CAPITAL CASE
No. 21-6654

In the
Supreme Court of the United States

DONALD HUGH DAVIDSON, JR.
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

JESSICA J. YEARY
Public Defender

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY BRIEF

I. The Elements and Functional Elements of an Offense Remain the Same in Jury and Bench Trials.

To say Defendant waived elements of an offense by waiving a jury simply begs the question presented. The defendant's waiver of a jury was not a waiver of the findings required to justify imposing a death sentence. Ever since this Court decided *In re Winship*, 397 U.S. 358 (1970), it has been clear that determinations made by a judge instead of a jury — as in the juvenile proceeding in that case — are still subject to appropriate burdens of proof:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

Confidence in the application of the criminal law is even more important in cases where the ultimate penalty of death is at issue. It cannot reasonably be said that Mr. Davidson somehow waived the findings required under Florida law before imposing a death sentence merely because he waived the right to a penalty phase jury.

II. The Sufficiency of Aggravating Circumstances to Justify Imposing a Death Penalty is Separate from the Weighing of Aggravating Circumstances against Mitigating Circumstances.

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). 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.

In particular, 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. 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 that the aggravating factors are sufficient to justify imposing a death sentence. *See* § 921.141 (2) (a)-(b); 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."). This separate finding is independent of the weighing of aggravators and mitigators. *See* Fla. Stat. § 921.141 (2) (a)-(b).

Given that the number of potential aggravating factors has doubled since capital punishment was reinstated in Florida,[1] this is not a mere 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.

Until the Florida Supreme Court eliminated proportionality review in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), *cert. denied*, 142 S. Ct. 188 (2021), the court's practice of reviewing each death sentence sometimes served this function. *See, e.g.*, *Yacob v. State*, 136 So. 3d 539, 552 (Fla. 2014). In *Yacob*, the court vacated a death sentence as disproportionate, despite the presence of a statutory aggravating factor. *Id.* The court explained that the aggravating factor, a contemporaneous robbery, was not weighty based on the facts and circumstances of the case: the murder was not part of the robbery plan, the defendant had pocketed his gun while leaving after the robbery, and the defendant then fired the fatal shots when the victim moved suddenly. *Id.* at 550, 552. Accordingly, when the case was compared with similar capital cases, the court concluded death was not a proportionate sentence. *Id.* at 552.

The cases used as points of comparison in *Yacob* each involved either one or two aggravating factors which, although present, were insufficient to justify the

[1] 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).

death penalties imposed in those cases. *See Scott v. State*, 66 So. 3d 923, 925 (Fla. 2011) (vacating death sentence where two statutory aggravators were present, including a prior violent felony, but "the aggravators — though properly found — were not particularly weighty"); *Johnson v. State*, 720 So. 2d 232, 236 (Fla. 1998) (finding sufficient evidence to support the defendant's conviction, but vacating the defendant's death sentence because one of the alleged aggravators was "not strong"); *Sinclair v. State*, 657 So. 2d 1138, 1142-43 (Fla. 1995) (vacating a death sentence as disproportionate where the only valid aggravator was that the murder was committed in the course of a robbery); and *Thompson v. State*, 647 So. 2d 824, 827 (Fla. 1994) (vacating a death sentence based on a single valid aggravator, murder in the course of a robbery).

Under the current statute, the safeguard between a defendant with a comparatively minor prior criminal record, or whose capital offense was committed contemporaneously with a comparatively less weighty offense, is the requirement that the jury or trial judge make a determination that the alleged aggravators are sufficient to justify a death sentence.

This Court's decisions in *McKinney v. Arizona*, 140 S. Ct. 702 (2020) and *Kansas v. Carr*, 577 U.S. 108 (2016) arose in different contexts and 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).[2]

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.

---

[2] 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).

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. Petitioner is not arguing Florida's capital sentencing scheme attaches any particular burden of proof to the ultimate recommendation of a death sentence (or sentence of life in prison). What is at issue are the 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,

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

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