

DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

GREGORY ALAN KOKAL,

Petitioner,

vs.

JULIE L. JONES,
Secretary, Florida Department of Corrections,

Respondent.

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

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether an assessment of the relative culpability of codefendants in a capital case in Florida is required pursuant to the Eighth Amendment in order to ensure the reliability of a death sentence and whether it runs afoul of the prohibition against cruel and unusual punishment?

2. Whether an Eighth Amendment compliant proportionality review requires consideration of the culpability of codefendants, even those who pled guilty and received a lesser sentence as a result?

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Petitioner, **GREGORY ALAN KOKAL**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court.

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court in this cause appears as *Kokal v. Jones, etc.*, No. SC17-2022 (Fla. March 23, 2018), and is attached to this petition as Appendix A. The Florida Supreme Court's order denying rehearing is Attachment B to this petition.

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its order on March 23, 2018, rehearing denied on April 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257, 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 AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On October 20, 1983, Gregory Kokal was indicted and charged, along with codefendant William O'Kelly, Jr., with the premeditated first-degree murder of Jeffrey Russell in Jacksonville, Florida (R. 3).

On March 23, 1984, approximately six months prior to Mr. Kokal's capital trial, O'Kelly executed a document entitled "Plea of Guilty - Negotiated Sentence" wherein he agreed to plead to the lesser included offense of second-degree murder upon the understanding that prosecutors would recommend a sentence "in accordance with the sentencing guidelines" (12 to 17 years). In exchange for the plea, the State of Florida required that O'Kelly "testify truthfully" against Mr. Kokal. This was defined as testifying "in agreement with those prior consistent statements" given to detectives and a prosecutor. Further, "any breach of [the] agreement" by O'Kelly would "result in the setting aside of the plea" and prosecution for the indicted capital offense.

O'Kelly testified against Mr. Kokal and claimed that Mr. Kokal shot Mr. Russell. In his defense, Mr. Kokal testified that O'Kelly shot Mr. Russell. Mr. Kokal was convicted of first-degree murder (R. 228).

On October 12, 1984, a penalty phase was conducted. The jury unanimously recommended that a sentence of death be imposed upon Mr. Kokal (R. 236). Thereafter, on November 14, 1984, the trial court, finding no mitigating evidence, sentenced Mr. Kokal to death (R. 240-43, 257).

On direct appeal, the Florida Supreme Court affirmed Mr. Kokal's conviction and death sentence. *Kokal v. State*, 492 So. 2d 412 (Fla. 1986). No proportionality review was conducted. See *Id.*

On November 26, 1988, Mr. Kokal filed a postconviction motion in the state circuit court. After an evidentiary hearing held on February 11-12, 1997, the state circuit court denied relief (PCR. 296-307). Mr. Kokal appealed to the Florida Supreme Court, which affirmed the circuit court's order. *Kokal v. State*, 718 So. 2d 138 (Fla. 1998)

On August 12, 1999, Mr. Kokal filed a successive Rule 3.850 motion alleging newly discovered evidence of innocence (PCR-2. 1-57). The motion was amended on April 3, 2000 (PCR-2. 152-224). An evidentiary hearing was held on October 31, 2000 (PCR-2. 507-76).

During the hearing, Mr. Kokal presented evidence that O'Kelly had confessed, to an individual named Gary Hutto, to being the sole participant and triggerman in the murder.

On February 12, 2001, the circuit court issued an order denying relief (PCR-2. 371-78). On appeal, subsequent to briefing and oral argument, the Florida Supreme Court affirmed the denial of postconviction relief. *Kokal v. State*, 901 So. 2d 766 (Fla. 2005). With regard to O'Kelly's confession, the Florida Supreme Court found that Hutto's testimony was inadmissible hearsay and Mr. Kokal had not shown that O'Kelly was unavailable to testify. *Kokal*, 901 So. 2d at 775-76. The court alternatively found that "[e]ven if Hutto's testimony was admissible for the limited purpose of impeaching O'Kelly's credibility, the testimony is not

of such a nature that it would probably produce an acquittal upon retrial." *Id.*

On February 22, 2005, Mr. Kokal filed a federal habeas corpus petition and a supporting memorandum of law in the Middle District of Florida. On February 11, 2008, the district court issued an order denying the amended petition. The Eleventh Circuit affirmed the denial of relief. *Kokal v. Sec'y, Fla. Dep't of Corrs.*, 623 F.3d 1331 (11th Cir. 2010), *cert. denied* 563 U.S. 1023 (2011).

On November 16, 2017, Mr. Kokal filed a state habeas petition, asserting that his death sentence was unconstitutionally unreliable and in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Kokal asserted that in light of the Florida Supreme Court's recent decision in *McCloud v. State*, 208 So. 3d 668 (Fla. 2016)¹, the court should revisit its previous determination and consider whether Mr. Kokal's death sentence

¹In *McCloud*, 208 So. 3d at 687, the Florida Supreme Court recognized its prior holdings that the relative culpability of a codefendant is implicated only when the codefendant has been found guilty of the same degree of murder. The court proceeded to "reject this limitation, because we do not see the utility in a blanket rule prohibiting a relative culpability analysis when a codefendant is convicted or pleads guilty to a different degree of murder than the primary defendant." *Id.* Indeed, the Florida Supreme Court rejected "any principle of law that hamstring[s] this Court's ability to conduct a full proportionality review, including a relative culpability analysis, simply because the State allowed a codefendant to enter a plea to murder that resulted in a life sentence." *Id.* at 688. Rather, according to the court, "Where factual findings clearly establish that the less culpable defendant is the only defendant receiving a death sentence, that error must be rectified." *Id.*

constitutes disparate treatment in light of codefendant O'Kelly's significantly lesser sentence.

Mr. Kokal's petition was denied by the Florida Supreme Court on March 23, 2018. *Kokal v. Jones, etc.*, No. SC17-2022 (Fla. March 23, 2018). Rehearing was denied on April 24, 2018.

FACTS RELEVANT TO QUESTIONS PRESENTED

Mr. Kokal and O'Kelly were indicted for first-degree murder. Five months after the indictments, O'Kelly executed a guilty plea to second-degree murder and in exchange the prosecutors would recommend a sentence "in accordance with the sentencing guidelines" (twelve to seventeen years). Ultimately, O'Kelly received a sentence of fourteen years, and served just five-and-a-half years in prison. O'Kelly was also expected to testify against Mr. Kokal.

At Mr. Kokal's capital trial, the prosecution consisted of physical evidence linking O'Kelly and Mr. Kokal to the scene of the crime: Tire track impressions near the scene of the crime were consistent with the tires on O'Kelly's truck (T. 607). Shoeprint impressions near the scene of the crime were consistent with Nike shoes owned by Mr. Kokal and Pro-Wing shoes owned by O'Kelly (T. 614, 616) -- the examination of the impressions and the shoes was only limited to characteristics of the design, i.e. no class characteristics were observed (T. 614). A fingerprint identified as Mr. Kokal's was located on the cylinder of the firearm that belonged to O'Kelly, and on the end flap of the shell box (T. 619-20). Mr. Kokal's fingerprints were not found on

the victim's identification, the victim's wallet, the pool cue, or any other items introduced into evidence, other than a cigarette pack seized from O'Kelly's truck (T. 626-27). A small bloodstain on the tongue of the left Nike shoe was typed and found to be type B, the same blood type as the victim² (T. 637). No evidence was produced as to Mr. Kokal's blood type or whether or not O'Kelly's shoes exhibited any bloodstains. A firearms expert testified that the firearm seized from O'Kelly's truck fired the bullet retrieved from the victim's shoulder (R. 648).

The State also presented the testimony of Eugene Mosley. Mosley testified that he spoke to Mr. Kokal on September 30, 1983, and on that evening, Mr. Kokal told him: "that they had -- he killed a guy." (T. 551). Mosley did not know many details of the crime, but testified that Mr. Kokal told him that after exiting the car at Hanna Park, he and O'Kelly beat the victim and Mr. Kokal shot the victim (R. 552). Mosley also testified that Mr. Kokal stated: "dead men can't tell lies." (R. 554).

On cross-examination, Mosley admitted that Mr. Kokal was intoxicated during the conversation (T. 558). Mosley also admitted that during his deposition he attributed many of the actions Mr. Kokal allegedly discussed with him to both O'Kelly

²In 2000, Mr. Kokal requested that he be allowed to conduct DNA testing on the left Nike shoe in order to determine if the blood found on the shoe was in fact the victim's (PC-R3. 237-242). At the December 15, 2000, hearing, the State represented to the lower court that the blood sample obtained from the victim was destroyed and therefore there was no comparison available for testing (PC-R3. 583).

and Mr. Kokal, i.e., using the words "we" and "they" (T. 561). Mosley's explanation for the change in his testimony was that he "wasn't sure of the questions you were asking me. I had never gone through it before and I didn't know how to answer it." (*Id.*).

In his defense, Mr. Kokal called O'Kelly to testify. The sole purpose of calling O'Kelly to testify appeared to be so that the defense could introduce a letter written by O'Kelly in November, 1983, in which O'Kelly explained that he shot the victim, but the shooting was an accident (R. 692). On cross examination, O'Kelly read the letter to the jury:

On Thursday, September 29, 1983, I William Robert O'Kelly, Jr., and my partner, Gregory Alan Kokal, decided to go to the beach to see the ocean and to party. Greg being from Jacksonville said he knew a nice place where we could drive right up on the beach. The place is called Hanna Park. I was already pretty loaded from drinking and smoking some pot. When we got to the park the gates were already open, so we drove in.

Greg was driving as I was drinking more than him, and I thought it would be better if Greg drove. We drove to where we could drive up on the beach, but instead, we parked the truck up on the black top because we didn't want to get it stuck in the sand.

Greg shut the engine off and we got out to take a leak. Then, I told Greg let's shoot off soda water caps. We had about one gross of them that he got out in Arizona. When we got out I decided to take my .357 revolver out from underneath the seat and do some target practice.

There was what I thought to be driftwood or an old sack about a hundred and fifty feet down towards the water. I shot five rounds the first time because I always keep the hammer on the empty chamber when it's not in use.

Greg and I then went to the wood or sack and discovered that it wasn't what we thought it to be, but the body of a young man. As I was walking down to the wood I had the hammer of my gun cocked and aimed at the wood at about two feet away. I accidentally pulled the trigger and shot the body in the head.

I don't know why I did this because I never intentionally would shoot anyone unless it was in self defense. Then, Greg asked me what the hell did you do that for? I replied I don't know, I guess I was holding the trigger too tight. Then, he reached down to see if he was still alive. By this time I was still sober so I tried to get his pulse but his arm was cold and his driver's license was laying in the sand next to him and I picked it up and put it in my pocket.

There were pieces of what looked like the cue stick also laying in the sand that we both picked up. Then, I told Greg let's get the f**k out of here, so we threw down the cue stick pieces and ran up to the truck, got in and drove off. We decided to go and report it to the police, but then we thought it would look like we killed him and decided to just go home. I, William Robert O'Kelly, Jr., do solemnly swear as God is my witness that the above statement is true and to the best of my knowledge exactly as it happened in Hanna Park late night and early morning of September 29 and 30.

(T. 697-699). O'Kelly told the jury that the letter was intended to get him and Mr. Kokal "off the hook" (T. 699). O'Kelly then relayed to the jury his version of events, which completely exonerated him and inculpated Mr. Kokal (T. 702-706). O'Kelly's version of events also differed from the alleged statement that Mr. Kokal made to Mosley.

In his testimony, Mr. Kokal told the jury that O'Kelly was the triggerman. Mr. Kokal testified:

Q: (By Mr. Westling) Let's go to that night, the night Mr. Russell was killed. On that day, during about what time you got up (sic) based upon your usual habits?

A: About 2:00 o'clock.

Q: What did you do with the rest of the afternoon?

A: I drank and smoked.

Q: Where did you do that?

A: Out in the backyard, in the garage of the house.

Q: Was Mr. O'Kelly doing that with you?

A: Yes, sir.

Q: What did you and Mr. O'Kelly do that evening, and let's begin with the early -- first off, did you stay at the house all night or did you leave?

A: We left the house.

Q: About what time did you leave the house?

A: About 11:00 or 12:00 at night.

Q: Where did you go when you left the house? What was the intent?

A: Well, Mr. O'Kelly wanted to see the beach, the Atlantic Ocean. He had never seen it and we intended to go to the beach.

Q: All right. And who was driving the truck?

A: Me.

Q: Now, why were you going to drive?

A: Because I knew the area, I knew where I was going.

Q: All right. Now, did you all have any liquor with you when you left your mom's residence?

A: Well, no, we stopped on the way to the beach and got a bottle.

Q: A bottle of what?

A: Of rum, Bicardi.

* * *

Q: That evening, two or three hours, whatever, after you left your mother's house, did you all ever pick anybody up?

A: Yes, sir.

* * *

Q: Did you take the hitchhiker to Mayport?

A: No, sir.

Q: Where did you all go?

A: We went down -- we were heading towards the Naval Base and we asked him if he smoked pot and the guy said yes, and so we asked him if he wanted to smoke some and he said yes. So, we agreed that we'd go down to Hanna Park because it was a nice section of the beach and it was on the way. It was pretty isolated at night.

* * *

Q: Now, you left off, you stopped the truck, what did you do after you parked the truck?

A: I got out to go to the bathroom.

Q: Okay. Let me ask you where were you sitting? Well, obviously the driver's side. Where was Mr. O'Kelly sitting?

A: He was sitting on the passenger's side of the truck.

Q: All right. And where was Mr. Russell sitting?

A: In the center of the truck.

Q: Now, you got out and you went to the bathroom. What happened next? What did you do next Mr. Kokal?

A: Well, I used the bathroom on the beach.

Q: Okay. When you got done using the bathroom, what did you do?

A: I walked around to the back of the truck.

Q: Did you go around the back or the front?

A: Around the back of the truck.

Q: All right. And what if anything unusual did you observe as you got around the back of the truck?

A: I observed Mr. O'Kelly holding his pistol in the guy's face.

Q: How far apart were they from each other?

A: A couple of feet, just right --

* * *

Q: How would you describe your condition as far as intoxication is concerned? Look back and try to remember.

A: Pretty drunk.

Q: Had you also used marijuana that evening?

A: Yes, quite stoned and drunk; I was feeling pretty good.

Q: All right. Now, when you saw that pistol in his face, when you saw Bill holding that pistol, did you run?

A: No, sir.

Q: Why didn't you turn around and run?

A: Because I was scared.

* * *

Q: All right. Now, what happened next, if anything, after you saw Mr. O'Kelly with the pistol in the face of this boy, this young boy that you all had picked up? What if anything did Mr. O'Kelly do next?

A: He told the guy to turn around.

Q: Did the guy turn around?

A: Yes.

Q: Then what happened?

A: Then he hit the guy in the back of the head with the gun?

* * *

Q: What did Mr. O'Kelly do after he hit the man in the back of the head with the revolver?

A: He told the guy to put his hands on the truck.

Q: Did the guy do that?

A: Yes.

Q: All right. Had you said anything? Now we're going to go step by step. Had you said anything up to this point to Mr. Russell from the time that you saw the pistol until the time that he was struck in the head?

A: No, sir.

Q: Had you said anything to Mr. O'Kelly?

A: No.

Q: Why didn't you ask him to stop?

A: I didn't, just didn't ask him. I was scared of him.

Q: Did the man put his arms on the truck?

A: Yes, he did.

Q: What if anything did Mr. O'Kelly do then?

A: He stuck his pistol in his pants.

Q: And then what?

A: And then he reached in the guy's back pocket and took his wallet.

Q: What did O'Kelly do with the wallet?

A: Put the wallet in the truck.

Q: Where did he put it in the truck, do you know?

A: On the dashboard.

Q: What did O'Kelly do then?

A: Grabbed a pool cue off of the dashboard.

* * *

A: He walked out behind the guy and then hit him over the head with a pool cue.

* * *

Q: How many times did he hit him in the back of the head at the truck?

A: The time he hit him with the gun and the time he hit him with the stick.

Q: What happened when he hit him in the head with the stick, in the back of the head at the truck?

A: It broke.

Q: How many pieces?

A: Two.

Q: What did O'Kelly do then?

A: He picked up the piece that was broke.

Q: And then what?

A: He told the guy to walk down towards the ocean.

* * *

Q: What happened when the three of you all got down close to the water?

A: Mr. O'Kelly, Bill, hit the guy over the head with the pool stick again.

* * *

A: After he had hit him, then the guy still didn't fall down, or whatever Mr. O'Kelly expected him to do and he told the guy to lay down on the beach.

Q: Then what happened?

A: Then he hit him again with the pool stick repeatedly and then it broke again.

* * *

Q: Now, after the pool cue was finally broken, what did you and Mr. O'Kelly do?

* * *

A: I told him I was getting the hell out of there.

Q: What did he say?

A: As I recall, he didn't say anything right then.

Q: What did you do?

A: I started walking towards the truck.

Q: What did he do?

A: He was walking behind me.

* * *

A: I got in the truck and started the truck up and told him I was leaving.

Q: What did he do?

A: He said that he was going back down to the beach.

* * *

Q: What happened when he got down to the beach, what did you either see or hear with you in the truck and him down by the water?

A: I heard a blast and seen a flash.

Q: Okay. Then what happened?

A: Then he ran back up to the truck.

Q: Did he say anything when he got to the truck?

A: He said he just wasted the f****r, to be more specific he said I smoked the f****r.

* * *

Q: Did you know he was going to shoot the man?

A: No.

Q: Did you know that the man was going to be robbed?

A: No, sir.

(T. 719-35).

During his postconviction proceedings, Mr. Kokal presented evidence that O'Kelly had spoken to a fellow inmate while incarcerated at the Duval County Jail and at the Polk County Correctional Institution. That inmate, Gary Hutto, testified in October, 2000 about his contact with O'Kelly. Hutto recalled having contact with O'Kelly in 1983 and actually being housed with O'Kelly in the same cell in 1984 (PC-R3. 535-36). Hutto was also incarcerated with O'Kelly after they had both been sentenced at Polk Correctional Institution (Polk C.I.) (PC-R3. 536).

While incarcerated together at the Duval County Jail, O'Kelly implicated himself as the sole instigator, participant and triggerman in the Russell murder:

Q: (by Mr. Thomas) Okay. And did he explain to you what happened the night that he and Mr. Kokal were involved with the death of the sailor named Jeffrey Russell?

A: Yes.

Q: And what did he tell you?

A: He said that he had robbed the guy and that they had only got a dollar.

And that he had beat the guy in the head with a pool stick.

He said that so and so co-defendant of his, he called him names. I would prefer not to use that language.

Q: Well --

A: But he didn't do nothing and he was just a sorry piece of junk.

MR. THOMAS: With the court's indulgence, I would like to know exactly what you remember about what Mr. O'Kelly said about Greg Kokal.

If the court will allow it, Your Honor?

THE COURT: Sure.

Q: (By Mr. Thomas) Go ahead.

A: Well, he said that p***y m****r f****r Greg, he was too drunk to do anything. He was too sorry. He was too scared. He didn't want to do anything. He stayed up by the truck. He made me take this guy and, you know -- he didn't want nothing to do with it. He wouldn't have nothing to do with anything. He kept saying let's go, let's go.

And, you know, he said I took this guy down the beach and I beat him in the head, you know.

And he said he wouldn't shut up.

And he said I shot him, you know in the head with a .357.

And he said then, he said, the punk only had a dollar.

Q: Okay. Did he tell you whose idea it was to rob Mr. Russell?

A: Well, he said that it was his. Because he said that he thought that the guy had just got off -- he

said he had just got off a boat. You know, he's a sailor at Mayport and he had just got paid and he had just got liberty, all he's got is this big wad. And he said he wanted it. And it turned out to be a dollar.

Q: Did Mr. O'Kelly tell you how it came to be that he and Mr. Kokal and Mr. Russell were together that night?

A: Yeah. They were out hitchhiking. The sailor dude was out hitchhiking. They were riding around getting drunk, you know, having a good time, smoking some good stuff and drinking, from what I understand, some real good liquor, and that they had some better dope.

* * *

Q: Do you know what the sequence of events was from the time that they arrived at the beach area or anything?

A: All I know is that he said that he beat him in the head with the pool stick, and that he just kept beating him, and then he said all of a sudden he hit him in the head with the gun, or -- he hit him in the head with the gun.

* * *

Q: Did he at any time indicate anything that would lead you to believe that Mr. Kokal was involved with or consenting to the beating and homicide of Mr. Russell?

A: No. I believe that it was just the opposite, that he didn't know nothing about it. He was too messed up, you know, on drugs and alcohol to really be -- tangled up with him in the first place.

* * *

Q: Did he ever express any regret in your presence that Mr. Russell had been killed?

A: No. He said that -- I said, you know, I asked him why did you kill the dude over a dollar.

He said well, you know how it goes. He said someone -- dead men tell no tales. He said he can't tell on me now. He said he can't snitch on me. Dead men

tell no lies. You know, like from some horror movie or war movie or some s**t he was watching or that he had watched.

(PC-R3. 539-44) (emphasis added).

Furthermore, when O'Kelly and Hutto were incarcerated at Polk C.I., O'Kelly told Hutto that he had received a "sweet deal" on his case and that he would only have to serve six to eight years in prison for the Russell murder (PC-R3. 537). At the time of the conversation, O'Kelly was housed in protective custody due to the fact that he received a deal on his criminal charges (PC-R3. 537).

THE COURT'S RULING

In denying Mr. Kokal's claim that the disparate treatment of himself and his codefendant rendered his punishment disproportionate, the Florida Supreme Court stated:

Petitioner Gregory Alan Kokal, a prisoner under a sentence of death, has filed a successive petition for writ of habeas corpus contending that he is entitled to a life sentence pursuant to *McCloud v. State*, 208 So. 3d 668 (Fla. 2016) (plurality opinion), because his codefendant pleaded guilty to second-degree murder and received a lesser sentence. Based upon *Jeffries v. State*, 222 So. 3d 538, 547 (Fla. 2017) (plurality opinion), Kokal is not entitled to relief. See *id.* at 547 (noting that this Court has "historically refused to review the relative culpability of codefendants when a codefendant pleads guilt and receives a lesser sentence as a result"). Moreover, this claim is procedurally barred as it could have been raised on direct appeal. Further, Kokal presented a relative culpability argument in *Kokal v. State (Kokal II)*, 901 So. 2d 766 (Fla. 2005), and this claim is successive.

Finally, the jury specifically found that Kokal actually killed the victim. *Kokal v. State (Kokal I)*, 492 So. 2d 1317, 1319 (Fla. 1986). Additionally, during trial, "evidence was presented that Kokal had bloodstains consistent with the victim's blood type on

his shoes the morning after the murder. Further, Kokal's fingerprints were on the murder weapon, Kokal had the victim's driver's licence after the murder, and Kokal confessed to [a friend] that he had killed the victim."

Kokal v. Jones, etc., No. SC17-2022 (Fla. March 23, 2018).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CONSIDER WHETHER MR. KOKAL'S DEATH SENTENCE IS CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Underlying Eighth Amendment jurisprudence is the principle that punishment should be directly related to the personal culpability of the criminal defendant. See *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Where punishment is not directly related to, or exceeds the culpability of the defendant, it runs afoul of the Eighth Amendment. See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) ("it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.") (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)).

In Florida, an essential part of the death penalty scheme is the state supreme court's proportionality review. *Proffitt v. Florida*, 428 U.S. 242, 251 (1976). Indeed, proportionality review is one way that this Court has determined that Florida is fulfilling its obligation under *Furman v. Georgia*, 408 U.S. 238 (1972), which "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk

of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion).

In *Gregg*, the plurality pointed to Georgia's statute which was designed to require automatic review of death sentences to determine "whether the sentence is disproportionate compared to those sentences imposed in similar cases" to be "an important additional safeguard against arbitrariness and caprice." 428 U.S. at 198.³ Most succinctly, "the proportionality requirement on review is intended to prevent caprice in the decision to inflict the death penalty." *Id.* at 203.

Likewise, in *Profitt*, in upholding Florida's newly revised capital sentencing statute, the plurality again pointed to the Florida Supreme Court's proportionality review as part of the "procedures like those used in Georgia, [that] appear to meet the constitutional deficiencies identified in *Furman*." 428 U.S. at 251.⁴ Indeed, this Court stated that the Florida Supreme Court's

³The *Gregg* Court described Georgia's proportionality review:

In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant.

Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.

428 U.S. at 198 (emphasis added).

⁴The *Proffitt* Court specifically referenced the Florida Supreme Court's opinion in *State v. Dixon*, 283 So. 2d 1, 7 (Fla. (continued...))

automatic appellate review of death sentences “minimized” the “risk” that a death sentence would “be imposed in an arbitrary and capricious manner.” *Id.* at 252-53. Specifically, the plurality stated:

Under Florida’s capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. **Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is ‘no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not’.**

Proffitt, 428 U.S. at 253 (emphasis added)(citations omitted).

Further illustrating the importance of the Florida Supreme Court’s proportionality review to being an anchor to the Eighth Amendment’s requirement of reserving the death penalty for the worst offenders, the *Proffitt* plurality stated:

[I]t is apparent that the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences.

⁴(...continued)
1973), which upheld and described Florida’s newly revised capital sentencing statute. In *Dixon*, the Florida Supreme Court held that proportionality review “guarantees that the reasons present in one case [for imposition of the death penalty] will reach a similar result to that reached under similar circumstances in another case.” 283 So. 2d at 1, 10. Moreover, in *Dixon*, the Florida Supreme Court emphasized the “reasonable and controlled, rather than capricious and discriminatory” discretion that was included in Florida’s capital sentencing statute requiring review by the court. *Id.* at 7, 8.

Id. at 258-59 (citations omitted). Such a “provision [was] designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants” and thus, was central to the Eighth Amendment analysis. *Id.* at 258.

Clearly, the Florida Supreme Court has an independent obligation to review each case where a death sentence is imposed. And in cases where codefendants are involved in the commission of a crime, the Florida Supreme Court performs an additional analysis of relative culpability. *Shere v. Moore*, 830 So. 2d 56, 60 (Fla. 2002). The Florida Supreme Court has explained that “[e]ven when a codefendant has been sentenced subsequent to the sentencing of the defendant seeking review on direct appeal, it is proper for this Court to consider the propriety of the disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime.” *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992). Additionally, in upholding its obligation in determining relative culpability, the Florida Supreme Court recently rejected “any principle of law that hamstring[s] this Court’s ability to conduct a full proportionality review, including a relative culpability analysis, simply because the State allowed a codefendant to enter a plea to murder that resulted in a life sentence.” *McCloud*, 208 So. 3d at 688.

Yet, despite this Court’s jurisprudence, the Florida Supreme Court’s decision in *McCloud*, and the dictates of the Eighth Amendment, Mr. Kokal resides on Florida’s death row while his

equally or more culpable codefedant, William O'Kelly, served just five-and-a-half years in prison. Given that the concept of proportionality is central to the Eighth Amendment, see *Graham v. Florida*, 560 U.S. 48, 59 (2010), the notion that a defendant could receive a greater punishment than his equally or more culpable counterpart runs afoul of this concept and does not "prevent caprice in the decision to inflict the [death] penalty." *Gregg*, 428 U.S. at 203.

A substantial question as to whether Mr. Kokal was the triggerman establishes that his death sentence is disproportionate. At trial Mr. Kokal testified that O'Kelly was the triggerman and had a more dominant role in the crime, whereas O'Kelly testified that Mr. Kokal was the triggerman and had a more dominant role in the crime. Indeed, while both men were at the scene of the crime, only their testimonies provide details as to the degree of their respective involvement. The physical evidence was consistent with Mr. Kokal's testimony.

Based upon the evidence, O'Kelly could have been the triggerman. Even if he was not the triggerman, his involvement is no less culpable. It was O'Kelly's gun. The victim's belongings were recovered from O'Kelly's vehicle. O'Kelly was at the crime scene. There is no justification for different sentences.

Mr. Kokal submits that his sentence is being carried out in an arbitrary and capricious manner, as he is less deserving of the death penalty than his codefedant. See *Atkins*, 536 U.S. at 319 ("[O]ur jurisprudence has consistently confined the

imposition of the death penalty to a narrow category of the most serious crimes. . . . [T]he culpability of the average murderer is insufficient to justify the most extreme sanction available to the State"); *Roper v. Simmons*, 543 U.S. at 568 ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (citation omitted); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) ("[T]he penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.")).

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by electronic service to Jennifer Donahue, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, on this 19th day of July, 2018.

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