NO. 21-6429

IN THE SUPREME COURT OF THE UNITED STATES

RANDALL T. DEVINEY,
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 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).

Whether Petitioner's death sentence violates the Eighth Amendment — specifically, whether a death sentence for a defendant who was at least 18 years of age but less than 21 years of age at the time of the crime violates the evolving standards of decency that mark the progress of a maturing society as articulated by this Court in *Trop v. Dulles*, 356 U.S. 86 (1958), applied in *Roper v. Simmons*, 543 U.S. 551 (2005).

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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 *Deviney v. State*, 322 So. 3d 563 (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

On August 5, 2008, Petitioner murdered Dolores Futrell, a sixty-five-year-old woman who suffered from multiple sclerosis, at her home in Jacksonville, Florida. *Deviney*, 322 So. 3d at 566; *see also id.* at 574. Petitioner was "almost nineteen years old at the time of the murder." *Id.* at 573.

Upon resentencing in the wake of *Hurst v. Florida*, 577 U.S. 92 (2016), a jury in 2017 "unanimously found three aggravators beyond a reasonable doubt": (1) the murder was committed while Petitioner was engaged in the commission of a burglary, an attempt to commit a burglary, or an attempt to commit a sexual battery; (2) the murder was especially heinous, atrocious, or cruel (HAC); and the victim was a particularly vulnerable victim (PVV) due to advanced age or disability. Next, the jury "unanimously found the aggravators were sufficient to impose the death penalty [and unanimously found that] those aggravators outweighed the mitigation it found."

Deviney, 322 So. 3d at 569. Then, the jury "returned a . . . verdict recommending that [Petitioner] be sentenced to death." *Id.* Ultimately, the trial court "sentenced [Petitioner] to death." *Id.*

On direct appeal to the Supreme Court of Florida, Petitioner raised two issues relevant here: (1) Petitioner argued "that the trial court erred by failing to instruct the jury that it must determine beyond a reasonable doubt whether the aggravators were sufficient to impose death and whether those aggravators outweighed the mitigators . . ."; and (2) Petitioner argued that this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005) (*Roper*), "should be expanded to individuals under the age of twenty-one at the time they committed their murders" because "there is an emerging national consensus against imposing death on individuals under the age of twenty-one at the time of their offenses." *Deviney*, 322 So. 3d at 572-73. The Court rejected Petitioner's arguments and affirmed. *Id.* at 577.

REASON FOR DENYING THE WRIT

Question One
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 decision-making 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 death or 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 not just the existence of at least one aggravating factor but also that: the aggravating factors are sufficient to warrant the death penalty; and the aggravating factors outweigh the mitigating circumstances. *See* Petition, p. i:

> 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." The first question presented in this case 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.

Petitioner essentially argues that the Florida Legislature unknowingly created additional "elements" for death sentence eligibility beyond that required by the Eighth Amendment. *See* Petition, p. 15:

> [In response to *Hurst v. Florida*, the] Florida Legislature rewrote the state's capital sentencing scheme [which now] 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 death sentence.

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.[1] *See* Petition, p. 12:

> [Florida's] scheme requires the jury to make a recommendation of either death or life imprisonment based on 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. Until each of these determinations is made . . . the defendant is not eligible for the death penalty.

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 mitigating circumstances, and unanimously recommend a sentence of death.

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

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. 13:

> [T]he 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.

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). *See* Petition, p. 10:

> Under Florida's capital sentencing scheme, the determinations that the aggravating factors are sufficient to justify imposing death and that they outweigh the mitigating circumstances are the functional equivalent of elements *because these determinations expose a defendant to a greater punishment* than that authorized by statute for capital murder.

(Emphasis added).

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. 22:

> 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 factual finding that the aggravating factors are sufficient to justify death — a separate question from whether they are present at all — and the factual finding that they outweigh the mitigating evidence.

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, p. 19 ("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 v. Mississippi*, 472 U.S. 320, 340 n.7 (1985), 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 v. State*, 322 So. 3d 589, 603 (Fla. 2021), 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.[2] Even before *McKinney*, "[n]early every court that [had] considered the issue [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).[3] 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."

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[2] 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 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.").

[3] *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).

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 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 that the Florida Supreme Court's decision conflicts with relevant decisions of this Court, conflicts with another state court of last resort or a court of appeal of the United States, or implicates an important or unsettled question of federal law.

Question Two
Petitioner's Death Sentence
Does Not Violate the Eighth Amendment

I. Petitioner's claim

Petitioner relies exclusively on a public policy argument to claim that his death sentence violates the Eighth Amendment. *See* Petition, p. 29:

> This Court should reconsider the bright line allowing 18-year-olds to be executed. A decreasing number of states are responsible for most of the executions of those who had reached the age of 18 but were not over 21 when they offended. A majority of states no longer execute these offenders because of what science tells us about brain development.

With this claim, Petitioner essentially seeks an "update" to the Eighth Amendment that would retroactively prohibit his sentence. *See generally Roper*, 543 U.S. at 630 (Scalia, J., dissenting).

II. Analysis

Petitioner fails to argue that the lower court's decision: conflicts with any decision from this Court, another state court of last resort, or a court of appeal of the United States; or implicates an unsettled question of federal law. Petitioner only asserts that his death sentence implicates an important question of federal law — i.e., whether the Eighth Amendment should bar a death sentence for a new class of defendants (those under 21 at the time of the murder).

No Conflict with this Court's Decisions

The decision of the Supreme Court of Florida does not conflict with any decision by this Court. *See* Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision whether to grant review). Petitioner was "almost nineteen years old

at the time of the murder." *Deviney*, 322 So. 3d at 573. Under this Court's existing precedent, the Eighth Amendment prohibits the imposition of a death sentence on minors — not those, like Petitioner, who attained the age of majority before committing the offense that gave rise to the sentence at issue. *See Roper*, 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); *cf. Graham v. Florida*, 560 U.S. 48, 74-75 (2010), citing *Roper*, 543 U.S. at 574 ("Because '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime."); *cf. also Miller v. Alabama*, 567 U.S. 460, 465 (2012) ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"). Thus, there is no conflict between the lower court's decision and this Court's caselaw.

No Conflict with any Federal Appellate Court

The decision of the Supreme Court of Florida does not conflict with any decision by a federal appellate court. *See* Sup. Ct. R. 10(b) (listing conflict with a federal appellate court as a consideration in the decision whether to grant review). It appears that all of the federal appellate courts that have reached the issue of expanding *Roper* have declined the invitation to do so. *See, e.g., United States v. Bernard*, 762 F.3d 467, 482 (5th Cir. 2014) (denying certificate of appealability (COA) on a claim seeking to extend *Roper* to "mental age" in a case where the defendant was 19 years old when

he committed the murder, citing *Parr v. Quaterman*, 472 F.3d 245, 261 (5th Cir. 2006)); *see also In re Garner*, 612 F.3d 533, 535-36 (6th Cir. 2010) (denying permission to file a successive habeas petition seeking to extend *Roper* to a defendant who was 19 years old at the time of the murder but argued "he had a developmental or 'mental age' of less than 18 at the time he committed his crimes"); *United States v. Mitchell*, 502 F.3d 931, 981 (9th Cir. 2007) (denying defendant's claim "that it would violate the Eighth Amendment to sentence him to death because of his age and maturity level (he was 20 at the time of the offenses)"); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (denying a COA on a claim seeking to extend *Roper* to a defendant who committed the murder when he was 18 years old but committed the crimes used as an aggravator when he was under 18 years old). Thus, there appears to be no conflict between the lower court's decision and decisions of federal appellate courts.

No Conflict with any State Court of Last Resort

The decision of the Supreme Court of Florida does not conflict with any decision by a state court of last resort. *See* Sup. Ct. R. 10(b) (listing conflict with a state court of last resort as a consideration in the decision whether to grant review). Like the federal appellate courts, it appears that all of the state courts of last resort have rejected an invitation to expand *Roper*. *See, e.g.*, *Thompson v. State*, 153 So. 3d 84, 177 (Ala. Crim. App. 2012) (refusing to extend *Roper* to an 18-year-old defendant who was "traumatized, abused, and mentally ill"); *see also State v. Tucker*, 181 So. 3d 590, 627 (La. 2015) (refusing to extend *Roper* to a defendant who argued "he was barely

over the age of 18 and his IQ is 74"); *Mitchell v. State*, 235 P.3d 640, 659 (Okla. Crim. App. 2010) (refusing to extend *Roper* to a defendant who was "two weeks beyond his eighteenth birthday at the time of the murder"). Thus, there appears to be no conflict between the lower court's decision and decisions of other State courts of last resort.

Nevertheless, Petitioner relies on *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Ct. 7th Div. Aug. 01, 2017), for support. *See* Petition, pp. 24-27; *see also Commonwealth v. Bredhold*, 2017 WL 8792559, at *6 ("Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense."). However, that reliance is misplaced for two reasons. First, the ruling in that case is from a state trial court, not a state court of last resort. Therefore, Sup. Ct. R. 10(b) does not support a grant of review. Second, "the Kentucky Supreme Court recently held [that the *Roper*] issue [in the *Bredhold* trial] was not justiciable because the defendant had not been sentenced yet." *State v. Barnett*, 598 S.W.3d 127, 131 n.3 (Mo. 2020), citing *Commonwealth v. Bredhold*, 599 S.W.3d 409 (Ky. 2020), *cert. denied sub nom. Diaz v. Kentucky*, 141 S. Ct. 1233 (2021). As a result of that non-justiciability finding, the Kentucky Supreme Court vacated the trial court's order. *See Commonwealth v. Bredhold*, 599 S.W.3d at 423. Thus, the vacated trial court order in *Bredhold* offers no support here.

Wrong Forum for a Public Policy Debate

Despite a lack of any conflict, Petitioner argues that this Court should accept review because the decision by the Supreme Court of Florida implicates an important

question of federal law: whether a death sentence imposed on a defendant who was 18 when he committed the offense violates our national standards of decency. However, this Court is an inappropriate forum for such a public policy debate. *See Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting):

> [I]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.

See also Coker v. Georgia, 433 U.S. 584, 604 (1977) (Burger, C.J., dissenting); *Baze v. Rees*, 553 U.S. 35, 93 (2008) (Scalia, J., concurring).

To the extent this Court wishes to engage in such a debate, the "evolving standards of decency" — which has proven "problematic from the start" — should be discarded. *See Miller*, 567 U.S. at 510 (Alito, J., dissenting), quoting *Trop*, 356 U.S. at 101:

> The Court long ago abandoned the original meaning of the Eighth Amendment, holding instead that the prohibition of "cruel and unusual punishment" embodies the "evolving standards of decency that mark the progress of a maturing society." Both the provenance and philosophical basis for this standard were problematic from the start. (Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law? And in any event, aren't elected representatives more likely than unaccountable judges to reflect changing societal standards?)

(Citations omitted).

As noted by Justice Alito, the test mistakenly presumes that society evolves into a better version of itself with each passing generation. *See Miller*, 567 U.S. at

510 (Alito, J., dissenting) (*supra*); *see also* John. F. Stinneford, *Evolving Away from Evolving Standards of Decency*, Federal Sentencing Reporter, Vol. 23, No. 1, October 2010 ("The evolving standards of decency test reflected the Warren Court's faith in the inherently progressive nature of history.").

Additionally, the test undermines democracy. *See Miller*, 567 U.S. at 510 (Alito, J., dissenting) (*supra*); *see also Furman v. Georgia*, 408 U.S. 238, 418 (1972) (Powell, J., dissenting) ("I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent."); *see also Furman*, 408 U.S. at 468 (Rehnquist, J., dissenting).

Finally, the test raises significant concerns regarding stare decisis, federalism, judicial restraint, and separation of powers. *See Furman*, 408 U.S. at 417 (Powell, J., dissenting) ("Less measurable, but certainly of no less significance, is the shattering effect this collection of views has on the root principles of stare decisis, federalism, judicial restraint and — most importantly — separation of powers.").

Evolution Is a Flawed Concept

Biological evolution is a flawed concept because species do not get "better" over time; rather, they descend with modification as random genetic mutations allow some individuals to respond more competitively to random environmental conditions. *See* Robert J. D'Agostino, *Selman and Kitzmiller and the Imposition of Darwinian Orthodoxy*, 10 B.Y.U. Educ. & L.J. 1, 1 (2010). Because certain individuals can outcompete their rivals, their DNA is more likely to be found in future generations.

See Kent Greenawalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, 17 Notre Dame J.L. Ethics & Pub. Pol'y 321, 324 (2003). However, the presence of that DNA does not prove that a species is evolving into a better version of itself with each passing generation; rather, it simply illustrates how a species can adapt over time to an ever-changing world. *See* Thomas Earl Geu, *A Single Theory of Limited Liability Companies: An Evolutionary Analysis*, 42 Suffolk U. L. Rev. 507 (2009), quoting Edward O. Wilson, *The Diversity of Life* 94 (1992). Hence, future generations are not "better" than previous ones. *See* Kevin P. Lee, *Inherit the Myth: How William Jennings Bryan's Struggle with Social Darwinism and Legal Formalism Demythologize the Scopes Monkey Trial*, 33 Cap. U. L. Rev. 347, 354 (2004), citing Stephen Jay Gould, *Ever Since Darwin: Reflections in Natural History* 24-25 (1977).

Admittedly, societal change is somewhat different. *See generally* J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 Vand. L. Rev. 1407, 1418 (1996). Setting aside the ability of a society to bring about cataclysmic change, human behavior may appear more rational and less arbitrary than the process of natural selection. But even if true, that does not mean that future generations of humans are necessarily "better" or "more decent" than previous ones. *See, e.g.*, Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* (1776-1789); *see also* William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (1960). Like those who came before us, we are all imperfect beings. *See Furman*, 408 U.S. at

345 (Marshall, J., concurring).

Instead of acknowledging the arbitrariness of natural selection or the limitations of human nature, the evolving standards of decency test erroneously suggests constant societal progress toward a defined endpoint — i.e., perfection. *See Furman*, 408 U.S. at 410 (Blackmun, J., dissenting):

> It is comforting to relax in the thoughts — perhaps the rationalizations — that this is the compassionate decision for a maturing society; that this is the moral and the "right" thing to do; *that thereby we convince ourselves that we are moving down the road toward human decency*; that we value life even though that life has taken another or others or has grievously scarred another or others and their families; *and that we are less barbaric than we were* in 1879, or in 1890, or in 1910, or in 1947, or in 1958, or in 1963, or a year ago. . . .

(Emphases added). In short, the test erroneously presumes that we will someday progress to a point in time when we, as a society, are better than the death penalty. *See Roper*, 543 U.S. at 605-06 (O'Connor, J., dissenting) ("[T]he actions of the Nation's legislatures suggest that, although a clear and durable national consensus against this practice may in time emerge, that day has yet to arrive.").

The Evolving Standards of Decency Test Undermines Democracy

With the evolving standards of decency test, this Court transformed itself into an ongoing constitutional convention — one that lacks the appropriate input from the citizenry. *See generally* Douglas E. Abrams, *Teaching Legal History in the Age of Practical Legal Education*, 53 Am. J. Legal Hist. 482, 486 (2013) ("[I]s the U.S. Supreme Court an 'ongoing constitutional convention' whose decision-making helps overcome the difficulties of amending the organic document under Article V, a cumbersome process that has happened only 17 times since 1793?"); *see also Furman*,

408 U.S. at 467 (Rehnquist, J., dissenting).

If opponents of the death penalty seek its abolition, then let them compete in the marketplace of ideas. *See generally Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."). Let them convince voters and legislators that we, as a society, should no longer authorize capital punishment for defendants between the ages of 18 and 20. *See United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting); *see also Furman*, 408 U.S. at 410 (Blackmun, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., dissenting).

This approach keeps the public policy debate where it belongs — in the legislature and at the ballot box. *See Furman*, 408 U.S. at 383 (Burger, C.J., dissenting) ("[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."); *see also id.* at 456 (Powell, J., dissenting); *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting).

The Evolving Standards of Decency Test Ignores Stare Decisis

By definition, the "evolving standards of decency" test ignores the doctrine of stare decisis. Provided this Court determines that society has sufficiently "evolved," past decisions enjoy no precedential value. *See Furman*, 408 U.S. at 329-30 (Marshall, J., concurring), quoting *Trop*, 356 U.S. at 101:

> Perhaps the most important principle in analyzing "cruel and unusual" punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

> The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. . . . There is no holding directly in point, and the very nature of the Eighth Amendment would dictate that unless a very recent decision existed, *stare decisis would bow to changing values*, and the question of the constitutionality of capital punishment at a given moment in history would remain open.

(Emphasis added). *See also id.* at 424 (Powell, J., dissenting); *Roper*, 543 U.S. at 594 (O'Connor, J., dissenting).

And yet, decisions that fail to honor the principle of stare decisis should not enjoy the benefits of its protections. *See Furman*, 408 U.S. at 399-400 (Burger, C.J., dissenting) ("Only one year ago, in *McGautha v. California*, [402 U.S. 183 (1971),] the Court upheld the prevailing system of sentencing in capital cases. . . . [I]f stare decisis means anything, that decision should be regarded as a controlling pronouncement of law."); *see also id.* at 428 (Powell, J., dissenting).

The Evolving Standards of Decency Test Undermines Federalism

Because it allows this Court to disregard the social values reflected by state legislative enactments and state jury verdicts, the evolving standards of decency test undermines federalism. *See Coker*, 433 U.S. at 604 (Burger, C.J., dissenting) ("Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers."); *Furman*, 408 U.S. at 418 (Powell, J., dissenting); *but see Missouri v. Holland*, 252 U.S. 416, 434 (1920).

In doing so, the test erodes the people's faith in our system of laws. *See Furman*, 408 U.S. at 400 (Burger, C.J., dissenting) ("It may be thought appropriate

to subordinate principles of stare decisis where the subject is a sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. *The pattern of decisionmaking will do little to inspire confidence in the stability of the law.*") (emphasis added); *cf.* Raymond B. Marcin, *God's Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of Roe*, 25 J. Contemp. Health L. & Pol'y 38, 43-44 (2008):

> American constitutional law has ceased to be what it once was — a set of written principles to be changed only through the use of the constitutional amendatory process. . . . [E]verybody understands that the real source of the new fundamental moral norms is not so much what is *in* the Constitution as the Justices' own thoughts about what *should be* in the Constitution.

(Emphases in original).

The Evolving Standards of Decency Test Abandons Judicial Restraint

The evolving standards of decency test abandons the principle of judicial restraint. Over a century ago, Justice Holmes warned of this type of danger. *See N. Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting):

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Other Justices issued similar warnings. *See, e.g., Butler*, 297 U.S. at 78-79 (Stone, J., dissenting) ("[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."); *see also*

Furman, 408 U.S. at 405 (Burger, C.J., dissenting); *id.* at 411 (Blackmun, J., dissenting); *id.* at 431 (Powell, J., dissenting); *id.* at 467 (Rehnquist, J., dissenting).

As Justice Scalia more recently warned, this Court's Eighth Amendment decisions should reflect the views of our society — not just the views of this Court. *See Atkins*, 536 U.S. at 337-38 (Scalia, J., dissenting):

> Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.

See also Roper, 543 U.S. at 616 (Scalia, J., dissenting) ("By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?").

Despite these warnings, this Court erroneously proclaimed that it — not the people — has the final say in the "acceptability" of the death penalty. *Coker*, 433 U.S. at 597 ("[T]he attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."); *see also Atkins*, 536 U.S. at 312 (same); *Roper*, 543 U.S. at 563 (same); *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008) (same); *Hall v. Florida*, 572 U.S. 701, 721 (2014) (same).

The Evolving Standards of Decency Test Undermines Separation of Powers

The evolving standards of decency test undermines the separation of powers by ignoring the constitutional role of legislatures as the appropriate forum for

expressing the will of the people. *See Furman*, 408 U.S. at 436-37 ("Powell, J., dissenting) ("In a democracy the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives."). Put simply, judges are not legislators. *See id.* at 375 (Burger, C.J., dissenting); *see also id.* at 406 (Blackmun, J., dissenting); *Roper*, 543 U.S. at 607 (O'Connor, J., dissenting).

By sanctioning the act of legislating from the bench — guised as an effort to determine the "acceptability" of the death penalty — the evolving standards of decency test violates the constitution. *See Coker*, 433 U.S. at 604 (Burger, C.J., dissenting) ("In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature.").

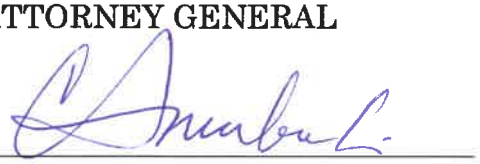
III. Conclusion

Petitioner fails to establish that the Florida Supreme Court's decision conflicts with relevant decisions of this Court, conflicts with another state court of last resort or a court of appeal of the United States, or implicates an important or unsettled question of federal law.

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,
ASHLEY MOODY
ATTORNEY GENERAL



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