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 Supreme Court of Florida

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PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. The Court Should Grant Review Because the Decision Below Rejects Mitigation Directly Related to the Defendant.

Petitioner did not cite *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022), in the Petition for Writ of Certiorari for the simple reason that this case, unlike *Tsarnaev*, involves mitigation related directly to Mr. Mosley. Mr. Mosley attempted to present evidence of the sexual abuse that pervaded his family of origin and its effect on him — evidence he had been allowed to present in a previous penalty phase. Thus, the decision in *Tsarnaev* is not controlling.

The evidence at issue in *Tsarnaev* was evidence linking the defendant's deceased brother, Tamerlan, to unsolved murders that had taken place in 2011, a little over a year and a half before the bombing involving Dzhokhar Tsarnaev. 142 S. Ct. 1024. The evidence purportedly related to Tamerlan's "domineering nature." *Id.* at 132. A third party, Ibragim Todashev, had implicated Tamerlan in the murders and told FBI agents the murders took place during a robbery; Todashev was then killed when he attacked the agents. *Id.* at 1032-33. When Dzhokhar Tsarnaev filed a motion to compel production of FBI records, the Government filed a motion in limine to exclude any reference to the earlier murders at Dzhokhar Tsarnaev's trial. *Id.* at 1033. The district court granted the motion, reasoning that "the evidence did not show what Tamerlan's role was and, with Todashev dead, no further line of inquiry remained." *Id.* A panel of the First Circuit Court of Appeals held the district court had abused its discretion in excluding the evidence. *Id.*

This Court reversed based on the application of the Federal Death Penalty Act (FDPA), specifically section 3593(c), which allows mitigating evidence to be excluded under a traditional balancing test that considers "the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *See Tsarnaev*, 142 S. Ct. at 1037. The Court noted there was no allegation Dzhokhar Tsarnaev had any role in the earlier crime, no way to verify the alleged facts, and no way to even confirm the role Tamerlan had played. *Id.* The Court rejected an argument that "a district court violates the Eighth Amendment…if it excludes any marginally relevant mitigating evidence that fails the § 3593(c) balancing test." *Id.* at 1038. The Court explained:

> Our cases do not support Dzhohkar's extreme position. "'*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.'"

Id. (citations omitted).

The Court continued that both the State and Federal Governments "may enact reasonable rules governing whether specific pieces of evidence are admissible." *Id.* (citations omitted). Because section 3593 does not deny defendants "a full and fair opportunity" to present relevant mitigating evidence, it does not violate Eighth Amendment standards. *Tsarnaev*, 142 S. Ct. at 1039.

This case presents the type of exclusion that violates *Lockett* and its progeny. Mr. Mosley attempted to offer evidence of how he had been affected by his father's sexual abuse of his sisters. The evidence was proffered by a witness with first-hand

knowledge, unlike the evidence at issue in *Tsarnaev*. The trial court rejected the evidence not on the grounds of a balancing test, but because Mr. Mosley's father was not on trial and thus his credibility was not at issue. This deprived Mr. Mosley of a full and fair opportunity to present mitigation evidence relating to his own background — as noted in the original Petition, evidence that had been admitted in an earlier penalty phase. Review of this decision is justified.

II. The Sufficiency of Aggravating Circumstances to Justify Imposing a Death Penalty is Separate from the Weighing of Aggravating Circumstances against Mitigating Circumstances.

Under Florida's capital sentencing scheme, the determination that at least one aggravating factor exists, the determination that sufficient aggravating circumstances exist to justify a death sentence, and the determination that aggravating factors outweigh any mitigating circumstances, are distinct findings. *See* Fla. Stat. § 921.141 (2) (a)-(b). The requirement that "sufficient" aggravating factors exist is an additional requirement not found in many state statutes. Florida and at least one other state require a separate finding that the aggravating factors are sufficient to justify imposing a death sentence. *See* § 921.141 (2) (a)-(b); Ark. Code Ann. § 5-4-603(a)(2021) (requiring imposition of a death sentence only if jury returns three findings including "(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt."). This separate finding is independent of the weighing of aggravators and mitigators. *See* Fla. Stat. § 921.141 (2) (a)-(b).

Given that the number of potential aggravating factors has doubled since capital punishment was reinstated in Florida,[1] this is not a mere formality; it is a legislative directive that the aggravating circumstances in a particular case not only fall into one of the enumerated categories, but also rise to a level justifying the death penalty.

Until the Florida Supreme Court eliminated proportionality review in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), *cert. denied*, 142 S. Ct. 188 (2021), the court's practice of reviewing each death sentence sometimes served this function. *See, e.g.*, *Yacob v. State*, 136 So. 3d 539, 552 (Fla. 2014). In *Yacob*, the court vacated a death sentence as disproportionate, despite the presence of a statutory aggravating factor. *Id.* The court explained that the aggravating factor, a contemporaneous robbery, was not weighty based on the facts and circumstances of the case: the murder was not part of the robbery plan, the defendant had pocketed his gun while leaving after the robbery, and the defendant then fired the fatal shots when the victim moved suddenly. *Id.* at 550, 552. Accordingly, when the case was compared with similar capital cases, the court concluded death was not a proportionate sentence. *Id.* at 552; *see also Scott v. State*, 66 So. 3d 923, 925 (Fla. 2011) (vacating death sentence where two statutory aggravators were present, including a prior violent felony, but "the aggravators — though properly found —

[1] When Florida rewrote its capital sentencing law following this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the law contained eight aggravating factors. *See Proffitt v. Florida*, 428 U.S. 242, 251 (1976). The statute now contains 16. *See* Fla. Stat. § 921.141(6)(a)-(p) (2022).

were not particularly weighty"); *Johnson v. State*, 720 So. 2d 232, 236 (Fla. 1998) (finding sufficient evidence to support the defendant's conviction, but vacating the defendant's death sentence because one of the alleged aggravators was "not strong"); *Sinclair v. State*, 657 So. 2d 1138, 1142-43 (Fla. 1995) (vacating a death sentence as disproportionate where the only valid aggravator was that the murder was committed in the course of a robbery); and *Thompson v. State*, 647 So. 2d 824, 827 (Fla. 1994) (vacating a death sentence based on a single valid aggravator, murder in the course of a robbery).

Under the current statute, the safeguard between a defendant with a comparatively minor prior criminal record, or whose capital offense was committed contemporaneously with a comparatively less weighty offense, is the requirement that the jury or trial judge make a determination that the alleged aggravators are sufficient to justify a death sentence.

This Court's decisions in *McKinney v. Arizona*, 140 S. Ct. 702 (2020) and *Kansas v. Carr*, 577 U.S. 108 (2016) arose in different contexts and do not negate Petitioner's argument. In *McKinney*, this Court held the Arizona Supreme Court could reweigh aggravating and mitigating circumstances on collateral review of a death sentence after a federal appeals court held the state court had failed to properly consider relevant mitigating evidence. 140 S. Ct. at 706, 709. Under the version of the Arizona sentencing statute in effect at the time McKinney was originally sentenced, he had not been entitled to a jury determination of aggravating circumstances. *See id.* at 708. McKinney argued that this Court's

subsequent decisions in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 577 U.S. 92 (2016), should be applied to require resentencing by a jury in his case. *See McKinney*, 140 S. Ct. at 707. This Court rejected McKinney's argument for two reasons. First, the Court held that appellate courts can reweigh aggravating and mitigating evidence if the lower court did not properly consider mitigating evidence. *Id.* (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990)). Second, the Court held *Ring* and *Hurst* had not changed the law to require that the jury weigh aggravating and mitigating circumstances before imposing death. *Id.* at 707-08.

The issue in *McKinney* was whether it was permissible to conduct appellate reweighing of aggravating and mitigating factors, and that is not the issue presented here. The issue here is the level of certainty required for the Florida requirement that the factfinder determine that the aggravating circumstances justify death before proceeding to the choice of sentence. The sufficiency requirement is a finding of ultimate fact, just as a finding that the "especially heinous, atrocious, or cruel" or "cold, calculated, and premeditated" were present is a finding of ultimate fact. *See generally U.S. v. Gaudin*, 515 U.S. 506, 514-15 (1995) (discussing the jury's role in determining not just historical facts, but the "ultimate facts" about whether the element of a crime has been satisfied).

Moreover, the statutes at issue are fundamentally dissimilar. The 1993 Arizona sentencing statute applied in *McKinney* specified that the trial court "alone" would make all factual determinations necessary to impose a death sentence. Ariz. Rev. Stat. Ann. § 13-703B (1993). The statute made death an

available punishment for every first-degree murder, with the trial court making the selection:

> In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Ariz. Rev. Stat. Ann. § 13-703E (1993).[2]

In contrast to the former Arizona statute, the current Florida sentencing scheme circumscribes the court's ability to impose a death sentence in several ways — one of which is requiring the findings in section 921.141(2)(b)2.a.-c. before a death penalty can be considered. That other states have structured their statutes differently does not change Florida's capital sentencing scheme. This Court's decisions upholding the constitutionality of statutes that require only a finding of an aggravating factor beyond a reasonable doubt before a defendant can be sentenced to death do not foreclose the possibility that a different statutory scheme creates different burdens of proof.

Finally, the ultimate facts of the sufficiency of the aggravator or aggravators to justify a death sentence and that they outweigh mitigating circumstances are distinct from the "mercy decision" referred to in *Carr*, 577 U.S. at 119. Petitioner is not arguing Florida's capital sentencing scheme attaches any particular burden of

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[2] The current Arizona provision is substantially similar, with the substitution of "trier of fact" for "court" and some other small revisions. *See* Ariz. Rev. Stat. Ann. § 13-751E (2021).

proof to the ultimate recommendation of a death sentence (or sentence of life in prison). What is at issue are the determinations without which a death penalty cannot be imposed. Once those determinations are made, both the jury and the trial court may, but are not required to, "accord mercy if they deem it appropriate." *Carr*, 577 U.S. at 119.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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