CAPITAL CASE
No. 21-5280

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

I. The Sufficiency of Aggravating Circumstances to Justify Imposing a Death Penalty is Separate from the Weighing of Aggravating Circumstances against Mitigating Circumstances; *McKinney v. Arizona* Is Not Controlling.

Under Florida's capital sentencing scheme, the determination that at least one aggravating factor exists is distinct from a determination that "sufficient aggravating factors exist," which in turn is distinct from the determination that aggravating factors outweigh any mitigating circumstances. *See* Fla. Stat. § 921.141 (2) (a)-(b) (2021).

The finding that "sufficient" aggravating factors exist is not merely a restatement of the requirement that one or more aggravating circumstances be found beyond a reasonable doubt. That initial finding is a step in the eligibility determination. *See id.* at (2)(b). The sufficiency determination and the weighing of aggravators and mitigators are the two final steps in the eligibility determination before the jury can select a life sentence or a death sentence. *See id.* at (2)(b)2.a.-c.[1]

The requirement of determining that "sufficient aggravating factors exist" is an additional requirement not found in many state statutes. Florida and at least one other state require a separate finding — independent of any weighing of aggravating and mitigating factors — that the aggravating factors are sufficient to

[1] The statute states the defendant is "eligible for a sentence of death" upon a finding that an aggravating circumstance is present. However, under the plain terms of the statute, a death penalty cannot be selected until the additional determinations in § 921.141 (2)(b)2.a.-c. are made, and thus those determinations increase the available penalty.

justify imposing a death sentence. *See id.*; Ark. Code Ann. § 5-4-603(a)(2021) (requiring imposition of a death sentence only if jury returns three findings including "(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.").

The trial court in this case found aggravating factors outweighed mitigating factors beyond a reasonable doubt. However, the court did not make the required finding that aggravating factors were sufficient to justify the death penalty beyond a reasonable doubt. In a state where the list of aggravating factors has doubled since capital punishment was reinstated,[2] this is not a mere formality; it is a legislative directive that the aggravating circumstances in a particular case not only fall into one of the enumerated categories, but also rise to a level justifying the death penalty.

Contrary to the assertion in the Brief in Opposition, this Court's decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), does not negate Petitioner's argument. In *McKinney*, this Court held the Arizona Supreme Court could reweigh aggravating and mitigating circumstances on collateral review of a death sentence after a federal appeals court held the state court had failed to properly consider relevant mitigating evidence. 140 S. Ct. at 706, 709. Under the version of the Arizona sentencing statute in effect at the time McKinney was originally sentenced,

[2] When Florida rewrote its capital sentencing law following this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the law contained eight aggravating factors. *See Proffitt v. Florida*, 428 U.S. 242, 251 (1976). The statute now contains 16. *See* Fla. Stat. § 921.141(6)(a)-(p) (2021).

he had not been entitled to a jury determination of aggravating circumstances. *See id.* at 708. McKinney argued that this Court's subsequent decisions in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 577 U.S. 92 (2016), should be applied to require resentencing by a jury in his case. *See McKinney*, 140 S. Ct. at 707. This Court rejected McKinney's argument for two reasons. First, the Court held that appellate courts can reweigh aggravating and mitigating evidence if the lower court did not properly consider mitigating evidence. *Id.* (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990)). Second, the Court held *Ring* and *Hurst* had not changed the law to require that the jury weigh aggravating and mitigating circumstances before imposing death. *Id.* at 707-08.

The issue in *McKinney* was whether it was permissible to conduct appellate reweighing of aggravating and mitigating factors, and that is not the issue presented here. The issue here is the level of certainty required for the Florida requirement that the factfinder determine that the aggravating circumstances justify death before proceeding to the choice of sentence. The sufficiency requirement is a finding of ultimate fact, just as a finding that the "especially heinous, atrocious, or cruel" or "cold, calculated, and premeditated" were present is a finding of ultimate fact. *See generally U.S. v. Gaudin*, 515 U.S. 506, 514-15 (1995) (discussing the jury's role in determining not just historical facts, but the "ultimate facts" about whether the element of a crime has been satisfied).

Moreover, the two statutes are too dissimilar to simply transfer this Court's reasoning in *McKinney* to the current Florida statute. The 1993 Arizona sentencing

statute specified that the trial court "alone" would make all factual determinations necessary to impose a death sentence. Ariz. Rev. Stat. Ann. § 13-703B (1993). The statute made death an available punishment for every first-degree murder, with the trial court making the selection:

> In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Ariz. Rev. Stat. Ann. § 13-703E (1993).[3]

In contrast to the former Arizona statute, the current Florida sentencing scheme circumscribes the court's ability to impose a death sentence in several ways — one of which is requiring the findings in section 921.141(2)(b)2.a.-c. before a death penalty can even be considered. This does not run afoul of the Court's reiteration, in *McKinney*, that judges can still make "the ultimate life-or-death decision" within the range created by state law. *See* 140 S. Ct. at 708 (citing *Ring*, 536 U.S. at 612 (Scalia, J., concurring)). In Florida's current capital sentencing scheme, both the jury and the trial court have the opportunity to make that ultimate choice between a life sentence and a death sentence. *See* Fla. Stat. §§ 921.141(2)(b)2.a.-c.; 921.141(3)(a)1.-2.

[3] The current Arizona provision is substantially similar, with the substitution of "trier of fact" for "court" and some other small revisions. *See* Ariz. Rev. Stat. Ann. § 13-751E (2021).

Finally, the ultimate fact of the sufficiency of the aggravator or aggravators to justify a death sentence is not the "mercy decision" referred to in *Kansas v. Carr*, 577 U.S. 108, 119 (2016). As the Brief in Opposition notes at page 12, Petitioner is not asking this Court to attach any particular burden of proof to the jury's ultimate recommendation of a death sentence (or sentence of life in prison). What is at issue is a particular finding, sufficiency of aggravating circumstances, without which a death penalty cannot be imposed. The discussion of mitigation in *Carr* does not illuminate that issue.

II. Factual Determinations that Involve Normative Judgment Must Be Made Beyond a Reasonable Doubt When They Increase the Available Penalty for a Crime.

The Brief in Opposition basically argues *Apprendi*[4] does not apply to the finding at issue here because the finding involves a "non-factual normative judgment." The implicit underlying premise is that a factual determination increasing the available penalty for a crime needs to comply with *Apprendi* only if the determination is one of purely objective, observable fact. The light was red. The firearm was discharged. This premise is false. *See U.S. v. Gaudin*, 515 U.S. 506, 514-15 (1995). This Court explained in *Gaudin* that the jury's role was "not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514. The Court noted a distinction between "'ultimate' or 'elemental' fact[s]" and "'evidentiary' or 'basic facts,'" and stated the

[4] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any fact increasing the available penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt).

jury had the responsibility "to find the ultimate facts beyond a reasonable doubt." *Id.* at 515 (quoting *Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156 (1979)).

The element at issue in *Gaudin*, materiality, required the jury to decide whether certain statements fulfilled the legal definition of materiality so as to satisfy an element of the charged crime of making false statements. *See id.* at 508-09. This Court squarely rejected the State's argument that materiality was a legal issue that would properly be resolved by the trial judge, pointing out:

> [O]ur cases have recognized in other contexts that the materiality inquiry, involving as it does "delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those inferences to him ... [is] peculiarly on[e] for the trier of fact.

Id. at 512. The Court also noted that, if juries were limited to finding only factual components of the elements of crimes, "the lawbooks would be full of cases, regarding materiality and innumerable other 'mixed-law-and-fact' issues," in which the judge applied the law to the facts rather than the jury, concluding: "We know of no such case." *Id.* at 512-13.

If a jury were not able to make normative or value judgments based on factual components, the jury would never be able to decide whether the especially heinous, atrocious, or cruel aggravating factor (EHAC) exists. To make that determination, the factfinder must determine, among other things, whether "the crime was conscienceless or pitiless." Fla. Std. Jury Instr. (Crim.) 7.11 (2021). "Conscienceless" is not an objective, observable, or quantifiable fact. It is a judgment, an elemental fact, based on other evidence. Under the "cold, calculated,

and premeditated" (CCP) aggravator, the factfinder must determine that the defendant acted "without any pretense of moral or legal justification." *Id.* A "pretense of moral or legal justification" is defined as "any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder." *Id.* The pretense of justification (or lack thereof) is not an objective, observable, or quantifiable finding. Capital juries regularly make these determinations, however. Moreover, juries are instructed that their determinations as to these and other aggravating factors must be made beyond a reasonable doubt. *See id.*

Outside the realm of capital sentencing, juries in Florida and elsewhere routinely make judgments about the existence of elements by either weighing or drawing inferences from the evidence rather than by making an objective, observable, or quantifiable finding of fact. To convict a defendant of possessing obscene material, for example, the jury must find beyond a reasonable doubt that "material depicts or describes sexual conduct in a patently offensive way" and "taken as a whole, lacks serious literary, artistic, political or scientific value." Fla. Std. Jury Instr. (Crim.) 24.5 (2021). Or, to decide whether the defense of necessity is available, the jury is instructed: "[t]he harm that the defendant avoided must outweigh the harm caused by committing the [charged crime]." Fla. Std. Jury Instr. (Crim.) 3.6(k) (2021). To find the defendant guilty of the charged offense when a necessity defense is presented, the jury must be "convinced beyond a reasonable doubt that the defendant did not commit the [charged crime] out of necessity." *See*

id. In other words, the jury must be convinced beyond a reasonable doubt that one harm outweighed another. *See id.* To convict a defendant of culpable negligence, the State must prove beyond a reasonable doubt that the alleged negligence was "gross and flagrant." Fla. Std. Jury Instr. (Crim.) 8.9 (2021). These findings are the type of "ultimate" or "elemental" facts this Court recognized in *Allen* and *Gaudin*.

In Florida's capital sentencing scheme, the determination that an aggravating factor is, or factors are, sufficient to justify imposing death, requires drawing inferences in addition to determining underlying facts. Even if the facts underlying a particular aggravator can be viewed as objective, observable, or quantifiable — for example, that the defendant was previously convicted of a felony involving the threat of violence to another — Florida's sentencing statute explicitly requires a finding that the aggravating circumstance is sufficient to justify death. Because that finding of ultimate fact increases the available penalty from life in prison to death, it is subject to the requirements of *Apprendi* and the cases emanating from that decision.

III. This Case is An Appropriate Vehicle for Addressing the Question Presented, Which Has Considerable Practical Impact.

The question presented is whether the determination that aggravating factors are sufficient to justify imposing death has to be made beyond a reasonable doubt. The trial court did, in fact, apply the beyond a reasonable doubt standard to its finding that the aggravating factors outweighed mitigating circumstances. The question presented here is discrete and its resolution does not depend on the appropriate burden of proof for any other finding making a death penalty available

under Florida law. The issue will continue to affect all those defendants against whom the State of Florida seeks a death penalty and thus addressing the standard of proof will have practical impact beyond the boundaries of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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