DOCKET NO. 18-7568

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD EARL SHERE, Jr.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied where (1) proportionality and relatively culpability are purely constructions of state law and not federally mandated; (2) Petitioner's relative culpability has already been found to be higher than his codefendant's; (3) Petitioner's death sentence does not violate equal protection; and (4) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

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The decision of the Florida Supreme Court is not reported, but can be found at *Shere v. State*, No. SC18-754, 2018 WL 4293400, (Fla. Aug. 31, 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on August 31, 2018. (Pet. App. A). Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Richard Shere was charged with the 1987 murder of Drew Snyder. Snyder had been reported missing and the police investigation quickly led them to Shere. *Shere v. State*, 579 So .2d 86, 88 (Fla. 1991). Shere waived his *Miranda*[1] rights, gave several statements. He also led detectives to various scenes connected with the murder. *Id.* According to Shere, on December 24, 1987, Shere's later codefendant, Bruce "Brewster" Demo, told Shere that the victim, Snyder, was going to inform the police about Shere's and Demo's theft of air conditioners. *Id.* The next day, Demo called Shere and said he was thinking about killing Snyder. Shere alleged that

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Demo threatened to kill Shere if he did not help. *Id.* Shere went to Demo's house where Demo loaded a shovel into Shere's car. The two men drank beers and smoked marijuana into the early hours before going to Snyder's house and convincing him to go rabbit hunting. *Id.*

Shere told police that at some point in the hunt he placed his rifle on the roof of the car so he could relieve himself. *Id.* While he was doing that, Demo grabbed the weapon and Shere heard a gunshot. *Id.* Upon hearing the initial shots, Shere dropped to the ground and he heard Snyder say, "Oh, my God, Brewster," followed by several more shots. *Id.* When he got up he saw Snyder, still alive, in the back of the car. Shere claimed that he suggested that he and Demo take Snyder to the hospital. *Id.* Instead, according to Shere, Demo took out a pistol and shot Snyder in the forehead. Demo then pulled Snyder out of the car and shot him in the chest. *Id.* Shere said they drove Snyder's body a short distance and Demo forced him to dig a hole and bury the body. *Id.* Shere then returned home, where he cleaned up and burned the car's bloodied backseat *Id.* Later, at Demo's suggestion, Shere and his girlfriend Heidi Greulich went to Snyder's house, gathered some of his belongings, and dumped them in another city hoping to leave the impression that Snyder had left town. *Id.*

Demo gave a different account to the detectives. In his version, Demo, not Shere, was the one who had turned his back to relieve himself when he heard Shere fire the first shots. *Id.* at 89. Demo turned and saw Shere fire through the rear car

window five or six times. *Id.* Shere then pointed the gun at Demo and ordered him to finish off Snyder. *Id.* Demo shot Snyder twice in the head and once in the heart. *Id.* He said he made Shere dig the grave because he was upset by what Shere had done. *Id.* Greulich also gave a statement to police wherein she revealed that Shere had told her that he alone had killed Snyder. *Id.* A friend of Shere's, Ray Pruden, testified that one night after Christmas, Shere told Pruden that he had shot Snyder ten or fifteen times while rabbit hunting. *Id.* Medical testimony showed that Snyder had been shot ten times. *Id.*

The jury found Shere guilty of first-degree murder and recommended a death sentence by a vote of seven to five. *Id.* The judge found three aggravating factors: 1) the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws by eliminating a witness; 2) the murder was especially evil, wicked, atrocious, or cruel; and 3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Id.* In mitigation, the court said "that it considered numerous possible mitigating circumstances, rejected some, and found that 'the aggravating circumstances far outweighed the mitigating circumstances.'" *Id.* The judge followed the jury's recommendation and sentenced Shere to death. *Id.* In a separate jury trial Demo was convicted of the lesser-included offense of second degree-murder and was sentenced to life in prison. *Id.* at 94.

Although the Florida Supreme Court struck the especially heinous, atrocious,

or cruel aggravator, the court upheld Shere's conviction and sentence. *Id.* at 97. Shere's sentence became final in 1991. He has spent the past nearly three decades unsuccessfully challenging his conviction and sentence. *See Shere v. State*, 742 So. 2d 215 (Fla. 1999) (affirming denial of postconviction relief); *Shere v. Moore*, 830 So. 2d 56 (Fla. 2002) (denial of a petition for writ of habeas corpus); *Shere v. Secretary, Department of Correction*, 537 F. 3d 1304 (11th Cir. 2008) (affirming the district court's denial of a petition for a writ of habeas corpus); *Shere v. State*, 91 So.3d 133 (Table) (Fla. 2012) (affirming denial of postconviction relief); *Shere v. State*, 2016 WL 3450466 (Fla. 2016) (affirming denial of postconviction relief); *Shere v. State*, 2018 WL 4293400 (Fla. 2018) (affirming denial of postconviction relief).

On November 16, 2017, Shere filed a successive motion for postconviction relief based upon *McCloud v. State*, 208 So. 3d 668 (Fla. 2016), which he asserted overturned *Shere v. Moore*, 830 So.2d 56 (Fla. 2002), where the Florida Supreme Court declined to conduct a relative culpability review of his case because his codefendant was convicted of a lesser degree of murder. His motion was denied and he appealed. On August 31, 2018, the Florida Supreme Court affirmed the denial of relief finding:

> Shere's postconviction motion argued that he is entitled to a life sentence based on his relative culpability under *McCloud v. State*, 208 So. 3d 668, 687 (Fla. 2016). Shere contends that *McCloud* overruled *Shere v. Moore*, 830 So. 2d 56, 62 (Fla. 2002), which provides that this Court does not conduct a relative culpability analysis when the codefendant is convicted of a lesser crime. Contrary to Shere's claim, *McCloud* did not overturn the general rule. *McCloud* carved out an exception for the specific situation in which a jury both convicts the defendant of a more serious crime than his or her codefendant and also

> explicitly enters a special interrogatory verdict finding that the defendant was not the shooter. *McCloud*, 208 So. 3d at 688. *See also Hannon v. State*, 228 So. 3d 505, 510 (Fla. 2017) (finding *McCloud* "inapposite" in the absence of an interrogatory verdict); *Jeffries v. State*, 222 So. 3d 538, 547-58 (Fla. 2017) (declining to conduct a relative culpability analysis where codefendants agreed to plea deals).
>
> No jury finding exists in Shere's case that would meet the *McCloud* exception. Therefore, we affirm the trial court's denial of postconviction relief.

Shere v. State, No. SC18-754, 2018 WL 4293400, at *1 (Fla. Aug. 31, 2018), *reh'g denied*, No. SC18-754, 2018 WL 6729930 (Fla. Oct. 26, 2018). Petitioner now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because: (1) proportionality and relatively culpability are purely constructions of state law and not constitutionally mandated (2) Petitioner's relative culpability has already been found to be higher than his codefendant's; (3) Petitioner's death sentence does not violate equal protection; and (4) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

Petitioner requests this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion, arguing that the state court's decision not to do a relative culpability analysis violates the Eighth and Fourteenth Amendments. He also argues that his sentence violates the Eighth Amendment and Due Process.

As will be shown, Florida's relative culpability analysis scheme is a construction of purely state law and does not implicate Shere's federal constitutional rights. Shere does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Likewise, Shere cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision below, in which the court determined that Shere was not entitled to relief because his codefendant's sentence to a lesser degree of murder precluded any relative culpability review. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

I. Florida's rule to not conduct a relative culpability analysis between codefendants who have already been found not to be equally culpable does not violate Equal Protection or Due Process

Petitioner argues that his death sentence must be revisited as it is in violation of the Eighth Amendment in light of *McCloud v. State*, 208 So. 3d 668 (Fla. 2016). He asserts that in *McCloud* the Florida Supreme Court rejected the discussion in *Shere v. Moore*, 830 So.2d 56 (Fla. 2002) that limited the relative culpability analysis to codefendants convicted of or pleading to the same degree of murder. As such, Petitioner contends his sentence is unconstitutional. He maintains the Florida Supreme Court failed to conduct a proportionality evaluation rendering his sentence arbitrary and capricious and without a "proper" proportionality review, he has been denied due process and equal protection amounting to an Eighth Amendment violation.

Foremost, this claim fails to articulate any federal grounds that would warrant certiorari review by this Court. It is true that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). However, Petitioner has received that individualized consideration, and while Florida conducts a proportionality analysis in death penalty cases, and a relative culpability analysis when applicable, there is no constitutional requirement to do so. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) ("There is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is

imposed . . . We are not persuaded that the Eighth Amendment requires us to take that course."). The Florida Supreme Court has pointed this out explicitly in previous cases. *See Garcia v. State*, 492 So. 2d 360, 368 (Fla. 1986) ("Our proportionality review is a matter of state law."); *State v. Henry*, 456 So. 2d 466, 469 (Fla.1984) ("We note that proportionality review is not a requirement of the federal constitution, [citing *Pulley*], but rather a feature of state law. Thus, the parameters of that duty are set forth in our cases interpreting that duty." (citation omitted)). Since the entirety of this claim rests on state law grounds, it is not reviewable by this Court.

Even if relative culpability were constitutionally mandated, Petitioner's contention that he and his codefendant are at best equally culpable is not supported by the record. In *Shere v. Moore*, Petitioner challenged his death sentence based on his codefendant receiving a life sentence. 830 So.2d at 57. However, unlike Petitioner, his codefendant was convicted only of second degree-murder, a lesser crime, and was ineligible for a death sentence. Typically, when the Florida Supreme Court receives cases where more than one defendant is involved in the murder, the Court conducts an analysis they have termed "relative culpability" of each participant to determine if a death sentence is proportional in a given case. *Id.* at 60. However, they reaffirmed in Shere's case that when two defendants are convicted of different levels of crimes, they cannot perform this analysis:

> In this case, however, we cannot conduct a true relative culpability analysis because the codefendant was convicted of second-degree murder. We cannot make a true comparison of a first-degree murder

conviction and a second-degree murder conviction. *See Steinhorst v. Singletary*, 638 So. 2d 33 (Fla.1994) (because Hughes, the codefendant, was convicted of second-degree murder, his sentence of life imprisonment was not relevant to a claim of disparate sentencing). A conviction of first-degree murder requires a finding by either a jury or the judge that the defendant committed a murder with premeditation or during the course of a felony enumerated in section 782.04(1)(a) 2, Florida Statutes (1987). When a defendant is convicted of second-degree murder, either a jury or the judge has determined that the defendant committed a murder by doing an act that was imminently dangerous to another and evincing a depraved mind regardless of human life, without any premeditated design, or that the murder was committed during the course of a felony by a person who was not engaged in the perpetration of that felony. See § 782.04(2)-(3), Fla. Stat. (1987). In other words, a conviction of second-degree murder means the defendant did not form the necessary intent to commit first-degree murder and did not commit the murder during the perpetration or attempt to perpetrate drug trafficking, arson, sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aggravated abuse of the elderly or disabled, aircraft piracy, carjacking, home invasion robbery, aggravated stalking, murder of another human, or unlawful throwing, placing or discharging of a destructive device or bomb. Because Shere's codefendant was convicted of second-degree murder, his relative culpability [fn. 4] for this murder has already been determined to be less than Shere's culpability.

FN. 4: *Black's Law Dictionary* explains the concept of culpability as follows:

> "The concept of culpability is used as a reference point to assess the defendant's guilt and punishment even though, in the two contexts, culpability denotes different aspects of the defendant and the murder. At the guilt phase, culpability is most often used to refer to the state of mind that the defendant must possess. Also at the guilt phase, culpability may reflect a broader judgment about the defendant: when he is culpable for his conduct, it means that he is blameworthy and deserves punishment. At the punishment phase, the concept of culpability stands as the benchmark for when the death penalty is an appropriate punishment." Phyllis L. Crocker,

Concepts of Culpability and Deathworthiness, 66 Fordham L.Rev. 21, 35-36 (1997).

Black's Law Dictionary 385 (7th ed.1999).

> This situation is not unlike the one we addressed in *Larzelere v. State*, 676 So.2d 394 (Fla.1996). In *Larzelere*, we found a sentence of death proportional where the codefendant was acquitted. In so finding, we noted "that Jason's acquittal is irrelevant to this proportionality review because, as a matter of law, he was exonerated of any culpability." *Id.* at 407. Similarly, in this case a separate jury has determined Shere's codefendant to be less culpable, evidenced by his conviction for second-degree murder.
>
> On the other hand, equally culpable connotes the same degree of blame or fault. In order to have that same degree of blame or fault the codefendants must, at a minimum, be convicted of the same degree of the crime; third-degree murder does not connote the same degree of blame or fault as second-degree murder, which does not connote the same degree of blame or fault as first-degree murder. It is the crime for which the defendant is convicted that determines his or her culpability, and in this case that decision has been made by the trier of fact.

830 So.2d at 60-61.

Put simply, the relative culpability analysis Petitioner argues he is entitled to has already been done by two independent Florida juries. By definition of the crimes he and his codefendant were convicted of, Petitioner has already been found to be more culpable. In fact, not only was he found to have acted with premeditation as required for first-degree murder, he was found to have acted in a cold, calculated, and premeditated manner (CCP). These findings directly contradict Petitioner's argument that it has not been established that he was more culpable than his codefendant.

Petitioner's contention that *McCloud* overruled the court's decision in *Shere*

v. Moore was expressly rejected by the Florida Supreme Court.[2] *McCloud* involved a rare factual scenario where McCloud had been convicted of a higher degree of murder, but the jury returned a special interrogatory verdict finding that he was not the shooter. *McCloud*, 208 So.3d at 688. Under the unique facts of McCloud's case, and in conformity with other state precedent involving non-shooter defendants, the Florida Supreme Court held that a relative culpability analysis was appropriate. *See Hazen v. State*, 700 So. 2d 1207, 1214 (Fla. 1997) (Observing that the court has long recognized "that the less culpable, non-triggerman defendant cannot receive a death sentence when the more culpable, triggerman defendant receives" a lesser sentence). This holding in *McCloud* carved out a small exception to the general rule outlined in *Shere* due to facts particular to McCloud's case that are not present in Petitioner's. Importantly, *McCloud* only implicates Florida's relative culpability analysis, which as discussed above does not touch on any protections guaranteed by the federal constitution.

II. Petitioner's death sentence has not been arbitrarily imposed and does not violate the Eighth Amendment or Equal Protection

Petitioner argues that his death sentence is disproportionate in light of *Hurst v. State*, 202 So.3d 40 (Fla. 2016) and his uncorroborated, factually refuted notion that he is likely less culpable than his codefendant. He also argues that no court has ever considered his codefendant's lesser sentence when reviewing his

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[2] The circuit court in its order denying postconviction relief also provided additional independent state grounds for denying certiorari review. The circuit court found that Petitioner was time-barred from filing for postconviction relief based Florida Rule of Criminal Procedure 3.851(d)(2). *See Petitioner Appendix A.*

death sentence. However, the sentencing judge was clearly aware of Demo's conviction and ineligibility for the death penalty (as was the Florida Supreme Court on direct appeal), noting in the sentencing order:

> Defendant also claims that he was under extreme duress or under the substantial domination of Bruce Demo. Fla. Stat. § 921.141(6)(e) (1987). Ironically, Bruce Demo made a similar claim in his trial and was convicted of Second Degree Murder. There is no evidence of domination.

Respondent App. A. at 3. Not only did the sentencing judge note Demo's conviction for a lesser degree of murder, the wording shows the judge rejected Petitioner's claim that he was less culpable than Demo.

In addition, Petitioner's death sentence is supported by two aggravating factors, one of which, CCP, is among the weightiest in Florida's capital sentencing scheme (*See e.g. Brown v. State*, 126 So.3d 211, 220 (Fla. 2013)), with essentially no established mitigating evidence. Even after striking one of the three aggravators, the Florida Supreme Court found this was among the narrow classes of cases where the death penalty is warranted, stating:

> Having rejected one of the aggravating circumstances, we must determine the effect of the error by examining the valid aggravating and mitigating circumstances. In its findings, the trial court reviewed the mitigating evidence and found only one statutory circumstance: that Shere was twenty-one years old when Snyder was murdered. As to nonstatutory mitigating circumstances, the trial court summarized the mitigating evidence and rejected it, concluding that "the only appropriate sentence is death." We have carefully reviewed the record and find substantial competent evidence to support the trial court's rejection of the mitigating circumstances. *See Nibert v. State*, 574 So.2d 1059, 1062 (Fla.1990) (trial court may reject defendant's claim that a mitigating circumstance has been proved if the record contains substantial competent evidence to support that conclusion).

> Thus, we are left with very little mitigation and the two valid aggravating circumstances of cold, calculated, and premeditated murder; and murder committed to disrupt or hinder the lawful exercise of a governmental function or law enforcement. The jury recommended death on evidence that proved this was a cold-blooded, premeditated murder designed and carried out to eliminate a witness to an earlier crime. Under the circumstances of this case, we conclude that the trial court would have imposed the same sentence had it found that the aggravating circumstance of heinous, atrocious, or cruel had not been established.

579 So.2d at 96. And as must be noted, this proportionality review is governed under state law only, and does not implicate any federal constitutional protections or precedent. This petition is merely Petitioner's latest attempt to relitigate an issue he lost at trial back in 1989, when two separate juries rejected his version of events and accepted Demo's, determining that Petitioner was the more culpable murderer.

Finally, although Petitioner only obliquely makes this argument, Respondent would point out that there is no basis for certiorari review based on *Hurst*. The Florida Supreme Court held that Petitioner was not entitled to relief under *Hurst* because his sentence became final before this Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). 2018 WL 4346801 at *1. This is due to that court's partial retroactive application of *Hurst* to cases that only became final after *Ring*. *See Hitchcock v. State*, 226 So.3d 216 (Fla. 2017). Florida's retroactivity analysis is a matter of state law and this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41

(2017); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So.3d 112, 113 (Fla. 2017), *cert. denied, Lambrix v. Florida*, 138 S. Ct. 312 (2017).

As every claim Petitioner has made are matters of state law, there is no basis for this Court to exercise its discretionary jurisdiction.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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