NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
(Term, 2022)

MARLIN LARICE JOSEPH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

THIS IS A CAPITAL (DEATH PENALTY) CASE

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

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

I.

Does the death penalty in and of itself violate the Eighth Amendment in light of contemporary standards of decency and the geographic and other arbitrarinesses of imposition of the death penalty?

II.

Did the Florida Supreme Court decision interpret the law incorrectly such that it violated Petitioner's Sixth and Fourth Amendment rights denying him due process, fair proceedings, the rights to confrontation and compulsory process?

III.

Was the Florida Supreme Court's refusal even to review proportionality in this death penalty case a denial of fundamental constitutional safeguards and protections for those facing the death penalty?

LIST OF INTERESTED PARTIES

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LIST OF ALL PROCEEDINGS IN COURTS BELOW

Florida Supreme Court Opinion, case number SC20-1741 (Fla. February 10, 2022).

Florida Supreme Court Order Denying Rehearing, case number SC20-1741 (Fla. March 21, 2022).

Florida 15th Judicial Circuit, State of Florida, Sentencing Order, case number 50-2017-CF-012413AXX (November 19, 2020).

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The Petitioner, MARLIN LARICE JOSEPH, petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Florida affirming, per curiam, on direct appeal, his convictions of capital murder and sentences of death.

OPINIONS BELOW

The judgment of the Supreme Court of Florida was entered on February 10, 2022 and rehearing was denied on March 21, 2022. The Mandate issued April 6, 2022. This petition is filed within ninety (90) days of the denial of rehearing.

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a) on the grounds that a right or privilege of Petitioner, Marlin Larice Joseph, which is claimed under the Constitution of the United States, has been denied by the State of Florida.

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

1. The Eighth Amendment to the United States Constitution, which states that:

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

2. The Fourteenth Amendment to the United States Constitution, which states, in pertinent part, that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Sixth Amendment to the United States Constitution, which states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On February 24, 2020, a twelve member jury found Petitioner, Marlin Larice Joseph, guilty of two counts of First Degree Murder With a Firearm. The victims were Kaladaa Crowell, his mother's partner, and with whom he and his family lived, and Ms. Crowell's eleven year old daughter, Kyra Inglett. The prosecution, the Fifteenth Judicial Circuit, State of Florida, Office of the State Attorney, sought death sentences and the penalty phase hearing of a death penalty case commenced immediately after the jury verdict: the same day with the same jury. The State presented two professional witnesses, and the defense called fifteen witnesses, most of whom were lay witnesses.

Two days later, February 26, 2020, following the State's error-ridden exhortation and closing argument in the trial phase, the jury unanimously rendered a verdict recommending death over life. The jury reached this penalty phase verdict in a mere two hours following the closing of the penalty phase trial. The jury found

four aggravating factors as to Ms. Crowell, and the same four as to her daughter, plus the additional aggravating factor that Kyra Inglett was less than twelve years old. The jury found no mitigating factors in this rush to judgment.

Following a Spencer hearing, Spencer v. State, 615 So.2d 688 (Fla. 1993) (a hearing providing defendants on opportunity to provide additional evidence to change the penalties to be imposed), held eight months later due to Covid-19 and other concerns, on October 16, 2020, the trial court followed the jury's recommendation and sentenced Mr. Joseph to death from that verdict.

Petitioner, Marlin Larice Joseph, appealed those sentences and convictions to the Florida Supreme Court. The judgments and sentences were affirmed. Joseph v. State, SC20-1741 (February 10, 2022) (Pet. App. A1-56).

Both in the trial court and before the Florida Supreme Court, Mr. Joseph challenged the constitutionality of multiple aspects of his trial case and Florida's death penalty jurisprudence, and of the death penalty itself. The Florida Supreme Court considered some of Mr. Joseph's claims, but refused review of four issues concerning the constitutionality of Florida's death penalty statute; the proportionality of Petitioner's death sentence; the constitutionality of Florida's death penalty scheme in light of its recent decision in Lawrence v. State, 308 So.3d 544 (Fla. 2020) and the sufficiency of the factors in determining the death penalty; although it did review this issue in another guise and affirmed the trial court's decision. The Florida Supreme Court considered and rejected all the remaining claims of Petitioner. It affirmed the trial court on those claims, refused to review

those detailed hereinabove, and affirmed the judgments and death penalty sentences imposed.

The Florida Supreme Court denied Petitioner's motion for rehearing March 21, 2022, its final action on this case, pursuant to which the Mandate issued April 6, 2022 (Pet. App. A57; Pet. App. A59). This petition is filed within ninety (90) days of the denial of the motion for rehearing.

B. PERTINENT FACTS AND BACKGROUND

Mr. Joseph was indicted on January 18, 2018 for two counts of First Degree Murder With a Firearm. The incidents leading to this indictment, conviction, and death penalty convictions occurred on December 28, 2017.

The day before trial was to begin, February 13, 2020, the State (State Attorney's Office, 15th Judicial Circuit, State of Florida) filed a last minute supplemental witness list naming a firearms and tool mark expert. The State also filed supplemental discovery on that date: a firearms report. The very next day, the first day of jury selection, Petitioner filed a motion to exclude the witness from testifying both because of the discovery violation and the resulting preparatory prejudice to him. The trial court found that there was an inadvertent discovery violation. The trial court asked Petitioner if he would use the State's witness as his own (Pet. App. A, p. 14). Petitioner responded in the negative (Pet. App. A, p. 14).

The trial court later inquired of Petitioner whether he was prejudiced as to his ability to prepare for trial. Petitioner responded in the affirmative (Pet. App. A, p. 17).

The trial court denied the motion to exclude. On appeal to the Florida Supreme Court, the Court affirmed the denial of Petitioner's motion to exclude and denied any other remedy (Pet. App. A., pg. 21). Despite the obvious prejudice, the Florida Supreme Court authorized the State to slip in substantially significant evidence at the last moment, in this ultimate criminal trial. In addition to the serious prejudice, this approval sets a very bad standard for the prosecution's supplying of untimely discovery, in controversion of fundamental principles of our constitutional jurisprudence. And then, the Court peremptorily cut off Petitioner's cross-examination of this last minute witness for whom he was not able to obtain a counter witness, through no dilatory behavior on his part. Petitioner had begun to explore a relevant area of inquiry and was simply and arbitrarily cut off, without even so much as a query regarding the line of questioning, or its purpose. The State had not objected. The trial court abandoned its fundamental status of impartiality and neutrality.

Petitioner made other, constitutional, objections on other grounds, to other evidence, resting on the Fourteenth Amendment, such as the objections to a portion of Jeshema Tarver's testimony that was irrelevant, speculative, unduly prejudicial, and involved no prior bad act, nor collateral crime, nor motive (Pet. App. A, p. 30 et seq). I.e., stating that she had heard Petitioner yelling about Kyra two days earlier. No further query or response was made regarding this testimony, yet it was admitted and then affirmed to stand, constituting an incorrect decision on the law.

On the date in issue, the whole family and visitors were at home. Petitioner, who was in the bedroom reading his Bible, came out of his room and began to shoot Ms. Crowell inside their home. She screamed for help and was shot again. Of the shots she endured, it is not known in what order the fatal shot occurred. Kyra Inglett was in the house and under her bed while her mother was shot. She ran out of the house, with Petitioner shooting at her, and hitting her several times. She lived for a few hours, dying at the hospital. She was never responsive after she fell to the ground outside of the home.

Petitioner fled the scene and was apprehended days later. His family, who had remained at the home, was interviewed that same night. All allegedly gave statements that incriminated Mr. Joseph. When the case came to trial two years later, their in-court testimonies and memories were inconsistent with the oral testimony provided by the police officer who had interviewed most of them the night of these shootings. This testimony was admitted via the detective and affirmed on appeal.

At trial, the facts presented were sufficiently straightforward, even with the recantation by his family members as to incriminating evidence regarding Petitioner, and as there were no other viable suspects due in part to the testifying expert and in part to the prejudice of the denial of the motion to exclude or craft a less prejudicial remedy. Also, as no one else was seen with a gun, nor departed the residence following the shooting, Mr. Joseph was convicted by the jury and sentenced to death on both counts within two hours of conclusion of the penalty

hearing. The trial judge later sentenced in line with this recommendation. The Florida Supreme Court affirmed.

This is not business as usual, not ordinary, typical, nor to have been expected for this kind of homicide with the kind of evidence presented to result in a death sentence for the Defendant. Petitioner suggests that his being sentenced to death for this kind of crime is a consequence of infortuitous timing and circumstances, a result of racism, a product of geographic accident, and as the Florida Supreme Court specifically refused to consider or undertake a proportionality review. These crimes were committed in Florida, a state where the death penalty is fairly routinely sought, and among the top five states where it is imposed, and although Palm Beach County, the 15th Judicial Circuit, itself had not seen a death penalty imposed in nearly two decades, the times and atmosphere were ripe for one, again despite proportionality standards and the constitutional commands of confrontation, compulsory process, due process, and against cruel and unusual punishment.

REASONS FOR GRANTING THE PETITION AND THE WRIT

1. THIS COURT SHOULD GRANT THE WRIT SO AS TO REVIEW DEATH PENALTY JURISDICTION IN LIGHT OF THE EIGHTH AMENDMENT, EVOLVING STANDARDS OF DECENCY, AND THE SEVERAL ARBITRARINESSES OF ITS IMPOSITION.

This Court has worked long and hard to craft a constitutional death penalty that is fully and fairly compliant with constitutional standards, as well as notions of fair play and substantial justice. Gregg v. Georgia, 428 U.S. 153 (1976) (founded on

plurality opinions), et al. However, from its very inception, and reinception, there have been clamors against its reinstatement from jurists and others all over the land, including from the very Justice who voted favorably on it.

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question -- does the system accurately and consistently determine which defendants "deserve" to die"—cannot be answered in the affirmative.

Callins v. Callins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

In his dissent in Glossip v. Gross, 135 S. Ct. 2726, 2755, reh'g denied, 136 S. Ct. 20 (2015), Justice Breyer opined:

> "Rather than try to patch up the death penalty's legal wounds one at a time, I would ask for a full briefing on a more basic question: whether the death penalty violates the Constitution."

This Court has itself restricted the category of persons eligible to have a death penalty imposed against them for a variety of reasons, including fairly recently in Hall v. Florida, 134 S. Ct. 1986 (2014).

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duly to teach human decency as the mark of a civilized world. The States are laboratories for experimentation,

> but those experiments may not deny the basic dignity the Constitution protects. Id., at 2007.

Hall held that Florida's IQ cut off rule violated the Eighth Amendment because it too narrowly considered an IQ score as final and conclusive evidence of intellectual capacity in that it failed to recognize the imprecision of the score. See also Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 543 U.S. 551 (2005).

This Court should grant this petition and writ of certiorari because the arbitrariness, capriciousness, imprecision, and unconstitutionality of the death penalty and its application is long and well-established. It should then consider striking down this uniquely irretrievable penalty in its entirety. It should then remand this matter to the Florida Supreme Court for imposition of a life or lesser sentence for Marlin Larice Joseph, Petitioner.

As merely a couple of examples of the arbitrariness and capriciousness involved in sentencing someone to death, consider the following.

Zacharias Moussaoui, convicted for his role as a terrorist for conspiring to kill citizens of the United States as part of the September 11, 2001 attacks, is serving a life sentence at a Federal prison in Florence, Colorado. This, even although he is the only person convicted in U.S. Court in connection with these thousands of deaths. A jury decided this on May 3, 2006.

Jared Loughner, found guilty of nineteen charges of Murder and Attempted Murder at a public gathering, including grievously wounding Congresswoman Gabby Giffords, all in connection with the mass unprovoked shooting in Tuscon,

Arizona on January 8, 2011, was sentenced to life in prison. Six people were killed, including Chief U.S. District Court Judge John Roll; a member of Congresswoman Gifford's staff, Gabe Zimmerman; and a nine year old girl, Christina Taylor-Green.

James Holmes is sentenced to life in prison. More precisely, twenty consecutive life sentences plus 3,318 years in prison. Still, he was spared the death penalty and its unique irretrievability. He killed twelve people and injured seventy others at a movie theater in Aurora, Colorado on July 20, 2012.

Dzhokhar Tsarnaev's fate remains in the balance. He is the Boston Marathon bomber. U.S. v. Tsarnaev, No. 20-443, S. Ct. His case to sentencing has been a rocky road and is, as of the date this is written, still uncertain; but it is fully reflective of the arbitrariness and capriciousness in utilization of the death penalty.

> "The First Circuit had ruled that the death sentence which had been imposed on Tsarnaev violated the "core promise of our criminal justice system . . . that even the very worst among us deserves to be fairly tried and lawfully punished. Despite a diligent effort, the judge here did not meet that standard."

United States of America v. Tsarnaev, 1st Cir., No. 16-6001 (2020).

This Court then overturned that decision and Tsarnaev now awaits another sentencing hearing.

On February 14, 2018, Nikolas Cruz killed seventeen people and injured seventeen others at Marjory Stoneman Douglas High School in Parkland, Florida, the neighboring county and Judicial Circuit to Petitioner's Palm Beach County. On October 20, 2021, he pleaded guilty to all charges. Sentencing has not as yet been determined.

In Broward County, the 17th Judicial Circuit of Florida, on May 20, 2022, the prosecution abandoned its death penalty request against Dayonte Resiles after obtaining conviction. He had killed his victim after binding her and stabbing her twenty-five times, and forcing her into a bathtub. NBC, May 20, 2022.

The death penalty as it is imposed, is arbitrary and therefore cruel and unusual.

The Constitution's proscription on "cruel and unusual punishments" protects the soul of humanity and human dignity. Hall, 134 S. Ct. at 2001; Kennedy v. Louisiana, 554 U.S. 407, 420 (2008); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion). The proscription is not etched in stone, but rather does grow and mature in light of the "evolving standards of decency that mark the progress of a maturing society." Kennedy, 554 U.S. at 419 (quoting Trop, 356 U.S. at 101).

At the time of Gregg, thirty-five states had enacted the death penalty. Currently, twenty-seven states have the death penalty and many of those have proposed death penalty abolishment bills pending in their legislatures. In those states where the death penalty survives, the practice is infrequent. Graham v. Florida, 560 U.S. 48 (2010). Florida has found it to be "most infrequent", Graham at 62, even though it is one of the top five states in imposing the sentence. There are currently approximately 2,500 persons facing execution in this country. However, the death row population has declined for twenty (20) consecutive years as sentence reversals, executions, and deaths by other causes are outpacing new death sentences. Death Penalty Information Center (as of January 1, 2022).

More than arguably, the death penalty has failed. The Gregg lineage has failed. Gregg had hoped that the punishment of death could be administered fairly, rationally, in compliance with penological purposes, and not cruelly nor unusually. That has not come to pass. This Court should grant this Petition for Writ of Certiorari, as well as the relief requested in this writ.

Additionally, besides those Justices in the Justice Brennan and Justice Marshall camp, at the time of the Gregg decision, Justice Powell finally abandoned the concept that the death penalty could be executed constitutionally.

The frequency of its use "in proportion to the opportunities for its imposition" is infinitesimal. Graham, 560 U.S. at 66. Of those arrested for homicide each year, fewer than two-tenths of one percent receive the final punishment of death. Of all those convicted of homicide, only three percent are eventually sentenced to death. The Case Against the Death Penalty, ACLU, 2012 revision. There is no brightline or other reliable standard to determine if these are indeed the worst of the worst offenders.

In 2020 and 2021, eighteen people only were sentenced to death. These are the fewest in the modern era. Three executions were carried out by outlier jurisdictions less than ten days before the 2021 Presidential inauguration of a new and different President, who, in fact, has expressed his opposition to the death penalty. Eleven people were executed in 2021. They continue to highlight the arbitrary, discriminatory and unconstitutionality of application of the death penalty. One of those put to death was a man who, without dispute, did not kill

anybody. Death Penalty Information Center, December 16, 2021. Additionally, from Justice Stevens, Baze v. Rees, 553 U.S. 35, 79 (2008) (Stevens, J., concurring in judgment):

> The legitimacy of deterrence as a justification for the death penalty is also questionable, at best. Despite thirty years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.

Lastly, the AEDPA standard of review is inapplicable in this case, so deference by this Court is inapplicable; the Supreme Court of Florida has issued its opinion and denied rehearing; and the constitutional question was presented and passed on below.

2. THIS COURT SHOULD GRANT THE WRIT SO AS TO REVIEW THE SIGNIFICANT VIOLATION OF THIS PETITIONER'S RIGHTS PURSUANT TO THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT'S CONFRONTATION AND COMPULSORY PROCESS CLAUSES.

The bottom line here is that whether the Florida Supreme Court wrongfully denied the exclusion of a State's expert witness in firearms and tool marks, whose name, credentials, and firearms report were only provided to Petitioner the day before jury selection commenced, two full years after Petitioner's indictment, it moreover permitted irrelevant, merely speculative testimony to act as evidence of motive. The Florida Supreme Court, along with that, and additionally, unconstitutionally violated Petitioner's due process and equal protection rights,

confrontation rights, and compulsory process rights. Petitioner's attempts at thorough cross-examination of this significant State's expert witness were arbitrarily cut off mid-cross examination, abrogating and foreclosing Petitioner from the opportunity to expose exculpatory or helpful evidence, and to the point at which he was denied the full and fair opportunity to procure an expert witness of his own (Pet. App. A, p. 12-17). The Florida Supreme Court failed to reverse this decision. It authorized the repudiating of Petitioner's meaningful fundamental right to a fair trial. It excused the trial court and State's responsibility to fashion a fair remedy. It also authorized the trial judge to abandon her neutral role. In fact, the State had made no objection to this line of questioning. The trial court, sua sponte, precluded it (Pet. App. A, p. 18). A man's life was at stake. Neither exclusion nor another fair remedy should have been undervalued, nor exhausted. A continuance should not have been unwarranted. Mr. Joseph should have had his constitutional right to even the playing field protected. This was, after all, a matter of life versus death.

Two distinct concepts are contained within the Confrontation Clause. The first is to guarantee criminal defendants the right to face the prosecution's witnesses in the case against them by cross-examination. The second concept is the right to dispute the witness's testimony.

The Florida Supreme Court affirmed the trial court's incorrect interpretation of the law and prejudicial decision to cut the defense's confrontation rights and compulsory process right off at the knees. And, thus creating a matter of national

significance; particularly in this death penalty review request that is otherwise arbitrary, cruel and unusual.

Petitioner was granted neither the right to exclude an expert witness presented absolutely for the first time at the literal last moment, nor the time to obtain a countering expert of his own, nor to conduct a complete and thorough cross-examination of the witness in efforts to dispute the witness's testimony and its impact. The expert's testimony was not merely cumulative to other testimony taken at the trial. It filled in holes in the testimony and limited the possibilities of further potential defendants and the witness himself had only conducted his examination and written his report the previous day. It was, at best, a cursory examination, fully subject to an informed cross-examination and testimony of Petitioner's own witness. As a result of the trial court's decision, and the Florida Supreme Court affirmance, Petitioner was denied an opportunity to fully challenge the expert witness's reliability before the fact-finder. U.S. v. Hennis, 79 M.J. 370 (February 28, 2020) (the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense); U.S. v. Bess, 75 M.J. 70 (January 6, 2016) (whether rooted directly in the Due Process Clause or the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense). Petitioner was denied a fair trial and substantial justice by the Florida Supreme Court.

Bess, Id., also validates our fundamental constitutional precept that the right to present a defense has many aspects. Pursuant to the Compulsory Process Clause, Petitioner had a right to call witnesses whose testimony was material and favorable to his defense. That right was materially and prejudicially violated. Petitioner's Sixth Amendment right to confront witnesses against him was violated as the trial judge limited his cross-examination in a manner that precluded an entire line of relevant inquiry. United States v. Israel, 60 M.J. 485 (C.A.A.F. 2005). Further, the constitutional right of petitioner to be heard through counsel was violated as the Court did not perforce allow Petitioner to protect his right to have his counsel make a proper argument on the evidence, to present testimony, and as to and the applicable law in his favor. Herring v. New York, 422 U.S. 853, 860 (1975). Furthermore, Petitioner's Fourteenth Amendment rights were violated pursuant to the Due Process Clause in that Petitioner was not the recipient of our guaranteed right to the fair application of the law before he could be, and was, convicted of these homicides, and sentenced to death. Crane v. Kentucky, 476 U.S. 683 (1986).

Also, the Florida Supreme Court violated the U.S. Constitution and its precepts when it affirmed the trial court's decision to admit irrelevant evidence (Pet. App. A, p. 30). In addition to the foundational basis of relevancy, Kirkman v. State, 233 So.3d 456, 467 (Fla. 2018) (quoting Hudson v. State, 922 So.2d 96, 107 (Fla. 2008), offered evidence must satisfy the rules of evidence. Wright vs. State, 19

So.3d 277, 291 (Fla. 2009). Florida law defines relevant evidence as that tending to prove or disprove a material fact. Morris v. State, 219 So.3d 33, 42 (Fla. 2017).

Jeshema Tarver was a fifteen year old staying in the Crowell/Denson home. The witness's testimony that she first heard Joseph (Petitioner herein) yelling about Kyra "two days ago", without more to her response, is simply irrelevant and speculative as to any evidence tending to prove or disprove a material fact. It was not inextricably intertwined evidence relevant to, nor did it establish, any motive. Ballard v. State, 66 So.3d 912 (Fla. 2011). To find motive was to take mere speculation and apply it backwards. At minimum, this testimony should have provided motive in order for it to have been admitted. Speculation should not have been sufficient to render this testimony admissible. Petitioner was denied his confrontation and due process rights such that valid constitutional claims arise.

3. THIS COURT SHOULD GRANT THE WRIT SO AS TO REVIEW THE SUPREME COURT OF FLORIDA'S FAILURE TO CONDUCT A PROPORTIONALITY REVIEW, A VIOLATION OF THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION, AND AS WELL A VIOLATION OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, AND GIVEN FLORIDA'S DECISION IN LAWRENCE v. STATE, 308 So.3d 544 (Fla. 2020).

On October 29, 2020, the Florida Supreme Court dismantled its required proportionality review upon imposition of the death penalty, a safeguard that had been in place in Florida for almost fifty years and which had equally long been held in respect throughout the nation. Lawrence v. State, 308 So.3d 544 (Fla. 2020) (abandoning required proportionality review); State v. Dixon, 283 So.2d 1 (1973)

(capital punishment is not, per se, violative of the U.S. Constitution. Review by this Court guarantees that the reasons provided by one case for imposition of the death penalty will reach a similar result to that reached under similar circumstances in another case). Several death sentences in Florida have, in fact, been reversed on proportionality grounds. Merely one such example is Yacob v. State, 136 So.3d 539 (Fla. 2014) (We vacate the sentence of death because we conclude that a death sentence in this case is not proportionate to other cases in which the sentence of death has been upheld).

In dismantling this safeguard and protection for defendants, the Florida Supreme Court relied on the Florida Constitution, Article 1, § 17, which states:

> **Section 17. Excessive punishments.**—Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and 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. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

Florida then quickly moved, mere weeks later, to amend the concomitant Florida Rule of Appellate Procedure 9.142(a) (procedure in death penalty appeals) (January 14, 2021), to remove any reference to comparative proportionality review.

Florida employed this Article's Conformity Clause as the vehicle to overturn the proportionality review mandate. It decided that since Pulley v. Harris, 467 U.S. 37, 50-51 (1984) did not mandate proportionality review, that then Florida's Conformity Clause prohibited such review. Somehow, not requiring proportionality review in every case became, for Florida, prohibiting proportionality review. Somehow, Florida, unconstitutionally, confounded "not required" with "prohibited".

Comparative proportionality review is intended to ensure uniformity of sentencing in death penalty proceedings. Its purpose is to fairly maximize the likelihood that only the most aggravated and least mitigated of first degree murders—i.e., only "the worst of the worst"—receive the death penalty. Rogers v. State, 285 So.3d 872 (Fla. 2019) quoting Urbin v. State, 714 So.2d 411 (Fla. 1998).

Respectfully, the Florida Supreme Court was mistaken and incorrectly interpreted the law in its Lawrence decision, Lawrence v. State, 45 Fla. L. Weekly S277 (Fla. October 29, 2020), although it was decided on a 6-1 basis. Justice Labarga was firm and well-reasoned in his eloquent dissent:

> "Today, the majority takes the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence—a step that eliminates a fundamental component of this Court's mandatory review in direct appeal cases".
>
> "In deciding whether death is a proportionate penalty", we make a comprehensive analysis in order to determine whether

> the crime falls within the category of both the most aggravated and least mitigated of murders, thereby assuring uniformity in the application of the sentence. Offord v. State, 959 So.2d 187, 191 (Fla. 2007) (quoting Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003). This entails a qualitative review. . .of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." (quoting Urbin v. State, 714 So.2d 411, 416 (Fla. 1998).
>
> "Today's decision by the majority, striking proportionality review from this Court's mandatory review in death penalty appeals, leaves only the sufficiency analysis. In removing this fundamental component of proportionality review, the majority's decision threatens to render this Court's initial review of death sentences an exercise in discretion."

This case comes to the Court on direct review with the constitutional issues well-preserved. Florida continues its sufficiency of the evidence review, whether it was raised below or not. Actually, it begins its sufficiency review in most, if not all, death penalty reviews with the language, "In appeals where the death penalty has been imposed, regardless of whether the defendant raises the sufficiency of the evidence as an issue on appeal, this Court [meaning the Florida Supreme Court] independently reviews the record to confirm that the jury's verdict is supported by competent, substantial evidence." Davis v. State, 2 So.3d 952 (Fla. 2008); Joseph v. State, (Pet. App. A, p. 54, Florida 2/10/22); Morris v. State, 219 So.3d 33 (Fla. 2017); Miller v. State, 42 So.3d 204 (Fla.2010).

Yet the Florida Supreme Court incorrectly refuses to undertake a proportionality review on this most serious of all matters: life versus death, declaring it somehow unconstitutional. Sufficiency only passes on the adequacy of the evidence. Proportionality passes on the proper balance of the various factors

involved in determining the death penalty. And on compliance with fundamental constitutional and jurisprudential safeguards of basic rights. There is no independent and adequate state ground for this requested Petition for Writ of Certiorari and hearing on the merits. The constitutional question was raised and passed on below.

CONCLUSION

For the reasons set forth above, Petitioner, Marlin Larice Joseph, herein respectfully requests that a writ of certiorari issue to review the decision of the Florida Supreme Court on the questions presented.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished this 15th day of June, 2022, by mail and email service to:

Leslie T. Campbell, Assistant Attorney General
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A courtesy copy has been furnished via email service to:
Honorable Cheryl Caracuzzo
Circuit Judge, Fifteenth Judicial Circuit of Florida
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, FL 33401
(cad-divisionfj@pbcgov.org)

Respectfully submitted,

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/s/ Fredrick R. Susaneck
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