No.

In the
Supreme Court of the United States

SCOTTIE D. ALLEN
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

JESSICA J. YEARY
Public Defender

BARBARA J. BUSHARIS*
Assistant Public Defender
**Counsel of Record for Petitioner*

SECOND JUDICIAL CIRCUIT OF FLORIDA
OFFICE OF PUBLIC DEFENDER
301 South Monroe Street, Ste. 401
Tallahassee, Florida 32301
(850) 606-1000
barbara.busharis@flpd2.com

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the Florida Supreme Court's rejection of Petitioner's claim of error based on the jury being affirmatively misinformed about its role in the sentencing process violates this Court's holding in *Caldwell v. Mississippi*, 472 U.S. 30 (1985), that the Eighth Amendment requires that the sentencer understand "the gravity of its task."

II. 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 second question presented is whether, considering the operation and effect of Florida's capital sentencing scheme, the Due Process Clause requires these additional determinations to be made beyond a reasonable doubt.

STATEMENT OF RELATED PROCEEDINGS

Allen v. State, No. SC19-1313, 322 So. 3d 589 (Fla. 2021) (Fla. opinion and judgment rendered June 3, 2021; order denying rehearing issued on August 17, 2021; mandate issued on September 2, 2021).

State v. Allen, No. 2018 203 CFA (Fla. 2d Cir. Ct. judgment and sentence entered on July 23, 2019).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

PAGES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Scottie D. Allen, respectfully requests that this Court issue a writ of certiorari to review the decision of the Florida Supreme Court affirming the judgment and sentence of death in his case. The Florida Supreme Court's decision is incompatible with this Court's holding in *Caldwell v. Mississippi*, 472 U.S. 30 (1985), that a death sentence cannot constitutionally imposed when the jury is misinformed about its role in the sentencing process as to minimize the importance of its role in that process. In addition, federal due process requires that findings increasing the available penalty from life to death under Florida law be made beyond a reasonable doubt.

OPINION BELOW

The opinion below is reported at *Allen v. State*, 322 So. 3d 589 (Fla. 2021), 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 June 3, 2021 and denied Petitioner's motion for rehearing on August 17, 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 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, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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 Scottie D. Allen, who was subjected to childhood experiences including repeated sexual abuse, killed a fellow inmate who was in prison for child-sex-related offenses. Following a jury trial, Mr. Allen was sentenced to death on July 23, 2018. Mr. Allen represented himself without standby counsel in both the guilt and penalty phases of his capital trial; the trial court appointed special counsel to present mitigation at a *Spencer* hearing.[1] The Florida Supreme Court issued its opinion affirming Mr. Allen's death sentence on June 3, 2021. *Allen v. State*, 322 So. 3d 589 (Fla. 2021) (Exhibit A).

Pretrial Proceedings.

Mr. Allen was charged with the first-degree murder of Ryan Mason, a fellow inmate; after counsel was appointed for him, Mr. Allen sought to waive his right to counsel and represent himself. (R. 53, 57.) The trial court ordered a competency evaluation and deferred ruling on Mr. Allen's request to waive counsel. (R. 71-74.) In January 2019 an expert submitted two reports: one opined Mr. Allen was competent to proceed to trial, and the other that he was competent to represent himself. (R. 106, 113.) The expert diagnosed Mr. Allen with depressive disorder, antisocial personality disorder, cannabis use disorder, and opiod use disorder. (R. 104, 111.)

The reports indicated that Mr. Allen grew up in a broken home, having limited contact with his biological father, and that his mother and stepfather

[1] *See Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

divorced when he was six years old. (R. 102, 109.) Beginning when Mr. Allen was eight years old he was repeatedly sexually abused, first by a cousin and then by his grandfather. (R. 102, 109.) By the time he was 12 years old Mr. Allen had tried alcohol, was using marijuana daily, and had been involved in the juvenile justice system. (R. 102-03, 109-10.) Although he was academically gifted, he dropped out of school after the eleventh grade. (R. 102, 109.) He began abusing Oxycontin as a young adult. (R. 103, 110.) At the time of the charged offense he was serving a 25-year prison term and had been treated for clinical depression. (R. 103-04, 110-11.)

The court found Mr. Allen competent to proceed and to represent himself. (R. 118-20, 933-35, 941-42.) Mr. Allen immediately demanded a speedy trial and announced he would not call defense witnesses or present mitigating evidence. (R. 98, 944-45, 951.)

The Guilt Phase.

Mr. Allen repeated his waiver of counsel at jury selection and represented himself during the guilt phase. (R. 1250.) A correctional officer testified that on October 2, 2017, Mr. Allen came up to her and said "I just murdered my roommate." (T. 55-56.) Another officer, who had conducted a morning count that day at which both Mr. Allen and Mr. Mason were present, went to investigate and found Mr. Mason on his bunk with a t-shirt ligature around his neck. (T. 21-26, 32-33, 40-46, 50, 80-82, 96-97, 163-66.) A medical examiner testified ligature strangulation was the cause of death. (T. 162-63, 171-74.) A Florida Department of Law Enforcement (FDLE) agent interviewed Mr. Allen that afternoon. (T. 184-86.) Mr. Allen waived

his Miranda rights and denied telling the first officer he had killed Mr. Mason, saying instead that he woke up and found Mr. Mason dead. (T. 190-93.)

About three weeks later, however, the State Attorney received a letter from Mr. Allen in which Mr. Allen stated he had planned the killing over a period of weeks, and added that he had planned to rape Mr. Mason as well. (R. 352-53; T. 142-43, 198-99, 213-16.) The medical examiner had stated there were no signs of sexual trauma when he examined Mr. Mason's body. (T. 180.)

When the FDLE agent re-interviewed Mr. Allen. (T. 201-13.) In the interview Mr. Allen stated he killed Mr. Mason because Mr. Mason was a child molester and "a waste of space." (T.202-03.) He said he decided to kill Mr. Mason when he found out Mr. Mason was lying about why he was in prison, and claimed he raped him several times as "retribution." (T. 206-07.) On the day of the offense Mr. Allen attacked Mr. Mason after the morning count, eventually pinning him down and telling him "I'm going to strangle the life out of you." (T. 207-08.) He strangled Mr. Mason to the point of unconsciousness and then tied a t-shirt around Mr. Mason's neck. (T. 208-09.) He claimed he was going to do "awful stuff" to Mr. Mason later but did not when he realized Mr. Mason had defecated on himself. (T. 209.) That afternoon, Mr. Allen told an officer he had killed his roommate. (T. 211-12.)

Mr. Allen presented no case and waived closing argument. (T. 270.) During the final guilt phase instructions, the trial court stated "It is the judge's job to determine a proper sentence if the defendant is found guilty." (R. 153; T. 251.) The jury returned a verdict of guilty as charged. (R. 160; T. 288-29.)

The Penalty Phase, *Spencer* Hearing, and Sentencing.

The court told the jury they were about to enter a "second phase" and "separate proceeding." (T. 289, 293.) They returned later that day for the penalty phase. At the end of the State's opening, the State told the jury it would be asking the jury to return a "recommendation" that Mr. Allen be sentenced to death. (T. 333.) Mr. Allen waived an opening statement (T. 334) and presented no case (T. 359.)

The State presented a second letter from Mr. Allen to the State Attorney in which he repeated he had planned the killing and had ensured that Mr. Mason suffered. (R. 405; T. 338-39, 345-46.) The State introduced evidence relating to the second-degree murder for which Mr. Allen was incarcerated at the time of the offense, which also involved strangulation. (R. 359-71; T. 347-59.)

The jury was instructed about its "duty to make a decision as to the appropriate sentence" (R. 161-66; T. 359-67) and that it should "realiz[e] a human life was at stake." (R. 166; T. 367.) The jury was instructed on five statutory aggravating factors: (1) that Mr. Allen was under sentence of imprisonment; (2) that Mr. Allen had a prior violent felony conviction; (3) that the killing was for pecuniary gain; (4) that the killing was especially heinous, atrocious, or cruel; and (5) that the killing was cold, calculated, and premeditated. (R. 161-63; T. 360-62.) The jury was also instructed that "the law neither compels nor requires you to determine that the defendant should be sentenced to death." (R. 165; T. 380.) The jury returned a verdict finding all but the pecuniary gain aggravator were present. (R. 169-80; T.

396-98.) It found no mitigating circumstances. (R. 170; T. 398.) It found the aggravating factors were sufficient to warrant a death sentence and outweighed the mitigating circumstances. (R. 170-71; T. 398.) The jury had not been instructed that these determinations required any particular burden of proof. (R. 164-65; T. 376-80.) It recommended a death sentence. (R. 171; T. 398.)

The trial court ordered a presentence investigation (PSI) and confirmed that Mr. Allen did not want counsel for the penalty phase. (R. 414; T. 401-04.) At a subsequent hearing the court informed Mr. Allen it had not renewed the offer of counsel between the guilt and penalty phase, and asked him to confirm whether he would have accepted the appointment of counsel. (R. 892-93.) The court also appointed special counsel to present mitigation at a *Spencer* hearing prior to imposing sentence. (R. 416-17, 893-97.)

At the *Spencer* hearing a licensed investigator and mitigation specialist testified Mr. Allen and his mother moved in with his maternal grandparents because his mother's divorce from his stepfather left them unable to make ends meet. (R. 998, 1005-06.) Mr. Allen's grandfather began molesting him soon after they moved in. Mr. Allen's grandfather was already sexually abusing two of Mr. Allen's cousins and was later convicted of molesting other children. (R. 481, 487, 497-513, 998, 1006-10.) Mr. Allen's mother began smoking marijuana with him when he was about nine years old. (R. 482, 490, 1005, 1010.) As he got older, he regularly abused marijuana, cocaine, and opiates. (R. 482, 490-91, 1016-19.) He was

in the juvenile justice system and spent time in foster care. (R. 482, 490, 755-92, 1015-18.)

Dr. Martin Falb, a psychologist, testified that he reviewed extensive documentation and interviewed Mr. Allen, and was of the opinion that Mr. Allen suffered from both antisocial personality disorder and post-traumatic stress disorder. (R. 1067-94.) He stated Mr. Allen had suffered "extreme measures of trauma" beginning at a young age. (R. 1077-78.) The court continued the hearing to allow the State to prepare a rebuttal witness. (R. 1107-09.) The State's witness diagnosed Mr. Allen with antisocial personality disorder, cannabis use disorder, and possible alcohol use disorder, but disagreed with the defense expert's diagnosis of post-traumatic stress disorder. (R. 1178-1235.)

The trial court imposed a death sentence based on the four aggravating circumstances reflected in the jury verdict. (R. 814-17, 965-68.) It found several mitigating circumstances had been established and assigned weight to each: (1) Mr. Allen's capacity to conform his conduct to the requirements of the law was substantially impaired (moderate weight); (2) Mr. Allen suffered from major depression (moderate weight); (3) Mr. Allen had been diagnosed with alcohol and drug dependency (some weight); (4) Mr. Allen did not want his family contacted for the penalty phase (some weight); Mr. Allen was courteous, respectful, and considerate at every court appearance (some weight); and Mr. Allen was raised in a dysfunctional family setting (great weight). (R. 818-20, 970-73.)

The Direct Appeal.

Mr. Allen, through counsel, made four arguments on appeal. *See Allen*, 322 So. 3d at 596. First, he argued fundamental error occurred when the trial court failed to renew the offer of counsel before the penalty phase trial. Second, he argued constitutional error occurred when the State, without objection, indicated to the jury that it would return a "recommendation" regarding the sentence because the State's comments misled the jury regarding its sentencing role so as to diminish its sense of responsibility. Third, he argued fundamental error occurred when the trial court admitted expert testimony because, through that testimony the State was able to use compelled statements Mr. Allen made to the expert. And fourth, he argued a denial of due process occurred when the court failed to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances.

The Florida Supreme Court rejected the argument that the trial court's failure to renew an offer of counsel before the penalty phase began created fundamental error. The court did not reach the issue of fundamental error because it held the trial court cured the error through a retroactive inquiry into whether Mr. Allen had wanted counsel. *Allen*, 322 So. 3d at 596-97. The court also rejected the argument that the jury instructions and closing argument created fundamental error under *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), where this Court held it was unconstitutional to base a death sentence "on a determination made by a sentencer who has been led to believe that the responsibility for determining the

appropriateness of the defendant's death rests elsewhere." *Allen*, 322 So. 3d at 597-600. Next, the court rejected an argument that introducing certain statements Mr. Allen made during a mental health examination violated his right against compelled self-incrimination. *Id.* at 601-02. Finally, the court rejected Mr. Allen's challenge to the penalty phase jury instructions regarding whether aggravating factors were sufficient to justify death and whether those factors outweighed mitigating circumstances, stating "We have repeatedly held that 'these determinations are not subject to the beyond a reasonable doubt standard of proof.'" *Id.* at 603.

REASONS FOR GRANTING THE PETITION

I. The Florida Supreme Court's Decision Conflicts with this Court's Holding in *Caldwell v. Mississippi* that Misinforming the Jury About the Gravity of Its Role in Sentencing is Inconsistent with the Eighth Amendment.

During Mr. Allen's guilt phase, the trial court instructed the jury that "It is the judge's job to determine a proper sentence if the defendant is found guilty." (R. 153, T. 251.) With that as a backdrop, the State began the penalty phase with an opening statement telling the jury the State would be asking it to return a "recommendation" that Mr. Allen be sentenced to death. (T. 333.) These statements were, at best, an incomplete statement of the law that misled the jury regarding its role in sentencing and misstated the operation of the sentencing scheme under which Mr. Allen was sentenced.

In *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), this Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." When the sentencer is misled regarding its role, the reliability of the resulting sentence is undermined. *See id.* at 330. When a sentencing jury does not fully appreciate its role in the process, the jury may minimize its own role or assume that a too-harsh sentence will be corrected. *See id.* at 331-32. Misinformation regarding the nature of the jury's responsibility raises concerns about arbitrary or capricious sentencing. *See id.* at 343 (O'Connor, J., concurring). The instruction and argument at issue here created the concern noted in Justice O'Connor's concurrence in *Caldwell*,

namely that the jury failed to wholly appreciate its responsibility in the sentencing process.

The Florida Supreme Court rejected the challenge to the State's argument outright, stating "a sentencing 'recommendation' is precisely what the penalty-phase jury provides." *Allen*, 322 So. 3d at 598. The court acknowledged the guilt-phase instructions should not have included the phrase "It is the judge's job to determine a proper sentence if the defendant is found guilty," *id.*, but held the phrase did not violate *Caldwell* because "Florida's statutory scheme remains a hybrid sentencing scheme that does not place the ultimate responsibility for sentencing the defendant on the jury." *Id.* at 600.

The capital sentencing scheme under which Mr. Allen was sentenced, however, gives the jury more than simply advisory power. It gives the jury selection power, because the "recommendation" of a life sentence is binding:

> (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(3) (2019).

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. Allowing — or, worse, causing — the jury to misapprehend the nature of its sentencing authority and the limits on the court's discretion to choose a sentence creates the risk that the jury will devalue its sentencing responsibility. Because of the unanimity requirement, if a single juror had disagreed about sentencing Mr. Allen to death, the trial court would have lacked discretion to impose a death sentence. Characterizing the jury's verdict as a mere recommendation likely diminished the jury's sense of responsibility for the outcome of the penalty phase, which in turn violates *Caldwell* and undermines the reliability required by the Eighth Amendment.

II. 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*, and Is Inconsistent with Due Process.

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 functionally an element of the offense, which the

State must prove beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 494 n.19 (2000). In *Ring v. Arizona*, 536 U.S. 584, 605 (2002), this 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.*

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, 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). Before the sentencer uses whatever discretion it has to select the appropriate sentence, the sentencing scheme requires the jury (or judge, in a bench trial) to make 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.

> (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 (2) (2019).

Until each of those preliminary determinations is made, even though premeditated murder is labeled a "capital felony," the death penalty is not

available. *See id.* The actual selection of the death penalty or a penalty of life in prison takes place separately under Fla. Stat. § 921.141 (3). The determinations that one or more aggravating factors have been proved, that aggravating factors are sufficient to justify death, and that they outweigh the mitigating evidence are the findings that increase the potential sentence from life in prison to death.

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. *See also Blakely v. Washington*, 542 U.S. 296, 302-05 (2004) (applying *Apprendi* 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); *Alleyne v. United States*, 570 U.S. 99 (2013) (applying *Apprendi* to factors increasing mandatory minimum sentences).

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 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. *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. Allen was sentenced. 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." 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 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 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.

One 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.*

In addition, treating a defendant as eligible for the death penalty when all prerequisite findings have not been established beyond a reasonable doubt 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.

Finally, 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.* This reasoning would prevent assigning the standard of proof beyond a reasonable doubt to required findings such as the "especially heinous, atrocious, or cruel" aggravator, which necessarily require the exercise of moral judgment. Obviously this is not the State of Florida's position. The result is a fundamental inconsistency — the standard of beyond a reasonable doubt can be applied to moral judgments favoring the death penalty, but not to those weighing against it.

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 factual conclusion that the aggravating factors outweigh mitigating circumstances.

III. The Questions Presented Have the Potential to Affect Present and Future Capital Defendants.

The Florida Supreme Court's rejection of Mr. Allen's *Caldwell* challenge misstated the role of the jury, which is not wholly advisory. Under the plain terms

of the Florida capital sentencing scheme, the jury has the potential to bind the trial court to a particular sentence. This occurs when the jury does not unanimously recommend death. The instructions given during Mr. Allen's penalty phase and the State's closing argument misled the jury as to the potential effect of its decision, which violates *Caldwell*. This error is likely to be repeated to the detriment of future capital defendants.

In addition, 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. denied*, 2021 WL 4508396 (Oct. 4, 2021). 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. A Florida trial court cannot proceed to impose the death penalty after the jury finds one or more aggravating circumstances. Only after the 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,

therefore, 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,

JESSICA J. YEARY
Public Defender

/s/ Barbara J. Busharis
BARBARA J. BUSHARIS*
Assistant Public Defender
*Counsel of Record for Petitioner

SECOND JUDICIAL CIRCUIT OF FLORIDA
OFFICE OF PUBLIC DEFENDER
301 South Monroe Street, Ste. 401
Tallahassee, Florida 32301
(850) 606-1000
barbara.busharis@flpd2.com

November 15, 2021