No.

In the
Supreme Court of the United States

ROBERT CRAFT,
Petitioner,
v.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under the Due Process Clause, the determination of the existence of an element of a crime must be made beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 476-85, 490, 494 n.19 (2000). The same burden applies to determinations of "functional equivalents" of elements of the offense. *See id.* at 494-96. In *Ring v. Arizona*, 536 U.S. 584, 603-05, 609 (2002), this Court concluded that the determination as to whether one or more aggravating circumstances existed was the functional equivalent of an element under Arizona's capital sentencing scheme.

Under Florida's capital sentencing scheme, in addition to finding at least one aggravating factor exists, the factfinder must make additional determinations before a capital sentence can be imposed: (1) whether "sufficient aggravating factors exist," and (2) whether "aggravating factors exist which outweigh the mitigating circumstances." *See* Fla. Stat. § 921.141(2) (2019).

The question presented in this case is whether, considering the operation and effect of Florida's capital sentencing scheme, the Due Process Clause requires the determination that sufficient aggravating factors exist to justify imposing a death sentence to be made beyond a reasonable doubt.

STATEMENT OF RELATED PROCEEDINGS

Craft v. State, 312 So. 3d 45 (Fla. 2020), No. SC18-2061 (Fla. corrected opinion and judgment rendered November 19, 2020; order denying rehearing issued on March 4, 2021; mandate issued on March 22, 2021).

State v. Craft, No. 12 2018 CF 667 (Fla. 3d Cir. Ct. judgment entered on June 7, 2019).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

PAGES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is reported at *Craft v. State*, 312 So. 3d 45 (Fla. 2020), and a copy is attached to this Petition as Appendix A. The order of the Florida Supreme Court denying Petitioner's motion for rehearing is attached to this Petition as Appendix B.

JURISDICTION

The Florida Supreme Court issued its judgment affirming Petitioner's death sentence on November 19, 2020 and denied Petitioner's motion for rehearing on March 4, 2021. This Court has extended the time for filing petitions for certiorari to 150 days in any case where the relevant lower court denying rehearing was issued before July 19, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner Robert Craft pleaded guilty to the murder of Darren Shira, a fellow inmate. *Craft v. State*, 312 So. 3d 45, 49 (Fla. 2020). Mr. Craft expressed a desire to waive the presentation of mitigating evidence as well as a penalty phase jury, and also expressed a desire to be sentenced to death. *Id.* at 48. The trial court was alerted to the existence of significant mitigating evidence through the preparation of two competency evaluations and a presentencing investigation report. *Id.* at 49-50. Although Mr. Craft continued to decline to present mitigation at his sentencing hearing, he allowed four family members to testify about his background and traumatic childhood. *Id.* at 50-51. The trial court found the State had proved the existence of four aggravating factors beyond a reasonable doubt, and also found beyond a reasonable doubt that those factors outweighed any mitigation in the record. *Id.* at 51-52. At issue is whether the additional determination that the aggravating factors in this case were sufficient to justify the death penalty had to be made beyond a reasonable doubt.

The Pretrial Proceedings and Guilty Plea.

Mr. Craft confessed to Mr. Shira's killing the day it occurred and stated he decided to kill Mr. Shira when he learned Shira was a child molester. (R.1 309, R.3 28-29, 55-56.) Mr. Craft was charged on October 1, 2018 with killing Mr. Shira. He filed a pro se motion to waive counsel and represent himself. 312 So. 3d at 48. Following a hearing the trial court ordered Mr. Craft to be evaluated by two mental health experts to determine his competency to proceed. *Id.* at 49. Both experts opined that he was competent to represent himself. *Id.* On March 27, 2019, the trial

court granted Mr. Craft's request to represent himself and appointed standby counsel. The court then conducted a plea colloquy and accepted his plea to the premeditated killing of Mr. Shira. *Id.* at 49-50. Mr. Craft did not challenge the validity of his plea, and the Florida Supreme Court agreed the plea "was knowing, intelligent, and voluntary, and the factual basis for [the] plea provides competent, substantial evidence to support his conviction for first-degree murder." *Id.* at 59.

The Penalty Phase.

The court ordered a presentence investigation report before holding a sentencing hearing. *Id.* at 50. Mr. Craft waived a jury and continued to waive his right to present mitigation. *Id.* The State presented evidence including Mr. Craft's prior statements and the medical examiner's testimony, which established that Mr. Shira died of strangulation and blunt force head trauma. *Id.* The State also introduced copies of Mr. Craft's prior judgment and sentence for aggravated battery with a deadly weapon, aggravated assault with a deadly weapon, and armed false imprisonment. *Id.*

Mr. Craft again declined to present mitigation, but four family members who were present gave statements without being questioned, and Mr. Craft then made a brief statement. *Id.* at 50-51. Beyond those statements, the trial court had the reports of the competency evaluations (R.1 289-307) and presentence investigation. (R.1 308-29). These reports stated Mr. Craft's mother abused drugs and alcohol while pregnant (R.1 290, 297, 323-24), and he was born with his umbilical cord wrapped around his neck, which kept him from breathing (R.1 326). He had only

limited contact with his father, in part due to his father's incarceration (R.1 289, 297, 318). He was labeled a "slow learner" and "mentally retarded," and dropped out of school in the ninth grade. (R.1 290, 297, 317, 320, 326.) His mother introduced him to drug use when he was still a child. (R.1 319, 321, 328.) Although he was diagnosed with ADHD and bipolar disorder his mother did not obtain mental health treatment for him, believing she could "beat it out of him." (R.1 290, 297, 299, 319.) Mr. Craft and his siblings were often left without food. (R.1 319, 323, 325, 327-28.) Mr. Craft's aunt reported an incident where his mother stated he had run off; his aunt found him hiding near his house, wearing only dirty underwear, and bloody as though he had been whipped "literally from head to toe." (R.1 326.) He was about nine or ten years old. (R.1 326.) When he was around 13, he was involved in a nearly fatal car accident that left him in a coma. He had to be resuscitated at the scene; among other things, his orbital sockets were shattered, and he had to undergo surgery and a long period of rehabilitation. (R.1 290, 298, 320.)

As an adult, Mr. Craft had held a variety of jobs including tree cutting, carpentry, painting, and welding. (R.1 290, 298, 317.) He had been in the Department of Corrections for over four years when he killed Mr. Shira. (R.1 321.)

The State suggested several non-statutory mitigators and presented argument in favor of four aggravating factors: Mr. Craft had a prior violent felony; he was under sentence of imprisonment at the time of the offense; the offense was heinous, atrocious and cruel; and the offense was committed with heightened premeditation. 312 So. 3d at 51. Following a separate sentencing hearing, the trial

court found the existence of all four factors had been established beyond a reasonable doubt. *Id.* It gave the first two factors great weight, and the second two very great weight. *Id.* The court also found four non-statutory mitigating circumstances had been established: childhood trauma, close family ties, general mental health mitigation, and good behavior during trial. *Id.* The court then imposed sentence:

> As explained above, this Court has found beyond a reasonable doubt the existence of four statutory aggravating factors, including both that the murder was committed in a cold, calculated, and premeditated manner and that it was especially heinous, atrocious, or cruel: "two of the most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999). This Court assigned very great weight to those two "most serious aggravators," and great weight to the other two aggravating factors, which related to the Defendant's prior felonies.
>
> This Court carefully evaluated the statutory mitigating factors and found that none are applicable in this case. This Court found that four non-statutory mitigating factors have been sufficiently proven. These factors were afforded little, slight, some, and little weight, respectively.
>
> This Court, having compared the mitigating factors against the aggravating factors, finds that the aggravating factors clearly, convincingly, and beyond a reasonable doubt outweigh the mitigating factors. In fact, the mitigating evidence "is minimal and does not come close to outweighing the aggravating factors." *McWatters v. State*, 36 So. 3d 613, 642 (Fla. 2010). In other words, although the number of mitigating factors is equal to the number of aggravating factors, the relevant inquiry and determination is not the sheer number but, rather, the weight afforded each factor. Here, the nature and quality of the mitigating evidence pales in comparison to the enormity of the aggravating factors proven in this case.

312 So. 3d at 51-52.

The Direct Appeal.

On appeal, Mr. Craft raised five arguments relating to how the trial court handled the mitigation evidence, including the acceptance of his waiver, the weighing of mitigating evidence relating to childhood trauma, and the trial court's failure to ensure mitigation was placed in the record after being alerted to the possibility of significant mitigation. *Id.* at 52-55. Mr. Craft also argued the trial court had failed to consider all mitigation in the record, pointing to evidence that:

> (1) Craft was born with the umbilical cord around his neck and was blue and not breathing; (2) Craft's mother failed to obtain proper mental health treatment for Craft and felt that she could "beat it out of him"; (3) by age four, all of Craft's baby teeth were rotten because of malnutrition, and at times, Craft's mother would starve the children; (4) Craft was designated "emotionally handicapped" and a "slow learner," classified as "mentally retarded," and was enrolled in special education classes; (5) Craft began drinking beer and smoking marijuana around age ten or twelve, and later began using crystal methamphetamine; (6) Craft had previously worked, including repairing vehicles, welding, tree service, carpentry, and painting/remodeling; (7) as an adult, Craft saved a fellow inmate's life while they were both in jail; (8) Craft immediately, and repeatedly, confessed to killing the victim; and (9) Craft later pleaded guilty to first-degree murder.

Id. at 55. The Florida Supreme Court held the trial court had considered the first five items in the context of general childhood trauma or general mental health; and that the trial court had considered, but rejected, the last two items. *Id.* at 56. Based on the State's concession that the trial court had not considered the sixth or seventh item, the court considered and rejected a claim of cumulative error. *Id.* at 56-57.

Next, Mr. Craft argued the trial court had fundamentally erred "by failing to determine beyond a reasonable doubt that the aggravating factors were sufficient to justify the death penalty. The Florida Supreme Court rejected this argument, stating that "in cases where the defendant did not waive the right to a penalty-phase jury we have repeatedly health that this determination is 'not subject to the beyond a reasonable doubt standard of proof.'" *Id.* at 57 (citations omitted). The court added "that the same claim is equally meritless where, as here, the defendant waived the right to a penalty-phase jury." *Id.* (citations omitted). Finally, the court declined to require remand for the entry of a nunc pro tunc competency of order, finding the trial court's failure to enter a written order did not create fundamental error. *Id.* at 57-58. Although not raised as an issue by Mr. Craft, the court also upheld the trial court's acceptance of his guilty plea. *Id.* at 58.

REASONS FOR GRANTING THE PETITION

I. The Florida Supreme Court's Decision Directly Conflicts With This Court's Decisions on the Standard of Proof for Functional Elements of an Offense, Including *Apprendi v. New Jersey*, *Ring v. Arizona*, *Alleyne v. United States*, and *Hurst v. Florida*.

The Florida Supreme Court's decision in this case conflicts with the principle that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury verdict" is an element of the offense, which the State must prove beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 494 (2000). Whether that fact is described as an "element" or a "sentencing factor," the "relevant inquiry is not one of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. Under Florida's capital sentencing scheme, the determination as to whether the aggravating factors are sufficient to justify imposing death is the functional equivalent of an element because it is one of the determinations that expose a defendant to a greater punishment than that authorized by statute for capital murder.

A murder with premeditation is a first-degree murder under Florida law, and is classified as a capital felony. Fla. Stat. § 782.04(1)(a)1 (2019). A person who is convicted of a capital felony can be punished by death "if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment." Fla. Stat. § 775.082(1)(a) (2019). The

sentencing procedure requires the jury (or judge, in a bench trial) to make three determinations before considering whether a defendant "should be sentenced to life imprisonment without the possibility of parole or death":

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.
>
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
>
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:
>
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
>
> 2. Unanimously 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. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

Fla. Stat. § 921.141 (2019).

This scheme requires the jury to make a recommendation of either death or life imprisonment based on three determinations: that at least one aggravating factor exists, that the aggravating factor or factors are sufficient in themselves, and that the aggravating factor or factors outweigh the mitigating circumstances. *See id.* Until each of those determinations is made, even though premeditated murder is labeled a "capital felony," the defendant is not eligible for the death penalty. *See id.*

The selection of the death penalty or a penalty of life in prison takes place separately:

> (3) IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH.—
>
> (a) If the jury has recommended a sentence of:
>
> 1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
>
> 2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.
>
> (b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

Id.[1]

[1] Section 921.141(4) makes clear that in each case, without limitation for bench trials, a written order imposing death must address "the aggravating factors set

Under this system, a jury can recommend either a life sentence, in which case the court has no discretion to override the jury's recommendation, or a death sentence, in which case the court can choose between imposing a death sentence and imposing a sentence of life in prison.

Therefore, the determinations regarding the presence of aggravating circumstances, sufficiency of aggravating circumstances, and whether the aggravating circumstances outweigh any mitigation presented necessarily precede the selection of a death sentence. In other words, those determinations are eligibility determinations: they must be made before the defendant can be subjected to the imposition of a sentence exceeding the statutory maximum of life without parole for first-degree murder.

In *Apprendi*, this Court held that any circumstance that increases a sentence "beyond the maximum authorized statutory sentence…is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 530 U.S. at 494 n.19. In *Blakely v. Washington*, 542 U.S. 296, 302-05 (2004), the Court applied that rule to reverse a sentence that exceeded the standard sentencing range for a particular offense, even though the sentence did not exceed the overall statutory maximum for that class of offenses. The Court later applied similar

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forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence."

reasoning to sentencing factors increasing mandatory minimum sentences in *Alleyne v. United States*, 570 U.S. 99 (2013).

In *Ring v. Arizona*, 536 U.S. 584, 605 (2002), the Court stated the finding of aggravating circumstances under Arizona's capital sentencing scheme was the "functional equivalent" of an element of a greater offense, stating that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative." Because that finding exposed defendants to a sentence of death, which exceeded the statutory maximum under Arizona law, it had to be made by a jury. *Id.*

Critically, the Court's focus in each of these cases was the sentence actually imposed; the Court repeatedly rejected arguments that a particular sentence could be upheld because it was within a theoretically acceptable range of punishment. *See Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 303-04; *Ring*, 536 U.S. at 603-04. Death is theoretically an available penalty in any first-degree murder case under Florida law, but to impose it on a specific defendant requires additional determinations over and above those necessary to convict the defendant of the underlying crime.

The Court applied these principles in *Hurst v. Florida*, 136 S. Ct. 616 (2016), holding unconstitutional the then-existing Florida capital sentencing scheme because it allowed a death sentence to be imposed without submitting all necessary findings to a jury. The Court's opinion began with a clear reiteration of the principle that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact

necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. at 619. Under the sentencing statute in effect at the time, imposing a death sentence required a separate sentencing proceeding leading to an "advisory sentence" from the jury, which was not required to give a factual basis for its recommendation. *See id.* at 620. Then, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, [was required to] enter a sentence of life imprisonment or death." *Id.* (citing § 921.141(3), Fla. Stat. (2010)). Hurst had been sentenced to death based on the sentencing judge's determination that two aggravating circumstances exist, and the Florida Supreme Court "rejected Hurst's argument that his sentence violated the Sixth Amendment in light of *Ring*." *Id.*

This Court concluded Hurst's death sentence violated the Sixth Amendment because the statutory scheme at issue did not "require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. The Court pointed out that the statute did not make a defendant eligible for death until those findings were made. *Id.*

The Florida Legislature rewrote the state's capital sentencing scheme following *Hurst v. Florida*, eventually creating the system under which Mr. Craft was sentenced. That system, as set forth in detail above, requires not only a finding regarding the presence of aggravating circumstances, but also a finding about their sufficiency and their weight relative to any mitigating circumstances, before the sentencer can choose between a life and a death sentence. Although the Florida

Supreme Court initially interpreted the revised statute consistently with the *Apprendi* line of cases, the court changed direction and began receding from its own holdings about the operation and effect of the revised statute. The result has created conflict between Florida law and this Court's precedent.

The Florida Supreme Court initially held in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016) that, before a death sentence could be imposed, a jury must find unanimously and beyond a reasonable doubt the existence of aggravators, the sufficiency of the aggravators, and whether the aggravators outweighed the mitigation:

> [W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst, 202 So. 3d at 44; *see also Perry*, 210 So. 3d at 640 (interpreting Florida's revised death penalty statute). The Florida Supreme Court distinguished the findings of sufficient aggravation and that the aggravating factors outweighed the

mitigation from the ultimate sentencing recommendation, noting that a jury is not compelled or required to recommend a death sentence. *Perry*, 210 So. 3d at 640.

Subsequently, in *Foster v. State*, 258 So. 3d 1248, 1251-52 (Fla. 2018), the Florida Supreme Court rejected an argument that a defendant whose sentence had become final in 2001 should be sentenced to life because a jury had not found all the elements of "capital first-degree murder."[2] The court stated the penalty phase findings were not elements of "the capital felony of first-degree murder" but, rather, were findings required before the death penalty could be imposed. *Id.* at 1252. *Foster* did not recede from *Hurst* or *Perry*, and did not involve the operation and effect of the sentencing scheme created after *Hurst v. Florida. See id.* at 1251-52 (describing *Hurst* as "a change in this state's decisional law").

Then, in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019), *cert. denied*, 141 S. Ct. 284 (2020), the Florida Supreme Court explicitly receded from *Hurst* and *Perry*, holding two of the findings making a defendant eligible for the death penalty were not elements of the offense requiring a unanimous finding beyond a reasonable doubt:

> To the extent that in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable

[2] The court had already rejected retroactive application of *Hurst* in *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016), which held *Hurst* relief was not available to defendants whose death sentence became final before the opinion in *Ring v. Arizona*.

> doubt. Since *Perry*, in *In re Standard Criminal Jury Instructions in Capital Cases* and *Foster*, we have implicitly receded from its mischaracterization of *Hurst v. State*. We now do so explicitly.

285 So. 3d at 885-86.

Finally, in *State v. Poole*, 297 So. 3d 487, 490 (Fla. 2020), *cert. denied*, 141 S. Ct. 1051 (2021), the Florida Supreme Court went a step further and receded from *Hurst v. State* "except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." To correctly understand *Hurst v. Florida*, the court stated, that decision had to be viewed in light of cases distinguishing "the eligibility decision and the selection decision." *Poole*, 297 So. 3d at 501 (citing *Tuilaepa v. California*, 512 U.S. 967, 971 (1994)). The "eligibility" decision required a murder conviction and one aggravating circumstance. *See id.* (citations omitted). The selection decision required "an individualized determination that assesses the defendant's culpability." *Id.* (citation omitted). The court then reasoned that *Hurst v. Florida* was "about eligibility, not selection," *id.*, and that the only finding that had to be made by a jury was the existence of one or more statutory aggravating circumstances, *id.* at 502-03.

A problem with this reasoning is that it is based on a version of the statute predating the legislative changes that took place because of *Hurst v. Florida*. *See Poole*, 297 So. 3d at 495-96. That statutory scheme, which still placed the jury in an advisory role, did not describe the eligibility decision and the selection decision the same way the current statute does. *Compare* Fla. Stat. § 921.141 (2011) *with* Fla. Stat. § 921.141 (2019). The "eligibility finding" was "[t]hat sufficient aggravating

circumstances exist as enumerated in subsection (5)." *Poole*, 297 So. 3d at 502 (citing Fla. Stat. § 921.141(3)(a) (2011)). The selection finding was "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* (citing Fla. Stat. § 921.141(3)(b) (2011)). Under the statute at issue in *Poole*, the selection finding gave the defendant "an opportunity for mercy if…justified by the relevant mitigating circumstances and by the facts surrounding his crime. *Id.* at 503. On its face, that statutory scheme operated differently from the current one, which requires the existence, sufficiency, and relative weight of aggravating circumstances to be determined before a death sentence can be considered.

In holding that the determinations that are currently required before Florida defendants can be subjected to a death penalty are not the elements (or the functional equivalent of elements) requiring a verdict based on proof beyond a reasonable doubt, Florida law directly conflicts with this Court's decisions in *Apprendi*, *Ring*, *Alleyne*, and *Hurst v. Florida*.

II. The Florida Supreme Court's Decision Allowing An Increased Penalty to be Imposed Without Requiring Proof Beyond a Reasonable Doubt of All Factors Increasing the Available Penalty is Inconsistent With Due Process.

The due process right of requiring the State to prove every element of a crime beyond a reasonable doubt "reflects a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. 358, 361-62 (1970) (citation omitted). The requirement of proof beyond a reasonable doubt not only guards against the danger of an erroneous conviction, but also "provides

concrete substance for the presumption of innocence." *Id.* at 363. The standard also has a vital role in maintaining public confidence in the court system. *Id.* at 364. The standard also protects the interests of criminal defendants facing deprivation of life or liberty by requiring a subjective state of certitude regarding the elements of an offense. *Id.* The reasonable doubt standard is just as critical when making determinations that affect a sentence as when determining guilt of an underlying offense:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily followed that the defendant should not — at the moment the State is put to proof of these circumstances — be deprived of protections that have, until this point, unquestionably attached.

Apprendi, 530 U.S. at 484.

The Florida Supreme Court's decision in *Poole* regarding which determinations must be made beyond a reasonable doubt also makes an unwarranted and unnecessary distinction between determinations that are "purely factual," on one hand and those that are subjective, or that call for the exercise of moral judgment, on the other. *See* 297 So. 3d at 503. Under this view, determinations that cannot be objectively verified "cannot be analogized to an element of a crime." *Id.* But if the constitutional right of proof beyond a reasonable doubt applies to the existence of an aggravator such as the "especially heinous, atrocious, or cruel" aggravator, that distinction is artificial.

The solution is to return to *Apprendi* and its progeny, and to look at the operation of Florida's current capital sentencing scheme. A determination that increases the available penalty from life to death exposes the defendant to a greater punishment than his conviction for the underlying crime, and thus must be proved beyond a reasonable doubt. Under the current statute, that includes the sufficiency of the aggravating factors.

III. The Question Presented Has Considerable Practical Impact.

Since receding from *Hurst* and *Perry*, the Florida Supreme Court has repeatedly held that determinations as to whether aggravating factors are sufficient to justify the death penalty and whether the aggravating factors outweigh mitigating evidence "are not subject to the beyond a reasonable doubt standard of proof." *Newberry v. State*, 288 So. 3d 1040, 1047 (Fla. 2019), *cert. denied*, 141 S. Ct. 625 (2020); *see also, e.g.*, *Bright v. State*, 299 So. 3d 985, 998 (Fla. 2020), *cert. denied*, 141 S. Ct. 1697 (2021); *Santiago-Gonzalez v. State*, 301 So. 3d 157, 177 (Fla. 2020), *cert. denied*, 2021 WL 2519344 (June 21, 2021); *Craven v. State*, 310 So. 3d 891, 902 (Fla. 2020), *cert. pending*, No. 20-8403.

However, under the operation and effect of Florida's capital sentencing scheme, these determinations are necessary to make a defendant eligible for a death penalty. The finding of one or more aggravating factors does not allow a court to impose a death penalty without those additional determinations. Only after those determinations are made does the jury select between life and death in making its sentencing recommendation and, if the jury selects death, the court still has

discretion to impose either a life sentence or the death penalty. Under the current statute, consideration of mitigation is not merely an "opportunity for mercy," but is a necessary step in deciding whether the death penalty is available at all. The Florida Supreme Court's reading of the statute is depriving Florida defendants of due process of law by lessening the State's burden of proof as expressed in the *Apprendi* line of cases. The issue has implications for every pending and future capital case decided under Florida's current statutory scheme.

CONCLUSION

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

Respectfully submitted,

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