No.

In the
Supreme Court of the United States

THOMAS BEVEL,
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

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether Florida's capital sentencing scheme violates the Eighth Amendment because the controlling statute does not meaningfully limit the class of defendants eligible for the death penalty and Florida's elimination of proportionality review has removed an essential safeguard against arbitrary and inconsistent sentencing.

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) (2021). 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).

III. Whether the Florida Supreme Court improperly extended the holding of *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), to limit Mr. Bevel's ability to argue to a jury that a death sentence was inappropriate.

STATEMENT OF RELATED PROCEEDINGS

Bevel v. State, 376 So. 3d 587 (Fla. 2023), No. SC2022-0210 (Fla. opinion and judgment rendered October 16, 2023; order denying rehearing rendered on December 15, 2023).

State v. Bevel, No. 16-2004-CF-004525 (Fla. 4th Cir. Ct. judgment and sentencing order filed on February 11, 2022, nunc pro tunc to February 4, 2022, the date of oral pronouncement of sentence).

Bevel v. State, 221 So. 3d 1168 (Fla. 2017) (Fla. Opinion rendered June 15, 2017, reversing the denial of post-conviction relief and remanding for resentencing).

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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…"

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 Thomas Bevel was convicted in 2005 of the first-degree murders of Garrick Stringfield and Phillip Sims, Stringfield's 13-year-old son, and of the attempted murder of Feletta Smith, all arising out of the same criminal episode. *See Bevel v. State*, 376 So. 3d 587, 589 (Fla. 2023). His conviction was affirmed on direct appeal, but his sentence was vacated following an appeal from the denial of post-conviction relief. *See id.* at 591. The Florida Supreme Court held counsel had been ineffective during the original penalty phase and, further, that Mr. Bevel was entitled to resentencing for the murder of Mr. Stringfield based on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), receded from in part by *State v. Poole*, 297 So. 3d 487 (Fla. 2020), *cert. denied*, 141 S. Ct. 1051 (2021). *Bevel*, 376 So. 3d at 591; *see generally Bevel v. State*, 221 So. 3d 1168 (Fla. 2017) (reversing denial of post-conviction relief, vacating sentence, and remanding for resentencing).

The Penalty Phase.

At a November 2019 hearing on a defense motion to bar the death penalty based on intellectual disability (R. 98-111, 1540-85), Dr. Robert Ouaou testified he had evaluated Mr. Bevel in 2013 and determined that Mr. Bevel's IQ was 71, and that a subsequent evaluation of Mr. Bevel's adaptive functioning in 2018-19 had resulted in the conclusion that he met the criteria for intellectual disability. (R. 1544-48.) However, he testified that an adaptive behavior assessment from 2005 changed his mind, and that with that additional information, he concluded that Mr. Bevel did not meet the criteria to be considered intellectually disabled. (R. 1553-55.) He agreed that Mr. Bevel had deficits in adaptive functioning. (R. 1555.) The

defense agreed it would not be arguing Mr. Bevel had an intellectual disability as that is defined in the law. (R. 1575.) The court later entered an order denying the defense motion. (R. 127-31.)

Following a February 2020 motion hearing the trial court denied a number of defense motions. (R. 259, 260-63, 1601-50.) These included a Motion to Declare Sections 921.141 and/or 921.141(5)(d) Florida Statutes and/or the (5)(d) Standard Instruction Unconstitutional Facially and As Applied (R. 206-11), denied (R. 260); Motion to Declare Sections 921.141 and/or 921.141(5)(b) Florida Statutes and/or the Standard (5)(b) Instruction Unconstitutional On Its Face and As Applied (R. 222-27), denied (R. 261); Defendant's Motion for Requested Jury Instruction: Mercy (R. 247-48), denied (R. 261); Defendant's Requested Preliminary Instruction (R. 229-30), ruling reserved (R. 262); and Motion to Declare Florida Capital Sentencing Scheme Unconstitutional as Violative of the 8th Amendment and Evolving Standards of Decency, denied (R. 262).

Defendant's Requested Preliminary Instruction would have required the court, among other things, to inform the jury: "Regardless of your findings on aggravating factors, you are never compelled or required to find that a person should be sentenced to death. You may always consider Mercy in making this determination." (R. 229-30.) Defendant's Motion for Requested Jury Instruction: Mercy, would have informed the jury "[R]egardless of your findings as to aggravating and mitigating circumstances, you are neither compelled nor required

to recommend a sentence of death. You may always consider mercy in making this determination." (R. 247-28.)

Following argument in November and December 2021, the court granted in part a State motion in limine to preclude the defense from making any argument about the proportionality of the death sentence during voir dire or any other part of the trial, including stating the death penalty is reserved for the "worst of the worst." (R. 351-52, 1676-1755, 1945, 1954-80.) The trial court ordered the defense to refrain from referencing, arguing, or inviting the jury to engage in a comparative proportionality analysis, but did not preclude using the phrase "worst of the worst." (R. 360-62.)

Penalty Phase Trial and *Spencer* Hearing

The state presented testimony from Sojourner Sims Parker, Phillip Sims's mother (T. 668-79); Feletta Smith, the third victim in the original incident (T. 682-703); investigating officers (714-26, 849-1017); the doctor who treated Ms. Smith, who said her wounds would have been fatal if she did not receive treatment (T. 729-33); and two medical examiners (T. 747-68). The state also read back testimony from Rohnika Dumas, mother of Mr. Bevel's child, who was with him on the night of the incident. (T. 776-808.)

The witnesses established that Phillip Sims was visiting his father, Garrick Stringfield, on the evening of Saturday, February 28, 2004. (T. 676.) Mr. Bevel, who Mr. Stringfield called his "nephew," was there. (T. 676.) Eventually they were joined by Mr. Stringfield, Ms. Smith, and Ms. Dumas. (T. 690-91, 779-83.) The adults went

into separate bedrooms, leaving Phillip Sims playing a video game. (T. 693-94.) At about 3:00 AM Ms. Smith heard a knock on the bedroom door and Mr. Bevel's voice; then shots were fired. (T. 696-97, 792-93.) Mr. Bevel told her "bitch, shut up" and shot her; she played dead. (T. 697-98, 793.) He left the room and shot Phillip Sims, then left the house with Ms. Dumas. (T. 698, 1017.) As they drove away Mr. Bevel asked her to hold the steering wheel, put the rifle to his own chin, and said he hadn't meant to kill the boy. (T. 794-95, 1057-58.) Ms. Smith spent a month in the hospital and had multiple surgeries, and eventually identified Mr. Bevel to the police. (T. 702-03.) Mr. Bevel was interrogated by police about a month after the shooting and initially denied involvement, but eventually made several admissions. (T. 903-22, 943-45, 1014-17.)

The court also heard victim impact testimony from Mr. Stringfield's mother, as well as Phillip Sims's mother, brother, and grandmother. (T. 1083-98.) As Ms. Parker left the stand, Mr. Bevel said to her "I am sorry for the pain I caused you," leading to an admonishment from the trial judge. (T. 1101, 1102-03.)

The defense case included a read-back of prior testimony of Mr. Bevel's half-brother, grandmother, and a family friend, as well as testimony from someone who grew up with him, an attorney who represented him as a juvenile, and a foster parent who cared for him for several months when he was a teen. They established that Mr. Bevel's father was a heroin addict who left the family and died of AIDS when Mr. Bevel was about 18; that he was sexually abused as a child; that his mother was killed in a car accident when he was about 12, after which he was

raised by his grandmother, who had several other children in the home; and that he started drinking heavily and smoking marijuana before he was a teenager. (T. 1109-12; 1186; 1236-37; 1248-53; 1377-79; 1392.) Even before his mother died, he had been involved in selling street drugs for an older man, and he was arrested for possession of crack cocaine with intent to distribute not long after her death. (1137-38; 1181-85; 1252-53; 1286.) He was briefly placed in a therapeutic placement, where he attended school and was well-behaved at home, but then he returned to his family and old neighborhood. (1286-92; 1335-51; 1378-79.) When he was 18, he started selling drugs for Mr. Stringfield. (1125; 1131.) Drug sales, drive-by shootings, and gang wars were common in the neighborhood where he grew up. (1131-36; 1181.) One of his sisters died of AIDS and two brothers were killed in a drug war. (1183-84.) Mr. Bevel was shot several times when he was 20 in drug-related shooting. (1192.)

Dr. Steven Gold, a psychologist specializing in trauma, testified to Mr. Bevel's history of depression and abuse. (T. 1377-80.) Of ten "adverse childhood experiences" that greatly increase the possibility of psychological difficulties later in life Mr. Bevel had experienced seven or eight and "unquestionably" suffered from post-traumatic stress disorder (PTSD) in addition to untreated depression, both of which would have begun in childhood. (T. 1384-84; 1387-89; 1391-91; 1414.) Dr. Gold stated he was not attributing Mr. Bevel's offenses directly to his diagnoses but was unequivocal that Mr. Bevel was under the influence of extreme mental or emotional disturbance at the time of the murders. (T. 1407-15.)

A prison and jail consultant described Mr. Bevel as "a model inmate, a compliant prisoner," and said he had skills that could be beneficial in the prison system if he were allowed to leave death row. (T. 1458; 1464-65; 1470-76.)

A psychologist with a specialization in neuropsychology who administered a battery of tests on Mr. Bevel in 2013 testified there were no signs of malingering, and the tests were consistent with frontal lobe impairment attributed to a number of head injuries Mr. Bevel had suffered during his childhood and youth. (T. 1521-22; 1534-43.) Although his memory was good, his performance was significantly impaired on seven of eight tests of executive function. (T. 1543-44.) Dr. Ouaou stated frontal lobe impairment affects decision-making, can make people more impulsive based on the environment, and is linked not just with physical injury, but also with early alcohol use as well as early physical or sexual trauma. (T. 1545-47.) A diagnostic radiologist testified that MRI and PET scans of Mr. Bevel's brain showed frontal lobe deficits and damage to the brain in the areas involving "regulating emotion and control of behaviors." (T. 1611-13; 1615-16; 1620-21.)

Finally, Mr. Bevel's 17-year-old daughter testified that she was in frequent contact with her father, and that he encouraged her to stay focused and stay in school. (T. 1647-48.)

The jury found the prior violent felony aggravator was satisfied as to Mr. Stringfield, and found no mitigating circumstances. (R. 1261-68; T. 1874-77.) As to Phillip Sims, the jury found both the prior violent felony and the "avoiding arrest" aggravators were satisfied, and again found no mitigating circumstances. (R. 1269-

75; T. 1878-81.) The jury voted unanimously to sentence Mr. Bevel to death on both charges. (R. 1268, 1276; T. 1877, 1881.)

At a *Spencer* hearing the defense provided the court with two additional transcripts of testimony from Mr. Bevel's family at prior proceedings. (R. 1304-20; 1326-56.) Mr. Bevel did not testify at either the penalty phase trial or the *Spencer* hearing.

The Sentencing Order.

In its written sentencing order, attached as Exhibit C, the court found the State had proven the violent felony aggravator as to both Mr. Stringfield and Phillip Sims beyond a reasonable doubt based on the contemporaneous nature of the charged offenses and a prior conviction for attempted robbery, and gave it very great weight. (R. 1440-42.) As to Phillip Sims, the court also found the State had proven the "avoid arrest" aggravator beyond a reasonable doubt and gave it very great weight. (R. 1442-45.) The court found the aggravating factors "sufficient — individually and collectively — to warrant a sentence of death." (R. 1445-46.)

As to the mitigating factors, the court agreed with the jury that Mr. Bevel had not established that he committed the murders while under the influence of extreme mental or emotional distress. (R. 1450.) The court also agreed Mr. Bevel's age at the time of the offenses — 22 years old — was not a mitigating circumstance. (R. 1452.)

Under the heading of the "catch-all" mitigating provision, Florida Statutes section 921.141(7)(h), the court either rejected most of Mr. Bevel's proposed mitigation or gave it little weight:[1]

- Mr. Bevel's IQ of 71 was found to be established by the greater weight of the evidence, but given little weight;
- The trauma of Mr. Bevel losing his mother at the age of 12 was established by the greater weight of the evidence, but given little weight;
- The absence of Mr. Bevel's father and his later death from heroin use was established by the greater weight of evidence, but the court found it not mitigating in nature and gave it no weight;
- Mr. Bevel's repeatedly witnessing acts of violence and substance abuse during his childhood and teenage years was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's being raised by a grandmother who was trying to raise multiple grandchildren with few financial or emotional resources was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's growing up in an area where drug sales, gunfire, violence, and substance abuse were common was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's being brought into a criminal lifestyle at a very young age was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel being heavily influenced by the older Garrick Stringfield, who sold drugs and had a reputation for violence, was not established by the greater weight of the evidence and was given no weight;
- Mr. Bevel's being shot in 2001, when he was 20 years old, was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel having the capacity for love and kindness, in spite of his traumatic childhood, was established by the greater weight of the evidence but the court found it was not mitigating in nature and gave it no weight;

[1] As to each rejected mitigating circumstance, the court noted that if the circumstances were found to be mitigating, it would accord them very slight weight.

- Mr. Bevel's good behavior in jail and in court was established by the greater weight of the evidence but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel responding well to structured environments was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's confession and remorse were not established by the greater weight of the evidence and were given no weight;
- Mr. Bevel's continued involvement with his family and nurturing relationship with his daughter was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's suffering from brain damage that affected his decision-making was established by the greater weight of the evidence, and afforded little weight;
- Mr. Bevel's being raised in a strong religious faith was established by the greater weight of the evidence, but the trial court did not consider it mitigating in nature and gave it no weight.

(R. 1453-63.)

The court concluded that "the aggravating factors heavily outweigh the mitigating factors, and that death is the only proper penalty for the murders of Garrick Stringfield and Phillip Sims…." (R. 1464.)

The Direct Appeal.

On appeal, Mr. Bevel raised five issues. First, Mr. Bevel argued the trial court abused its discretion in disregarding the uncontroverted expert testimony of Dr. Gold that Mr. Bevel was under the influence of extreme mental and emotional distress, caused by persistent PTSD and depression, at the time of the offenses, and in improperly focusing on whether Mr. Bevel's PTSD caused the offenses. Second, he argued the court abused its discretion in denying the defense's requested jury instructions on the role of mercy in capital sentencing. Third, he argued fundamental error occurred when the court failed to instruct the jury that its

determinations regarding the sufficiency and weight of aggravating factors were subject to proof beyond a reasonable doubt. Fourth, he argued that Florida's capital sentencing scheme does not satisfy Eighth Amendment standards because it does not adequately channel the sentencer's discretion and lacks safeguards against arbitrary and inconsistent capital sentencing in light of increases in the number and scope of aggravating factors under Florida law and the Florida Supreme Court's elimination of proportionality review. Finally, he argued the court erred when it granted the State's First Motion in Limine and precluded the defense from making any argument about the proportionality of a death sentence for Mr. Bevel.

A timely motion for rehearing was denied without further discussion. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

I. 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. Bevel'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 (2021). 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) (2021). 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) (2021).

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*, 577 U.S. 92 (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.[2] 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." *Id.* at 94. 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 95-96. 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 98. 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

[2] 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. *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.

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. The earlier statutory scheme, which still placed the jury in an advisory role, did not describe the eligibility decision and the selection decision the same way as the statutes in effect when Mr. Bevel was sentenced. *Compare* Fla. Stat. § 921.141 (2011) *with* Fla. Stat. § 921.141 (2021). 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.

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*.

B. Imposing a Death Sentence Without Subjecting Predicate Findings to the Appropriate Burden of Proof Violates Mr. Bevel'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.

The Florida Supreme Court's decision in *Poole* 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.*[3] 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.

II. Florida's capital sentencing scheme does not meaningfully limit the class of defendants eligible for the death penalty and thus does not satisfy Eighth Amendment standards.

Since Florida enacted its post-Furman capital sentencing scheme, the legislature and courts have repeatedly increased the breadth and number of aggravating factors. In addition, the Florida Supreme Court's elimination of proportionality review has removed an essential check on the sentencer's discretion.

[3] 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);); *Wells v. State*, 364 So. 3d 1005, 1014 (Fla.), *cert. denied*, 144 S. Ct. 385 (2023).

The result is that Florida law no longer contains safeguards against arbitrary and inconsistent sentencing and fails to satisfy Eighth Amendment standards.

A. Florida's sentencing scheme does not meaningfully limit the number of offenses eligible for a death sentence.

This Court has stated that "channeling and limiting of the sentencer's discretion is imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). This requires meaningful narrowing of the class of individuals subject to capital punishment. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987) ("a State must 'narrow the class of murderers subject to capital punishment' by providing 'specific and detailed guidance' to the sentencer.") (citations omitted). An aggravating circumstance making a defendant eligible for the death penalty "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). An aggravating circumstance is constitutionally deficient when it does not provide a "principled way" to distinguish cases in which death is an appropriate penalty from those in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 428, 433 (1980) (holding nothing in the phrase "outrageously or wantonly vile, horrible and inhuman" implied "any inherent restraint on the arbitrary and capricious infliction of the death sentence").

When Florida's first post-Furman sentencing statute was enacted, it included eight statutory aggravating factors. *See State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). Florida's current capital sentencing scheme contains 16 aggravating factors. Fla Stat. § 921.141(6)(a)-(p) (2023). Beyond the addition of eight statutory aggravating factors, two factors have been amended to expand their scope since the original eight were enacted. Subsection (6)(a), which referred to "a person under sentence of imprisonment" when *Dixon* was decided, now encompasses "a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation." Subsection (6)(d), the prior violent felony aggravator, has been amended since *Dixon* was decided to include additional felonies. *See* 273 So. 2d at 5. Since *Dixon*, cases applying that aggravator have upheld the use of convictions that were pending on appeal as "prior violent felonies." *E.g., Peek v. State*, 395 So. 2d 492, 499 (Fla. 1981) (superseded by statute on other grounds as stated in *Merck v. State*, 763 So. 2d 295, 299 (Fla. 2000)). An offense occurring contemporaneously with the charged capital offense can also be treated as a "prior violent felony." *See Lucas v. State*, 376 So. 2d 1149, 1153 (Fla. 1979).[4]

This steady expansion of the number and scope of aggravating factors may be typical of states still maintaining the death penalty, but that does not make it any less problematic:

[4] Most recently, the Florida Legislature added two non-homicide offenses to the list of offenses for which a death sentence can be imposed. *See* Fla. Stat. § 921.1425 (2023) ("Sentence of death or life imprisonment for capital sexual battery); Fla. Stat. § 921.142 (2023) ("Sentence of death or life imprisonment for capital drug trafficking felonies").

> When only a handful of offenders are sentenced to death despite expansive statutes that render most murderers eligible for the death penalty, it becomes more likely that those selected for death are being chosen arbitrarily.

Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv. C.R.-C.L.L. Rev. 223, 223–24 (2011) (footnotes omitted).

Given the number and breadth of the statutory aggravators in Florida's death penalty statute, *see, e.g.*, *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992), it is impossible to say they "channel the sentencer's discretion by clear and objective standards" as required by, inter alia, *Godfrey*, 446 U.S. at 428. In 2013, a commentator noted that nearly all first-degree murder cases were death-eligible. *See generally* Stephen K. Harper, *The False Promise of Proffitt*, 67 U. Miami L. Rev. 413, 417-23 (2013). For a brief time after Florida's capital sentencing statute was revised in light of this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), the Florida Supreme Court interpreted the sentencing statute to require a finding of "sufficient" aggravating circumstances to justify a death sentence. *See Hurst v. State*, 202 So. 3d 40, 57-58 (Fla. 2016). Since then, however, the Florida high court has receded from *Hurst* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Poole*, 297 So. 3d at 507. Continually adding to the list of aggravating factors with no requirement that they be sufficient to justify a death sentence completely fails to serve the narrowing function required by this Court's jurisprudence.

B. The elimination of proportionality review has removed a necessary safeguard against arbitrary and inconsistent capital sentencing.

The Florida Supreme Court adopted comparative proportionality review as an essential feature of Florida's post-*Furman* sentencing scheme "to ensure that the statute would be implemented in a way that would avoid the constitutional concerns articulated in Furman." *See Lawrence v. State*, 308 So. 3d 544, 549 (Fla. 2020) (citing *State v. Dixon*, 283 So. 2d 1 (Fla. 1973)). This Court cited Florida's practice of reviewing the proportionality of death sentences favorably in its decision upholding Florida's post-*Furman* capital sentencing scheme. *See Proffit v. Florida*, 428 U.S. 242, 251 (1976).

Then, this Court held in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), that comparative proportionality analysis is not the only way to limit the sentencer's discretion in imposing the death penalty. The Court did not disapprove of proportionality review, however, and cited Florida's appellate review of death sentences as an example of a system containing appropriate safeguards against arbitrary or inconsistent sentencing. *Id.* at 45-48. The Florida Supreme Court continued to analyze the proportionality of death sentences for more than 35 years later until, ostensibly in reliance on *Pulley*, the court eliminated comparative proportionality review. *See Lawrence*, 308 So. 3d at 548.

The Florida statute does not, on its face, meaningfully limit the number of persons who are subject to the death penalty or provide a meaningful basis for ensuring that death is imposed only for similar offenses occurring under similar circumstances. Until 2020, Florida's long-standing practice of comparative

proportionality review did that that. *See Lawrence*, 308 So. 3d at 544-55 (Labarga, J., dissenting); *see also Yacob v. State*,136 So. 3d 539, 546-47 (Fla. 2014) (receded from in Lawrence).

If the factors making a defendant "death eligible" are consistently expanded, and the resulting sentences upheld without viewing the proof of those aggravating factors in any kind of context, there is no meaningful limit on the sentencer's discretion.

III. The Court Erred in Precluding Any Argument to the Jury about the Proportionality of Mr. Bevel's Possible Sentence.

The court erred in granting the State's first motion in limine and in hampering the defense from arguing that Mr. Bevel's case was not among the small number where a death sentence is justified. The State's motion relied in part on *Herring v. State*, 446 So. 2d 1049 (Fla. 1984), which held that proportionality was not a jury issue. *Herring* is no longer good law; it was based on a former version of Florida Statutes that allocated decision-making in capital cases differently from the current statute, and it was decided at a time when the Florida Supreme Court still adhered to a mandate of appellate review of comparative proportionality. *See id.* at 1056. The motion also relied on *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), which receded from this Court's previous requirement of comparative proportionality review. However, the defendant in *Lawrence* had waived a jury, *id.* at 548, and so that case did not involve what could or could not be argued to the jury. The holding in *Lawrence* was that, under the conformity clause and in light of U.S. Supreme

Court precedent saying proportionality review is not constitutionally required, a judicially created requirement of proportionality review on appeal could not stand.

As discussed in Section II, above, this Court has never held that proportionality review is improper. It has simply held that requiring appellate review of comparative proportionality of a death sentence is not constitutionally required for a state statutory scheme to satisfy Eighth Amendment standards. *Pulley v. Harris*, 465 U.S. 37, 50 (1984). As Justice Stevens noted when explaining the denial of certiorari in a separate case:

> We stated in [*Pulley v. Harris*] that the Eighth Amendment does not require comparative proportionality review of every capital sentence. *Id.*, at 44–46; *see also McCleskey*, 481 U.S. at 306, ("[W]here the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required"). But that assertion was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them, *id.*, at 45; it was not meant to undermine our conclusion in *Gregg* and *Zant* that such review is an important component of the Georgia scheme.

Walker v. Georgia, 555 U.S. 979, 983–84 (2008).

Appellate review of Mr. Bevel's sentence was not at issue in the trial court. Arguments based on the proportionality of a defendant's potential sentence are neither improper nor precluded under *Pulley v. Harris*, 465 U.S. 37, 50 (1984), and the Florida courts erred in extending *Pulley* beyond its scope to limit the arguments Mr. Bevel could make to his sentencing phase jury. As a result, Mr. Bevel's sentence violates his right to be free from cruel and unusual punishment.

CONCLUSION

Florida's capital sentencing scheme fails to satisfy both Sixth and Eighth Amendment standards because, as interpreted by the Florida Supreme Court, it allows a death sentence to be imposed based on findings that are not subject to proof beyond a reasonable doubt. Florida's capital sentencing scheme does not comport with Eighth Amendment standards because it fails to narrow the sentencer's discretion appropriately. Finally, the Florida Supreme Court has inappropriately extended the holding of *Pulley v. Harris* to preclude trial arguments based on the proportionality of a sentence. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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