No._____

IN THE SUPREME COURT OF THE UNITED STATES

_____

NORMAN BLAKE MCKENZIE,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT.

_____

_____

ON PETITION OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

_____

_____

PETITION FOR WRIT OF CERTIORARI

_____

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CAPITAL CASE

QUESTIONS PRESENTED

Mr. McKenzie had a right to a jury finding for each fact that subjected him to the enhanced penalty of death. This proof was required to be "beyond a reasonable doubt" according to well established constitutional law. In this case, Mr. McKenzie challenged the manner in which his death sentence was decided. Because he was denied his rights under the United States Constitution, he presents the following issue:

> Whether the failure to require the jury, and the jury alone, to find that the aggravating factors outweighed the mitigating factors, beyond and to the exclusion of every reasonable doubt, and that death should be imposed, beyond and to the exclusion of every reasonable doubt, denied Mr. McKenzie his right to a jury trial and due process under the Sixth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

All parties are listed in the caption

NOTICE OF RELATED CASES

Underlying Trial:

Circuit Court of St. Johns County, Florida
State of Florida v. Norman Blake McKenzie, 1991-CF-2899
Judgment Entered: October 19, 2007
State v. McKenzie, 2007 WL 7238330 (Fla.Cir.Ct.)

Direct Appeal:

Florida Supreme Court
McKenzie v. State No. SC07-2101.
Judgment Entered: January 7, 2010; rehearing denied February 15, 2010
McKenzie v. State, 29 So. 3d 272 (Fla. 2010)

Petition for Writ of Certiorari

United States Supreme Court
McKenzie v. Florida, No. 09–10878.
McKenzie v. Florida, 562 U.S. 854 (2010)
Judgment Entered: October 4, 2010

State Postconviction:

Circuit Court of St. Johns County, Florida
State of Florida v. Norman Blake McKenzie, 1991-CF-2899
Judgment Entered: March 8, 2012; rehearing denied April 13, 2012
Unreported

Appeal from the denial of postconviction
Florida Supreme Court
McKenzie v. State of Florida, SC12-986
Judgment entered April 17, 2014; rehearing granted in part and denied in part December 11, 2014; disposition, affirmed December 14, 2014
McKenzie v. State, 153 So. 3d 867 (Fla. 2014), *on reh'g* (Dec. 11, 2014)

Original Petition for Writ of Habeas Corpus
Florida Supreme Court
McKenzie v. Cannon, SC12-2349
Judgment entered April 17, 2014; rehearing granted in part and denied in part December 11, 2014; disposition, denied December 14, 2014

McKenzie v. Cannon, 153 So. 3d 867 (Fla. 2014), *on reh'g* (Dec. 11, 2014)

Federal Habeas Corpus

United States District Court, Middle District of Florida, Jacksonville Division
McKenzie v. Secretary, Department of Corrections and Attorney General, State of Florida; 3:15-cv-47-J-34JRK
Petition for Writ of Habeas Corpus under §2254
Administratively closed pending exhaustion of claims in state court.
Reopened for status report due July 15, 2022.

Successive State Postconviction Motion

Circuit Court of St. Johns County, Florida
State of Florida v. Norman Blake McKenzie, 1991-CF-2899
Judgment Entered: June 19, 2017 (granting a retrial on sentencing)

Resentencing Trial

Circuit Court of St. Johns County, Florida
State of Florida v. Norman Blake McKenzie, 1991-CF-2899
Judgment Entered: February 14, 2020
Unreported

Appeal Following New Death Sentence

Florida Supreme Court
McKenzie v. State, No. SC20-243
Judgment entered February 10, 2022
McKenzie v. State, 333 So. 3d 1098 (Fla. 2022)

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CONSTITUTIONAL PROVISIONS

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Florida Supreme Court appears at Appendix B to the petition and is reported at *McKenzie v. State*, 333 So. 3d 1098 (Fla. 2022).

The order of the Circuit Court in and for St. Johns County, Florida, imposing death is unreported and appears at Appendix A.

JURISDICTION

The date the Florida Supreme Court decided the case was February 10, 2022. The opinion is reported at *McKenzie v. State*, 333 So. 3d 1098 (Fla. 2022). An extension of time to file the petition for a writ of certiorari was granted by order of Justice Thomas dated April 4, 2022 extending the time for seeking certiorari to July 10, 2022. Application (21A571).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution, Section 1 provides:

> 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

Norman Blake McKenzie (Mr. McKenzie) was tried for, and convicted of, two counts of first-degree murder. *McKenzie v. State*, 29 So. 3d 272, 277 (Fla. 2010). Mr. McKenzie proceeded pro se for both phases of the trial. The jury recommended the death penalty by a vote of 10-2 for each murder. Mr. McKenzie appealed to the Florida Supreme Court. The Florida Supreme Court affirmed the convictions and death sentences. *Id*. at 288. Mr. McKenzie petitioned this Court for a writ of certiorari. This Court denied the petition. *McKenzie v. Florida*, 562 U.S. 854 (2010).

Mr. McKenzie sought postconviction relief in state court. The state circuit court summarily denied Mr. McKenzie's motion without an evidentiary hearing. Mr. McKenzie appealed the denial of postconviction relief to the Florida Supreme Court and filed a state petition for a writ of habeas corpus under the Florida Supreme Court's original jurisdiction. *McKenzie v. State*, 153 So. 3d 867 (Fla. 2014); *McKenzie v. Cannon*, 153 So. 3d 867 (Fla. 2014).

Mr. McKenzie sought a writ of habeas corpus in the United States District Court, Middle District of Florida. After this Court issued *Hurst v. Florida*, 577 U.S. 92 (2016), Mr. McKenzie filed a successive motion for postconviction relief in state court, and the District Court stayed the petition. *McKenzie v. Secretary, Department of Corrections and Attorney General, State of Florida*; 3:15-cv-47-J-34JRK. The petition was administratively closed but was reopened by the District Court for a status report due July 15, 2022.

The state circuit court granted Mr. McKenzie's successive motion for

postconviction relief and vacated his death sentence. Mr. McKenzie was retried on the penalty phase. He was again sentenced to death after the jury recommended death 12-0 on both counts of murder. Mr. McKenzie appealed his death sentences to the Florida Supreme Court. The Florida Supreme Court affirmed his death sentences on February 10, 2022. *McKenzie v. State*, 333 So. 3d 1098 (Fla. 2022).

The jury found five aggravating factors beyond a reasonable doubt for each murder. These were:

> 1) McKenzie was previously convicted of a capital felony or a felony involving the use or threat of violence to a person (based on the contemporaneous murders of Johnston and Peacock, and also based on eight prior violent felony convictions); (2) the first-degree murder was committed while McKenzie was engaged in the commission of a robbery; (3) the first-degree murder was committed for financial gain; (4) the first-degree murder was especially heinous, atrocious, or cruel (HAC); and (5) the first-degree murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification (CCP).

Id. at 1102. The jury made no further findings beyond a reasonable doubt but:

> The jury also unanimously found that the aggravating factors were sufficient to warrant a sentence of death. One or more jurors found that one or more mitigating circumstances was established by the greater weight of the evidence, and the jury unanimously found that the aggravators outweighed the mitigating circumstances. The jury unanimously found that McKenzie should be sentenced to death for each murder.

Id. The Florida Supreme Court went on to describe:

> The trial court later conducted a *Spencer* hearing and a sentencing hearing. In its sentencing order, the court found that all five aggravating factors were proven beyond a reasonable doubt as to each murder. The court assigned weight to each aggravating factor as follows: (1) McKenzie was previously convicted of a capital felony or a felony involving the use or threat of violence to a person—based on the contemporaneous murders of Johnston and Peacock, and also based on

> eight prior violent felony convictions (very great weight); (2) the first-degree murder was committed while McKenzie was engaged in the commission of a robbery (great weight); (3) the first-degree murder was committed for financial gain (merged with murder during commission of a robbery; no additional weight); (4) HAC (great weight); and (5) CCP (great weight).
>
> The trial court also found the following statutory mitigating circumstances as to each murder: (1) the murder was committed while McKenzie was under the influence of extreme mental or emotional disturbance (moderate weight); and (2) McKenzie's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired (slight weight).
>
> As to nonstatutory mitigating circumstances, the trial court found as follows: (1) McKenzie's childhood was chaotic (slight weight); (2) McKenzie and his siblings were inadequately supervised after their parents' divorce (very slight weight); (3) McKenzie began huffing inhalants at the age of eleven (slight weight); (4) McKenzie had an early and chronic abuse and dependency on alcohol and drugs (slight weight); (5) McKenzie had a cocaine dependency relapse starting in July 2006 that continued up to the time of and after the murders (slight weight); (6) McKenzie consistently used a voluminous amount of cocaine from July to October of 2006 (slight weight); (7) McKenzie cooperated with law enforcement at the time of his arrest (slight weight); (8) McKenzie admitted to the murders (moderate weight); (9) McKenzie has artistic ability (slight weight); (10) McKenzie was a construction assistant superintendent before the murders and had a key role in the construction of a shopping center (slight weight); (11) McKenzie impacted the life of his wife/fiancée in a positive way while in prison (slight weight); and (12) the prior sentencing jury did not unanimously recommend that McKenzie be sentenced to death (not a mitigating circumstance; no weight).

Id. at 1102-03.

Mr. McKenzie raised six issues on appeal to the Florida Supreme Court. The following issues are relevant to the instant petition, which Mr. McKenzie argued, and the Florida Supreme Court held as follows:

> Issue IV: Whether the trial court erred in finding that the aggravating factors were sufficient to support the death penalty when the jury did

> not find the aggravators were sufficient beyond a reasonable doubt, and the jury was not instructed on what constitutes sufficient in order to support the death penalty in violation of McKenzie's Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution?

Initial Brief, 47. (McKenzie, Appellant, v. State, Appellee., 2020 WL 5359504 (Fla.),

47. Mr. McKenzie argued:

> [T]hat his death sentence is invalid because the jury did not find beyond a reasonable doubt that the aggravating factors were sufficient to impose the death penalty. He contend[ed] that for a death sentence to be valid, the jury must find beyond a reasonable doubt that the aggravating factors were sufficient to impose the death penalty and that the aggravating factors outweighed the mitigating circumstances.

McKenzie, 333 So. 3d at 1105. The Florida Supreme Court held:

> However, these jury determinations are "not subject to the beyond a reasonable doubt standard of proof." *Newberry v. State*, 288 So. 3d 1040, 1047 (Fla. 2019); *see also Craft v. State*, 312 So. 3d 45, 57 (Fla. 2020); *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019). We decline McKenzie's invitation to revisit what has been settled: only the existence of a statutory aggravating factor must be found beyond a reasonable doubt. *See [State v.] Poole*, 297 So. 3d [487,] 505 [(Fla. 2020)]. *See also McKinney v. Arizona*, —— U.S. ——, 140 S. Ct. 702, 707-08, 206 L.Ed.2d 69 (2020).

Id. Also, based on *State v. Poole*, 297 So. 3d 487, 505 (Fla. 2020), the Florida Supreme

Court rejected Mr. McKenzie's argument,

> that the term "sufficient" requires a qualitative, not a numerical definition, and that the failure to define "sufficient" for the jury constituted fundamental error. [And having] expressly rejected the qualitative versus numerical argument in *Poole*: "Poole's suggestion that 'sufficient' implies a qualitative assessment of the aggravator—as opposed simply to finding that an aggravator exists—is unpersuasive and contrary to this [[the Florida Supreme]Court's] decades-old precedent." *Poole*, 297 So. 3d at 502.

Id.

> Issue V: Whether the statutory construction in *Hurst II* constitutes

> substantive law, and the Due Process clause of the Fourteenth Amendment law, requires that this substantive law govern the law that existed at the time of Mr. McKenzie's new penalty phase trial.

Initial Brief (McKenzie, Appellant, v. State, Appellee., 2020 WL 5359504 (Fla.), 60). Mr. McKenzie argued that the Florida Supreme "Court's analysis of jury sentencing in *Hurst v. State* [, 202 So. 3d 40 (Fla. 2016) receded from *State v. Poole,* 297 So. 3d 487 (Fla. 2020), *cert denied* 141 S. Ct 1051 (2021)] established substantive law that required his jury to find certain 'elements' beyond a reasonable doubt." *McKenzie,* 333 So. 3d at 1105. The Florida Supreme Court rejected what it called Mr. McKenzie's "'elements' argument" because of its holding in *Poole* that "jury sentencing determinations are not 'elements' that must be found beyond a reasonable doubt." *Id*. The court also rejected, based on its own prior case law, Mr. McKenzie's argument "that the *Hurst v. State* jury sentencing determinations constitute elements of a purported greater offense of capital first-degree murder . . ." based on the court's decision in *Foster v. State*, 258 So. 3d 1248, 1251 (Fla. 2018). *Id*. at 1105-06; citing *Wright v. State*, 312 So. 3d 59, 60 (Fla. 2021) (quoting *Foster v. State*, 258 So. 3d 1248, 1251 (Fla. 2018)). The court quoted *Wright*, stating:

> As we explained in *Foster*, there is no independent crime of "capital first-degree murder"; the crime of first-degree murder is, by definition, a capital crime, and *Hurst v. State* did not change the elements of that crime. *Id*. at 1251-52 (holding that when a jury makes *Hurst* determinations, "it only does so after a jury has unanimously convicted the defendant of the capital crime of first-degree murder").

Id. at 1106.

Justice LaBarga concurred in result only "[f]or the reasons expressed in my dissenting opinion in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) (receding from

proportionality review requirement in death penalty direct appeal cases) [ ]." *Id.*

Mr. McKenzie fully raised and exhausted these claims, specifically arguments 4 and 5, *supra*, that form the basis of this petition for writ of certiorari on direct appeal to the Florida Supreme Court following his resentencing.

REASONS FOR GRANTING THE WRIT

MR. MCKENZIE WAS DENIED A FINDING OF PROOF BEYOND A REASONABLE DOUBT ON THE CRITICAL FACT FINDING THAT SUBJECTED HIM TO THE ENHANCED PENALTY OF DEATH.

Mr. McKenzie had a right to jury finding of fact on each decision that subjected him to the death penalty. Merely having a jury return a finding by unanimous acclamation was insufficient to meet the constitutional requirement that a jury in a criminal case must find any fact beyond a reasonable doubt before such a finding may be considered to the detriment of the defendant. This Court should grant certiorari to make clear that this standard applies in the context of a determination of whether death should be imposed.

After this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), the Florida Supreme Court and the Florida legislature changed Florida death penalty law in an attempt to conform with the United States Constitution. Nevertheless, the court and the legislature failed to cure the infirmity of Florida's death penalty scheme. Despite receiving a new penalty phase based on this Court's decision in *Hurst*, the Florida courts again denied Mr. McKenzie's rights under the United States Constitution. Mr. McKenzie was denied his right to a jury finding beyond a reasonable doubt for the facts that subjected him to the death penalty, in violation of the Sixth and Fourteenth

Amendments to the United States Constitution.

Starting with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has recognized the necessity for a jury determination of the critical facts that subject an individual to an enhanced sentence. In *Apprendi*, this Court held that in a non-capital case, "[o]ther 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." *Apprendi*, 530 U.S. at 490. This Court recognized that the principles supporting a jury trial,

> extend[] down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...."

Id. at 477, (citations omitted). Justice Scalia, in concurrence, added:

> It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State-and an increasingly bureaucratic part of it, at that.). The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

Id. at 498.

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their

maximum punishment." *Id.* at 589. In *Hurst v. Florida*, 577 U.S. 92 (2016), this Court stated the crux of *Ring*, that:

> "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" Had Ring's judge not engaged in any factfinding, *Ring* would have received a life sentence. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.

Id. at 98. (Internal quotes omitted). The Court applied *Ring* directly to Florida's death penalty system and found:

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); accord, *State v. Steele*, 921 So. 2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased *Hurst*'s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at 98-99.

A mere finding by a jury does not meet the requirements of a jury verdict because the facts that subject a person to death in Florida must be proven beyond a reasonable doubt. Here, on the critical issue of whether the aggravating factors

outweighed the mitigating factors, the jury was not asked to consider, and never returned, a finding beyond a reasonable doubt. The same was true on whether death should be imposed.

In *In re Winship*, this Court held that the elements necessary to adjudicate a juvenile and subject him or her to sentencing under the juvenile system required each fact necessary be proven beyond a reasonable doubt. This Court made clear, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold 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." *In re Winship*, 397 U.S. 358, 364 (1970).

In *Ivan V. v. City of N.Y.*, 407 U.S. 203 (1972), this Court applied *Winship*'s proof-beyond-a-reasonable doubt standard retroactively, stating:

> 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' *Williams v. United States,* 401 U.S. 646, 653, 91 S. Ct. 1148, 1152, 28 L. Ed. 2d 388 (1971). *See Adams v. Illinois*, 405 U.S. 278, 280, 92 S. Ct. 916, 918, 31 L.Ed.2d 202 (1972); *Roberts v. Russell*, 392 U.S. 293, 295, 88 S. Ct. 1921, 1922, 20 L. Ed. 2d 1100 (1968).
>
> *Winship* expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal

> law' . . . 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' 397 U.S., at 363—364, 90 S. Ct., at 1072.
>
> Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.

407 U.S. at 204–05 (1972).

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion or sudden provocation when the issue is properly presented in a homicide case. *Id*. at 704. Thus, under the Due Process Clause, it is the state, and the state alone, which must prove each element beyond a reasonable doubt and has the burden of persuasion.

This Court has also recognized the importance of a jury in meeting the commands of the Eighth Amendment. As stated in *Gregg v. Georgia*, 428 U.S. 153 (1976), "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Id.* at 181–82, 2929 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, (1968)). A jury is "a significant and reliable objective index of contemporary values because it is so directly involved." *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 439–40 (1972) (Powell, J., dissenting)).

The Florida courts and the Florida legislature attempted to remedy the unconstitutionality that was identified by this Court in *Hurst*. First the Florida Supreme Court held in *Hurst v. State*:

> Upon review of the decision in *Hurst v. Florida,* as well as the decisions in *Apprendi* and *Ring,* we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger,* 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991), under Florida law, "The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances." *Id.* at 313, 111 S. Ct. 731 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)). Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.[7] These same requirements existed in Florida law when Hurst was sentenced in 2012—although they were consigned to the trial judge to make.

Hurst v. State, 202 So. 3d 40, 53 (Fla. 2016)

> [T]hat before 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."

Id. at 57.

> We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.

Id. at 59.

The Florida Supreme Court held that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty requires a unanimous jury fact-finding.

> [T]he foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S. Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So. 3d 40, 59–60 (Fla. 2016). The court cited to Eighth Amendment concerns, finding that, "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. (Emphasis in original). "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by

jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence is required under the Eighth Amendment." *Id*. at 59.

The Florida Supreme Court went a step further than this Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" *Hurst v. State*, 202 So. 3d at 60 (internal citations omitted).

The legislature amended the death penalty statute to conform with the change in the law. *See* Section 921.141, Florida Statutes (2019) *cf.* Section 921.141, Florida Statutes (2010). While *Hurst v. State* was ambiguous regarding the burden of proof for the additional fact finding beyond the aggravating factors, the Florida Supreme Court made clear that it was only the aggravating factors themselves that required proof beyond a reasonable doubt, not the other fact finding that the jury was required to make.

> 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. Thus, these determinations are not subject to the beyond a reasonable doubt standard of proof, and the trial court did

not err in instructing the jury

Rogers v. State, 285 So. 3d 872, 885–86 (Fla. 2019). This was clearly contrary to this Court's decisions.

When Mr. McKenzie was tried to determine his death sentence, the jury only returned a finding that the *aggravating factors* existed "beyond a reasonable doubt." Everything else that the jury found against Mr. McKenzie was unanimous, but without a defined standard of "proof beyond a reasonable doubt." However, these findings were necessary for Mr. McKenzie to receive a sentence of death. *Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) ("[T]he due process requirement, as defined in *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970), [is] that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged." *Patterson v. New York*, 432 U.S. 197 (1977).

While the Florida courts and legislature made strides toward a constitutional death penalty system, these efforts fell short of the Constitution's requirements first established by this Court in *Apprendi* and developed through *Hurst v. Florida*. The requirements first initiated by the Florida Supreme Court and then encompassed into the statute by the legislature required additional fact-finding by the jury before Mr. McKenzie could receive a death sentence. While it is certainly necessary under the Constitution for such findings to be made to narrow the class of individuals subjected to death, once the Florida Supreme Court and Florida Statutes insisted upon such findings, these findings were required to be made beyond a reasonable doubt in addition to unanimously.

Mr. McKenzie argued the requirement of proof beyond a reasonable doubt to the Florida Supreme Court in his direct appeal briefing. The Florida Supreme Court's reliance on its recent decision in *Poole v. State* failed to address the fact that the jury under the death penalty system that Mr. McKenzie was tried did make additional findings of fact beyond mere guilt in order to return a recommendation for death and as authority for the trial court imposing it. Whatever the minimum requirements necessary for a death sentence may be, the reality is that Florida has chosen to require a detailed fact finding by a jury. This Court has made clear, once that path was chosen, those facts were required to be proven beyond a reasonable doubt.

Any determination which is necessary to increase the penalty for a crime must be found beyond a reasonable doubt by a jury. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. at 483 n.10, 490 (2000)). Leading to this decision in Mr. McKenzie's case, the Florida Supreme Court receded from *Perry v. State*, 210 So. 3d 610, 640 (Fla. 2016) as seen in *Rogers v. State*, 285 So. 3d 872, 885–86 (Fla 2019); *cert denied*, *Rogers v. Florida*, 141 S. Ct. 284 (2020). In *Poole*, the Florida Supreme Court explicitly receded from its prior decision in *Hurst v. State*, 202 So. 3d 40, on other grounds, but the fact-finding required of the jury remained the same.

Based on the post-*Hurst* death statute, Section 921.141, Florida Statutes (2019), that Mr. McKenzie was retried under for his new penalty phase trial, the maximum penalty he could have received based on a verdict of guilt was a life sentence without the possibility of parole. Florida required that there be additional

fact-finding before a death sentence could be imposed. Again, without a jury finding of one or more aggravating factors beyond a reasonable doubt, the sentence was life. The jury's findings in this case did not end there. The jury found unanimously, but not beyond a reasonable doubt, that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. Although the penalty phase verdict was unanimous, there is no indication the unanimity was grounded on the reasonable doubt standard, either overtly stated in the findings or required by the jury instruction. Failing to instruct the jury regarding the proper standard of proof and failing to require a finding beyond a reasonable doubt rendered Mr. McKenzie's death sentence unconstitutional.

The Florida Supreme Court's recent receding from the well-reasoned requirements in *Hurst v. State* has no bearing on the issues before the Court. Once the legislature revised Florida's death penalty statute the legislature required findings by a jury. In *Poole*, and the other cases relied upon by the Florida Supreme Court to deny Mr. McKenzie relief, the question was whether it was necessary under general constitutional principles to grant relief after the case was final. This was far different than an initial challenge made to the law that enabled Mr. McKenzie's death sentence on direct appeal. Mr. McKenzie challenged the actual law applied in his case and was not seeking retroactive application of what the law should have been. Once Florida required fact-finding by a jury, that fact-finding needed to be made beyond a reasonable doubt.

Mr. McKenzie acknowledges this Court's decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), in which the majority stated:

> Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, 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. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this Court carefully avoided any suggestion 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." *Id*., at 481, 120 S. Ct. 2348. And in the death penalty context, as Justice Scalia, joined by Justice THOMAS, explained in his concurrence in *Ring*, the decision in *Ring* "has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed." 536 U.S. at 612, 122 S. Ct. 2428; *see also Kansas v. Carr*, 577 U.S. ——, ——– – ———, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016) (slip op., at 9–11). Therefore, as Justice Scalia explained, the "States that leave the ultimate life-or-death decision to the judge may continue to do so." *Ring*, 536 U.S. at 612, 122 S. Ct. 2428.

Id. at 707–08. This is not dispositive because Florida chose a different path than the one suggested by Justice Scalia. While Florida allows the judge to make the ultimate life-or-death decision, the judge may only do so when the jury has returned a unanimous verdict on certain decisions. After the jury's decisions culminate in a unanimous recommendation, the judge may choose between life or death, but a death sentence is only permissible if the jury unanimously made these findings. These decisions are jury questions, and jury questions alone, as far as whether a death sentence may be imposed at all. Under well-established case law, it is imperative that these decisions must be made beyond a reasonable doubt.

CONCLUSION

Mr. McKenzie was sentenced to death based on fact-finding that did not require proof beyond a reasonable doubt on all issues to be decided. He had a right to fact-finding under the time-honored standard of proof beyond a reasonable doubt to comply with well-established precedent of this Court and to ensure the fundamental reliability the Eighth Amendment demands in a capital case.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: July 7, 2022