CASE NO. 18-7569

IN THE SUPREME COURT OF THE UNITED STATES

PAUL SCOTT,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General
Tallahassee, Florida

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General

CELIA TERENZIO
Chief Assistant Attorney General

Office of the Attorney General
1515 N Flagler Dr. Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 268-5315
Celia.Terenzio@myfloridalegal.com

[Capital Case]

QUESTION PRESENTED FOR REVIEW

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

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Rules

Other Authorities

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court appears as *Scott v. Jones*, Case No. SC17-2045, 2018 WL 1677542 (Fla. April 6, 2018). The Florida Supreme Court's direct appeal decision appears at *Scott v. State*, 411 So. 2d 866 (Fla. 1982). The Florida Supreme Court's post-conviction decisions appear as follows: *Scott v. State,* 419 So. 2d 1058 (Fla. 1982); *Scott v. State,* 433 So. 2d 974 (Fla. 1983); *Scott v. State,* 464 So. 2d 1171 (Fla. 1985); *Scott v. State,* 513 So.2d 653 (Fla. 1987) *Scott v. State*, 634 So. 2d 1062 (Fla. 1993); *Scott v. State,* 657 So. 2d 1129 (Fla. 1995); *Scott v. State,* 717 So. 2d 908 (Fla. 1998); *Scott v. State,* 46 So. 3d 529 (Fla. 2009); The Eleventh Circuit Court of Appeals' affirmance of the denial of Petitioner's federal habeas petitions appear as *Scott v. Singletary*, 891 F.2d 800 (11th Cir. 1989); *Scott Singletary,* 38 F.3d 1547 (11th Cir. 1994).

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 an adequate and independent state ground, 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment; Eighth Amendment; Fourteenth Amendment.

STATEMENT OF THE CASE AND FACTS

Paul Scott's conviction for the first-degree murder of James Alessi was upheld on appeal thirty-seven years ago. *Scott v. State*, 411 So. 2d 866 (Fla. 1982). Since then, there have been nine additional published opinions from the Florida Supreme Court, one published opinion from the federal district court of the Southern District of Florida, and two published opinions from the Eleventh Circuit Court of Appeals. The facts of the crime were recounted by the Florida Supreme Court on direct appeal and they are as follows:

> On the evening of the murder, Scott and his co-perpetrator, Richard Kondian, told Charles Soutullo of their plan to rob and to kill Alessi and asked him to join them. Soutullo declined the invitation. Later that evening, Alessi picked up

Scott and Kondian. At approximately 11 p. m. they arrived at Alessi's father's home where the victim borrowed his father's station wagon and obtained a patio umbrella from his father. They then drove off in the victim's car and in his father's car. The patio umbrella was later found in the victim's backyard.

The next morning the victim's nude body, which was covered with blood, was discovered in his home. His hands and feet were tightly bound with electrical cord and telephone wire. He had been brutally beaten about his head, chest, and arms. He had sustained six blows to the head with a blunt instrument, one of which was so severe that it had caused a compressed fracture of the skull. The head injuries were the cause of his death. There were many signs of a violent struggle by the victim in his attempt to get away from his assailants. **Throughout the house were broken articles and bloodstains on the walls, furniture, curtains, and floors. Scott's fingerprints were found on various items throughout the victim's home, including the neck of a broken vase and the bloodstained knife on the sofa which apparently had been used to cut the electrical cords used to tie the victim.**

After bludgeoning the victim to death, Scott and Kondian rummaged through the house. The same night as the murder and as a part of their intended scheme to rob and to kill Alessi, they went to the victim's flower shop with a key and took most of the gold in the shop. They also took the victim's car. **Scott was found a month later in Sacramento, California. He had in his possession various items of jewelry, including a golden bear charm. The victim wore a golden bear charm, and there was one in his shop the day he was killed.**

Although Scott was indicted for the premeditated beating death of Alessi, the State, in addition to proceeding on the theory of premeditated murder, also sought to prove felony murder.

Scott challenges his conviction of first-degree murder on several grounds, none of which we find to be meritorious. Initially, he argues that the evidence presented by the State was not sufficient to prove him guilty beyond a reasonable doubt and that the evidence does not exclude a reasonable hypothesis of innocence. We disagree and hold there is substantial, competent evidence in the record to sustain Scott's conviction. **Scott and Kondian made a definite statement preceding the murder of their plans to rob and to kill Alessi. The victim's father identified Scott as one of the two men who had been with his son late on the evening of his death.** The patio umbrella they had picked up was found the next morning at the victim's home, evidencing that the three had gone there later that evening. **Scott's fingerprints were found throughout the house in places reasonably consistent only with the conclusion that he had committed the homicide. Items of gold jewelry were found in Scott's motel room in Sacramento, California, including a golden bear charm like the one that was taken from the victim's shop the day of his murder.** Also, a gold bracelet like the one taken from the victim's shop was found in the possession of Kondian's girlfriend. Viewing all the evidence presented at trial, we conclude that the evidence is inconsistent with any reasonable hypothesis of innocence. See Thomas v. State, 374 So. 2d 508 (Fla. 1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed. 2d 249 (1980).

Scott also contends that the evidence does not support a finding of premeditation nor does it prove robbery or burglary. The manner in which the victim was murdered in itself evidences premeditation. **There was a long bloody chase throughout the house, the victim was badly beaten, his hands and feet were tied while he was still alive, and he was struck on the head six times with a blunt instrument.** The evidence was clearly sufficient to establish premeditation. See Mines v. State, 390 So. 2d

> 332 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S. Ct. 1994, 68 L. Ed. 2d 308 (1981). We likewise reject Scott's contention regarding lack of proof of the robbery and burglary.

411 So. 2d at 867. (emphasis added). Scott's defense at trial was that the co-defendant, Richard Kondian, was the major participant in the murder and Scott's role was minor. In fact, Scott argued at trial that he ran out of the house before the victim was robbed and killed. (ROA 1355-1356, 1370). *See also Scott v. State*, 513 So.2d 653, 654 (Fla. 1987); *Scott v. State,* 657 So. 2d 1129, 1130 (Fla. 1995). The jury, the sentencing court and the Florida Supreme Court all rejected this defense. In fact, the Florida Supreme Court noted the following:

> Scott's fingerprints were found throughout the house in places reasonably consistent only with the conclusion that he had committed the homicide.

Id. Since his direct appeal, Scott has presented a constitutional challenge regarding the relative culpability between himself and the co-defendant[1] multiple times. In 1987 Scott filed a motion for postconviction relief alleging numerous claims of ineffective assistance of counsel. At the evidentiary hearing regarding this claim, Scott argued that trial counsel should have presented a "defense of others" theory

---

[1] Richard Kondian, Scott's eighteen-year old co-defendant, pled guilty to second-degree murder and received a forty-five-year sentence.

rather than the defense that Kondian was the major participant.[2] The theory goes that Scott came to Kondian's defense after the victim made **unexpected** and **uninvited** homosexual advances to Kondian which resulted in the violent struggle that cost Alessi his life. *Scott,* 513 So. 2d at 655. The Florida Supreme Court rejected the ineffective assistance of counsel claim by pointing out the glaring inconsistency between the defense presented at trial and one the advanced in the collateral proceedings;

> Moreover, Kondian's story to the Rhode Island police completely contradicted defense counsel's theory that Kondian did the killing. Indeed, **Kondian told police that Scott had dealt the majority of the blows suffered by Alessi and that his own role in the struggle had been minimal. Based on the facts in this record, a "defense of others" theory and a theory that Kondian primarily was responsible for the murder could not have been asserted at the same trial.** Thus, even if **Kondian's** testimony had been available, we would have to decide whether counsel was ineffective in failing to pursue one theory of defense rather than the other.

Id. (emphasis added). The Court also noted that any claim that Scott was acting in defense of Kondian due to the alleged rape was completely inconsistent with the

---

[2] In support of that theory, Kondian testified at the evidentiary hearing that he and Scott were Alessi's home to buy drugs when Alessi "attacked" Kondian. Scott came to his rescue. Both defendants left the house together. Kondian has never explicitly admitted being a major participant in the actual beating. (PCR 4211-4255).

physical evidence.[3] The Court explained as follows:

> We cannot view this choice as anything but a strategic one, especially in light of medical evidence indicating that Alessi had been beaten and killed after he had been bound with the electrical cord.

Id.

Scott then sought relief in federal court. The United States District Court for the Southern District of Florida made it perfectly clear in 1988 in its denial of federal habeas relief that Scott was a major participant to this murder. The court found as follows:

> [The] description of Alessi's murder **unquestionably establishes that Scott played a major role in the beating death of Alessi**. Indeed, without Scott's help Alessi probably would have escaped Kondian's attack. Furthermore, Scott **displayed a reckless disregard for Alessi's life by battering him across the head and back with a vase and chair, and then tying him to a chair**.

Scott v. Dugger, 686 F. Supp. 1488 (U.S.D.C. S.D. FL 1988) (emphasis added). The Eleventh Circuit similarly rejected Defendant's ineffective assistance claims by pointing out the inconsistencies between Defendant's multiple versions of events.

> In the clemency hearing, appellant testified that Kondian deliberately engaged in sex with Alessi so that appellant could rummage through the house for things to steal. Appellant now argues,

---

[3] In addition to the numerous theories developed over the years, Scott admitted at a clemency hearing that he and Kondian **intentionally planned** for Kondian to have sex with the victim while Scott went through the house looking for items to steal. *Scott v. State*, 513 So. 2d at 655.

> however, that his lawyer should have presented a "defense of others" theory. Such a defense would contradict appellant's clemency testimony and present a theory that Alessi attempted to rape Kondian and that appellant came to Kondian's aid. The defense theory would also assert that, after successfully interrupting the rape attempt, appellant left the house while Alessi was still alive. Obviously, appellant's clemency hearing testimony proved such a defense false. Thus, appellant's lawyer could not have rendered ineffective assistance by failing or refusing to present a false defense.

Scott v. Dugger, 891 S. 2d 800, 803, 805 (11th Cir. 1989).

Scott returned to state court and filed multiple successive collateral challenges to his capital sentence, all based on the alleged disparate treatment between Kondian and himself. In 1992, he filed a successive motion for postconviction relief alleging as follows:

> In this appeal, Scott alleges that: 1) the circuit court erred by summarily denying his second rule 3.850 motion without conducting an evidentiary hearing or attaching those portions of the record that refute his claims; 2) newly discovered evidence establishes that Scott was innocent of first-degree murder; 3) newly discovered evidence of Scott's codefendant's 45-year sentence renders Scott's sentence disproportionate, and that other newly discovered evidence negates the aggravating factors found by the trial court and establishes additional mitigating factors; 4) he was erroneously denied an opportunity to present exculpatory evidence to the jury due to either prosecutorial misconduct or the ineffectiveness of defense counsel; 5) he was denied the effective assistance of counsel; 6) the prosecutor improperly argued inapplicable aggravating factors; and 7) his sentence was unconstitutionally founded on arbitrary, capricious, and

> impermissible evidence because the state emphasized nonstatutory aggravating factors during the penalty phase proceeding.
>
> Scott's claims I through V are based on the following allegedly new evidence: 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; and 5) Scott's trial and postconviction counsel rendered ineffective assistance by failing to investigate the facts stated above and by failing to raise them at trial or in postconviction proceedings.

Scott v. Dugger, 634 So. 2d 1062, 1064 (Fla. 1993). In rejecting relief, the Florida Supreme Court again relied on the evidence which completely refuted any claim that Scott did not participate in the fatal and brutal beating of Alessi. The Court noted:

> Last, none of the affidavits submitted with the instant rule 3.850 motion exonerates Scott. **Kondian's affidavit and his statements at his plea hearing acknowledge that Scott participated in the savage beating of the victim.** The only allegation beneficial to Scott in Kondian's affidavit is Kondian's statement that Scott never intended to kill the victim. We note that **the evidence establishes that the victim died from multiple blows to the head that he received after he had been bound hand and foot.** Looking at the entire record of all

> three proceedings before this Court, we find that the evidence asserted as new in these proceedings is not newly discovered evidence.

Id. 634 So. 2d at 1064. (emphasis added).

Scott filed a third motion for postconviction relief alleging numerous instances of prosecutorial misconduct in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). The specific allegations were as follows:

> Principally, he contends that the State violated the principles of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by not disclosing: (1) a statement by Dexter Coffin, a cellmate of Scott's codefendant Richard Kondian, in which Coffin states he told a police officer that Kondian admitted killing the victim; (2) a statement by Robert Dixon, in which Dixon states he told a police officer that Kondian was angry with Scott for running out on him at the murder scene; and (3) 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 claims that, in light of this newly discovered evidence, we should revisit our ruling in *Scott v. Dugger*, 634 So. 2d 1062 (Fla. 1993), and grant a new sentencing hearing.

Scott v. State, 657 So. 2d 1129, 1130 (Fla. 1995). Following an evidentiary hearing, the Florida Supreme Court again denied all relief finding:

> Finally, Scott claims that the trial court erred in excluding certain evidence from the evidentiary hearing. As noted above, this Court remanded this case for an evidentiary hearing on Scott's Brady claims, which

> included the claim that the State had failed to disclose a medical examiner's photo showing a bloody circle that could have supported Scott's claim that Kondian struck the fatal blow by hitting Alessi on the head with a champagne bottle. During the evidentiary hearing on January 23, trial prosecutor Selvig testified that he had disclosed the photo, and the record sustained his averments. In light of this proof, the court granted the State's motion to exclude any further testimony relating solely to the materiality of the photo under *Brady*. Scott contends that this was error because trial counsel's failure to present a material photo could give rise to an ineffectiveness claim. We disagree. This Court remanded this case solely for resolution of the Brady claims, not for resolution of an ineffectiveness claim. We find no abuse of discretion.

Scott v. State, 717 So. 2d 908, 912-913 (Fla. 1998).

Eight years later, Scott filed a motion for DNA to establish whether his blood was found at the scene. The trial court summarily denied the motion given the fact that the motion was legally insufficient, and any "favorable" results would not have led to reasonable probability of exoneration or a lesser sentence. Once again in rejecting yet another variation on the same claim, the Florida Supreme Court found as follows:

> In the instant case, the presence or absence of Scott's blood at the crime scene has no bearing on whether he committed the crime because Scott's presence at Mr. Alessi's home is not in question. Consequently, even if DNA testing revealed that Scott's blood was not at the scene, it would not tend to establish his innocence or prove that he did not strike the victim. See Galloway, 802 So.2d at 1175.
>
> Furthermore, Scott never advanced the theory that he was not

present in the victim's home. In fact, the opposite is true. In his initial brief, Scott stated that he admitted being present for an altercation between himself, the codefendant, and the victim. He also "defended against the murder charges by attempting to blame Kondian for the actual murder and minimize his own involvement." Scott, 513 So.2d at 654. And, in an earlier 3.850 motion, he even claimed his counsel was ineffective for failing to present a defense of others theory. Id. at 654-55. What Scott has attempted to allege is that he was not present for the actual murder. However, given that **Scott has admitted he was involved in an altercation with the victim,** Scott cannot reasonably show how the absence of his blood would give rise to a reasonable probability that he did not commit the crime.

Alternatively, Scott asserts that if the DNA test revealed that his blood was at the scene it would lend support to his theory that he acted in defense of Kondian. First, as we have previously held, Scott cannot simultaneously allege two competing theories, namely that Kondian was responsible for the murder and Scott's involvement was minimal and that Scott acted in defense of Kondian. See id.; see also Armour & Co. v. Lambdin, 154 Fla. 86, 16 So.2d 805, 809 (1944) ("[A] suitor is not permitted to invoke the aid of the Courts upon contradictory principles or theories." (emphasis in original) (quoting 28 C.J.S., Election of Remedies § 2)). Second, this theory is unpersuasive because the presence of Scott's blood at the scene lends nothing to the theory that he acted in defense of Kondian. Rather, if Scott's blood was detected, it would only confirm that he was present-a point not in dispute. Third, Scott's theory that he killed Alessi while defending Kondian is contradicted by the evidence. The doctor in this case testified that

*534 the victim was still alive when his hands and feet were bound. There remained no reason to pursue the beating.... The subsequent blows to the head were fatal and the entire episode can only reflect there being imposed upon the victim a high degree of pain with little indifference to, or even the enjoyment of the suffering of the victim. It was pitiless and totally unnecessary....

Scott, 411 So.2d at 869 (quoting trial court's sentencing order). Given that Alessi was bound before he was killed, Scott cannot possibly show that he killed Alessi in defense of Kondian.

Scott v. State, 46 So. 3d 529, 533–34 (Fla. 2009) (emphasis added).

Scott filed a state Petition for Writ of Habeas Corpus in 2017, again alleging that his co-defendant's sentence renders his death sentence disproportionate and unconstitutional. To overcome the explicit and multiple rejections of this claim, Scott relied on a recent case from the Florida Supreme Court wherein the Court granted relief to a capital defendant based on disparate treatment of his co-defendant. *See McCloud v. State*, 208 So. 3d 668 (Fla. 2016) (determining that jury finding that co-defendant was the actual killer along with same finding by trial court warranted relief based on disparate treatment). Scott alleged that *McCloud* is a change in Florida law on which he was entitled to rely. The Florida Supreme in an order, rejected this claim pursuant to *Jeffries v. State*, 222 So. 3d 538 (Fla. 2017) (reaffirming long standing precedent preceding *McCloud* that a co-defendant's conviction to lesser offence after plea deal does not implicate a claim of disparate treatment).

In this Petition, Scott seeks certiorari review of that order.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S DECISION IS BASED ON AN INDEPENDENT AND ADEQUATE STATE GROUND; IT DOES NOT PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW; NOR DOES IT CONFLICT WITH ANY DECISION OF ANOTHER STATE SUPREME COURT

Petitioner, Paul Scott, is seeking federal review of his capital sentence claiming that it is a violation of the Eighth Amendment because his co-defendant, whom he alleges was equally or more culpable than himself, received a forty-five-year sentence. Although he makes a perfunctory reference to the 8th Amendment, this constitutional challenge is premised solely on state law. Scott claims that a recent Florida Supreme Court case, *McCloud v. State,* 208 So. 3d 668 (Fla. 2016), has established a "new substantive constitutional right" in Florida to which he is now entitled. **Pet at 8.** In denying relief, the Florida Supreme Court determined that the facts herein were completely distinguishable from those of McCloud, and instead, the Court found the recent case of Jeffries *v. State,* 222 So. 3rd 538 (Fla. 2017) to be controlling. The Court reaffirmed long standing precedent that a co-defendant's conviction to a lesser crime pursuant to a plea deal does not implicate a claim of disparate treatment between co-defendants. **See Pet. App. 1**

In this petition, Scott invites this Court to reconcile the "confusion" allegedly

created by the Florida Supreme Court's rulings in these two cases, urging this Court to provide "clarity" and rectify the Florida Supreme Court's "mistake." Scott's argument is frivolous as certiorari review cannot be premised on this basis as this Court is bound by the Florida Supreme Court's interpretation of state law. *See Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.* 426 U.S. 482, 488 (1976) (reaffirming edict that USSC is bound to accept interpretation of state law from the state's highest court). The state asserts that for this reason alone, review must be denied. [2]

Additionally, the relative proportionality review under attack herein is not a requirement of the Eighth Amendment, and therefore there is no federal question presented. Instead the Florida Supreme Court's proportionality review is based on adequate and independent state ground and therefore review is not warranted. The Eighth Amendment requires capital punishment to be limited "to those who commit

---

[2] Additionally, the issue presented below was based on state law, specifically the recent case of *McCloud v. State,* 208 So.3d 608 (Fla. 2016). Therefore, the federal constitutional challenge under the Eighth Amendment was not fairly presented and therefore review is precluded. *See Adams v. Robertson*, 520 U.S. 83, 87-88 (1997) (discussing the various ways a petitioner may properly present an issue to a lower court and dismissing the writ of certiorari as improvidently granted because the issue was not presented to the state supreme court).

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, 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). The Court also explained that it does such a review in every case regardless of whether that review is reflected in the opinion because it is an integral part of the process. *See 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.

Additionally, Florida's proportionality review is not in conflict with any other state court of last review, nor it is in conflict with any federal appellate court, or in conflict with this Court's Eighth Amendment jurisprudence. 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. Because 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]."). As noted elsewhere, the alleged conflict upon which Scott relies for review is the alleged internal conflict under Florida law. That does not provide a basis for review and therefore cert review must be denied. *Hortinville, supra.*

Even if Scott could overcome all the jurisdictional deficiencies to his claim, this is not the appropriate case for this Court to answer any question regarding the Eight Amendment and the relative culpability of co-defendants. Every court to address relative culpability has found Scott to be the major participant in the beating death of the victim. Furthermore Kondian, who was only 18 years old at the time of the crime, received a forty-five-year sentence not because of a jury recommendation or the trial judge's determination based on a weighing of aggravating and mitigating circumstances, but because prosecutorial discretion took the death penalty off the

table for Kondian.

As explained in detail above, the facts herein are completely as odds with the factual basis relied upon for relief in *McCloud* consequently, Scott would never be entitled to relief even if he could overcome the fact that Kondian was convicted of a lesser crime following a plea deal. The trial court nor jury ever made a finding that Scott was not an instigator of the crime. In short, the factual premise required for any consideration for relief is non-existent in this case, as there has never been any evidence presented that calls into question the Florida Supreme Court's initial findings regarding Scott's participation in the actual beating death of the victim. Added to that is how Scott has seriously undermined his own credibility as well as exposed the weakness of his case through his numerous presentations premised on a multitude of inconsistent theories regarding the facts of the murder. Unfortunately for Scott, even after a trial and two evidentiary hearings, his varying factual theories and corresponding legal claims remain inconsistent with each other as well as inconsistent with the physical evidence and have been rejected repeatedly by at least nine courts throughout the years.

Finally, Scott's assertion that *McCloud* expands the Eighth Amendment proportionality analysis to include when codefendants have been convicted of or pled to a non-capital homicide charge is wrong. The Florida Supreme Court is bound

by the Florida Constitution and does not have the power to sketch out its own determinations of what is a violation of the Eighth Amendment. The Florida Constitution states:

> The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Fla. Const. art. I, § 17. The Florida Supreme Court is bound by the Conformity Clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court. *Correll v. State*, 184 So.3d 478 (2015), certiorari denied 193 L.Ed.2d 307. *See also Valle v. State*, 70 So.3d 530 (2011), certiorari denied 132 S.Ct. 1, 564 U.S. 1067, 180 L.Ed.2d 940 (In accordance with the Florida Constitution, the Florida Supreme Court is bound by the precedent of the United States Supreme Court regarding challenges to Florida's chosen method of execution). A relative culpability analysis is not required by any Federal law nor by the United States Constitution. In fact,

> the Supreme Court has never required a state court to compare the culpability and sentences of co-defendants in capital cases. To the contrary, the Supreme Court has determined that absent a showing that a system operated in an arbitrary and capricious manner, a petitioner "cannot prove a constitutional violation by demonstrating that other

> defendants who may be similarly situated did *not* receive the death penalty."

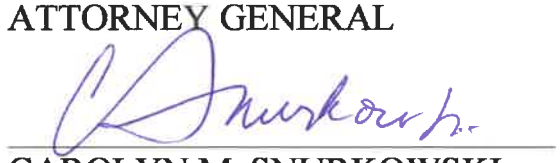
Krawczuk v. Secretary, Florida Dept. of Corrections, 2015 WL 4645838, (U.S.D.C., M.D. FL 2015) citing *McCleskey v. Kemp*, 481 U.S. 279, 306-307 (1987) (emphasis in original); *See also Sorola v. Texas*, 493 U.S. 1005, 1009 n.6 (1989) (noting that "[a] prosecutor's decision to waive the death penalty rather than burden the defendant, the court, and the jury with a meaningless proceeding should be respected, if not applauded."). Therefore, the Eighth Amendment does not require a relative culpability analysis.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL



CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General

CELIA TERENZIO
Chief Assistant Attorney General
Florida Bar No. 0656879

Office of the Attorney General
1515 N. Flagler Dr Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 268-5315
Celia.Terenzio@myfloridalegal.com
Carolyn.snurkowski@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT