NO. 18-6167

IN THE SUPREME COURT OF THE UNITED STATES

RONALD WAYNE CLARK, JR.,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

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 *Clark v. Jones*, no. SC17-2009, 2018 WL 1136122 (Fla. Mar. 2, 2018). The Florida Supreme Court's direct appeal decision appears as *Clark v. State*, 613 So. 2d 412 (Fla. 1992), *cert. denied*, *Clark v. Florida*, 510 U.S. 836 (1993). The Florida Supreme Court's post-conviction decision appears as *Clark v. State*, 35 So. 3d 880 (Fla. 2010). The Eleventh Circuit Court of Appeals' affirmance of the denial of Petitioner's federal habeas petition appears as *Clark v. Fla. Att'y Gen.*, 821 F.3d 1270 (11th Cir. 2016), *cert. denied*, *Clark v. Jones*, 137 S. Ct. 1103 (2017).

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, Ronald Clark, was convicted of the first-degree murder of Ronald Willis and sentenced to death. *Clark*, 613 So. 2d at 412. On January 12, 1990, Petitioner and John Hatch

> decided to hitchhike to Jacksonville to shoot pool. Along the way they shot at signs and beer bottles with a pistol Hatch had stolen from a house he had been remodeling. Willis stopped to give them a ride, and, during the ride, Clark whispered to Hatch that he was going to steal the truck. When Hatch asked Willis to stop the truck, both he and Clark got out of the truck, and Clark, who had the stolen pistol, shot Willis seven or eight times. Clark shoved Willis' body to the center of the seat, Hatch got in the passenger's seat, and Clark drove to a more secluded area. Clark pulled Willis' body from the truck, during which Willis' shirt came off. Clark then took Willis' wallet and boots and

> pushed his body into a ditch. Clark and Hatch went to a restaurant and to Hatch's ex-wife's apartment complex, but later returned to where they had left the body. Taking the body with them, they went to Clark's father's house and got a rope and several cinder blocks. They then drove to the Nassau County Sound Bridge, tied the blocks to the body, and dumped it into the water. After driving around some more, they went to an acquaintance's house to buy drugs. The acquaintance went with them to the motel where Willis' ex-wife and her sister found the truck. Hatch and Clark left the state, eventually winding up in South Carolina. Hatch returned to Nassau County, where he was arrested. South Carolina authorities arrested Clark on February 7, 1990 and returned him to Florida.

Id. at 413. "Hatch, in exchange for a twenty-five-year sentence, testified against Clark. Clark testified on his own behalf that Hatch killed Willis." *Id.* Petitioner was found guilty of armed robbery and first-degree murder and sentenced to death after the jury's recommendation by a vote of eleven to one. *Clark*, 35 So. 3d at 884. After Petitioner refused to put on any evidence of mitigation, the trial judge found

> (1) Clark was previously convicted of another capital felony, (2) the murder was committed during the commission of a robbery, and (3) the murder was committed for pecuniary gain. The trial judge considered and rejected the following mitigating factors: (1) prior criminal history, (2) extreme mental or emotional disturbance, (3) the victim was a participant in the conduct or consented to the act, (4) Clark was a minor participant, (5) Clark was under extreme duress or under substantial domination, (6) diminished capacity, and (7) Clark's age at the time of the murder.

Id. at 884 n.1. After asking the trial judge to consider three mental health experts' reports, the "trial court found that all three aggravators and no mitigators had been established" and sentenced Petitioner to death. *Clark*, 613 So. 2d at 414. On direct appeal, the Florida Supreme Court affirmed the convictions and sentences. *Id.* at 415.

After the Florida Supreme Court denied his claims on direct appeal, Petitioner filed a petition for a writ of certiorari to this Court, which was denied in 1993. *Clark*, 510 U.S. at 836. Under Florida law, Petitioner's judgment and sentence became final upon this Court's disposition of the petition for a writ of certiorari, which occurred in 1993. Fla. R. Crim. P. 3.851(d)(1)(B).

Petitioner filed a post-conviction motion raising twenty-eight claims. *Clark*, 35 So. 3d at 885 n.3. On appeal, Clark contended

> (1) trial counsel was ineffective for failing to investigate and present evidence that Hatch was the shooter; (2) trial counsel was ineffective for failing to present mitigation at the penalty phase of his trial or, alternatively, for failing to convince Clark that he needed to present mitigation; and (3) there is newly discovered evidence that Hatch confessed to being the shooter in the Duval County murder, which Clark claims entitles him to a new trial.

Id. at 886. Petitioner's counsel testified "that had there been a basis to show that Hatch was the shooter, [he] would have developed that evidence." *Id.* at 888. Additionally, Petitioner "presented no evidence to support this claim," that Hatch was "the shooter and the leader." *Id.* Regarding the claim of newly discovered evidence that Hatch allegedly confessed to being the shooter to an individual named Thompson, the Florida Supreme Court found the claim was procedurally barred. Even if the claim was not procedurally barred,

> Thompson testified that Hatch admitted he shot someone after a drug deal gone bad, that Hatch had testified against Clark to save his own life, that the victim owed one of them money and had pulled a gun on them, and that Hatch had thrown the victim's body in the canal. Thompson did not testify regarding the name of the victim, the time of the murder, or any other information that would clearly exonerate

> Clark in the murder. The information alleged to have been provided by Hatch to Thompson does not create sufficient doubt that Hatch was the shooter instead of Clark.

Id. at 892. Further, Thompson's evidence was "not consistent with the evidence presented at trial" and, since "Thompson is serving multiple sentences,"[1] he "would probably not serve as a credible witness at a new trial." *Id.* at 893. The Florida Supreme Court noted that on direct appeal, they found "sufficient evidence" even after considering that "Clark testified at trial that Hatch was the shooter." *Id.* at 888 (citing *Clark*, 613 So. 2d at 413). The Florida Supreme Court affirmed the post-conviction court's denial of Petitioner's claims. *Id.*

After the denial of his State post-conviction motion, Petitioner filed a federal habeas petition in the United States District Court for the Middle District of Florida, which denied the petition and a certificate of appealability. *Clark*, 821 F.3d at 1282. The Eleventh Circuit issued a certificate of appealability on three questions, then affirmed the decision of the district court denying the petition. *Id.* at 1282, 1291.

Petitioner filed a successive post-conviction motion raising three claims related to *Hurst*, which was denied because his case became final pre-*Ring*. *Clark v. State*, 238 So. 3d 99 (Fla. 2018), *cert. denied*, *Clark v. Florida*, no. 17-9492, 2018 WL 3094240 (Oct. 1 2018); *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*,

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[1] Specifically, nine consecutive life sentences. *Clark v. Sec'y, Fla. Dep't of Corr.*, no. 3:10-cv-547, 2014 WL 4059131 (M.D. Fla. 2014).

202 So. 3d 40 (Fla. 2016).

Petitioner then filed a petition for a writ of habeas corpus in the Florida Supreme Court raising the issue of relative culpability, which the Court denied. *Clark*, 2018 WL 1136122 at *1. In an unpublished opinion, the Court stated:

> Petitioner, Ronald Wayne Clark, Jr., a prisoner under a sentence of death, has filed a petition for writ of habeas corpus contending that he is entitled to relief pursuant to *McCloud v. State*, 208 So. 3d 668 (Fla. 2016) (plurality opinion). Having considered the petition, the response, and the reply, we hereby deny the petition. *See Jeffries v. State*, 222 So. 3d 538, 547 (Fla. 2017) (plurality opinion) (noting that the Court has "historically refused to review the relative culpability of codefendants when a codefendant pleads guilty and receives a lesser sentence as a result").

Id. Petitioner then filed a Petition for a Writ of Certiorari in this Court. This is the Respondent's 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.[2] *Clark*, 2018 WL 1136122 at *1. The Petition alleges that Petitioner's death sentence is violative of the Eighth Amendment because his relative culpability is

[2] This Court recently denied two petitions for writ of certiorari of nearly identical arguments regarding the relative culpability of co-defendants. *See Kokal v. Jones*, no. 18-5330, 2018 WL 3576260 (Oct. 1, 2018); *Melton v. Florida*, no. 17-9330, 2018 WL 2985870 (Oct. 1, 2018).

less than that of his co-defendant, yet he received a greater sentence. (Petition at 6, 18). 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.

Petitioner's claim is successive and procedurally barred from review. Moreover, Petitioner's claim is also barred by law of the case doctrine or collateral estoppel because the Florida Supreme Court did review proportionality during the direct appeal, as it does in every case in which the death penalty is the sentence. Petitioner's claim related to his relative culpability was also reviewed and rejected during post-conviction proceedings. The procedural bar alone is reason enough for this Court to deny certiorari review. This Court has repeatedly recognized that where a state court judgment 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.").

Even if there were no procedural bars, 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 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 conducted on direct appeal. 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 and 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. Therefore, the Florida Supreme Court's proportionality review is not required by the United States Constitution and is instead a product of adequate and independent state grounds.

Further, "[t]he 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 Federal Death Penalty Act (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) (noting 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, as described in *Harris*, does not require proportionality review.

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 proportionality 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. In Petitioner's case, his co-defendant had already pled guilty prior to trial and the culpability of each party was put to the jury as both Clark and Hatch gave testimony accusing the other of being the culpable party. *Clark*, 613 So. 2d at 414. Thus, Petitioner's claim is meritless because despite the jury hearing from both co-defendants who blamed each other for the shooting, and being informed at sentencing, as a form of mitigation, that Hatch received "disparate treatment," the jury found Clark guilty and sentenced him to death. *Id.* Petitioner's argument during the direct appeal that his death sentence was disproportionate was also rejected. *Id.* at 415. Further, the issue was raised and rejected during post-conviction. *Clark*, 35 So. 3d at 886.

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; (Petition at 6). 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 in the murder of Willis. Only Petitioner disputes that he was the triggerman, a claim which was presented to and rejected by the jury, the trial judge, the post-conviction court, and twice by the Florida Supreme Court, on direct appeal and in post-conviction. In direct contravention with *McCloud*, where the jury found he was not the triggerman, Petitioner's jury found Clark guilty and sentenced him to death after being presented with testimony from Hatch that Clark killed Willis, then from Clark that Hatch killed Willis. *Clark*, 613 So. 2d at 413. 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 pled 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.[3] Further, the Court found Jeffries' death sentence to be proportional in light of the "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, Hatch, pled guilty to a lesser degree of murder in exchange for a lesser sentence. Hatch pled guilty prior to Petitioner's trial and received a sentence of twenty-five years in exchange for his truthful testimony against Petitioner. *Clark*, 613 So. 2d at 413. Like *Jeffries*, the Florida Supreme Court found Petitioner's death sentence to be proportional. *Id.* at 415. In light of two 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. *Id.*; *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

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[3] The dissent in *Jeffries* 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 neither arbitrary nor capricious. *Jeffries*, 222 So. 3d at 547 (citing *McCleskey*, 481 U.S. at 311-12).

compare each death sentence with past capital cases"). Petitioner's claim of disparate treatment is meritless because the jury convicted and sentenced Petitioner after hearing conflicting testimony regarding who the shooter was from Petitioner and his co-defendant and since Petitioner's co-defendant received a plea 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 recognize 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,
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