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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JESSICA J. YEARY
Public Defender
A. VICTORIA WIGGINS*

Assistant Public Defender
**Counsel of Record for Petitioner*

SECOND JUDICIAL CIRCUIT OF FLORIDA
OFFICE OF PUBLIC DEFENDER
301 South Monroe Street, Ste. 401
Tallahassee, Florida 32301
(850) 606-1000
victoria.wiggins@flpd2.com

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I. This Case Is an Appropriate Vehicle For Addressing The Exceptionally Important Question Presented.

Respondent argued that this Court does not have jurisdiction "because 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.' " Opp. 8-11. Respondent referred to Footnote 11 of *Bright v. State,* 299 So. 3d 985 (Fla. 2020) which states, "[b]ecause the trial court did not err, we do not reach the State's argument that Bright waived fundamental error review by agreeing to the jury instructions." App. at 31. The plain language of the footnote clearly indicates the Florida Supreme Court did not even consider the issue of whether Petitioner waived fundamental error review under Florida law.

Respondent erroneously attempts to show the lower court's decision on this issue was based on state law when, in fact, it was based upon federal law. "State courts, in appropriate cases, are not merely free to–they are bound to–interpret the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995). But in "doing so, they are not free from the final authority of this Court." *Id*. at 8-9. To that end, [this Court] announced, in *Michigan v. Long*, 463 U.S. 1032 (1983), the following presumption:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is

> not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."
>
> At the same time, [this Court] adopted a plain-statement rule to avoid the presumption: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Florida v. Powell, 559 U.S. 50, 56-57 (2010) (internal citations omitted).

Further, the "*Long* 'plain statement' rule applies regardless of whether the disputed state-law ground is substantive . . . or procedural." *Harris v. Reed*, 489 U.S. 255, 261 (1989).

> Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this court from reaching the federal claim: "[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." Furthermore, ambiguities in that regard must be resolved by application of the Long standard."

Id. at 261-62 (internal citations omitted).

Applying that rule here, a conclusive presumption exists that the Florida Supreme Court decided the case the way it did because it believed federal law required it to do so. Its decision appears to rest primarily on federal law, and does not clearly and expressly indicate it was based on state law.

In Petitioner's Initial Brief filed in the lower court, he argued that the failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigators violated his right

to Due Process under the Fourteenth Amendment to the U. S. Constitution.[1] The State based its argument on the same grounds in its Answer Brief. Therefore, the question posed to the Florida Supreme Court was based upon federal law. In its opinion, the Florida Supreme Court cited its decision in *Rogers v. State,* 285 So. 3d 872, 885-86 (Fla. 2019) where it deemed to have "mischaracterize[d]" *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) in a subsequent decision[2] to require that the sufficiency and weight of the aggravating factors must be determined by the jury beyond a reasonable doubt. The court also mentioned its decision in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018) where it expressly receded from its decision in *Perry*. The basis for the court's ruling in *Rogers, Perry, and Foster* was its interpretation of this Court's decision in *Hurst v. Florida,* 136 S.Ct. 616 (2016). Thus, the decision in this case was predicated upon the interpretation of federal law, and not state law. In particular, the decision does not clearly or expressly indicate it was based the ground finding the issue unpreserved or the error not to be fundamental.

This Court's prior decisions reinforce that reality. For instance, in *Hildwin v. Florida*, 490 U.S. 638, 641 (1989), overruled on other grounds by *Hurst*, 136 S. Ct. at 616, *Hildwin* "did not present th[e] issue [raised on appeal] to the trial court, but raised it for the first time in the Florida Supreme Court." The State "therefore argue[d] that the decision below rest[ed] on an adequate and independent state ground." Id. But this Court rejected that argument, and reasoned: "The Florida

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[1] Petitioner's Initial Brief as well as Respondent's Answer Brief can be found at http://onlinedocketssc.flcourts.org/DocketResults/CaseByYear?CaseNumber=2244&CaseYear=2017.

[2] *Perry v. State*, 210 So. 3d 630 (Fla. 2016).

Supreme Court . . . did not rest its decision on this procedural argument, finding instead that there was 'no merit' to petitioner's claim." *Id.*

Like *Hildwin*, Petitioner did not present this argument in the trial court, and raised it for the first time on direct appeal to the Florida Supreme Court. As in *Hildwin*, the Florida Supreme Court did not rule on the issue of preservation, but simply ruled Petitioner's claim was without merit.

Respondent argued that even if the trial court erred *sua sponte* by failing to offer the jury instruction Petitioner cannot demonstrate prejudice under Florida law. Opp. 11-12. However, this error related to instructing the jury has been deemed to be fundamental under Florida law. The Florida Supreme Court has held that fundamental error occurs "when the omission [of a jury instruction] is pertinent or material to what the jury must consider in order to convict." *Daughtery v. State*, 211 So. 3d 29, 39 (Fla. 2017). In the case at bar, the omission of an instruction that the determinations of the sufficiency and weight of the aggravating factors had to be made beyond a reasonable doubt was pertinent to the jury's conclusion to sentence Petitioner to death.

Since the Florida Supreme Court based was based upon its interpretation of this Court's decisions and elected not to rule on whether this issue presented fundamental error under state law, this case properly presents an issue of federal law upon which this Court has jurisdiction.

II. The Florida Supreme Court's Decision Conflicts With This Court's Decisions.

Respondent argues that there is no conflict between the decision in this case and this Court's decisions by labeling the determinations of sufficiency and weight of the aggravators are "normative judgments" as opposed to facts, and argues that as "normative judgment," the determinations are not the functional equivalent to elements requiring the burden of proof of beyond a reasonable doubt. Opp. 12-16. This argument ignores that weighing aggravators and mitigators is a part and parcel of the factual determination of whether the defendant is eligible for the death penalty under Florida law. This Court has held that the label of a determination is not dispositive of whether it is a functional equivalent of an element of the underlying offense, but rather, the function of the determination:

> We held that Apprendi's sentence violated his right 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, 477 (2000)]. That right attached not only to Apprendi's weapons offense but also to the "hate crime" aggravating circumstance. New Jersey, the Court observed, "threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race." *Apprendi*, 530 U.S. at 476. "Merely using the label 'sentencing enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Id.*
>
> The dispositive question, we said, "is not one of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact- no matter how the State labels it- must be found by a jury beyond a reasonable doubt." *Id.* at 482-483.

Ring v. Arizona, 536 U.S. 584, 602 (2002). In *Ring*, Arizona argued that its state law specifying life imprisonment or death was only "sentencing options" as opposed to elements of the offense of first-degree murder. The Court in *Ring* specifically rejected that distinction, stating

> Arizona also supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors… As to the elevation of the maximum punishment, however, *Apprendi* renders the argument untenable; the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury."

Ring, 536 U.S. at 604-605. The Court held, "… Arizona's enumerated aggravating factors operate as the 'functional equivalent of an element of a greater offense…" *Id*. at 609.

Likewise, the determinations of the sufficiency and weight of aggravating factors are the functional equivalent of elements because they must be made to enhance the penalty beyond the statutory maximum allowed for capital murder. Under Florida's sentencing scheme, the statutory maximum for capital murder is life without parole. §775.082(1)(a), Fla. Stat. (2017). Thus, the determinations of the existence of aggravating factors, the sufficiency of aggravating factors, and the weight of the aggravating factors are all required for the imposition of the enhanced sentence of the death penalty. § 921.141(2), Fla. Stat. (2017). This Court found these determinations to be functional equivalents of elements because these determinations are necessary to impose the death penalty. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016).

Thus, in holding the determinations of sufficiency and weight of the aggravating factors not to be functional equivalents of elements, the Florida Supreme Court's decision in Petitioner's case expressly and directly conflicts with the decisions from this Court.

III. The Florida Supreme Court's Decision is Wrong .

Respondent argues the Florida Supreme Court decision was correct in that the Petitioner failed to argue fundamental error and that the determinations of sufficiency and weight of aggravating factors are "sentencing factors" rather than elements. Opp. 16-17. Petitioner has addressed both arguments in the preceding sections. However, Respondent adds the citation to *State v. Poole*, 297 So. 3d 487 (Fla. 2020). *Poole* is totally inapplicable because the issue in *Poole* involved the sentencing laws in 2011, and not the sentencing laws in 2017 which applied to Petitioner's case.

Respondent argues the existence of an aggravating factor alone makes a defendant eligible for the death penalty, and since the state statute requires the jury to find the existence of an aggravating factor beyond a reasonable doubt, the determinations of the sufficiency and weight of the aggravating factors are not elements and thus, are not required to be found beyond a reasonable doubt. Opp. 16-21. Respondent's argument fails to acknowledged that the determination of the existence of one or more aggravating factor is just the first step of the eligibility determination. Section 921.141 clearly states that unless the jury finds the

aggravating factors to be sufficient **and** to outweigh the mitigating factors, the death penalty cannot be imposed; therefore, the finding of aggravating factors alone will not allow the imposition of the death penalty.

Respondent cited to this Court's opinion in *McKinney v. Arizona*, 140 S. Ct. 702 (2020) in support of his argument. The first problem with Respondent's reliance on *McKinney* is the difference between Arizona law and Florida law. The Arizona statute does make a defendant eligible for the death penalty upon the finding of the existence of an aggravating factor whereas, as explained above, the Florida statute requires the additional determinations that the aggravating factors are sufficient and outweigh the mitigating factors before the death penalty can be imposed. Second, the issue in *McKinney* was whether an appellate court can reweigh the aggravating and mitigating factors, and not the burden of proof. Respondent argues that if a trial court or an appellate court can reweigh the aggravating and mitigating factors, then that determination cannot be element that is subject to the burden of beyond a reasonable doubt. The fallacy of this argument is that whether a determination is an element depends upon its function under the state law as to whether it increases the penalty beyond the maximum penalty upon a verdict of guilty.

Respondent also cited to *Kansas v. Carr*, 136 S. Ct. 633 (2016) where this Court held that a jury does not need to be instructed to weigh mitigating factors beyond a reasonable doubt. *Carr* does not support Respondent's argument because the findings of mitigating factors are not the functional equivalents of elements

since they do not enhance the penalty beyond the statutory maximum, and thus, would not be subject to the burden of proof of beyond a reasonable doubt.

Finally, Respondent claims Petitioner's "substantial expansion of the *Apprendi* doctrine would have significant and troubling practical implications." Opp.23-24. Respondent suggests reversing the Florida Supreme Court's decision would lead to (1) federal trial judges having to determine beyond a reasonable doubt whether "the chosen sentence is 'not greater than necessary' to effectuate 'the purposes set forth in'" 18 U.S.C. § 3553(a) (2020); and (2) juries having to determine beyond a reasonable doubt whether death is the appropriate sentence. Opp.23-24.

However, Respondent's fears are unfounded. Unlike the determinations at issue here, a determination as to whether "the chosen sentence is 'not greater than necessary' to effectuate 'the purposes set forth in'" 18 U.S.C. § 3553(a) "does not increase the statutory maximum." *United States v. Gabrion*, 719 F.3d 511, 550 (6th Cir. 2013) (Moore, J., dissenting). Instead, it simply guides the sentencing judge to impose a less-than-maximum punishment when such a punishment would suffice to effectuate the relevant purposes.

Similarly, a determination that death is the appropriate sentence does not increase the maximum punishment for first-degree murder. Instead, that determination–whether binding or advisory–is "the ultimate sentencing decision within the relevant sentencing range," *McKinney*, 140 S.Ct. at 707.

For these reasons, the lower court decision was wrongly decided.

CONCLUSION

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

Respectfully submitted,

JESSICA J. YEARY
Public Defender

A. VICTORIA WIGGINS*

Assistant Public Defender
**Counsel of Record for Petitioner*
SECOND JUDICIAL CIRCUIT OF FLORIDA
OFFICE OF PUBLIC DEFENDER
301 South Monroe Street, Ste. 401
Tallahassee, Florida 32301
(850) 606-1000
victoria.wiggins@flpd2.com

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