No.

In the

Supreme Court of the United States

RANDALL T. DEVINEY
Petitioner,
v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. The Due Process Clause requires the existence of an element of a crime to be determined beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 476-85, 490, 494 n.19 (2000). The same burden applies to "functional equivalents" of elements of the offense. *See id.* at 494-96; *Ring v. Arizona*, 536 U.S. 584, 603-05, 609 (2002) (concluding the determination as to whether one or more aggravating circumstances existed was the functional equivalent of an element under Arizona's capital sentencing scheme). Under Florida's capital sentencing scheme, in addition to finding at least one aggravating factor exists, the factfinder must make additional determinations before a capital sentence can be imposed: (1) whether "sufficient aggravating factors exist," and (2) whether "aggravating factors exist which outweigh the mitigating circumstances." *See* Fla. Stat. § 921.141(2) (2019). The first question presented in this case is whether, considering the operation and effect of Florida's capital sentencing scheme, the Due Process Clause requires these additional determinations to be made beyond a reasonable doubt.

II. Whether the Eighth and Fourteenth Amendments bar the imposition of the death penalty on a defendant who is over 18, but not yet 21, at the time of the charged offense.

STATEMENT OF RELATED PROCEEDINGS

Deviney v. State, 322 So. 3d 563, No. SC17-2231 (Fla. corrected opinion and judgment rendered May 6, 2021; order denying rehearing issued on August 19, 2021; mandate issued on September 8, 2021).

Deviney v. State, 213 So. 3d 794, No. SC15-1903 (Fla. opinion rendered March 23, 2017, reversing for a new penalty phase; mandate issued April 13, 2017).

Deviney v. State, 112 So. 3d 57 No. SC10-1436 (Fla. opinion rendered Feb. 21, 2013, reversing for a new trial; mandate issued July 2, 2013), cert. denied, Florida v. Deviney, 134 S. Ct. 518 (2013).

State v. Deviney, No. 16 2008 CF 12641 AX (Fla. 4th Cir. Ct. judgment entered on Dec. 11, 2017).

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is reported at *Deviney v. State*, 322 So. 3d 563 (Fla. 2021), and a copy is attached to this Petition as Appendix A. The order of the Florida Supreme Court denying Petitioner's motion for rehearing is attached to this Petition as Appendix B.

JURISDICTION

The Florida Supreme Court issued its judgment affirming Petitioner's death sentence on May 6, 2021 and denied Petitioner's motion for rehearing on August 19, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION 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: "(N)or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION AND STATEMENT OF THE CASE

Randall T. Deviney was convicted of killing a neighbor, Delores Futrell, who had known him since childhood. At the time of the offense, in 2008, Mr. Deviney was 18 years old and had experienced verbal, physical, and sexual abuse at the hands of family members for a substantial portion of his childhood. His original conviction was reversed and remanded for a new guilt phase trial because of Miranda violations. *See Deviney v. State*, 112 So. 3d 57, 60 (Fla. 2013). He was again convicted and sentenced to death, but his sentence was vacated pursuant to *Hurst v. Florida* because it was based on a non-unanimous jury recommendation. *See Deviney v. State*, 213 So. 3d 794, 795 (Fla. 2017). Following a new sentencing hearing Mr. Deviney was resentenced to death, and the Florida Supreme Court upheld the sentence. *See Deviney v. State*, 322 So. 3d 563, 566 (Fla. 2021).

Pretrial Proceedings.

Mr. Deviney filed a motion to bar imposition of the death penalty on the ground that he was under 21 at the time of the offense. (R.1 5626-58.) He pointed to evidence that he had been adversely affected by repeated, severe childhood trauma. (R.1 5626-27, 5630, 6321-23.) He argued that death is a disproportionate punishment for offenders who are older than 17 but under 21 at the time of their offenses based on developmental factors diminishing the culpability of those under 21 in comparison with those over 21, and thus that the Eighth Amendment prevents executing such offenders. (R. 5630-44.) The trial court denied the motion after a hearing, but without explanation. (R.1 5751-851, 5908-72, 6320-26.)

The Penalty Phase.

Testimony at the penalty phase established that on August 5, at 10:01 p.m., Jacksonville 911 received a call from Ms. Futrell's residence, but no one communicated with the dispatcher. (R.2 703-04, 706-08.) When officers arrived, they saw lights on inside and heard a TV, but did not hear any people. (R.2 711-12.) They officers entered through the unlocked front door (R.2 712-16.) and observed a petite, elderly woman on the living room floor, her neck appeared cut, and her shirt was pulled up, exposing her breasts and midriff. (R.1 2200; R.2 716.) Her underwear, which had been cut, were pulled up on her hips, and her legs appeared to be posed in a sexual manner. (R.2 716-17, 728-29.) It was immediately apparent that she was deceased. (R.2 717.) She was later identified as Ms. Futrell. (R.2 780.)

After clearing the living room, the officers noticed a lack of blood in that room. (R.2 718, 769-70.) But items from a purse appeared to be scattered on a couch, an open wallet was on an ironing board, and a pair of bloody jeans were on the floor near the back door. (R.1 2219, 2222-24, 2245-46; R.2 719-20, 751-54, 762.) The rest of the house was undisturbed and unoccupied. (R.2 721-22.)

In the backyard officers found a large pool of blood. (R.1 2192, 2201-03; R.2 722-25, 741, 744, 770.) Blood was also in and near a koi pond, as well as on a chair, in the backyard. (R.1 2195-2200, 2210-11; R.2 725-27, 742-44, 748.) Upon further investigation, there appeared to be a trail of blood from the backyard into the residence. (R.1 2205-06; R.2 746-47.) A piece of metal, which appeared to be broken off from a knife, was located in the backyard. (R.1 2240, 2242-43; R.2 760-62.)

DNA was later recovered from under Ms. Futrell's fingernails and determined to match Mr. Deviney's DNA. (R.2 806-09, 811-12, 846, 901-02.) On August 30, Mr. Deviney was arrested and charged with her murder. (R.2 848, 886-891.) Two days later, Mr. Deviney placed a call from the jail to his father. (R.2 892.) In the call, Mr. Deviney stated: "I lost it. It wasn't me. It was another person in me." (R.2 899.)

Mr. Deviney grew up in the neighborhood where Ms. Futrell lived, and she knew him from the time he was nine or ten years old. (R.2 682, 701, 831-32.) As a child, Mr. Deviney and his brother, Wendell, would often visit her. (R.2 678, 682, 693-94, 702-03, 864.) When Deviney got older, he would help her with yardwork. (R.2 832.) She treated him like a grandson. (R.2 695.)

Before Mr. Deviney was born, his parents were charged in connection with the death of an older brother, they were sentenced to 20-year prison terms but paroled after five years. (R.2 835, 837, 938-39, 954, 962-63.) His parents did not have a good relationship, and domestic violence took place in front of their children. (R.2 940-41, 1162.) Mr. Deviney's mother was arrested for striking Mr. Deviney's father with a shovel, again in front of Mr. Deviney and his brother. (R.2 942-43, 958.) Mr. Deviney was also stabbed once by his younger brother, requiring hospital attention. (R.2 939-40, 961-62.) His parents divorced when he was in grade school. (R.2 943.) When Mr. Deviney's father remarried, he and his new wife had domestic violence issues as well. (R.2 943.) Mr. Deviney's father divorced and remarried a third time. (R.2 946.) He was later arrested and convicted of abusing Mr. Deviney

and his brother. (R.2 946-47.) The incident involved Mr. Deviney's father kicking Mr. Deviney in the face. (R.2 947.)

At school, Mr. Deviney had problems with staying focused, being angry, and learning, and was diagnosed as dyslexic. (R.2 941, 954-56, 1161-62.) He later attended special educational classes and saw a speech and language therapist. (R.2 1161-62.) The Department of Children and Families came to the homes of both of Mr. Deviney's parents, and he was placed in various "programs" during his childhood. (R.2 945, 957.) Deviney was placed into various "programs." (R.2 957.)

Dr. Stephen Bloomfield, a psychologist, testified that he met with Mr. Deviney on approximately ten different occasions. (R.2 985, 991, 998, 1030.) Dr. Bloomfield emphasized that Mr. Deviney was 18 at the time of the offense. (R.2 995.) Bloomfield explained that the brain is not yet fully developed at 18. (R.2 995-96, 1076-80.) In particular, the frontal lobe of the brain is the last part of the brain to fully develop. (R.2 996.) The frontal lobe influences a person's ability to exercise executive functioning — that is, to "delay gratification, delay impulse, and to make mature decisions." (R.2 996.) Put another way, an 18-year-old is more likely to be impulsive, take risks, and not recognize potential consequences. (R.2 997.)

Beyond that, Dr. Bloomfield determined that Mr. Deviney "suffered . . . a chaotic and deprived childhood." (R.2 992.) He "didn't receive the nurturing, love, hugging that you would expect a kid his age to receive." (R.2 994.) Mr. Deviney had been diagnosed with learning disabilities and depression. (R.2 992-93.) At one point,

he was prescribed both Zoloft, an antidepressant, and Thorazine, an antipsychotic. (R.2 995, 1005.)

Dr. Bloomfield testified Mr. Deviney had confided that he had been sexually abused by both his mother and his mother's drug dealer, "Mike." (R.2 994, 999-1001, 1031-33.) Although Dr. Bloomfield acknowledged there was no record of that abuse, he explained that a failure to report sexual abuse is "not that uncommon for boys." (R.2 994, 999, 1031-33.) Bloomfield also reasoned that Mr. Deviney's "acting out behavior in school" and his speech and language struggles may have been "part of a posttraumatic stress issue." (R.2 995.)

Dr. Bloomfield testified as to Mr. Deviney's description of his mother grabbing his arm and digging her nails in. (R.2 1001.) That action indicated to Mr. Deviney that he was about to be struck. (R.2 1001, 1003.) There were times where Mr. Deviney's mother punched him and hit him with objects. (R.2 1003.)

Dr. Bloomfield explained that PTSD often involved re-experiencing trauma, including through flashbacks, and can be triggered by physical touch. (R.2 1007-08.) Mr. Deviney experienced a "great deal of trauma in his life." (R.2 1008.) Dr. Bloomfield opined that Mr. Deviney may have been experiencing PTSD at the time of the offense. (R.2 1008.) He explained that Mr. Deviney had advised him that, on the night of the incident, Ms. Futrell wanted to talk to Mr. Deviney "about abuse he experienced and how he grew up." (R.2 1009, 1054.)

Dr. Steve Gold, a psychologist and trauma specialist, also diagnosed Mr. Deviney with PTSD. (R.2 1093-95, 1120.) He explained that trauma arises from "an

event that creates usually a lasting wound in terms of somebody's psychological functioning." (R.2 1096.) Dr. Gold further elaborated that trauma affects brain development. (R.2 1097.) In particular, trauma affects the prefrontal lobe. (R.2 1097.) As a result of trauma, "the part of the brain that's responsible for feelings and impulses becomes overactive […] and the part of the brain that's responsible for thinking ahead, planning, [and] moderating impulses and emotions with logic does not fully develop." (R.2 1097.)

Dr. Gold determined that multiple factors indicating an elevated risk of trauma were present in Deviney's life. (R.2 1103, 1107, 1118-19.) Those factors included (1) physical and verbal abuse, (2) emotional and physical neglect, (3) domestic violence, and (4) childhood sexual abuse. (R.2 1108-16.) With respect to the latter, though Dr. Gold indicated that he was not able to corroborate Mr. Deviney's report of sexual abuse, Dr. Gold explained that childhood sexual abuse is normally "very difficult to corroborate." (R.2 1116-18, 1140-41.) Further, Dr. Gold stated that he was able to corroborate most of the information on which he relied in reaching his findings. (R.2 1116, 1126.) In conclusion, Dr. Gold opined that Futrell's murder was committed while Mr. Deviney was under the influence of an extreme mental or emotional disturbance. (R.2 1122-23.)

The jury returned a verdict unanimously recommending death. (SR. 6399-6410.) The court imposed a death sentence following a separate sentencing hearing. (SR. 6411-59.)

In determining that the evidence established beyond a reasonable doubt that the capital felony was especially heinous, atrocious, or cruel, the court considered Mr. Deviney's guilt phase testimony, particularly his admission to "slicing Ms. Futrell's throat and stabbing her three times in the chest," his "acknowledg[ing] Ms. Futrell suffered and knew she was going to die when he cut her throat," and that "it took thirty to forty-five seconds for Ms. Futrell to die." (SR.1 6423.) The court conceded that "the instant penalty phase jury was not privy to" Mr. Deviney's earlier testimony. (SR.1 6423.) The court also found that the evidence established beyond a reasonable doubt that the victim of the capital felony was particularly vulnerable due to advanced age or disability. (SR.1 6424.)

The Direct Appeal.

Mr. Deviney made six arguments in his direct appeal. First, he argued reversible error occurred when the court denied his cause challenges to two jurors. Second, he argued due process and this Court's precedent require treating the findings that aggravating factors were sufficient to justify death and that aggravating factors outweighed the mitigating evidence as functional elements of his offense because those findings had to be made before the death penalty was available. Third, he argued his sentence violated his right to be free from cruel and unusual punishment because the Eighth Amendment forbids imposing a death sentence on offenders older than 17 but younger than 21. Fourth, he argued the court had erred in its rulings regarding the aggravating factors that the victim was particularly vulnerable; fifth, that there was insufficient evidence to support the

especially heinous, atrocious, or cruel aggravator factor. Finally, he argued his death sentence was disproportionate.

REASONS FOR GRANTING THE PETITION

I. The Florida Supreme Court's Decision Directly Conflicts With This Court's Decisions on the Standard of Proof for Functional Elements of an Offense, Including *Apprendi v. New Jersey*, *Ring v. Arizona*, *Alleyne v. United States*, and *Hurst v. Florida*.

The Florida Supreme Court's decision in this case conflicts with the principle that any fact that "expose(s) the defendant to a greater punishment than that authorized by the jury verdict" is an element of the offense, which the State must prove beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 494 (2000). Whether that fact is described as an "element" or a "sentencing factor," the "relevant inquiry is not one 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?" *Id.* at 494. Under Florida's capital sentencing scheme, the determinations that the aggravating factors are sufficient to justify imposing death and that they outweigh mitigating circumstances are the functional equivalent of elements because these determinations expose a defendant to a greater punishment than that authorized by statute for capital murder.

A. The "Functional Elements" of a Crime are Not Determined by Their Labels, but by How They Operate.

A murder with premeditation is a first-degree murder under Florida law, and is classified as a capital felony. Fla. Stat. § 782.04(1)(a)1 (2019). A person who is convicted of a capital felony is punished by life imprisonment unless a separate procedure results in a death sentence. Fla. Stat. § 775.082(1)(a) (2019). The

sentencing procedure requires the sentencer to make three determinations before considering whether a defendant "should be sentenced to life imprisonment without the possibility of parole or death":

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.
>
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
>
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:
>
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
>
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

Fla. Stat. § 921.141 (2019).

This scheme requires the jury to make a recommendation of either death or life imprisonment based on three determinations: that at least one aggravating factor exists, that the aggravating factor or factors are sufficient in themselves, and that the aggravating factor or factors outweigh the mitigating circumstances. *See id.* Until each of those determinations is made, even though premeditated murder is labeled a "capital felony," the defendant is not eligible for the death penalty. *See id.* The selection of the death penalty or a penalty of life in prison takes place separately:

> (3) IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH.—
>
> (a) If the jury has recommended a sentence of:
>
> 1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
>
> 2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.
>
> (b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

Id.

Under this system, a jury can recommend either a life sentence, in which case the court has no discretion to override the jury's recommendation, or a death

sentence, in which case the court can choose between imposing a death sentence and imposing a sentence of life in prison.

Therefore, the determinations regarding the presence of aggravating circumstances, sufficiency of aggravating circumstances, and whether the aggravating circumstances outweigh any mitigation presented necessarily precede the selection of a death sentence. In other words, those determinations are eligibility determinations: they must be made before the defendant can be subjected to the imposition of a sentence exceeding the statutory maximum of life without parole for first-degree murder.

In *Apprendi*, this Court held that any circumstance that increases a sentence "beyond the maximum authorized statutory sentence…is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 530 U.S. at 494 n.19. In *Blakely v. Washington*, 542 U.S. 296, 302-05 (2004), the Court applied that rule to reverse a sentence that exceeded the standard sentencing range for a particular offense, even though the sentence did not exceed the overall statutory maximum for that class of offenses. The Court later applied similar reasoning to sentencing factors increasing mandatory minimum sentences in *Alleyne v. United States*, 570 U.S. 99 (2013).

In *Ring v. Arizona*, 536 U.S. 584, 605 (2002), the Court stated the finding of aggravating circumstances under Arizona's capital sentencing scheme was the "functional equivalent" of an element of a greater offense, stating that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is

not determinative." Because that finding exposed defendants to a sentence of death, which exceeded the statutory maximum under Arizona law, it had to be made by a jury. *Id.*

Critically, the Court's focus in each of these cases was the sentence actually imposed; the Court repeatedly rejected arguments that a particular sentence could be upheld because it was within a theoretically acceptable range of punishment. *See Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 303-04; *Ring*, 536 U.S. at 603-04. Death is theoretically an available penalty in any first-degree murder case under Florida law, but to impose it on a specific defendant requires additional determinations over and above the conviction of the underlying crime and the finding of one or more aggravating factors.

The Court applied these principles in *Hurst v. Florida*, 136 S. Ct. 616 (2016), holding unconstitutional the then-existing Florida capital sentencing scheme because it allowed a death sentence to be imposed without submitting all necessary findings to a jury. The Court's opinion reiterated that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. at 619. Under the sentencing statute in effect at the time, imposing a death sentence required a separate sentencing proceeding leading to an "advisory sentence" from the jury, which was not required to give a factual basis for its recommendation. *See id.* at 620. Then, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, [was required

to] enter a sentence of life imprisonment or death." *Id.* (citing § 921.141(3), Fla. Stat. (2010)). Hurst had been sentenced to death based on the sentencing judge's determination that two aggravating circumstances exist, and the Florida Supreme Court "rejected Hurst's argument that his sentence violated the Sixth Amendment in light of *Ring*." *Id.*

This Court concluded Hurst's death sentence violated the Sixth Amendment because the statutory scheme at issue did not "require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. The Court pointed out that the statute did not make a defendant eligible for death until those findings were made. *Id.*

The Florida Legislature rewrote the state's capital sentencing scheme following *Hurst v. Florida*, eventually creating the system under which Mr. Deviney was resentenced. That system, as set forth in detail above, requires not only a finding regarding the presence of aggravating circumstances, but also a finding about their sufficiency and their weight relative to any mitigating circumstances, before the sentencer can choose between a life and a death sentence. Although the Florida Supreme Court initially interpreted the revised statute consistently with the *Apprendi* line of cases, the court changed direction and began receding from its own holdings about the operation and effect of the revised statute. The result has created conflict between Florida law and this Court's precedent.

The Florida Supreme Court initially held in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016) that, before a death

sentence could be imposed, a jury must find unanimously and beyond a reasonable doubt the existence of aggravators, the sufficiency of the aggravators, and whether the aggravators outweighed the mitigation:

> [W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst, 202 So. 3d at 44; *see also Perry*, 210 So. 3d at 640 (interpreting Florida's revised death penalty statute). The Florida Supreme Court distinguished the findings of sufficient aggravation and that the aggravating factors outweighed the mitigation from the ultimate sentencing recommendation, noting that a jury is not compelled or required to recommend a death sentence. *Perry*, 210 So. 3d at 640.

Subsequently, in *Foster v. State*, 258 So. 3d 1248, 1251-52 (Fla. 2018), the Florida Supreme Court rejected an argument that a defendant whose sentence had become final in 2001 should be sentenced to life because a jury had not found all the

elements of "capital first-degree murder."[1] The court stated the penalty phase findings were not elements of "the capital felony of first-degree murder" but, rather, were findings required before the death penalty could be imposed. *Id.* at 1252. *Foster* did not recede from *Hurst* or *Perry*, and did not involve the operation and effect of the sentencing scheme created after *Hurst v. Florida*. *See id.* at 1251-52 (describing *Hurst* as "a change in this state's decisional law").

Then, in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019), *cert. denied*, 141 S. Ct. 284 (2020), the Florida Supreme Court explicitly receded from *Hurst* and *Perry*, holding two of the findings making a defendant eligible for the death penalty were not elements of the offense requiring a unanimous finding beyond a reasonable doubt:

> To the extent that in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt. Since *Perry*, in *In re Standard Criminal Jury Instructions in Capital Cases* and *Foster*, we have implicitly receded from its mischaracterization of *Hurst v. State*. We now do so explicitly.

285 So. 3d at 885-86.

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[1] The court had already rejected retroactive application of *Hurst* in *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016), which held *Hurst* relief was not available to defendants whose death sentence became final before the opinion in *Ring v. Arizona*.

Finally, in *State v. Poole*, 297 So. 3d 487, 490 (Fla. 2020), *cert. denied*, 141 S. Ct. 1051 (2021), the Florida Supreme Court went a step further and receded from *Hurst v. State* "except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." To correctly understand *Hurst v. Florida*, the court stated, that decision had to be viewed in light of cases distinguishing "the eligibility decision and the selection decision." *Poole*, 297 So. 3d at 501 (citing *Tuilaepa v. California*, 512 U.S. 967, 971 (1994)). The "eligibility" decision required a murder conviction and one aggravating circumstance. *See id.* (citations omitted). The selection decision required "an individualized determination that assesses the defendant's culpability." *Id.* (citation omitted). The court then reasoned that *Hurst v. Florida* was "about eligibility, not selection," *id.*, and that the only finding that had to be made by a jury was the existence of one or more statutory aggravating circumstances, *id.* at 502-03.

This reasoning, however, is based on a version of the statute predating the legislative changes that took place because of *Hurst v. Florida*. *See Poole*, 297 So. 3d at 495-96. The previous statutory scheme, which still placed the jury in an advisory role, did not describe the eligibility decision and the selection decision the same way the current statute does. *Compare* Fla. Stat. § 921.141 (2011) *with* Fla. Stat. § 921.141 (2019). The "eligibility finding" was "(t)hat sufficient aggravating circumstances exist as enumerated in subsection (5)." *Poole*, 297 So. 3d at 502 (citing Fla. Stat. § 921.141(3)(a) (2011)). The selection finding was "(t)hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Id. (citing Fla. Stat. § 921.141(3)(b) (2011)). Under the statute at issue in *Poole*, the selection finding gave the defendant "an opportunity for mercy if…justified by the relevant mitigating circumstances and by the facts surrounding his crime. *Id.* at 503. On its face, that statutory scheme operated differently from the current one, which requires the existence, sufficiency, and relative weight of aggravating circumstances to be determined before a death sentence can be considered.

In holding that the determinations that are currently required before Florida defendants can be subjected to a death penalty are not the elements (or the functional equivalent of elements) requiring a verdict based on proof beyond a reasonable doubt, Florida law directly conflicts with this Court's decisions in *Apprendi*, *Ring*, *Alleyne*, and *Hurst v. Florida*.

B. The Florida Supreme Court's Decision Allowing An Increased Penalty to be Imposed Without Requiring Proof Beyond a Reasonable Doubt of All Factors Increasing the Available Penalty is Inconsistent With Due Process.

The due process right of requiring the State to prove every element of a crime beyond a reasonable doubt "reflects a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. 358, 361-62 (1970) (citation omitted). The requirement of proof beyond a reasonable doubt not only guards against the danger of an erroneous conviction, but also "provides concrete substance for the presumption of innocence." *Id.* at 363. The standard also has a vital role in maintaining public confidence in the court system. *Id.* at 364. The standard also protects the interests of criminal defendants facing deprivation of life

or liberty by requiring a subjective state of certitude regarding the elements of an offense. *Id.* The reasonable doubt standard is just as critical when making determinations that affect a sentence as when determining guilt of an underlying offense:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily followed that the defendant should not — at the moment the State is put to proof of these circumstances — be deprived of protections that have, until this point, unquestionably attached.

Apprendi, 530 U.S. at 484.

The Florida Supreme Court's decision in *Poole* regarding which determinations must be made beyond a reasonable doubt also makes an unwarranted and unnecessary distinction between determinations that are "purely factual," on one hand and those that are subjective, or that call for the exercise of moral judgment, on the other. *See* 297 So. 3d at 503. Under this view, determinations that cannot be objectively verified "cannot be analogized to an element of a crime." *Id.* But the constitutional right of proof beyond a reasonable doubt applies to findings such as the "especially heinous, atrocious, or cruel" aggravator, which cannot be objectively verified or quantified; it necessarily incorporates a moral judgment. If a jury can make those judgments as to aggravators, it is illogical that they cannot make they at other steps in the sentencing process.

Since receding from *Hurst* and *Perry*, the Florida Supreme Court has repeatedly held that determinations as to whether aggravating factors are sufficient to justify the death penalty and whether the aggravating factors outweigh mitigating evidence "are not subject to the beyond a reasonable doubt standard of proof." *Newberry v. State*, 288 So. 3d 1040, 1047 (Fla. 2019), *cert. denied*, 141 S. Ct. 625 (2020); *see also, e.g.*, *Bright v. State*, 299 So. 3d 985, 998 (Fla. 2020), *cert. denied*, 141 S. Ct. 1697 (2021); *Santiago-Gonzalez v. State*, 301 So. 3d 157, 177 (Fla. 2020), *cert. denied*, 2021 WL 2519344 (June 21, 2021); *Craven v. State*, 310 So. 3d 891, 902 (Fla. 2020), *cert. denied*, 2021 WL 4508396 (Oct. 4, 2021).

However, under the operation and effect of Florida's capital sentencing scheme, those determinations are necessary to make a defendant eligible for a death penalty. The finding of one or more aggravating factors does not allow a court to impose a death penalty without those additional determinations. Only after those determinations are made does the jury select between life and death in making its sentencing recommendation and, if the jury selects death, the court still has discretion to impose either a life sentence or the death penalty. Under the current statute, consideration of mitigation is not merely an "opportunity for mercy," but is a necessary step in deciding whether the death penalty is available at all. The Florida Supreme Court's reading of the statute is depriving Florida defendants of due process of law by lessening the State's burden of proof as expressed in the *Apprendi* line of cases. The issue has implications for every pending and future capital case decided under Florida's current statutory scheme.

The solution is to return to *Apprendi* and its progeny, and to look at the operation of Florida's current capital sentencing scheme. A determination that increases the available penalty from life to death exposes the defendant to a greater punishment than his conviction for the underlying crime, and thus must be proved beyond a reasonable doubt. Under the current statute, that includes the factual finding that the aggravating factors are sufficient to justify death — a separate question from whether they are present at all — and the factual finding that they outweigh the mitigating evidence.

II. The Eighth and Fourteenth Amendments Bar the Imposition of the Death Penalty on Defendants Who Had Reached the Age of 18, but Were Under 21, at the Time of the Charged Offense.

Since this court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), providing a bright line below which the death penalty can not constitutionally be imposed, scientific knowledge about brain development has expanded at a rapid pace. This includes understanding how childhood trauma affects the development of the brain itself. Our enhanced understanding of brain development supports the underlying rationale of *Roper* — the diminished culpability of juvenile defendants, *see id.* at 570-71 — and, at the same time, has supported an emerging consensus that calls into question the setting of a bright line at 18.

A. The Continuing Evolution of the Law Regarding the Execution of Youth Demonstrates an Emerging Consensus Against Executing Offenders Who Have Reached Their 18th Birthday.

The Eighth Amendment's protection against cruel and unusual punishments has evolved to reflect evolving social consensus about what punishments are and are not acceptable: this Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 561. Among the considerations that guide the analysis of these standards are objective indicia such as legislative enactments and sentencing practices in state courts. *See Graham v. Florida*, 560 U.S. 48, 61-62 (2010). Consistent evolution towards or away from a particular practice is also significant. *See Roper*, 543 U.S. at 565-66 (discussing the number of states that had already abandoned capital punishment for juvenile offenders at the time of the decision). The evolution noted in *Roper* has continued in the sixteen years since it was decided.

Legislative trends reflect an emerging consensus against executing offenders who were under 21 when they committed their crimes. When *Roper* was decided, 20 states either had no express minimum age, or had a minimum age of 16 or 17, for imposing the death penalty. 543 U.S. at 579. Since *Roper*, one of those states has abolished the death penalty outright: Virginia, in 2020. In Kentucky, a court decision found the death penalty statute unconstitutional to the extent it allowed execution of those under 21 at the time of their offense, relying in part on the

changes in death penalty law since *Roper*. *See Commonwealth v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, No. 14-CR-161, 2017 WL 8792559 (Ky. Fayette Cir. Aug. 1, 2017) (available at https://files.deathpenaltyinfo.org/legacy/files/pdf/TravisBredholdKentuckyOrderExtendingRopervSimmons.pdf) (hereafter Bredhold Order).[2]

The Bredhold Order noted that, "[s]ince *Roper*, six (6) states have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute." 2017 WL 8792559 at *2. "Additionally, the governors of four (4) states have imposed moratoria on executions in the last five (5) years." *Id.* Of "the states that do have a death penalty statute and no governor-imposed moratoria, seven (7) have de facto prohibitions on the execution of offenders under twenty-one (21) years of age." *Id.* Thus, "there are currently thirty states in which a defendant who was under the age of twenty-one (21) at the time of their offense would not be executed — ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005." *Id.*

Also, at the time *Roper* was decided, another 18 states set the minimum age for a death sentence at 18. *See Roper*, 543 U.S. at 579-80. Of those states, five have abolished the death penalty for all offenders: New York, New Mexico, Illinois,

[2] The Kentucky Supreme Court later held the issue was premature because the defendant had not been sentenced yet. *See Commonwealth v. Bredhold*, 599 S.W.3d 409 (Ky. 2020), *cert. denied sub nom Diaz v. Kentucky*, 141 S.Ct. 1233 (Jan. 29, 2021).

Connecticut, and Maryland.[3] More recently, the Supreme Court of Washington held that state's statute was unconstitutional, while leaving open "the possibility that the legislature may enact a 'carefully drafted statute' to impose capital punishment in this state." *State v. Gregory*, 427 P.3d 621, 636 (Wash. 2018) (citations omitted).

With some exceptions, including Florida, the statistics on executions further reveal an emerging consensus against executing offenders who were under 21 when they committed their crimes. A 2018 ABA report indicated that "[i]n 2016, 31 individuals received death sentences, and only two of those individuals were under the age of 21 at the time of their crimes." ABA Death Penalty Due Process Review Project & Section of Civil Rights and Social Justice, Proposed Resolution and Report to House of Delegates (2018) (hereafter ABA Report; available at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_ review_project/resources/ policy), at 2. The Bredhold Order similarly noted that "[o]f the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016." 2017 WL 8792559 at *3.

These changes should be viewed against the myriad ways the law treats those over 18, but under 21, as requiring additional protection or as having some form of diminished capacity:

> Youths under the age of 21 years old remain a protected class for a wide range of purposes, under laws that

[3] *See People v. LaValle*, 3 N.Y.3d 88 (2004); N.M. Stat. § 31-18-14 (eff. July 1, 2009); 725 Ill. Comp. Stat. Ann. 5/119-1 (West 2021); Conn. Gen. Stat. § 53a-35a (West 2021); Md. Code Ann., [Corr. Servs.] §§ 3-901 – 3.910 (repealed).

recognize the diminished capacity of this age group. Most people are familiar with restrictions and protections on youths ages 18-21 under the liquor laws. However, there are literally hundreds of other restrictions and protections in the state and federal statutes for youths ages 18- 21. Youth under the age of 21 years are usually ineligible for commercial drivers' licenses. They are prohibited from entering sexually oriented businesses. The inheritance laws for adopted beneficiaries use age 21 as the cutoff for preferential treatment under the tax code. Many states include children up to the age of 21 years old in their provisions for public education. State statutes and constitutions often define "child" and "adult" to include persons under 21 years old as "children" or "minors" for many purposes. A wide range of professions are closed to children under the age of 21 years old. Many provisions of state statutes refer to persons under the age of 21 as "children" and "minors." Persons under age 21 are usually minors for claims before the Industrial Claims Commissions. The Workers' Compensation statutes (that govern compensation of children of deceased workers) presume children between the ages of 18 and 21 to be wholly dependent. Even before passage of the 2010 federal Patient Protection and Affordable Care Act, which extended health care coverage for young adult children under their parent's health plan up to the age of 26, many states' health care coverage acts already defined a "dependent child" as one up to 21 years of age or older. The Uniform Transfers to Minors Act refers to children under 21 years old as minors. A person licensed as a physician's assistant by virtue of their status as a child health associate may work on patients only if the patient is under the age of 21 years old. Some states (including Colorado) allow certain offenders who have reached their 18th birthday at the time of sentencing to be provided services through youthful offender programs.[4]

[4] Hollis A. Whitson & Eric A. Samler, Execution of Youth under Age 21 on the Date of Offense: Ending with a Bang or a Whimper? (September 14, 2019) (citations omitted). Available at SSRN: https://ssrn.com/abstract=3453830 or http://dx.doi.org/10.2139/ssrn.3453830

B. Increases in Scientific Understanding of Brain Development Weigh Against Drawing a Line Allowing 18-Year-Olds to be Executed.

In addition, research in science and social science continues to support the premise that those who have reached the age of 18 are categorically less culpable than older adults. It is appropriate to consider the increase in research on brain development in the years since *Roper* was decided. *See Miller v. Alabama.* 567 U.S. 460, 471 (2012). As the Bredhold Order noted, "[i]f the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling:"

> Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late teens. Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.

2017 WL 8792559, at *4 (citations omitted). The ABA Report reached the same conclusion after an extensive review of the available literature:

> The empirical research shows that most delinquent conduct during adolescence involves risk-taking behavior that is part of normative developmental processes. The U.S. Supreme Court in Roper v. Simmons recognized that these normative developmental behaviors generally lessen as youth mature and become less likely to reoffend as a direct result of the maturational process. In Miller and Graham, the Court also recognized that this maturational process is a direct function of brain growth, citing research showing that the frontal lobe, home to key components of circuitry underlying "executive functions" such as planning, working memory, and impulse control, is among the last areas of the brain to mature.

> In the years since *Roper*, research has consistently shown that such development actually continues beyond the age of 18. Indeed, the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development. While there were findings that pointed to this conclusion prior to 2005, a wide body of research has since provided us with an expanded understanding of behavioral and psychological tendencies of 18 to 21 year olds.
>
> Findings demonstrate that 18 to 21 year olds have a diminished capacity to understand the consequences of their actions and control their behavior in ways similar to youth under 18. Additionally, research suggests that late adolescents, like juveniles, are more prone to risktaking and that they act more impulsively than older adults in ways that likely influence their criminal conduct. . . .
>
> More recent research shows that profound neurodevelopmental growth continues even into a person's mid to late twenties. . . . This period of development significantly impacts an adolescent's ability to delay gratification and understand the long-term consequences of their actions.

ABA Report at 7-8 (citations omitted).

The science regarding the brain development of youth over 18 years of age means that imposing death on those offenders does not serve legitimate penalogical goals. These goals were identified in *Roper* as both retribution and deterrence:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.
>
> As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . . [T]he absence of evidence of deterrent effect

> is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.

543 U.S. at 571 (citations omitted).

But retribution is misplaced when it is exacted against a group of defendants whose developmental stage is characterized by "(1) a lack of maturity and an underdeveloped sense of responsibility, (2) increased susceptibility to negative influence, emotional states, and social pressures, and (3) undeveloped and highly fluid character." ABA Report at 11-12. For the same reasons, to the extent the death penalty is a deterrent at all, it is less likely to be an effective deterrent for defendants in that category.

This Court should reconsider the bright line allowing 18-year-olds to be executed. A decreasing number of states are responsible for most of the executions of those who had reached the age of 18 but were not over 21 when they offended. A majority of states no longer execute these offenders because of what science tells us about their brain development.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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