**NO. 23-7024**

**IN THE SUPREME COURT OF THE UNITED STATES**

**THOMAS BEVEL,**
***Petitioner,***

**v.**

**STATE OF FLORIDA,**
***Respondent.***

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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## QUESTIONS PRESENTED FOR REVIEW

**[Capital Case]**

**I. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim that due process requires that all findings related to capital sentencing be at the beyond a reasonable doubt standard of proof.**

**II. Whether the Florida Supreme Court abolishing proportionality review in capital cases violates the Eighth Amendment or *Pulley v. Harris*, 465 U.S. 37 (1984).**

**III. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim that proportionality was a jury issue.**

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## JURISDICTION

This Court's jurisdiction to review the final judgment of the Supreme Court of Florida is permissible under 28 U.S.C. § 1257. However, this Court should decline to exercise jurisdiction in this case because the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a court of appeal of the United States, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. In short, no compelling reasons exist to grant a writ of certiorari in this case. Sup. Ct. R. 10.

## CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

## STATEMENT OF CASE

The petition seeks review of a decision of the Florida Supreme Court affirming death sentences for the first-degree murders of Bevel's friend and roommate, Garrick Stringfield, and Stringfield's thirteen-year-old son, Phillip Sims.

**Facts of the murder**

Thomas Bevel, who was twenty-two years old at the time of the crime[s], resided with Garrick Stringfield, who was thirty. The two were close friends, such

that Stringfield referred to Bevel as "nephew" or "Tom Tom" and Bevel referred to Stringfield as "Unc." *Bevel v. State*, 376 So. 3d 587, 589 (Fla. 2023).

On February 28, 2004, both men were at a street parade in Jacksonville where they ran into Feletta Smith, whom they both knew from their childhood. Smith exchanged telephone numbers with Stringfield and made plans to meet later that evening. Because Stringfield was going out, he asked Bevel to wait for his thirteen-year-old son, Phillip Sims, who was being dropped off by his mother, Sojourner Parker. Around 9 p.m., Stringfield met Smith at a Walgreens store and she followed him back to his house. When they arrived at Stringfield's house, Bevel and Sims were playing video games in the living room where Smith and Stringfield joined them. *Id.* at 589–90.

At some point, Smith and Stringfield went into his bedroom to watch television. Stringfield showed Smith an AK-47 rifle that he kept under his bed and, because Smith was scared of it, he handed the gun to Bevel who removed it from the room. Bevel then left to meet up with his girlfriend, Rohnicka Dumas, who he brought back to the house. *Id.*

Later in the evening, Bevel left the bedroom with the AK-47 rifle in his hand. He went to Stringfield's bedroom, where Smith and Stringfield were lying in bed nearly asleep, knocked on the door and said, "Unc, open the door." Stringfield got up from the bed, unarmed, and opened the door in his pajamas. Bevel immediately

shot Stringfield in the head and he instantly fell to the floor in the doorway. Smith began screaming and Bevel yelled, "Bitch, shut up" while he shot her several times as she lay in the bed. Smith became quiet and pretended to be dead. *Id.* Smith was eventually able to reach 911 by using Stringfield's cell phone. Ultimately, rescuers were able to transport her to the hospital where she stayed for almost a month while undergoing multiple surgeries for various gunshot wounds to her pelvis and upper legs. *Id.* at 590–91.

Bevel then went into the living room where Sims was still sitting on the sofa with the television remote in his hand and shot him twice, once grazing his arm and chest and once in the face. Subsequently, Bevel returned to the bedroom where Dumas had been, and they walked out the front door. Bevel locked the burglar bar door, a barred security gate located on the outside of the front door to the house and drove away in Stringfield's car with Dumas sitting in the passenger seat. While driving to Dumas's house, Bevel held the AK-47 rifle under his chin and stated that he did not mean to kill the boy (Sims) but had to because he was going to be a witness. Bevel abandoned Stringfield's car near Dumas's house. *Id.*

After hiding for almost a month, Bevel was finally found by officers from the Jacksonville Sheriff's Office on March 27, 2004. Although Bevel confessed to murdering Stringfield and Sims, his version of events was contrary to the testimony of both Smith and Dumas. Bevel stated that he and Stringfield had been fighting

recently about money that Stringfield believed he was owed, and that Bevel feared that Stringfield was going to try and kill him. He said that when he brought Dumas back to the house that night, Stringfield began to get angry, saying that he should have killed Bevel a long time ago. While Dumas and Smith were in opposite bedrooms, the fight escalated until Stringfield was pointing the handgun at Bevel and Bevel had picked up the AK-47 rifle. Then, Stringfield went into his bedroom and, when Bevel heard a clicking noise that sounded like a magazine being loaded into the handgun, Bevel moved towards the room and shot Stringfield when he reached the door. Bevel said the gun went off several times, but he did not mean to shoot Smith. *Id.*

On appeal, the Florida Supreme Court unanimously rejected all of Bevel's claims and affirmed his murder convictions and death sentences. *Id.* at 526.

In 2017, on appeal from the denial of his motion for postconviction relief, the Florida Supreme Court reversed and remanded for a new penalty phase after concluding that counsel was ineffective during the penalty phase and that Bevel was entitled to relief under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), receded from in part by *State v. Poole*, 297 So. 3d 487 (Fla. 2020), for the death sentence imposed for Stringfield's murder. *Id. see generally Bevel v. State,* 221 So. 3d 1168 (Fla. 2017) (reversing denial of post-conviction relief, vacating sentence, and remanding for resentencing).

**Pre-Trial Motions**

On August 30, 2021, the State filed State's First Motion in Limine Regarding Death Sentences — Proportionality, which sought 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).

During the hearing on the State's motion, the State objected to defense counsel asking the jury or implying to the jury, either in jury selection or through any witness or through closings, to perform a proportionality analysis. The State reasoned that under the law the jury decides based on the case in front of it, and as reflected by case law the jury does not have an opportunity to weigh or determine one case versus another in terms of proportionality. (R 1682-83). In response, the defense conceded they were prohibited from asking the jury to perform a proportionality analysis:

> MS. SCHLAX: Your Honor, as written the state's first Motion in Limine the largest concern is that it's essentially asking the Court to have a chilling effect on the argument of counsel as written. *I concede that it would be improper* as was requested in *Herring* and the actual issue in *Herring vs. State*, found at 446 So. 2d 1049, was the defense attempted to actually call in their penalty phase other lawyers that practiced in their jurisdiction and wanted them to testify to the facts of their particular cases and, you know, then ultimately argue those people received a life sentence.
>
> THE COURT: Okay.
>
> MS. SCHLAX: *That was prohibited obviously, and I understand that ruling. I would not seek to do any such thing.*

THE COURT: Right.

MS. SCHLAX: I will tell the Court candidly that I do not anticipate asking any witness about any other facts of any other homicide and would obviously oblige the very particular ruling of *Herring* but to expand it to suggest that we are not even in questioning and it's difficult to anticipate every responsive a juror where you might give an example of a fellow murderer very popularly known. Like I have seen I have seen Adolf Hitler used as an example. Those are examples. They are not in any way attempting to have the jury conduct a proportionality review so I would ask the Court to deny this Motion in Limine and put any restrictions on the record as the Court has absolute discretion to limit or guide against any misstatements of the law the Court is concerned that defense counsel may do.

THE COURT: So at this juncture the Court is going to grant the motion in limited part and deny it as to the remainder. It's granted in limited part as to there shall be no mention, argument or invitation for jurors to conduct any sort of comparative analysis or what I think the law would consider proportionality review in their own way in a layman non legal way such as comparison of Adolf Hitler and the like. It is denied as to the remainder.

(R 1684-86; 1688).

The trial court also denied Defense 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); and Motion to Declare Florida Capital Sentencing Scheme

Unconstitutional as Violative of the 8th Amendment and Evolving Standards of Decency, denied (R 262).

**Penalty Phase/*Spencer* Hearing**

On December 7, 2021, a new jury was selected and sworn for Bevel's re-sentencing trial (TT 585-589) with opening arguments commencing on December 8, 2021. (TT 643-668).

After hearing the evidence, the jury unanimously found that the proposed aggravators—prior violent felony (based on a prior attempted robbery conviction and the contemporaneous murder and attempted murder) as to both murders and that the murder was committed for the purpose of avoiding arrest as to Sims's murder—were proven beyond a reasonable doubt and unanimously voted to sentence Bevel to death for each murder. None of the jurors found that any of the mitigating circumstances were established by the greater weight of the evidence. The trial court ultimately agreed with the jury that the aggravators were proven beyond a reasonable doubt and afforded each very great weight. As to the statutory mitigating circumstances, the trial court agreed with the jury that Bevel had not established that he committed the murders while under the influence of extreme mental or emotional disturbance and that Bevel's age of twenty-two at the time of the offenses was not mitigating.

As to the proposed other factors in Bevel's background that would mitigate against imposition of the death penalty under section 921.141(7)(h), Florida Statutes (2021), the trial court found as follows: IQ of seventy-one (little weight); Bevel's childhood was impacted by the trauma of his mother's death at age twelve (little weight); Bevel's father did not actively participate in his life and subsequently died due to heroin use (no weight); Bevel's childhood and teenage years were plagued by witnessing repeated acts of violence and substance abuse within his family (no weight); Bevel was essentially raised by his grandmother, who attempted to raise multiple grandchildren with very little financial or emotional resources (no weight); Bevel grew up in the eastern part of downtown Jacksonville, where drug selling, gunshots, violence, and substance abuse were common (no weight); Bevel was brought into the criminal lifestyle at a young age by his then criminal role models (no weight); Bevel was heavily influenced by the much older Garrick Stringfield (no weight); Bevel was shot multiple times in 2001 in front of his grandmother's house (no weight); Bevel, in spite of his traumatic childhood, has repeatedly shown the capacity for love and kindness (no weight); Bevel has exhibited good jail conduct as well as appropriate courtroom behavior (no weight); Bevel responds well in structured environments (no weight); Bevel confessed to his crimes and has shown immediate and repeated remorse (not established/no weight); Bevel continues to impact the lives of his family members and has developed a nurturing, caring

relationship with his daughter (no weight); Bevel suffers from brain damage which affects his decision making (little weight); Bevel was raised in a strong religious faith (no weight).

In sentencing Bevel to death, the court gave great weight to the jury's death recommendation and "wholly agree[d] with the jury's verdicts based on an assessment of the aggravating factors and mitigating circumstances presented and their respective weights." The court concluded that "the aggravating factors heavily outweigh[ed] the mitigating circumstances [ ] and that death is the only proper penalty for the murders." *Bevel v. State*, 376 So. 3d 587, 591–92 (Fla. 2023).

**Direct Appeal**

Bevel filed a notice of appeal on February 11, 2022, raising five issues.[1] The Florida Supreme Court affirmed the sentences and convictions on December 12, 2022. *Id.* at 598. Bevel filed a motion for rehearing that was denied on December 15, 2023. The mandate was issued on January 2, 2024.

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[1] Bevel claimed that (1) the trial court abused its discretion when it determined that Bevel was not under the influence of extreme mental or emotional distress when he killed Garrick Stringfield and Phillip Simms; (2) the court abused its discretion in denying the defense's requested jury instructions on the role of mercy in capital sentencing; (3) 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; (4) that Florida's capital sentencing scheme is unconstitutional; and (5) 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 Bevel.

On March 14, 2024, Bevel, represented by the Public Defender of the Second Judicial Circuit of Florida, filed a petition for a writ of certiorari in this Court.

## REASONS FOR DENYING THE WRIT

### I. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim that due process requires that all findings related to capital sentencing be at the beyond a reasonable doubt standard of proof.

Petitioner Bevel seeks review of the Florida Supreme Court's decision rejecting a claim that due process requires additional determinations to be made beyond a reasonable doubt standard of proof before the sentencer can choose to impose the death penalty. (Pet. at 19). Bevel also misconstrues sentencing aggravating and mitigating factors as functional elements of the crime. (Pet. at 12). Petitioner presents no unsettled question of constitutional law on the issue presented. Nor does the decision below present a conflict among either state or federal court. Accordingly, review should be denied.

**Florida Supreme Court Decision**

On direct appeal, Bevel argued that the trial court committed fundamental error by failing to find sufficient aggravators were found beyond a reasonable doubt and outweighed the mitigating factors to warrant the death penalty. Bevel's argument is based on the premise that the sufficiency and weighing determinations called for by § 921.141, Fla. Stat. (2021), are elements of the crime of capital murder and, as a result, require proof beyond a reasonable doubt. However, the Florida

Supreme Court noted that it has consistently rejected that argument holding that neither sufficiency nor weighing determination is subject to the reasonable doubt standard. *E.g.*, *McKenzie v. State*, 333 So. 3d 1098, 1105 (Fla. 2022), *cert. denied*, – — U.S. —, 143 S. Ct. 230, 214 L.Ed.2d 95 (2022); *Joseph v. State*, 336 So. 3d 218, 227 (Fla. 2022), *cert. denied*, — U.S. —, 143 S. Ct. 183, 214 L.Ed.2d 65 (2022); *Davidson v. State*, 323 So. 3d 1241, 1247-48 (Fla. 2021), *cert. denied*, — U.S. — –, 142 S. Ct. 1152, 212 L.Ed.2d 32 (2022). *Bevel v. State*, 376 So. 3d 587, 597 (Fla. 2023). The Florida Supreme Court found that Bevel's argument lacked merit and was inconsistent with case law and denied relief. *Id.*

As the Florida Supreme Court has explained, the penalty phase findings at issue here-whether the aggravators are sufficient-is "not [an] element of the capital felony of first-degree murder." *Rogers v. State,* 285 So. 3d 872, 885 (Fla. 2019), *cert. denied, Rogers v. Florida,* 141 S. Ct. 284 (Oct. 5, 2020); *see also State v. Poole*, 297 So. 3d 487, 503-13 (Fla. 2020), *cert. denied, Poole v. Florida,* No. 20-250 (Jan. 11, 2021). "Rather, [it is a] finding required of a jury: (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred." *Rogers,* 285 So. 3d at 885 (emphases in original). That is, the sufficiency of the aggravators is a sentencing factor intended to make the imposition of capital punishment less arbitrary by

guiding the exercise of the judge and jury's discretion within the applicable sentencing range.

The plain text of Florida's death-penalty statute supports this reading:

> If the jury ... [u]nanimously 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.

§ 921.141(2)(b)2., Fla. Stat.

In light of this Court's recent decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), Petitioner's contrary argument fails on its own terms. On certiorari review, the defendant argued that "a jury must resentence him" because a court "could not itself reweigh the aggravating and mitigating circumstances." *Id.* This Court rejected that claim because, "Under *Ring* and *Hurst,*" "a jury must find the aggravating circumstance that makes the defendant death eligible." *Id.* at 707. "[I]mportantly," however, "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.; see also id.* at 708 (explaining that "*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances"). Because the Sixth Amendment permits the "weigh[ing] [of] aggravating and mitigating" evidence by judges, *id.* at 707, the determination that

aggravators outweigh mitigators, or the determination that the aggravators are sufficient to impose a death sentence, cannot be considered an "element" of the offense. And because those determinations are not elements, they are not subject to the beyond-a reasonable- doubt standard. *See Alleyne v. United States,* 570 U.S. 99, 107 (2013) ("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."). In other words, *McKinney* rejects an essential premise of Petitioner's argument: that anything more than the finding of an aggravating factor is either an "element" or the "functional equivalent" of an element.

The outcome is not different simply because Florida has chosen to assign (in cases where the right to a penalty-phase jury has not been waived) the sufficiency of the aggravator's determination to the jury, rather than the judge as it constitutionally could have. If the Sixth Amendment permits a judge to determine whether aggravators outweigh mitigators, or whether the aggravators are sufficient to impose the death penalty, and further permits the judge to make either determination by some lesser standard (or none at all), nothing prevents the state from re-allocating that task to the jury by the same standard of proof. Any contrary theory would punish states for being *more* generous in extending procedural protections to capital defendants by forcing them to extend *all* available procedural protections. But because the weight of the aggravators is not an element of a capital offense, that

determination need not be found by a jury and, correspondingly, need not be found beyond a reasonable doubt. *See McKinney*, 140 S. Ct. at 707-08.

Finally, the statutory requirement that the jury weigh, among other considerations, "[w]hether sufficient aggravating factors exist," § 921.141(2)(b)2. a., Fla. Stat., adds nothing to Petitioner's argument. As construed by the Florida Supreme Court, "it has always been understood that . . . 'sufficient aggravating circumstances' means 'one or more.'" *Poole*, 297 So. 3d at 502 (citing cases). Put differently, "[u]nder longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances." *Id.* at 502-03.

For reasons this Court has already explained, it would make little sense to apply the beyond-a-reasonable-doubt standard to normative determinations of the kind at issue here. In *Kansas v. Carr*, this Court "doubt[ed]" that it is "even possible to apply a standard of proof to the mitigating-factor determination." *State v. Whitaker*, 577 U.S. 108, 119 (2016). This Court reasoned that "[i]t is possible to do so for the aggravating factor determination," on the one hand, because the existence of an aggravator "is a purely factual determination." *Id.* Whether mitigation exists, on the other hand, "is largely a judgment call"--or "perhaps a value call"-just as the "ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Id.* Thus, "[i]t would mean nothing . .

. to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more likely than not deserve it." *Id.*

The beyond-a-reasonable-doubt standard ensures that the prosecution must "persuad[e] the factfinder at the conclusion of the trial of [the defendant's] guilt beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364 (1970). This safeguard preserves the "moral force of the criminal law" because it does not "leave people in doubt whether innocent men are being condemned." *Id.* But sufficiency and weighing do not go to whether the defendant is guilty of a capital offense-that question is answered when the jury finds the existence of an aggravated first-degree murder. *See McKinney*, 140 S. Ct. at 707; *Kansas v. Marsh*, 548 U.S. 163, 175-76 (2006). Sufficiency and weighing instead go to the appropriateness of the penalty. That is, they are normative judgments, not facts. Not surprisingly, this Court has repeatedly denied review of similar challenges to the role of the jury in weighing and recommending death in Florida post-*Hurst*.[2]

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[2] *Randolph v. Florida*, 142 S. Ct. 905 (2022); *Craft v. Florida*, 142 S. Ct. 490 (2021); *Doty v. Florida*, 142 S. Ct. 449 (2021); *Wright v. Florida*, 142 S. Ct. 403 (2021); *Craven v. Florida*, 142 S. Ct. 199 (2021); *Santiago-Gonzalez v. Florida*, 141 S. Ct. 2828 (2021); *Bright v. Florida*, 141 S. Ct. 1697 (2021); *Newberry v. Florida*, 141 S. Ct. 625 (2020); *Rogers v. Florida*, 141 S. Ct. 284 (2020). This Court has also denied certiorari review in a case presenting the underlying question of whether the Sixth and Eighth Amendments require that a jury find that the aggravators outweighed the mitigators. *See Poole v. Florida*, 141 S. Ct. 1051 (2021).

**Question of State Law**

Petitioner does not argue that the Constitution necessarily requires that a jury weigh aggravating factors and mitigating circumstances during the eligibility phase of the capital sentencing process or that the Constitution requires that a jury find such weighing beyond a reasonable doubt. Rather, Petitioner argues that the Florida Legislature placed the weighing of aggravating factors and mitigating circumstances in the eligibility phase instead of the selection phase, thereby transforming the consideration of those factors into elements of the offense that must be found unanimously by the jury beyond a reasonable doubt.

Fatal to Petitioner's argument, however, the Florida Legislature and the Supreme Court of Florida have stated unequivocally that the eligibility phase ends once the jury finds at least one aggravating factor. See Fla. Stat.§ 921.141(2)(b)2; *see also Poole*, 297 So. 3d at 502-03. And with its decision in *Poole*, the Supreme Court of Florida expressly rejected any claim that the weighing of aggravating factors and mitigating circumstances takes place during the eligibility phase; *See Poole,* 297 So. 3d at 502-04 (interpreting a previous version of the statute and rejecting defendant's "suggestion" that sufficiency and weighing are elements of the offense). Therefore, to the extent Petitioner raises a question of state law regarding the elements of an offense, this Court must defer to the state court. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) (noting this Court is bound by a state

supreme court's interpretation of state law, including its determination of what are the elements of a criminal statute citing *Johnson v. Fankell*, 520 U.S. 911, 916 (1997)).

**No Conflict with this Court's Sixth and Eighth Amendment Jurisprudence**

The cases Petitioner cites do not conclude that the beyond a reasonable-doubt standard applies to non-factual determinations intended to guide the jury's sentencing recommendation. To the contrary, those cases evince this Court's understanding that that standard of proof is limited to factual findings. Due Process prescribes the beyond-a-reasonable-doubt standard only to "facts" found by "the factfinder." *In re Winship*, 397 U.S. at 363-64. The Due Process Clause, the Court there held, "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364; *see also Alleyne*, 570 U.S. at 103 ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."). Consistent with *Winship*, this Court in *Apprendi* expressly and repeatedly explained that the beyond-a-reasonable-doubt standard of proof applies to "facts." Thus, *Apprendi* did not hold that the beyond a reasonable doubt standard should be extended to non-factual normative judgments of the kind at issue here, and this Court's statements concerning that standard of proof undermine rather than support Petitioner's claim.

This Court's cases applying *Apprendi* to the capital sentencing context likewise did not hold that the Due Process Clause requires the jury to determine, beyond a reasonable doubt, that normative considerations support the imposition of the death penalty. In *Ring*, for example, this Court explained that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona,* 536 U.S. 584, 589 (2002). So too in *Hurst*, where this Court reiterated that the sentencing scheme in *Ring* violated the defendant's right to have "a jury find the facts behind his punishment." 577 U.S. at 98; *see also id.* at 94 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.").

In sum, the decision below does not conflict with this Court's precedents. None of the cases Petitioner cites held that a jury (or here, a judge) must find beyond a reasonable doubt that aggravating factors are sufficient to warrant the imposition of capital punishment. What is more, the reasoning of those cases expressly ties the beyond a reasonable doubt standard to factfinding of a kind not at issue here and thus undermines rather than supports Petitioner's claim.

**II. Whether the Florida Supreme Court abolishing proportionality review in capital cases violates the Eighth Amendment or *Pulley v. Harris*, 465 U.S. 37 (1984).**

Petitioner Bevel asserts that the Florida Supreme Court's decision in this case violates the Eighth Amendment because the Florida legislature and courts have increased the breadth and number of aggravating factors as well as eliminating proportionality review in capital cases. (Pet. at 20). There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case rejecting Petitioner's argument. This Court in *Pulley v. Harris,* 465 U.S. 37, 45 (1984) found that proportionality review is not a constitutional requirement. The Eighth Amendment does not require proportionality review regardless of the number of statutory aggravating factors in Florida's death penalty statute. This Court should deny review.[3]

**Florida Supreme Court Decision**

On direct appeal, Bevel argued that Florida's death penalty statute is facially unconstitutional under the Eighth Amendment stemming from the sheer number of aggravating factors in the statute combined with the Florida Supreme Court's holding in *Lawrence v. State*, 308 So. 3d 544, 552 (Fla. 2020) (finding comparative proportionality incompatible with conformity clause in article I, section 17 of Florida's Constitution). The court noted that they have consistently rejected similar arguments, *e.g.*, *Joseph*, 336 So. 3d at 227 n.5 (declining to address claim that

[3] This Court declined to review the Florida Supreme Court decision abrogating proportionality review in *Lawrence v. Florida*, 142 S. Ct. 188 (2021).

Florida's death penalty statute is unconstitutional because it does not sufficiently narrow the class of individuals eligible to receive the death penalty on the ground that this Court has repeatedly rejected the same argument); *Covington v. State*, 348 So. 3d 456, 480 (Fla. 2022) (rejecting claim that elimination of proportionality review in *Lawrence* rendered Florida's capital sentencing scheme unconstitutional); *Colley v. State*, 310 So. 3d 2, 15-16 (Fla. 2020) (rejecting claim that Florida's capital sentencing scheme is unconstitutional because the number of aggravating factors does not sufficiently narrow the class of individuals who are eligible to receive the death penalty). The court further noted that Bevel made no novel or compelling argument that would warrant reconsideration of the court's position. *Bevel*, 376 So. 3d at 597-98.

**No Conflict with this Court's Sixth and Eighth Amendment Jurisprudence**

There is no conflict between the Florida Supreme Court's decision in this case and this Court's Sixth and Eighth Amendment jurisprudence. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). This Court in *Pulley v. Harris* held the Eighth Amendment does not require proportionality review and the California scheme for imposition of the death penalty is not rendered unconstitutional by absence of provision for proportionality review. *Pulley v. Harris*, 465 U.S. 37 (1984). Harris was convicted of a capital crime in a California court and was sentenced to death. *Id.* at 38. In his appeals to the California Supreme Court and

his federal habeas petition, Harris argued that California's death penalty statute violated the Eighth Amendment for failure to require the court to compare Harris's sentence with the sentences imposed in similar capital cases and thereby to determine whether they were proportionate. *Id.* at 39-40.

The Court in *Pulley* explained that traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime by looking at the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes. *Pulley*, 465 U.S. 37 at 42-43. However, the review sought by Harris inquired whether the penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime. *Id.* at 43. Harris's argument relied mainly on *Furman v. Georgia*, 408 U.S. 238 (1972), and *Zant v. Stephens*, 462 U.S. 862 (1983), to support his position that the constitution mandates proportionality review in capital cases but this Court rejected Harris's interpretation in both cases and went on to discuss several other capital cases whose emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. *Pulley*, 465 U.S. at 50. This Court found that proportionality review was "an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley*, 465 U.S. at 50. The Court believed that to hold that the Eighth Amendment mandates proportionality review

would require the Court to effectively overrule *Jurek v. Texas*, 428 U.S. 262 (1976) and would substantially depart from the sense of *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) and *Proffitt v. Florida*, 428 U.S. 242 (1976). *Pulley*, 465 U.S. at 51.

Bevel, however, relies upon *Maynard v. Cartwright*, 486 U.S. 356 (1988). (Pet. at 21). But Maynard was a due process vagueness challenge to Oklahoma's heinous, atrocious, and cruel (HAC) aggravating factor, not an Eighth Amendment proportionality review case. Maynard certainly did not overrule *Pulley v. Harris*. Indeed, the Maynard Court did not even cite *Pulley v. Harris*. Bevel also relies on *Godfrey v. Georgia*, where the Court found Georgia's capital sentencing statutory aggravating circumstance so broad and vague that it violated the Eighth Amendment. *Godfrey v. Georgia*, 446 U.S. 420 (1980). However, the present case is not about the vagueness of the statute but about the elimination of proportionality review which is not required by the Eighth Amendment.[4]

This Court noted that proportionality review in capital cases was required by "numerous state statutes." *Pulley*, 465 U.S. at 43 & n.7. This Court also noted that

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[4]Even if this Court were inclined to reexamine its decades old precedent, this case presents a very poor vehicle for doing so. This was a resentencing and on Bevel's previous direct appeal---before proportionality review was eliminated---the Florida Supreme Court had little difficulty concluding that the death sentence was proportional for this double homicide. *Bevel v. State*, 983 So. 2d 505, 523–25 (Fla. 2008) ("Based on the very strong aggravation and minimal nonstatutory mitigation in this case and the jury's unanimous recommendation, we conclude that death is a proportionate punishment as to the murder of Sims.").

in the states whose death penalty statute did not require proportionality review, some states, such as Florida, the appellate court performs proportionality review despite the absence of a statutory requirement, while in other states, such as California and Texas, the appellate courts did not perform proportionality review. *Pulley*, 465 U.S. at 44. In a footnote, the *Pulley* majority discussed the Florida Supreme Court's proportionality review. *Id.* at 46 n.8. This Court stated that, while some states provide proportionality review, that "does not mean that such review is indispensable." *Id.* at 45. *See also Murray v. Giarratano,* 492 U.S. 1, 19 (1989); *Lewis v. Jeffers,* 497 U.S. 764, 779 (1990).

In *McKinney v. Arizona,* 140 S. Ct. 702 (2020) this Court reaffirmed *Clemons v. Mississippi,* 494 U.S. 738 (1990). McKinney argued that under *Ring v. Arizona,* 536 U.S. 584 (2002), and *Hurst v. Florida,* 577 U.S. 92 (2016), the jury was required to weigh the aggravation against the mitigation. The *McKinney* Court rejected that argument explaining that the Sixth Amendment only requires that the jury in a capital case find the one aggravator that makes the defendant eligible for the death penalty, not that the jury perform the weighing. *Id.* at 707. This Court stated that "a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found." *McKinney,* 140 S. Ct. at 705-06 (citing *Tuilaepa v. California,* 512 U.S. 967 (1994), *Zant v. Stephens,* 462 U.S. 862 (1983), and

*Gregg v. Georgia,* 428 U.S. 153 (1976)). So, under the reasoning of *McKinney,* an aggravating factor, by itself, is enough to warrant a death sentence.

There is no conflict between this Court's decision in *Pulley v. Harris* and the Florida Supreme Court's decision in this case.

**Equal Protection and Proportionality Review in Capital Cases**

Bevel is not actually asserting in his petition that this Court should recede from *Pulley v. Harris.* Rather, his assertion is that when a state has a "myriad" of aggravating factors in its death penalty statute, those particular states are required to have proportionality review as an additional safeguard against arbitrariness. Bevel argues that the Florida Supreme Court's elimination of proportionality review has removed an essential check on the sentencer's discretion. The result is that Florida law no longer contains safeguards against arbitrary and inconsistent sentencing and fails to satisfy Eighth Amendment standards.

But this Court has explained that a death penalty statute that limits the number of death-eligible crimes, requires bifurcated proceedings, and demands proof of at least one aggravating factor, gives the jury broad discretion to consider mitigating circumstances, and provides the jury with standards to guide its use of aggravating and mitigating information, is sufficient to minimize "the risk of wholly arbitrary, capricious, or freakish" death sentences. *Pulley*, 465 U.S. at 45 (discussing *Gregg*, 428 U.S. at 197-98). Florida's death penalty system does all those things and more.

Florida limits the death penalty as a possible penalty for first-degree murder which encompasses both premeditated murder and felony murder, but the murder statute limits the underlying felonies § 782.04(1)(a), Fla. Stat. (2021); *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018) (explaining capital murder in Florida). Florida, by case law, has trifurcated proceedings, not merely bifurcated proceedings. Florida has a guilt phase and a penalty phase in front of the jury as is typical of capital trials, but then Florida has another bench penalty phase where the defendant can present sensitive mitigation, such as illegal drug abuse, to the judge alone. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). Most importantly and unlike many other state's death penalty statutes, Florida's death penalty statute is jury sentencing plus judge sentencing. § 921.141, Fla. Stat. (2021). Under the death penalty statute, amended by the Florida Legislature in the wake of *Hurst*, a Florida capital jury must find each aggravating factor unanimously. § 921.141(2)(b)(2), Fla. Stat. (2021). The judge is bound by the jury's findings regarding the aggravating factors. § 921.141(3)(a), Fla. Stat. (2021) ("The court may consider only an aggravating factor that was unanimously found to exist by the jury."). If the jury does not "unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death." § 921.141(2)(b)(l), Fla. Stat. (2021). And under Florida case law, the prosecution is limited to statutory aggravating factors and may not present non-statutory aggravating factors. *Oyola v. State*, 158 So. 3d 504, 509-10, 513 (Fla. 2015)

(reversing because the trial court improperly relied on non-statutory aggravation which "cannot be harmless" under Florida law and remanding for a new penalty phase).[5] But there is no limit on the type of mitigating circumstances that a defendant may present under the "catch-all" statutory mitigating circumstance. § 921.141(7)(h), Fla. Stat. (2021) ("the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty"). The jury then finds mitigating circumstances and whether the aggravation "outweighs" the mitigation before making a sentencing recommendation to the judge. § 921.141(2)(b)(2), Fla. Stat. (2021). Under the statute the jury's findings regarding the aggravation are binding on the trial court but the jury's findings regarding mitigation are not. A jury can reject all the mitigation, but the trial court is free to disagree with the jury's assessment and find mitigation that was rejected by the jury. At the time of Bevel's sentencing, a recommendation of death from the jury must be unanimous § 921.141(2)(c), Fla. Stat. (2021). A Florida jury's recommendation of a life sentence is binding on the judge, but the jury's recommendation of a death

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[5] The FDPA allows the prosecution to present non statutory aggravating factors, unlike Florida's scheme. *United States v. Jones,* 132 F.3d 232, 240 (5th Cir. 1998) (rejecting a constitutional attack on the FDPA based on a combination of lack of proportionality and the prosecution being allowed to use and define non statutory aggravation and concluding that the FDPA is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of proportionality review). In effect, the FDPA allows a limitless number of aggravators and certainly far more than Florida's statutory aggravators.

sentence is not. § 921.141(3)(a)l, Fla. Stat. (2021) (stating that if the jury recommends a life sentence, "the court shall impose the recommended sentence"). However, a Florida trial judge is free to disagree with the jury's death recommendation and impose a life sentence. The jury has the last word on a life sentence but not on a death sentence. As is clear from this description, Florida's death penalty statute has better safeguards against arbitrariness than proportionality review. *United States v. Jones*, 132 F. 3d 232, 240 (5th Cir. 1998) (upholding the constitutionality of the FDPA regarding proportionality review on similar grounds).

Under Florida's death penalty statute, a Florida capital defendant gets a second opportunity for a life sentence from the judge. A Florida judge is free to disagree with the jury provided it benefits the defendant. A Florida capital defendant gets all the benefits of either actor's findings in his favor. It is hard to see how such a statute could possibly violate the Eighth Amendment, regardless of how the Eighth Amendment is interpreted. In addition, Bevel cannot meet the burden of an equal protection challenge because he cannot establish that he is being treated differently than defendants similarly situated. *Engquist v. Oregon Dept. of Agric.*, 553 U.S. 591, 602 (2008).

Given this Court's clear directive that proportionality review of capital cases is not required by the Eighth Amendment, there is no basis for granting certiorari review of this issue.

**III. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim that proportionality was a jury issue.**

Lastly, Petitioner Bevel asserts that 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 Bevel could make to his sentencing phase jury. (Pet. at 26). There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case, as this Court has made clear that arguments based on the proportionality of a defendant's potential sentence is not a matter for the jury. Though a capital sentencer must be allowed to consider relevant mitigating evidence, this Court has refused to limit "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 v. Ohio,* 438 U.S. 586, 605 n. 12 (1978).

This Court should deny review.

**Florida Supreme Court Decision**

On direct appeal Bevel relied on *Pulley v. Harris*, 465 U.S. 37, 50 (1984) to argue that since Appellate review of Bevel's sentence was not at issue in the trial court, arguments based on the proportionality of Bevel's potential sentence were neither improper nor precluded. In finding that the trial court did not err in its ruling,

the Florida Supreme Court stated that the jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant. It is not to compare the facts of the case before it to the facts of other cases or to compare the aggravation and mitigation applicable to the defendant before it to the aggravation and mitigation applicable to other defendants. *Bevel v. State*, 376 So. 3d 587, 597 (Fla. 2023), citing *Herring v. State*, 446 So. 2d 1049, 1056 (Fla. 1984).

**No Conflict with this Court's Eighth Amendment Jurisprudence**

There is no conflict between the Florida Supreme Court's decision in this case and this Court's Eighth Amendment jurisprudence, as this Court has made clear that the use of sentences imposed on other defendants is not a matter for the jury. (Sup. Ct. R. 10(c) listing conflict with this Court as a consideration in the decision to grant review).

The Eighth Amendment jurisprudence of this Court establishes two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. *Gregg v. Georgia,* 428 U.S. 153 (1976); *Furman v. Georgia,* 408 U.S. 238 (1972). Second, even though the sentencer's discretion must be restricted, the capital defendant

generally must be allowed to introduce any relevant mitigating evidence regarding his " 'character or record and any of the circumstances of the offense.' " *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett, supra,* 438 U.S., at 604. Whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases, is not relevant to that determination.

Beginning with *Furman*, this Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused. *Eddings* at 111 (1982). Thus, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the principal opinion held that the danger of an arbitrary and capricious death penalty could be met "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Id.*, at 195. By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances," the Georgia statute properly ***confined*** and directed the jury's attention to the circumstances of the particular crime and to "the characteristics of the person who committed the crime...." *Id.*, at 197. (emphasis added). These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. *Id.*

Likewise, in *Woodson v. North Carolina*, this Court held that the Eighth Amendment prohibited the use of mandatory death statutes because they prohibited

jurors from considering facts specific to the offender and the offense in each case. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Court expanded this requirement of case-specific, individualized determinations in *Lockett v. Ohio*, where the Court held that under the Eighth and Fourteenth Amendments to the United States Constitution, in order to constitutionally impose a capital sentence, the sentencer may "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." *Lockett*, 438 U.S. at 604. In *Lockett* and its progeny, this Court clearly established that "virtually no limits are placed on the ***relevant*** mitigating evidence a capital defendant may introduce ***concerning his own circumstances***...." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

However, the *Lockett* rule protects a defendant's right to present mitigating evidence particular to his person. The *Lockett* rule does not mean that the defense has carte blanche to argue any and all evidence that it wishes. *Troy v. Sec'y, Fla. Dep't of Corr.*, 763 F.3d 1305, 1314–15 (11th Cir. 2014). Personalized aggravating and mitigating factors are the essence of the "individualized consideration" mandated by the Eighth and Fourteenth Amendments. *Lockett*, 438 U.S. at 605, 98 S. Ct. 2954. At the heart of *Lockett* is the concept of individualization, not

comparison as Bevel suggests. Evaluating the sentences of other defendants in unrelated crimes sheds no light on Bevel's character, conduct, or individual qualities.

Given this Court's clear directive that there is no requirement in *Lockett* for the admission of such evidence in the sentencing phase, there is no basis for granting certiorari review of this issue.

## CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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