CASE NO. 22-5088

IN THE SUPREME COURT OF THE UNITED STATES

NORMAN BLAKE MCKENZIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
*Counsel of Record

DORIS MEACHAM
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
Telephone: (850) 414-3300
CapApp@myfloridalegal.com
Carolyn.Snurkowski@myfloridalegal.com

CAPITAL CASE

QUESTION PRESENTED

In *Kansas v. Carr*, this Court expressed the view that "[i]t would mean nothing . . . to tell the jury that" certain "value call[s]"—like whether aggravators outweigh mitigators and whether the defendant deserves mercy—must be found "beyond a reasonable doubt." 136 S. Ct. 633, 642 (2016). Consistent with that view, Florida law does not require such determinations to be made beyond a reasonable doubt.

Petitioner Norman Blake McKenzie was convicted and sentenced to death for the first-degree murders of Randy Wayne Peacock and Charles Frank Johnston in St. Johns County. Originally convicted and sentenced to death in 2007, McKenzie received a new penalty phase in light of *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 297 So.3d 487 (Fla. 2020). McKenzie's second penalty phase was tried before a new jury in August 2019. The penalty-phase jury unanimously found the existence of an aggravating factor beyond a reasonable doubt; it also unanimously determined that the aggravating factors were sufficient to warrant death, that those factors outweighed the mitigating circumstances, and that Petitioner should be sentenced to death. The trial judge agreed and sentenced Petitioner to death. In February 2020, McKenzie was resentenced to death for both murders. *McKenzie v. State*, 333 So.3d 1098, 1099 (Fla. 2022).

Petitioner 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.

The question presented is: Whether Petitioner's death sentences violate the right to a jury trial and due process under the Sixth and Fourteenth Amendments to the United States Constitution because the weighing of aggravators and mitigators is not considered an element of a higher offense and not subject to the reasonable doubt standard under Florida law.

PARTIES TO THE PROCEEDINGS

Petitioner, Norman Blake McKenzie, was the Movant in the trial court and the Appellant in the Florida Supreme Court.

Respondent, State of Florida, was the Respondent in the trial court and the Appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14. l(b)(iii), these are related cases:

Original Guilt and Penalty Phase Trial:
Circuit Court of St. Johns County, Florida
State of Florida v. Norman Blake McKenzie, 1991-CF-2899
Judgment Entered: October 19, 2007

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

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

Initial Post-conviction Proceedings:
Circuit Court of St. Johns County, Florida
State of Florida v. Norman Blake McKenzie, 1991-CF-2899
Judgment Entered: March 8, 2012; *on reh'g* (April 13, 2012)

Florida Supreme Court, Case No. SC12-986
McKenzie v. State, 153 So.3d 867 (Fla. 2014), *on reh'g* (Dec. 11, 2014)
Judgment entered April 17, 2014; rehearing granted in part and denied in part December 11, 2014; disposition, affirmed December 14, 2014

State Habeas Proceedings
Florida Supreme Court, Case No. SC12-2349
McKenzie v. Cannon, 153 So.3d 867 (Fla. 2014), *on reh'g* (Dec. 11, 2014)
Judgment entered April 17, 2014; rehearing granted in part and denied in part December 11, 2014; disposition, denied December 14, 2014

Federal Habeas Corpus
United States District Court, Middle District of Florida, Jacksonville Division
McKenzie v. Sec'y, Dept. of Corr., No. 3:15-cv-47-J-34JRK
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

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

TABLE OF CONTENTS

CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OPINION BELOW

Petitioner challenges the decision by the Supreme Court of Florida affirming his death sentences; that decision appears as *McKenzie v. State*, 333 So.3d 1098 (Fla. 2022).

JURISDICTION

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, this Court should decline to exercise jurisdiction in this case because the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a court of appeal of the United States, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT

In Florida, the jury actively participates in both the eligibility and selection phases of the capital sentencing process. Under Florida law, a capital defendant is eligible to receive the death penalty once the jury unanimously finds at least one aggravating factor beyond a reasonable doubt. *See* Fla. Stat. § 921.141(2)(b)2 ("If the jury ... [u]nanimously finds at least one aggravating factor, [then] the defendant is eligible for a sentence of death...."); *see also Poole,* 297 So.3d at 502-03 ("Under longstanding Florida law, there is only one eligibility finding required: the existence

of one or more statutory aggravating circumstances."); *see generally McKinney v. Arizona,* 140 S. Ct. 702, 707 (2020) ("Under *[Ring v. Arizona,* 536 U.S. 584 (2002),] and *[Hurst v. Florida,* 577 U.S. 92 (2016)], a jury must find the aggravating circumstance that makes the defendant death eligible.").

By finding the existence of an aggravating factor beyond a reasonable doubt, the jury necessarily determines that each aggravating factor found is "sufficient" to warrant a death sentence. *See* § 921.141(2)(b)2.a ("Whether sufficient aggravating factors exist."); *see also Poole,* 297 So.3d at 502 ("[O]ur Court was wrong in *[Hurst v. State,* 202 So.3d 40 (Fla. 2016),] when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously."). For the purposes of the§ 921.141(2)(b)2.a determination, "sufficient" simply means "one or more." *Poole,* 297 So.3d at 502, quoting *Miller v. State,* 42 So.3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances").

While the finding of at least one aggravating factor beyond a reasonable doubt concludes the jury's role in the eligibility phase, it marks the beginning of the jury's role in the selection phase. If the jury unanimously finds at least one aggravating factor beyond a reasonable doubt, then the jury proceeds to the sentence selection phase where it must evaluate the weight of the aggravating factors and mitigating circumstances. *See Poole,* 297 So.3d at 502 (identifying the weighing of aggravating factors and mitigating circumstances as the "selection finding"); *see generally Tuilaepa v. California,* 512 U.S. 967, 971 (1994) ("Our capital punishment cases

under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision.").

In performing its role during the selection phase, the jury must weigh two considerations: (1) "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist"; and (2) "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death." Fla. Stat. § 921.141(2)(b)2.b-c.; *see generally Tuilaepa,* 512 U.S. at 972, quoting *Zant v. Stephens,* 462 U.S. 862, 879 (1983) (In order for a defendant to receive the death penalty at the conclusion of the selection phase, the sentencer must make an "individualized determination," with that determination based upon a consideration of "relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.") (emphasis omitted).

After considering whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigating circumstances, the jury must recommend to the trial court "whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death." Fla. Stat. §921.141(2)(b)2. If the jury recommends death, then the trial court may impose either a death sentence or a sentence of life imprisonment without the possibility of parole. Fla. Stat. § 921.141(3)(a)2. If, however, the jury recommends a sentence of life without the possibility of parole, then the trial court can only impose a life sentence. Fla. Stat.§ 921.141(3)(a)l.

FACTS AND PROCEDURAL BACKGROUND

The underlying facts are set forth in the opinion below. *McKenzie* 29 So.3d at 275-76. On October 5, 2006, two Flagler Hospital employees became concerned when Randy Peacock, a respiratory therapist at the hospital, did not report to work. The two employees drove to the home that Peacock shared with Charles Johnston. Upon their arrival, they noticed that Peacock's vehicle, a green convertible, was not there. When the employees entered the residence, they found Peacock lying face down on the kitchen floor in a pool of blood. *Id.* at 275. When deputies from the St. Johns County Sheriff's Office (SJSO) arrived, they secured the scene and subsequently located the body of Charles Johnston in a shed that was also located on the property. While processing the crime scene, law enforcement officers located a hatchet inside the shed that appeared to have blood on its blade and handle. A butcher knife was found in the kitchen sink. Deputies observed a gold sport utility vehicle (SUV) in the driveway and determined that it was registered to Norman Blake McKenzie. *Id.*

The deputies subsequently spoke with a neighbor of the victims. The neighbor stated that on October 4, 2006, he went to the victims' home to assist Johnston with repairs on his vehicle. When the neighbor first arrived, Johnston was not there but Peacock was present and was speaking with a man whom the neighbor later identified in a photo lineup as McKenzie. The neighbor confirmed that he saw Peacock speaking with McKenzie between 4:30 and 7 p.m., and that he also observed a gold SUV in the driveway. The neighbor departed the victims' residence before dark. *Id.*

McKenzie subsequently had an encounter with a Citrus County sheriff's deputy during which Randy Peacock's wallet was recovered from one of McKenzie's pockets. Further, Charles Johnston's wallet was located in a vehicle that McKenzie had recently operated. McKenzie agreed to speak with SJSO deputies on two separate occasions during which he confessed to the murders of Peacock and Johnston. *Id.*

McKenzie explained that he went to the victims' residence on October 4, 2006, to borrow money from Johnston because of his drug addiction. When he first arrived, only Peacock and the neighbor were present; however, Johnston returned home around dusk. The neighbor left after briefly speaking with Johnston, and at some point, Peacock went inside the residence. McKenzie then asked Johnston for a hammer and a piece of wood so that he could knock some "dings" out of the door of his SUV. Johnston could not locate a hammer and gave McKenzie a hatchet. While walking into the shed to locate a piece of wood, McKenzie struck Johnston in the head with the blade side of the hatchet. Johnston fell to the floor and McKenzie struck him again. *Id.* McKenzie then entered the home, approached Peacock, who was cooking in the kitchen, and struck him with the hammer side of the hatchet approximately two times. *Id.* at 276.

McKenzie returned to the shed, and when he observed that Johnston was still alive, he struck Johnston one or more times with the hatchet. McKenzie removed Johnston's wallet from his pocket, placed the hatchet on top of a bucket inside the shed, and re-entered the residence. McKenzie observed that Peacock was struggling to stand up, so he grabbed a knife and stabbed Peacock multiple times. McKenzie

then placed the knife in the sink, took Peacock's wallet and car keys, and departed in Peacock's vehicle. *Id.*

The jury recommended the death penalty for each murder by a vote of ten to two for each murder. *Id.* at 277. The trial court followed the jury's recommendation and sentenced McKenzie to death for both murders. *Id.* at 277-78. Following unsuccessful state post-conviction litigation, McKenzie sought relief in federal court.

After this Court issued *Hurst v. Florida*, 577 U.S. 92 (2016), 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-MMH-LLL. On June 19, 2017, the trial court entered its order vacating McKenzie's death sentences and returned the matter to the trial docket for a new penalty phase proceeding.

McKenzie's second penalty phase was tried before a new jury in August 2019. The State and the defense each presented evidence, following which the jury unanimously found—as to each murder—that the State established the existence of five proposed aggravating factors beyond a reasonable doubt: (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).

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. *McKenzie v. State*, 333 So.3d 1098, 1102 (Fla. 2022).

The trial court later conducted a *Spencer*[1] 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).

---

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993)(providing capital defendants a hearing following the penalty phase jury recommendation in which the defendant can present additional evidence and argument before the judge).

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 non-statutory 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.

McKenzie raised six issues on appeal to the Florida Supreme Court. [2] The Florida Supreme Court affirmed his death sentences and with respect to the issues relevant to the instant petition, the court held as follows:

> **IV. Sufficiency of Aggravating Factors**
>
> McKenzie argues that 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 contends 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. 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

---

[2] Issue I: Whether the trial court erred in denying defendant's motion for interrogatory penalty phase verdict in violation of the Fourth, Fifth, Sixth, and Fourteenth Constitutional Amendments; Issue II: Whether the trial court erred in denying the appellant's motion to strike state's amended notice of aggravating circumstances in violation of his Fifth, Sixth, and Fourteenth Constitutional Amendments; Issue III: Whether the trial court erred by denying appellant's motion to allow victim impact evidence before the judge alone in violation of appellant's Fourth, Fifth, Eighth, and Fourteenth Constitutional Amendments; 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; 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 McKenzie's new penalty phase trial; Issue VI: Whether the trial court erred in denying McKenzie's motion to find section 921.141, Florida Statutes, as unconstitutional because the "prior violent felony" aggravator is unconstitutionally vague and overbroad.

Initial Brief, 29, 34, 39, 47, 60, 66. (*McKenzie v. State*, 2020 WL 5359504 (Fla. Sept. 1, 2020).

reasonable doubt. *See Poole*, 297 So. 3d at 505. *See also McKinney v. Arizona*, —— U.S. ——, 140 S. Ct. 702, 707-08, 206 L.Ed.2d 69 (2020).

McKenzie also argues that the term "sufficient" requires a qualitative, not a numerical definition, and that the failure to define "sufficient" for the jury constituted fundamental error. However, we 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 [Court's] decades-old precedent." *Poole*, 297 So. 3d at 502.

V. *Hurst v. State*

McKenzie contends that this Court's analysis of jury sentencing in *Hurst v. State* established substantive law that required his jury to find certain "elements" beyond a reasonable doubt. This Court has soundly rejected McKenzie's "elements" argument and has explained that *Hurst v. State* jury sentencing determinations are not "elements" that must be found beyond a reasonable doubt. *See Poole*, 297 So. 3d at 505.

Moreover, to the extent that McKenzie argues that the *Hurst v. State* jury sentencing determinations constitute elements of a purported greater offense of capital first-degree murder, we have also rejected this argument:

> 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").

Wright v. State, 312 So. 3d 59, 60 (Fla. 2021) (quoting *Foster v. State*, 258 So. 3d 1248, 1251 (Fla. 2018)).

McKenzie v. State, 333 So.3d 1098, 1105–06 (Fla. 2022).

The instant petition for writ of certiorari to this Court followed.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Conflict with This Court's Precedents.

Petitioner asks this Court to address whether, for death sentence eligibility, the Due Process Clause of the Fourteenth Amendment requires Florida juries in capital cases to find beyond a reasonable doubt that: the aggravating factors are sufficient to warrant the death penalty; and the aggravating factors outweigh the mitigating circumstances. Petitioner does not assert that his question presented implicates a division among the lower courts. Instead, he claims that the Florida Supreme Court's decision "conflicts with this Court's opinions in *Apprendi*[3], *Ring*, *In Re Winship*[4], *Alleyne*[5], and *Hurst*." Pet. 9-12, 17. Petitioner is incorrect.

The cases Petitioner cites do not conclude that the beyond-a-reasonable-doubt standard applies to non-factual determinations intended to guide the jury's sentencing recommendation. To 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 Due Process Clause, the Court there held, "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 v. United*

---

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

[4] *In re Winship*, 397 U.S. 358 (1970).

[5] *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

States, 570 U.S. 99, 103 (2013) ("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." For example, the Court:

- required the States to "adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt," *Apprendi v. United States,* 530 U.S. 466, 483–84 (2000);

- referenced the jury's "assessment of facts," *id.* at 490 (quotation marks omitted);

- described the "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," *id.* at 482–83 (emphasis omitted); and

- explained that "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense" and "a state scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional punishment' may raise serious constitutional concern." *Id.* at 486 (internal citation omitted).

Thus, *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, and this Court's statements concerning that standard of proof undermine rather than support Petitioner's claim.

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." 536 U.S. at 589. 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." 577 U.S. at 98; *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 sum, 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.

II. The Decision Below Is Correct.

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), *cert. denied subnom. 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* and noted that weighing is not a factual determination. *Poole,* 297 So.3d at 503. Indeed, "the ultimate question whether mitigating circumstances outweigh aggravating 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 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 *McKinney,* 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 nova* 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* and *Hurst,*" 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 *Hurst* 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, *id.* at 707, the determination that aggravators

outweigh mitigators cannot be considered an "element" of the offense. And because that determination is not an element, it is not subject to the beyond-a-reasonable-doubt standard. *See Alleyne*, 570 U.S. at 107 ("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, *McKinney* rejects an essential premise of Petitioner's argument: that the weighing of aggravators and mitigators is either an "element" or the "functional equivalent" of an element.

The outcome is not different simply because Florida has chosen to assign the weighing determination to the jury, rather than the judge as it constitutionally could have. If the Sixth Amendment permits a judge to determine whether aggravators outweigh mitigators, and further permits the judge to make that determination by some lesser standard (or none at all), nothing prevents the State from re-allocating that task to the jury by the same standard of proof. Any contrary theory would punish States for being *more* generous in extending procedural protections to capital defendants by forcing them to extend *all* available procedural protections. But because the weight of the aggravators is not an element of a capital offense, that determination need not be found by a jury and, correspondingly, need not be found beyond a reasonable doubt. *See McKinney*, 140 S. Ct. at 707–08.

Finally, the statutory requirement that the jury weigh, among other considerations, "[w]hether sufficient aggravating factors exist," § 921.141(2)(b)(2)(a), adds nothing to Petitioner's argument. As construed by the Florida Supreme Court,

"it has always been understood that . . . 'sufficient aggravating circumstances' means 'one or more.'" *Poole*, 297 So.3d at 502 (citing cases). Put differently, "[u]nder longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances." *Id.* And it is undisputed that, in this case, that requirement was satisfied when the jury unanimously found multiple aggravating circumstances beyond a reasonable doubt. *McKenzie v. State*, 333 So.3d 1098, 1102 (Fla. 2022).

For reasons this Court has already explicated, it would make little sense to apply the beyond-a-reasonable-doubt standard to normative determinations of the kind at issue here. In *Carr*, this Court "doubt[ed]" that it is "even possible to apply a standard of proof to the mitigating-factor determination." 136 S. Ct. at 642. The Court reasoned that "[i]t is possible to do so for the aggravating-factor determination," on the one hand, because the existence of an aggravator "is a purely factual determination." *Id.* Whether mitigation exists, on the other hand, "is largely a judgment call"—or "perhaps a value call"—just as the "ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Id.* Thus, "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it." *Id.*

As this Court has explained, 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." *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.* at 364. 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.

A fact is "something that has actual existence" or, perhaps more appropriately in this context, is "a piece of information presented as having objective reality." "Fact," Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/fact. Facts have their basis in observable truths about the world. A fact either is or isn't; although a person's perception of facts may be open to debate, facts are objectively discernable. By contrast, normative judgments are opinions. As such, they turn on the subjective views of individual decisionmakers. In short, they are questions involving discretion.[6]

Petitioner's substantial expansion of the *Apprendi* doctrine would have significant and troubling practical implications, including for non-capital sentencing. The federal statute governing criminal sentences, for example, provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply

---

[6] Judges routinely make sentencing decisions within the statutory range authorized by statute using their best judgement or discretion. Judges are not required to make that discretionary decision beyond a reasonable doubt. It is no different when the jury makes a discretionary sentencing recommendation.

with" certain statutorily enumerated sentencing factors. 18 U.S.C. § 3553(a). Given that a federal sentence must, by statute, be supported by a normative judgment that the chosen sentence is "not greater than necessary" to effectuate "the purposes set forth in" the statutory sentencing factors, *see id.*, must that "finding" be made by a jury beyond a reasonable doubt? And if not, why is that normative judgment any different than the moral determination at issue here—i.e., that aggravating factors outweigh mitigating circumstances? *See United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (en banc).

Petitioner asks this Court to rule those two determinations—sufficiency and weighing—must be made beyond a reasonable doubt. But the statute also provides that the trial court may not impose death unless the jury further determines, based on those two factors, that death is the appropriate sentence. See Fla. Stat. § 921.141(2)(b)(2)(c), (3)(a)(2) (requiring the jury to determine, based on sufficiency and weighing, "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death," and providing that the court may sentence the defendant to death if, and only if, "the jury has recommended a sentence of . . . [d]eath"). Petitioner nevertheless does not go so far as to say that that the jury's ultimate recommendation that "the defendant should be sentenced to . . . death," § 921.141(2)(b)(2)(c), must be made beyond a reasonable doubt. And for good reason: "Any argument that the Constitution requires that a jury impose the sentence of death," this Court has explained, "has been soundly rejected by prior decisions of this

Court." *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990); *see also McKinney*, 140 S. Ct. at 707; *Proffitt*, 428 U.S. at 252 (plurality opinion).

Nor would Petitioner's proposed extension of the *Apprendi* doctrine necessarily redound to the benefit of criminal defendants. If state laws like the one Petitioner asks this Court to strike down—those that seek to protect criminal defendants by reducing the risk of arbitrariness and guiding a sentencing authority's discretion to impose particularly harsh punishments—give rise to otherwise non-existent due process problems, lawmakers may well respond by repealing, rolling back, or declining to create such protections in the first place. That is one reason why this Court has "warned against wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries." *Oregon v. Ice*, 555 U.S. 160, 172 (2009) (quotation marks omitted); *see Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

The foregoing explains why this Court has denied certiorari in multiple cases presenting the identical jury-instruction issue. [7]

---

[7] *Wright v. Florida,* 142 S. Ct. 403 (Oct. 18, 2021) (No. 21 5356); *Randolph v. Florida,* 142 S. Ct. 905 (January 24, 2022) (No. 21 6387); *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) (No. 21-5672); *Craft v. Florida,* 142 S. Ct. 490 (Nov. 15, 2021) (No. 21-5280); *Craven v. Florida,* 142 S. Ct. 199 (Oct. 4, 2021) (20-8403); *Newberry v. Florida,* 141 S. Ct. 625 (Oct. 19, 2020) (No. 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).

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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI*
Deputy Assistant Attorney General
Florida Bar No. 158541
*Counsel of Record

DORIS MEACHAM
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
Telephone: (850) 414-3300
CapApp@myfloridalegal.com
Carolyn.Snurkowski@myfloridalegal.com