CAPITAL CASE

No. 22-6488

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 FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ASHLEY MOODY
Attorney General of Florida

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

CHARMAINE M. MILLSAPS
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3566
capapp@myfloridalegal.com

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether this Court should grant review of a decision of the Florida Supreme Court affirming the exclusion of testimony that the defendant's father sexually abused his sisters as mitigation during the penalty phase and rejecting a claim that the Eighth Amendment requires the admission of any even marginally relevant mitigating evidence.

II. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim that the Sixth Amendment right to a jury trial and due process requires that all findings related to capital sentencing be made by the jury at the beyond a reasonable doubt standard of proof.

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Mosley v. State*, 349 So.3d 861 (Fla. 2022) (SC20-195).[1]

JURISDICTION

On September 15, 2022, the Florida Supreme Court vacated the death sentence following the second penalty phase and remanded for a new *Spencer* hearing.[2] *Mosley v. State*, 349 So.3d 861 (Fla. 2022) (SC20-195). On September 29, 2022, Mosley filed

[1] The pleadings filed in the direct appeal of the resentencing are available online on the Florida Supreme Court's website under case number SC20-195.

[2] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

a motion for rehearing in the Florida Supreme Court. On October 11, 2022, the Florida Supreme Court denied the rehearing. On January 5, 2023, Mosley filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). Petitioner asserts jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth Amendment right-to-a-jury-trial provision, the Eighth Amendment cruel and unusual punishment provision, and the Fourteenth Amendment due process provision.

The Sixth Amendment to the United States Constitution, provides:

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

U.S. Const. Amend. VI.

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.

U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Mosley was convicted of two counts of first-degree murder and sentenced to death for the murder of his infant son.

Facts of the case

On April 22, 2004, Mosley, to avoid paying child support, strangled his girlfriend, Lynda Wilkes, to death and asphyxiated their ten-month old son, Jay-Quan, by placing the infant in a garbage bag and tying the bag closed. *Mosley v. State*, 46 So.3d 510, 514-16 (Fla. 2009). Later that evening, with the bodies in the back of the Suburban, he drove sixty miles to Waldo, Florida. *Id.* at 515. He drove down a dirt road and disposed of the girlfriend's body by burning it. He then drive to Ocala and threw the garbage bag with his infant son's body in a dumpster behind a Winn-Dixie store. *Id.* at 515.

The co-perpetrator, fifteen year-old Bernard Griffin, who Mosley paid $100.00 dollars to help him, told his mother about the crime. *Mosley*, 46 So.3d at 516. Griffin confessed and led law enforcement to the girlfriend's body in Waldo. *Id.* at 516. The infant's body was never recovered. *Id.* Cell phone records established that Mosley made an phone call at 2:24 a.m., on April 23, 2004, near the location of the girlfriend's body. *Id.* The girlfriend's DNA was located in the Suburban.

Procedural history

Mosley was convicted of two counts of first-degree murder and sentenced to death for the murder of his infant son. *Mosley*, 46 So.3d at 516, 518. Years later, he was granted a resentencing based on *Hurst v. State*, 202 So.3d 40 (Fla. 2016). *See Mosley v. State*, 209 So.3d 1248, 1284 (Fla. 2016) (affirming the denial of the postconviction motion regarding the guilt phase issues but reversing for a new penalty

phase based on *Hurst v. State*).

At the second penalty phase, Mosley called his mother to testify in mitigation. *Mosley v. State*, 349 So.3d 861, 865 (Fla. 2022). There was a proffer from the mother regarding the sexual abuse of his sisters by his father. The trial court refused to admit the testimony regarding the sexual abuse of his sisters. *Id.* at 865. The trial court ruled that because the father was not a witness, his credibility was not at issue, and there was no evidence that Mosley himself was the victim of the sexual abuse or involved with the abuse. (T. 829-32). His mother testified regarding his father being physically abusive to Mosley and his being raised by his grandmother. *Id.* at 865.

The jury unanimously found that the State had proven four aggravating factors: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed in a cold, calculated, and premeditated manner; (3) the victim was less than twelve years of age; and (4) Mosley was previously convicted of another capital murder. *Mosley*, 349 So.3d at 865. The jury unanimously found that the aggravating factors were sufficient to impose the death penalty and found no mitigating circumstances. *Id.* at 865. And the jury unanimously found that the aggravating factors outweighed the mitigating circumstances. *Id.* The trial court again sentenced Mosley to death for the murder of his infant son. *Id.* at 866.

In the direct appeal of the resentencing to the Florida Supreme Court, Mosley raised six issues. The Florida Supreme Court rejected the argument that the trial court had improperly excluded his mother's proposed mitigation testimony that his father had sexually abused two of his sisters at the penalty phase. *Mosley*, 349 So.3d at 870. The Florida Supreme Court also rejected a claim that the trial court committed fundamental error by failing to instruct the jury that it must find beyond a reasonable doubt that the aggravating factors were sufficient to justify death and that the aggravating factors outweighed the mitigating factors. *Id.* at 870.

The Florida Supreme Court vacated the death sentence based on a violation of *Faretta v. California*, 422 U.S. 806 (1975), at the *Spencer* hearing and remanded for a new *Spencer* hearing at which Mosley would be permitted to represent himself but did not grant Mosley a third penalty phase. *Mosley*, 349 So.3d at 866, 870. The dissent would have affirmed the death sentence based on a finding that Mosley's request for self-representation during *Spencer* hearing was untimely. *Mosley*, 349 So.3d at 870-71 (Muniz, J., dissenting).[3]

On January 5, 2023, Mosley, represented by the Office of the Public Defender of the Second Judicial Circuit of Florida, filed a petition for a writ of certiorari in this Court raising two issues.

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[3] The purpose of a *Spencer* hearing is multifaceted. Such hearings are held in all capital cases to give the defendant, his counsel, and the State an opportunity to be heard before sentencing; to afford both the State and the defendant an opportunity to present additional evidence; to allow both sides to comment on, or rebut, information in the presentence investigation (PSI) or a medical report; and to afford the defendant an opportunity to be heard in person prior to the final sentencing. *Sievers v. State*, ___ So.3d ___, 47 Fla. L. Weekly S285, 2022 WL 16984701(Fla. Nov. 17, 2022) (citing *Spencer*, 615 So.2d at 691). But the main purpose of a *Spencer* hearing is to allow the defendant to present additional mitigation to the trial court alone that might not be viewed as mitigating by a jury, such as illegal drug use. *Cf. Doty v. State*, 170 So.3d 731, 736 (Fla. 2015). *Spencer* hearings can be quite extensive in cases where the capital defendant waived the presentation of mitigation to the jury, but special mitigation counsel was appointed by the trial court to present mitigation to the judge, regardless of the defendant's wishes, so that the Florida Supreme Court can perform its traditional, but recently abolished, proportionality review. *See, e.g., Russ v. State*, 73 So.3d 178, 186 (Fla. 2011); *Muhammad v. State*, 782 So.2d 343, 364-65 (Fla. 2001) (holding a trial court has the discretion to appoint special mitigation counsel in cases where a capital defendant waives the presentation of mitigation to the jury to facilitate proportionality review).

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT AFFIRMING THE EXCLUSION OF TESTIMONY THAT THE DEFENDANT'S FATHER SEXUALLY ABUSED HIS SISTERS AS MITIGATION DURING THE PENALTY PHASE AND REJECTING A CLAIM THAT THE EIGHTH AMENDMENT REQUIRES THE ADMISSION OF ANY EVEN MARGINALLY RELEVANT MITIGATING EVIDENCE.

Petitioner Mosley seeks review of the Florida Supreme Court's decision affirming the exclusion of evidence regarding his father's sexual abuse of his sisters at the penalty phase because it did not relate to the defendant himself. There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision affirming the exclusion of this mitigation testimony about the father's behavior towards his other children. There certainly is no conflict with this Court's recent decision in *United States v. Tsarnaev*, 142 S.Ct. 1024, 1037-39 (2022), which rejected the argument that the Eighth Amendment requires the admission of any even marginally relevant mitigating evidence. This Court has already addressed this issue and rejected such an "extreme" reading of its Eighth Amendment caselaw. There is also no conflict between the lower appellate courts and the Florida Supreme Court's decision. Review of this issue should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court rejected the argument that the trial court improperly excluded his mother's testimony that his father had sexually abused two of his sisters. *Mosley v. State*, 349 So.3d 861, 870 (Fla. 2022). The Florida Supreme Court found no abuse of discretion "because the trial court reasonably concluded that Mosley's mother's proffered testimony did not establish that she had personal knowledge of the sexual abuse or how it affected Mosley." *Id.* at 870.

Florida's death penalty statute

Florida's death penalty statute, § 921.141(1), Florida Statutes (2022), provides, in pertinent part:

> In the proceeding, evidence may be presented as to any matter that the court deems *relevant* to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating factors enumerated in subsection (6) and for which notice has been provided pursuant to s. 782.04(1)(b) or mitigating circumstances enumerated in subsection (7). Any such evidence that the court deems to have *probative value* may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

(emphasis added). Florida's evidence code defines relevant evidence as "evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2022).

No conflict with this Court's Eighth Amendment jurisprudence

There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case. Opposing counsel, relying on *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), insists that Eighth Amendment mandates that any evidence that can possibly be labeled as mitigation cannot be excluded.

But this Court recently rejected such an "extreme" reading of *Lockett* and its progeny. In *United States v. Tsarnaev*, 142 S.Ct. 1024 (2022), this Court, in the federal capital prosecution of the Boston Marathon bomber, held that the federal district court did not abuse its discretion by excluding evidence sought to be introduced as mitigation by the defense at the capital sentencing. At the sentencing phase, Tsarnaev sought to introduce evidence that the co-perpetrator, his elder brother, masterminded the bombing and had pressured him into participating. *Tsarnaev*, 142 S.Ct. at 1032. He wanted to introduce evidence of an unsolved triple homicide, that had occurred years earlier, in which his older brother was a suspect. During the investigation of the

bombing, the FBI interviewed a friend of his older brother, who confessed to being involved in the triple homicide but who pointed to the older brother as the mastermind and actual killer of all three victims in the prior crime. *Id.* at 1032-33. The friend, however, attacked the FBI agents during the interview and was killed by the agents before he could provide a written confession. *Id.* at 1033. The prosecution filed a motion to exclude all of the evidence regarding the triple homicide from the sentencing phase of the younger brother, arguing it was irrelevant, and alternatively, that it lacked probative value and was likely to confuse the issues. The federal district court granted the motion and excluded the evidence of the prior triple homicide noting that everyone involved, including the friend who confessed, was dead. Tsarnaev argued that his older brother was the more culpable of the two brothers at the sentencing phase but without this testimony as support.

Justice Thomas, writing for the seven-justice majority, rejected Tsarnaev's argument that the triple homicide was evidence of his brother's domineering nature that supported his mitigation defense that his older brother was the "ringleader." *Tsarnaev*, 142 S.Ct. at 1032, 1037. This Court found the district court's conclusion that the triple homicide, committed years ago, was "without any probative value" and would be nothing more than "a waste of time" to be reasonable and not an abuse of discretion. *Id.* at 1033, 1037. This Court noted that the defendant himself had no role in the triple homicide. *Id.* at 1041. The *Tsarnaev* Court reasoned that the evidence regarding the triple homicide certainly did not show that, almost two years later, the older brother dominated Tsarnaev in a manner that would mitigate his culpability. *Id.*

Tsarnaev argued that Federal Death Penalty Act, 18 U.S.C. § 3591(c), violates the Eighth Amendment if it excluded any even "marginally" relevant mitigating evidence, relying on both *Lockett v. Ohio* and *Eddings v. Oklahoma*. *Tsarnaev*, 142 S.Ct. at 1037-38. But this Court found such a reading of *Lockett* to be "extreme,"

noting that both the Federal Government and the States have the authority to set reasonable limits on the admission of mitigating evidence. *Id.* at 1038. The majority noted that § 3591(c) limits evidence at the sentencing phase to "any matter relevant to the sentence, including any mitigating or aggravating factor." *Id.* at 1037. But that, in this Court's words, does not make capital sentencing proceedings "evidentiary free-for-alls." *Id.* at 1037. This Court explained that 18 U.S.C. § 3593(c) was a "highly permissive regime that allows criminal defendants to introduce a wide range of normally inadmissible evidence" and does not exclude "any category of mitigating evidence." *Id.* at 1038. Rather, the federal death penalty statute simply preserves the traditional gatekeeping function of judges to assess relevancy and probative value of evidence. [4] This Court rejected the Eighth Amendment challenge to § 3593(c). *Id.* at 1039.

Here, as in *Tsarnaev*, the state trial court did not abuse its discretion in excluding the proposed mitigation. Just as in *Tsarnaev*, where the defendant himself had no role in the triple homicide that he sought to admit as mitigation, Mosley had no role in the sexual abuse that he sought to admit as mitigation. It was his sisters who were the victims of the abuse, not him. And, here, unlike in *Tsarnaev*, the father was not involved at all in the two murders that Mosley was being sentenced for committing. The father did not even testify at the second penalty phase. This proposed mitigation has even less relevance than the proposed mitigation in *Tsarnaev*.

The Eighth Amendment does not mandate the admission of any and all evidence merely because the defendant encants the word "mitigation." State penalty phases are not required to be "evidentiary free-for-alls," any more than federal penalty phases

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[4] Indeed, the *Lockett* Court, in a footnote to its definition of mitigation, stated that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12.

are. *Tsarnaev*, 142 S.Ct. at 1037.

Opposing counsel totally ignores this Court's recent decision in *Tsarnaev* in the petition. *Tsarnaev* is not cited or distinguished in any manner. Petitions for writ of certiorari that do not account for this Court's most recent decision in an area do not warrant this Court's serious consideration.

Furthermore, a parent's conduct toward a defendant's other siblings does not meet the constitutional definition of mitigation. The constitutional definition of mitigation is "any aspect of the *defendant*'s character, record, background, or circumstances of the offense" that would mitigate against the imposition of the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 601 (1978) (plurality) (stating "the sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense'"); *id.* at 604 (stating that the sentencer 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"); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (adopting the *Lockett* definition of mitigation as "any aspect of the defendant's character or record or any circumstances of the offense"); *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (defining mitigation as "evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty"); *id.* at 327-28 (stating that the "jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"). Mosley's father's sexual abuse of his sisters is not any aspect of his own "character or background, or the circumstances of the offense." The father's conduct has no bearing on the defendant's character, prior record, or the circumstances of these murders.

Not everything is mitigating. For example, a jury's lingering or residual doubt

over a defendant's guilt is not considered proper mitigation because it is not an aspect of the defendant's "character, record, or a circumstance of the offense," and therefore, does not meet the constitutional definition of mitigation. *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988); *cf. Graham v. Collins*, 506 U.S. 461, 500 (1993) (Thomas, J., concurring) (expressing astonishment that defendants would attempt the "mockery" of raising a diagnosis of antisocial personality disorder as mitigation because all the diagnosis demonstrates is that that the defendant is "a sociopath"); *Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000) (observing that antisocial personality disorder is "fancy language for being a murderer"). The exclusion of the father's sexual abuse of the sisters does not conflict with this Court's definition of mitigation.

There is no conflict with this Court's Eighth Amendment mitigation jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with the lower appellate courts

There is also no conflict between the decision of any federal appellate court or any state supreme court and the Florida Supreme Court's decision in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

The federal courts follow this Court's recent decision in *Tsarnaev*. *See e.g.*, *Fauber v. Davis*, 43 F.4th 987, 1007-08 (9th Cir. 2022) (holding a plea offer does not

qualify as constitutionally relevant mitigating evidence because a plea offer is not an "aspect of a defendant's character or record or any of the circumstances of the offense" which is the traditional constitutional definition of mitigation citing *Tsarnaev*). Opposing counsel does not cite to any decision of any federal circuit court or state supreme court opinion, decided after *Tsarnaev*, holding that any mitigation evidence, no matter how unrelated to the defendant himself, must be admitted as mitigation under the Eighth Amendment.

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state court of last resort. Because there is no conflict among the lower appellate courts, review should be denied.

ISSUE II

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT REJECTING A CLAIM THAT THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL AND DUE PROCESS REQUIRES THAT ALL FINDINGS RELATED TO CAPITAL SENTENCING BE MADE BY THE JURY AT THE BEYOND A REASONABLE DOUBT STANDARD OF PROOF.

Petitioner Mosley seeks review of the Florida Supreme Court's decision rejecting a claim that the Sixth Amendment right-to-a-jury-trial provision and due process requires that all additional determinations, such as the sufficiency of the aggravating factors and weighing of the aggravation against the mitigation, be made by the jury at the beyond a reasonable doubt standard of proof. First, the Florida Supreme Court's interpretation of Florida's death penalty statute is solely a matter of state law. This Court is bound by a state court's reading of a state statute. Alternatively, there is no conflict between this Court's Sixth Amendment or due process jurisprudence and the Florida Supreme Court's decision in this case. As this Court has explained, many of these additional determinations, such as sufficiency and weighing, are not even factual

determinations. Weighing, for example, is a "question of mercy" rather than a factual determination. *Kansas v. Carr*, 577 U.S. 108, 119 (2016). Standards of proof do not apply to such determinations. *Id.* at 119. Furthermore, the view that all factual determinations must be made by the jury is contrary to this Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013). The *Alleyne* Court explained that it is only factual determinations that increase or "aggravate" the sentence that must be made by the jury; additional determinations within the already increased sentencing range may be made by the judge alone. As this Court recently explained in *McKinney v. Arizona*, 140 S.Ct. 702 (2020), in capital cases, under most state sentencing schemes, the fact that increases the sentence to a death sentence is the finding of one aggravating factor and therefore, it is only the finding of that one fact that constitutionally must be made by the jury. The Florida Supreme Court's holding in *State v. Poole*, 297 So.3d 487, 505 (Fla. 2020), that the state's death penalty statute only requires a jury finding of one aggravating factor at the beyond a reasonable doubt standard for a Florida capital defendant to be eligible for a death sentence exactly mirrors this Court's reasoning in *McKinney*. There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision in this case. Nor is there any conflict between the Florida Supreme Court's decision in this case and that of the lower appellate courts. Therefore, review of this issue should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court rejected the claim that the trial court committed fundamental error by failing to instruct the jury that it must find beyond a reasonable doubt that the aggravating factors were sufficient to justify death and that the aggravating factors outweighed the mitigating factors. *Mosley v. State*, 349 So.3d 861, 870 (Fla. 2022). The Florida Supreme Court explained that the sufficiency of the

aggravating factors and the weighting of the aggravating factors against the mitigating circumstances "are not elements that must be determined by the jury beyond a reasonable doubt." *Id.* at 870 (citing *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019)).

Florida's death penalty statute

Florida's death penalty statute, § 921.141(2), Florida Statutes (2022), provides:

> 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.
> (c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(emphasis added). The explicit text of Florida's death penalty statute provides that a Florida capital defendant is "eligible" for a death sentence if the penalty phase jury unanimously finds "at least one aggravating factor." § 921.141(2)(b)(2), Fla. Stat. (2022). The Florida Supreme Court has read the state's death penalty statute to require only that the jury find one aggravating factor unanimously at the beyond a

reasonable doubt standard of proof for a Florida capital defendant to be eligible for the death penalty. *State v. Poole*, 297 So.3d 487, 505 (Fla. 2020), *cert denied, Poole v. Florida*, 141 S.Ct. 1051 (2021); *McKenzie v. State*, 333 So.3d 1098, 1105 (Fla. 2022) (declining to revisit what was settled in *State v. Poole* which was "only the existence of a statutory aggravating factor must be found beyond a reasonable doubt"), *cert. denied, McKenzie v. Florida*, 143 S.Ct. 230 (2022). The Florida Supreme Court has also interpreted the statutory phrase "whether sufficient aggravating factors exist," to mean "one or more" aggravators. *State v. Poole*, 297 So.3d at 502 (citing § 921.141(3)(a), Fla. Stat. and quoting prior cases).

Interpretation of a state statute is a matter of state law

This Court lacks jurisdiction over issues that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). The interpretation of a state statute by a state court is a matter of state law, not a matter of federal constitutional law. *Johnson v. United States*, 559 U.S. 133, 138 (2010) (stating we are "bound by the Florida Supreme Court's interpretation of state law" including its determination of the elements of a state statute citing *Johnson v. Fankell*, 520 U.S. 911, 916 (1997)); *Schad v. Arizona*, 501 U.S. 624, 636 (1991) (stating: "we are not free to substitute our own interpretations of state statutes for those of a State's courts"); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (stating that state courts are the ultimate expositors of state law and that "we are bound by their constructions except in extreme circumstances").

Whether Florida's death penalty statute requires the jury make the additional sentencing determinations, such as sufficiency of the aggravators and weighing, is solely a matter of state law, already definitively and finally decided by the Florida

Supreme Court adversely to the petitioner's position in *State v. Poole*. The Florida Supreme Court has held that only the aggravating factors must be found beyond a reasonable doubt and this Court is not free to disagree. While this Court can declare the statute, as interpreted by the state courts, unconstitutional, this Court is not free to read a state statute differently from the state's highest court. There is no federal question presented in this issue and therefore, this Court lacks jurisdiction to grant review of this issue.

No conflict with this Court's jurisprudence

There is no conflict between this Court's Sixth Amendment or due process jurisprudence and the Florida Supreme Court's decision in this case.

Regarding the standard of proof in connection with mitigation and weighing, this Court has noted that many mitigating circumstances, such a mercy, "simply" are not factual determinations. *Kansas v. Carr*, 577 U.S. 108, 121 (2016). This Court also observed that mitigation is "largely a judgment call" or "perhaps a value call" rather than purely a factual determination. *Carr*, 577 U.S. at 119. This Court additionally observed that the ultimate question of whether mitigating circumstances outweigh aggravating circumstances "is mostly a question of mercy" and it would "mean nothing" to tell the jury that the defendants must deserve mercy beyond a reasonable doubt. *Id.* at 119. The *Carr* Court observed that jury instructions on the burden-of-proof regarding such determinations would only produce jury confusion. *Id.* This Court's view is that, in the last analysis, "jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not." Because sufficiency and weighing are not factual determinations, no standard of proof applies to those determinations.

Regarding the Sixth Amendment, this Court recently explained in *McKinney v. Arizona*, 140 S.Ct. 702 (2020), that the right-to-a-jury trial provision only requires jury

findings regarding the aggravating circumstance, not weighing. This Court stated that capital defendants are entitled to "a jury determination of any fact on which the legislature conditions an increase in their maximum punishment—in particular, the finding of an aggravating circumstance." *McKinney*, 140 S.Ct. at 707. But this Court also explained that defendants are not constitutionally entitled to a jury determination of weighing or to a jury determination of the "ultimate sentencing decision." *Id.* at 707. "States that leave the ultimate life-or-death decision to the judge may continue to do so." *McKinney*, 140 S.Ct. at 708. Neither *Ring v. Arizona*, 536 U.S. 584 (2002), nor *Hurst v. Florida*, 577 U.S. 92 (2016), require jury weighing of the aggravation against the mitigation. *Id.* at 708. Constitutionally, judges may perform the weighing function, including appellate judges. Indeed, the basic holding of *McKinney* was to reaffirm the concept of appellate reweighing, established in *Clemons v. Mississippi*, 494 U.S. 738 (1990), which permitted reviewing courts to reweigh the aggravation against the mitigation. *Id.* at 709. There is no conflict between this Court's decision in *McKinney* and the Florida Supreme Court's decision in *State v. Poole* because the Florida Supreme Court's reasoning in *State v. Poole* exactly mirrors this Court's reasoning in *McKinney*.

Opposing counsel's insistence that all additional determinations required for a jury to recommend a death sentence must also be made by the jury is contrary to this Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013), despite opposing counsel's reliance on the case. Pet. at 12,17. The *Alleyne* Court explained that 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." *Alleyne*, 570 U.S. at 107. When a finding of fact "aggravates" the punishment, that fact necessarily forms a constituent part of a new offense and must be found by the jury. *Id.* at 114-15. If the aggravating fact produces a higher range

of punishment, that "conclusively indicates that the fact is an element" of the aggravated crime and the Sixth Amendment requires it be submitted to the jury and found beyond a reasonable doubt. *Id.* at 116. The *Alleyne* Court held that a jury "must find any facts that increase either the statutory maximum or minimum" but also observed that additional factual determinations within the range may be made by the judge. The *Alleyne* Court specifically noted that its holding "does not mean that any fact that influences judicial discretion must be found by a jury." *Id.* at 116. Rather, it stated that this Court has long recognized, and continues to recognize, that judicial factfinding related to sentencing "does not violate the Sixth Amendment." *Id.* at 116 (citing *Dillon v. United States*, 560 U.S. 817, 828 (2010)). Judges may still make factual findings to select a punishment within limits fixed by law and, while such fact finding may lead the judge to select a sentence that is more severe, "the Sixth Amendment does not govern" that aspect of sentencing *Alleyne*, 570 U.S. at 113, n.2. The *McKinney* Court more recently observed that this Court has "carefully avoided any suggestion" in its line of cases based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that it was "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." *McKinney*, 140 S.Ct. at 707.

This Court has repeatedly observed that it is aggravators that are elements of the greater offense of capital murder. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (stating that because aggravating factors "operate as the functional equivalent of an element of a greater offense" of capital murder, "the Sixth Amendment requires that they be found by a jury"); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality opinion) (explaining, that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances'" which "increases the maximum permissible

sentence to death" and therefore, a jury, and not a judge, must find the existence of any aggravating circumstances beyond a reasonable doubt); *McKinney*, 140 S.Ct. at 705 (stating that under "this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found," citing numerous cases). So, because it is the aggravator that increases the penalty to death, it is only aggravating factors that must be found at the beyond a reasonable doubt under this Court's due process jurisprudence. Only one fact increases a sentence to a death sentence in Florida and that fact, under the text of Florida's death penalty statute and the Florida Supreme Court's controlling precedent of *State v. Poole*, is the finding of one aggravating factor. § 921.141(2)(b)(2), Fla. Stat. (2022). It is that fact, and that fact alone, that the jury must find at the beyond a reasonable doubt standard of proof.

Opposing counsel argues that mitigation is not merely an opportunity for mercy but a "necessary step" in Florida's death penalty statute for a jury to recommend a death sentence. Pet. at 20. This Court in *Carr* did not view mitigation as a factual determination, but even if mitigation is viewed as a factual determination, mitigation does not increase or aggravate the sentence, as required for a fact to operate as an element. To the contrary, mitigation operates to *decrease* the sentence. Mitigation, therefore, is not an element under the definition used in *Ring* or *Alleyne*. Mitigation is a sentencing factor that constitutionally may be determined by a judge alone at a lower standard of proof. A "necessary step" does not an element make. Weighing is also a necessary step in most capital sentencing schemes but this Court rejected the argument that weighing had to be performed by the jury in *McKinney*. Opposing counsel's position really amounts to a claim that the constitution requires jury sentencing in capital cases but this Court has repeatedly rejected that view, including most recently in *McKinney*. *McKinney*, 140 S.Ct. at 708 ("*Ring* has nothing to do with

jury sentencing").

Furthermore, as opposing counsel acknowledges, this Court has repeatedly denied similar petitions raising these same arguments, including petitions raising this same issue by this same attorney.[5] This Court should likewise deny review of this petition.

Moreover, the petition does not acknowledge or distinguish *Carr* or *McKinney*. Again, petitions for writ of certiorari that do not account for this Court's recent decisions in an area do not warrant this Court's serious consideration.

There is no conflict with this Court's Sixth Amendment or due process jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with the lower appellate courts

There is also no conflict between the decision of any federal appellate court or any state court of last resort and the Florida Supreme Court's decision in this case. As

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[5] *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019), *cert. denied, Rogers v. Florida*, 141 S.Ct. 284 (2020) (No. 19-8473) (same office); *Newberry v. State*, 288 So.3d 1040, 1047 (Fla. 2019) (holding sufficiency and weighing determinations "are not subject to the beyond a reasonable doubt standard of proof"), *cert. denied, Newberry v. Florida*, 141 S.Ct. 625 (2020) (No. 20-5072) (same office); *Bright v. State*, 299 So.3d 985, 998 (Fla. 2020), *cert. denied, Bright v. Florida*, 141 S.Ct. 1697 (2021) (No. 20-6824) (same office); *Santiago-Gonzalez v. State*, 301 So.3d 157, 177 (Fla. 2020), *cert. denied, Santiago-Gonzalez v. Florida*, 141 S.Ct. 2828 (2021) (No. 20-7495) (same office); *Craven v. State*, 310 So.3d 891, 902 (Fla. 2020), *cert. denied, Craven v. Florida*, 142 S.Ct. 199 (2021) (No. 20-8403) (same office); *Craft v. State*, 312 So.3d 45, 57 (Fla. 2020), *cert. denied, Craft v. Florida*, 142 S.Ct. 490 (2021) (No. 21-5280) (same issue raised by the same attorney); *Doty v. State*, 313 So.3d 573, 577 (Fla. 2020), *cert. denied, Doty v. Florida*, 142 S.Ct. 449 (2021) (No. 21-5672) (same issue raised by the same attorney); *Woodbury v. State*, 320 So.3d 631, 656 (Fla. 2021), *cert. denied, Woodbury v. Florida*, 142 S.Ct. 1135 (2022) (No. 21-6393); *Deviney v. State*, 322 So.3d 563, 572-73 (Fla. 2021), *cert. denied, Deviney v. Florida*, 142 S.Ct. 908 (2022) (No. 21-6429) (same issue raised by the same attorney); *Allen v. State*, 322 So.3d 589, 603 (Fla. 2021), *cert. denied, Allen v. Florida*, 142 S.Ct. 904 (2022) (No. 21-6328) (same issue raised by the same attorney); *Davidson v. State*, 323 So.3d 1241, 1247-48 (Fla. 2021) ("Since *Rogers*, we have consistently held the reasonable-doubt standard inapplicable to either the sufficiency or weighing determination"), *cert. denied, Davidson v. Florida*, 142 S.Ct. 1152 (2022) (No. 21-6654) (same issue raised by the same attorney); *McKenzie v. State*, 333 So.3d 1098, 1105 (Fla. 2022), *cert. denied, McKenzie v. Florida*, 143 S.Ct. 230 (2022) (No. 22-5088); *Bell v. State*, 336 So.3d 211, 217 (Fla. 2022), *cert. denied, Bell v. Florida*, 143 S.Ct. 184 (2022) (No. 21-8187) (same issue raised by the same attorney); *Joseph v. State*, 336 So.3d 218, 227, n.5 (Fla. 2022), *cert. denied, Joseph v. Florida*, 143 S.Ct. 183 (2022) (No. 21-8177).

this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

The federal circuit courts, of course, follow *Carr* and *McKinney*. Opposing counsel cites no federal circuit court holding that jury weighing or jury sentencing in capital cases is constitutionally required by the Sixth Amendment after this Court's statements to the contrary in *McKinney v. Arizona*. Various state supreme courts have followed this Court's recent decision in *McKinney*. *See, e.g., State v. Trail*, 981 N.W.2d 269, 309 (Neb. 2022) (holding Nebraska's sentencing scheme, which leaves to the three-judge panel the ultimate life-or-death decision as well as the determinations of whether the aggravating circumstances justify the death penalty and weighing "does not violate the Sixth Amendment right to a jury trial" citing *McKinney v. Arizona*); *State v. Whitaker*, 196 N.E.3d 863 (Ohio 2022) (rejecting an argument that a capital defendant is entitled to a jury determination of the mitigation and weighing citing *McKinney v. Arizona*); *People v. McDaniel*, 493 P.3d 815, 851, 859 (2021) (stating a penalty phase jury's sentencing decision "is not a traditional factual determination in any relevant sense" and acknowledging this Court's holding in *McKinney v. Arizona* that the Constitution does not require a jury to perform the weighing or that the jury make the ultimate sentencing decision in a capital case), *cert. denied, McDaniel v. California*, 142 S.Ct. 2877 (2022). Opposing counsel does not even attempt in the petition to establish any conflict between the Florida Supreme Court's decision in *State*

v. Poole or in this case and that of any other state supreme court after this Court's decision in *McKinney*.

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state court of last resort. Because there is no conflict among the lower appellate courts, review should be denied.

In sum, the petition presents two issues—one of which this Court just recently rejected in *United States v. Tsarnaev* and another one of which is a matter of state law regarding the interpretation of a state statute by the state highest court over which this Court lacks jurisdiction.

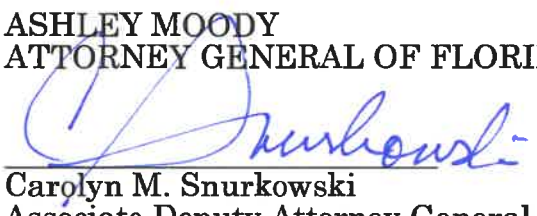
Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



Carolyn M. Snurkowski
Associate Deputy Attorney General
Counsel of Record

Charmaine Millsaps
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3566
primary email: capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com