No. _____

OCTOBER TERM 2021

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD BARRY RANDOLPH,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's decision in *Hurst v. State* constitutes statutory construction of substantive law, and if so, whether the Due Process Clause of the Fourteenth Amendment requires that this substantive law govern the law in existence at the time of Richard Barry Randolph's alleged offense.

2. Whether Florida's capital sentencing scheme requires a factual finding proven beyond a reasonable doubt that sufficient aggravating circumstances are not outweighed by the available mitigating circumstances to sentence someone to in conformity with the Eighth, Sixth, and Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Richard Barry Randolph, a death-sentenced individual in the state of Florida, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Per Rule 14.1(b)(iii) of the Rules of the Supreme Court of the United States, the following cases relate to this petition:

Underlying Trial:
Circuit Court of Putnam County, Florida
State of Florida v. Richard Barry Randolph, Case No. 88-1357-CF-M
Judgment Entered: April 5, 1989

Direct Appeal:
Florida Supreme Court, Case No. SC60-74083
Randolph v. State, 562 So. 2d 331 (Fla. 1990)
Judgment Entered: May 3, 1990

Supreme Court of the United States, Case No. 90-5949
Randolph v. Florida, 498 U.S. 992 (1990)
Judgment Entered: November 26, 1990

Initial Postconviction Proceedings:
Circuit Court of Putnam County, Florida
State of Florida v. Richard Barry Randolph, Case No. 88-1357-CF-M
Judgment Entered: April 2, 1993 (Claim 5); February 24, 1998 (Claims 1-19); and May 14, 1998 (Claim 20)

Florida Supreme Court, Case No. SC60-81950
Randolph v. State, 676 So. 2d 369 (Fla. 1996)
Judgment Entered: March 7, 1996

Florida Supreme Court, Case No. SC60-93675
Randolph v. State, 853 So. 2d 1051 (Fla. 2003)
Judgment Entered: April 24, 2003

State Habeas Proceedings
Florida Supreme Court, Case No. SC01-2855
Randolph v. James v. Crosby, Jr., etc., 853 So. 2d 1051 (Fla. 2003)
Judgment Entered: April 24, 2003

Second State Habeas Proceedings
Florida Supreme Court, Case No. SC03-1056
Randolph v. James v. Crosby, 861 So. 2d 430 (Fla. 2003)
Judgment Entered: November 21, 2003

Supreme Court of the United States, Case No. 03-8419
Randolph v. Sec'y, Fla. Dep't of Corr., 541 U.S. 961 (2004)
Judgment Entered: March 29, 2004

Federal Habeas Proceedings
United States District Court for the Middle District of Florida
Randolph v. Walter A. McNeil, No. 3:04-CV-1206-J-33, 2008 WL 11438125, at *1 (M.D. Fla. Feb. 19, 2008)
Judgment Entered: February 19, 2008

United States Court of Appeals for the Eleventh Circuit, Case No. 08-12854
Randolph v. Walter A. McNeil, Bill McCollum, 590 F.3d 1273 (11th Cir. 2009)
Judgment Entered: December 22, 2009

Supreme Court of the United States, Case No. 10-5601
Randolph v. Walter A. McNeil, Sec'y, Fla. Dep't of Corr., et al., 131 S. Ct. 506 (2010)
Judgment Entered: November 1, 2010

First Successive Postconviction Proceedings
Circuit Court of Putnam County, Florida
State of Florida v. Richard Barry Randolph, Case No. 88-1357-CF-M
Judgment Entered: March 7, 2011

Florida Supreme Court, Case No. SC11-725
Randolph v. State, 91 So. 3d 782 (Fla. 2012)
Judgment Entered: April 26, 2012

Second Successive Postconviction Proceedings
Circuit Court of Putnam County, Florida
State of Florida v. Richard Barry Randolph, Case No. 88-1357-CF-M
Judgment Entered: December 31, 2019

Florida Supreme Court, Case No. SC20-287
Randolph v. State, 320 So. 3d 629 (Fla. 2021)
Judgment Entered: February 4, 2021
Rehearing Denied: June 22, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richard Barry Randolph, is a condemned prisoner in the State of Florida. Petitioner respectfully requests that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The Florida Supreme Court's opinion that is the subject of this Petition is reported as *Randolph v. State*, 312 So. 3d 59 (Fla. 2021), and attached hereto as "Appendix A." The Florida Supreme Court's order denying Mr. Randolph's motion for rehearing is unreported but referenced as *Randolph v. State*, No. SC19-2123, 2021 WL 914174, at *1 (Fla. Mar. 10, 2021), and is attached hereto at "Appendix D." The state circuit court order denying Mr. Randolph's successive motion for postconviction relief is unreported and attached hereto as "Appendix B."

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its opinion on February 4, 2021, and denied Mr. Randolph's timely Motion for Rehearing on June 22, 2021. This petition is timely filed in light of the Court's directive due to the COVID-19 pandemic extending the deadline to file any petition for writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower court order denying a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), with Petitioner having asserted in the state court below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the

United States.

CONSTITUTIONAL PROVISIONS INVOLVED

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

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . 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."

STATUTORY PROVISIONS INVOLVED

Fla. Stat. § 775.082 (2021)

Fla. Stat. § 782.04 (2021)

Fla. Stat. § 921.141 (2021)

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

I. LEGAL BACKGROUND

1. ***Florida's Original Sentencing Scheme.*** Florida's death penalty sentencing scheme requires the cross-referencing of multiple statutes. Fla. Stat. §§ 782.04, 775.082, 921.141. Under Florida law, a first-degree murder conviction constitutes a "capital felony" and is automatically subject to a life sentence without parole. § 775.082, Fla. Stat. (2021). § 775.082(1)(a) reads that a person convicted of a capital

felony "shall 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*. . . ." § 775.082(1)(a), Fla. Stat. (2019) (emphasis added).

At the time of Randolph's sentencing in 1989, the relevant portion of § 921.141 read:

> (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist. . . .;
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

§ 921.141(2), Fla. Stat. (1983). As indicated, this role was advisory in nature with the judge making the ultimate sentencing determinations. *Id.*

2. *Addressing the Role of Juries.* In 2000, this Court issued *Apprendi v. New Jersey* holding that "[o]ther than the fact of a prior conviction, *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added). The Court focused on whether "the required finding expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict[.]". *Id.* at 494. The Majority also noted that "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to

a defendant's guilt or innocence*, but simply to the length of his sentence*.'" *Id. (*quoting *Almendarez-Torres v. United States*, 523 U.S 224, 484 (1998)) (emphasis added).

In 2002, this Court issued Ring *v. Arizona*, finding that Arizona's capital sentencing scheme violated a defendant's Sixth Amendment right to a jury trial when it allowed "a judge, sitting without a jury, to find the aggravating circumstance necessary for imposition of the death penalty." *Ring v. Arizona,* 536 U.S. 584, 609 (2002). The Majority reasoned that because the enumerated aggravating factors function as "element[s] of a greater offense," the Sixth Amendment requires they be found by a jury. *Id.* at 585 (quoting *Apprendi,* 530 U.S. at 494). Further, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—*no matter how the State labels it*—must be found by a jury beyond a reasonable doubt." *Id.* at 585-86 (emphasis added). In his concurrence, Justice Scalia noted that "the accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges… cause[s] me to believe that our people's traditional belief in the right of trial by jury is in perilous decline." *Ring*, 536 U.S. at 611-12 (Scalia, J., concurring); *see also Id.* at 610 ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment . . . —whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."); *Apprendi,* 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater

punishment than that authorized by the jury's guilty verdict?").

3. *Applying* Apprendi *and* Ring *to Florida.* Fourteen years after *Ring*, this Court issued *Hurst v. Florida* holding Florida's 2010 capital sentencing scheme unconstitutional to the extent it allowed the judge, not the jury, to determine the sufficient aggravating circumstances necessary to impose a sentence of death. Fla. Stat. § 775.082(1)(a) (2010); Fla. Stat. § 921.141 (2010); *Hurst v. Florida*, 577 U.S. 92 (2016) [hereinafter *Hurst I*]. The Majority made clear that it is constitutionally infirm for a judge to make the factual findings supporting the determination that sufficient aggravating factors exist and are not outweighed by mitigating circumstances because the Sixth Amendment and the Due Process Clause "require[ ] that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst I,* 577 U.S. at 97 (citing *Alleyne v. United States*, 570 U.S. 99 (2013)).

In response to *Hurst I*, the Florida Legislature *partly* amended § 921.141. Fla. Stat. § 921.141 (2016). The statute now, for the first time, required a life sentence unless at least 10 jurors voted to recommend a death sentence. *Id.* at § 3(2)(c). The specific factual findings required for a recommendation of death remained the same. *Compare* § 921.141, Fla. Stat. (2015) *with* § 921.141, Fla. Stat. (2016) (noting that both Subsection (2) of the 2015 statute and Subsection (2)(2) of the 2016 statute require the jury to make its recommendation based on whether sufficient aggravating factors exist that are not outweighed by sufficient mitigating circumstances).

On October 14, 2016, the Florida Supreme Court decided *Hurst v. State* and

reinforced the Sixth Amendment's requirement that a jury be the "finder of every fact, and thus every element, necessary for the imposition of the death penalty." *Hurst v. State,* 202 So. 3d 40, 53 (Fla. 2016) [hereinafter *Hurst II*]. *Hurst II* found that whether sufficient aggravating circumstances exist and whether they outweigh mitigating circumstances are "critical findings necessary for imposition of a death sentence [and] are the sole province of the jury." *Id.* at 57. The court ultimately held:

> [T]he Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger,* 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), under Florida law, "The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances." *Id.* at 313, 111 S.Ct. 731 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)). Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Id. at 53. In addition to these findings, the Florida Supreme Court held that the Eighth Amendment requires "juror unanimity in any recommended verdict resulting in a death sentence." *Id.* at 59. This principle was further cemented in *Perry v. State*, 210 So. 3d 630, 639 (2016) ("Consistent with our decision in *Hurst*, we construe section 921.141(2)(b) 2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating

factors exist to impose death, and that they outweigh the mitigating circumstances found to exist."). With these decisions, the Florida Supreme Court expressly intended to ensure the "future validity and long-term viability of the death penalty in Florida" in accordance with federal law. *Hurst II,* 202 So. 3d at 61-62.

On March 13, 2017, in response to *Hurst II*, the Florida Legislature again amended § 921.141 to accord with the announced rule of law. The modified statute required a life sentence unless a *unanimous* jury recommends death. Fla. Stat. § 921.141 (2017). As was the case with the 2016 amendments, the specific factual findings required to recommend death remained unmodified. *Compare* § 921.141, Fla. Stat. (2016) *with* § 921.141, Fla. Stat. (2017) (noting the only change between the two statutes occurred in Subsection (2)(c) which went from requiring at least 10 jurors to recommend death to requiring a unanimous recommendation). § 921.141(2) currently provides that the jury shall unanimously determine that the State has proven beyond a reasonable doubt that at least one aggravating factor exists in order to make a defendant eligible for a death sentence. § 921.141(2), Fla. Stat. (2021). If the jury finds that at least one aggravating factor exists, it is then instructed to make a recommendation to the court by weighing whether sufficient aggravating factors outweigh the mitigating circumstances. *Id.* at § (b)(2).

4. *Applying* Hurst *Retroactively*. Following *Hurst I* & *II*, Florida courts saw an influx of relief claims from individuals on death row who were sentenced under Florida's original statutory scheme. The issue then became whether the decisions

announced applied to those whose sentences had already been finalized. The question of retroactivity is not a new one. It carries a complicated history and difficult application that many lower courts, as well as this Court, continue to work through today.

Analyzing retroactive application in the state of Florida most notably starts in 1980 with *Witt v. State* where the Florida Supreme Court held that a change in law can only apply retroactively if "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt v. State*, 387 So. 2d at 931 (Fla. 1980). To be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. That threefold test requires courts to weigh: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. *Id. at 926.*

Nine years after *Witt,* this Court issued *Teague v. Lane*, addressing and ultimately reworking the federal analysis of retroactive rule application. *Teague v. Lane*, 489 U.S. 288, 302 (1989) ("The *Linkletter* retroactivity standard has not led to consistent results."). While primarily focusing on cases in direct appeal, the opinion

observed that the *Linkletter* standard resulted in disparate treatment of "similarly situated defendants on collateral review." *Id.* at 305. The Majority likened the disparity to both its "failure to treat retroactivity as a threshold question and the *Linkletter* standard's inability to account for the nature and function of collateral review." *Id.* To remedy the disconnect, this Court held that "decisions announcing new constitutional rules would only be applied retroactively on collateral review under two circumstances: (1) decisions placing conduct beyond the power of the government to proscribe; and (2) decisions announcing a 'watershed' rule of criminal procedure that is 'implicit in the concept of ordered liberty.'" *Windom v. State,* 886 So. 2d 915 (Fla. 2004) (quoting *Teague,* 489 U.S. at 311).

Teague effectively became the floor of retroactivity application and state supreme courts were free to adopt more expansive standards. *Danforth v. Minnesota,* 552 U.S. 264, 281 (2008). Florida has continued to use *Witt* to analyze its retroactivity cases. *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005) ("We continue to apply our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague.*"); *see generally Asay v. State*, 224 So. 3d 695 (Fla. 2016) (conducting a full *Witt* analysis).

Despite being given a green light to apply more expansive retroactivity standards than *Teague*, state courts are not free to "establish the scope of [their] own habeas corpus proceedings." *Danforth*, 552 at 299. The *Danforth* Court left open the question of whether state courts were required to apply *Teague*'s "substantive rule"

exception. This issue was later addressed in *Montgomery v. Louisiana*, where this Court first highlighted that the classification of new substantive rules as an "exception" to *Teague* was misleading; rather, substantive rules "are more accurately characterized as . . . not subject to the bar [on retroactive application]." *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004)). The Court then clarified that "when a new substantive rule of constitutional law controls the outcome of a case, the constitution requires state collateral review courts to give retroactive effect to that rule." *Id.* at 200.

The question of whether a rule applies retroactively weighs heavily, if not entirely, on whether an announced rule is substantive or procedural. A rule is substantive if it narrows the scope of a criminal statute by interpreting it in a way that "alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 U.S. at 353. A rule is procedural if it regulates only "the manner of determining the defendant's culpability . . . ." *Id.*

These new substantive rules, as recently clarified by *Montgomery*, are exempt from *Teague*'s retroactivity analysis. *Montgomery*, 577 U.S. at 198. Similarly, outside of *Teague*'s scope are decisions that interpret a statute. When a court of law interprets a statute, it is simply clarifying the language of the statute as it has always existed. *See Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague* . . . because our decision in

Bailey v. United States, 516 U.S. 137 . . . (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted."). That construction is "an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994); *see also Fiore v. White*, 531 U.S. 225, 228–29 (2001) (holding that the interpretation of the specific statute at issue "furnish[ed] the proper statement of law at the date Fiore's conviction became final."). After such interpretations are decided by a court, the legislature is presumed to have adopted those judicial constructions, unless it vocalizes otherwise. *Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010) (quoting *Fla. Dep't of Children & Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004)).

The Florida Supreme Court has consistently treated *Hurst I & II* as introducing new procedural law, barring its retroactive application.

On December 22, 2016, the Florida Supreme Court decided *Asay v. State* and *Mosley v. State* addressing the issue of retroactivity. *Asay*, 224 So. 3d 695*; Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). The cases collectively held that death sentences finalized before the June 24, 2002 decision of *Ring v. Arizona* are not entitled to *Hurst* relief. *Asay*, 224 So. 3d 695*; Mosley*, 209 So. 3d 1248. Within that bright-line rule the court emphasized that sometimes it is necessary to forgo standard retroactivity analysis when "fundamental fairness alone" requires retroactive application of certain decisions in death penalty jurisprudence. *Mosley*, 209 So. 3d at 1274-75 (citing

James v. State, 615 So. 2d 668 (Fla. 1993)). In *James v. State*, the Court found it unjust to deprive someone of relief simply because their sentence was finalized before the principle of law they had properly preserved throughout the course of their initial trial and direct appeal had a case name. *James v. State*, 615 So. 2d 668 (Fla. 1993); *e.g.*, *Mosley,* 209 So. 3d at 1274-75 (reasoning that because Mr. Mosley had consistently argued that Florida's capital sentencing scheme was unconstitutional under *Ring* to no avail that it would be fundamentally unfair to deny him relief under the decision that ultimately embraced his initial arguments simply because it was not precedent at the time of his sentencing).

Despite this reasoning, the Florida Supreme Court has consistently stuck to its hardline litmus test, only affording *Hurst* relief to individuals whose sentences became finalized before June 24, 2002. *See e.g. Zack v. State,* 228 So. 3d 41 (Fla. 2017); *Marshall v. Jones*, 226 So. 3d 211 (Mem) (Fla. 2017); *Lambrix v. State*, 217 So. 3d 977 (Fla. 2017); *Bogle v. State*, 213 So. 3d 833 (Fla. 2017); *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017).

5. *Receding from* Hurst. On January 23, 2020, a newly composed five-Justice Florida Supreme Court partially receded from *Hurst II*. *State v. Poole* 297 So. 3d 487 (Fla. 2020). By re-instating the death sentence of an individual who had previously been granted relief, the Florida Supreme Court walked back its holdings in *Hurst II* and articulated its new "understanding" of *Hurst I*. *Id.* at 501. The court held that § 921.141(3) requires two separate findings. *Id.* at 502. First, the "eligibility finding"

that aggravating circumstances exist. *Id.* Then, the "selection finding" that sufficient aggravating factors are not outweighed by mitigating circumstances. *Id.* The court overruled its *Hurst II* decision to the extent it required juries to unanimously decide on the "selection finding;" and instead, held that juries are only required to unanimously find the existence of at least one aggravating circumstance. *Id.* Whether the aggravating circumstance is sufficient and whether it is outweighed by any mitigation is under the purview of the court. *Id.* at 503. It further overruled *Hurst II's* holding "that the Eighth Amendment requires a unanimous jury recommendation of death." *Id.* at 504. As a result, only three years after *Hurst II* issued, the new court effectively overruled *Hurst II* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance." *Id.* at 491.

II. FACTUAL BACKGROUND[1]

1. *Initial Trial.* On August 15, 1988, two witnesses observed Richard Barry Randolph leaving a Handy-Way store. *Randolph v.* State, 562 So. 2d 331, 332 (Fla. 1990). Shortly thereafter, Minnie Ruth McCollum was discovered on the floor of the store having suffered an assault. *Id.* She was brought to a nearby hospital, but succumbed to her injuries six days later. *Id.* at 333. Mr. Randolph was arrested and,

[1] References to the record on appeal transmitted to the Florida Supreme Court from the initial trial will be designated "R-1990 ___"; References to the record on appeal transmitted to the Florida Supreme Court on the "Howard Pearl" issue will be designated "R-1996 ___"; References to the record on appeal transmitted to the Florida Supreme Court from the initial 3.850 motion will be designated "R-2003 ___"; References to the Supplemental Record transmitted to the Florida Supreme Court after the relinquishment proceedings will be designated "Supp. R-2001.___"; References to the record on appeal transmitted to the Florida Supreme Court from the Second Successive 3.851 Motion will be designated "R-2020.___".

after waiving his *Miranda* rights, confessed to the murder of Ms. McCollum. *Id.*

The trial court appointed the Putnam County Public Defender Howard Pearl to represent Mr. Randolph. (R-1990.19). Before trial began, Mr. Pearl made multiple motions including two regarding the role of the jury in Mr. Randolph's case. *Id.* at 105-32. He requested that the jury be required to find all statutory aggravating circumstances unanimously, arguing that aggravating circumstances are elements in Florida statutory schemes and thus the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution require they be found unanimously by a jury. *Id.* Anticipating a potential *Caldwell* issue, the defense also motioned to prohibit the jury from hearing reference to its advisory role. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) ("It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe, as the jury was in this case, that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."); (R-1990.127-28). The defense supported its motion arguing that when a jury hears its sentence is merely an advisory recommendation it is more inclined to recommend death, and such an inclination misleads the jury in violation of the Eighth Amendment. (R-1990.127-29). The motions were denied, and, with respect to the anticipated *Caldwell* claims, the court and State agreed to modify the instruction language. *Id.* at 777-92, 1507-09 (removing statements that the jury "is not responsible for the penalty in any way because of your verdict.").

After a brief three-day trial, Mr. Randolph was convicted as charged on February 23, 1989. *Id.* at 583-84. At the end of the guilt phase, Randolph renewed his previous motions, including a motion for new trial. *Id.* at 1620. The court once again denied them. *Id.* at 1620-21. During the penalty phase, Randolph renewed the pretrial motion to have the jury agree unanimously in determining the statutory aggravating factors. *Id.* at 1797-98. This renewed motion was also denied. *Id.* at 1798. Before being sent to deliberate, the jury was instructed of its duty "to advise the court as to what punishment should be imposed . . . ." *Id.* at 1841. With respect to the warnings of *Caldwell*, the court highlighted that "the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, . . . [the jury's] recommendation is important and will be given great weight." *Id.* at 1841. While the jury was deliberating, Randolph renewed "every objection heretofore overruled and every Motion for Mistrial heretofore denied." *Id.* at 1849. The motion was denied, and the rulings on the objections were affirmed. *Id*. After deliberations, the jury recommended death by a vote of eight to four. *Id.* at 1850.

Randolph promptly filed a Motion for a New Trial on the grounds that "the statutory scheme by which an advisory verdict is decided by a majority, rather than unanimously, fails to genuinely limit the class of persons eligible for the death penalty . . . ." *Id.* at 600. The sentencing court denied the motion for a new trial, and on April 5, 1989, sentenced Mr. Randolph to death. *Id.* at 610, 641-47.

2. *Direct Appeal.* Mr. Randolph timely appealed his conviction and sentence to the Florida Supreme Court raising, amongst other claims, that Florida's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution both on its face and as it is being applied. (Appellant's Initial Br.) Between trial and direct appeal, however, this Court rendered its decision in *Hildwin v. Florida* finding no Sixth Amendment requirement "that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989). Randolph acknowledged this Court's holding and argued that without a unanimous sentencing recommendation requirement, or even a substantial majority, one is denied their right to a jury and to due process of law. (Appellant's Initial Br. at 76 (1989)). Such a scheme, lacking "any structured means by which to review" the factual findings made by a jury is arbitrary. *Id.* at 54. Without analysis, the Florida Supreme Court rejected the claim that Florida's capital sentencing statute was unconstitutional as meritless and affirmed Randolph's conviction and sentences. *Randolph v. State*, 562 So. 2d 331 (Fla. 1990), *cert. denied, Randolph v. Florida*, 498 U.S. 992 (1990).

III. PROCEEDINGS BELOW

1. *Initial 3.850.* On April 6, 1992, Mr. Randolph timely filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (R-2003.1-12). Among other claims, Mr. Randolph argued that Howard Pearl's undisclosed status as a Special Deputy Sheriff while representing Randolph violated Randolph's Sixth,

Eighth, and Fourteenth Amendment rights. *Id.* at 8. Mr. Randolph's case was consolidated with a group of others that brought identical conflict of interests claims as a result of Howard Pearl's representation during their initial trials. *Randolph v. State,* 676 So. 2d 369, 370 (Fla. 1996). During the consolidated evidentiary hearing, the appellants' counsel objected to the courtroom conditions and procedure. *Id.* ("[A]ppellants were unable to consult with counsel during the hearing because the appellants were seated in the jury box while counsel were seated across the courtroom in the pews. . . . preclud[ing] them from consulting their files and referencing documents during testimony.")

Due to an unwarranted delay in receiving his public records production, Randolph filed an amended Rule 3.850 motion on July 6, 1992. (R-2003.47-171). A second amended Rule 3.850 motion was filed on February 23, 1993 after testimony of Randolph's trial judge, Judge Perry, revealed for the first time that he too had been a special deputy sheriff during Randolph's capital trial. *Id.* at 6337-58.

The circuit court partially denied the initial 3.850 motion on April 2, 1993 finding insufficient proof that Mr. Pearl's status as special deputy sheriff resulted in any real or implied prejudice towards Mr. Randolph. (Order, Apr. 2, 1993, No. 88-1357). That denial was appealed to the Florida Supreme Court where it was vacated citing the procedurally flawed evidentiary hearings that violated Mr. Randolph's due process. *Randolph v. State,* 676 So. 2d at 371. The Florida Supreme Court held that Mr. Randolph was entitled to a new individual evidentiary hearing on his post-

conviction claims. *Id.*

Shortly after his new evidentiary hearing, Mr. Randolph filed an amendment to his Rule 3.850 motion after discovering a draft judgment and sentence with handwritten notes in the State Attorney's files which did not exist in Pearl's file and did not match the final judgement and sentence signed and filed by Judge Perry. (R-2003.4239-300). The amendment alleged that, beyond disregarding the procedures set forth in § 921.141, the apparent *ex parte* communications between the judiciary and the state's office undermined Mr. Randolph's right to an individualized and reliable sentencing proceeding in violation of the Eighth and Fourteenth Amendments. *Id.* at 4247. On February 24, 1998, Mr. Randolph was granted an evidentiary hearing on the basis of this amendment, but all other grounds in the initial 3.850 motion were denied. (Order on Mot. for Post Conviction Relief, No. 88-1357, 24 Feb. 1998).

The post-conviction court conducted the evidentiary hearing in April of 1998. Randolph presented evidence that his trial judge had failed to independently weigh the aggravating and mitigating circumstances, instead relying expressly on the findings prepared by the state and also engaged in improper *ex parte* communications with the state attorney as to what should be included in the final judgment and sentence. (R. 2003.5223-437). Despite finding the communication between the State Attorney's Office and the judge's law clerk without the presence of defense counsel "may have been improper," the court deemed the improper contact "purely ministerial

in nature," and denied the motion. (Order, No. 88-1357, 14 May 1998).

On appeal, the Florida Supreme Court relinquished jurisdiction for additional evidentiary development of the *ex parte* communications between the state and the judiciary during the trial. (Supp. R-2001.977). A hearing was set for March 21, 2001. *Id.* at 980. Mr. Randolph attempted to depose additional state attorneys who had already testified in other evidentiary hearings regarding the trial judge's practice of drafting sentencing orders for the judiciary, but that motion was denied for being "speculative and not relevant to these proceedings." *Id.* at 985, 1007.

In preparation for the hearing, Defense Counsel motioned to disqualify the entire judicial circuit from hearing the case upon learning the original prosecutor alleged to have assisted with drafting Mr. Randolph's sentencing order now sat as a judge in the same circuit as the judge expected to preside over the current proceedings. *Id.* at 990. Randolph also motioned for additional discovery, citing the need to gather more information on the practice of drafting sentencing orders; and also filed a motion to continue the upcoming evidentiary hearing as a result of the incomplete discovery. *Id.* at 1030-39.

At the March 21, 2001 hearing, counsel for Mr. Randolph requested the court address the three motions previously filed. *Id.* at 1212. The presiding judge responded that he had already ruled on the motions in February, denying all three. *Id*. Both Mr. Randolph and the State interjected that they had never received the orders, and Mr. Randolph expressed further confusion given that he filed the Motion to Disqualify the

Circuit in March. *Id.* The court then expressly denied the Motion to Disqualify as "legally [in]sufficient," but allowed Mr. Randolph to read the relevant portions of previous testimony in which a former Assistant State Attorney admitted to drafting the judgments and sentences for two capital defendants at the direction of Judge Perry, Randolph's trial judge, and further ensured it would take into consideration the depositions that had not yet been completed. *Id.* at 1213, 1221. In May, before Randolph had completed the authorized depositions, the circuit court filed a status report with the Florida Supreme Court articulating that "no evidence [had] been presented which would in any way support the appellant's claim of such improper *ex parte* communication." *Id.* at 1055. The relinquishment proceedings were completed and the Record on Appeal was supplemented.

Concurrently with his appeal to the Florida Supreme Court, Mr. Randolph filed his first state petition for writ of habeas corpus in December of 2001 with the Florida Supreme Court. On April 24, 2003, the Florida Supreme Court denied both the initial 3.850 motion as well as the petition for habeas relief. In the opinion, the justices highlighted their disapproval of "the improper *ex parte* contact between Judge Perry's law clerk and the prosecutor," but ultimately found his right to a neutral judge was not violated by the communications. *Randolph v. State*, 853 So. 2d 1051, 1059 (Fla. 2003).

2. *Second State Habeas.* On June 16, 2003, Mr. Randolph filed a habeas petition with the Florida Supreme Court premised upon *Ring v. Arizona*. (Pet. Writ

Habeas Corpus, SC03-1056) Randolph argued that: (1) *Ring* requires specific factual findings by the jury to determine death eligibility; (2) aggravating factors constitute elements of an offense; (3) his jury was not instructed that these elements must be proven beyond a reasonable doubt; and (4) *Ring* and the Sixth Amendment are violated when a jury decides death eligibility and recommends death by a mere majority. *Id.* This claim was denied in an unpublished decision on November 21, 2003. (Pet. App. 21a).

3. *First Successive 3.851.* On November 29, 2010, Randolph filed a successive Rule 3.851 motion alleging that the Florida Supreme Court failed to properly analyze prejudice based on clearly established federal law as set forth in *Porter v. McCollum* and *Strickland v. Washington*. On March 7, 2011, the circuit court denied the motion, and Randolph appealed to the Florida Supreme Court. On April 26, 2012, the Florida Supreme Court affirmed the denial. *Randolph v. State*, 91 So. 3d 782 (Mem) (Fla. 2012).

4. *Second Successive 3.851.* The second successive Rule 3.851 motion, the one at issue herein, was filed on January 10, 2017. (R-2020.43). The Motion, along with two amendments filed at later dates, raised a variety of claims challenging Mr. Randolph's death sentence. *Id.* at 43, 119, 336. The five total claims were rooted in the holdings of *Hurst I*, *Hurst II*, and the Florida Supreme Court's subsequent case law relating to *Hurst*'s retroactivity. *See* discussion *infra* Section (I)(4).

The circuit court entered an order denying Randolph's 3.851 motion on

December 31, 2019. (R-2020.460-70). Mr. Randolph filed a motion for rehearing on January 14, 2020, which the court denied on January 21, 2020. *Id.* at 471-76, 487. Randolph timely appealed to the Florida Supreme Court, which denied his claim on February 4, 2021. *Randolph v. State*, 320 So. 3d 629 (Fla. 2021). In a brief order, the Florida Supreme Court rejected Randolph's argument that the statutory construction announced in *Hurst II* constituted substantive law requiring retroactive application to the date of the law's original enactment. *Id.* at 3 ("[T]here is no independent crime of 'capital first-degree murder'; the crime of first-degree murder is, by definition, a capital crime, and *Hurst v. State* did not change the elements of that crime."). Randolph filed a motion for rehearing in February of 2021, which was denied on June 22, 2021. (Mot. Reh'g, SC20-287 (2021)); *Randolph v. State*, No. SC20-287, 2021 WL 2550663 (Fla. 2021). This petition timely follows.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT'S DECISION IN THIS CASE IS CONTRARY TO THE FOURTEENTH AMENDMENT'S REQUIREMENT THAT THE STATE PROVE EACH ELEMENT OF A CRIMINAL OFFENSE BEYOND A REASONABLE DOUBT AND THIS COURT'S PRECEDENT REQUIRING JUDICIAL STATUTORY INTERPRETATION TO DATE BACK TO THE STATUTE'S ORIGINAL ENACTMENT.

In *Hurst II*, the Florida Supreme Court clarified the meaning of Florida's capital sentencing statutes. This interpretation constitutes substantive law falling outside of *Teague* and *Witt* analysis and dates back to the statute's enactment. *Hurst II,* 202 So. 3d at 44. The Florida Supreme Court's subsequent rulings have been in

direct conflict with this Court's analyses and violate the Fourteenth Amendment due process rights of Petitioner and other similarly situated Death Row inmates.

Whether a decision of this Court applies retroactively to cases on collateral review depends almost entirely on the rule's classification as a substantive rule or a procedural rule. *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). New substantive rules apply retroactively; new rules of procedure do not. *Id.*

New procedural rules regulate only the manner of determining the defendant's culpability. This Court has previously held a variety of rules constitute procedural rule announcements and barred their retroactive application. *See generally McKinney v. Arizona,* 140 S. Ct. 702, 708 (2020) (holding *Ring* and *Hurst I* announced new procedural rules); *Wharton v. Bockting*, 549 U.S. 406, 417 (2007) (holding *Crawford* announced new procedural rule); *Summerlin*, 542 U.S. at 353 (holding *Ring* introduced new procedural rule).

On the other hand, new substantive rules include those that narrow the scope of a criminal statute by interpreting its terms thereby altering the range of conduct or the class of persons that the law punishes. *Summerlin*, 542 U.S. at 351-52. These rules generally apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Id.* While originally classified as exceptions to *Teague*, this Court has recently clarified that these rules are not exceptions but are more correctly seen as falling outside of *Teague*'s scope.

Montgomery, 577 U.S. at 198. These interpretations do not change the law, but rather merely explain what the statute meant ever since it was enacted. *See Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague* . . . because our decision in *Bailey v. United States*, 516 U.S. 137 . . . (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted."). A decision of statutory interpretation does not "overrule any prior decision of this Court;" rather, it finds and establishes that the lower court decisions reading the statute in question differently "were incorrect." *Rivers v. Roadway Express, Inc.*, 511 U.S. at 312 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (emphasis removed). When a court clarifies the meaning of a statute, the statutory construction as explained by that court dates back to the statute's enactment. *Fiore*, 531 U.S. 225.

After a court interprets statutory language, the enacting Legislature is presumed to have adopted that construction unless otherwise expressing the contrary. *Fla. Dep't of Children & Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004). After addressing the constitutional requirements for a termination of parental rights, the Florida Supreme Court found that the Florida Legislature adopted the constitutional requirements described in *Padgett* because the enacted statute did not abrogate that decision. *Id.* (citing *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So. 2d 565, 570 (Fla.1991)). In 2010, the Florida Supreme Court engaged in such a

presumption as it related to whether "sufficient aggravating circumstances" in the state's capital sentencing statute indicated a requirement that two or more of such circumstances be found. *Zommer*, 31 So. 3d at 733. In the 36 years between the Court originally answering this question in *State v. Dixon*, holding that "sufficient aggravating circumstances" means "one or more such circumstance," and the case at hand, the Florida Legislature did not amend the statute to indicate a contrary position to that interpretation. *Id.* at 754 (citing *State v. Dixon*, 283 So. 2d 1 (Fla.1973)). As a result, the Court concluded, the Florida Legislature adopted the interpretation. *Id.*

When a court construes a statute, that construction dates to the statute's enactment. *Fiore*, 531 U.S. at 228. Because the sufficiency of the aggravating circumstances was a statutorily identified fact that had to be found before a death sentence could be imposed, the Florida Supreme Court concluded that it was an element of a greater offense to be found unanimously by a jury. *Hurst II*, 202 So. 3d at 40. The Fourteenth Amendment forbids the State from convicting a defendant of a crime without first proving the elements of that crime beyond a reasonable doubt. *Bunkley v. Florida*, 538 U.S. 835, 840 (2003). Therefore, pursuant to the Fourteenth Amendment, the statutory construction set forth in *Hurst II* must have been the governing law at the time the offense occurred in the instant case, August 15, 1988. *See, e.g., Fiore*, 531 U.S. 225 (holding a state court's construction of the state's statutory law is binding even on the Supreme Court of the United States).

In *Hurst I*, this Court reversed and remanded the Florida Supreme Court's original interpretation of Florida's capital sentencing statutes. *Hurst I*, 577 U.S. 92. This Court held that Florida's capital sentencing scheme was unconstitutional to the extent that it failed to require the jury, rather than the judge, to find the facts necessary to impose the death sentence. *Hurst II*, 202 So. 3d at 44. Further, the Court emphasized that each finding necessary to impose a death sentence constitutes an "element[ ]" of that offense. *Hurst I*, 577 U.S at 97. On remand, the Florida Supreme Court expressly embraced this interpretation. *Hurst II*, 202 So. 3d at 53 ("[J]ust as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder **. . .** are also elements that must be found unanimously by the jury."). Turning to Florida's statute, the court identified these "elements" to include: (1) the existence of aggravating factors proven beyond a reasonable doubt; (2) the sufficiency of the factors to impose death; and (3) that the aggravating factors outweigh the mitigating circumstances. *Id.* In addition to this express language in the majority opinion, Justice Canady's dissenting opinion stated his disagreement with the Majority's classification of the aggravators' sufficiency as an element. *Id*. at 81-82 (Canady, J., dissenting) (agreeing that *Ring* and *Hurst I* categorize the existence of an aggravating circumstance as a factor and disagreeing with the inclusion of sufficiency and weight against mitigators). The disagreement between the Majority and the Dissent in *Hurst II* was over whether the finding that the aggravating circumstances were sufficient was an

element of the greater offense of capital murder. This disagreement at its core was a matter of statutory construction and fell entirely on the reading of Florida's capital sentencing statute. Fla. Stat. § 921.141(3) (2015).

This holding did not change Florida's capital sentencing statute, but rather interpreted it as it has always existed. *Hurst II*, at 53. ("[U]nder Florida law, 'The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances.' [Parker v. Dugger, 498 U.S. 308,] 313, 111 S. Ct. 731 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).") By citing to the 1985 decision *Parker v. Dugger*, the Florida Supreme Court further demonstrated that this additional fact finding was the law in Florida at the time of Mr. Randolph's offense in 1988.

The Florida Legislature did amend Florida's capital sentencing statute after the decisions of *Hurst I* and *Hurst II*, but these actions only further prove the adoption by the legislature that the sufficiency of the aggravating factor is an element be found before an individual be sentenced to death. *Compare* Fla. Stat. § 921.141 (2014) *with* Fla. Stat. § 921.141 (2017) (noting difference in unanimity requirements for finding aggravating factor, but that the weighing of sufficient aggravating factors with mitigating circumstances exists in both versions). The unchanging nature of the sufficiency requirement, after being identified as an element of a greater offense by both the United States Supreme Court and the Florida Supreme Court, establishes that the Florida Legislature believed that the Florida Supreme Court correctly

construed § 921.141 in *Hurst II*. 202 So. 3d 40. Just as in *Zommer*, where the Court held that a 36-year opportunity to abrogate its interpretation of the number of aggravating circumstances required to sentence someone to death constituted adoption of that ruling, the consistency of Florida's statute requiring the factual finding that "sufficient aggravating factors exist" not "outweigh[ed by] the mitigating circumstances" constitutes adoption of those as elements of the greater offense. *Compare Zommer*, 31 So. 3d 733 *with Hurst II*, 202 So. 3d 40 (by not changing the statue after the ruling in *Zommer*, the Florida Legislature adopted the court's interpretation of the statute that only one aggravating circumstance needs to be found).

The Florida Supreme Court clearly struggled in *Hurst v. State* as it tried to determine what was a matter of statutory construction and what was a matter of Fifth and Sixth Amendment jurisprudence under *Ring v. Arizona* and *Hurst v. Florida*. *Hurst II* acknowledged that *Hurst I* only found Florida's capital sentencing statute unconstitutional as it relates to *who* makes the findings required to sentence someone to death. *Hurst II,* 202 So. 3d. at 43-44 ("[T]he Supreme Court . . . held, for the first time, that Florida's capital sentencing scheme was unconstitutional to the extent it failed to require the jury, rather than the judge, to find the facts necessary to impose the death sentence . . . ."). Beyond that, the court turned to the state's statute to interpret what factual findings are required before an individual is sentenced to death. That analysis, outside of the Fifth and Sixth Amendment

jurisprudence, constitutes substantive statutory construction and dates back to the statute's enactment. *Hurst II* identified what statutorily identified facts were elements of the greater offense and had to be found by a jury before a death sentence could be imposed. Pursuant to the Fourteenth Amendment, the statutory construction set must be applied as the governing law at the time the offense occurred in the instant case, August 5, 1988. *See, e.g.*, *Fiore*, 531 U.S. 225.

The Florida Supreme Court's decision to apply the statute otherwise flies in the face of this Court's Due Process jurisprudence and violates the Fourteenth Amendment rights of Petitioner and other similarly situated Death Row prisoners. While this Court has previously ruled that *Ring* and *Hurst I* constitute new procedural rules barring retroactive application, it should grant review to determine whether the Florida Supreme Court's interpretation and application of *Hurst I* & *II* is consistent with the jurisprudence of this Court.

II. THE FLORIDA SUPREME COURT'S DECISIONS IN *FOSTER V. STATE* AND *STATE V. POOLE* DIRECTLY CONFLICT WITH THIS COURT'S DECISIONS IN *APPRENDI V. NEW JERSEY, RING V. ARIZONA* AND *HURST V. FLORIDA*.

This Court has explicitly held that any finding that "exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict" constitutes an "element of a greater offense." *Hurst I*, 577 U.S. 92; *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court's holdings in *Foster v. State* and *State v. Poole* directly contradict this by holding that *Hurst* determinations beyond the existence of aggravating circumstances do not constitute "'elements' of that new offense" because

they occur only "after a jury has unanimously convicted the defendant of the capital crime of first-degree murder." *Poole*, 297 So. 3d at 503; *Foster v. State,* 258 So. 3d 1248, 1251 (Fla. 2018).

In *State v. Poole*, the court announced it was receding from *Hurst II*. *Poole*, 297 So. 3d at 502-03 ("[O]ur Court was wrong in *Hurst v. State* when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously."). By rejecting the construction of § 921.141 that had been adopted in *Hurst II*, the *Poole* court's construction conflicts with the jurisprudence of this Court.

Any factor that exposes a defendant to a greater punishment than that allowed by the jury's guilty verdict constitutes an element of the greater offense and must be unanimously found to have been proven by the state beyond a reasonable doubt. *Hurst I*, 577 U.S. 92; *Ring,* 536 U.S. 584; *Apprendi,* 530 U.S. 466. In *Apprendi,* this Court dispelled the notion that sentencing factors cannot operate as elements of a crime. *Apprendi,* 530 U.S. at 494 ("Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). This Court furthered this analysis in *Ring* finding "a defendant may not be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring,* 536 U.S. at 586.

It is not dispositive that *Hurst* determinations only occur "after a jury has unanimously convicted the defendant of the capital crime of first-degree murder" because the defendant cannot be sentenced to death on that conviction alone. Fla. Stat. § 921.141 (2017) ("If the jury . . . does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death."); *Foster,* 258 So. 3d at 1251. The Eighth Amendment requires that aggravating circumstances "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 876 (1983). This Court has acknowledged the critical role aggravating circumstances play in "circumscrib[ing] the class of persons eligible for the death penalty" and has further held that such findings may occur at "either the sentencing phase of the trial or the guilt phase." *Id.* at 878; *e.g.*, *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988).

The Florida Legislature decided that juries would carry out the narrowing function required by *Zant* with the factual determination that "sufficient aggravating circumstances existed." *Stringer v. Black*, 503 U.S. 222 (1992) (comparing the capital sentencing statutes of Louisiana, Florida, Georgia, and Texas); *Zant*, 462 U.S. at 878. In Florida's capital sentencing scheme, the maximum punishment "authorized by the jury's guilty verdict" alone is life in prison. Section 775.082 provides that a person convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death."

Fla. Stat. § 775.082 (2021). The Florida Supreme Court has long held that §§ 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. *Dixon*, 283 So. 2d at 7. Analyzing this sentencing scheme through an inquiry "not of form, but effect" shows that the sufficiency of the aggravating circumstances and their weight against mitigators constitutes an element intended by the Florida Legislature to be proven by the jury beyond a reasonable doubt. *Contra McKinney v. Arizona*, 140 S. Ct. 702 (2020) (holding there is no constitutional requirement that juries weigh the aggravating factors against the mitigating circumstances).

The Florida Supreme Court's decisions in *Foster* and *Poole* are irreconcilable with this Court's jurisprudence. Such inconsistencies raise Eighth Amendment concerns that should be addressed by this Court. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (holding the death penalty may not be "inflicted in an arbitrary and capricious manner.").

III. THIS ISSUE IS OF GREAT IMPORTANCE TO THE CONSTITUTIONAL INTERESTS OF DEATH SENTENCED INDIVIDUALS IN FLORIDA, AS WELL AS THE OPERATIONAL INTERESTS OF THE STATE.

The case for certiorari here is reinforced by its undeniable importance to all who interact with Florida's capital sentencing system—those who have already been sentenced, those that will be sentenced in the future, and the operational interests of the State.

The unanswered question of whether the Florida Supreme Court is applying

Hurst II in conformity with this Court's precedent carries great implications for the rights of death sentenced individuals in Florida. Further, the question of whether the sufficiency of aggravating factors and their weight against available mitigators is an element of the greater offense impacts every pending and future Florida capital case and thus implicates the State's interest to ensure "future validity and long-term viability of the death penalty in Florida" in accordance with federal law. *Hurst II,* 202 So. 3d at 61-62.

Mr. Randolph's case is not unique, making it an excellent vehicle to resolve the question at hand. The relevant facts are undisputed, and the resolution of the question presented will be outcome-dispositive for not only Mr. Randolph, but also for those individuals sentenced under Florida's capital scheme and those sentenced in the future. Without resolution by this Court, the issue of whether the sufficiency of aggravating circumstances and their weight against mitigators must be proven beyond a reasonable doubt will continue to recur frequently before the Florida courts.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari to review the Florida Supreme Court's decision affirming the circuit court's denial postconviction relief.

Respectfully submitted,

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