No.

In the
Supreme Court of the United States

JESSE BELL
Petitioner,
v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

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." *See* Fla. Stat. § 921.141(2) (2021). The question presented 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.

STATEMENT OF RELATED PROCEEDINGS

Bell v. State, No. SC20-472, 336 So. 3d 211 (Fla.), *reh'g denied*, 2022 WL 819738 (Fla. Mar. 18, 2022).

State v. Bell, No. 34 2019 CF 55 (Fla. 3d Cir. Ct. judgment and sentence entered on March 13, 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jesse Bell, respectfully requests that this Court issue a writ of certiorari to review the decision of the Florida Supreme Court affirming the judgment and sentence of death in his case. Federal due process requires that findings increasing the available penalty from life to death under Florida law be made beyond a reasonable doubt.

OPINION BELOW

The opinion below is reported at *Bell v. State*, 336 So. 3d 211 (Fla.), *reh'g denied*, 2022 WL 819738 (Fla. Mar. 18, 2022), and a copy is attached to this Petition as Appendix A. The order of the Florida Supreme Court denying Petitioner's motion for rehearing is attached to this Petition as Appendix B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or 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."

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner Jesse Bell killed a fellow inmate at Mayo Correctional Institution in June 2019. Mr. Bell entered a no contest plea to the capital offense, waived a penalty-phase jury, and represented himself at sentencing. The trial court sentenced him to death. The Florida Supreme Court issued its opinion affirming Mr. Bell's death sentence on February 3, 2022 (Exhibit A).

Pretrial Proceedings, Acceptance of Plea, and Competency.

Mr. Bell and his co-defendant, Barry Noetzel, were charged by Indictment with one count of first-degree murder, one count of attempted first-degree murder of a correctional officer, one count of conspiracy to commit first-degree murder, and possession of contraband in a prison. *Bell v. State*, 336 So. 3d 211, 213 (Fla. 2022). Counsel was appointed at arraignment, but Mr. Bell asserted that he intended to represent himself and plead guilty; he was allowed to proceed pro se. *Id.* at 214. After renewing an offer of counsel or standby counsel, the court accepted an open plea to the charges. *Id.* The court also accepted Mr. Bell's waiver of a jury for the penalty phrase trial but ordered a competency evaluation to take place before the trial. *Id.*

A competency evaluation was conducted in which the materials reviewed were limited to the arresting officers' reports and DOC records, along with a clinical interview of Mr. Bell. (R. 198-204.) The DOC records indicated Mr. Bell had been sexually abused when he was five years old, although he denied a history of abuse in the clinical interview. (R. 199.) Mr. Bell acknowledged a history of depression

throughout his adult life, and DOC records also indicated a diagnosis of Generalized Anxiety Disorder and Major Depressive Disorder. (R. 201.) The examiner concluded Mr. Bell was competent to proceed. (R. 204.)

The Penalty Phase, *Spencer* Hearing, and Sentencing.

Two correctional officers testified about a cafeteria incident on the morning of the charged offenses, during which the co-defendants stabbed another officer. *Bell*, 336 So. 3d at 214. Two homemade knives were found near the location where the officer had been wounded. (R. 461-62.) When one of the officers went to speak to Mr. Bell, Mr. Bell informed him there was a "dead chomo" (prison slang for child molester) in his cell, under the bunk. (R. 463-64.) Officers then found the victim's body wrapped in a blanket (R. 465-66, 474-76.) Both officers agreed they had never had problems with Mr. Bell. (R. 467, 480-81.) The victim's cause of death was later determined to be manual strangulation, but the victim had also suffered stab wounds. (R. 594-97.) Another officer testified that Mr. Bell made admissions about the attacks being planned and that Mr. Bell held Mr. Eastwood down and choked him while Mr. Noetzel stabbed him (R. 492-509, 580-86). A note on the wall of the cell where Mr. Eastwood was found said "God hates fags, fags hate God, kill all fags and chomos and any COs who fuck with you." (R. 484.) Mr. Bell said he wrote the note. (R. 498.) A "to do" list found in the cell contained 12 items including several relating directly to the charged offense. *Bell*, 336 So. 3d at 213.

Mr. Bell gave the following statement:

> I had a pretty good childhood, really no abuse, nothing to speak of.

I've been in prison a long time. My behavior hasn't been really good in prison, but I've never assaulted any officers besides Mr. Newman, which was brought up. I had my reasons for that. He knows what they are.

Well, I suffer from depression and I would like the competency doctor's diagnosis to be put into evidence. [The report of Dr. Mhatre was admitted.]

I came forward. I pled guilty. I've had good behavior in court. My family loves me.

I've had good prison behavior since this incident. I haven't had any DRs or any kind of problems with the officers.

I have no excuse for what I did. And I understand that according to the law, aggravators versus mitigators, I understand which by law says you're supposed to do.

I'm getting old, so that ain't a good mitigator for me.

That's — I've been through the statutes for statute mitigators and I don't meet any of the criteria for any of those, so the only mitigators I've really got is what I've told you.

I've never been a good person, but I've always been an honest person. I don't know if the two of those can go together, but I believe in taking responsibility for what you do.

And everybody has thought it's crazy that me and my codefendant wanted to plead guilty and waive the jury and represent ourselves, but I think society's gone crazy because they've created such political correctness that you can't even take responsibility for yourself anymore without jumping through a whole bunch of hoops. And I think it's a shame we cost the taxpayers extra money and stuff like this when we should be able to plead guilty, get our sentence and go on with whatever we're sentenced to.

It has nothing to do with being crazy or anything like that, what me and him did. We're men and we've always taken responsibility for what we did. That's about it. […] I didn't want to call any witnesses because I don't think it's right to — I ain't from Florida, I'm from Kansas. None of my relatives live anywhere close to here, so it ain't right to pull — grab them out of their life to come say they love me when I know they do. And to put them through this, you know, that's kind of crazy. That ain't being a man, you understand?

That's all I've got to say.

Bell, 336 So. 3d at 215 (see also R. 600-02). Mr. Bell rested his case without presenting any additional evidence. (R. 602, 606.)

A six-page Pre-Sentence Investigation (PSI) report was prepared. (R. 647-52.) The PSI noted Mr. Bell had refused to sign a release, the victim's brother had not responded to an opportunity to comment, and Officer Newman had reserved comments until sentencing. (R. 649.) The PSI reviewed Mr. Bell's criminal and juvenile history. (R. 650.) The PSI did not include specific dates for Mr. Bell's education (GED) or previous employment. (R. 650.) The following statutorily required information was provided: "Offender reports he had a good childhood; Offender declined to provide name of wife and denied to having fathered any children; Offender reports to be in good health excluding being treated for depression; Offender reports he had resided his entire life in Kansas except for this time in Florida State Prison System." (R. 651.) The PSI also provided the following optional information: "Offender reports to having never used any type of illegal drugs." (R. 651.)

At a final hearing Mr. Bell declined to present further mitigation, to address the court or to make a recommendation for sentencing. (R. 418, 422-23.)

The court imposed a sentence of death for the capital offense, with concurrent life, 30-year, and 15-year terms for the remaining offenses. (R. 407-15.) The oral pronouncement was followed by a detailed written order. *Bell*, 336 So. 3d at 215-16.

The court found four of five alleged aggravating factors had been proven beyond a reasonable doubt: that the capital felony was committed by a person under sentence of imprisonment for a previous felony, that the defendant was previously convicted of a prior violent felony, that the capital felony was especially heinous, atrocious, or cruel (HAC), and that the capital felony was committed in a cold, calculated, and premeditated manner (CCP). (R. 341-51). The court assigned great weight to the first two aggravators, and very great weight to the HAC and CCP aggravators. (R. 342, 343, 346, 351.) The court did not find a fifth alleged aggravator had been proven, which was that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function. (R. 343-44.)

Next, the sentencing order reviewed potential mitigating evidence, noting such evidence had been "very minimal" (R. 351), but finding five items of non-statutory mitigation. First, the court found Mr. Bell took responsibility for his conduct and cooperated during the investigation and prosecution, and gave this factor little weight. (R. 353-54.) Second, the court found Mr. Bell exhibited appropriate courtroom behavior, and gave this factor little weight. (R. 354.) Third, the court found Mr. Bell had not previously assaulted any correctional officers, but opined that was non-mitigating in nature and assigned it no weight. (R. 354-55.) Fourth, the court found Mr. Bell's family loves him and assigned that factor slight weight. (R. 355.) Finally, the court found Mr. Bell likely suffered from depression, and assigned that little weight. (R. 355.) The court then found "that the aggravating

factors clearly, convincingly, and beyond a reasonable doubt outweigh the mitigating factors," and sentenced Mr. Bell to be put to death. (R. 356.)

The Direct Appeal.

Mr. Bell, through counsel, made two arguments on appeal. First, he challenged the court's consideration of mitigation as insufficient, including but not limited to the cursory PSI introduced at the *Spencer* hearing. Second, he argued a denial of due process occurred when the court failed to determine beyond a reasonable doubt that the aggravating factors were sufficient to justify a death sentence. *Bell*, 336 So. 3d at 216.

The Florida Supreme Court rejected both arguments. As to the second argument, the court stated the argument had been resolved in other recent decisions. *See Bell*, 336 So. 3d at 217-18 (citing *Rogers v. State*, 285 So. 3d 872, 885 (Fla. 2019); *Lawrence v. State*, 308 So. 3d 544, 552 n.8 (Fla. 2020); *Craft v. State*, 312 So. 3d 45, 57 (Fla. 2020); *Santiago-Gonzalez v. State*, 301 So. 3d 157, 177 (Fla. 2020); *Bright v. State*, 299 So. 3d 985, 998 (Fla. 2020); and *Davidson v. State*, 323 So. 3d 1241, 1247-48 (Fla. 2021)). The court also found Mr. Bell's plea had been voluntarily and knowingly entered. *Id.* at 218.

REASONS FOR GRANTING THE PETITION

I. The Florida Supreme Court's Decision Directly Conflicts With This Court's Decisions on the Standard of Proof for Functional Elements of an Offense, Including *Apprendi v. New Jersey*, *Ring v. Arizona*, *Alleyne v. United States*, and *Hurst v. Florida*, and Is Inconsistent with Due Process.

The Florida Supreme Court's decision in this case conflicts with the principle that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury verdict" is functionally an element of the offense, which the State must prove beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 494 n.19 (2000). 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) (2021). 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 determination as to whether the aggravating factors are sufficient to justify imposing death is the functional equivalent of an element because it is one of the determinations that expose a defendant to a greater punishment than that authorized by statute for capital murder.

A murder with premeditation is a first-degree murder under Florida law, classified as a capital felony. Fla. Stat. § 782.04(1)(a)1 (2021). A person who is convicted of a capital felony can be punished by death "if the proceeding held to

determine sentence according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment." Fla. Stat. § 775.082(1)(a) (2021). Before the sentencer uses whatever discretion it has to select the appropriate sentence, the sentencing scheme requires the jury (or judge, in a bench trial) to make three determinations: that at least one aggravating factor exists, that the aggravating factor or factors are sufficient in themselves, and that the aggravating factor or factors outweigh the mitigating circumstances.

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.
>
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
>
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:
>
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
>
> 2. Unanimously 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. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.

> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

Fla. Stat. § 921.141 (2).

Until each of those preliminary determinations is made, even though premeditated murder is labeled a "capital felony," the death penalty is not available. *See id.* The actual selection of the death penalty or a penalty of life in prison takes place separately under Fla. Stat. § 921.141 (3). The determinations that one or more aggravating factors have been proved, that aggravating factors are sufficient to justify death, and that they outweigh the mitigating evidence are the findings that increase the potential sentence from life in prison to death.

The finding that "sufficient" aggravating factors exist is not merely a restatement of the eligibility requirement that one or more aggravating circumstances be found beyond a reasonable doubt. *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.[1]

[1] 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.

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,[2] 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.

In *Apprendi*, this Court held that any circumstance that increases a sentence "beyond the maximum authorized statutory sentence…is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 530 U.S. at 494 n.19. In *Ring v. Arizona*, 536 U.S. 584, 605 (2002), this Court stated the finding of aggravating circumstances under Arizona's capital sentencing scheme was the "functional equivalent" of an element of a greater offense, stating that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is

[2] 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).

not determinative." Because that finding exposed defendants to a sentence of death, which exceeded the statutory maximum under Arizona law, it had to be made by a jury. *Id.*; s*ee also Blakely v. Washington*, 542 U.S. 296, 302-05 (2004) (applying *Apprendi* to reverse a sentence that exceeded the standard sentencing range for a particular offense, even though the sentence did not exceed the overall statutory maximum for that class of offenses); *Alleyne v. United States*, 570 U.S. 99 (2013) (applying *Apprendi* to factors increasing mandatory minimum sentences).

The Court applied these principles in *Hurst v. Florida*, 577 U.S. 92 (2016), holding unconstitutional the then-existing Florida capital sentencing scheme because it allowed a death sentence to be imposed without submitting all necessary findings to a jury. The Court's opinion began with the principle that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 94. Under the sentencing statute in effect at the time, imposing a death sentence required a separate sentencing proceeding leading to an "advisory sentence" from the jury, which was not required to give a factual basis for its recommendation. *See id.* at 95. Then, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, [was required to] enter a sentence of life imprisonment or death." *Id.* at 96 (citing § 921.141(3), Fla. Stat. (2010)). Hurst had been sentenced to death based on the sentencing judge's determination that two aggravating circumstances existed. *Id.*

This Court concluded Hurst's death sentence violated the Sixth Amendment because the statutory scheme at issue did not "require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 98-99. The Court pointed out that the statute did not make a defendant eligible for death until those findings were made. *Id.*

The Florida Legislature rewrote the state's capital sentencing scheme following *Hurst v. Florida*, eventually creating the system under which Mr. Bell was sentenced. Although the Florida Supreme Court initially interpreted the revised statute consistently with the *Apprendi* line of cases, the court changed direction and began receding from its own holdings about the operation and effect of the revised statute. The result has created conflict between Florida law and this Court's precedent.

The Florida Supreme Court initially held in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016) that, before a death sentence could be imposed, a jury must find unanimously and beyond a reasonable doubt the existence of aggravators, the sufficiency of the aggravators, and whether the aggravators outweighed the mitigation:

> [W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the

> existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst, 202 So. 3d at 44; *see also Perry*, 210 So. 3d at 640 (interpreting Florida's revised death penalty statute). The Florida Supreme Court distinguished the findings of sufficient aggravation and that the aggravating factors outweighed the mitigation from the ultimate sentencing recommendation, noting that a jury is not compelled or required to recommend a death sentence. *Perry*, 210 So. 3d at 640.

Subsequently, in *Foster v. State*, 258 So. 3d 1248, 1251-52 (Fla. 2018), where the sentence at issue had become final in 2001, the Florida Supreme Court stated the penalty phase findings were not elements of "the capital felony of first-degree murder" but, rather, were findings required before the death penalty could be imposed. *Id.* at 1252. *Foster* did not recede from *Hurst* or *Perry*, and did not involve the operation and effect of the sentencing scheme created after *Hurst v. Florida*. *See* 258 So. 3d at 1251-52 (describing *Hurst* as "a change in this state's decisional law").

Then, in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019), *cert. denied*, 141 S. Ct. 284 (2020), the Florida Supreme Court explicitly receded from *Hurst* and *Perry*, holding two of the findings making a defendant eligible for the death penalty were not elements of the offense requiring a unanimous finding beyond a reasonable doubt:

> To the extent that in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt. Since *Perry*, in *In re Standard Criminal Jury Instructions in Capital Cases* and *Foster*, we have implicitly receded from its mischaracterization of *Hurst v. State*. We now do so explicitly.

285 So. 3d at 885-86.

Ultimately, in *State v. Poole*, 297 So. 3d 487, 490 (Fla. 2020), *cert. denied*, 141 S. Ct. 1051 (2021), the Florida Supreme Court receded 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." To correctly understand *Hurst v. Florida*, the court stated, that decision had to be viewed in light of cases distinguishing "the eligibility decision and the selection decision." *Poole*, 297 So. 3d at 501 (citing *Tuilaepa v. California*, 512 U.S. 967, 971 (1994)). The "eligibility" decision required a murder conviction and one aggravating circumstance. *See id.* (citations omitted). The selection decision required "an individualized determination that assesses the defendant's culpability." *Id.* (citation omitted). The court then reasoned that *Hurst v. Florida* was "about eligibility, not selection," *id.*, and that the only finding that had to be made by a jury was the existence of one or more statutory aggravating circumstances, *id.* at 502-03.

This reasoning was based on a version of the statute predating the legislative changes that took place because of *Hurst v. Florida*. *See Poole*, 297 So. 3d at 495-96.

That statutory scheme, which still placed the jury in an advisory role, did not describe the eligibility decision and the selection decision the same way the current statute does. *Compare* Fla. Stat. § 921.141 (2011) *with* Fla. Stat. § 921.141 (2021). The "eligibility finding" was "[t]hat sufficient aggravating circumstances exist as enumerated in subsection (5)." *Poole*, 297 So. 3d at 502 (citing Fla. Stat. § 921.141(3)(a) (2011)). The selection finding was "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* (citing Fla. Stat. § 921.141(3)(b) (2011)). Under the statute at issue in *Poole*, the selection finding gave the defendant "an opportunity for mercy if…justified by the relevant mitigating circumstances and by the facts surrounding his crime. *Id.* at 503. On its face, that statutory scheme operated differently from the current one, which requires the existence, sufficiency, and relative weight of aggravating circumstances to be determined before a death sentence can be considered.

In addition, treating a defendant as eligible for the death penalty when all prerequisite findings have not been established beyond a reasonable doubt is inconsistent with due process. The due process right of requiring the State to prove every element of a crime beyond a reasonable doubt "reflects a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. 358, 361-62 (1970) (citation omitted). The requirement of proof beyond a reasonable doubt not only guards against the danger of an erroneous conviction, but also "provides concrete substance for the presumption of innocence." *Id.* at 363. The standard has a vital role in maintaining public confidence in the

court system. *Id.* at 364. The standard also protects the interests of criminal defendants facing deprivation of life or liberty by requiring a subjective state of certitude regarding the elements of an offense. *Id.* The reasonable doubt standard is just as critical when making determinations that affect a sentence as when determining guilt of an underlying offense:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily followed that the defendant should not — at the moment the State is put to proof of these circumstances — be deprived of protections that have, until this point, unquestionably attached.

Apprendi, 530 U.S. at 484.

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, while 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).[3]

In contrast to the former Arizona statute, the current Florida sentencing scheme explicitly limits 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.

Under Florida's current sentencing scheme, 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 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).

[3] 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).

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; s*ee* Fla. Stat. §§ 921.141(2)(b)2.a.-c.; 921.141(3)(a)1.-2.

Finally, the Florida Supreme Court's decision in *Poole* regarding which determinations must be made beyond a reasonable doubt makes an unwarranted and unnecessary distinction between determinations that are "purely factual," on one hand and those that are subjective, or that call for the exercise of moral judgment, on the other. *See* 297 So. 3d at 503. Under this view, determinations that cannot be objectively verified "cannot be analogized to an element of a crime." *Id.* This reasoning would prevent assigning the standard of proof beyond a reasonable doubt to required findings such as the "especially heinous, atrocious, or cruel" aggravator, which necessarily require the exercise of moral judgment. The result is a fundamental inconsistency — the standard of beyond a reasonable doubt can be applied to moral judgments favoring the death penalty, but not to those weighing against it.

The solution is to return to *Apprendi* and its progeny, and to look at the operation of Florida's current capital sentencing scheme. A determination that increases the available penalty from life to death exposes the defendant to a greater punishment than his conviction for the underlying crime, and thus must be proved beyond a reasonable doubt. Under the current statute, that includes the sufficiency

of the aggravating factors and the factual conclusion that the aggravating factors outweigh mitigating circumstances.

II. The Question Presented Potentially Affects Present and Future Capital Defendants in the State of Florida.

Since receding from *Hurst* and *Perry*, the Florida Supreme Court has repeatedly held that determinations as to whether aggravating factors are sufficient to justify the death penalty and whether the aggravating factors outweigh mitigating evidence "are not subject to the beyond a reasonable doubt standard of proof." *Newberry v. State*, 288 So. 3d 1040, 1047 (Fla. 2019), *cert. denied*, 141 S. Ct. 625 (2020); *see also, e.g.*, *Bright v. State*, 299 So. 3d 985, 998 (Fla. 2020), *cert. denied*, 141 S. Ct. 1697 (2021); *Santiago-Gonzalez v. State*, 301 So. 3d 157, 177 (Fla. 2020), *cert. denied*, 2021 WL 2519344 (June 21, 2021); *Craven v. State*, 310 So. 3d 891, 902 (Fla. 2020), *cert. denied*, 2021 WL 4508396 (Oct. 4, 2021); *McKenzie v. State*, 333 So. 3d 1098 (Fla. 2022), pet. for cert. due July 10, 2022 (No. 21A571).

However, under the operation and effect of Florida's capital sentencing scheme, these determinations are necessary to make a defendant eligible for a death penalty. A Florida trial court cannot proceed to impose the death penalty after the jury finds that one or more aggravating circumstances exist. Only after the additional determinations are made does the jury select between life and death in making its sentencing recommendation and, if the jury selects death, the court still has discretion to impose either a life sentence or the death penalty. Under the current statute, therefore, consideration of mitigation is not merely an "opportunity

for mercy," but is a necessary step in deciding whether the death penalty is available at all. The Florida Supreme Court's reading of the statute is depriving Florida defendants of due process of law by lessening the State's burden of proof as expressed in the *Apprendi* line of cases. The issue has implications for every pending and future capital case decided under Florida's current statutory scheme.

CONCLUSION

In holding that the determinations that are currently required before Florida defendants can be subjected to a death penalty are not the elements (or the functional equivalent of elements) requiring a verdict based on proof beyond a reasonable doubt, Florida law directly conflicts with this Court's decisions in *Apprendi*, *Ring*, *Alleyne*, and *Hurst v. Florida*. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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