CAPITAL CASE
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

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

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I. The Jury at Mr. Allen's Trial Was Affirmatively Misinformed About Its Role in Sentencing.

The instruction that it was "the judge's job to determine a proper sentence" and the State's representation that it would ask for a "recommendation" of death affirmatively misled the jury about its role in the sentencing process under applicable Florida law.

Under the law under which Mr. Allen was sentenced, a capital jury, not the judge, determines whether a death sentence can even be considered. *See* Fla. Stat. § 921.141(2) (2019). It is the jury, not the judge, that makes the initial choice between life and death; if a capital jury does not unanimously choose a death sentence, the court is required to impose a life sentence. *See id.* § 921.141(2)-(3). In that situation the decision has been made and the court's role is, frankly, ministerial.

Just as in *Caldwell*, where the jury was advised its decision was "not the final decision,"[1] the jury here was advised its decision was not final. And, as the *Caldwell* Court noted, telling the jury the "responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." 472 U.S. at 333. Specifically, the incorrect instruction presents the intolerable danger that a juror who is reluctant to impose a death sentence would nevertheless "give in", *see id.*,

[1] *Caldwell v. Mississippi*, 472 U.S. 320, 324-25 (1985).

and vote for death, without understanding that Florida law is written so that a death sentence cannot be obtained if even a single juror disagrees with that outcome.

Finally, as the State of Florida points out, this Court has in several cases declined to review a *Caldwell* challenge to Florida's sentencing instructions. In each of the instances cited by the State, the conviction was obtained under an earlier version of the statute that did not require a unanimous verdict. *See Jones v. State*, 256 So. 3d 801 (Fla. 2018), *cert. denied*, 139 S. Ct. 1341 (2019) (involving a 1992 conviction); *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), *cert. denied*, 139 S. Ct. 27 (2018) (involving a 2003 conviction); *Philmore v. State*, 234 So. 3d 567 (Fla. 2018), *cert. denied*, 139 S. Ct. 478 (2018) (involving a 2002 conviction); and *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017), *cert. denied*, 138 S. Ct. 829 (2018) (involving a 2012 conviction). The issues presented in those cases were not the same as the issue presented here, which involves the application of the current statute.

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

Under Florida's capital sentencing scheme, the determination that at least one aggravating factor exists, the determination that sufficient aggravating circumstances exist to justify a death sentence, and the determination that aggravating factors outweigh any mitigating circumstances, are distinct findings. *See* Fla. Stat. § 921.141 (2) (a)-(b). Petitioner does not argue the Florida Legislature did this unknowingly. However, whether the Florida Legislature labeled these

determinations "elements" or not, the relevant inquiry is whether they increase the available penalty for a crime. They do.

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

The requirement of determining that "sufficient aggravating factors exist" is an additional requirement not found in many state statutes. Florida and at least one other state require a separate finding — independent of any weighing of aggravating and mitigating factors — that the aggravating factors are sufficient to justify imposing a death sentence. *See id.*; Ark. Code Ann. § 5-4-603(a)(2021) (requiring imposition of a death sentence only if jury returns three findings including "(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt."). Given that the number of potential aggravating factors has doubled since capital punishment was reinstated in Florida,[3] this is not a mere

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

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

formality; it is a legislative directive that the aggravating circumstances in a particular case not only fall into one of the enumerated categories, but also rise to a level justifying the death penalty.

This Court's decisions in *McKinney v. Arizona*, 140 S. Ct. 702 (2020) and *Kansas v. Carr*, 577 U.S. 108 (2016) do not negate Petitioner's argument. In *McKinney*, this Court held the Arizona Supreme Court could reweigh aggravating and mitigating circumstances on collateral review of a death sentence after a federal appeals court held the state court had failed to properly consider relevant mitigating evidence. 140 S. Ct. at 706, 709. Under the version of the Arizona sentencing statute in effect at the time McKinney was originally sentenced, he had not been entitled to a jury determination of aggravating circumstances. *See id.* at 708. McKinney argued that this Court's subsequent decisions in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 577 U.S. 92 (2016), should be applied to require resentencing by a jury in his case. *See McKinney*, 140 S. Ct. at 707. This Court rejected McKinney's argument for two reasons. First, the Court held that appellate courts can reweigh aggravating and mitigating evidence if the lower court did not properly consider mitigating evidence. *Id.* (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990)). Second, the Court held *Ring* and *Hurst* had not changed the law to require that the jury weigh aggravating and mitigating circumstances before imposing death. *Id.* at 707-08.

The issue in *McKinney* was whether it was permissible to conduct appellate reweighing of aggravating and mitigating factors, and that is not the issue

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

Moreover, the statutes at issue are fundamentally dissimilar. The 1993 Arizona sentencing statute applied in *McKinney* specified that the trial court "alone" would make all factual determinations necessary to impose a death sentence. Ariz. Rev. Stat. Ann. § 13-703B (1993). The statute made death an available punishment for every first-degree murder, with the trial court making the selection:

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

Ariz. Rev. Stat. Ann. § 13-703E (1993).[4]

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

In contrast to the former Arizona statute, the current Florida sentencing scheme circumscribes the court's ability to impose a death sentence in several ways — one of which is requiring the findings in section 921.141(2)(b)2.a.-c. before a death penalty can even be considered. The fact that other states have structured their statutes differently does not change Florida's capital sentencing scheme. This Court's decisions upholding the constitutionality of statutes that require only a finding of an aggravating factor beyond a reasonable doubt before a defendant can be sentenced to death do not foreclose the possibility that a different statutory scheme creates different burdens of proof.

Finally, the ultimate facts of the sufficiency of the aggravator or aggravators to justify a death sentence and that they outweigh mitigating circumstances are distinct from the "mercy decision" referred to in *Carr*, 577 U.S. at 119. In Florida's current capital sentencing scheme, both the jury and the trial court have the opportunity to make that ultimate choice between a life sentence and a death sentence. *See* Fla. Stat. §§ 921.141(2)(b)2.a.-c.; 921.141(3)(a)1.-2. Petitioner is not asking this Court to find that Florida's capital sentencing scheme attaches any particular burden of proof to the jury's ultimate recommendation of a death sentence (or sentence of life in prison). What is at issue are two determinations without which a death penalty cannot be imposed. Once those determinations are made, both the jury and the trial court have the opportunity to "accord mercy if they deem it appropriate." *Carr*, 577 U.S. at 119.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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