge agreed and sentenced Petitioner to death.

On appeal, Petitioner argued for the first time that the trial court committed "fundamental error" in not instructing the jury that its findings as to the sufficiency and weight of the aggravating circumstances must be made beyond a reasonable doubt. The Florida Supreme Court rejected that claim. This Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), it explained, did not require that the findings at issue here—that "sufficient aggravating factors exist" and that those factors "outweigh the mitigating circumstances"—be made beyond a reasonable doubt. Accordingly, "no fundamental error occurred" even if Petitioner did not waive any such claim by agreeing to the jury instructions. Pet. App. 11 & 31 n.11. This Court subsequently confirmed that *Hurst* "did not require jury weighing of aggravating and mitigating circumstances." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020).

The question presented is:

Whether the Florida Supreme Court erred, as a matter of federal law, in rejecting Petitioner's unpreserved claim of fundamental error.

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STATEMENT

1. In *Hurst v. Florida*, 577 U.S. 92 (2016), this Court held that Florida's capital sentencing scheme violated the Sixth Amendment in light of *Ring v. Arizona*, 536 U.S. 584 (2002). Under Florida law, the maximum sentence a capital felon could receive based on a conviction alone was life imprisonment. *Hurst*, 577 U.S. at 95. Capital punishment was authorized "only if an additional sentencing proceeding 'result[ed] in findings by the court that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. § 775.082(1) (2010)). At that additional sentencing proceeding, a jury would render an advisory verdict recommending for or against the death penalty, and in making that recommendation was instructed to consider whether sufficient aggravating factors exist, whether mitigating circumstances exist that outweigh the aggravators, and, based on those considerations, whether death is an appropriate sentence. Fla. Stat. § 921.141(2)(a)-(c) (2010).

This Court struck down that scheme in *Hurst*. Observing that it had previously declared invalid Arizona's capital sentencing scheme because the jury there did not make the "required finding of an aggravated circumstance"—which exposed a defendant to "a greater punishment than that authorized by the jury's guilty verdict"—the Court held that that criticism "applie[d] equally to Florida's." *Hurst*, 577 U.S. at 98 (quoting *Ring*, 536 U.S. at 604). "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, [was] therefore unconstitutional." *Id.* at 103.

In response to *Hurst* and the Florida Supreme Court's subsequent interpretation of that decision, the Florida Legislature repeatedly amended Section 921.141 to comply with those rulings. As relevant here, the amended law requires the jury, not the judge, to "determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor." Fla. Stat. § 921.141(2)(a) (2017). If the jury concludes that no aggravating factor has been proven, the defendant is "ineligible" for the death penalty. *Id.* § 921.141(2)(b)1. If on the other hand the jury unanimously finds at least one aggravator, the defendant is "eligible for a sentence of death." *Id.* § 921.141(2)(b)2. In that event, the jury must make a sentencing recommendation based on a weighing of three considerations: *first*, "[w]hether sufficient aggravating factors exist";[1] *second*, "[w]hether

[1] As construed by the Florida Supreme Court, "it has always been understood that . . . 'sufficient aggravating circumstances' means 'one or more.'" *State v. Poole*, 297 So. 3d 487, 502 (Fla. 2020) (citing cases). Any "suggestion that 'sufficient' implies a qualitative assessment of the aggravator—as opposed simply to finding that an aggravator exists—is unpersuasive and contrary to this decades-old precedent." *Id.* at 502–03 (disapproving prior case holding that "the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously," and explaining that, "[u]nder longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances").

aggravating factors exist which outweigh the mitigating circumstances found to exist"; and *third*, based on the other two considerations, "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death." § 921.141(2)(b)2.a-c.

By assigning to the jury those latter three findings, the Florida Legislature granted capital defendants procedural protections beyond what *Hurst* required. *See Hurst*, 577 U.S. at 103 (requiring a jury to find "the existence of an aggravating circumstance"); *see also id.* at 105–06 (Alito, J., dissenting) ("[T]he Court's decision is based on a single perceived defect, *i.e.*, that the jury's determination that at least one aggravating factor was proved is not binding on the trial judge."). Neither Section 921.141 nor the standard jury instructions require that the jury undertake those determinations by any particular standard of proof.

2. Early in the morning on February 19, 2008, Petitioner Raymond Bright murdered Derrick King and Randall Brown. Pet. App. 3–5. King was twenty years old; Brown was sixteen. *Id.* at 3.

Their bodies were discovered in Petitioner's home. King was face down on the carpet next to a sofa, partially wrapped in a sleeping bag or comforter. *Id.* The sofa was saturated with blood on one end, which was adjacent to where King's head rested on the floor. *Id.* Blood was on the wall behind the sofa and the ceiling above it. *Id.* It was cast-off blood—defined as droplets of blood that are flung from a weapon and make a trail of blood where they land—and the

pattern was consistent with someone being on the couch and swinging his arm back. *Id.*

The sixteen-year-old Brown was found seated sideways in a recliner with his head leaning up against a wall and a blanket covering his head. *Id.* The wall against which Brown's body rested showed a pattern of blood that radiated from his head, and there was also blood on the ceiling. *Id.* Brown's blood had also puddled on the floor. Above Brown's head was a framed picture with one side of the frame broken away. *Id.* That one side was indented, consistent with having been struck by something round, such as a hammer. *Id.* Police found the hammer buried in Petitioner's yard. *Id.*

Petitioner told two people about what occurred on the night of the murders. *Id.* at 4. Prior to his arrest, Petitioner informed friend and former coworker Benjamin Lundy that he had "screwed up" and may have killed two people. *Id.* Petitioner told Lundy that the murders occurred after a confrontation erupted when one of the victims, who were guests in Petitioner's home, accused Petitioner of stealing drugs. *Id.*

Petitioner told another friend that he went into the kitchen at 2 a.m. on February 19. *Id.* at 4–5. King was on the sofa and Brown was in the recliner. *Id.* at 5. Brown had a nine-millimeter handgun and started waving it around. *Id.* King rose from the sofa and took the gun from Brown. *Id.* Petitioner saw an opportunity and attempted to take the gun from King. *Id.* As the men struggled, the gun discharged. *Id.* The gunshot startled King and he released the gun. *Id.*

Petitioner then pointed it at King and attempted to shoot him, but the gun misfired. *Id.* Petitioner dropped the weapon and tried to run out of the house, but he tripped and fell. *Id.* He grabbed a hammer that was within reach, turned around, and began striking King, knocking him back toward the sofa where King had previously been lying down. *Id.* When Petitioner turned around, he saw that Brown was about to pick up the handgun. *Id.* Petitioner then struck Brown with the hammer. *Id.* The next time Petitioner turned toward the sofa, he saw King reaching for a rifle. *Id.* Petitioner again struck King with the hammer. *Id.* When he stopped, he could hear King and Brown breathing and gurgling, but then the room became silent. *Id.* Petitioner, remarking on the events, said that he had "lost it." *Id.*

3. A jury found Petitioner guilty of both murders, and he was sentenced to death. *Id.* A Florida postconviction court later vacated the sentences and ordered a new penalty phase due to trial counsel's ineffective assistance. *Id.* at 6. That new penalty phase was conducted in 2017. *Id.*

At that proceeding, the jury heard that Petitioner was previously convicted of armed robbery after he held up a store clerk at knifepoint. *Id.* It also learned of the extent of the victims' injuries. *Id.* at 6–7. King died of blunt force trauma to the head. *Id.* at 7. He had 38 blunt impact injuries to his head and about 20 injuries to his extremities. *Id.* King suffered a laceration through the upper eyelid above the right eyebrow, through the left eye. *Id.* His eye was sunken. *Id.* One injury on his head went through his scalp to

reveal his underlying skull. *Id.* King was covered in numerous defensive wounds. *Id.*

Brown also died of blunt head trauma, likely inflicted with a hammer. *Id.* at 6. He had more than 14 injuries to the outside of his head, which included lacerations, bruises, contusions, and fractures. *Id.* These did not include the skull fractures or brain injuries. *Id.* Brown had many defensive injuries, including a fracture of his left ulna, punctate-type lacerations to his left arm, and injuries to his wrists, hands, and thigh. *Id.* at 6–7.

Both King and Brown were still alive when they suffered these injuries. *Id.*

The jury was instructed that, before it could recommend a sentence of death, it had to find the existence of at least one aggravator beyond a reasonable doubt. R. Vol. 1 at 455. It was also told to assess the sufficiency of that aggravator and to weigh the aggravators against any mitigators. *Id.* at 456–57. At the charge conference, Petitioner did not object to that instruction or request that the jury be told it must find beyond a reasonable doubt that the aggravators were sufficient and outweighed any mitigators. R. Vol. 2 at 1111–12, 1114, 1286.

As to both murders, the jury unanimously found beyond a reasonable doubt that Petitioner had been previously convicted of a capital felony or a felony involving the use or threat of violence to a person. Pet. App. 8–9. As to King, the jury unanimously found beyond a reasonable doubt that the murder was perpetrated in a heinous, atrocious, and cruel fashion.

Id. at 9. It unanimously rejected both statutory mitigating circumstances alleged by Petitioner and further concluded, by an 11-1 vote, that there was nothing in Petitioner's "character, background, or life or the circumstances of the offense" that mitigated against imposition of the death penalty. *Id.* As to both murders, the jury unanimously determined that the aggravating factors were sufficient to warrant a sentence of death, that those factors outweighed the mitigating circumstances, and that Petitioner should be sentenced to death. *Id.*

In performing its own sentencing calculus, the trial court found that several nonstatutory mitigators had been established but assigned them "no weight" or "little weight." *Id.* at 10. It determined that the "aggravating circumstances heavily outweigh[ed] the mitigating circumstances" and that death was the appropriate penalty. *Id.*

4. On appeal to the Florida Supreme Court, Petitioner acknowledged that he did not object to the jury instructions but argued that the trial court committed "fundamental error" in failing to instruct the jury that its determinations as to sufficiency and weight must be made beyond a reasonable doubt. Initial Br., *Bright v. Florida*, No. SC17-2244, at *42–43 (Sept. 13, 2018). The court rejected that claim. Pet. App. 11. It explained that, under its most recent pronouncements, those findings "are [not] elements." *Id.* As non-elements, sufficiency and weight "are not subject to the beyond a reasonable doubt standard of proof," and thus "no fundamental error occurred." *Id.* (quoting *Rogers v. State*, 285 So. 3d 872, 885–86 (Fla. 2019)).

5. Several months after the Florida Supreme Court's decision, this Court decided *McKinney v. Arizona*, 140 S. Ct. 702 (2020). There, the Court confirmed that, under *Ring* and *Hurst*, a jury must find the fact of an aggravating factor but need not weigh the aggravating and mitigating circumstances or make the ultimate sentencing decision. *Id.* at 707. Those determinations may instead constitutionally be made by a judge. In other words, the weight of the aggravators, like the sufficiency of the aggravators, is not an element of capital murder under *Apprendi* and its progeny. *See id.*

REASONS FOR DENYING THE PETITION

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

In the proceeding below, Petitioner conceded that he "failed to request" the jury instructions he now claims were constitutionally required. Initial Br., *Bright v. Florida*, No. SC17-2244, at *42 (Sept. 13, 2018). He thus admitted that the Florida Supreme Court would review his claim only for "fundamental error." *Id.* at *43.

The Florida Supreme Court held that "no fundamental error occurred," even assuming Petitioner had not "waived fundamental error review by agreeing to the jury instructions." Pet. App. 11, 31 n.11. That holding does not warrant this Court's review, and Petitioner does not argue otherwise. *See* Pet. i (framing question presented without reference to the fundamental error standard applicable to unpreserved claims of instructional error); *id.* at 7–15

(omitting any discussion of the fundamental error standard in reasons for granting the petition). Assuming that the separate question purportedly raised in the Petition would otherwise warrant this Court's review, the Court should have the opportunity to address that issue in a case where the issue was raised in the trial court and preserved for appellate review. What is more, it should take up that question in a case where the answer will affect the eventual outcome, and not where—as here—an unexcused procedural default renders the defendant ineligible for relief as a matter of state law.

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

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

At trial, Petitioner acquiesced to the jury instructions and failed to object on the ground he would later raise in the Florida Supreme Court. Asked whether the defense was "okay with" the instruction that jurors must unanimously find that the aggravators outweigh any mitigators, defense counsel said yes. R. Vol. 2 at 1111–12. Petitioner himself agreed to the proposed jury instructions. *Id.* at 1114. And defense counsel did not object when the instructions were read to the jury. *Id.* at 1286.

Petitioner provides no justification for not raising his claim in the trial court. Notably, the principal cases on which Petitioner relies (*Winship*, *Apprendi*, and *Hurst*) were decided in 1970, 2000, and 2016—before his own sentencing hearing in 2017. *See* Pet. 8–13. Accordingly, it is undisputed that this case squarely implicates the policies underlying Florida's contemporaneous objection rule, which "prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second [sentencing hearing] if the first

decision is adverse to the client." *See T.G.*, 800 So. 2d at 210.

That procedural default makes this case a poor vehicle for resolving the federal constitutional question Petitioner presents for this Court's review. Not only should Petitioner not be rewarded for his failure to object at trial, but the narrow issue in this case, as Petitioner conceded in the proceeding below, is whether the unobjected-to jury instruction was "fundamental error" under Florida law. Petitioner does not ask this Court to resolve that state-law issue. And in his Petition, he does not even attempt to argue that his "sentence could not have been obtained without the assistance of the alleged error," *Smiley*, 295 So. 3d at 174; *see* Pet. 7–15. So Petitioner offers no basis for disturbing the Florida Supreme Court's holding that "no fundamental error occurred." Pet. App. 11.

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

Of particular relevance, ample record evidence supports the jury's determination that Petitioner's murder of King was heinous, atrocious, and cruel. *See* Pet. App. 3–7; *cf. Larkins v. State*, 739 So. 2d 90, 95

(Fla. 1999) (calling this aggravator one of "the most serious aggravators set out in the statutory sentencing scheme"). And the jury found that the murders of both King and Brown were aggravated because Petitioner was previously convicted of a capital felony or a felony involving the use or threat of violence: the contemporaneous murder, as well as Petitioner's prior conviction for armed robbery. Pet. App. 8–9. In addition, the jury unanimously rejected Petitioner's proposed statutory mitigating circumstances and concluded, by a vote of 11-1, that there did not exist any other factors in Petitioner's character, background, or life—or the circumstances of the offense—mitigating against the imposition of the death penalty. *Id.* at 9.

Not only can Petitioner not demonstrate prejudice under his unique facts, the better view is that "[i]t would [have] mean[t] nothing . . . to tell the jury that" certain "value call[s]"—like whether aggravators outweigh mitigators and whether the defendant deserves mercy—must be found "beyond a reasonable doubt," *see Kansas v. Carr*, 577 U.S. 108, 119 (2016).

In short, Petitioner cannot show fundamental error under state law, and therefore would not be entitled to any relief even if his federal constitutional claim had merit.

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

1. Petitioner does not assert that his question presented implicates a division among the lower courts. *See* Pet. 7–15. Instead, he claims that the

Florida Supreme Court's decision "conflicts with this Court's opinions in *Apprendi*, *Ring*, *Alleyne*, and *Hurst*." *Id.* at 10; *see id.* at 7–14. Petitioner is incorrect.

As threshold matter, none of the cases Petitioner cites addressed, and none had occasion to address, the precise question at issue in this case: whether a trial court commits "fundamental error" within the meaning of Florida law when it does not *sua sponte* instruct the jury that it should apply the beyond-a-reasonable-doubt standard to the kind of normative sentencing factors at issue here. *See* Pet. App. 11. That consideration, standing alone, refutes Petitioner's claim that "the Florida Supreme Court's opinion in this case . . . conflicts with this Court's opinions." Pet. 10.

2. Even putting aside the narrow holding of the decision below, the cases Petitioner cites do not conclude that the beyond-a-reasonable-doubt standard applies to non-factual determinations intended to guide the jury's sentencing recommendation. To the contrary, those cases evince this Court's understanding that that standard of proof is limited to *factual* findings. By its terms, *In re Winship* applies the beyond-a-reasonable-doubt standard only to "the factfinder." 397 U.S. 358, 363–64 (1970); *see also id.* (referencing "the trier of fact"). The Due Process Clause, the Court there held, "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364; *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("Any fact that, by law,

increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

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

- required the States to "adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt," *Apprendi v. United States*, 530 U.S. 466, 483–84 (2000);

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

- described the "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," *id.* at 482–83 (emphasis omitted); and

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

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

3. This Court's cases applying *Apprendi* to the capital sentencing context likewise did not hold that the Due Process Clause requires the jury to determine, beyond a reasonable doubt, that normative considerations support the imposition of the death penalty. In *Ring*, for example, this Court explained that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. So too in *Hurst*, where this Court reiterated that the sentencing scheme in *Ring* violated the defendant's right to have "a jury find the facts behind his punishment." 577 U.S. at 98; *see also id.* at 94 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.").

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

beyond-a-reasonable-doubt standard to factfinding of a kind not at issue here—and thus undermines rather than supports Petitioner's claim.

III. The Decision Below Is Correct.

In rejecting Petitioner's claim of fundamental error, the Florida Supreme Court explained that Petitioner failed to show any instructional error—fundamental or otherwise. *See* Pet. App. 11. The court was right to hold that "no fundamental error occurred," *see id.*, and its opinion correctly applied this Court's precedents to Florida's capital sentencing scheme.

1. As the Florida Supreme Court has explained, the penalty phase findings at issue here—whether the aggravators are sufficient and whether those aggravators outweigh the mitigators—"are not elements of the capital felony of first-degree murder." *Rogers v. State*, 285 So. 3d 872, 885 (Fla. 2019), *cert. denied Rogers v. Florida*, 141 S. Ct. 284 (Oct. 5, 2020); *see also State v. Poole*, 297 So. 3d 487, 503–13 (Fla. 2020), *cert denied Poole v. Florida*, No. 20-250 (Jan. 11, 2021). "Rather, they are findings required of a jury: (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred." *Rogers*, 285 So. 3d at 885 (emphases in original). That is, they are sentencing factors intended to make the imposition of capital punishment less arbitrary by guiding the exercise of the judge and jury's discretion within the applicable sentencing range.

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

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

Fla. Stat. § 921.141(2)(b)(2).

2. In light of this Court's recent decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), Petitioner's contrary argument fails on its own terms. Petitioner frames the constitutional question as whether the sufficiency and weighing of aggravators can be characterized as the "functional equivalents" of elements. *See* Pet. i, 7–13. But Petitioner does not address *McKinney*, which rejected the theory that a jury must weigh aggravators and mitigators, and thus made clear that a determination that aggravators outweigh mitigators is not an "element" of capital murder for purposes of *Apprendi* and its progeny. And, as explained below, the statutory sufficiency requirement adds nothing to Petitioner's argument. *McKinney* therefore rejects an essential predicate of Petitioner's claim.

In *McKinney*, a capital defendant challenged his death sentence because the sentencing judge had failed to consider his posttraumatic stress disorder as a mitigating factor, thereby violating *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that a capital

sentencer may not refuse as a matter of law to consider relevant mitigating evidence). On remand from the Ninth Circuit, the Arizona Supreme Court performed its own *de novo* weighing of the aggravators and mitigators, including the defendant's PTSD, and upheld the sentence. *McKinney*, 140 S. Ct. at 706. In the state supreme court's independent judgment, the balance of the aggravators and mitigators warranted the death penalty. *Id.*

On certiorari review, the defendant argued that "a jury must resentence him" because a court "could not itself reweigh the aggravating and mitigating circumstances." *Id.* This Court rejected that claim. "Under *Ring* and *Hurst*," the Court explained, "a jury must find the aggravating circumstance that makes the defendant death eligible." *Id.* at 707. "[I]mportantly," however, "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.*; *see also id.* at 708 (explaining that "*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances").

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

whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense."). In other words, *McKinney* rejects an essential premise of Petitioner's argument: that the weighing of aggravators and mitigators is either an "element" or the "functional equivalent" of an element. *See* Pet. i, 7–13.

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

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[2] Even if it were unclear whether *McKinney* disposes of claims like Petitioner's, any such doubt provides an additional basis for denying review. Because *McKinney* post-dated the decision below, the Florida Supreme Court did not analyze its applicability. This Court therefore lacks the benefit of

Finally, the statutory requirement that the jury weigh, among other considerations, "[w]hether sufficient aggravating factors exist," § 921.141(2)(b)(2)(a), adds nothing to Petitioner's argument. As construed by the Florida Supreme Court, "it has always been understood that . . . 'sufficient aggravating circumstances' means 'one or more.'" *Poole*, 297 So. 3d at 502 (citing cases). Put differently, "[u]nder longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances." *Id*. And it is undisputed that, in this case, that requirement was satisfied when the jury unanimously

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a reasoned lower court analysis of a critical issue germane to Petitioner's claim: whether and to what extent *McKinney*'s holding that a jury need not determine that aggravators outweigh mitigators impacts the related question whether such normative determinations must be made beyond a reasonable doubt. Thus, *McKinney*, at a minimum, shows that further percolation is warranted before this Court steps in to resolve the claim Petitioner raised for the first time on appeal. *See California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (explaining that percolation "allow[s] . . . the issue [to] receive[] further study" in the lower courts "before it is addressed by this Court").

found multiple aggravating circumstances beyond a reasonable doubt. *See* Pet. App. 8–9.

3. For reasons this Court has already explicated, it would make little sense to apply the beyond-a-reasonable-doubt standard to normative determinations of the kind at issue here. In *Carr*, this Court "doubt[ed]" that it is "even possible to apply a standard of proof to the mitigating-factor determination." 136 S. Ct. at 642. The Court reasoned that "[i]t is possible to do so for the aggravating-factor determination," on the one hand, because the existence of an aggravator "is a purely factual determination." *Id.* Whether mitigation exists, on the other hand, "is largely a judgment call"—or "perhaps a value call"—just as the "ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Id.* Thus, "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it." *Id.*

As this Court has explained, the beyond-a-reasonable-doubt standard ensures that the prosecution must "persuad[e] the factfinder at the conclusion of the trial of [the defendant's] guilt beyond a reasonable doubt." *Winship*, 397 U.S. at 364. This safeguard preserves the "moral force of the criminal law" because it does not "leave[] people in doubt whether innocent men are being condemned." *Id.* at 364. But sufficiency and weighing do not go to whether the defendant is guilty of a capital offense—that question is answered when the jury finds the existence of an aggravated first-degree murder. *See*

McKinney, 140 S. Ct. at 707; *Kansas v. Marsh*, 548 U.S. 163, 175–76 (2006). Sufficiency and weighing instead go to the appropriateness of the penalty. That is, they are normative judgments, not facts.

A fact is "something that has actual existence" or, perhaps more appropriately in this context, is "a piece of information presented as having objective reality." "Fact," Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/fact. Facts have their basis in observable truths about the world. A fact either is or isn't; although a person's perception of facts may be open to debate, facts are objectively discernable. By contrast, normative judgments are opinions. As such, they turn on the subjective views of individual decisionmakers. In short, they are questions involving discretion.

As a consequence, a jury is not better situated to make normative determinations than a judge. Indeed, sufficiency and weighing no more need be conducted by a jury than the traditional in-range sentencing discretion performed by judges throughout the nation countless times each day. As *McKinney* recognized, *Apprendi* expressly reserved for judges the power to exercise that type of discretion. *McKinney*, 140 S. Ct. at 707 ("[T]his Court carefully avoided any suggestion that 'it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute.'" (quoting *Apprendi*, 530 U.S. at 481)); *see also Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality op.) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the

imposition . . . of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").

4. Petitioner's substantial expansion of the *Apprendi* doctrine would have significant and troubling practical implications, including for non-capital sentencing. The federal statute governing criminal sentences, for example, provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with" certain statutorily enumerated sentencing factors. 18 U.S.C. § 3553(a). Given that a federal sentence must, by statute, be supported by a normative judgment that the chosen sentence is "not greater than necessary" to effectuate "the purposes set forth in" the statutory sentencing factors, *see id.*, must that "finding" be made by a jury beyond a reasonable doubt? And if not, why is that normative judgment any different than the moral determination at issue here—*i.e.*, that aggravating factors outweigh mitigating circumstances? *See United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (en banc).

Notably, Petitioner himself appears unwilling to accept the practical consequences of his own theory. Petitioner asks this Court to rule that two determinations—sufficiency and weighing—must be made beyond a reasonable doubt. But the statute also provides that the trial court may not impose death unless the jury further determines, based on those two factors, that death is the appropriate sentence. *See* Fla. Stat. § 921.141(2)(b)(2)(c), (3)(a)(2) (requiring the jury to determine, based on sufficiency and weighing,

"whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death," and providing that the court may sentence the defendant to death if, and only if, "the jury has recommended a sentence of . . . [d]eath"). Petitioner nevertheless does not go so far as to say that that the jury's ultimate recommendation that "the defendant should be sentenced to . . . death," § 921.141(2)(b)(2)(c), must be made beyond a reasonable doubt. And for good reason: "Any argument that the Constitution requires that a jury impose the sentence of death," this Court has explained, "has been soundly rejected by prior decisions of this Court." *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990); *see also McKinney*, 140 S. Ct. at 707; *Proffitt*, 428 U.S. at 252 (plurality opinion).

Nor would Petitioner's proposed extension of the *Apprendi* doctrine necessarily redound to the benefit of criminal defendants. If state laws like the one Petitioner asks this Court to strike down—those that seek to *protect* criminal defendants by reducing the risk of arbitrariness and guiding a sentencing authority's discretion to impose particularly harsh punishments—give rise to otherwise non-existent due process problems, lawmakers may well respond by repealing, rolling back, or declining to create such protections in the first place. That is one reason why this Court has "warned against wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries." *Oregon v. Ice*, 555 U.S. 160, 172 (2009) (quotation marks omitted); *see Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

5. The foregoing explains why this Court has denied certiorari in a case presenting the identical jury-instruction issue, *see Rogers v. Florida*, No. 19-8473, and in a case presenting the underlying question whether the Sixth and Eighth Amendments require that a jury find that the aggravators outweighed the mitigators, *see Poole v. Florida*, No. 20-250.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 10, 2021