App. No. 18-7569

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 A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT IN REPLY

The State asserts that this Court should deny certiorari for three reasons relating to the Florida Supreme Court decision:

1. THE DECISION "IS BASED ON AN INDEPENDENT AND ADEQUATE STATE GROUND."

2. THE DECISION "DOES NOT PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW."

3. THE DECISON "DOES [NOT] CONFLICT WITH ANY DECISION OF ANOTHER STATE SUPREME COURT."

(Brief in Opposition ("BIO") at ii). In this Reply, Mr. Scott will address why the Respondent's independent-and-adequate-state-ground argument is without merit. Petitioner will then analyze why the Florida Supreme Court's decision implicates an important issue of federal law. In this discussion, Petition will explain why the absence of other state appellate courts taking a contrary position to the Florida Supreme Court—one that more zealously engages in relative culpability review in order to comply with the Eighth Amendment's mandate to diminish the risk of arbitrary and capricious punishment—only increases the importance that this Court grant certiorari here to issue a course correction based on an overly broad reading of this Court's decision in *Pulley v. Harris*, 465 U.S. 37 (1984) by the state and federal courts.

I. State law issues at play do not constitute an adequate and independent basis to insulate the Florida Supreme Court's decision from this Eighth Amendment challenge.

Respondent argues that Florida's proportionality review is based upon state law, and that it constitutes an adequate and independent basis for upholding Florida's scheme. This argument is misguided. For Florida law to provide an adequate and independent basis for the Florida Supreme Court for denying this Eighth Amendment claim, it would need to provide a basis for preventing review on the merits of the Eighth Amendment claim, such as a valid state procedural bar. However, what we have here is an alternative basis in state law for challenging Scott's sentence—similar but distinct from Scott's federal law challenge of that sentence. Even if Scott's sentence did not fail the Florida law test, this would not insulate Florida's scheme from an Eighth Amendment challenge before this Court. The Respondent's assertion that Scott's certiorari petition is frivolous and seeks to have this Court merely issue clarity to an issue of state law is flatly contrary to the portion of Scott's argument the Respondent cited, which quotes from Scott's motion for rehearing to the Florida Supreme Court, emphasizing the need for clarity as to the Eighth Amendment issues at stake (BIO at 14-15; Petition at 8). Further, the Respondent asserts that the Eighth Amendment argument that Scott presents here was not preserved before the Florida Supreme Court

(BIO at 15, n.2). This is inaccurate; the Eighth Amendment argument was explicitly made throughout the habeas petition. (*See* Appendix 1 at 17-19, 21-22, 27-28).

II. The Eighth Amendment requires more than a state having a list of aggravators in the statute book; it requires a capital scheme that in practice adequately narrows the imposition of death sentences to the worst of the worst offenders.

The Respondent asserts that whether or not Florida conducts a proportionality review is entirely irrelevant to the Eighth Amendment, arguing that because Florida has enacted a list of aggravating factors, the narrowing requirement of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976) is satisfied (BIO at 15- 16). This overly narrow scrutiny has been rejected by this Court, which, post-*Furman,* has consistently conducted a more exacting view of how each state's death penalty scheme functions in practice—to ascertain whether its capital sentencing scheme adequately minimizes risk that the death penalty will be imposed in a manner that is arbitrary and capricious. *See Gregg*, 428 U.S. at 198 ("In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman,* the Supreme Court of Georgia compares each death

sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*."); *Pulley*, 465 U.S. at 45 ("We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable. As was said in *Gregg*, '[we] do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis.' 428 U.S., at 195 (footnote omitted)."); *Barclay v. Florida*, 463 U.S. 939, 958-60 (1983) (Stevens, J., concurring) ("Particular features of state sentencing schemes may be sufficiently inadequate, unreliable, or unfair that they violate the United States Constitution. Particular death penalty determinations may demonstrate that a State's sentencing procedure is constitutionally inadequate in one or more respects. . . . A constant theme of our cases – from *Gregg* and *Proffitt* through *Godfrey* [*v. Georgia*, 446 U.S. 420 (1980)], *Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982)], and most recently *Zant* [*v. Stephens*, 462 U.S. 862, 877 (1983)] – has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed

in a consistent, rational manner. As stated in *Zant*, we have stressed the necessity of 'genuinely [narrowing] the class of persons eligible for the death penalty,' and of assuring consistently applied appellate review. 462 U.S., at 877, 890. Accordingly, my primary purpose is to reemphasize these limiting factors in light of the decisions of the Supreme Court of Florida.").

While this Court has refused to mandate that every state adopt one particular model for how to achieve the guided discretion that the Eighth Amendment demands, *see Spaziano v. Florida*, 468 U.S. 447, 463-65 (1984) ("As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme."), this Court has repeatedly reviewed the capital schemes of individual states to assure that they were in fact maintaining compliance with the necessary reliability that wielding the machinery of death demands. This analysis is fact-intensive and involves review of the entire death penalty scheme, not only a glance over the list of aggravators, as can be seen by this Court's reliance on multiple of different occasions upon the Florida Supreme Court's comparative proportionality review as part of the justification for holding that Florida's scheme supplied the checks necessary to comply with Eighth Amendment reliability. *See Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976) ("Florida, like Georgia, has responded to *Furman* by enacting

legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed. See *Furman* v. *Georgia,* 408 U.S., at 310 (Stewart, J., concurring)."); *Dobbert v. Florida*, 432 U.S. 282, 295 (1977) ("Finally, in what may be termed a tripartite review, the Florida Supreme Court is required to review each sentence of death. This required review, not present under the old procedure, is by no means perfunctory; as was noted in *Proffitt,* as of that time the Florida Supreme Court had vacated 8 of the 21 death sentences that it had reviewed to that date."); *Barclay v. Florida*, 463 U.S. 939, 958 (1983) ("[O]ur decision is buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether 'the punishment is too great.' *State* v. *Dixon*, 283 So. 2d 1, 10

(1973). See, *e.g., Blair* v. *State*, 406 So. 2d 1103, 1109 (Fla. 1981).”). Although this Court held in *Pulley v. Harris* that California’s system had sufficient checks to render its scheme reliable despite the absence of proportionality review by its appellate court, this holding does not entail a finding that other state’s schemes, as they currently exist, would not be unconstitutional if it deleted proportionality from their framework. 465 U.S. 37, 51 (1984) (“Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort.”). Florida is such a scheme, particularly as its system functioned when Scott was sentenced to death by a jury recommendation of 7-5.

III. Relative culpability review between codefendants is constitutionally necessary for Florida’s capital scheme in order to diminish the risk of arbitrary and capricious imposition of death sentences.

This Court, beginning with its first approval of Florida’s post-*Furman* capital sentencing scheme, has emphasized and relied on Florida’s vibrant appellate review to find that this adequately checked the risk of arbitrary and capricious implementation of death sentences. *See Parker v. Dugger*, 498 U.S. 308, 321 (1991) (“We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not

imposed arbitrarily or irrationally. See, *e.g., Clemons* [*v. Mississippi*, 494 U.S. 738, 749 (1990)] (citing cases); *Gregg* v. *Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error . . . .").

By the time this Court approved of Florida's scheme in *Proffitt* in 1976, Florida had already implemented comparative proportionality analysis between the death sentence at hand and every other death sentence previously reviewed by the Florida Supreme Court, *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973)), as well as adopted the special rule for relative culpability review in cases where a person sentenced to death had codefendants involved in his or her crime. *Slater v. State*, 316 So. 2d 539, 542-43 (Fla. 1975). In *Slater*, despite the codefendant having previously been sentenced to life under a plea deal with the state, the Florida Supreme Court reversed Slater's death sentence, believing that his sentence was disproportionate to his equally-culpable codefendant's sentence to life. *Slater* did not defer to prosecutorial discretion in ignoring the codefendant's sentence; rather, the Florida Supreme Court kept its rigorous check on potential arbitrariness in the imposition of disparate sentences among codefendants of the same crime by intervening and commuting Slater's

sentence to life imprisonment. This was the robust comparative proportionality analysis in place in Florida's capital scheme at the time this Court uttered its initial approval in *Proffitt* a year later.

As time progressed, the Florida Supreme Court watered down its relative culpability review among codefendants, most clearly in *Shere v. Moore*, 830 So. 2d 56 (Fla. 2002), declaring that prosecutorial discretion was a bar to consideration by the Florida Supreme Court of an equally- or more-culpable codefendant's lesser sentence. After recognizing the error and arbitrariness of this position in *McCloud v. State*, 208 So. 3d 668, 687-88 (Fla. 2016), the Florida Supreme Court hastily backtracked to its former restricted review of codefendant sentences in *Jeffries v. State*, 222 So. 3d 538, 547 (Fla. 2017). Without this appellate scrutiny of disparate sentences among codefendants, Florida's capital scheme remains exposed to the potential of arbitrariness based on prosecutorial caprice that renders Florida's scheme in violation of the Eighth Amendment's demands of reliability. It cannot be said that Florida's system adequately assures that only the worst of the worst will receive the ultimate sanction when its appellate review permits a less culpable person to receive the death penalty when a more culpable codefendant receives mercy at the behest of the prosecutor. Whereas this Court in *Pulley* noted that California's scheme

required that the "special circumstances" (aggravators) be alleged in the charging document and found by the jury during the guilt phase beyond a reasonable doubt, we have no knowledge of whether the jury found any aggravating circumstances proved beyond a reasonable doubt for Mr. Scott, as its verdict merely tells us that it was recommending death by a vote of 7 to 5. While under California's system this Court deemed its mandatory appellate review of the trial court's weighing of the aggravating and mitigating circumstances to satisfy the Eighth Amendment without an explicit requirement of comparative proportionality review, the same cannot be found regarding the procedures resulting in Mr. Scott's death sentence. *C.f.*, *Hurst v. State*, 202 So. 3d 40, 60 (Fla. 2016) ("This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.").

The critical nature of Florida's comparative proportionality review for its capital scheme, despite the deficiency for relative culpability analysis that

Scott seeks this Court to correct here, is seen in the number of cases in which the Florida Supreme Court has used proportionality review to commute death sentences to life sentences. Since 1990, the Florida Supreme Court has commuted over 50 sentences based on a finding of disproportionality.[1] These are 50+ sentences of death which were found on

[1] *Blakely v. State*, 561 So. 2d 560, 561 (Fla. 1990); *Farinas v. State*, 569 So. 2d 425, 427 (Fla. 1990); *Nibert v. State*, 574 So. 2d 1059, 1063 (Fla. 1990); *Penn v. State*, 574 So. 2d 1079, 1083-84 (Fla. 1991); *Douglas v. State*, 575 So. 2d 165, 165 (Fla. 1991); *Klokoc v. State*, 589 So. 2d 219, 222 (Fla. 1991); *Tillman v. State*, 591 So. 2d 167, 167 (Fla. 1991); *McKinney v. State*, 579 So. 2d 80, 81 (Fla. 1991); *Clark v. State*, 609 So. 2d 513, 514 (Fla. 1992); *White v. State*, 616 So. 2d 21, 21 (Fla. 1993); *Knowles v. State*, 632 So. 2d 62, 63 (Fla. 1993); *Deangelo v. State*, 616 So. 2d 440, 441 (Fla. 1993); *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993); *Thompson v. State*, 647 So. 2d 824, 825 (Fla. 1994); *Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994); *Morgan v. State*, 639 So. 2d 6, 14 (Fla. 1994); *Santos v. State*, 629 So. 2d 838, 839 (Fla. 1994); *Chaky v. State*, 651 So. 2d 1169, 1170 (Fla. 1995); *Besaraba v. State*, 656 So. 2d 441, 442 (Fla. 1995); *Sinclair v. State*, 657 So. 2d 1138, 1139 (Fla. 1995); *Terry v. State*, 668 So. 2d 954, 957 (Fla. 1996); *Wright v. State*, 688 So. 2d 298, 301 (Fla. 1996); *Curtis v. State*, 685 So. 2d 1234, 1237 (Fla. 1996); *Robertson v. State*, 699 So. 2d 1343, 1344 (Fla. 1997); *Voorhees v. State*, 699 So. 2d 602, 615 (Fla. 1997); *Sager v. State*, 699 So. 2d 619, 623 (Fla. 1997); *Puccio v. State*, 701 So. 2d 858 (Fla. 1997); *Jones v. State*, 705 So. 2d 1364, 1365 (Fla. 1998); *Urbin v. State*, 714 So. 2d 411 (Fla. 1998); *Williams v. State*, 707 So. 2d 683, 686 (Fla. 1998); *Jorgenson v. State*, 714 So. 2d 423, 429 (Fla. 1998); *Hardy v. State*, 716 So. 2d 761, 762 (Fla. 1998); *Hawk v. State*, 718 So. 2d 159, 160 (Fla. 1998); *Johnson v. State*, 720 So. 2d 232, 233 (Fla. 1998); *Almeida v. State*, 748 So. 2d 922, 924 (Fla. 1999); *Cooper v. State*, 739 So. 2d 82, 83 (Fla. 1999); *Fernandez v. State*, 730 So. 2d 277, 278 (Fla. 1999); *Woods v. State*, 733 So. 2d 980, 990 (Fla. 1999); *Larkins v. State*, 739 So. 2d 90, 91 (Fla. 1999); *Almeida v. State*, 748 So. 2d 922, 924 (Fla. 1999); *Ray v. State*, 755 So. 2d 604 (Fla. 2000); *Hess v. State*, 794 So. 2d 1249, 1252 (Fla. 2001); *Bell v. State*, 841 So. 2d 329, 330 (Fla. 2002); *Crook v. State*, 908 So.

appellate review to not be among "the most aggravated and the least mitigated of first-degree murders," *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998), despite having passed through Florida's trial level capital apparatus. For Florida's system to remain in compliance with *Furman*/*Gregg*, comparative proportionality review should be found to be constitutionally necessary.

IV. This Court's resolution of this Eighth Amendment issue would serve to correct a deficiency in Florida's capital scheme and would provide profoundly beneficial guidance to other states as well in this post-*Pulley* setting.

When this Court issued its decision in *Pulley* in 1984, twenty-nine states were conducting comparative proportionality review, however, after *Pulley* that number diminished to twenty-one, and the implementation of that review has been "mixed at best." Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29-3 Just. Sys. J. 257, 260 (2008). This is a negative trend for the assurance that the risk is diminished of arbitrary and capricious imposition of death sentences. For this Court to

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2d 350, 358-59 (Fla. 2005); *Offord v. State*, 959 So. 2d 187, 192 (Fla. 2007); *Jones v. State*, 963 So. 2d 180, 181 (Fla. 2007); *Green v. State*, 975 So. 2d 1081, 1083 (Fla. 2008); *Williams v. State*, 37 So. 3d 187, 190 (Fla. 2010); *Ballard v. State*, 66 So. 3d 912, 915 (Fla. 2011); *Scott v. State*, 66 So. 3d 923, 925 (Fla. 2011); *Davis v. State*, 121 So. 3d 462, 467 (Fla. 2013); *Yacob v. State*, 136 So. 3d 539, 546-50 (Fla. 2014); *Delgado v. State*, 162 So. 3d 971, 972 (Fla. 2015); *Phillips v. State*, 207 So. 3d 212, 214 (Fla. 2016); *McCloud v. State*, 208 So. 3d 668, 687-88 (Fla. 2016); *Wood v. State*, 209 So. 3d 1217, 1221 (Fla. 2017).

grant certiorari to review whether Florida's retreat from a meaningful comparison of codefendant sentences sufficiently weakens Florida's appellate scrutiny that Florida's scheme violates the Eighth Amendment's tolerance for risk, it would signal to states throughout the nation that their schemes as well must remain zealous to weed out those death sentences—sought by prosecutors and imposed by juries/courts—that nonetheless are disproportionate to others of relative culpability, and do not consist of the worst of the worst offenders.

Finally, the Respondent suggests that this Mr. Scott's case is not an ideal candidate for this challenge, because he was a major participant along with Richard Kondian in this homicide (BIO at 23). First, unlike the district court case cited by the Respondent, *Krawczukv. Secretary, Florida Dept. of Corrections,* 2015 WL 4645838, (U.S.D.C., M.D. FL 2015) (BIO at 26), the Florida Supreme Court has never found that Scott was more culpable than Kondian, and Florida Supreme Court justices have expressed skepticism over the years regarding whether Kondian's incarceration of fifteen years was disparate to Scott's death sentence. *E.g.*, *Scott v. State*, 419 So. 2d 1058 (Fla. 1982) (Overton, J., dissenting); *Scott v. State*, 657 So. 2d 1129 (Fla. 1995) (Kogan, J., concurring).

Most compellingly, the prosecutor made Scott's point here succinctly in his closing argument in Scott's 1979 trial: "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). Scott has a strong argument from the record that he is no more culpable than Kondian, and the Respondent never attempted to challenge that position in its briefing before the Florida Supreme Court. (Appendix 2 at 10-11 (arguing only that the facts show that Scott "was not less culpable than Kondian"). In the alternative, to the extent that this Court believes that further factual finding on the comparative culpability of Scott and Kondian is necessary, Scott would ask that this Court grant certiorari and issue a holding that relative culpability review is constitutionally necessary for Florida's scheme, and remand for further review by the Florida Supreme Court as to the application of that holding to Scott's capital sentence.

Respectfully submitted,

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