CAPITAL CASE
No. 21-6429

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

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

JESSICA J. YEARY
Public Defender

BARBARA J. BUSHARIS*
Assistant Public Defender
**Counsel of Record for Petitioner*

SECOND JUDICIAL CIRCUIT OF FLORIDA
OFFICE OF PUBLIC DEFENDER
301 South Monroe Street, Ste. 401
Tallahassee, Florida 32301
(850) 606-1000
barbara.busharis@flpd2.com

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I. An Analysis of Florida's Capital Sentencing Scheme Must Reflect the Way the Scheme Actually Operates.

Under Florida's capital sentencing scheme, the determination that at least one aggravating factor exists, the determination that sufficient aggravating circumstances exist to justify a death sentence, and the determination that aggravating factors outweigh any mitigating circumstances, are distinct findings. *See* Fla. Stat. § 921.141 (2) (a)-(b). Petitioner does not argue the Florida Legislature did this unknowingly. However, whether the Florida Legislature labeled these determinations "elements" or not, the relevant inquiry is whether they increase the available penalty for a crime. They do.

The finding that "sufficient" aggravating factors exist is not merely a restatement of the requirement that one or more aggravating circumstances be found beyond a reasonable doubt. That initial finding is a step in the eligibility determination. *See id.* at (2)(b). The sufficiency determination and the weighing of aggravators and mitigators are the two final steps in the eligibility determination before the jury can select a life sentence or a death sentence. *See id.* at (2)(b)2.a.-c.[1]

The requirement of determining that "sufficient aggravating factors exist" is an additional requirement not found in many state statutes. Florida and at least one other state require a separate finding — independent of any weighing of

[1] The statute states the defendant is "eligible for a sentence of death" upon a finding that an aggravating circumstance is present. However, under the plain terms of the statute, a death penalty cannot be selected until the additional determinations in § 921.141 (2)(b)2.a.-c. are made, and thus those determinations increase the available penalty.

aggravating and mitigating factors — that the aggravating factors are sufficient to justify imposing a death sentence. *See id.*; Ark. Code Ann. § 5-4-603(a)(2021) (requiring imposition of a death sentence only if jury returns three findings including "(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt."). Given that the number of potential aggravating factors has doubled since capital punishment was reinstated in Florida,[2] this is not a mere formality; it is a legislative directive that the aggravating circumstances in a particular case not only fall into one of the enumerated categories, but also rise to a level justifying the death penalty.

This Court's decisions in *McKinney v. Arizona*, 140 S. Ct. 702 (2020) and *Kansas v. Carr*, 577 U.S. 108 (2016) do not negate Petitioner's argument. In *McKinney*, this Court held the Arizona Supreme Court could reweigh aggravating and mitigating circumstances on collateral review of a death sentence after a federal appeals court held the state court had failed to properly consider relevant mitigating evidence. 140 S. Ct. at 706, 709. Under the version of the Arizona sentencing statute in effect at the time McKinney was originally sentenced, he had not been entitled to a jury determination of aggravating circumstances. *See id.* at 708. McKinney argued that this Court's subsequent decisions in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 577 U.S. 92 (2016), should be applied to

[2] When Florida rewrote its capital sentencing law following this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the law contained eight aggravating factors. *See Proffitt v. Florida*, 428 U.S. 242, 251 (1976). The statute now contains 16. *See* Fla. Stat. § 921.141(6)(a)-(p) (2021).

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

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

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

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

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

Ariz. Rev. Stat. Ann. § 13-703E (1993).[3]

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

Finally, the ultimate facts of the sufficiency of the aggravator or aggravators to justify a death sentence and that they outweigh mitigating circumstances are distinct from the "mercy decision" referred to in *Carr*, 577 U.S. at 119. In Florida's current capital sentencing scheme, both the jury and the trial court have the

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

opportunity to make that ultimate choice between a life sentence and a death sentence. *See* Fla. Stat. §§ 921.141(2)(b)2.a.-c.; 921.141(3)(a)1.-2. Petitioner is not asking this Court to find that Florida's capital sentencing scheme attaches any particular burden of proof to the jury's ultimate recommendation of a death sentence (or sentence of life in prison). What is at issue are two determinations without which a death penalty cannot be imposed. Once those determinations are made, both the jury and the trial court have the opportunity to "accord mercy if they deem it appropriate." *Carr*, 577 U.S. at 119.

II. Executing Those Who Were Under 21 When They Offended Is Contrary to Developing Brain Science.

For decades, this Court has analyzed Eighth Amendment issues in light of "the evolving standards of decency that mark the progress of a maturing society." *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). This is not because of some forced march to perfection, but because the policy underlying the Eighth Amendment is that human dignity requires the State's power to be exercised "within the limits of civilized standards." *Id.* It is a matter of fact that those standards have changed over time, as Justice O'Connor noted in dissent in *Roper v. Simmons*:

> It is by now beyond serious dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791.

Roper v. Simmons, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting from result). When seeking to determine whether standards have changed with respect to a specific Eighth Amendment challenge, the Court therefore looks to a wide variety of

external indicia before bringing its own judgment to bear. *See, e.g.*, *id.* at 590 (citations omitted). When those external indicia reveal a consensus has emerged, the Court has reconsidered earlier decisions accordingly. *See generally, e.g.*, *Roper*, 543 U.S. at 561-64.

So, for example, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court abrogated an earlier decision that executing mentally retarded defendants was not categorically prohibited by the Eighth Amendment. In that earlier decision, the Court had found "insufficient evidence of a national consensus against executing mentally retarded people" to create a categorical exclusion, despite some evidence of public sentiment opposing the practice. *See Penry v. Lynaugh*, 492 U.S. 302, 334-35 (1989). At the time *Penry* was decided, only two state statutes specifically prohibited executing mentally retarded offenders. *See Atkins*, 536 U.S. at 314. By the time the Court revisited the issue, 18 additional states had passed laws exempting mentally retarded defendants from the death penalty, not counting one that was vetoed for other reasons. *See id.* at 314-15. Moreover, among those states that allowed the practice, only five had executed offenders with a known IQ under 70 since 1989. *Id.* Based on those external indicia, the Court concluded: "The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.* at 316.

Biological evolution is about survival, not perfection. *See, e.g.*, J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 Vand. L. Rev. 1406, 1413 n.14

(1996) (available at https://scholarship.law.vanderbilt.edu/vlr/vol49/iss6/2). To the extent any form of evolution is important here, it is the evolution of our understanding of brain development. Uncontroverted expert testimony at Mr. Deviney's trial established that the brain of an under-21-year-old defendant is still developing and is not meaningfully different from the brain of a younger adolescent in matters of judgment and impulse control. Our ability to study brain development and to understand both systems and structures within the brain has been enhanced dramatically since *Roper* was decided. *See generally* ABA Death Penalty Due Process Review Project & Section of Civil Rights and Social Justice, Proposed Resolution and Report to House of Delegates 7-8 (2018) (available at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/resources/ policy).

Recognizing that our knowledge has increased on a topic does not threaten federalism or undermine democracy. And revisiting a categorical Eighth Amendment exclusion based on a strong showing that attitudes toward a particular practice have changed over a period of years does not abandon stare decisis: it is required by stare decisis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSICA J. YEARY
Public Defender
/s/ Barbara J. Busharis
BARBARA J. BUSHARIS*
Assistant Public Defender
*Counsel of Record for Petitioner

SECOND JUDICIAL CIRCUIT OF FLORIDA
OFFICE OF PUBLIC DEFENDER
301 South Monroe Street, Ste. 401
Tallahassee, Florida 32301
(850) 606-1000
barbara.busharis@flpd2.com

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