NO. 18-5330

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY ALAN KOKAL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case

Question Presented

Whether this Court should grant certiorari review where the Florida Supreme Court declined to readdress the relative culpability of the two co-defendants as a part of a proportionality review which is based on adequate independent state grounds and the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal, does not conflict with this Court's precedent, and does not otherwise raise an important federal question.

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Opinion Below

The decision of the Florida Supreme Court appears as *Kokal v. Jones*, no. SC17-2022, 2018 WL 1446112 (Fla. Mar. 23, 2018). The Florida Supreme Court's direct appeal decision appears as *Kokal v. State*, 492 So. 2d 1317 (Fla. 1986). The Florida Supreme Court's post-conviction decision appears as *Kokal v. State*, 718 So. 2d 138 (Fla. 1998). The Eleventh Circuit Court of Appeals' affirmance of the denial of Petitioner's federal habeas petition appears as *Kokal v. Fla. Att'y Gen.*, 623 F.3d 1331 (11th Cir. 2010), *cert. denied*, *Kokal v. Buss*, 563 U.S. 1023 (2011).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme

Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(g)(i). Additionally, the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Gregory Kokal, was convicted of first-degree murder and sentenced to death. *Kokal*, 492 So. 2d at 1318.

> Kokal and a companion picked up a hitchhiker about midnight on the 29th or 30th of September 1983 and drove to a beach park near Jacksonville. When they alighted from the truck, the hitchhiker was struck with a pool cue belonging to Kokal and robbed. The victim was then marched about 100 feet at gunpoint where he was beaten unconscious with the pool cue as he pleaded for his life and then was killed with a single shot from a .357 revolver. When the body was discovered the following morning, the police initially believed, and the news media reported, that the victim had been beaten to death. An autopsy revealed that the gunshot was the cause of death, but this information was restricted to the doctor performing the autopsy and to investigating personnel.
>
> The following morning Kokal was apprehended by a police officer after fleeing in his companion's truck from a gas station without paying for gas. When confronted by the police officer and gas station attendant, Kokal offered to pay for the stolen gas, but did not have sufficient cash. When asked for identification, Kokal produced his own Florida driver's

> license, a Colorado driver's license belonging to his companion, a New York driver's license belonging to the victim, and an Arizona vehicle registration for the truck which was titled to his companion. The officer determined that the truck had not been stolen in Florida but was unable to check through the National Crime Information Computer because of system outage. He arrested Kokal and seized and inventoried the truck. Within the truck the officer found the murder weapon and a box of shells, both of which had Kokal's fingerprints. At the time of Kokal's arrest, the police did not know of his involvement in the murder and released him that day. Later that evening, Kokal told a friend of specific details of the robbery and murder not known to the public, including the fact that the victim was killed by a gunshot following the robbery because "dead men can't tell lies."

Id. at 1318-19. Petitioner testified at trial and blamed the shooting on his accomplice in the murder, William O'Kelly. *Kokal*, 718 So. 2d at 139. Petitioner

> stated that it was his companion, William O'Kelly, who actually beat, robbed, and shot the victim. While Kokal admitted to being present during the murder, he denied any involvement. It was not disputed at trial that the weapon used to shoot Russell belonged to O'Kelly. Further, a crucial piece of evidence in the State's case was a pair of Nike sneakers that Kokal admitted were his and that he had been wearing on the night of the murder. Blood matching the victim's blood type was found on the sneakers.

Kokal v. State, 901 So. 2d 766, 768 (Fla. 2005). "O'Kelly pled guilty to second-degree murder, agreed to testify truthfully if called, and received a fourteen-year sentence." *Id.* at 769. Additionally, the defense called O'Kelly as a witness at the trial and he

> admitted to being with Kokal on the night of the murder, but denied ever firing the weapon. He was then questioned regarding a letter he had written to Kokal in November 1983, in which he wrote that it was he, O'Kelly, who had fired the weapon that night and had accidentally shot the victim in the head. On cross-examination by the State, O'Kelly testified that at the time he wrote the letter, he was

> attempting to establish an explanation that would exonerate both him and Kokal of the crime. He stated that Kokal was his friend and he wanted to help him. O'Kelly then proceeded to detail the events that occurred on the night of the murder. O'Kelly recounted almost the identical story as Kokal, except he claimed that Kokal was the sole perpetrator and that he played no role whatsoever in the crime. He noted that he was arrested shortly after the murder and on the night he was arrested he told the police the same story he had just testified to, i.e., that despite what he had written in the letter, the truth was that Kokal had committed the crime.

Id. at 768-69. The State also presented the testimony of Eugene Mosley at trial, who "testified that Kokal informed him that it was he, Kokal, who had actually shot Russell in the head. According to Kokal, the motive was to rob the victim. Mosley testified that when he asked Kokal why he had shot the victim, Kokal said 'because dead men can't tell lies.'" *Id.* at 769.

Petitioner was found guilty of first-degree murder and sentenced to death after the jury's recommendation by a vote of twelve to zero. *Kokal*, 492 So. 2d at 1319. Further, the "jury's verdict on the first-degree murder charge included the specific finding that it was Kokal who had shot Russell." *Kokal*, 901 So. 2d at 796.

> The trial judge found four aggravating circumstances under section 921.141(5), Florida Statutes (1983): the murder was committed while engaged in a robbery-subsection (5)(d); the murder was committed for the purpose of avoiding or preventing a lawful arrest-subsection (5)(e); the murder was especially heinous, atrocious or cruel-subsection (5)(h); and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification-subsection 5(i).

Kokal, 492 So. 2d at 1319. The trial court found no mitigating circumstances. *Kokal*, 718 So. 2d at 139. On direct appeal, the Florida Supreme Court affirmed the

convictions and sentences. *Kokal*, 492 So. 2d at 1320.

Petitioner filed a post-conviction motion and petition for a writ of habeas corpus. *Kokal*, 718 So. 2d at 139. To rebut the claims of ineffective assistance of counsel, Petitioner's trial counsel testified at the evidentiary hearing that "Kokal admitted shooting the victim and recounted in great detail the steps of the crime." *Id.* at 140 n.5. Trial counsel's "strategy during the guilt phase was to contend that O'Kelly had been the triggerman," which Petitioner agreed to and "insisted on testifying that he was not the killer." *Id.* at 140 n.7. The Florida Supreme Court affirmed the post-conviction court's denial of Petitioner's claims and denied the petition for a writ of habeas corpus. *Id.* at 144.

After the denial of his first state post-conviction motion, Petitioner filed a federal habeas petition in the United States District Court for the Northern District of Florida, which denied the petition but issued a certificate of appealability on one issue. *Kokal*, 623 F.3 at 1343. The Eleventh Circuit affirmed the district court's denial of the petition. *Id.* at 1350.

Petitioner filed a successive post-conviction motion, in which one claim raised was newly discovered evidence of actual innocence, which was denied. *Kokal*, 901 So. 2d at 775-77, *cert. denied*, *Kokal v. Florida*, 546 U.S. 983 (2005). The newly discovered evidence was an affidavit by Gary Hutto, who claimed that while he and Petitioner's co-defendant, O'Kelly, were cellmates, O'Kelly admitted to him that he was the one who shot Russell and that Kokal had not participated in the murder.

Id. at 769. In a remarkably similar fashion, O'Kelly wrote an affidavit, and later testified at a post-conviction evidentiary hearing, that Hutto committed the murder for which his co-defendant, Kight, had previously been convicted and sentenced to death. *Id.* at 769-70; *see also Kight v. State*, 784 So. 2d 396, 398-99 (Fla. 2001). Hutto's affidavit implicating O'Kelly was drafted after O'Kelly's affidavit implicating Hutto, likely in retaliation. *Kokal*, 901 So. 2d at 769. Additionally, Hutto's version of events directly contradicted the testimony of Kokal as well as other evidence presented at trial. *Id.* at 776. The trial court denied Petitioner's newly discovered evidence because it was not evidence of such a nature that it would probably produce an acquittal upon retrial because the "overwhelming evidence of Kokal's guilt supports the trial court's denial of relief.". *Id.* at 775-76; *see Mills v. State*, 786 So. 2d 547, 549 (Fla. 2001); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

Petitioner raised two other successive motions for post-conviction relief which were both denied. One asserted that Florida's existing lethal injection procedure was unconstitutional. *Kokal v. State*, no. SC10-2007, 2012 WL 181648 (Fla. Jan. 20, 2012). The other related to ineffective assistance of counsel for failure to investigate and present mental health mitigation evidence during the penalty phase. *Kokal v. State*, 108 So. 3d 652 (Fla. 2013); *Kokal v. Sec'y, Fla. Dep't of Corr.*, 623 F.3d 1331, 1337 (11th Cir. 2010).

Petitioner then filed a writ of habeas corpus in the United States District

Court for the Middle District of Florida, No. 05-00173-CV-VMC, which was denied. The Eleventh Circuit affirmed the denial of Kokal's claim that "his trial attorney was constitutionally ineffective during the penalty phase because counsel failed to conduct a reasonable investigation that would have revealed organic brain damage." *Kokal*, 623 F.3d at 1344, *reh'g denied*, No. 08-11722-P, 410 Fed. Appx. 296 (11th Cir. Dec. 22, 2010), *cert. denied*, *Kokal v. Buss*, 563 U.S. 1023 (2011).

Petitioner filed another successive post-conviction motion raising three claims related to *Hurst*, which was denied because his case became final pre-*Ring*. *Kokal v. State*, 237 So. 3d 907 (Fla. 2018); *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Petitioner filed a petition for a writ of certiorari in this Court which is currently pending (case no. 17-9536).

Petitioner filed a successive petition for a writ of habeas corpus in the Florida Supreme Court raising the issue of relative culpability, which the Court denied. *Kokal*, 2018 WL 1446112 at *1. In an unpublished opinion, the 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 (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 guilty 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 license after the murder, and Kokal confessed to [a friend] that he had killed the victim." *Kokal II*, 901 So. 2d at 776. Accordingly, Kokal is the more culpable party.
>
> Based upon the foregoing, the petition is denied.

Id. Petitioner then filed a Petition for a Writ of Certiorari in this Court. This is the Respondents' Brief in Opposition to the Petition.

Reasons for Denying the Writ

> **There Is No Basis for Certiorari Review of the Florida Supreme Court's Proportionality Review in This Case Where the Claim Was Procedurally Barred in State Court and Does Not Present an Important or Unsettled Question of Federal Law or Conflict with That of Any Other State Supreme Court.**

Petitioner seeks certiorari review of the Florida Supreme Court's decision re-affirming that his death sentence is in proportion with Petitioner's culpability. *Kokal*, 2018 WL 1446112 at *1. The Petition alleges that Petitioner's death sentence is violative of the Eighth Amendment because his relative culpability is less than that of his co-defendant, yet he received a greater sentence. (Petition at 23-24). However, relative proportionality review, which includes a relative culpability analysis in cases with co-defendants, is not a requirement of the Eighth Amendment. The Florida Supreme Court's proportionality review is not required by the constitution but instead is based on adequate and independent state

grounds. Nor is Florida's proportionality review in conflict with any other state court of last review, in conflict with any federal appellate court, or in conflict with this Court's Eighth Amendment jurisprudence. Thus, Petitioner's request for certiorari review should be denied.[1]

The Florida Supreme Court found Petitioner's claim to be "successive" and "procedurally barred" from review. Petitioner's claim was procedurally barred in state court because he failed to raise a claim of disparate treatment on direct appeal. The procedural bar alone is reason enough for this Court to deny certiorari review. This Court has repeatedly recognized that where a state court judgement rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *see also Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Moreover, Petitioner's claim is also barred by law of the case doctrine or collateral estoppel because despite Petitioner's failure to raise a claim of disparate treatment on direct appeal, the Florida Supreme Court did review proportionality, as it does in every case in which the death penalty is the sentence. Petitioner's actual innocence

[1] A very similar petition for a writ of certiorari in *Melton v. Florida* (No. 17-9330) has been distributed for the September 24, 2018, conference.

claim related to his relative culpability was also reviewed and rejected during post-conviction proceedings.

Certiorari review should be denied in this case because Florida's proportionality review is based on adequate and independent state grounds. The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005), *quoting Atkins v. Virginia*, 536 U.S. 304, 319 (2002). As such, the death penalty is limited to a specific category of crimes and "[s]tates must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper*, 543 U.S. at 568. The State of Florida has a list of sixteen aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. In Petitioner's case, four aggravating factors were proven. Because at least one of these enumerated aggravating factors has been proven beyond a reasonable doubt, Eighth Amendment concerns have been satisfied.

Many states also add protections that go above and beyond the requirements of the Eighth Amendment. Often times, these additional state-based requirements are forward looking in anticipation of evolving standards of decency and to ensure

that their capital sentencing schemes will remain constitutionally valid in the future. Because these are additional safeguards that are premised on the principles of, but not necessitated by the Eighth Amendment, they are state requirements and thus based on adequate and independent state grounds. This Court does not review state court decisions that are based on adequate and independent state grounds. *See Long*, 463 U.S. at 1040 ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, [this Court], of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010) (*quoting Long*, 463 U.S. at 1041).

One such additional safeguard added by many states is a proportionality review. In the wake of *Furman*, many states in redrafting their capital sentencing statutes added a statutory requirement to review whether a capital "sentence is disproportionate to that imposed in similar cases" to "avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Furman v. Georgia*, 408 U.S. 238 (1972). As this Court said, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Harris*, 465 U.S. at 50; *see also Lewis v. Jeffers*, 497 U.S. 764, 779 (1990) (noting

that "proportionality review is not constitutionally required"). As such, both proportionality review and its subset of analyzing the relative culpability of co-defendants are matters of state law. *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014) (holding that while a review of proportionality is not required by the Eighth Amendment, it is required by Florida's death penalty statute as interpreted by *Dixon*) (citing *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973)).

Florida's "proportionality review flows from Florida's capital punishment statute . . ." as well as arising "in part by necessary implication from the mandatory, exclusive jurisdiction [the Florida Supreme] Court has over death appeals." *Yacob*, 136 So. 3d at 546 (*citing Dixon*, 283 So. 2d at 10); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991); *see also*, Fla. R. App. P. 9.142(a)(5). The "Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). In reviewing proportionality as a product of Florida specific law, the Florida Supreme Court looks to many factors.

> In deciding whether death is a proportionate penalty, the Court conducts a comprehensive analysis to determine "whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003) (citations omitted). Accordingly, this Court considers the totality of the circumstances and compares the present case with other similar capital cases. *See Duest v. State*, 855 So. 2d 33, 47 (Fla. 2003)

> (quoting *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996)). This consideration entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998). "In reviewing the sentence for proportionality, this Court accepts the jury's recommendation and the trial court's weighing of the aggravating and mitigating evidence." *Miller v. State,* 42 So. 3d 204, 229 (Fla. 2010), *cert. denied,* [*Miller v. Florida,* 562 U.S. 1151] (2011).

McCray v. State, 71 So. 3d 848, 880-81 (Fla. 2011). Further,

> just because proportionality is not mentioned in its opinion on direct appeal, that does not mean that proportionality review has been omitted. . . . That review is an inherent aspect of our review of all capital cases. We need not specifically state that we are doing that which we have already determined to be an integral part of our review process.

Booker v. State, 441 So. 2d 148, 153 (Fla. 1983); *citing Messer v. State*, 439 So. 2d 875, 878-79 (Fla. 1983); *see also Patton v. State*, 878 So. 2d 368, 380-81 (Fla. 2004); *Krawczuk v. State*, 92 So. 3d 195, 208-09 (Fla. 2012). This state based proportionality review serves as an additional check on arbitrariness to ensure the narrowing requirements established by Florida law comply with the Eighth Amendment are, in practice, fully narrowing capital punishment only for defendants who, based on their crimes and aggravating circumstances, are "most deserving of execution." *Atkins*, 536 U.S. at 319. Proportionality review is not required by the United States Constitution and is instead a product of adequate and independent state grounds.

Further, "opportunities for discretionary leniency under state law does not render the capital sentences imposed arbitrary and capricious." *McCleskey v.*

Kemp, 481 U.S. 279, 307 (1987). So long as a capital sentence was imposed under sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," there is a presumption that the "death sentence was not 'wantonly and freakishly' imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976)).

Because this Court has held that the Eighth Amendment does not require proportionality review and any such review provides greater protection for defendants, the Florida Supreme Court's conducting of a proportionality review and relative culpability analysis in Petitioner's case does not conflict with this Court's Eighth Amendment jurisprudence. Thus, certiorari review should be denied.

Nor is there any conflict between Florida's proportionality review and any federal appellate court or state supreme court. Following this Court's decision in *Harris*, the federal appellate courts have consistently held that proportionality review and relative culpability review are not required by the Eighth Amendment. *Harris*, 465 U.S. at 50; *see United States v. Hammer*, 226 F.3d 229, 237 (3rd Cir. 2000), *cert. denied*, *Hammer v. United States*, 532 U.S. 959 (2001) (nothing that proportionality review is "not constitutionally necessary"); *United States v. Higgs*, 353 F.3d 281, 321 (4th Cir. 2003), *cert. denied*, *Higgs v. United States*, 543 U.S. 999 (2004) (rejecting the "claim that the FDPA violates the Eighth Amendment because

it does not require proportionality review"); *Hughes v. Johnson*, 191 F.3d 607, 622 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000) (noting that "the state appellate court is *not* required to conduct such a comparative proportionality review" citing *Harris*); *Wheeler v. Simpson*, 852 F.3d 509, 520 (6th Cir. 2017), *cert. denied Wheeler v. White*, 138 S. Ct. 357 (2017) (nothing there is "no federal constitutional requirement that a state appellate court conduct a comparative proportionality review"); *Silagy v. Peters*, 905 F.2d 986, 1000 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991) (noting that though "many states provide for proportionality review in their statutes," *Harris* "concluded that such a review is not constitutionally mandated"); *McGehee v. Norris*, 588 F.3d 1185, 1199 (8th Cir. 2009), *cert. denied*, *McGehee v. Hobbs*, 562 U.S. 1224 (2011) (noting that *Harris* held "that the Constitution does not require courts to consider whether a punishment is disproportionate to the punishment imposed on others convicted of the same crime"); *United States v. Mitchell*, 502 F.3d 931, 980 (9th Cir. 2007), *cert. denied*, *Mitchell v. United States*, 553 U.S. 1094 (2008) (*Harris* "squarely rejected the claim that the Constitution requires proportionality review in death sentences"); *United States v. Barrett*, 496 F.3d 1079, 1109 (10th Cir. 2007), *cert. denied*, *Barrett v. United States*, 552 U.S. 1260 (2008) (citing *Harris* for the premise that "the Eighth Amendment does not require state courts to conduct proportionality review of a death sentence"); *Mendoza v. Sec'y, Fla. Dept. of Corr.*, 659 Fed. Appx. 974, 981 (11th Cir. 2016) (noting "there is no constitutional right to *Proffitt*-style appellate

review"). The federal appellate courts are uniform in holding that the federal constitution does not require proportionality review in light of *Harris*.

As for the individual states, approximately "nineteen of the thirty-six states that provide for capital punishment continue to require comparative proportionality review by statute." Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29-3 Just. Sys. J. 257, 259 (2008). Each state that conducts a proportionality review does so based on different state law principles, none of which are violative of federal law, but are instead additional precautions that go above and beyond the requirements of the federal constitution. In determining whether a sentence is excessive or disproportionate to the penalty imposed in similar cases, some states compare the case at hand to other cases where a capital felony has been charged. Other states compare the case to other cases in which the sentence is death. *See, e.g., State v. Cobb*, 234 Conn. 735, 958 n.18 (Conn. 1995) (offering a consolidated comparative analysis of state-based proportionality review). Though the reviews are slightly different from state to state, they are not in conflict with each other. Since states that perform a proportionality review are going beyond what is required by the federal constitution, they are free to enact any additional protective measures that they feel are appropriate for criminal appellants in that state. *See, e.g., Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a boarder range of cases than is

required by this [Court].").

Additionally, this case presents a poor vehicle for the underlying Eighth Amendment question of whether a less or equally culpably co-perpetrator can be sentenced to death while the other co-perpetrator receives a lesser sentence. Here, Petitioner's claim is meritless because the jury made a specific finding that Petitioner was the triggerman and thus more culpable than his co-perpetrator, O'Kelly. *Kokal*, 492 So. 2d at 1319. In Petitioner's case, his co-defendant had already pleaded guilty prior to trial and the culpability of each party was put to the jury as both Kokal and O'Kelly gave testimony accusing the other of being the culpable party.

In his successive habeas petition to the Florida Supreme Court, Petitioner raised no extraordinary or exceptional circumstances as a basis for why the issue of proportionality should be relitigated. Instead, Petitioner argued that since he is less culpable, his disparate treatment claim should be considered in light of the newly decided *McCloud* and in order to ensure equal protection of the law. *McCloud*, 208 So. 3d at 668. Even ignoring any procedural bars, the law of the case doctrine, collateral estoppel, and retroactivity issues, *McCloud* is distinguishable from Petitioner's case and thus is not applicable. Instead, *Jeffries* which was decided in July 2017, not *McCloud* which was decided in November 2016, is the proper case under which Petitioner's claim would be analyzed. *Jeffries*, 222 So. 3d at 538.

In conducting the proportionality review in *McCloud*, the Florida Supreme Court rejected

> any principle of law that hamstrings this Court's ability to conduct a full proportionality review, including a relative culpability analysis, simply because the State allowed a codefendant to enter to a plea to murder that resulted in a life sentence. Here, the relative culpability of the defendant as compared with the codefendant is so clear under the unique circumstances of this case that his death sentence must be reduced to a life sentence.

McCloud, 208 So. 3d at 688. In *McCloud*, five co-perpetrators were all indicted for two counts of first degree murder. *Id.* at 674. One co-perpetrator was found legally incompetent to stand trial and three others entered pleas to second-degree murder in exchange for testifying truthfully in proceedings against the other co-perpetrators. *Id.* McCloud was the only co-perpetrator to receive death sentences. In *McCloud*, the "unique circumstances" which required his sentence to be reduced to life included the fact that "the jury explicitly determined by special interrogatory that McCloud was not the shooter." *Id.* at 688. Not only was McCloud not the triggerman, he also was not an instigator of the crime, the ringleader, or a dominant player in the crimes. *Id.* at 688-69. As clear from the opinion, *McCloud* is the exception to the rule, not the rule itself.

Unlike the facts in *McCloud*, Petitioner was a dominant player and the actual triggerman in the murder of Russell. Only Petitioner disputes that he was the triggerman, a claim with which even the jury disagreed. In direct contravention with *McCloud*, where the jury found he was not the triggerman, Petitioner's jury

"specifically found that Kokal had personally killed the victim." *Kokal*, 492 So. 2d at 1319. Petitioner's case is vastly different from the "unique circumstances" found in *McCloud*. Thus, *McCloud*'s narrow exception is not applicable to Petitioner.

In contrast with the *McCloud* exception, the rule of Florida's proportionality review related to co-defendants is that

> a relative culpability analysis is not always conducted. For example, [the Florida Supreme Court has] held that such a review cannot be performed if a codefendant is ineligible for the death penalty because of age or intellectual disability. Relative culpability is also inappropriate when a codefendant is adjudicated of a lesser offense that does not carry a possible sentence of death.
>
> Additionally, we have historically refused to review the relative culpability of codefendants when a codefendant pleads guilty and receives a lesser sentence.

Jeffries, 222 So. 3d at 547 (citations omitted). Jeffries claimed his sentence was disproportionate with one of his co-defendants who pled guilty to first-degree murder and was sentenced to life imprisonment but did not claim his sentence was disproportionate to the other co-defendant who pleaded guilty to second-degree murder. *Id.* at 545, 548 n.2. The Florida Supreme Court affirmed "the trial court's refusal to consider the relative culpability" of Jeffries and his two co-defendants who pled guilty and received lesser sentences as a result of plea deals. *Id.* at 548.[2] Further, the Court found Jeffries' death sentence to be proportional in light of the

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[2] The dissent believes that the "failure to conduct a relative culpability analysis contradicts" *McCloud*. *Jeffries*, 222 So. 3d at 552. The dissent's main concern lies with ensuring "that the death penalty is not imposed arbitrarily or capriciously." *Id.* But as the majority notes, prosecutorial discretion regarding capital sentencing is not arbitrary and capricious. *Jeffries*, 222 So. 3d at 547 (citing *McCleskey*, 481 U.S. at 311-312).

"four valid aggravating circumstances that were assigned moderate to great weight" and the "relatively little mitigating evidence, all of which the trial court assigned little weight." *Id.* at 550.

Like *Jeffries*, Petitioner's co-defendant, O'Kelly, pled guilty to a lesser degree of murder in exchange for a lesser sentence. O'Kelly pled guilty prior to Petitioner's trial to second-degree murder and received a sentence of fourteen years in exchange for his truthful testimony against Petitioner. *Kokal*, 901 So. 2d at 769. Like *Jeffries*, the Florida Supreme Court found Petitioner's death sentence to be proportional. In light of four valid aggravators and no mitigating circumstances, and in comparison to other cases in which a death sentence was upheld, Petitioner's death sentence was affirmed. *Kokal*, 718 So. 2d at 139; *Messer*, 439 So. 2d at 879 ("we must compare the case under review with all past capital cases to determine whether or not the punishment is too great" but "[w]e reject the assertion that in our written opinion we must explicitly compare each death sentence with past capital cases"). Petitioner's claim of disparate treatment is meritless because the jury specifically found that Kokal was the triggerman and since Petitioner's co-defendant received a plea to second-degree murder in exchange for testimony against Petitioner.

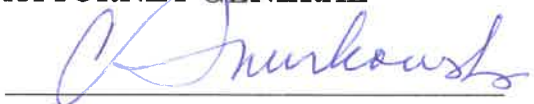
The Florida Supreme Court's determination of proportionality in Petitioner's case was based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. There is no conflict between the Florida

Supreme Court's proportionality decision and any federal appellate court as the appellate courts recognized that proportionality review is not constitutionally mandated. Finally, though Florida's proportionality review differs from other states, it is not in conflict with any other state as each state is free to determine the extent to which it is appropriate to provide greater protections to state defendants beyond the protections mandated by the Eighth Amendment. Thus, certiorari review should be denied.

Conclusion

Respondent respectfully submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL



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