No.

In the
Supreme Court of the United States

JOHN F. MOSLEY JR.,
Petitioner,
v.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JESSICA J. YEARY
Public Defender

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

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

CAPITAL CASE

QUESTIONS PRESENTED

I. The first question presented is whether excluding evidence of a history of sexual abuse in Mr. Mosley's family of origin was contrary to this Court's holding in *Eddings v. Oklahoma*, 455 U.S. 104 (1982) that the sentencer cannot refuse to consider relevant mitigating evidence.

II. Under Florida's capital sentencing scheme, in addition to finding at least one aggravating factor exists, the factfinder must make additional determinations before a capital sentence can be imposed: (1) whether "sufficient aggravating factors exist," and (2) whether "aggravating factors exist which outweigh the mitigating circumstances." *See* Fla. Stat. § 921.141(2) (2019). The second question presented in this case is whether, considering the operation and effect of Florida's capital sentencing scheme, the Due Process Clause requires those additional determinations to be made beyond a reasonable doubt before the sentencer can choose to impose the death penalty, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 476-85, 490, 494 n.19 (2000) and *Ring v. Arizona*, 536 U.S. 584, 603-05, 609 (2002).

STATEMENT OF RELATED PROCEEDINGS

Mosley v. State, 349 So. 3d 861 (Fla. 2022), No. SC20-195 (Fla. opinion and judgment rendered September 15, 2022; order denying rehearing issued on October 11, 2022; mandate issued on November 8, 2022).

State v. Mosley, No. 16-2004-CF-6675 (Fla. 4th Cir. Ct. judgment entered on February 11, 2020).

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) (Fla. order and opinion vacating Petitioner's original death sentence pursuant to Hurst v. State, 202 So. 3d 40 (Fla. 2016) and denying post-conviction relief on other grounds).

Mosley v. State, 46 So. 3d 510 (Fla. 2009) (Fla. order and opinion affirming Petitioner's original death sentence).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

PAGES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is reported at *Mosley v. State*, 349 So. 3d 861 (Fla. 2022), and a copy is attached to this Petition as Appendix A. The order of the Florida Supreme Court denying Petitioner's motion for rehearing is attached to this Petition as Appendix B. The trial court order imposing a death sentence after resentencing is attached as Appendix C.

JURISDICTION

The Florida Supreme Court issued its judgment affirming Petitioner's death sentence on September 15, 2022 and denied Petitioner's motion for rehearing on October 11, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner John F. Mosley, Jr. was convicted of two counts of first-degree murder in 2005. *See Mosley v. State*, 349 So. 3d 861, 863 (Fla. 2022). He was sentenced to life in prison for the death of his girlfriend, Lynda Wilkes; following a non-unanimous jury vote in favor of imposing the death sentence, he was sentenced to death for the death of their ten-month-old son, Jay-Quan. *See id.* The Florida Supreme Court affirmed the convictions and death sentence on direct appeal, but ultimately vacated the death sentence in light of the unanimity requirement announced in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See Mosley*, 349 So. 3d at 863.

Mr. Mosley's second penalty phase took place in December 2019 and the jury unanimously found that the state had proven four aggravating factors; that the aggravating factors were sufficient to impose the death penalty; and that the aggravating factors outweighed any mitigating circumstances. *See id.* at 865. At a sentencing hearing in January 2020 the court orally reimposed a death sentence, *id.*, following that with a written order on February 11, 2020.

The Penalty Phase.

Mr. Mosley represented himself in the second penalty phase trial. *See id*. at 864. The key witness in the State's case was Bernard Griffin, who had been charged as a co-defendant. *Id.*; *see also* Appendix C at 2. Griffin testified he was present when Ms. Wilkes was killed and that he saw Mr. Mosley place Jay-Quan in a garbage bag, which he then placed in the back of his SUV. Appendix C at 7-9. A

pediatrician testified, based on his review of transcripts from previous proceedings, that Jay-Quan struggled to escape but did not have the ability to untie or rip the bag. *Id.* at 8. Griffin also testified Mr. Mosley had approached him about "killing a baby" about two or three weeks earlier and had given him directions to Ms. Wilkes's home. *Id.*

Mr. Mosley presented a number of witnesses, including family members, friends, a forensic psychologist, and a psychologist specializing in trauma. *Id.* at 2-3, 10. The witnesses established that Mr. Mosley's father abandoned him and, when he was present, was physically and emotionally abusive. *Id.* at 10-11. Mr. Mosley's grandmother, who raised him when his mother was absent, was also abusive. *Id.* Despite this background Mr. Mosley was a "loving and active participant" in his daughters' lives. *Id.* at 11-12.

Mr. Mosley asked to recall his mother after her initial testimony and, following a State objection that the additional testimony would be cumulative, the trial court required Mr. Mosley to proffer the testimony outside the presence of the jury. 349 So. 3d at 865. The court then limited the testimony by prohibiting references to sexual abuse perpetrated by Mr. Mosley's father against his sisters and to how that had affected Mr. Mosley:

> During the proffer, Mosley asked his mother whether his father had sexually abused his sisters. Additionally, he asked whether his father had physically abused him and whether he had in fact been raised by his grandmother. The trial court allowed Mosley to elicit before the jury his mother's testimony regarding his physical abuse and being raised by his grandmother. But, explaining that the credibility of Mosley's father was not at issue, the trial

> court did not permit Mosley to ask questions about his father's sexual abuse of Mosley's sisters.

Id.

At Mr. Mosley's first penalty phase trial, the proffered testimony had been admitted. *See Mosley v. State*, 46 So. 3d 510, 516 (Fla. 2009). That trial resulted in a recommendation of death by a vote of eight to four. *Id.* at 517.

The Sentencing Order.

The jury found the State had proven the existence of four aggravating factors beyond a reasonable doubt: (1) the murder was especially heinous, atrocious, or cruel; (2) the offense was committed in a cold, calculated, and premeditated manner; (3) the victim was under 12 years of age; and (4) Mr. Mosley had previously been convicted of another capital felony. 349 So. 3d at 865.

The trial court entered a Sentencing Order on February 11, 2020. *See* Appendix C. The court agreed with the jury's conclusion regarding the four aggravating factors and assigned each factor great weight. *Id.* at 6-9. The court found Mr. Mosley had established a number of mitigating circumstances under the "catch all" provision set out in section 941.121(7)(h), Florida Statutes (2019). These are set out in the Sentencing Order, Appendix C at 10-19:

- The court gave moderate weight to the factors that Defendant was emotionally neglected as a child by his caregiver; Defendant was physically abused as a child by his father; and Defendant, at age ten, experienced the trauma of knowing his maternal grandmother was killed by his maternal step-grandfather.

- The court gave slight weight to the factors that Defendant was abandoned by his father; Defendant honorably served his country as a member of the United States Naval Reserve; Defendant has great love

and concern for his daughters; Defendant has the love and support of his family members; Defendant was a good parent to his daughters Amber and Alexis; Defendant was a good and respectful son to his mother, grandmother, and other family members; Defendant was a good friend to many; Defendant was never disciplined or reprimanded for performing his duties in the Naval Reserve; Defendant successfully completed an extended program provided by the Florida Junior College and graduated with an Emergency Medical Care (EMC) certificate of completion; Defendant was vice-president of programs for the PTA at Twin Lakes Elementary School and participated in PTA activities on the state and local level (established in part); Defendant volunteered as a Recreational Coordinator for the Tenant Advisory Council; Defendant successfully completed an extensive program and received a diploma certificate from the Division of State Fire Marshal (Volunteer Basic Course); Defendant was a volunteer fireman; Defendant was a mentor to Derrale Lee and took an interest in his well-being; Defendant's psychological profile indicates he has the potential to be a productive inmate; Defendant successfully completed law enforcement training; Defendant coached neighborhood youth in sports and recreation; Defendant encouraged others to remain in school and complete their education; Defendant helped his daughters with their work while growing up, and Defendant's daughters were in the gifted program in high school; Defendant still gives "life advice and counsel" to his wife and two daughters even though he is in prison; and Defendant's daughter Alexis went into the U.S. Naval Reserves upon the advice of her father.

- The court gave minimal weight to the factor that Defendant graduated from high school.

- Five proposed factors either were not established, were only partially established, or were already addressed in other mitigating circumstances, and were given no weight. These were: Defendant grew up in a dysfunctional family environment; Defendant was affected by seeing physical and/or mental abuse at an early age; Defendant maintained steady employment throughout his adult life; Defendant successfully completed a Certified Nursing Assistant Program; and Defendant's daughter Amber became a registered nurse.

The court noted the jury had unanimously found the aggravating factors outweighed the mitigating circumstances, adding, "[a]lthough the Court through its own review of the record has found certain mitigating circumstances exist that the

jury did not find to exist, the Court concludes that the aggravating factors that exist outweigh the mitigating circumstances that exist." *Id.* at 19. Finally, the order reimposed a death sentence:

> In determining the appropriate sentence, the Court cannot focus solely on the consequences of Defendant's action, Jay-Quan Mosely's murder. The Court must also consider Defendant's intent as to each action he took during the crime.
>
> Defendant set out to murder Jay-Quan. He solicited Bernard Griffin to kill Jay-Quan and provided Griffin with a map to and diagram of Linda Wilkes's home. When Griffin refused to murder a baby, Defendant killed Jay-Quan.
>
> The Court gives great weight to the jury's recommendation to impose the death penalty and wholly agrees with the jury's recommendation based on an assessment of the aggravating factors and mitigating circumstances presented. The Court finds the aggravating factors heavily outweigh the mitigating circumstances, and death is the proper penalty for the murder of Jay-Quan Mosley.

Id. at 19-20.

The Direct Appeal.

On appeal, Mr. Mosley raised six issues. Two related to the trial court's handling of his sentencing hearing. 349 So. 3d at 866-69. The Florida Supreme Court held Mr. Mosley was entitled to a new sentencing hearing and *Spencer* hearing because of the court's failure to address Mr. Mosley's motion to represent himself at his *Spencer* hearing. *Id.* at 866. The court denied relief on the remaining issues. *Id.* at 869. Mr. Mosley argued that the trial court denied his right of confrontation by preventing him from cross-examining a witness about his

motivation for testifying. *Id.* at 869-70. He also argued that "the trial court improperly excluded his mother's proffered testimony that his father had sexually abused two of his sisters." *Id.* at 870. He argued the trial court committed fundamental error when it did not instruct the jury that its findings regarding the sufficiency and weight of the aggravating factors had to be made beyond a reasonable doubt. *Id.* Finally, he argued the trial court had improperly refused to consider his request for an evidentiary hearing based on newly discovered evidence regarding the competency of the medical examiner. *Id.* A timely motion for rehearing addressing the issues raised in the initial brief was denied without further discussion. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

I. The Florida Supreme Court's Decision Approving the Exclusion of Mitigation Evidence Conflicts with this Court's Precedent Including *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

The Florida Supreme Court's decision approving of the trial court's wholesale exclusion of evidence of sexual abuse perpetrated by Mr. Mosley's father against his sisters and the effect that had on Mr. Mosley was contrary to this Court's precedent. The Eighth Amendment requires individualized consideration of the offender "as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Therefore, the death penalty cannot constitutionally be imposed without offering the accused the opportunity to present potentially mitigating evidence. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 603-04 (1978). The prohibition against cruel and unusual punishment and the Due Process clause do not allow limitations on what type of evidence can be considered in mitigation in a particular case:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604.

"Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982). This typically includes "[e]vidence of a difficult family history."

Id. at 115; *see also Smith v. Texas*, 543 U.S. 37, 45 (2004) (recognizing evidence of a troubled childhood as plainly "relevant for mitigation purposes"); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (vacating a death sentence because the trial judge considered only the mitigating factors specifically enumerated in the applicable statute and failed to consider other testimony concerning the defendant's family background); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (noting if a fact would allow the jury to draw an inference favorable to the defendant, that inference is potentially mitigating and may not be excluded from consideration). Although the sentencer retains latitude in determining what weight to give the evidence, the sentencer cannot refuse to hear it. *Eddings*, 455 U.S. at 114-15.

The exclusion of evidence about the sexual abuse perpetrated by Mr. Mosley's father on his sisters and its effect on Mr. Mosley cannot be justified. A jury could reasonably infer that a family system where one of the daughters had to be hidden from a sexually abusive father, as testified to by Mr. Mosley's mother (Appendix C, Tr. at 828), would have damaging psychological effects on other children in that family. Because the facts about this abuse would allow a factfinder to draw an inference favorable to Mr. Mosley, the evidence was mitigating in nature and could not constitutionally be excluded from the penalty phase trial.

It is worth noting that at Mr. Mosley's first trial, where this mitigation was presented, the jury did not return a unanimous verdict. The petition should be granted, and the Florida Supreme Court's decision reviewed, because the decision improperly removed an entire category of mitigating evidence from consideration.

II. The Florida Supreme Court's Decision Directly Conflicts With This Court's Decisions on the Standard of Proof for Functional Elements of an Offense and Violates Mr. Mosley's Right to Due Process.

A. Florida's Capital Sentencing Scheme Exposes Defendants to Greater Punishment Based on Findings Regarding the Sufficiency and Weight of Aggravating Factors, and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) Require Such Findings to Be Subject to Proof Beyond a Reasonable Doubt.

The Florida Supreme Court's decision in this case conflicts with the principle that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury verdict" is functionally an element of the offense, which the State must prove beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 494 n.19 (2000). In *Ring v. Arizona*, 536 U.S. 584, 605 (2002), this Court stated the finding of aggravating circumstances under Arizona's capital sentencing scheme was the "functional equivalent" of an element of a greater offense, stating that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative." Because that finding exposed defendants to a sentence of death, which exceeded the statutory maximum under Arizona law, it had to be made by a jury. *Id.*

Under Florida's capital sentencing scheme, the determination as to whether the aggravating factors are sufficient to justify imposing death is the functional equivalent of an element because exposes a defendant to a greater punishment than that authorized by statute for capital murder.

A murder with premeditation is a first-degree murder under Florida law, classified as a capital felony. Fla. Stat. § 782.04(1)(a)1 (2019). A person who is convicted of a capital felony can be punished by death "if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment." Fla. Stat. § 775.082(1)(a) (2019). Before the sentencer uses whatever discretion it has to select the appropriate sentence, the sentencing scheme requires the jury (or judge, in a bench trial) to make three determinations: that at least one aggravating factor exists, that the aggravating factor or factors are "sufficient," and that the aggravating factor or factors outweigh the mitigating circumstances.

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.
>
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
>
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:
>
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
>
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to

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

Fla. Stat. § 921.141 (2) (2019).

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

In *Apprendi*, this Court held that any circumstance that increases a sentence "beyond the maximum authorized statutory sentence…is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 530 U.S. at 494 n.19. *See also Blakely v. Washington*, 542 U.S. 296, 302-05 (2004) (applying *Apprendi* to reverse a sentence that exceeded the standard sentencing range for a particular offense, even though the sentence did not exceed the overall statutory maximum for that class of offenses); *Alleyne v. United States*, 570 U.S. 99 (2013) (applying *Apprendi* to factors increasing mandatory minimum sentences).

The Court applied these principles in *Hurst v. Florida*, 136 S. Ct. 616 (2016), holding unconstitutional a Florida capital sentencing scheme because it allowed a death sentence to be imposed without submitting all necessary findings to a jury.[1] The Court's opinion began with the principle that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. at 619. Under the sentencing statute in effect at the time, imposing a death sentence required a separate sentencing proceeding leading to an "advisory sentence" from the jury, which was not required to give a factual basis for its recommendation. *See id.* at 620. Then, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, [was required to] enter a sentence of life imprisonment or death." *Id.* (citing § 921.141(3), Fla. Stat. (2010)).

This Court concluded Hurst's death sentence violated the Sixth Amendment because the statutory scheme at issue did not "require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. The Court pointed out that the statute did not make a defendant eligible for death until those findings were made. *Id.*

The Florida Legislature rewrote the state's capital sentencing scheme following *Hurst v. Florida*. Although the Florida Supreme Court initially interpreted the revised statute consistently with the *Apprendi* line of cases, the

[1] Hurst had been sentenced to death based on the trial court's determination that two aggravating circumstances were present. *Id.* at 620.

court changed direction and began receding from its own holdings about the operation and effect of the revised statute. The result has created conflict between Florida law and this Court's precedent.

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

> [W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst, 202 So. 3d at 44; *see also Perry*, 210 So. 3d at 640 (interpreting Florida's revised death penalty statute). The Florida Supreme Court distinguished the findings of sufficient aggravation and that the aggravating factors outweighed the

mitigation from the ultimate sentencing recommendation, noting that a jury is not compelled or required to recommend a death sentence. *Perry*, 210 So. 3d at 640.

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

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

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

285 So. 3d at 885-86.

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

This reasoning is based on a version of the statute predating the legislative changes that took place because of *Hurst v. Florida*. *See Poole*, 297 So. 3d at 495-96. That statutory scheme, which still placed the jury in an advisory role, did not describe the eligibility decision and the selection decision the same way the current statute does. *Compare* Fla. Stat. § 921.141 (2011) *with* Fla. Stat. § 921.141 (2019). The former "eligibility finding" was "[t]hat sufficient aggravating circumstances exist as enumerated in subsection (5)." *Poole*, 297 So. 3d at 502 (citing Fla. Stat. § 921.141(3)(a) (2011)). The selection finding was "[t]hat there are insufficient

mitigating circumstances to outweigh the aggravating circumstances." *Id.* (citing Fla. Stat. § 921.141(3)(b) (2011)). Under the statute at issue in *Poole*, the selection finding gave the defendant "an opportunity for mercy if…justified by the relevant mitigating circumstances and by the facts surrounding his crime." *Id.* at 503. On its face, that statutory scheme operated differently from the current one, which requires the existence, sufficiency, and relative weight of aggravating circumstances to be determined before a death sentence can be considered. The requirement of "sufficient" aggravating circumstances in the current statute is separate from the mere existence of any of the enumerated aggravating circumstances. Because the number of potential aggravating factors has doubled since capital punishment was reinstated in Florida, this requirement is a safeguard that requires aggravation to rise to a certain level before a death sentence can be imposed.[2]

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

[2] When Florida rewrote its capital sentencing law in the 1970s, the statute contained eight aggravating factors. *See Proffitt v. Florida*, 428 U.S. 242, 251 (1976). The 2022 statute contains 16 aggravating factors. *See* Fla. Stat. § 921.141(6)(a)-(p) (2022).

B. Imposing a Death Sentence Without Subjecting Predicate Findings to the Appropriate Burden of Proof Violates Mr. Mosley's Right to Due Process.

In addition, treating a defendant as eligible for the death penalty when all prerequisite findings have not been established beyond a reasonable doubt is inconsistent with due process. The due process right of requiring the State to prove every element of a crime beyond a reasonable doubt "reflects a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. 358, 361-62 (1970) (citation omitted). The requirement of proof beyond a reasonable doubt not only guards against the danger of an erroneous conviction, but also "provides concrete substance for the presumption of innocence." *Id.* at 363. The standard has a vital role in maintaining public confidence in the court system. *Id.* at 364. The standard also protects the interests of criminal defendants facing deprivation of life or liberty by requiring a subjective state of certitude regarding the elements of an offense. *Id.* The reasonable doubt standard is just as critical when making determinations that affect a sentence as when determining guilt of an underlying offense:

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

Apprendi, 530 U.S. at 484.

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

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

C. The Question Presented Affects Every Capital Defendant in the State of Florida.

Since receding from *Hurst* and *Perry*, the Florida Supreme Court has repeatedly held that determinations as to whether aggravating factors are sufficient to justify the death penalty and whether the aggravating factors outweigh mitigating evidence "are not subject to the beyond a reasonable doubt standard of

proof." *Newberry v. State*, 288 So. 3d 1040, 1047 (Fla. 2019), *cert. denied*, 141 S. Ct. 625 (2020); *see also, e.g.*, *Bright v. State*, 299 So. 3d 985, 998 (Fla. 2020), *cert. denied*, 141 S. Ct. 1697 (2021); *Santiago-Gonzalez v. State*, 301 So. 3d 157, 177 (Fla. 2020), *cert. denied*, 141 S. Ct. 2828 (2021); *Craven v. State*, 310 So. 3d 891, 902 (Fla. 2020), *cert. denied*, 142 S. Ct. 199 (2021).

However, under the operation and effect of Florida's capital sentencing scheme, these determinations are necessary to make a defendant eligible for a death penalty. The finding of one or more aggravating factors does not allow a court to impose a death penalty without those additional determinations. Only after those determinations are made does the jury select between life and death in making its sentencing recommendation and, if the jury selects death, the court still has discretion to impose either a life sentence or the death penalty. Under the current statute, consideration of mitigation is not merely an "opportunity for mercy," but is a necessary step in deciding whether the death penalty is available at all. The Florida Supreme Court's reading of the statute is depriving Florida defendants of due process of law by lessening the State's burden of proof as expressed in the *Apprendi* line of cases. The issue has implications for every pending and future capital case decided under Florida's current statutory scheme.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSICA J. YEARY
Public Defender

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

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

January 5, 2023