No.

In the
Supreme Court of the United States

WAYNE C. DOTY,
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 and pursuant to the right to a trial by jury, 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) (2018).

The question presented in this case is whether, considering the operation and effect of Florida's capital sentencing scheme, the Due Process Clause and right to a jury trial require these additional determinations to be made beyond a reasonable doubt.

STATEMENT OF RELATED PROCEEDINGS

Doty v. State, 313 So. 3d 573 (Fla. 2020), No. SC18-973 (opinion and judgment rendered February 13, 2020), *rehearing denied*, 315 So. 3d 633 (Fla. 2021) (Mem.) (order rendered April 14, 2021); mandate issued on May 4, 2021.

Doty v. State, 170 So. 3d 731 (Fla. 2015).

State v. Doty, No. 04-2011-CF-000498-A (Fla. 8th Cir. Ct. sentencing order entered on May 15, 2018).

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The opinion below is reported at *Doty v. State*, 313 So. 3d 573 (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; the motion for rehearing is attached as Appendix C.

JURISDICTION

The Florida Supreme Court issued its judgment affirming Petitioner's death sentence on February 13, 2020 and denied Petitioner's motion for rehearing on April 15, 2021. This Court previously extended the time for filing petitions for certiorari to 150 days in cases 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 PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed […]."

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 Wayne C. Doty entered a plea of guilty in August 2012 in the first-degree murder of Xavier Rodriguez, a fellow inmate at Florida State Prison. Mr. Rodriguez was killed on May 17, 2011. Following a penalty phase trial, ten members of the 12-member jury recommended a death sentence. The trial judge imposed that penalty, and the Florida Supreme Court affirmed Mr. Doty's conviction and sentence. *See Doty v. State*, 170 So. 3d 731 (Fla. 2015). That death sentence was subsequently vacated pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), following this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

As he had done during the first trial, *see* 170 So. 3d at 734, Mr. Doty represented himself at a second penalty phase trial in February 2018. (R. 1717, 1948, 2132, 2267, 2346.) During Mr. Doty's second penalty phase trial the jury was instructed that it had to make findings regarding whether one or more aggravating factors existed, whether the aggravating factors were sufficient to impose death, and whether the aggravating factors outweigh any mitigating evidence presented. *See* 313 So. 3d at 576. At issue here is whether the findings that the aggravating factors in this case were sufficient to justify the death penalty and that those factors outweighed any mitigating evidence had to be made beyond a reasonable doubt.

The Guilty Plea.

Mr. Doty confessed to killing Mr. Rodriguez on the day of the event. *See* 170 So. 3d at 734. Before the trial court accepted his plea, Mr. Doty presented a competency evaluation and went through "a very detailed plea colloquy." *Id.* at 738. Mr. Doty did not challenge the validity of his plea in his first appeal, and the

Florida Supreme Court held the plea "was knowingly, intelligently, and voluntarily entered." 170 So. 3d at 739. In addition, the court found the factual basis for the plea provided competent, substantial evidence to support a conviction for first-degree murder. *Id.*

The Second Penalty Phase.

Mr. Doty stipulated to the existence of two alleged aggravating factors: that he was serving a sentence of imprisonment for a prior felony at the time of the charged crime, and that he was previously convicted of a capital felony. *See* 313 So. 3d at 575. The State put on evidence in support of a third aggravator, that the killing of Mr. Rodriguez had been done in a cold, calculated, and premeditated manner without pretense of moral or legal justification. *Id.*

Mr. Doty presented evidence of several nonstatutory mitigating factors. *See* 313 So. 3d at 575-76. This included evidence that Mr. Doty had experienced adverse childhood experiences in the form of neglect, abandonment, domestic violence, and the lack of a positive male role model, and that he had been diagnosed with obsessive compulsive personality disorder. *Id.* Mr. Doty's mother testified that his father left, taking Mr. Doty, when Mr. Doty was just two years old. *Id.* at 576. Mr. Doty's older half-brother testified that Mr. Doty's father was abusive to both his mother and Mr. Doty's older half-siblings, and as a result he went to live with his father before his mother and Mr. Doty's father separated. (R. 2402-06.) Mr. Doty's mother did not see Mr. Doty again until he was 20 or 21 years old, when he briefly reunited with her and stayed with her and her husband. (R. 2387-88.) At that time

Mr. Doty could not seem to connect with people and was unable to accept the affection they offered; one night he did not return, and she learned from his employer that he had returned to Florida. (R. 2388-89, 2397-400.)

Two women testified Mr. Doty's father had physically abused them in front of Mr. Doty. 313 So. 3d at 576. Shelley Connor, who moved in with Mr. Doty's father when Mr. Doty was about five years old, said Mr. Doty's father once beat her so badly she could not go to work for a week. (R. 2434.) Mr. Doty reported the abuse to someone at school, but she denied it when the police came to question her. (R. 2436-37.) Prior testimony from Ann Hertle, who had a child with Mr. Doty's father, was read into the record, in which she said Mr. Doty's father was both physically and mentally abusive to her. (R. 2497.) Ms. Hertle acknowledged using physical punishment on Mr. Doty, including burning his hand on a stove after she found him and her son playing with matches. (R. 2503.) Mr. Doty's father testified and acknowledged being abusive. 313 So. 3d at 576.

The jury found, unanimously and beyond a reasonable doubt, the existence of the three alleged aggravators. *Id.* The jury found four mitigating circumstances had been established and did not find three others had been established. *Id.* The jury unanimously found the aggravating factors outweighed the mitigating circumstances, and unanimously recommended a death sentence. *Id.*

At a post-verdict sentencing hearing Mr. Doty presented argument, but no additional evidence. (R. 1567-83.) The trial court entered a Sentencing Order on May 15, 2018 (R. 1380-1400, attached to this Petition as Appendix C). The Order

stated the court had independently weighed the aggravating and mitigating circumstances in reaching its decision. (R. 1382.) The court found each alleged aggravating factor was proved beyond a reasonable doubt and gave them great weight or very great weight. (R. 1382-88.) The court found Mr. Doty had established each of the seven mitigating circumstances he had offered, including those not found by the jury, and gave them slight to moderate weight. (R. 1388-96.) The court concluded that the aggravating circumstances "far outweigh[ed]" the mitigating circumstances, and imposed a death sentence. (R. 1399.)

The Direct Appeal.

On appeal, Mr. Doty argued fundamental error occurred when the trial court failed to instruct the jury that whether the aggravating factors were sufficient to justify a death sentence and whether they outweighed the mitigating circumstances had to be found beyond a reasonable doubt. He argued the Sixth and Fourteenth Amendments to the U.S. Constitution required proof beyond a reasonable doubt of any findings increasing the available penalty from life in prison to death. *See* Initial Br., Case No. SC19-973, at 32-45 (available at https://efactssc-public.flcourts.org/casedocuments/2018/973/2018-973_brief_131800_ initial20brief2dmerits.pdf). The Florida Supreme Court rejected this argument, stating: "these determinations are not subject to the beyond a reasonable doubt standard of proof. […] We therefore conclude that the trial court did not err in failing to so instruct the jury." 313 So. 3d at 577 (citations omitted) (Appendix A). Mr. Doty filed a timely Motion for Rehearing, which was denied without elaboration. *See* Appendices B and C.

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, finding the aggravating factors are sufficient to justify imposing death is the functional equivalent of an element because it is one of the findings that exposes a defendant to a greater punishment than that authorized by statute for capital murder. The finding that the aggravating factors outweigh any mitigating circumstances is likewise a finding that exposes a defendant to a greater punishment than otherwise would be authorized.

A. The Operation of Florida's Capital Sentencing Scheme.

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 (2018). 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) (2018). The sentencing procedure requires the jury to make three findings 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 (2018).

This scheme requires the jury to make a recommendation of either death or life imprisonment only after deciding 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 findings is made, even though premeditated murder is labeled a "capital felony," the defendant cannot be sentenced to death. *See id.* The standard jury instructions for capital cases reinforce the need to make separate findings about the existence, sufficiency, and relative weight of the aggravating circumstances:

> The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor[s] found to exist outweigh the established mitigating circumstances must be unanimous, and your decision to impose a sentence of death must be unanimous.

Fla. Std. Jury Instr. 7.11 (2017).

The jury's findings as to all of the steps outlined above are necessary precursors to imposing the death penalty. 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.

Fla. Stat. § 921.141 (2018).

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.

B. This Court's Precedent Treats Circumstances Increasing the Available Penalty as the Functional Equivalent of Elements.

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 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*, 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 existed, 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.*

C. Conflict Has Arisen between Florida's Application of the Capital Sentencing Scheme and This Court's Precedent.

The Florida Legislature rewrote the state's capital sentencing scheme following *Hurst v. Florida*, eventually creating the system under which Mr. Doty 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 at 44, 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.

Then, 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[1] should be sentenced to life because a jury had not found all the

[1] 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*. At issue in *Foster* was whether there was a way to bring the defendant's case back within the ambit of *Hurst* despite the length of time that had passed after the defendant's sentence became final.

elements of "capital first-degree murder." 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").

However, 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 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 completed its rejection of *Hurst v. State*, receding from that opinion "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.

This reasoning was 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 (2018). 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 the earlier 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 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 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, as there is nothing "purely factual" about the judgment that one murder is "especially" heinous while another is merely heinous.

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 and the finding that they outweigh the mitigating circumstances.

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; *Craft v. State*, 312 So. 3d 45, 57 (Fla. 2020), cert. pending, No. 21-5280.

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, by itself, does not allow a court to impose a death penalty. Only after those additional 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 their constitutional rights under the Sixth and Fourteenth Amendments 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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