App. No. 18-7569

IN THE SUPREME COURT OF THE UNITED STATES

October 2018 Term

PAUL WILLIAM SCOTT,

Petitioner,

vs.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF FLORIDA, et al.

Respondent.

APPENDIX TO REPLY ON PETITION FOR WRIT OF CERTIORARI

Nov. 17, 2017 Petition for Writ of Habeas Corpus to the Florida Supreme Court APPENDIX 1

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-_____
LOWER TRIBUNAL NO. 1979-CF-167

PAUL WILLIAM SCOTT,

Petitioner,

vs.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Challenging a sentence of death from the Circuit Court,
Fifteenth Judicial Circuit, in and for Palm Beach County, Florida

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INTRODUCTION

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.[1] (Exhibit A (DOC Crime & Time Report).)

Recognizing the serious Eighth Amendment concerns with such gross disparity in sentencing in this capital case, Justice Overton uttered these prescient words in his dissent from this 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,

[1] Kondian surrendered to the Rhode Island police on the warrant for Alessi's murder on December 6, 1978. Kondian was released from prison on February 8, 1994, and he was discharged from parole on June 8, 2011. Thus, Kondian served **15 years, 2 months, and 4 days** in prison, and then was on parole for 17 years, 3 months. Prison plus parole for Kondian was approximately 32 1/2 years. Scott was arrested in Sacramento on January 5, 1979 and was transported back to Palm Beach County three days later. This coming January will mark 39 years of incarceration.

> 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 this 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).[2, 3] To this day, no court has ever made a merits ruling on Scott's overwhelmingly decisive Eighth

[2] In Witt v. State, this Court addressed the proportionality claim on direct appeal, not in postconviction, when the codefendant's life plea deal was accepted prior to Witt's direct appeal being final. 342 So.2d 497, 500-01 (Fla. 1977) ("After carefully reviewing the records of the two proceedings, we hold the facts and circumstances support the imposition of the death penalty on the appellant Witt and a life sentence for Tillman. Testimony of five psychiatrists who examined Tillman indicated Tillman had a severe mental or emotional disturbance and was subject to domination by Witt. Witt's dominance was enhanced by his age of thirty years, compared to Tillman's age of eighteen.").

[3] Issues presented by Scott on direct appeal: sufficiency of the evidence to exclude reasonable hypothesis of innocence; sufficiency of the evidence as to premeditation or robbery/burglary; restricting cross-examination of Soutullo; admitting gold bracelet that had been taken from Kondian's girlfriend; instructing on felony murder; conducting jury selection on Yom Kippur thus restricting his right to a representative jury; denying motion for continuance; excusing jurors for cause who stated that they would never recommend the death penalty; finding that the murder was committed in the commission of a robbery and for pecuniary gain and finding HAC; prohibiting journalist from testifying that Scott should receive prison; Florida's death penalty statute is unconstitutional. Scott v. State, 411 So. 2d 866 (Fla. 1982).

Amendment proportionality challenge, and this Court can and must utilize this habeas petition to finally remedy this injustice as Mr. Scott nears completing his fourth decade on death row while his more-culpable co-defendant has been on the streets for nearly twenty-five years.

SCOTT'S POSTCONVICTION ATTEMPTS TO ADDRESS PROPORTIONALITY

After Scott's direct appeal was affirmed, this 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 this Court in 1983, Scott also filed a petition for habeas corpus raising claims of ineffective assistance of appellate counsel in direct appeal,[4] as well as an

[4] Scott v. Wainwright, 433 So. 2d 974, 975 n.* (Fla. 1983) ("Scott alleges that appellate counsel was ineffective because appellate counsel should have argued that the trial court erred by precluding defense counsel from making an opening statement regarding the victim's drug use and homosexual activities, should have raised the State's surprise identification of Richard Kondian during trial, should have argued that the court erred in disallowing cross-examination of the State witness who identified Kondian, should have challenged a statement in the State's brief on appeal regarding a statement by Scott as to his robbery and murder plans, should have argued that the trial judge erroneously found nonstatutory aggravating circumstances, should have asserted that the trial court erred in allowing the State to cross-examine clinical psychologist Brad Fisher after Scott had waived reliance on the mitigating factor of no significant prior criminal activity, should have raised

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.[5] Id. at 976. This 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 the reality of Kondian's plea and 45-year sentence.

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as error the trial court's denial of a motion for mistrial because a witness had referred to him as an inmate of the Palm Beach County Jail and because of outbursts of the victim's mother, and should have raised as error the overruling of counsel's objection to the prosecutor's remarks regarding Soutullo's cooperation with the police.").

[5] A petition for writ of error coram nobis was the appropriate means to raise newly discovered evidence at the time in 1983. See Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979) ("The general rule repeatedly employed by this Court to establish the sufficiency of an application for writ of error coram nobis is that the alleged facts must be of such a vital nature that had they been known to the trial court, they *conclusively* would have prevented the entry of the judgment."); Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) (referring to Hallman as the "seminal case on attempting to set aside a conviction because of newly discovered evidence"). It was not until Richardson v. State, 546 So. 2d 1037 (Fla. 1989) that this Court receded from Hallman and concluded that all newly discovered evidence claims should be brought in a 3.850 motion rather than in an application for a writ of error coram nobis, unless the defendant was not in custody. Jones, 591 So. 2d at 915.

Having already been denied on this ground, Scott's initial 3.850 motion that was filed in 1984 did not raise again another claim regarding Kondian's sentencing.[6] Besides that this claim had already been rejected by this Court, Scott had additional reason for not doing so: a co-defendant's subsequent sentence of less than death was not acknowledged as a valid type of NDE claim until 1992 in Scott (Abron) v. Dugger, 604 So. 2d 465, 467 (Fla.). However, shortly before Scott (Abron) 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;
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> 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;

[6] Scott raised the following claims of ineffective assistance of trial counsel in his initial postconviction motion: (a) failure to obtain and present the testimony of the co-perpetrator, Richard Kondian; (b) failure to properly impeach the state's key witness, Charles Soutullo; (c) failure to adequately cross-examine the state's medical expert; and (d) failure to present evidence during the sentencing phase that Scott had helped save a counselor's life while incarcerated in California. Scott v. State, 513 So. 2d 653 (Fla. 1987). "Three witnesses testified on behalf of appellant at the 3.850 hearing: (1) Richard Kondian, the co-perpetrator; (2) George Barrs, the defendant's trial counsel; and (3) David Roth, Kondian's lawyer. The state presented no witnesses." Id. at 654.

> 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;
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> 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) (Exhibit B (Kondian affidavit); Exhibit C (Soutullo affidavit), Exhibit D (Kondian's judgment and sentence).)[7] However, this 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 having 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 this Court to address proportionality in Scott's second successive 3.850 motion, in which this 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;
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> (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

[7] Scott also raised an IAC claim, in the alternative, that his 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 (Fla. 1993).

> 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); (Exhibit E (Coffin affidavit); Exhibit F (Dixon affidavit); Exhibit G (crime scene photograph of ring of blood).) 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.
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> 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 this 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 subsequent evidentiary hearing order by this Court was a disaster.[8] After conducting one day of hearing, which insisted entirely of the testimony of the prosecutor in this case, the trial court decided to continue the evidentiary hearing, later rescheduling it to a different date on which lead counsel was unavailable, due to litigation in another death penalty case with a pending death warrant.[9] Nonetheless, the trial court denied Scott's motions to continue the hearing (as well as seven motions to disqualify the trial court based on multiple grounds), and inexperienced co-counsel for the defense appeared at the hearing and asserted her incapacity to proceed with the hearing, and no additional evidence was presented. The trial court thereafter denied all three of Scott's Brady claims, without following Justice Kogan's explicit instructions on the importance of conducting a proportionality analysis, based on its belief that it only needed to comply with the directions of the majority opinion. The appeal of the trial court's

[8] See, generally, Scott v. State, Case No. 88,551, Initial Brief of Mr. Scott at 82 (filed June 2, 1997) ("Mr. Scott respectfully urges the Court to reverse the lower court's order and remand Mr. Scott's case to the circuit court with direction that Mr. Scott receive a full and fair evidentiary hearing, and vacate his unconstitutional convictions and sentences. Mr. Scott respectfully requests that this Court order that the Honorable Marvin U. Mounts, and Ken Selvig, Assistant State Attorney be disqualified from any further prosecution of Mr. Scott's case.").

[9] The other client represented at the time by Scott's counsel Marty McClain was Rickey Roberts, for whom Gov. Lawton Chiles signed a death warrant in January 1996, and who came within 18 hours of execution before the Florida Supreme Court entered a stay. See "Life Sentence for Man Convicted of 1984 Baseball Bat Murder," by David Ovalle, *The Miami Herald* (2014), available at: http://www.miamiherald.com/news/local/crime/article66224902.html.

denial of the Brady claims was a challenge based procedural harm rather than the merits of the claims this Court found so compelling in its 1995 opinion.[10] Scott v. State, 717 So. 2d 908 (Fla. 1998). Justices Anstead and Kogan dissented from this 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 this Court to finally rule upon Mr. Scott's pivotal proportionality challenge to his death sentence.

However, a new window has opened for this Court to finally address this fundamental injustice: this Court's decision last November in McCloud v. State, 208 So. 3d 668. Prior to McCloud, this Court had held that a co-defendant's sentence of less than death could never be considered in an Eighth Amendment proportionality challenge if the co-defendant had pled guilty to something less than

[10] Scott raised the following six issues in that appeal, claiming that the trial court erred in addressing the following matters: "(1) participation of the assistant state attorney as prosecutor/witness; (2) motions to disqualify the judge; (3) the scheduling of the resumption of the evidentiary hearing on February 14, 1996; (4) Scott's absence during the resumption of the evidentiary hearing on February 14; (5) denial of Scott's motions to continue the evidentiary hearing and depose witnesses; (6) exclusion of certain evidence at the evidentiary hearing." Scott v. State, 717 So. 2d 908, 910 n.6 (Fla. 1998).

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 now brings this habeas within one year of McCloud being issued, requesting this Court to apply McCloud to his case and to thereby vacate his death sentence and remand for the imposition of a sentence in prison.

ARGUMENT

MR. SCOTT'S DEATH SENTENCE IS GROSSLY DISPROPORTIONAL TO THE FIFTEEN YEARS SERVED IN PRISON BY HIS MORE CULPABLE CODEFENDANT RICHARD KONDIAN, IN VIOLATION OF THE EIGHTH AMENDMENT

I. This Court has jurisdiction to hear this petition for habeas corpus

This Court has original jurisdiction to grant Petitioner a writ of habeas corpus under Article I, Section 13, and Article V, Section 3(b)(9) of the Florida Constitution. This proceeding is also authorized by Florida Rules of Appellate Procedure 9.030(a)(3). This petition complies with the Rule 9.100(a) requirements.

II. Eighth Amendment Proportionality in Capital Cases

This Court has been conducting proportionality analyses in all capital cases since its first post-Furman capital decision: State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). As to how proportionality applies in a case with codefendants, this Court recently summarized the analysis in McCloud:

> This Court generally conducts a qualitative assessment of capital cases to ensure that the death penalty is imposed against the most aggravated and least mitigated first-degree murder convictions. *Wade v. State*, 41 So. 3d 857, 879 (Fla. 2010) (citing *Lebron v. State*, 982 So. 2d 649, 668 (Fla. 2008)). However "where more than one defendant is involved, the Court performs an additional analysis of relative culpability guided by the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." *Blake v. State*, 972 So. 2d 839, 849 (Fla. 2007) (quoting *Brooks v. State*, 918 So. 2d 181, 208 (Fla. 2005)). If "the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite the fact the codefendant received a lighter sentence for his participation in the same crime." *Gonzalez v. State*, 136 So. 3d 1125, 1165 (Fla. 2014) (quoting *Brown v. State*, 721 So. 2d 274, 282 (Fla. 1998)). But, "[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." *Id.* (quoting *Sexton v. State*, 775 So. 2d 923, 935 (Fla. 2000)).

208 So. 3d at 687.

As noted above, this Court decided in 1992 in Scott (Abron) v. Dugger that a codefendant's subsequent sentence to less than death was a valid basis for a newly discovered evidence challenge in postconviction. However, two years later, this Court in Steinhorst v. Singletary imposed an absolute restriction on proportionality analysis: if the codefendant was convicted of a crime lesser than capital murder, then no proportionality analysis should be conducted. 638 So. 2d 33 (Fla. 1994) (codefendant found guilty of Murder 2); see also Shere v. Moore, 830 So. 2d 56, 62 (Fla. 2002) (relying on Steinhorst and concluding: "Therefore, once a codefendant's culpability has been determined by a jury verdict or a judge's

finding of guilt we should abide by that decision, and only when the codefendant has been found guilty of the same degree of murder should the relative culpability aspect of proportionality come into play."); Brown v. State, 143 So. 3d 392 (Fla. 2014) (refusing to conduct proportionality analysis where codefendant who pled guilty to second degree murder).

In McCloud, this Court last November reversed over two decades of caselaw and held as follows:

> 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." *Shere v. Moore*, 830 So. 2d 56, 62 (Fla. 2002); *accord Brown v. State*, 143 So. 3d 392, 406-07 (Fla. 2014); *Wade* [*v. State*], 41 So. 3d [857,] 868 [(Fla. 2010)]. 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.
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> * * *
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> When ensuring that our proportionality analysis conforms to these basic principles of capital sentencing, it may be apparent why a codefendant received a life sentence through the entry of a plea agreement with the State. Indeed, one valid reason for such a plea agreement might be the lesser culpability of the codefendant. But the acceptance of a plea agreement does not automatically mean that the codefendant was less culpable. We reject any principle of law that hamstrings this Court's ability to conduct a full proportionality review, including a relative culpability analysis, simply because the State allowed a codefendant to enter a plea to murder that resulted in a life sentence. Here, the relative culpability of the defendant as compared with the codefendant is so clear under the unique circumstances of this case that his death sentence must be reduced to a life sentence. Where factual findings clearly establish that the less

> culpable defendant is the only defendant receiving a death sentence, that error must be rectified.

208 So. 3d at 687-88.[11]

III. McCloud is retroactive under Witt, Montgomery, and James/Mosley

A. McCloud is retroactive under Florida law pursuant to Witt

Under Witt v. State, a change in law should be applied retroactively if it (a) emanates from this Court or the U.S. Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. 387 So. 2d 922, 931 (Fla. 1980). A change of law is a "development of fundamental significance" whenever the change "place[s] beyond the authority of the state the power to regulate certain conduct or impose certain penalties." Id. at 929. This is precisely what this Court's decision in McCloud did, finding that a certain category of persons—those who were equally or less culpable than codefendants who had been convicted of something less than capital murder—could no longer be executed in accordance with the Eighth Amendment.

[11] McCloud issued a well reasoned and explicit overruling of Shere and its progeny, and the McCloud decision is entitled to *stare decisis*. To the extent that this Court's decision in Jeffries v. State, 42 Fla. L. Weekly S732 (Fla. July 13, 2017) appears to diverge from McCloud's holding, this Court should reaffirm McCloud again with this decision and repudiate any dicta in Jeffries that would seem to conflict with McCloud, the decision which ruled head on with the question of whether a codefendant's plea to less than capital murder should still be compared with the defendant's death sentence for Eighth Amendment proportionality review.

In Walls v. State, the Florida Supreme Court conducted a Witt analysis and found that Hall v. Florida, 134 S. Ct. 1986 (2014) was a fundamental development of constitutional law and must be applied retroactively to cases in postconviction status. In applying the Witt analysis, the Supreme Court reasoned:

> The [U.S.] Supreme Court's rejection of Florida's mandatory IQ score cutoff means defendants with IQ scores that are higher than 70 must still be permitted to present evidence of all three prongs of the test for intellectual disability. . . The rejection of the strict IQ score cutoff increases the number of potential cases in which the State cannot impose the death penalty, while requiring a more holistic review means more defendants may be eligible for relief. Accordingly, the *Hall* decision removes from the state's authority to impose death sentences more than just those cases in which the defendant has an IQ score of 70 or below. We find that *Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before. *Cf. Falcon v. State*, 162 So. 3d 954, 961-62 (Fla. 2015) (rejecting State's argument that because a Supreme Court decision only invalidated a statute as applied to a specific subgroup of people, the decision was only a procedural refinement such that retroactive application was unnecessary).

213 So. 3d 340, 346 (Fla. 2016).

The reasoning in finding Hall retroactive applies as well to McCloud, in its expansion of this Court's Eighth Amendment proportionality analysis to include codefendants who have been convicted of or pled to non-capital homicide charges. In turn, this will have the effect of "remov[ing] from the state's authority to impose death sentences in more than just those cases" that would have been precluded prior to the McCloud decision. Thus, this Court should find that McCloud is "a

development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range" of circumstances than under the previously governing caselaw, namely, those whose sentences are disproportionate in light of the sentences received by codefendants convicted of lesser crimes.

B. McCloud is retroactive under federal law pursuant to Montgomery

Further, McCloud must be found retroactive under federal law, because it proclaims a new substantive constitutional rule, i.e., that persons who are equally or less culpable than codefendants who have received death sentences on non-capital charges are prohibited from being executed under the Eighth Amendment. In Montgomery v. Louisiana, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In Montgomery, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in Miller v. Alabama, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that Miller was not retroactive as a matter of state retroactivity law. Montgomery, 136 S. Ct. at 727. The United States Supreme

Court reversed, holding that because the Miller rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. See id. at 732-34.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively, notwithstanding state-law analysis. 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). Thus, Montgomery held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." Id. at 731-32.

In concluding that Miller was a substantive holding, the Supreme Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," id. at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* *Miller* "bar[red] life without parole . . . . For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." Id. at 734; see also Welch v. United States, 136 S. Ct. 1257, 1265 (2016) (finding its decision to be substantive and thus retroactive in Johnson v. United States, 135 S. Ct. 2551 (2015) (holding

unconstitutional various aspects of the Armed Career Criminal Act based on lack of notice, arbitrariness, and vagueness), reasoning: "[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule.").

C. Fundamental fairness under James and Mosely requires that Scott receive the benefit of McCloud

Finally, under this Court's fundamental fairness analysis elucidated in James v. State, 615 So. 2d 668, 669 (Fla. 1993), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016), Mr. Scott individually must be given the benefit of McCloud, give that he has tried on numerous occasions before multiple courts to raise this proportionality claim (e.g., direct appeal in 1982, 3.850 filed in 1990, 3.850 filed in 1994), and yet no court has ever ruled on its merits. It would be fundamentally unfair, a violation of due process, and a violation of the equal protection of the law to deny Mr. Scott the benefit of this new fundamental change of law in his favor, rendering his death sentence unreliable and arbitrary under Eighth Amendment jurisprudence.

IV. This claim is not procedurally barred

Mr. Scott has filed this claim within one year of this Court's decision in McCloud, which created the legal right that he brings in this habeas petition. C.f., Fla. R. Crim. P. 3.851(d)(2)(B) ("the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been

held to apply retroactively"); Chandler v. Crosby, 916 So. 2d 728, 735 (Fla. 2005) (Anstead, J., concurring in decision to rule on retroactivity in a habeas petition directly this Court, stating: "[I]t is apparent that habeas is the more efficient, if not the exclusive, mechanism for resolving retroactivity claims, especially in death penalty cases, given this Court's exclusive jurisdiction in such cases and its exclusive authority to determine whether its decisions are retroactive under *Witt*.").

Further, Scott raised this proportionality claim at first opportunity on direct appeal, with Justice Overton dissenting from this Court's refusal to consider that claim at the earliest opportunity rather than passing it off for another day. Thereafter, Scott in his first postconviction challenge raised Kondian's sentence in an application for writ of error coram nobis, but this Court denied because the evidence did not qualify as "new." Scott actually filed his another proportionality claim in 1990, and this Court again refused to hear the claim on its merits, despite its decision a year prior in Scott (Abron) v. Dugger, 604 So. 2d at 467 that a codefendant's subsequent sentence to less than death could be properly raised as a newly discovered evidence claim in Rule 3.850. Finally, from at least as far back as this Court's 1994 decision in Steinhorst, until its decision last November in McCloud, Scott had no colorable proportionality claim on the merits under this Court's jurisprudence. Thus, Scott cannot be found to have failed to bring a claim

that was without legal basis before this Court, and that this Court has repeatedly refused to rule upon over the nearly four decades of this case's history.

Finally, even if this Court did believe a procedural bar to exist, under the procedural history of this case and Scott's numerous attempts to secure a ruling on this meritorious claim, the doctrine of manifest injustice would mandate that this Court set aside that bar and issue a ruling on the merits. See State v. McBride, 848 So. 2d 287, 291-92 (Fla. 2003) (finding that the manifest injustice exception prevents collateral estoppel from being invoked to bar relief where its application would result in a manifest injustice); see also State v. Akins, 69 So. 3d 261, 268 (Fla. 2011) ("The State contends that the law of the case doctrine and collateral estoppel barred the Second District from addressing this claim below. We disagree. Under Florida law, appellate courts have the power to reconsider and correct erroneous rulings made in earlier appeals in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." (internal citations omitted)).

V. On the merits, Mr. Scott's death sentence violates the Eighth Amendment in light of Mr. Kondian's 15 years in prison

With this Court finally having the opportunity to address the merits of the proportionality claim, it is overwhelmingly clear that Mr. Scott's death sentence cannot be allowed to stand alongside Mr. Kondian's freedom—freedom which he has known since 1994. As Justice Anstead wrote about Mr. Scott in 1995, "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." And yet Mr. Scott still sits on death row in 2017, though this Court can and should step in now to remedy that blatant Eighth Amendment violation.

A. The trial evidence, and the State's argument that Scott and Kondian were equally culpable

The State has taken the position, as far back as its closing argument in Scott's trial (see, generally, Exhibit H (transcript of closing argument at Scott's trial); Exhibit I (transcript of closing argument in Scott's penalty phase); c.f., Exhibit J (transcript of Kondian's plea and sentencing)), that Kondian is equally culpable with Scott:

> 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.
>
> And they killed him as brutally as they did, not because they had to. Remember, they had the keys to his car. Richard Kondian drove his car over. They could have went to the shop and robbed it then. They didn't have to do that. They didn't have to tie him up and beat him the way they did.

(Exhibit H at 1419-20.) That position, that they are equally culpable, is sufficient to render Scott's death sentence to be in violation of the Eighth Amendment. The federal district court, in conducting its deferential review of this Court's denial of

Scott's 1983 application on procedural grounds, went further and concluded that Scott's trial "record amply supports" his counsel's sentencing argument that Kondian was the "major perpetrator" and that Scott's "participation was relatively minor." Scott v. Dugger, 686 F. Supp. 1488, 1515-16 (S.D. Fla. 1988). The discussion regarding the constitutionality of Scott's death sentence could end here, given that the State should be estopped from taking a contrary position to what they argued to Scott's jury in attempting to persuade them of Scott's guilt, which was that the two codefendants were equally culpable in this homicide. See Ray v. State, 755 So. 2d 604, 611 (Fla. 2000) ("It has long been established that ***equally culpable*** codefendants should receive equal punishment." (emphasis added)); Bradshaw v. Stumpf, 545 U.S. 175 (2005) (reversing and remanding for consideration of whether the prosecutor's inconsistent theories in the homicide trials of two different codefendants about which was the principal actor constituted a violation of due process); Raleigh v. State, 932 So. 2d 1054, 1066 (Fla. 2006) (conducting a Stumpf analysis but finding the prosecutor's argument to have consistently painted one defendant as the principal actor in both of their separate trials).

B. New evidence in postconviction has revealed that Kondian in fact was far more culpable than Scott

But further, because this relative culpability claim is based upon newly discovered evidence under Scott (Abron) v. Dugger, this Court—in evaluating the

relative culpability of Scott and Kondian—must review all the new evidence and recanted testimony that has come to light over the entire postconviction history of this case. See Hildwin v. State, 141 So. 3d 1178, 1187-88 (Fla. 2014) (Court must "consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial, and conduct a cumulative analysis of all the evidence so that there is a total picture of the case and all the circumstances of the case"). This evidence includes most importantly an affidavit from Kondian himself, and affidavits from multiple people regarding statements that Kondian made to them, making it crystal clear that Scott's relative culpability has only diminished in relation to Kondian since the State argued in 1980 for their equal culpability. In making a finding regarding the relative culpability of Kondian and Scott, it is critical that this Court review how the evidence secured throughout postconviction has undermined the original portrait of this incident that this Court was first presented in the early 1980s.

Throughout the decades of postconviction litigation in Scott's case, many of the factual assumptions relied upon by this Court in affirming Scott's conviction and sentence have been conclusively refuted or rendered indecisive for the question of the relative roles of Scott and Kondian in Alessi's death:

- Kondian has sworn an affidavit that Scott acted in his defense and that Scott never intended to kill Alessi (Exhibit B)

- Soutullo has admitted that he lied in Scott's trial when he testified that he hear Scott state that he and Kondian state that they were planning to rob and murder Alessi that night (Exhibit C)

- A crime scene photograph that was not admitted at trial and which shows a ring of blood consistent with having been left by a champagne bottle (Exhibit G)

- A police report from Rhode Island reports that Kondian stated that he cut his finger on a broken bottle during the struggle

- Kondian admitted to Rhode Island police, as well as DOC intake staff, that he struck Alessi multiple times with a wine or champagne bottle (Exhibit N)

- The State's medical examiner signed a letter stating that he had changed his opinion and that he now concludes that it was likely the champagne bottle and not the bear figurine that was used to strike that fatal head blow to the victim, which was what the State argued at Scott's trial (Exhibit K)

- An affidavit by Kondian's cellmate, Dexter Coffin, wherein Coffin stated that he told a police officer that Kondian admitted killing the victim (Exhibit D)

- An affidavit 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 (Exhibit F)

- Bernadine Bernard testified in a deposition that Scott did not provide her the bear charm she had in her possession at the time of Scott's arrest; rather, she was given it by someone other than Scott and told to keep it a secret (Exhibit M)

- Forensic report completed in 1994 undermining State's argument at trial (Exhibit L)

- Letter to Scott's sister from Kondian supports Scott's account (Exhibit O)

- Affidavit from cellmate Avera of Kondian that Kondian told him that Scott fled from the scene prior to the homicide (Exhibit P)

- Letter from Judge Rudnack to Kondian's parole board challenging Kondian's parole (Exhibit R)

- Arrest report of Alessi, demonstrating his homosexual tendencies, as relevant to the accounts given by Kondian and Scott regarding sexual activity occurring that initiated the confrontation (Exhibit S)

- Affidavits from four of Scott's jurors stating that this newly discovered evidence would have affected their decision (Exhibit Q)[12]

All of this new information provides overwhelming reason to conclude that Kondian was at least as culpable as Scott, and most likely much more so, in the death of Alessi. Further, it was Kondian who had the prior relationship with Alessi and the knowledge that he had wealth that could be stolen. It was Kondian who was sexually assaulted by Alessi that night, giving him the motive to respond in fury and revenge.[13]

[12] All of these exhibits were attached to Scott's 1994 Brady postconviction motion and emergency motion to stay his scheduled execution.

[13] To the extent that the State would argue that other offenses should be taken into consideration, it should be observed that the parole which Kondian was serving was for felony murder for a robbery in California in which his codefendant alone unexpectedly killed someone. It should also be noted that Kondian, while incarcerated on this charge but prior to entering his plea, brutally sexually assaulted another inmate. (Exhibit T.)

C. This Court's Eighth Amendment proportionality jurisprudence demands that Scott's death sentence be barred, in light of Kondian's 15 years behind bars

Finally, this is not an instance where Scott received a death sentence while Kondian is doing life—Kondian served a mere 15 years in prison—when all evidence bellows that he was the leader in this incident. (Exhibit A.) Further, in relation to the jury's razor thin 7-5 vote to recommend death in Scott's case, powerful additional mitigating evidence has come to light during postconviction, including that Scott is intellectually disabled, with an IQ of 69. (See, generally Exhibit U (Crowne neuropsychological report); Exhibit V (Fisher psychological report).)

Given that Scott only needs to show that Kondian was equally culpable with him yet received a lesser sentence, which Scott has done, this Court should find that the Eighth Amendment requires that Scott's death sentence should be vacated. See Ray v. State, 755 So. 2d 604, 611-12 (Fla. 2000) (reversing death sentence where codefendant possibly was the shooter; much of the evidence pointed to him as the dominant player in the crimes; and he was at least as culpable as defendant given that the evidence showed "[b]oth men actively participated in planning the robbery, in executing the robbery, and in stealing the [getaway] car"); Hazen v. State, 700 So. 2d 1207, 1214-15 (Fla. 1997) (determining non-shooter coperpetrator's life sentence precluded death sentence for Hazen because "the

evidence clearly establishe[d] that [the non-shooter coperpetrator] was a prime instigator and was more culpable than Hazen"); Puccio v. State, 701 So. 2d 858, 863 (Fla. 1997) (holding defendant's death sentence was disproportionate in comparison to sentences imposed against other equally culpable participants in victim's beating death; defendant played lesser role than the others in planning since he was not present during initial formulation of plan or ways to kill victim, and defendant played no greater a role in actual killing than two others who initiated and finished the melee).

VI. Conclusion

Returning to Justice Anstead's concurring opinion in the 1995 decision:

> 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.

This Court should finally rule upon that pivotal point and grant Mr. Scott the relief to which he is entitled. The Eight Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection demand that this Court step in now and remedy this true injustice. See McCloud, 208 So. 3d at 689.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court vacate his death sentence and remand to the trial court for the entry of an order sentencing Mr. Scott to prison sentence proportional to that received by Kondian.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the instant brief has been served to the Office of the Attorney General via eportal at capapp@myfloridalegal.com and to the State Attorney's Office via eportal at FELMCU@sa15.org and E-POSTCONVICTION@sa15.org this 17th day of November, 2017.

/s/ Joe Hamrick
A T T O R N E Y