

CAPITAL CASE

DOCKET NO. 18-7568

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD EARL SHERE, Jr.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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CAPITAL CASE

REPLY ON QUESTION PRESENTED

The State's reformulation of the question presented avoids the important issues that are properly before this Court. Certiorari should be granted.

LIST OF PARTIES

All parties appear in the caption on the cover page.

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REPLY TO BRIEF IN OPPOSITION

THE STATE'S BRIEF IN OPPOSITION DOES NOT OVERCOME MR. SHERE'S ARGUMENTS FOR GRANTING CERTIORARI.

The grounds in Mr. Shere's petition are properly before this Court. This petition reaches this Court as gross injustices remain in Florida's death penalty system that can only be adequately addressed by this Court. Mr. Shere maintains that his case is no longer one of the most aggravated and least mitigated based on his codefendant's life sentence and that Mr. Shere's death sentence violates equal protection. This Court should grant certiorari.

The State argued a number of points in its Brief in Opposition. These points are countered as follows:

MR. SHERE'S PETITION DID NOT CHALLENGE THE FLORIDA SUPREME COURT'S PROPORTIONALITY DECISION; HE ALLEGED THAT HIS DEATH SENTENCE NO LONGER FITS IN THE NARROW CLASS OF CASES THAT ARE THE MOST AGGRAVATED AND LEAST MITIGATED BECAUSE MR. SHERE'S CULPABILITY DOES NOT RISE TO THE LEVEL NECESSARY TO JUSTIFY A DEATH SENTENCE.

1. The State misconstrues Mr. Shere's argument.

Mr. Shere's petition specifically did not raise state proportionality. In his petition, Mr. Shere states in the second paragraph that:

Mr. Shere acknowledges that this Court has found that proportionality analysis, *per se*, is not required as a matter of constitutional law. See *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984) (holding that, "[T]he Eighth Amendment, applicable to the States through the Fourteenth Amendment, [does not] require a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner."). However, the denial of relief below

has rendered Florida's sentencing scheme "so lacking in other checks and on arbitrariness that it would not pass constitutional muster without comparative proportionality review," *id.* at 51, when the arbitrariness in the Florida Supreme Court's denial of *Hurst* relief to all of the pre-*Ring*, its granting of relief to all post-*Ring* non-unanimous cases, and Mr. Shere's co-defendant's sentence are considered.

Petition at 20. He did argue, as expressed by the Florida Supreme Court, that proportionality is used by the Florida Supreme Court to meet the requirements of the Eighth Amendment, as seen in the lengthy quote from *Yacob v. State*, 136 So. 3d 539, 547-48 (Fla. 2014). It is precisely the larger Sixth, Eighth and Fourteenth Amendment issues that this Court should resolve, regardless of how the State misconstrues Mr. Shere's argument.

The independent and adequate state ground theory does not prevent review of state court decisions that conflict with the United States Constitution. In the instant case it was the state court decision finding that the Eighth and Fourteenth Amendments were not violated that was the basis for denying Mr. Shere a remedy. There is no greater federal question than whether an individual's death sentence is arbitrary, capricious and excessive.

2. The State's reliance on "two separate juries rejecting" Mr. Shere's "version of events" ignores the scope of a guilt phase trial.

The State ignores the fact that a jury did not decide whether Mr. Shere was more or less culpable. The jury was not informed of

Mr. Demo's life sentence during guilt phase or the advisory panel during penalty phase. What Mr. Shere had was a jury trial on guilt. If he had better trial counsel like Mr. Demo had, he too could have been found guilty of a lesser charge. Nevertheless, the *guilt phase* jury in Mr. Shere's case made no determination that Mr. Shere was more culpable than Mr. Demo.

It is entirely possible that a jury could have believed that Mr. Demo was the older, more-culpable instigator of the murder, yet still found that the State had proven Mr. Shere's guilt of the charged offense. Once that part of the trial was over, the jury became an advisory panel and returned no verdict on specific findings of fact. See *Hurst v. Florida*, 136 S. Ct. 616 (2016). Nobody knows why the advisory panel recommended death by the slimmest of margins.

Neither jury considered the full extent of the evidence presented in the other case. As far as guilt was concerned, Mr. Demo did not testify in Mr. Shere's case and Mr. Shere did not testify in Mr. Demo's case. In Florida's bifurcated system, during the guilt phase, the jury decides whether the State has proven the case beyond a reasonable doubt, it does not consider the level of a codefendant's culpability. In Mr. Shere's case there were separate juries. In each trial, defense counsel would have attempted to cast blame on the other codefendant. This was not the

same as a jury actually weighing the culpability of each codefendant against the other.

In Mr. Shere's case, the vote by the advisory panel was 7-5. It was highly likely that when the jury was reconvened as an advisory panel the jury still believed that Mr. Shere was the less culpable of the two codefendants. A bare majority of the advisory panel could have believed that death was appropriate for both codefendants. A bare majority could have also felt that a death sentence for Mr. Demo was a foregone conclusion once a similarly situated advisory panel heard the case against Mr. Demo.

What could have led one or more members of the bare majority recommending death to recommend life was consideration that Mr. Demo was able to avoid a death sentence. It would have struck the remaining death voters as unfair and absurd that Mr. Shere receive a death sentence while the equally or more culpable Mr. Demo did not.

There is no take away from the lesser verdict in Mr. Demo's case. The verdict only showed that Mr. Demo had better trial counsel than Mr. Shere or that Mr. Shere's prosecutor was somehow lacking. Mr. Demo's jury never heard from Mr. Shere as Mr. Shere certainly was not a witness in Mr. Demo's case. That jury also could have believed that Mr. Demo was the most culpable and that Mr. Shere should be found guilty of a lesser charge or receive a lesser sentence than Mr. Demo.

None of the evidence from the other codefendant's case was considered by the other jury. This was why it was critical that the Florida Supreme Court consider the fact that Mr. Demo avoided death when it reviewed Mr. Shere's death sentence. This looked like it would take place when the Florida Supreme Court recognized the need for relative proportionality as a function of the Court's Eighth Amendment review in *McCloud v. State*, 208 So. 3d 668, 687 (Fla. 2016). In *McCloud*, the Florida Supreme Court,

recognize[d] that this Court has generally held that the relative culpability of a codefendant is implicated "only when the codefendant has been found guilty of the same degree of murder." *Shere v. Moore*, 830 So.2d 56, 62 (Fla.2002); accord *Brown v. State*, 143 So.3d 392, 406-07 (Fla.2014); *Wade*, 41 So.3d at 868. We now reject this limitation, because we do not see the utility in a blanket rule prohibiting a relative culpability analysis when a codefendant is convicted or pleads guilty to a different degree of murder than the primary defendant. As Justice Anstead wrote over a decade ago, such a rule would do a substantial injustice in cases like the one at bar:

Due to the uniqueness and the finality of death, this Court addresses the propriety of all death sentences in a proportionality review upon appeal. See *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990). In conducting this review, this Court considers the totality of all the circumstances in a case as compared to other cases in which the death penalty has been imposed, see *Robinson v. State*, 761 So.2d 269 (Fla.1999), thereby providing for uniformity in the application of this sentence. As a corollary to this analysis of comparing the circumstances of a case in which death had been imposed to others with a similar sentence, *688 the Court also performs an additional analysis of relative culpability in cases where more than one defendant was involved in the commission of the killing.

While the first analysis focuses on the larger universe of death sentences that have been imposed, the latter analysis [hones] in on the smaller universe of the perpetrators and participants in a given capital murder. We explained the principle in *Slater v. State*, 316 So.2d 539, 542 (Fla.1975), when we declared: "We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts." More recently, in *Ray v. State*, 755 So.2d 604, 611 (Fla.2000), this Court again emphasized and reaffirmed the principle that equally culpable codefendants should be treated alike in capital sentencing.

Shere, 830 So.2d at 64 (Anstead, J., concurring in part and dissenting in part).

Id. at 687-88. Considering it was Mr. Shere's own case that the Florida Supreme Court rejected the limitation, it would have seemed that court would welcome the opportunity to address the disparate treatment between codefendants and that Mr. Shere's death sentence was excessive. Instead the court denied Mr. Shere relief based on his not having a specific verdict that Mr. Shere was not the shooter like in *McCloud*. See *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). This was particularly disingenuous because Mr. Shere was denied his right to a jury for penalty phase at the time he was tried. See *Hurst v. Florida*, 136 S. Ct. 616 (2016).

By not applying the rule from *McCloud* in Mr. Shere's case, the Florida Supreme Court denied Mr. Shere equal protection.

Failing to consider that a death sentence may be excessive based on Mr. Shere's codefendant's life sentence allows Mr. Shere's death sentence to stand in violation of the Eighth Amendment's bar on arbitrary, capricious and excessive sentences. Mr. Shere is unconstitutionally sentenced to death because no decision maker has ever considered the lesser sentence of his codefendant in light of each codefendant's conduct and whether this removed Mr. Shere's case from the most aggravated and least mitigated of cases.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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