No. 21-6654

In The

Supreme Court of the United States

DONALD DAVIDSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO CERTIORARI

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Capital Case

QUESTION PRESENTED

Donald Davidson was sentenced to death after pleading guilty to the first-degree murder of Roseann Welsh and subsequent rape of her ten-year-old daughter. He seeks certiorari review of the Florida Supreme Court's rejection of his argument that the weighing and sufficiency selection criteria in Florida's capital system are subject to the beyond a reasonable doubt standard. Under Florida's system, the finding of a single aggravator renders a defendant eligible for a capital sentence. When—as Davidson did below—a defendant waives his penalty phase jury, the sentencing court is only required to consider the aggravation and mitigation and find an aggravator before imposing death. Florida's system does not require the sentencing judge to determine either sufficiency of the aggravators or weigh them against the mitigation when a penalty-phase jury is waived. And even when a jury is involved, the weighing and sufficiency are mere selection criterium rather than facts that render a defendant eligible for a capital sentence.

This Court should accordingly decline to exercise certiorari jurisdiction over the following question presented:

I. Does the Fourteenth Amendment's due process clause require a judge under Florida's capital system to weigh the sufficiency of the aggravators and determine whether they outweigh the mitigation under a beyond a reasonable doubt standard when a defendant waives his right to a penalty phase jury?

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The Florida Supreme Court's decision petitioned for review appears as *Davidson v. State*, 323 So. 3d 1241, 1247 (Fla. 2021), *reh'g denied*, No. SC19-1851, 2021 WL 4145236 (Fla. Sept. 13, 2021).

JURISDICTION

This Court has jurisdiction over the Florida Supreme Court's determination that the federal due process clause does not require a determination that the aggravators are sufficient and outweigh the mitigators beyond a reasonable doubt. *See* 28 U.S.C. § 1257(a); 28 U.S.C. § 2101(d).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, section one:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This certiorari petition arises from the Florida Supreme Court's affirmance of Petitioner's conviction and capital sentence for the first-degree murder of Roseann Welsh.

Facts

The underlying facts are set forth in the opinion below. *Davidson*, 323 So. 3d

at 1243–44. While Davidson was on conditional release from prison and wearing an ankle monitor, he visited the victim's home while she was alone. *Id.* at 1243. He tricked her into letting him into her bedroom under the guise of playing video games, choked her, and tried to rape her. *Id.*

During this attempted rape, the victim's ten-year-old daughter arrived home from school. *Id.* When the victim heard the school bus arrive, she broke free from Davidson and ran into the bathroom. *Id.* Davidson followed her, removed a lace from a shoe, and strangled her until she lost consciousness. *Id.* When Davidson realized she was still alive, he stabbed her three times in the throat with a buck knife. *Id.* He then left the bedroom and sexually assaulted the victim's daughter. *Id.*

While Davidson assaulted the daughter, the victim's thirteen-year-old son returned home. *Id.* Davidson confronted him at the front door and told him his mother and sister were not home. *Id.* The son then left to search for his sister and mother.

Davidson removed his ankle monitor, forced the victim's daughter into the family's minivan, and drove away. *Id.* He threw out his cell phone and ordered her to duck any time they passed vehicles. *Id.* He fondled "her vagina, placing his penis in her mouth, and placing his penis in or around her anus and vagina." *Id.* Eventually, he returned her to a location near her home and allowed her to exist. *Id.* She was found by police (the son called after he eventually returned to the home and found his mother dead). *Id.* at 1243–44. The victim's daughter recounted the details about her encounter with Davidson. *Id.* at 1244.

After Davidson confessed, the State charged him with nine crimes: "first-

degree premeditated murder, kidnapping, and multiple counts of sexual battery upon a child twelve years of age or younger." *Id.* The State sought the death penalty. *Id.*

Davidson pled guilty on all counts and waived his right to a penalty phase jury. *Id.* The court found his plea to be "knowingly, freely, voluntarily, and intelligently given." *Id.* The court then held a bench penalty phase and found:

> five aggravating factors to be proven beyond a reasonable doubt, with the noted weight: Davidson committed the murder while under a sentence of imprisonment for a felony (great weight); Davidson committed prior violent felonies consisting of the 2010 aggravated battery, as well as the sexual batteries on and kidnapping of M.S. (great weight); Davidson murdered Welsh after attempting to commit a sexual battery upon her (great weight); the murder was especially heinous, atrocious, or cruel (great weight); and Davidson committed the murder after having been designated a sexual predator (moderate weight).

Id. at 1246. The court also evaluated the mitigating circumstances and assigned them weight. *Id.* at 1246–47. "Ultimately, the court concluded that the aggravating circumstances heavily outweighed the mitigating circumstances, thereby warranting imposition of the death penalty." *Id.* at 1247. Davidson then appealed to the Florida Supreme Court. *Id.*

Decision Below

Davidson argued—for the first time on appeal—that the sentencing court erred by failing to find "beyond a reasonable doubt that sufficient aggravating circumstances existed and that those aggravating circumstances outweighed the mitigating circumstances." *Id.* The Florida Supreme Court rejected this argument and noted it had "consistently held the reasonable-doubt standard inapplicable to either the sufficiency or weighing determination." *Id.* at 1248.

Davidson timely filed his petition for certiorari seeking review of the Florida Supreme Court's decision on November 19, 2021. This is the State's Brief in Opposition.

REASONS FOR DENYING THE WRIT

Donald Davidson (Petitioner) seeks certiorari review of the Florida Supreme Court's decision rejecting his claim that the Fourteenth Amendment's due process clause requires a sentencer to find the aggravators are sufficient and outweigh the mitigation presented beyond a reasonable doubt. He argues that the sufficiency and weighing selection criterium under section 921.141(2)(b)2.a.–b., Florida Statutes, are the functional equivalent of elements and must be found beyond a reasonable doubt.

This Court should deny review for two independent reasons. First, the section 921.141(2)(b)2.a.–b. provisions that Petitioner argues are elements do not apply to his case because he waived his penalty phase jury. Second, even if these provisions applied to Petitioner's case, the sufficiency and weighing determinations are not elements that require a beyond a reasonable doubt determination.

A. Florida's Statutory Selection Criteria for Sufficiency and Weighing Do Not Apply to Petitioner's Case.

This Court should deny review because the section 921.141(2)(b)2.a.–b., Florida Statutes, provisions that Petitioner argues are the functional equivalent of elements do not apply to his case. A decision from this Court would therefore afford him no relief and be purely advisory.

By way of background, the Florida Legislature has adopted a comprehensive statutory system applicable when the State seeks a capital sentence. *See* § 921.141, Fla. Stat. This system gives the defendant a right to a penalty phase before a jury (unless waived) and requires that jury to determine whether the "the state has

proven, beyond a reasonable doubt, the existence of at least one aggravating factor." § 921.141(2)(a), Fla. Stat. If the jury finds one aggravating circumstance beyond a reasonable doubt, "the defendant is eligible for a sentence of death." § 921.141(2)(b)2., Fla. Stat.

Florida's system then requires the jury to make a recommendation on what the appropriate sentence is. § 921.141(2)(b)2., Fla. Stat. In relevant part, the jury's recommendation must be "based on a weighing" of: "a. Whether sufficient aggravating factors exist" and "b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist." § 921.141(2)(b)2.a.–b., Fla. Stat. Petitioner argues that these provisions governing a jury's recommendation are the functional equivalent of elements and therefore must be proven beyond reasonable doubt.

Notably, however, these provisions only apply "if the defendant has not waived his or her right to a sentencing proceeding by a jury." § 921.141(2), Fla. Stat. If a defendant waives a penalty phase jury (as Petitioner did in this case), then Florida employs a much simpler process:

> If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

§ 921.141(3)(b), Fla. Stat. The statutory sufficiency and weighing provisions are omitted from this process; the sentencing court must simply find an aggravator and *consider* the aggravation and mitigation before imposing a capital sentence. §

921.141(3)(b), Fla. Stat.

Petitioner's argument is thus predicated on a clear misreading of the statutory provisions applicable when a defendant in Florida waives a penalty phase jury. Florida law is clear that, when a defendant waives a penalty phase jury, the sentencing court must only find an aggravator and consider the aggravation and mitigation before imposing a capital sentence. § 921.141(3)(b), Fla. Stat. Since Petitioner waived his penalty phase jury, he was subject exclusively to the framework found in section 921.141(3)(b), rather than the jury recommendation provisions found in § 921.141(2)(b). This framework only required the trial court to "consider" the aggravation and mitigation and find an aggravator before imposing death. § 921.141(3)(b), Fla. Stat. The sufficiency and weighing statutory language—on which Davidson relies—is exclusively found in the inapplicable jury recommendation provisions that Petitioner waived when he waived his right to a penalty phase jury. As a result of his waiver—regardless of the answer to the question Petitioner has presented to this Court—his sentence will remain unaffected. This Court should deny review on that basis alone.

B. Alternatively, Sufficiency and Weighing Are Not Elements that Require a Finding Beyond a Reasonable Doubt.

Moving past the obvious inapplicability of the statutory provisions that Petitioner argues are elements, he is substantively incorrect that the sufficiency and weighing selection criteria are elements or their functional equivalent.

Florida's statute specifically details the findings necessary to make a

defendant eligible for a capital sentence:

> If the jury . . . [u]nanimously finds at least one aggravating factor, *the defendant is eligible for a sentence of death* and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death.

§ 921.141(2)(b)2., Fla. Stat. (emphasis added). Once a defendant is eligible for a capital sentence, the jury must then determine their view of the appropriate sentence based on the facts of the case. In relevant part, this recommendation is "based on a weighing" of "[w]hether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." § 921.141(2)(b)2.a.–b., Fla. Stat.

The Florida Supreme Court recently explained why these selection criteria are not "facts" subject to the beyond a reasonable doubt standard. *State v. Poole*, 297 So. 3d 487, 503 (Fla. 2020),[1] *cert. denied sub nom. Poole v. Florida*, 141 S. Ct. 1051 (2021). In rejecting the argument that weighing is the functional equivalent of an element, the Florida Supreme Court acknowledged this Court's precedent in *Apprendi*[2] and noted that weighing is not a factual determination. *Poole*, 297 So. 3d at 503. Indeed, "the ultimate question whether mitigating circumstances outweigh aggravating

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[1] Poole was sentenced under the 2011 version of Florida's capital sentencing statute rather than the one applicable to Davidson. *Poole*, 297 So. 3d at 495 & n.3. That version of the statute did require a court to consider the sufficiency of the aggravators and weigh them against the mitigators. *Id.* But the present version of the statute has no such requirement.

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

circumstances is mostly a question of mercy." *Id.* (quoting *Kansas v. Carr*, 136 S. Ct. 633 (2016)). Subjective determinations, like weighing of the aggravators against the mitigators, "cannot be analogized to an element of a crime" because they are discretionary judgment calls. *Id.*

Finally, as a matter of Florida law, the Florida Supreme Court held that the finding of an aggravator is the sole eligibility criteria for a capital sentence. *Id.* "The role of the" weighing selection finding "is to give the defendant an opportunity for mercy if it is justified by the relevant mitigating circumstances and by the facts surrounding his crime." *Id.* And, again as a matter of Florida law, the Florida Supreme Court held that the sufficiency of the aggravators criteria is met once a jury finds a single aggravating circumstance. *Id.* at 502. This requirement was therefore automatically satisfied below when the court found the existence of aggravating circumstances beyond a reasonable doubt. *See Davidson*, 323 So. 3d at 1246 ("In the sentencing order, the trial court found five aggravating factors to be proven beyond a reasonable doubt.").

This Court's recent decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), confirms that the sufficiency and weighing selection criteria are not the functional equivalent of elements. In *McKinneyError! Bookmark not defined.*, a capital defendant challenged his death sentence because the sentencing judge had failed to consider his posttraumatic stress disorder (PTSD) as a mitigating factor, thereby violating *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence). On

remand from the Ninth Circuit, the Arizona Supreme Court performed its own *de novo* weighing of the aggravators and mitigators, including the defendant's PTSD, and upheld the sentence. *McKinney*, 140 S. Ct. at 706. In the state supreme court's independent judgment, the balance of the aggravators and mitigators warranted the death penalty. *Id.*

On certiorari review, the defendant argued that "a jury must resentence him" because a court "could not itself reweigh the aggravating and mitigating circumstances." *McKinney*, 140 S. Ct. at 706. This Court rejected that claim. "Under *Ring*[3] and *Hurst*,[4]" this Court explained, "a jury must find the aggravating circumstance that makes the defendant death eligible." *Id.* at 707. "[I]mportantly," however, "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.*; *see also id.* at 708 (explaining that "*Ring* and *HurstError! Bookmark not defined.* did not require jury weighing of aggravating and mitigating circumstances").

Because the Sixth Amendment permits the "weigh[ing] [of] aggravating and mitigating" evidence by judges, *McKinney*, 140 S. Ct. at 707, the determination that aggravators outweigh mitigators cannot be considered an "element" of the offense.

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[3] *Ring v. Arizona*, 536 U.S. 584 (2002).

[4] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

And because that determination is not an element, it is not subject to the beyond a reasonable doubt standard. *See Alleyne v. United States*, 570 U.S. 99, 107 (2013) ("The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense."). In other words, this Court in *McKinney* already rejected an essential premise of Petitioner's argument: that the sufficiency and weighing of aggravators and mitigators is either an "element" or the "functional equivalent" of an element.

Particularly viewed in light of *McKinney*, there is no conflict between the Florida Supreme Court's decision below and this Court's precedent. Petitioner asserts that the Florida Supreme Court's decision "conflicts with this Court's opinions in *Apprendi*, *Ring*, *Alleyne* and *Hurst*." Petition at 8. Petitioner is simply incorrect. The cases he cites do not conclude that the beyond a reasonable doubt standard applies to non-factual determinations intended to guide a jury's sentencing recommendation. On the contrary, those cases evince this Court's understanding that that standard of proof is limited to *factual* findings.

By its terms, *In re Winship* applies the beyond a reasonable doubt standard only to "the factfinder." 397 U.S. 358, 363–64 (1970); *see also id.* (referencing "the trier of fact"). The Court there held that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364; *see also Alleyne*, 570 U.S. at 103 ("Any fact that, by law, increases the penalty for a crime is

an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

Consistent with *Winship*, this Court in *Apprendi* expressly and repeatedly explained that the beyond a reasonable doubt standard of proof applies to "facts." *Apprendi*, 530 U.S. at 482–84, 486, 490. *Apprendi* did not hold that the beyond a reasonable doubt standard should be extended to non-factual normative judgments of the kind at issue here.

This Court's cases applying *Apprendi* to the capital sentencing context likewise did not hold that the due process clause requires the jury to determine, beyond a reasonable doubt, that normative considerations support the imposition of the death penalty. In *Ring*, for example, this Court explained that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. 584, 589 (2002). So too in *Hurst*, where this Court reiterated that the sentencing scheme in *Ring* violated the defendant's right to have "a jury find the facts behind his punishment." *Hurst v. Florida*, 577 U.S. 92, 98 (2016); *see also id.* at 94 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.").

In short, the decision below does not conflict with this Court's precedents. None of the cases Petitioner cites held that a jury must find beyond a reasonable doubt that aggravating factors outweigh mitigating circumstances or are sufficient to warrant the imposition of capital punishment. What is more, the reasoning of those cases

expressly ties the beyond a reasonable doubt standard to factfinding of a kind not at issue here—and thus undermines rather than supports Petitioner's claim.

The Florida Supreme Court below was eminently correct to refuse to apply a beyond a reasonable doubt standard to selection criteria based on moral judgments rather than facts. The beyond a reasonable doubt standard ensures that the prosecution must "persuad[e] the factfinder at the conclusion of the trial of [the defendant's] guilt beyond a reasonable doubt." *In re Winship*, 397 U.S. at 364. This safeguard preserves the "moral force of the criminal law" because it does not "leave[ ] people in doubt whether innocent men are being condemned." *Id.* But sufficiency and weighing do not go to whether the defendant is guilty of a capital offense—that question is answered when the jury finds the existence of an aggravated first-degree murder. *See McKinney*, 140 S. Ct. at 707; *Kansas v. Marsh*, 548 U.S. 163, 175–76 (2006). Sufficiency and weighing instead, go to the appropriateness of the penalty. That is, they are normative judgments, not facts.[5] Therefore, this Court should deny certiorari review.

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[5] It is, therefore, unsurprising that this Court has denied certiorari in several recent Florida cases presenting an identical issue. *See Santiago-Gonzalez v. Florida*, 141 S. Ct. 2828 (June 21, 2021) (No. 20-7495); *Rogers v. Florida*, 141 S. Ct. 284 (Oct. 5, 2020) (No. 19-8473); *Bright v. Florida*, 141 S. Ct 1697 (Mar. 22, 2021) (No. 20-6824); *Doty v. Florida*, 142 S. Ct. 449 (Nov. 1, 2021) (21-5672); *Craft v. Florida*, 142 S. Ct. 490 (Nov. 15, 2021) (21-5280); *Craven v. Florida*, 142 S. Ct. 199 (Oct. 4, 2021) (20-8403); *Newberry v. Florida*, 141 S. Ct. 625 (Oct. 19, 2020) (20-5072). This Court has also denied certiorari review in a case presenting the underlying question of whether the Sixth and Eighth Amendments require that a jury find that the aggravators outweighed the mitigators. *See Poole v. Florida*, 141 S. Ct. 1051 (Jan. 11, 2021) (No. 20-250).

CONCLUSION

The Florida Supreme Court's decision below does not present any conflict with any decision of this Court. Nor is any unsettled question of federal law involved. In addition, the statutory provisions Petitioner argues are elements are inapplicable to his sentence. Therefore, the Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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