App. No. _______

IN THE SUPREME COURT OF THE UNITED STATES

October 2018 Term

PAUL WILLIAM SCOTT,

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari to the Florida Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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This is a Capital Case.

CAPITAL CASE

QUESTION PRESENTED

Whether Florida's refusal to consider the disparity between the 15-year prison term of his equal or more culpable codefendant and Scott's death sentence violates the cruel and unusual punishment clause of the Eighth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Paul William Scott, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court.

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court in this cause appears as Scott v. Jones, No. SC17-2045 (Fla. Apr. 6, 2018), and is attached to this petition as Appendix A. The Florida Supreme Court's order denying rehearing is Appendix B to this petition.

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its opinion on April 6, 2018 and issued its order denying rehearing on October 24, 2018. The jurisdiction of the Florida Supreme Court is invoked

under 28 U.S.C. Section 1257, with Petitioner having asserted in the Florida Supreme Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

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

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

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

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

As previously laid out by the Florida Supreme Court:

> In 1979, Paul Scott was convicted of the first-degree murder of James Alessi. Alessi died from a compressed fracture of his skull after he sustained six blows to his head with a blunt object. *Scott v. State*, 411 So. 2d 866, 867 (Fla. 1982).
>
> The evidence presented at trial revealed that, on the evening of the murder, Scott and his coperpetrator, Richard Kondian, told a third party about their plans to rob and kill Alessi. *Id*. The next morning, Alessi's nude body, bound at his hands and feet, was found in his home, covered with blood. *Id*. Due to the multitude of broken objects and the presence of blood throughout the home, it was clear that a violent struggle had taken place. *Id*. Scott's fingerprints were found all through the home, including on the neck of a broken vase and on a "bloodstained knife on the sofa which apparently had been used to cut the electrical cords used to tie the victim." *Id*. After Alessi died, Scott and Kondian "rummaged through" Alessi's house, stole his car, and then went to his jewelry and flower shop and took most of the gold. *Id*. Scott was arrested a month later in California in possession of several items of jewelry that were apparently the same items stolen from Alessi's store. *Id*.

> The Florida Supreme Court affirmed Scott's conviction and sentence on direct appeal. *Id*. It has also affirmed all of the trial court's orders denying Scott's various requests for rehearing, habeas corpus, and postconviction relief. *See Scott v. State*, 717 So. 2d 908 (Fla. 1998); *Scott v. State*, 657 So. 2d 1129 (Fla. 1995); *Scott v. Dugger*, 634 So. 2d 1062 (Fla. 1993); *Scott v. State*, 513 So. 2d 653 (Fla. 1987); *Scott v. State*, 464 So. 2d 1171 (Fla. 1985); *Scott v. Wainwright*, 433 So. 2d 974 (Fla. 1983); *Scott v. State*, 419 So. 2d 1058 (Fla. 1982).

Scott v. State, 46 So. 3d 529, 531 (Fla. 2009).

In 2017, Mr. Scott filed a petition for habeas corpus with the Florida Supreme Court, raising the issue of the disparate sentencing between him and his codefendant Kondian, relying on the 2016 decision of the Florida Supreme Court in McCloud v. State, 208 So. 3d 668 (Fla. 2017), which receded from prior caselaw disallowing a relative culpability analysis for codefendants sentenced to less than death based on a plea bargain with the prosecutor. The Florida Supreme Court denied Mr. Scott's habeas petition in April 2018, relying on its decision, subsequent to McCloud, in Jeffries v. State, 222 So. 3d 538 (Fla. 2017). Scott timely filed a motion for rehearing, which was denied on October 24, 2018. This petition for certiorari timely follows.

FACTS RELEVANT TO QUESTION PRESENTED

When Scott went to trial for the murder of James Alessi in this case in December 1982, his co-defendant Richard Kondian was awaiting his own trial and facing his own notice of the State's intent to seek the death penalty. However, two months after Scott's trial and days after he filed his notice of appeal, Kondian—who was equally or more culpable than Scott in this homicide—cut a deal with the State and entered a plea to 45 years in prison on a second-degree murder conviction. Under the sentencing laws in place at that time, Kondian served only 15 years of that sentence and was released on parole in 1994, and that parole was terminated in 2011.

Recognizing the Eighth Amendment concerns with such gross disparity in sentencing in this capital case, Justice Overton uttered these prescient words in his dissent from the Florida Supreme Court's refusal to address this disproportionality in Scott's direct appeal in 1984:

> There is a serious disparity in the sentencing of Scott and his codefendant, Kondian, who pleaded guilty to murder and was sentenced to forty-five years imprisonment after the petitioner, Scott, was tried by a jury, convicted of murder, and sentenced to death. Petitioner correctly asserts that we have not addressed this issue in these proceedings. Even when the accomplice has been sentenced subsequent to the sentencing of the defendant seeking review, it is proper for the Florida Supreme Court to consider the propriety of disparate sentences, *see Witt v. State,* 342 So.2d 497, 500 (Fla. 1977), to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. ***We should consider this issue at this time, rather than wait and see it arise for a second review in a motion under Florida Rule of Criminal Procedure 3.850.*** It appears from the record that the trial judge considered the respective roles of Scott and his codefendant in committing the murder, and this is an issue we can decide in this review.

Scott v. State, 419 So. 2d 1058 (Fla. 1982) (emphasis added).

After Scott's direct appeal was affirmed, the Florida Supreme Court took what was at the time the unprecedented step of denying Scott a stay of execution to allow him the opportunity to litigate any state postconviction or federal habeas grounds, but the federal district court was successfully petitioned for a stay. Scott v. Wainwright, 433 So. 2d 974 (Fla. 1983); Scott v. Dugger, Case No. 83-8293-Civ, S.D. Fla. In conjunction with his unsuccessful emergency motion for stay of execution before the Florida Supreme Court in 1983, Scott also filed a petition for habeas corpus raising claims of ineffective assistance of appellate counsel in direct appeal, as well as an application for leave to file a petition for a writ of error coram nobis. In that application, following the cue given by Justice Overton in his dissent in 1982, Scott argued that newly discovered evidence established that Kondian was the major perpetrator in the murder of Alessi and that his participation was relatively minor, and thus his sentence of death should be precluded. Id. at 976. The Florida Supreme Court denied the application, not on a finding that

Kondian was in fact less culpable than Scott, but rather on the procedural ground that the new evidence that Scott wished to present regarding the facts of the homicide was not indeed new because Scott was an eyewitness to the homicide, id., despite that the truly most critical new piece of evidence was Kondian's plea and 45-year sentence.

In 1992, the Florida Supreme Court first held that a codefendant's subsequent sentence of less than death constituted a valid basis for a claim of newly discovered evidence in Scott (Abron) v. Dugger, 604 So. 2d 465, 467 (Fla. 1992). However, shortly before Scott was decided, Paul Scott did make a second attempt to argue that his death sentence should be vacated in light of Kondian's greater culpability, by filing his own NDE claim regarding Kondian's 45-year sentence in his first successive 3.850 in December 1990, along with three other NDE claims:

> 1) the affidavit signed by Scott's codefendant, Richard Kondian, which acknowledges Kondian's and Scott's violent struggle with the victim and asserts that Scott did not intend to murder the victim;
>
> 2) the affidavit of one of the State's witnesses, Charles Soutullo, in which he recants his testimony at trial that Scott had told him that he (Scott) planned to rob the victim;
>
> 3) the fact that Kondian told Rhode Island police that he had cut his finger on a broken bottle during the struggle with the victim;
>
> 4) Kondian's forty-five-year sentence, imposed after Scott's conviction and sentence pursuant to a negotiated plea.

Scott v. Dugger, 634 So. 2d 1062 (Fla. 1993). However, the Florida Supreme Court in 1993 affirmed the denial of that claim on the basis that it was procedurally barred for not having been brought in the 1984 initial postconviction motion, despite no legal authority existing in 1984 to bring such a claim, and despite that Mr. Scott already attempted to raise the claim in a petition for writ of error coram nobis in 1983. Id. at 1065.

A fourth opportunity arose for the Florida Supreme Court to address proportionality in Scott's second successive 3.850 motion, in which the Florida Supreme Court in 1995 reversed the trial court's summary denial of that motion and remanded for an evidentiary hearing on the following Brady evidence:

> (1) that the State withheld a statement by Kondian's cellmate, Dexter Coffin, wherein Coffin stated that he told a police officer that Kondian admitted killing the victim;
>
> (2) that the State withheld a statement by Kondian's roommate at the time of the murder, Robert Dixon, in which Dixon stated that he told a police officer that Kondian was angry with Scott for running out on him at the murder scene; and
>
> (3) that the State withheld a medical examiner's photograph that suggested that Kondian had struck the fatal blow by hitting Alessi on the head with a champagne bottle.

Scott v. State, 657 So. 2d 1129, 1130 (Fla. 1995). In his concurring opinion, joined by Justice Anstead, Justice Kogan drilled down on how the new Brady evidence cogently related to the major issue in Scott's case that still had never been addressed on the merits—the proportionality issue:

> The pivotal point of this case is that the co-perpetrator Richard Kondian entered into a plea agreement that resulted in only a forty-five year prison term. Today, Mr. Kondian is a free man. Florida law is well settled that death is not a proper penalty when a co-perpetrator of equal or greater culpability has received less than death. *Harmon v. State*, 527 So. 2d 182 (Fla. 1988). Thus, the overriding question today is whether Mr. Kondian's culpability vis-a-vis that of Mr. Scott might be judged differently in light of the alleged *Brady* material.
>
> * * *
>
> The *Brady* material presented today directly reflects on the relative level of culpability between the two co-perpetrators, because it tends to establish that Kondian bore the greater guilt. Had this material been available for trial, the defense then could have argued the disparity to the jury. If believed, such evidence could have changed the jury's recommendation from 7-to-5 in favor of death to a 6-to-6 split, which constitutes a life recommendation under Florida law. In sum, a vote change by a single juror would have altered the entire complexion of this case, because the trial judge is required to give the jury's recommendation great weight. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975).

> Moreover, the *Brady* material reasonably could have influenced the Florida Supreme Court on appeal to reduce death to life because of Kondian's lesser sentence and his greater guilt (assuming arguendo the allegations here are true). We repeatedly have reduced sentences to life where a co-perpetrator of equal or greater culpability has received life or less. *E.g.*, *Harmon*. Indeed, we have not hesitated to apply this standard even in collateral challenges long after the trial and direct appeals have ended, *Scott* [*(Abron)*] *v. Dugger*, 604 So. 2d 465 (Fla. 1992), as Mr. Scott now asks us to do. *Accord Garcia v. State*, 622 So. 2d 1325 (Fla. 1993).
>
> This conclusion is all the more compelling in light of the Florida Constitution's requirement that the death penalty be administered proportionately. Article I, section 17 of the Constitution prohibits the imposition of "unusual" punishments, and in examining this prohibition we previously have stated:
>
> > It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991).
>
> I can think of no more paradigmatic example of disproportionate penalties than a case in which two persons have participated in the same murder yet the more culpable co-perpetrator is a free man and the less culpable co-perpetrator is sitting on death row. If that in fact is the case here, then the alleged *Brady* violation in this case has led to a result directly contrary to article I, section 17 of the Florida Constitution, because Scott's sentence thereby would be rendered "unusual." This is a question that must be examined on remand.

Scott v. State, 657 So. 2d 1129 (Fla. 1995).

Regrettably, the evidentiary hearing on remand was never completed, due to the trial court's failure to grant a motion for continuance in order to secure the witnesses, while postconviction counsel was litigating another case under warrant during the time when the evidentiary hearing was scheduled in Scott's case. The appeal of the trial court's denial of the Brady claims was a challenge based procedural harm rather than the merits of the claims the Florida Supreme Court found so compelling in its 1995 opinion. Scott v. State, 717 So. 2d 908 (Fla. 1998). Justices Anstead and Kogan dissented from the Florida Supreme Court's decision affirming the trial court's rulings, with Justice Anstead writing:

> I cannot agree with the majority that the trial court did not err in denying the appellant's request to depose the two (2) out-of-state witnesses [Coffin and Dixon] whose prior statements formed the basis for our prior remand for an evidentiary hearing. *See Scott v. State*, 657 So. 2d 1129 (Fla. 1995). We cannot simply write this off as moot in view of the trial court's denial of a motion for continuance, since the evidentiary hearing was carried over from January to February 14 and 15.

Id. at 913. Thus, another critical opportunity was lost for the Florida Supreme Court to finally rule upon Mr. Scott's proportionality challenge to his death sentence.

However, a new window opened for the Florida Supreme Court to finally address this fundamental injustice: its decision in November 2016 in McCloud v. State, 208 So. 3d 668. Prior to McCloud, the Florida Supreme Court had held that a codefendant's sentence of less than death could never be considered in a proportionality challenge if the co-defendant had pled guilty to something less than capital murder. See, e.g., Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994). McCloud lifted that unconstitutional barrier, establishing a new substantive constitutional right under the Eighth Amendment. Mr. Scott brought a habeas petition within one year of McCloud being issued, requesting the Florida Supreme Court to apply McCloud to his case and to thereby vacate his death sentence and remand for the imposition of a sentence in prison.

THE FLORIDA SUPREME COURT'S RULING

The Florida Supreme Court, in a one-paragraph order, denied Mr. Scott's habeas petition raising the disparity of his more-culpable codefendant serving fifteen years for the same crime for which Mr. Scott continues to face a death sentence, 40 years later:

> Petitioner, Paul William Scott, 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").

SC17-2045 (order issued April 6, 2018).

The quote used from Jeffries states that the court has *historically* refused to consider the relative culpability of a co-defendant who pled to a lesser degree of homicide. This historical fact was also addressed in McCloud, when the Florida Supreme Court stated: "We recognize 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." 208 So. 3d at 687 (internal citations omitted). In the following sentence, the Florida Supreme Court declared: "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." Id. The Florida Supreme Court therefore commuted McCloud's sentence to life.

McCloud was decided on November 16, 2016, and it became final on January 26, 2017 when the motion for rehearing was denied. McCloud v. State, SC12-2103, docket at http://jweb.flcourts.org/pls/docket/ds_docket.[1](Justices Labarga, Pariente, and Perry concurred in the per curiam opinion, and Justice Quince concurred in the result). Less than six months later, the Florida Supreme Court issued its decision in Jeffries, which is irreconcilable with McCloud (although McCloud is nowhere mentioned within that decision, except by the dissent). 222 So. 3d at 552-53. (Justices Labarga, Lewis, Lawson, Canady, and Polston joined the per curiam opinion in its reasoning as to relative culpability analysis).

The Florida Supreme Court's decision to deny Scott habeas relief cannot be passed on a

[1] The motion for rehearing was filed by McCloud relating to his guilt-phase claims, rather than by the State challenging this Court's decision to reduce McCloud's sentence to life based on proportionality. (Motion for Rehearing, available at https://efactssc-public.flcourts.org/casedocuments/2012/2103/2012-2103_motion_112278.pdf.)

merits determination of habeas relief. It was a pure application of law that was no longer valid and binding post-McCloud—that is, until and unless that court issues an opinion explicitly overturning McCloud itself.[2] The Florida Supreme Court refused to address Scott's request for clarity set forth in his motion for rehearing:

> If this Court finds that step necessary (overturning McCloud), then Florida jurisprudence is entitled to hear and to examine this Court's reasoning in so arriving at that conclusion, and as to why *stare decisis* would not deter this Court from repudiating a conclusion so recently and fervently embraced. Further, such a written decision would permit Scott the opportunity to consider – under his argument to this Court that the Eighth Amendment requires a McCloud-type relative culpability analysis to assure the necessary narrowing and reliability functions of Florida's capital sentencing scheme – whether he should seek a petition of certiorari from the U.S. Supreme Court.

Despite not being offered that clarity, Mr. Scott petitions this Court for a writ of certiorari to provide guidance to both the Florida Supreme Court, and that of other death penalty states,[3] regarding an issue at the core of the proportionality requirement of the Eighth Amendment: that one codefendant should not receive the death sentence when another equally- or more-culpable codefendant was given term of year sentence—or in Mr. Scott's case, a sentence that ultimately on constituted only 15 years of incarceration.

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[2] The Florida Supreme Court, in ruling on another McCloud habeas petition, offered the specious distinction that McCloud involved a jury interrogatory that he was not the shooter and the jury found the defendant guilty of a more serious crime than his codefendants. Shere v. Jones, SC18-754. However, nothing in McCloud's bold and judicious pronouncement of its rejection of decades of prior caselaw allows for this narrow interpretation. It is troubling that the Florida Supreme Court's 6-month reversal between McCloud and Jeffries was triggered in part by a change of membership in the Florida Supreme Court—not by any serious consideration of *stare decisis*, which was never mentioned in Jeffries.

[3] According to an article published in 2013, 21 of 36 states that provided for capital punishment at that time required some form of proportionality review. See "Proportionality Review and the Death Penalty," Timothy V. Kaufman-Osborn, *Justice System Journal*, Vol. 29, published on Dec. 31, 2013, available at https://www.ncsc.org/~/media/Files/PDF/Publications/Justice%20System%20Journal/Proportionality%20Review%20and%20the%20Death%20Penalty.ashx.

REASONS FOR GRANTING THE WRIT

FLORIDA'S REFUSAL TO CONSIDER THE DISPARITY BETWEEN THE 15-YEAR PRISON TERM OF HIS EQUAL OR MORE CULPABLE CODEFENDANT AND SCOTT'S DEATH SENTENCE VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT

Mr. Scott submits that this Court should grant certiorari to consider whether the Florida Supreme Court's denial of relief contradicts this Court's Eighth Amendment proportionality jurisprudence. Doing so would provide clarity to the synthesis of this Court's opinions in Proffit v. Florida, 428 U.S. 242, 251 (1976) and Pulley v. Harris, 465 U.S. 37 (1984), particularly in their application on the issue of the relative culpability of codefendants in a single case, as opposed to general proportionality analysis of the universe of first-degree murders. The Florida Supreme Court's arbitrary exception to its proportionality analysis that the court jettisoned in McCloud and then reintroduced six months later in Jeffries offends the Eighth Amendment mandate that the death sentence must be limited to the "worst of the worst" criminals. See Gregg v. Georgia, 428 U.S. 153, 188 (1976); Kennedy v. Louisiana, 554 U.S. 407, 447 (2008). Under the Florida Supreme Court's application of Jeffries to Mr. Scott, Florida would allow Mr. Scott to be executed despite that he was not even the worst of the worst murderers in *his own* case, let alone the worst of the worst of all murderers.

The State's argument to the Florida Supreme Court that McCloud does not implicate Eighth Amendment concerns fails to adequately appreciate that constitutional scheme of guided discretion and narrowing left in place in the aftermath of Furman v. Georgia, 408 U.S. 238 (1972). In Gregg v. Georgia, 428 U.S. 153, 203 (1976), and Proffit v. Florida, 428 U.S. 242, 251 (1976), it becomes clear that Florida's mandatory appellate review, which requires a proportionality analysis, is one way that the United States Supreme Court has determined that Florida is fulfilling its obligation under Furman which "mandates that where discretion is

afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189 (plurality opinion).

In Gregg, the plurality pointed to Georgia's statute which was designed to require automatic review of death sentences to determine "whether the sentence is disproportionate compared to those sentences imposed in similar cases" to be "an important additional safeguard against arbitrariness and caprice." 428 U.S. at 198. Most succinctly, "the proportionality requirement on review is intended to prevent caprice in the decision to inflict the death penalty." Id. at 203.

Likewise, in Proffitt, in upholding Florida's newly revised capital sentencing statute, the plurality again pointed to the Florida Supreme Court's proportionality review as part of the "procedures like those used in Georgia, [that] appear to meet the constitutional deficiencies identified in *Furman*." 428 U.S. at 251. Indeed, the United States Supreme Court stated that the Florida Supreme Court's automatic appellate review of death sentences "minimized" the "risk" that a death sentence would "be imposed in an arbitrary and capricious manner." Id. at 252-53. Specifically, the plurality stated:

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

Proffitt, 428 U.S. 242 at 253 (emphasis added) (citations omitted). And, further illustrating the importance of the Florida Supreme Court's proportionality review to being an anchor to the

Eighth Amendment's requirement of reserving the death penalty for the worst offenders, the Proffitt plurality stated:

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

428 U.S. at 258-59 (citations omitted). Such a "provision [was] designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants" and thus, was central to the Eighth Amendment analysis. Id. at 258. See also Graham v. Florida, 560 U.S. 48, 59 (2010) ("For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910).").

In the first Florida case conducting a relative culpability analysis among codefendants, the Florida Supreme Court also made clear its belief that the Eighth Amendment dictated this analysis:

> 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. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law. Ironically, the trial judge stated in his reasons, "I don't feel you can treat Darius [the appellant, Darius Slater] and Charles Ware [the 'triggerman'] separately in that fashion," and then went ahead and did so. We recognize the validity of the Florida death penalty statute as expressed in *State v. Dixon*, 283 So.2d 1 (Fla.1973), but it is our opinion that the imposition of the death penalty under the facts of this case would be an unconstitutional application under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

Slater v. State, 316 So. 2d 539, 542-43 (Fla. 1975) (reducing sentence from death to life because more culpable codefendant received a life sentence).

However, when faced with the question of whether the Eighth Amendment required a proportionality analysis ***under California's post-Furman capital scheme***, this Court concluded in Pulley v. Harris that it did not. 465 U.S. 37 (1984). In 2014, the Florida Supreme Court addressed the question of whether its judicially-instituted proportionality analysis should continue in light of this Court's decision in Pulley. Yacob v. State, 136 So. 3d 539 (Fla. 2014) (vacating Yacob's sentence on proportionality grounds and imposing a life sentence). In rejecting the dissenting opinion that the conformation clause of the Florida Constitution required that Florida abandon its proportionality analysis after Pulley, the majority noted that this Court's decision in Pulley was based upon "the panoply of 'checks on arbitrariness' that existed in the California statute being reviewed," including that at least one "special circumstance" must be unanimously found by the jury beyond a reasonable doubt. Id. at n.2. This unanimity requirement of course did not exist in Florida until the decisions of Hurst v. Florida,136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016); otherwise, the 7-5 jury recommendation in Mr. Scott's case would have mandated a life sentence under current law.[4] The Florida Supreme Court continued its analysis in Yacob as follows:

> As we stated then and have consistently reaffirmed during the past four decades, "[i]f a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great" in order to control and channel the sentencing process until it "becomes a matter of reasoned judgment," *Dixon*, 283 So. 2d at 10, rather than an exercise in the kind of "uncontrolled discretion" that led the Supreme Court in *Furman*, 408 U.S. at 253 (Douglas, J., concurring), to invalidate the death penalty as applied

[4] Mr. Scott has been foreclosed from receiving relief under the Hurst decisions based on the Florida Supreme Court's retroactivity decision in Asay v. State, 224 So.3d 695, 703 (Fla. 2017), because his conviction and sentence became final prior to this Court's 2002 decision in Ring v. Arizona, 536 U.S. 584.

> “under sentencing procedures that created a substantial risk that [death] would be inflicted in an arbitrary and capricious manner.” *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion). In other words, “[b]ecause death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases.” *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990) (citation omitted).

Id. at 546-47. Justice Labarga’s compelling concurrent opinion focuses on the constitutional nature of this conclusion:

> However, I fully believe that our duty to examine each death sentence for proportionality arises in equal part from the law set forth by the United States Supreme Court that death as a penalty for first-degree murder “is reserved only for the most culpable defendants committing the most serious offenses.” *See Miller v. Alabama*, 132 S. Ct. 2455, 2467, 183 L. Ed. 2d 407 (2012). The Supreme Court has reiterated many times that “the death penalty is reserved for a narrow category of crimes and offenders,” *see Roper v. Simmons*, 543 U.S. 551, 568-69, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), thus there must be some mechanism by which the reviewing court can determine if *this* crime—measured not just by the fact that it is a first-degree murder but also by the extent of its aggravating circumstances—and *this* offender—measured not just by the fact that he or she is guilty of murder but in part by the mitigation present in the record—are within the narrow class of murders for which the death penalty is warranted. It is for this reason that we have long held that the death penalty in Florida is reserved for only the most aggravated and the least mitigated of first-degree murders. We explained in *Jones v. State*, 705 So. 2d 1364 (Fla. 1998), that “[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions ‘the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes.’” *Id*. at 1366 (quoting *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973)) (footnote omitted). This concept is in accord with Supreme Court precedent both before and after the issuance of the decision in *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

Id. at 552.

This reasoning applies most clearly to the heart of proportionality analysis—a comparison of codefendants in a single case. However, the Florida Supreme Court’s current application of its arbitrary exception to proportionality analysis—an unjustified deference to

prosecutorial "discretion"— denies this Eighth Amendment protection to a large category of defendants.

Finally, in addressing the merits of the constitutional issue at stake in Mr. Scott's case, the only reasonable conclusion that can be drawn is that Scott is equally or less culpable than his codefendant Kondian, a point which the State never attempted to dispute in its response to Mr. Scott's state's habeas—in which it argues only that the facts show that Scott "was not less culpable than Kondian." (Response 10-11.) If Scott was not less but equally culpable to Kondian then Scott's death sentence violates the Florida's relative culpability jurisprudence. See Sexton v. State, 775 So. 2d 923, 935 (Fla. 2000) ("[w]hen a codefendant is equally as culpable [as] or more culpable than the defendant, the disparate treatment of the codefendant may render the defendant's punishment disproportionate").

The State's reticence from making the more bold assertion that Scott has greater culpability is understandable, as there would be no record support for that assertion. The evidence shows that two people were involved in this all-out struggle throughout the house—at least at the outset and up until the point of having bound the victim Alessi. The jury's verdict contained no special interrogatory, so it is unclear if it found Scott guilty under premeditated murder or felony murder, which would be consistent with Scott's clemency account—that he came to the house to surreptitiously steal items (without violence), and that he then struck multiple blows against Alessi after Alessi attacked Kondian, and that Kondian struck the fatal blow(s) to the bound and wounded Alessi after Scott had already fled the residence. However, it is not essential that Scott's account be accepted in order for him to be entitled to relief in a relative culpability analysis. All that needs to be accepted here is that the jury's verdict in no way establishes that Scott was more culpable than Kondian, or even equally culpable with him.

Further, when the trial judge sentenced Scott to death, the judge had no clue that the State would, two months later, withdraw its notice of seeking death penalty and agree to a term of year sentence which would result in Kondian serving fifteen years for this homicide, so the trial court was never given the opportunity to weigh Kondian's lesser sentence before imposing death against Scott.

Most significantly, the State in its own closing argument in Scott's case made multiple statements which decisively provide the basis to conclude that Scott was not more culpable than Kondian:

> What did Mr. Soutullo say? Well, briefly, he said, "That on this evening, they approached me. That it was mainly Rick [Kondian]'s idea, but both of them were interested in it."

(Trial Trans. 1294.)

> Earlier in the evening—earlier in that day, [Scott] is recruited by Rick Kondian—recruited is too strong a word. [Kondian] said, "Yeah, come on, let's go. I got this guy set up in Boca. Let's go—" whatever people like that say. Have some fun or whatever they thought they were going to do to him. In essence, beat him and rob him. And so Scott says, "Sure, why not?"

(Trial Trans. 1301.)

> And that is that both Paul Scott and Richard Kondian—Richard Kondian is just as bad as he is. Don't let me try to be putting anything good on him. His day is coming too—both of them in that house went there with the thought in mind to rob Jim Alessi.

(Trial Trans. 1329.)

All of this is enough to end the inquiry. Kondian was the initiator and planner, according to the prosecutor. Further, all that Scott needs to show is that he was less or equally culpable to Kondian, and he has more than accomplished that from citing to the State's arguments. Further, in postconviction this fact has become even more unquestionably clear, though the State's

response provides little answer to Scott's extensive treatment in his habeas of the evidence that has arisen in postconviction, for example:

- Soutullo admitted that he lied in Scott's trial when he testified that he heard Kondian state that he and Scott were planning to rob and murder Alessi that night.
- Kondian swore in an affidavit that Scott acted in his defense and that Scott never intended to kill Alessi.
- Kondian stated to police in Rhode Island upon his arrest that he cut his finger on a broken bottle during the struggle, and Kondian reaffirmed under oath in court during Paul's postconviction hearing in 1986 that this prior statement was true.
- Kondian admitted to Rhode Island police, as well as DOC intake staff, that he struck Alessi multiple times with a wine or champagne bottle.
- Kondian's cellmate Dexter Coffin signed an affidavit stating that he told a police officer that Kondian admitted killing the victim.
- Kondian stated to his roommate at the time of the murder, Robert Dixon, that Kondian was angry with Scott for running out on him at the murder scene.

Rather than actually conducting an analysis from any specific evidence in this case to show that Scott is more culpable than Kondian, the State instead hangs its hat on "prosecutorial discretion" as a basis for asking the Florida Supreme Court to ignore Kondian's fifteen years served for his part in this crime (Response 14), and the Florida Supreme Court apparently accepted this reasoning. In so doing, the Florida Supreme Court shirked its responsibility to conduct its own review of that prosecutorial decision, and this Court must intervene to correct this injustice, to prevent this disproportionate death sentence.

Finally, Mr. Scott submits that the Florida Supreme Court's unjustified refusal to conduct a relative culpability analysis in any case where the prosecutor allows a codefendant to enter a plea to a crime less than first-degree murder violates his due process rights, equal protection rights, and results in an arbitrary and capricious sentence of death that lacks reliability. See Evitts

v. Lucy, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, 76 S. Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights be strictly scrutinized.); Johnson v. Mississippi, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."); Godfrey v. Georgia, 446 U.S. 420, 427 (1980) ("[T]he penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.").

CONCLUSION

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

Respectfully submitted on this 22nd day of January, 2019,

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