No. 20-7495

IN THE

Supreme Court of the United States

ANGEL SANTIAGO-GONZALEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General of Florida

AMIT AGARWAL
Solicitor General
**Counsel of Record*

JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
amit.agarwal@myfloridalegal.com

Counsel for Respondent

QUESTION PRESENTED

Petitioner Angel Santiago-Gonzalez was convicted of first-degree murder. After he waived the right to a penalty-phase jury, the trial court found the existence of four aggravating circumstances beyond a reasonable doubt and concluded that those aggravators were sufficient to warrant the death penalty, outweighed the mitigating circumstances, and that death was the appropriate sentence.

On appeal, Petitioner argued for the first time that the trial court committed "fundamental error" in not applying the beyond-a-reasonable-doubt standard to its findings as to the sufficiency and weight of the aggravating circumstances. 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. In *McKinney v. Arizona*, this Court subsequently confirmed that "weighing of aggravating and mitigating circumstances" is not an element of capital murder. 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 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

[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").

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. While an inmate in a Florida prison, Petitioner Angel Santiago-Gonzalez stabbed a fellow inmate, Donald Burns, sixty-four times, killing him. Pet. App. 2, 6. Prison officials discovered the crime when they responded to Burns' cell and found Burns lying on the floor with both his hands and feet bound, *id.* at 2, "brutally stabbed." *Id.* at 20; *see also id.* at 2. Petitioner was still holding the knife and refused to immediately relinquish it. *Id.* at 2.

After being read his *Miranda* rights, Petitioner told a corrections officer that he had asked to be moved into Burns' cell so that Burns could help with Petitioner's legal matters. *Id.* at 4–5. According to Petitioner, after they were together in Burns' cell for two to three hours, Burns started "acting funny" and at some point touched Petitioner's buttocks underneath his boxer shorts. *Id.* at 5. Petitioner observed that Burns' penis was erect and became irate. *Id.* Over the course of several minutes,

Petitioner formed his plan to attack Burns and ripped his bedsheet into multiple pieces. *Id.* He admitted: "I said, I'm going to kill this man. I just blamed him. I wanted to tie him, I want to knock him over. I tied him up and I'm going to kill him and that's what I did. Just punch him somewhere in the eyes, somewhere in the head." *Id.*

After punching Burns, Petitioner tied him up with the torn bedsheet. *Id.* Petitioner remarked to investigators: "He trying, he was, I just hold him down just to keep him, I punched around, all around the neck and head. I tried to stab him in the face, in the eye, heart, chest, back, and hand. I just black out, I just, I had been on psyche medication for a long time, just all my anger, everything, I just come out. I just black out." *Id.* Petitioner recalled thinking, "the mother fucker has to die, he's going to die." *Id.* Burns succumbed to his wounds nearly six months later. *Id.* at 6.

3. Petitioner pled guilty to first-degree murder and waived the right to a jury during the penalty phase. *Id.* at 6, 17, 22. His penalty phase was therefore conducted solely before a judge.

At that proceeding, the trial court heard testimony about the facts of the murder along with various aggravating and mitigating circumstances. Among other things, the State proved that Petitioner had committed multiple prior violent felonies, including an armed robbery during which he "shot the victim in the abdomen while taking her necklace" and an attempted escape from the Seminole County Jail during which he smuggled a firearm into the facility

and used it to kidnap and rob a correctional officer. R. 4308–09 (Sentencing Order).

Petitioner did not ask the trial court—in making its findings as to sufficiency and weight—to apply the beyond-a-reasonable-doubt standard of proof. In fact, his proposed verdict form cited the beyond-a-reasonable-doubt standard in reference to the required finding of an aggravating circumstance yet did not ask the judge to apply that burden of proof to the sufficiency and weight findings. *See* R. 4125–34; *see also* Tr. 1134, 1202–03 (defense counsel explaining that, though not requested by the court, the defense would "submit a verdict form").[2]

In its nearly 40-page sentencing order, the trial court concluded that death was the appropriate sentence. R. 4342; *see also* Pet. App. 11. It found the following four aggravating circumstances beyond a reasonable doubt: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) prior violent felony; (3) the capital felony was especially heinous, atrocious, or cruel (HAC); and (4) the murder was committed in a cold, calculated, and premeditated

[2] At most, Petitioner argued in 2016—two years before his penalty phase and before he waived the right to a jury—that Florida's death penalty statute was unconstitutional because it did not expressly require the jury to unanimously find beyond a reasonable doubt the sufficiency and weight of the aggravators. *See* R. 97, 148–63. But Petitioner later professed the belief that his waiver of the right to a jury rendered those arguments "moot," 10/10/18 Tr. 7, and the trial court denied his motions to declare the statute invalid. R. 294, 298. The trial court did not address—and was never asked to—what burden of proof, if any, would apply to sufficiency and weight.

manner without any pretense of moral or legal justification (CCP). R. 4307–13; Pet. App. 11. It assigned each of these aggravators either "great weight" or "very great weight." Pet. App. 11. And it found that "the aggravating circumstances in this case far outweigh the mitigating circumstances." R. 4341; Pet. App. 20.

4. On appeal, Petitioner asked the Florida Supreme Court to reverse for a new penalty phase because the trial court failed to find the sufficiency and weight of the aggravators beyond a reasonable doubt, which he alleged was a "fundamental error." Initial Br., *Santiago-Gonzalez v. State*, No. SC18-806, at *60 (Apr. 1, 2019). Under Florida law, the fundamental error doctrine is a basis for reversing due to unpreserved but egregious trial court errors. The Florida Supreme Court rejected that claim. Pet. App. 19–20. It explained that, under its most recent pronouncements, those findings are "[not] elements." *Id*. Thus, "these determinations are not subject to the beyond a reasonable doubt standard of proof." *Id*. at 20 (quoting *Rogers v. State*, 285 So. 3d 872, 885–86 (Fla. 2019)).

5. Several months before 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. The Petition Is Untimely.

A petitioner seeking review of a judgment entered after March 18, 2020 has 150 days from entry of the judgment to file a certiorari petition. *See* Sup. Ct. R. 13.1 & 13.3, *modified by* 589 U.S ___ (Mar. 19, 2020). Petitioner seeks review of a judgment rendered on September 17, 2020. *See* Pet. 2. His filing period thus ended on February 15, 2021. *Id.* As Petitioner concedes, his Petition is 11 days late. *Id.* ("[T]his Petition should have been timely filed on or before February 15, 2021."). And he did not move for an extension "within the period sought to be extended." *See* Sup. Ct. R. 30.2.

This Court's filing rules apply just as much to capital petitioners as they do non-capital petitioners. *See, e.g.*, *Penry v. Texas*, 515 U.S. 1304, 1305–06 (1995) (Scalia, J., in chambers) (denying a capital petitioner's motion to extend the time to file a petition for writ of certiorari); *see also Madden v. Texas*, 498 U.S. 1301, 1304–05 (1991) (Scalia, J., in chambers) (noting that capital cases have not "been made a generic exception to" the Court's filing rules). That is for good reason. Deadlines for appeal "set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands." *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943). If capital petitioners could seek blank-check

extensions unbound by this Court's rules and procedures, they "could prolong indefinitely the appeal period," occupying finite State resources and delaying long-sought closure for their victims. *See id.*

Simply put, "[a]t some point all litigation must end." *Jimenez v. U.S. Dist. Court for S. Dist. of Fla., Miami Div.*, 84 S. Ct. 14, 19 (1963) (Goldberg, J., in chambers). Because Petitioner has offered no reason for accepting the untimely Petition beyond counsel's negligence, the Court should deny certiorari on this basis alone.

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

Petitioner conceded below, in a portion of his brief addressing appellate preservation, that his beyond-a-reasonable-doubt claim "must be reviewed for fundamental error"—an acknowledgment that he failed to preserve it at trial. Initial Br., *Santiago-Gonzalez v. State*, No. SC18-806, at *60 (Apr. 1, 2019). That procedural default makes this case a poor vehicle.

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 failed to object on the ground he would later raise in the Florida Supreme Court. Indeed, his proposed verdict form required the judge to find beyond a reasonable doubt each of the aggravating circumstances but said nothing about that standard as applied to the sufficiency and weighing determinations, or as applied to the ultimate decision of life or death. *See* R. 4125–34.

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 below, is whether the trial court's failure to apply the beyond-a-reasonable-doubt standard was "fundamental error" under Florida law.

2. Even if the state trial court erred in not *sua sponte* instructing itself in a manner 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 [judge'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 trial court's determination that the aggravators were sufficient and "far outweighed" the mitigators. Petitioner tied up his cellmate and stabbed him sixty-four times, admitting later to investigators that the murder was premeditated. And Petitioner was sentenced to death based on four aggravators: (1) murder committed while under sentence of imprisonment; (2) prior violent felony, (3) HAC, and (4) CCP. As the Florida Supreme Court explained, three of those factors—prior violent felony, HAC, and CCP—have repeatedly been identified "as among the weightiest" in Florida's death penalty scheme. Pet. App. 19.

Not only can Petitioner not demonstrate prejudice under his unique facts, the better view is that "[i]t would [have] mean[t] nothing" to say 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. *See* Stephen M. Shapiro et al., Supreme Court Practice § 4.4(f) (10th ed. 2013) (observing that "certiorari may be denied" where the question presented is "irrelevant to the ultimate outcome of the case").

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

Petitioner does not assert that his question presented implicates a division among the lower courts. *See* Pet. 10–19. Instead, he claims that the Florida Supreme Court's decision "conflicts with this Court's opinions in *Apprendi*, *Ring*, *Alleyne*, and *Hurst*." *Id.* at 13; *see id.* at 10–17. Petitioner is incorrect.

The cases he 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.

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 (or here, a judge) 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 if it does not *sua sponte* provide itself 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.

IV. The Decision Below Is Correct.

In rejecting Petitioner's claim of fundamental error, the Florida Supreme Court explained that Petitioner failed to show error. *See* Pet. App. 19–20. The court was right to hold the sufficiency and weighing determinations are not "elements," *see id.* at 19, 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, 1, 10–19. But Petitioner does not cite—let alone 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.

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, 1, 10–19.

The outcome is not different simply because Florida has chosen to assign (in cases where the right to a penalty-phase jury has not been waived) 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.[3]

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[3] 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 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,

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 judge found multiple aggravating circumstances beyond a reasonable doubt. *See* Pet. App. 11.

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

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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").

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.*

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.

Consequently, 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 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. All of this explains why this Court has denied certiorari in two cases presenting the identical issue, *see Rogers v. Florida*, No. 19-8473; *Bright v. Florida*, No. 20-6824, 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,

ASHLEY MOODY
Attorney General of Florida

OFFICE OF THE
ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL
32399-1050
Phone: (850) 414-3300
amit.agarwal@
myfloridalegal.com

AMIT AGARWAL
Solicitor General
**Counsel of Record*

JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General

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