No. 22-5088

IN THE SUPREME COURT OF THE UNITED STATES

NORMAN BLAKE MCKENZIE,

PETITIONER,

VS.

STATE OF FLORIDA,

RESPONDENT.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

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REPLY TO BRIEF IN OPPOSITION

Mr. McKenzie maintains that this Court should grant certiorari. He replies below to the State's Brief in Opposition filed on August 12, 2022, as necessary, to properly place the issues in this petition before this Court. No arguments in his initial petition are waived.

REPLY ON ARGUMENT

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.

The State erroneously relies on the Florida Supreme Court's cases addressing the death penalty during postconviction review. It is important to consider the procedural posture of *State v. Poole*, 297 So. 3d 487 (Fla. 2020), *cert. denied Poole v. Florida*, 141 S. Ct. 1051 (2021). *Poole* involved the retroactive application of *Hurst v. Florida,* 577 U.S. 92 (2016) to Mr. Poole. In *Poole*, the Florida Supreme Court receded from its own decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Both Mr. Hurst and Mr. Poole were tried under the very same death penalty process that this Court found constitutionally infirm in *Hurst v. Florida*. Mr. McKenzie by contrast, was tried under the new death penalty statute that the Florida Legislature passed in the wake of *Hurst* and its progeny.

In *Poole*, the Florida Supreme Court "recede[d] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Poole*, 297 So. 3d at 507. The

court went on to hold in conclusion:

> The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona* and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt. *See Poole II*, 151 So. 3d at 419. In light of our decision to recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance, we reverse the portion of the trial court's order vacating Poole's death sentence.

Id. at 508. While the Florida Supreme Court's decision in *Poole* raises numerous constitutional issues, they are far different than what is at issue in Mr. McKenzie's case. It does not matter what the Florida Supreme Court considers the bare minimum requirements for a death sentence, if the Florida legislature decides to require jury determinations before an individual receives the death penalty, those decisions need to be made under a reasonable doubt standard. The State further quotes *Poole* in the Brief In Opposition ("BIO"):

> 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.

BIO at 10 (citing *Poole,* 297 So. 3d at 505). This reliance is in error because it was the legislature that created the substantive law when it required certain findings in the post-*Hurst* statute, not the court's opinion in *Hurst.*

In *Poole*, the Florida Supreme Court acknowledged this Court has held in *Alleyne v. United States*, 570 U.S. 99 (2013):

> Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment "within limits fixed by law." While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing.
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> *Id.* at 113 n.2, 133 S. Ct. 2151 (quoting *Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949)). And *Alleyne* merely echoes what the Supreme Court said in *Apprendi*: "We should be clear that nothing in this history suggests 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." *Apprendi*, 530 U.S. at 481, 120 S. Ct. 2348.
>
> In sum, because the section 921.141(3)(b) selection finding is not a "fact" that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, it is not an element. And because it is not an element, it need not be submitted to a jury. *See Hurst v. Florida*, 136 S. Ct. at 621 (defining "element").

Id. at 503-04. The Florida Supreme Court, however, failed to recognize that the sentencing Court may only exercise discretion to not impose death. If the jury answers no to any of the questions Mr. McKenzie submits should be proven beyond a reasonable doubt, the judge has no discretion to impose anything but a life sentence. Barring any last-minute leniency, the findings by the jury that the aggravating factors outweigh the mitigating factors, and that death should be imposed, are the final decision on whether the individual receives death. Mr. McKenzie would not have been eligible for a death sentence if the jury answered one of the two questions at issue here with a no.

Kansas v. Carr, 577 U.S. 108 (2016) addressed the merits of the Kansas Supreme Court's conclusion that the Eighth Amendment requires capital-sentencing

courts in Kansas "to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt." *Id.* at 118-119. It raised the question of whether the Kansas Supreme Court could find that the jury was required to be instructed that mitigation need not be found beyond a reasonable doubt under the Eighth Amendment." Mr. McKenzie received a very similar instruction. States are certainly free to have a lower standard of proof for mitigation, but critical decisions such as those at issue here, require proof beyond a reasonable doubt to a jury when those determinations subject the individual defendant to enhanced penalties.

The State's reliance on *Carr*, is essentially on the dicta. *See* BIO at i. This Court confronted none of the issues in *Carr* that are presented here. Florida required by legislative statute that the jury in a capital case make certain determinations in order for the higher sentence of death to be imposed. When the legislature decided that, the proof needed for the State to meet its burden was proof beyond a reasonable doubt.

The State's, and indeed the Florida Supreme Court's, distinction between eligibility and selection is artificial and only serves to diminish and hide the jury's role in the death penalty in Florida. The jury in Florida is actually making determinations that are necessary for individuals to receive the enhanced penalty of death. Mr. McKenzie was denied an essential aspect of a trial guaranteed by the United States Constitution – the right to proof beyond a reasonable doubt found by a jury. Having suffered this violation, the only remedy that satisfies the requirements of the Constitution is a new trial.

Mr. McKenzie's argument is wholly consistent with *Apprendi*, which stated:

In sum, our reexamination of our cases in this area, and of the history

> upon which they rely, confirms the opinion that we expressed in *Jones*. Other 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. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

"[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence [that may be] impose[d] solely on the basis of the facts reflected in the jury verdict." *Blakely v. Washington*, 542 U.S. 296, 303 (2004)(citation omitted). However, while Mr. McKenzie's sentencing contained such findings, the Florida courts give effect to them without a finding of beyond a reasonable doubt. "In other words, the relevant 'statutory maximum' is not the maximum sentence [that may be] impose[d] after finding additional facts, but the maximum [that may be] impose[d] without any additional findings." *Id.* at 303-04. The court imposed a death sentence in Mr. McKenzie's case without the jury finding these facts beyond a reasonable doubt. The sentencing court could have imposed death in Mr. McKenzie's case if the jury returned a finding beyond a reasonable doubt, but the jury was never so instructed.

Unlike *Apprendi* and the cases that followed, Mr. McKenzie does not insist on findings further than those already required by Section 921.141, Florida Statutes (2019). He does insist that these findings be made with the certainty that the constitutionally mandated "beyond a reasonable doubt standard" engenders. There should be no misunderstanding that the questions that a jury decides in Florida are

appropriate. The jury decides whether the aggravating factors outweigh the mitigating factors and whether death should be imposed. Both questions are required to be answered unanimously. If the answer to either question is no, the sentencing court may not impose death. The jury findings render the death sentence an impermissible sentence under Florida statute. If a juror finds that the aggravating factors do not outweigh the mitigating factors or that death should not be imposed, that is the end of the matter. A life sentence must be imposed.

All of the decisions made by the jury in the sentencing phase in Florida are important, indeed, they are life and death decisions. Based on the importance of these decisions, the jury should be instructed that the standard that each juror must decide these questions is the beyond a reasonable doubt standard.

The reliability of the beyond a reasonable doubt standard, is beyond dispute. Mr. McKenzie asserts that he has a right to this level of reliability. This Court stated in *Ivan V. v. City of N.Y.*, 407 U.S. 203 (1972) (referring to *In re Winship*, 397 U.S. 358, 363-64 (1970)):

> *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).

This Court, in finding the death penalty constitutional after *Furman v. Georgia*, 408 U.S. 238 (1972), recognized that 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)). Juries, however, decide issues under the "beyond a reasonable doubt" standard in a criminal case.

While there was some reference to the Eighth Amendment in the Florida Supreme Court's decision, Mr. McKenzie did not present an argument based on arbitrariness or failure to narrow in his initial petition. While those aspects of the Eighth Amendment may be below the surface, requiring that each finding by the jury be made beyond a reasonable doubt, would certainly serve to ameliorate such concerns. Proof beyond a reasonable doubt cures a significant amount of potential error. With an instruction requiring proof beyond a reasonable doubt for all of the jury's decisions, a death sentence would have assurances that the death penalty is being imposed in only the worst of the worst cases.

Lastly, it should be considered that the Florida Supreme Court initially seemed to have decided this issue correctly, only to abandon the reasonable doubt standard

shortly thereafter. In *Rogers v. State*, 285 So. 3d 872 (Fla. 2019), receded from on other grounds in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), the Court held:

> 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.

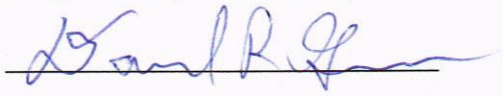
Id. at 885-86. The Florida Supreme Court was correct in *Perry v. State*, 210 So. 3d 630 (Fla. 2016) and then decided to abandon that in *Rogers*. Mr. McKenzie asks this Court to grant certiorari to ensure that if he is to be sentenced to death, the decisions are being made under the constitutionally mandated beyond a reasonable doubt standard.

Ultimately, the Florida legislature decided to require certain findings before an individual is sentenced to death. These are important findings that if found in the negative would prevent a sentence of death. Because these decisions determine whether an individual may receive a death sentence at all, they must be made beyond a reasonable doubt. The United States Constitution requires no less.

CONCLUSION

For the reasons outlined in Mr. McKenzie's petition for writ of certiorari and those arguments presented in the above Reply Brief, Mr. McKenzie's petition for writ of certiorari should be granted.

Respectfully submitted,



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