No. 20-8403__

In the
Supreme Court of the United States

DANIEL JACOB CRAVEN,
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

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I. Summary

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 as part of the selection process as opposed to eligibility, and argues that as part of the selection process, these determinations are not the functional equivalent to elements requiring the burden of proof of beyond a reasonable doubt. Opp. 7-12. 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.

II. Florida Law

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).

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. 7-9. Respondent's argument fails to acknowledge 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.

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. This 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. This 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.

Respondent cites to *State v. Poole*, 297 So. 3d 487 (Fla. 2020). *Poole* is 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 cited to this Court's opinion in *McKinney v. Arizona*, 140 S. Ct. 702 (2020) in support of her 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.

III. Petitioner's Claim

Respondent misconstrues Petitioner's claim as arguing "that the Florida Legislature unknowingly created additional elements for death sentence eligibility beyond the Eighth Amendment." Opp. 9. As stated above, Petitioner's argument is that since all three findings of existence of an aggravating factor, the sufficiency of the aggravating factors, and that the aggravating factors outweigh mitigating factors must be found before the death penalty, an enhanced sentence beyond the statutory maximum of life, can be imposed, the three findings are the functional equivalents of elements.

Then, Respondent repeats her argument that only the finding of the existence of an aggravating factor is necessary to make Petitioner eligible for the death penalty while the findings of sufficiency and whether the aggravating factors outweigh the mitigating factors are part of the selection process, citing *Tuilaepa v. California,* 512 U.S. 967 (1994). Respondent's reliance on *Tuilaepa* is misplaced as the issue before the Court was whether the definition of aggravating factors was unconstitutionally vague.

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)….
>
> We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an individualized determination on the basis of the character of

> the individual and the circumstances of the crime." That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.

Tuilaepa, 512 U.S. at 972-973 (citations omitted). The Court further explained, "[t]here is one principle common to both decisions, however: The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision… [t]hat is the controlling objective when we examine eligibility and selection factors for vagueness. Indeed, it is the reason that eligibility and selection factors (at least in some sentencing schemes) may not be 'too vague.'" *Id*.

Thus, the Court's holding in *Tuilaepa* had nothing to do with which sentencing determinations were elements. The decision regarding the two stages of eligibility and selection process focused on preventing bias or ambiguity in the determination of whether the death penalty should be imposed. Requiring the determinations of sufficiency of aggravating factors and that the aggravating factors outweigh mitigating factors to be found beyond a reasonable doubt would create that certainty against bias or ambiguity called for in *Tuilaepa*. The Court in *In re Winship*, 397 U.S. 358,363-364 (1970), explained the certitude provided by the standard of reasonable doubt protects the extraordinary interests at stake for criminal defendants by requiring the factfinder to reach a subjective state of certitude as to the elementary determinations at issue:

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

> reasonable doubt..." To this end, the reasonable doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude."

Id. (internal citations omitted). This explains the Court's decisions in *Apprendi, Ring, Alleyne,* and *Hurst* that any determinations required to raise the penalty beyond the statutory maximum must be found unanimously by a jury beyond a reasonable doubt. This Court recognizes these determinations as functional equivalents of substantive elements of the offense because they are required to be made for the imposition of the enhanced penalty.

IV. Question of State 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. Op. 12-13. "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 its decisions to require that the sufficiency and weight of the aggravating factors must

[1] Petitioner's Initial Brief and Respondent's Answer Brief can be found at http://onlinedocketssc.flcourts.org/DocketResults/CaseByYear?CaseNumber=1643&CaseYear=2018.

be determined by the jury beyond a reasonable doubt. The court expressly cites this Court's decisions in *McKinney* and *Ring* in its interpretation of this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). *Craven v. State*, 310 So. 3d 891, 902 (Fla. 2020).

Thus, the decision in this case was predicated upon the interpretation of federal law, and not state law.

V. Conflict with this Court's Decisions

Respondent argues the Florida Supreme Court's decision does not conflict with this Court's decision in *Alleyne, Ring* and *Hurst* because those decisions concern "fact determinations" which increases the penalty beyond the statutory maximum rather than "subjective determinations involving mercy". Op. 13-14. Respondent repeats her argument distinguishing "eligibility" process determinations from "selection" process determination. As shown above, that distinction has no relevance as to whether sentencing determinations should be found beyond a reasonable doubt. Respondent's argument ignores the fact that this Court made it clear in *Apprendi, Ring,* and *Alleyne* that it was the function of the determination, not the label, that indicated whether it should be considered as an element of capital murder; if the function of the determination increased the penalty beyond the statutory maximum, then that determination functions as an element.

Respondent cites to *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003) which is based upon Pennsylvania law and not Florida law. As pointed out in the Petition, § 921.141(2)(b) requires more than a finding of an aggravating factor to make a defendant eligible for the death penalty; the jury also must find the aggravating factor was

sufficient to support the sentence of death *and* that the aggravating factors must outweigh the mitigating factors. All three findings must be made before the jury can recommend a death sentence. Respondent's reliance on *McKinney* and *Kansas v. Carr*, 136 S. Ct 633 (2016) as support for her argument is misplaced. The issue in *McKinney* was whether an appellate court could "reweigh" the mitigating and aggravating factors to which this Court answered in the affirmative comparing the appellate court's reweighing akin to the application of the harmless error analysis. In *Carr*, the issue was whether the jury had to find mitigating evidence beyond a reasonable doubt. The Court held that the burden of beyond a reasonable doubt did not apply to weighing of mitigating evidence because weighing of mitigating evidence alone does not increase the penalty. Respondent conflates the objective of displaying mercy in the consideration of mitigation with the determination that aggravating factors outweigh mitigating factors which serves as a basis to increase the penalty from a life sentence to the death penalty. A determination which increases the penalty cannot be simply regarded as a question of mercy.

VI. Unsettled Question or Conflict Among the Lower Courts

Respondent argues there is no unsettled conflict among the lower courts. Op. 18-19. The first case Respondent cites is *State v. Mason*, 108 N.E. 3d 56 (Ohio 2018) in which the issue raised was that the jury does too little in merely recommending a death sentence while the judge makes the findings upon which the death sentence is imposed. Thus, *Mason* is not on point. While the Sixth Circuit's opinion in *United States v. Gabrion*, 719 F. 3d 513 (6th Cir. 2013) may support Respondent's position, cases from Delaware require the jury to find that aggravating factors outweigh mitigating

factors beyond a reasonable doubt where the Delaware Supreme Court held that state's death penalty to be unconstitutional because it failed to require the finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt. *Rauf v. State*, 145 A. 3d 430 (Del. 2016). Therefore, the decision below presents an unsettled question of constitutional law.

Accordingly, the petition for certiorari should be granted.

CONCLUSION

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

Respectfully submitted,

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