NO. 21-6328

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case

QUESTIONS PRESENTED

Whether Petitioner's death sentence violates the Eighth Amendment — specifically, whether the jury instructions and arguments by the State minimized the role of the capital jury in violation of this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Whether Petitioner's death sentence violates the Due Process Clause of the Fourteenth Amendment — specifically, whether the failure to apply the beyond a reasonable doubt standard to the jury's weighing of aggravating factors and mitigating circumstances violated this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

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OPINION BELOW

Petitioner challenges the decision by the Supreme Court of Florida affirming his sentence of death; that decision appears as *Allen v. State*, 322 So. 3d 589 (Fla. 2021).

JURISDICTION

This Court's jurisdiction to review the final judgment of the Supreme Court of Florida is permissible under 28 U.S.C. § 1257. However, this Court should decline to exercise jurisdiction in this case because the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a court of appeal of the United States, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. In short, no compelling reasons exist to grant a writ of certiorari in this case. Sup. Ct. R. 10.

STATEMENT OF THE CASE AND FACTS

In the fall of 2017, Ryan Mason was an inmate housed in cell 109 in the protective management unit inside the J Dorm at Wakulla Correctional Institution near Crawfordville, Florida. JT Vol. I, pp. 21, 24, 41. Mr. Mason's cellmate was Petitioner, who was serving a twenty-five-year prison sentence for second-degree murder. JT Vol. I, p. 26; *Allen*, 322 So. 3d at 592.

A "couple of weeks" prior to the beginning of October 2017, Petitioner decided that he was going to kill Mr. Mason because Petitioner believed that Mr. Mason "had been lying" to him. JT Vol. II, p. 206. Mr. Mason told Petitioner that he was in prison for "home invasion." JT Vol. II, p. 206. One day when Mr. Mason went to take a shower, he "left his locker open." JT Vol. II, p. 206. Taking advantage of the situation, Petitioner saw Mr. Mason's "legal work." JT Vol. II, p. 206. Surprised, Petitioner thought that Mr. Mason was "a real piece of shit." JT Vol. II, p. 206. Petitioner

"stewed on it" for a few days, told himself "fuck it," and then decided to kill Mr. Mason. JT Vol. II, p. 206. Petitioner thought Mr. Mason deserved to die because he was a "Chomo." JT Vol. II, p. 203. According to Petitioner, Mr. Mason as "a waste of space." J T Vol. II, p. 203.

On the morning of Monday, October 2, 2017, Petitioner woke up and used the bathroom because he "had the flutter stomach." JT Vol. II, p. 207. After the morning count, Petitioner put a sheet up over the door. JT Vol. II, p. 208. Petitioner then "tapped [Mr. Mason] on the shoulder and . . . said 'You're it.'" JT Vol. II, p. 207. Mr. Mason "tried to fight." JT Vol. II, p. 207. Mr. Mason "did some kicking and knocked" both he and Petitioner "off the bed onto the floor." JT Vol. II, p. 207. Mr. Mason got away from Petitioner because he "was kicking like crazy." JT Vol. II, p. 207. To keep other inmates from hearing the struggle, Petitioner "grabbed [Mr. Mason] from behind and pulled him over toward the toilet." JT Vol. II, p. 208. Then, Petitioner "sat on [Mr. Mason's] chest and held him." JT Vol. II, p. 208. While Mr. Mason was still conscious, Petitioner told him: "I'm going to strangle the life out of you. You're a piece of shit. You know, tell the devil I said hello." JT Vol. II, p. 208. After that, Mr. Mason fell unconscious. JT Vol. II, p. 208. Petitioner then tied one of Mr. Mason's T-shirts around Mr. Mason's neck. JT Vol. II, p. 209. Then, Petitioner put Mr. Mason on his bed with "his head facing down." JT Vol. II, p. 209. After killing his cellmate, Petitioner "sat down, drank a cup of coffee, [and] ate a half a Honey Bun." JT Vol. II, p. 209.

A DNA sample from the shirt around Mr. Mason's neck matched the DNA profile of Mr. Mason and the profile of Petitioner. JT Vol. II, p. 138. Additionally, a DNA sample from Mr. Mason's left-hand fingernails matched the DNA profile of Mr. Mason and the profile of Petitioner. JT Vol. II, p. 140.

On multiple occasions, Petitioner confessed to the murder of Mr. Mason. These confessions included a videotaped interview with law enforcement as well as a letter written to the prosecutor. JT Vol. II, pp. 199-211; R-402-03.

At trial, Petitioner represented himself. *See Allen*, 322 So. 3d at 592. During the guilt phase, Petitioner elected not to testify; nor did he present any defense or closing argument. *Id.* at 593. The jury unanimously found Petitioner guilty of first-degree murder. *Id.*

During the penalty phase, Petitioner "did not present mitigation or argument to the . . . jury." *Allen*, 322 So. 3d at 593. The jury "unanimously found that the State had established beyond a reasonable doubt" the existence of the following four aggravating factors: (1) Petitioner was previously convicted of a felony and under sentence of imprisonment; (2) Petitioner was previously convicted of a felony involving the use or threat of violence to another person; (3) the first-degree murder was especially heinous, atrocious, or cruel (HAC); and (4) the first-degree murder was committed in a cold, calculated, and premeditated (CCP) manner, without any pretense of moral or legal justification. *Id.*

Additionally, the jury unanimously found: the aggravating factors it found the State had established beyond a reasonable doubt were sufficient to warrant a possible

sentence of death; one or more individual jurors had not found that one or more mitigating circumstances was established by the greater weight of the evidence; and the aggravating factors it found the State had established beyond a reasonable doubt outweighed the mitigating circumstances. *Allen*, 322 So. 3d at 593. Finally, the jury unanimously recommended that Petitioner should be sentenced to death. *Id.*

During the subsequent *Spencer*[1] hearing, Petitioner "continued to represent himself and maintained his desire not to present mitigation." *Allen*, 322 So. 3d at 593. Nevertheless, the trial court "appointed amicus counsel to develop and present mitigation." *Id.* After reviewing all of the evidence, the trial court "found and assigned great weight to each of the four aggravating factors that [the] jury found to exist beyond a reasonable doubt." *Id.* at 595.

Additionally, "the trial court found the following five non-statutory mitigating circumstances": (1) Petitioner has been diagnosed with alcohol abuse and drug dependency; (2) Petitioner was diagnosed with major depression; (3) Petitioner was raised in a dysfunctional family setting; (4) Petitioner was courteous, respectful, and considerate to the court during every court appearance; and (5) Petitioner did not want his family contacted for mitigation purposes. *Allen*, 322 So. 3d at 596.

The trial court also found that the aggravating factors outweighed the mitigating circumstances. *Allen*, 322 So. 3d at 596. Finally, the trial court sentenced Petitioner to death. *Id.* at 595.

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

REASON FOR DENYING THE WRIT

Petitioner's Death Sentence Does Not Violate the Eighth Amendment

I. Petitioner's Claim

Petitioner claims that two separate *Caldwell* violations occurred during his capital trial that impermissibly minimized the jury's role in the sentencing process. *See* Petition, p. 11.

First, Petitioner argues that the trial court inaccurately described the jury's sentencing role by providing the following, generalized instruction during the guilt phase: "Your duty is to determine if the defendant has been proven guilty or not, in accord with the law. It is the judge's job to determine a proper sentence if the defendant is found guilty." R-153; *see also* Petition, p. 11.

Second, Petitioner claims that the prosecutor mischaracterized the jury's sentencing role during opening statements for the penalty phase by commenting:

> So and at the conclusion of presentation of the evidence, I'll have another opportunity to get up and speak with y'all. And at that time I will be asking you, based upon the aggravating circumstances of this crime and compared to any mitigating circumstances you may think exist in this case, that the appropriate sentence in this case is a recommendation that the defendant be sentenced to death for the crime he committed in this case based upon the aggravating circumstances that were proven in this trial.

JT Vol. IV, p. 333; *see also* Petition, p. 11.

II. Analysis

The Supreme Court of Florida correctly followed this Court's precedent when it "analyz[ed] whether the 'remarks to the jury improperly described the role assigned to the jury by local law' so as to violate *Caldwell*'s mandate against 'mislead[ing] the

jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. . . .'" *Allen*, 322 So. 3d at 600, quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

With regard to Petitioner's first claim, the lower court acknowledged that the trial court "should not have included [the statement] in the guilt-phase instructions" during a capital case. *Allen*, 322 So. 3d at 598. Nevertheless, after examining the entire record, the Court concluded that

> despite the guilt-phase instructional error, the record establishes that the jury was properly informed as to its role in Allen's sentencing, including that if the jury found Allen guilty of first-degree premeditated murder, a separate penalty-phase trial would occur in which the jury's role would be to determine Allen's eligibility for the death penalty and recommend the appropriate sentence.

Id. at 600. Furthermore, the Court found: "Nor did the guilt-phase instructional error amount to fundamental error in light of the correct penalty-phase jury instructions and accurate descriptions of the jury's role in sentencing that otherwise permeated Allen's trial." *Id.*

And with regard to Petitioner's second claim, the lower court concluded that "no error, let alone fundamental error, occurred as a result of the prosecutor's statement that he would ask the jury to return a 'recommendation' of death because the statement did not 'improperly describe[ ] the role assigned to the jury by local law.'" *Allen*, 322 So. 3d at 597, quoting *Romano*, 512 U.S. at 9. In reaching its conclusion, the Court noted that "[u]nder the plain text of Florida's death penalty

statute, a sentencing 'recommendation' is precisely what the penalty-phase jury provides."[2] *Id.* at 597-98.

III. Conclusion

Petitioner failed to demonstrate that the Florida Supreme Court's fundamental error review of a single erroneous guilt phase instruction was inconsistent with any decision from this Court.[3] The Florida Supreme Court looked to the instructions as a whole and determined that the jury was not misled about its role under Florida's hybrid sentencing system. The sufficiency of the Florida Supreme Court's fundamental error review on a single erroneous instruction is clearly established by a review of the lower court's opinion. *See Barclay v. Florida*, 463 U.S. 939, 958 (1983) (wherein this Court recognized that the Florida Supreme

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[2] This Court has consistently declined to review challenges to Florida's sentencing instructions in light of *Caldwell**Error! Bookmark not defined.***. *See, e.g.*, *Jones v. State*, 256 So. 3d 801 (Fla. 2018), *cert. denied*, *Jones v. Florida*, 139 S. Ct. 1341 (2019) (No. 18-7428); *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), *cert. denied*, *Reynolds v. Florida*, 139 S. Ct. 27 (2018); *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017), *cert. denied*, *Middleton v. Florida*, 138 S. Ct. 829 (2018); *Philmore v. State*, 234 So. 3d 567 (Fla. 2018), *cert. denied*, *Philmore v. Florida*, 139 S. Ct. 478 (2018).

[3] Where, as here, a defendant fails to lodge an objection, the issue is not preserved and can only be reviewed under the stricter standard of fundamental error. *See State v. Smith*, 241 So. 3d 53, 55 (Fla. 2018) ("Florida follows 'the general rule' that an '[e]rror[ ] that ha[s] not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental.' Whether an error is fundamental–meaning that the error 'goes to the foundation of the case or goes to the merits of the cause of action. . . .'") (citations omitted); *see also Allen*, 322 So. 3d at 600, quoting *Bush v. State*, 295 So. 3d 179, 212 (Fla. 2020) ("[E]xplaining that where, as here, the claim of fundamental error relates to the death sentence, 'fundamental error' is error that 'reaches down into the validity of the trial itself to the extent that a . . . jury recommendation of death could not have been obtained without the assistance of the alleged error.'").

Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless). Because no meaningful constitutional question has been presented, Respondent submits that this Court should deny review of the instant case.

Petitioner's Death Sentence Does Not Violate the Due Process Clause of the Fourteenth Amendment

I. Summary

The capital sentencing process that produced a death sentence in Petitioner's case does not violate the Fourteenth Amendment nor conflict with any precedent from this Court; therefore, this Court need not address the question presented.

Under Florida law, a capital defendant is eligible to receive a sentence of death once the jury finds the existence of at least one aggravating factor beyond a reasonable doubt. *See* Fla. Stat. § 921.141(2)(b)2.; *see also State v. Poole*, 297 So. 3d 487, 502-03 (Fla. 2020), *cert. denied, Poole v. Florida*, 141 S. Ct. 1051 (2021). That finding: increases the maximum authorized sentence from life imprisonment to death; concludes the eligibility phase of the capital sentencing process; and signals the beginning of the selection phase — where the judge and jury share a role in the determination of an appropriate sentence. Because the subjective weighing of the aggravating factors and mitigating circumstances involves the exercise of mercy, not the finding of a fact required for death sentence eligibility, the jury's participation in the selection phase does not transform the consideration of those factors into the

functional equivalents of elements. Whether considered by the judge, the jury, or both (as in Florida), the subjective weighing of aggravating factors and mitigating circumstances remains part of the selection phase. Thus, no Due Process violation occurred.

II. Florida Law

Eligibility Phase

Under Florida law, a capital defendant is eligible to receive the death penalty once the jury unanimously finds at least one aggravating factor beyond a reasonable doubt. *See* Fla. Stat. § 921.141(2)(b)2. ("If the jury . . . [u]nanimously finds at least one aggravating factor, [then] the defendant is eligible for a sentence of death. . . ."); *see also Poole*, 297 So. 3d at 502-03 ("Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances."); *see generally McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020) ("Under *Ring* [*v. Arizona*, 536 U.S. 584 (2002),] and *Hurst*[*v. Florida*, 577 U.S. 92 (2016)], a jury must find the aggravating circumstance that makes the defendant death eligible.").

By finding the existence of an aggravating factor beyond a reasonable doubt, the jury necessarily determines that each aggravating factor found is "sufficient" to warrant a death sentence. *See* § 921.141(2)(b)2.a. ("Whether sufficient aggravating factors exist."); *see also Poole*, 297 So. 3d at 502 ("[O]ur Court was wrong in *Hurst v. State*[, 202 So. 3d 40 (Fla. 2016),] when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury

must find unanimously."). For the purposes of the § 921.141(2)(b)2.a. determination, "sufficient" simply means "one or more." *Poole*, 297 So. 3d at 502, quoting *Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances").

Selection Phase

The finding of at least one aggravating factor concludes the jury's role in the sentence eligibility phase — but not its role in the overall sentencing process; if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt, the jury then proceeds to the sentence selection phase where it must evaluate the weight of the aggravating factors and mitigating circumstances. *See Poole*, 297 So. 3d at 502 (identifying the weighing of aggravating factors and mitigating circumstances as the "selection finding"); *see generally Tuilaepa v. California*, 512 U.S. 967, 971 (1994) ("Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision.").

In performing its role during the selection phase, the jury must weigh two considerations: (1) "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist"; and (2) "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death." Fla. Stat. § 921.141(2)(b)2.b.-c.; *see generally Tuilaepa*, 512 U.S. at 972, quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (In order for a defendant to receive the death penalty at the conclusion of the selection phase, the sentencer must make an

"individualized determination," with that determination based upon a consideration of "relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.") (emphasis omitted).

After weighing those considerations, the jury must recommend to the trial court either "a sentence of death" or "a sentence of life imprisonment without the possibility of parole." Fla. Stat. § 921.141(2)(c). If the jury recommends death, then the trial court may impose either a death sentence or a sentence of life imprisonment without the possibility of parole. Fla. Stat. § 921.141(3)(a)2. If, however, the jury recommends a sentence of life without the possibility of parole, then the trial court can only impose a life sentence. Fla. Stat. § 921.141(3)(a)1.

III. Petitioner's Claim

Petitioner asks this Court to address whether, for death sentence eligibility, the Due Process Clause of the Fourteenth Amendment requires Florida juries in capital cases to find beyond a reasonable doubt that: the aggravating factors are sufficient to warrant the death penalty; and the aggravating factors outweigh the mitigating circumstances. *See, e.g.*, Petition, p. 1 ("[F]ederal due process requires that findings increasing the available penalty from life to death under Florida law must be made beyond a reasonable doubt."); *see also id.* at 21 ("[T]reating 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.").

Petitioner essentially argues that the Florida Legislature unknowingly created additional "elements" for death sentence eligibility beyond that required by the

Eighth Amendment. *See generally Tuilaepa*, 512 U.S. at 971-72 ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase.").

Even though the Florida Legislature expressly stated that the finding of one aggravating factor is all that is required for death sentence eligibility, *see* Fla. Stat. § 921.141(2)(b)2., Petitioner nevertheless claims that a defendant convicted of first-degree murder in Florida is ineligible to receive a death sentence unless the jury: (1) unanimously finds beyond a reasonable doubt the existence of at least one aggravating factor; (2) unanimously finds beyond a reasonable doubt that any established aggravating factors are sufficient to justify the death penalty; (3) unanimously finds beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances; and (4) unanimously recommends death.[4] *See* Petition, p. 16 ("The determinations that one or more aggravating factors have been proved [sic], 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."); *see also Hurst v. State*, 202 So. 3d at 57:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the

[4] Although Petitioner only argues the first three, the fourth represents the culmination of those three. *See* § 921.141(2)(b)2. ("The recommendation shall be based on a weighing of all of the following. . . .").

> mitigating circumstances, and unanimously recommend a sentence of death.

Receded from in *Poole*, 297 So. 3d at 491 ("As for the sentencing issue, we agree with the State that we must recede 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.").

Highlighting that a trial court in Florida cannot impose a death sentence unless all of the section 921.141(2)(b) steps are satisfied, Petitioner argues that the eligibility process is not complete simply because the jury unanimously finds an aggravating factor beyond a reasonable doubt; rather, Petitioner claims that the eligibility phase concludes only after the jury determines beyond a reasonable doubt whether the aggravating factors are sufficient and whether the aggravating factors outweigh the mitigating circumstances. *See* Petition, p. 1:

> 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.

More specifically, Petitioner claims that the eligibility phase ends once the jury concludes its responsibilities under subsections 921.141(2)(b)2.a. (sufficiency) and 921.141(2)(b)2.b. (weighing), not the first sentence of 921.141(2)(b)2. (finding at least one aggravating factor).

By arguing that a jury's role in determining sentence eligibility extends beyond factfinding and continues into the subjective consideration of aggravating factors and

mitigating circumstances, Petitioner claims that the jury's consideration of those factors takes place during the eligibility phase, not the selection phase of Florida's capital sentencing process. Under Petitioner's view, the jury subjectively considers a set of aggravating factors and mitigating circumstances during the eligibility phase, but the trial court subjectively considers those same factors and considerations (and potentially even more mitigation) during the selection phase.

Ultimately, Petitioner argues that the jury's § 921.141(2)(b)2.a. and (2)(b)2.b. determinations are what establish the maximum authorized sentence under Florida law. *See* Petition, p. 10:

> 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.

The following table illustrates where the Florida Legislature and Supreme Court of Florida place the various § 921.141(2) considerations as well as where Petitioner seeks to place them:

Statutory Section	**Consideration**	**Where Florida Places the Consideration**	**Where Petitioner Seeks to Place the Consideration**
§ 921.141(2)(b)2.	"at least one aggravating factor"	Eligibility phase	Eligibility phase
§ 921.141(2)(b)2.a.	"whether sufficient aggravating factors exist"	Eligibility phase	Eligibility phase

§ 921.141(2)(b)2.b.	"whether aggravating factors exist which outweigh the mitigating circumstances found to exist"	Selection phase	Eligibility phase
§ 921.141(2)(b).c.	"whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death"	Selection phase	Eligibility phase

IV. Analysis

Question of State Law

Petitioner does not argue that the Constitution necessarily requires that a jury weigh aggravating factors and mitigating circumstances during the eligibility phase of the capital sentencing process or that the Constitution necessarily requires that a jury find such weighing beyond a reasonable doubt. Rather, Petitioner argues that the Florida Legislature placed the weighing of aggravating factors and mitigating circumstances in the eligibility phase instead of the selection phase, thereby transforming the consideration of those factors into elements of the offense that must be found unanimously by the jury beyond a reasonable doubt.

Fatal to Petitioner's argument, however, the Florida Legislature and the Supreme Court of Florida have stated unequivocally that the eligibility phase ends once the jury finds at least one aggravating factor. *See* Fla. Stat. § 921.141(2)(b)2.; *see also Poole*, 297 So. 3d at 502-03. And with its decision in *Poole*, the Supreme Court of Florida expressly rejected any claim that the weighing of aggravating factors and

mitigating circumstances takes place during the eligibility phase. *See Poole*, 297 So. 3d at 502-04 (interpreting a previous version of the statute and rejecting defendant's "suggestion" that sufficiency and weighing are elements of the offense). Therefore, to the extent Petitioner raises a question of state law regarding the elements of an offense, this Court lacks jurisdiction and the petition should be denied. *See Foster v. Chatman*, 136 S. Ct. 1737, 1759 (2016).

No Conflict with this Court's Decisions

Petitioner appears to rely on 28 U.S.C. § 1257 as a basis for invoking this Court's jurisdiction, arguing that the decision by the Supreme Court of Florida below conflicts with this Court's decisions in *Alleyne v. United States*, 570 U.S. 99 (2013), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Hurst v. Florida*, and *Ring*. *See* Petition, pp. 20-21 ("In holding that the determinations that are currently required before Florida defendants can be subjected to a death penalty are not elements (or functional equivalent of elements) requiring a verdict based on proof beyond a reasonable doubt, Florida law directly conflicts with this Court's opinions in *Apprendi*, *Ring*, *Alleyne*, and *Hurst v. Florida*.").

However, no such conflict exists. *Apprendi*, *Ring*, and *Alleyne* all deal with facts that increase the maximum authorized sentence — not subjective determinations involving questions of mercy. *See Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also Ring*, 536 U.S. at 589 ("Capital defendants, no

less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."); *Alleyne*, 570 U.S. at 103 ("[A]ny fact that increases the mandatory minimum is an 'element' that must be submitted to the jury.").

To the extent Petitioner argues that *Hurst* categorizes the weighing of aggravating factors and mitigating circumstances as factfinding under Florida's capital sentencing scheme, *see Hurst*, 577 U.S. at 99-100, this Court's subsequent decisions in *Kansas v. Carr*, 577 U.S. 108 (2016), and *McKinney* eliminated any possible confusion regarding the factfinding required for death penalty eligibility: a capital defendant becomes eligible to receive a death sentence when the trier of fact makes an objective, factual determination that at least one aggravating factor exists beyond a reasonable doubt. *See Carr*, 577 U.S. at 119 (identifying the aggravating-factor determination as the so-called "eligibility phase," which involves a purely factual determination); *see also McKinney*, 140 S. Ct. at 707 ("[A] jury must find the aggravating circumstance that makes the defendant death eligible."); *United States v. Tsarnaev*, 968 F.3d 24, 89 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 1683, 209 L. Ed. 2d 463 (2021):

> [I]f the Supreme Court in *Hurst* intended to impose the reasonable-doubt standard on the weighing process — as Dzhokhar argues — the Court in *Carr* would not have said days later that telling the jury to use that standard "would mean nothing."
>
> . . . .
>
> *McKinney* helps sink Dzhokhar's claim that *Hurst* requires the jury to make the weighing determination beyond a reasonable doubt — a view we hold because *McKinney* makes crystal clear *Hurst* addressed only the

> finding of aggravating facts and had nothing to do with the weighing process.

Quite clearly, *Carr* and *McKinney* confirmed the continued viability of decisions from this Court holding that the finding of at least one aggravating factor beyond a reasonable doubt is all that is required for a defendant convicted of murder to be eligible for a sentence of death. *See, e.g.*, *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003):

> [F]or purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.

In doing so, *Carr* and *McKinney* also confirmed the continued viability of both § 921.141(2)(b)2. and *Poole*. *Compare Tuilaepa*, 512 U.S. at 971-72 ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."), *with* § 921.141(2)(b)2. ("If the jury . . . [u]nanimously finds at least one aggravating factor, [then] the defendant is eligible for a sentence of death. . . ."), *and with Poole*, 297 So. 3d at 502-03 ("Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances.").

Furthermore, *McKinney* clearly holds that the jury is not constitutionally required to weigh the aggravating factors and mitigating circumstances during any phase of the capital sentencing process; the judge alone can conduct that subjective analysis. *See McKinney*, 140 S. Ct. at 707 ("[I]n a capital sentencing proceeding just

as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weight the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

If *McKinney* recognizes that the jury need not participate in the selection phase, then it stands to follow that the trier of fact's participation in that phase does not automatically transform subjective considerations of aggravating factors and mitigating circumstances into the functional equivalents of elements. Once the finding of at least one aggravating factor has established the maximum authorized sentence in the eligibility phase, any subsequent determinations during the selection phase simply represent the exercise of sentencing discretion. *See Apprendi*, 530 U.S. at 481 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute.") (emphasis in original); *see also Alleyne*, 570 U.S. at 116 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.").

Regardless of whether the capital sentencer is the judge, the jury, or a combination of both, the weighing of aggravating factors and mitigating circumstances involves a subjective question of mercy that by definition takes place during the selection phase. *See generally Carr*, 577 U.S. at 119 ("And of course the ultimate question whether mitigating circumstances outweigh aggravating

circumstances is mostly a question of mercy — the quality of which, as we know, is not strained."); *see also Caldwell*, 472 U.S. at 340 n.7, quoting *Zant v. Stephens*, 462 U.S. at 900 (Rehnquist, J., concurring in judgment) ("[I]n one crucial sphere of a system of capital punishment, the capital sentencer comes very near to being 'solely responsible for [the defendant's] sentence,' and that is when it makes the often highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'") (emphasis omitted). Put simply, what happens in the selection phase stays in the selection phase.

As the foregoing demonstrates, the decision by the Supreme Court of Florida did not conflict with this Court's decisions in *Alleyne*, *Apprendi*, *Hurst*, or *Ring*. In Petitioner's case, the lower court correctly held that the jury's weighing of aggravating factors and mitigating circumstances — even in Florida — is not an element subject to the beyond a reasonable doubt standard of proof. *See Allen*, 322 So. 3d at 603, citing *Newberry v. State*, 288 So. 3d 1040, 1047 (Fla. 2019). Because Florida law clearly and correctly indicates that the eligibility phase ends once the jury finds the existence of at least one aggravating factor beyond a reasonable doubt, no basis for conflict jurisdiction under 28 U.S.C. § 1257(a) exists.

No Unsettled Question or Conflict Among the Lower Courts

There is also no meaningful conflict with any other state or federal appellate court.[5] Even before *McKinney*, "[n]early every court that [had] considered the issue

[5] The lone outlier on this question is *Rauf v. State*, 145 A.3d 430 (Del. 2016), which was decided four years before this Court's decision in *McKinney*. Quite clearly, *McKinney* illustrates that *Rauf* misapprehended the requirements of the

[had] held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances." *State v. Mason*, 108 N.E.3d 56, 64 (Ohio 2018) (citing cases).[6] Similarly, "[e]very [federal] circuit" that had addressed the argument that *Apprendi* requires jury weighing of aggravators and mitigators had "rejected" that claim. *United States v. Gabrion*, 719 F.3d 511, 532-33 (6th Cir. 2013) (en banc) (joining six other federal courts of appeals).

In light of *McKinney*, it is now "crystal clear [that] *Hurst* addressed only the finding of aggravating facts and had nothing to do with the weighing process." *Tsarnaev*, 968 F.3d at 89 (explaining that "*McKinney* helps sink Dzhokhar's claim that *Hurst* requires the jury to make the weighing determination beyond a reasonable doubt"); *see also People v. Suarez*, 471 P.3d 509, 565 (Cal. 2020) (quoting *McKinney* for the proposition that *Hurst* "did not require jury weighing of aggravating and mitigating circumstances"). Accordingly, it does not appear that any court has held, post-*McKinney*, that the Sixth Amendment requires jury weighing of aggravators and

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constitution. *See McKinney*, 140 S. Ct. at 708 ("In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances, and *Ring* and *Hurst* did not overrule *Clemons* [*v. Mississippi*, 494 U.S. 738 (1990),] so as to prohibit appellate reweighing of aggravating and mitigating circumstances.").

[6] *See State v. Wood*, 580 S.W.3d 566, 582-88 (Mo. 2019) (correcting *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003)); *Evans v. State*, 226 So. 3d 1, 38-39 (Miss. 2017); *Ex Parte Alabama*, 223 So. 3d 954, 966 (Ala. Crim. App. 2016); *State v. Belton*, 74 N.E.3d 319, 337 (Ohio 2016); *Nunnery v. State*, 263 P.3d 235, 250-51 (Nev. 2011); *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005); *Commonwealth v. Roney*, 866 A.2d 351, 361 (Pa. 2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004); *Oken v. State*, 835 A.2d 1105, 1147 (Md. Ct. App. 2003); *State v. Gales*, 658 N.W.2d 604, 626 (Neb. 2003).

mitigators, even if the pertinent sentencing statute provides that a sentence of death may not be imposed unless the sentencing authority determines that aggravators outweigh mitigators.

V. Conclusion

Petitioner fails to establish under the second question presented that the Florida Supreme Court's decision implicates an important or unsettled question of federal law, conflicts with another state court of last resort or a court of appeal of the United States, or conflicts with relevant decisions of this Court. Therefore, Respondent asks this Court to deny the petition for a writ of certiorari.

CONCLUSION

This case presents no constitutional question or controversy worthy of this Court's review. Therefore, Respondent respectfully submits that this Court should deny the petition.

Respectfully submitted,
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