No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL A. GORDON
*Petitioner,*

v.

STATE OF FLORIDA
*Respondent.*

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

# PETITION FOR WRIT OF CERTIORARI

Howard L. "Rex" Dimmig, II
Tenth Judicial Circuit Public Defender

Steven L. Bolotin
Assistant Public Defender
*Counsel of Record for Petitioner*

Office of the Public Defender
Tenth Judicial Circuit of Florida
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
sbolotin@pd10.org
(863) 534-4200

Attorneys for Petitioner

**Capital Case**

## QUESTION PRESENTED

Has the Florida Supreme Court by abandoning comparative proportionality review in death penalty appeals - - while dismantling other safeguards, and in view of the proliferation of additional statutory aggravating factors (to the point where nearly all first-degree murder defendants are death-eligble) - - misapplied this Court's decision in *Pulley v. Harris*, 465 U.S. 37 (1984) and rendered Florida's capital sentencing scheme arbitrary, capricious, unreliable, and violative of the Eighth and Fourteenth Amendments?

## STATEMENT OF RELATED PROCEEDINGS

*Gordon v. State*, No. SC20-284, 350 So. 3d 25 (Fla. 2022) (Florida Supreme Court opinion and judgment rendered September 1, 2022; order denying rehearing issued on October 17, 2022; mandate issued on November 2, 2022).

*State v. Gordon*, No. CF15-000476-XX (Florida Tenth Judicial Circuit Court judgment and sentence entered on February 7, 2020).

## TABLE OF CONTENTS



## INDEX OF APPENDICES

## TABLE OF AUTHORITIES

PAGE NO.

FEDERAL CASES



STATE CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS



OTHER AUTHORITES

## OPINION BELOW

The opinion of the Florida Supreme Court (App. 1a–31a) is reported at *Gordon v. State*, 350 So. 3d 25 (Fla. 2022). The order of the Florida Supreme Court denying Petitioner's motion for rehearing (App. 1b) is reported at *Gordon v. State*, No. SC20-284, 2022 WL 9704213 (Fla. October 17, 2022).

## JURISDICTION

The Florida Supreme Court issued its judgment affirming Petitioner's convictions and death sentences on September 1, 2022, and denied Petitioner's motion for rehearing on October 17, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part that the no state shall deprive "any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner, MICHAEL A. GORDON, was tried and convicted in January and February 2019 on a multi-count indictment, including two counts of first-degree murder of Patricia Moran and Deborah Royal in their residence, which occurred during a protracted attempt to escape (by Gordon and three others)[1] while being pursued by police after a pawn shop armed robbery. In the penalty phase (as stated in the Florida Supreme Court's opinion on direct appeal):

> Gordon presented the testimony of six expert witnesses - - a former prison warden, a neuropsychologist, a neurocognitive imaging specialist, a neurologist, a clinical pharmacologist, and a clinical and forensic psychologist - - and that of Gordon's sister, Theresa Gordon. Several of the experts concluded that Gordon might have brain damage from the extensive abuse he endured as a child. The jury heard evidence that Gordon's IQ as measured when he was in the second grade was 80, and that a more recent adult IQ test had returned a score of 70. Gordon's records showed a variety of mental health diagnoses, including schizophrenia, schizoaffective disorder depressive type, bipolar disorder, psychosis not otherwise specified (NOA), and posttraumatic stress disorder (PTSD). Gordon's sister testified to extensive emotional, verbal, physical, and sexual abuse and neglect that she and her brother endured at the hands of their father with the tacit consent of their mother.

*Gordon v. State*, 350 So.3d 25, 32-33 (Fla. 2022) (footnote omitted)[App. 14a]

With the exception of Gordon's father's denial that he ever abused his children [App. 15a], Gordon's mitigating evidence was unrebutted.

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[1] As on direct appeal, Gordon does not concede guilt.

At the conclusion of the penalty phase, the jury returned verdicts for the death penalty for both murders, and Gordon was sentenced to death by Circuit Judge Jalal Harb on February 7, 2020.

At the time of Gordon's trial and at the time the death penalty was imposed, the Florida Supreme Court reviewed all death sentences - - as it had done for nearly five decades whether requested to or not[2] - - to determine if capital punishment was proportionally warranted. However, on October 29, 2020 (while Gordon's appeal was pending but had not yet been briefed), the Florida Supreme Court announced in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020) that it would no longer conduct proportionality review - - indeed that it was precluded from conducting proportionality review - - based on this Court's then-36-year-old decision in *Pulley v. Harris*, 465 U.S. 37 (1984), in conjunction with Florida's "conformity clause" (Art. 1, §17, Florida Constitution) which provides that the state's prohibition against cruel and unusual punishment should be construed in conformity with controlling decisions of the United States Supreme Court.

In Gordon's brief on direct appeal - - which was filed less than two months after the *Lawrence* decision - - Gordon argued, inter alia, that the death penalty was disproportionate in light of the extensive and unrebutted mental health mitigation, and in a separate eighteen-page Point on Appeal he argued that by jettisoning proportionality review in mistaken reliance on *Pulley v. Harris,* the state Supreme

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[2] See, e.g. *Kaczmar v. State*, 104 So.3d 990, 1007 (Fla. 2012).

Court had rendered Florida's death penalty scheme arbitrary, capricious, and violative of the Eighth and Fourteenth Amendments and the constitutional principles of *Furman v. Georgia*, 408 U.S. 238 (1972). Gordon pointed out that the *Pulley* decision specifically addressed California's 1977 capital sentencing statute, and that *Pulley* did not hold that proportionality review is never constitutionally required. To the contrary, the *Pulley* majority expressly left open the question of whether a given state's death penalty scheme might be so lacking in other safeguards against arbitrary infliction of the death penalty that proportionality review would be necessary in order to satisfy Eighth Amendment standards. Gordon argued that while California's 1977 scheme may not have been of "that sort" [*Pulley*, 465 U.S. at 879-80]; Florida's death penalty scheme - - especially as construed by the state's Supreme Court since 2019 - - is of that sort, and accordingly proportionality review cannot constitutionally be dispensed with.

Nevertheless, the Florida Supreme Court disposed of both the proportionality issue itself, and the constitutional challenge to Florida's death penalty scheme without it, by summarily reaffirming its decision in *Lawrence*. [App. 25a].

## REASONS FOR GRANTING THE PETITION

### I. Introduction.

In the aftermath of its 2019 change in membership, the Supreme Court of Florida has methodically eviscerated five decades of precedent designed to ensure that the death penalty in this state is not imposed in an arbitrary, capricious, biased, and/or unreliable manner. The state Supreme Court has misread this Court's 38-year-old decision in *Pulley v. Harris*, 465 U.S. 37 (1984) as holding that the Eighth and Fourteenth Amendments never require comparative proportionality review in death penalty appeals, when in fact *Pulley* contains no such sweeping holding. To the contrary - - in the specific context of California's 1977 capital punishment statute - - this Court held that proportionality review is not constitutionally mandated so long as a state's capital sentencing scheme otherwise provides sufficient safeguards against arbitrary imposition of the death penalty. *Pulley* expressly assumes the possibility that a state's system can be so lacking in checks on arbitrariness that it would not pass constitutional muster without proportionality review, but "the 1977 California statute is not of that sort." 465 U.S. at 51. Florida's, as will be shown, is of that sort, and the Florida Supreme Court's recent jettisoning of proportionality review, for no apparent reason other than its mistaken belief that *Pulley* required it to do so, renders its entire capital sentencing scheme violative of the Eighth and Fourteenth Amendments and the core principles of *Furman v. Georgia*, 408 U.S. 238 (1972).

**II. Historical overview; the rise and fall of proportionality review in Florida - - from *Furman* to *Lawrence*.**

It has been recognized since 1972 that the death penalty cannot be imposed under sentencing procedures which create a substantial risk that it will be inflicted in an arbitrary and capricious manner. *Furman v. Georgia*, 408 U.S. 238 (1972). There must be a meaningful basis for distinguishing the few cases in which capital punishment is imposed from the many in which it is not. *Gregg v. Georgia*, 428 U.S. 153,188 (1976), citing Justice White's concurring opinion in *Furman*. Accordingly, when the Florida Supreme Court first upheld the constitutional validity of Florida's post-*Furman* capital sentencing statute it recognized that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation"; therefore the Florida legislature properly chose to reserve its application to only the most aggravated and least mitigated of first degree murders. *State v. Dixon*, 283 So.2d 1,7 (Fla. 1973).

For nearly five decades, the Florida Supreme Court had considered proportionality review to be "a unique and highly serious function of [the] Court, the purpose of which is to foster uniformity in death-penalty law." *Crook v. State*, 908 So.2d 350,356 (Fla. 2005); *Urbin v. State*, 714 So.2d 411,417 (Fla. 1998). "The inquiry is two-pronged: We compare the case under review to others to determine if the crime falls within the category of <u>both</u> (1) the most aggravated, and (2) the least

mitigated of murders. . . so as to justify the imposition of death as the penalty." *Crook*, 908 So.2d at 357 (emphasis in opinion). Thus, even when the aggravation prong is satisfied, imposition of the death penalty is unwarranted when there is compelling mitigating evidence. *Crook*, at 357-58; see also *Cooper v. State*, 739 So.2d 82,83-86 (Fla. 1999); *Davis v. State*, 121 So.3d 462,499-502 (Fla. 2013).

In Urbin, 714 So.2d at 416, the state Supreme Court recognized that one of the sources of the requirement that capital punishment be administered proportionately is the legislative intent to comply with *Furman*'s constitutionally-based prohibition of the arbitrary imposition of death:

> In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So.2d 1,7 (Fla. 1973). See also Jones v. State, 705 So.2d 1364,1366 (Fla. 1998)(reasoning that "[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes'")(footnote omitted).

*Urbin*, at 416 (emphasis supplied).

When this Court upheld the constitutionality of Florida's post-*Furman* death penalty law in 1976, it emphasized that any risk of arbitrary or capricious imposition is minimized by Florida's system of appellate review, to determine whether the ultimate penalty is or is not warranted. *Proffitt v. Florida*, 428 U.S. 242,252-53 (1976). Trial judges' decisions to impose death "are reviewed to ensure that that they are consistent with other sentences imposed in similar

circumstances", and thus in Florida it is no longer true that there is "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." *Proffitt*, 428 U.S. at 253. This Court found it noteworthy that the Florida Supreme Court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed", having vacated 8 of the 21 death sentences it had reviewed to date. *Proffitt*, 428 U.S. at 253 [See *Olsen v. State*, 67 P.3d 536,610 (Wyo.2003)("As seen in *Pulley [v. Harris*, 465 U.S. 37 (1984)], the Court continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective"). [The Florida Supreme Court used to be willing to set aside unwarranted death sentences; that ship has sailed. See p.23 and n.6, infra].

In 1983, this Court granted certiorari on the question of whether California's 1977 capital punishment statute was constitutionally invalid because it failed to require that state's supreme court to conduct comparative proportionality review. *Pulley v. Harris*, 460 U.S. 1036 (1983); *Pulley v. Harris*, 465 U.S. 37,38-41 (1984). The Florida Supreme Court - - well aware of the pending issue regarding the California death penalty scheme - - stated in *Booker v. State*, 441 So.2d 148,153 (Fla. 1983) that *Pulley v. Harris* "is of no significance to the instant case. The United States Supreme Court has stated that the issue will not apply to states which are already conducting proportionality review. The United States Supreme Court has already approved of this Court's method of review in a specific statement

in *Proffit* and this Court has repeatedly stated that we conduct proportionality review in all cases" (emphasis supplied).

This Court subsequently decided in *Pulley v. Harris* that comparative proportionality review was not required in California, because that state's 1977 statutory scheme provided adequate safeguards to prevent arbitrary and capricious imposition of the death penalty. 465 U.S. at 51-54. *Pulley v. Harris* does not categorically hold that proportionality review is never constitutionally required; it depends on the presence or absence of sufficient other "checks on arbitrariness." See also *State v. Welcome*, 458 So.2d 1235, 1249 (La. 1984)(emphasis supplied)(in *Pulley v. Harris* the Supreme Court held that the Eighth Amendment does not necessarily require proportionality review; "[t]he principal constitutional consideration is that the overall system contain sufficient checks and safeguards against the arbitrary imposition of capital punishment"); *Walker v. Georgia*, 555 U.S. 979 (2008) (statement of Justice Stevens respecting the denial of the petition for writ of certiorari)(*Pulley v. Harris*' statement that the Eighth Amendment does not require proportionality review of every capital sentence "was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them").

In 2002, the Florida Constitution was amended to provide that the state's prohibition against cruel and unusual punishment shall be construed in conformity with decisions of the U.S. Supreme Court which interpret the Eighth Amendment's prohibition against cruel and unusual punishment. Art. 1, §17, Fla. Const.; see

*Lightbourne v. McCollum*, 969 So.2d 326,334-35 (Fla. 2007). Florida has a similar conformity clause regarding search and seizure law. Art. 1, §12, Fla. Const. The question of whether a U.S. Supreme Court decision automatically modifies Florida law depends on whether the Supreme Court decision "is both factually and legally on point" and "whether it is controlling." *Smallwood v. State*, 113 So.3d 724, 730 (Fla. 2013); see also *State v. Michel*, 257 So.3d 3, 12 (Fla. 2018) (Pariente, J., dissenting).

Since *Pulley v. Harris* expressly decides only the question of whether California's 1977 capital sentencing scheme - - a very different system than Florida's - - provides sufficient safeguards against arbitrary imposition of the death penalty even without mandatory proportionality review, it is neither controlling in Florida nor is it factually and legally on point. Consequently, for years after the adoption of the conformity clause, the Florida Supreme Court continued to conduct proportionality review - - whether or not raised by the capital defendant on appeal - - in order to limit imposition of the death penalty to the most aggravated and least mitigated first degree murders, as the legislature intended and as the Eighth Amendment requires. However, in 2014, Florida Supreme Court Justices Canady and Polston announced their conclusion that proportionality review is <u>prohibited</u> in this state by the (then twelve year old) conformity clause, coupled with the (then thirty year old) *Pulley v. Harris* decision. *Yacob v. State*, 136 So.3d 539,557-63 (Fla. 2014)(Canady J., joined by Polston, C.J., concurring in part and dissenting in part). Based on that flawed legal analysis, Justices Canady and Polston would have

refused to set aside Yacob's death sentence even though they agreed with the plurality and concurring Justices that death was a disproportionate punishment "under this Court's comparative proportionality jurisprudence" in Yacob's case [136 So.3d at 557 and 562].

The plurality opinion in *Yacob* and the concurring opinion of Justice Labarga each emphasized that proportionality review arises from a variety of sources in state and federal law, and (with the plurality citing *Furman, Proffitt, Gregg*, and *Dixon*) it is essential to guard against the arbitrary imposition of the death penalty. 136 So.3d at 546-550,552-57. The plurality opinion specifically points out another fatal flaw in the dissent's conformity clause analysis, i.e., its implicit assumption that what this Court said about California's 1977 capital sentencing scheme necessarily applies to Florida's very different scheme. 136 So.3d at 549 n.2.

Six days after the *Yacob* opinions were issued, another capital defendant who was challenging the proportionality of his death sentence, Humberto Delgado, filed motions to disqualify Justices Canady and Polston on the ground that they would decline to engage in the Court's mandatory proportionality review. The two Justices denied the motions for disqualification. In 2015, Delgado's death sentence was reduced to life imprisonment on proportionality grounds, largely based on compelling mental health mitigation. *Delgado v. State*, 162 So.3d 971,982-83 (Fla. 2015). Once again, Justices Canady and Polston agreed with the majority's conclusion that Delgado's death sentence "cannot withstand scrutiny under this Court's comparative proportionality jurisprudence." Justice Canady wrote:

> [In Yacob] I expressed the view that the exercise of proportionality review by this Court is inconsistent with the conformity clause of article 1, section 17, of the Florida Constitution. My view on the subject was, however, expressly rejected by the Court majority. Until the State presents an argument justifying receding from our precedent on the subject that was clearly established in Yacob, I will follow that precedent. Accordingly, I agree with the decision to overturn the sentence of death imposed in this case.

*Delgado*, 162 So.3d at 983 (Canady, J. concurring).

Thus, by dint of fortunate timing, Michael Yacob (whose crime was a single-aggravator "robbery gone bad", with a spur-of-the-moment shooting precipitated by the store clerk's sudden movement) and Humberto Delgado (who suffered from a serious, longstanding, and well-documented mental illness, and where the shooting of the police officer also occurred on the spur of the moment after Delgado was tasered) were spared the death penalty because it was proportionally unwarranted. [If their cases were before the Florida Supreme Court now their death sentences would be upheld without consideration of Yacob's minimal aggravation or Delgado's severe mental illness, on the flawed theory that the reviewing court's hands are tied by the conformity clause, since *Yacob* and five decades of sound precedent have been overturned by *Lawrence*, *infra*].

In January 2019, Florida Supreme Court Justices Lewis, Quince, and Pariente, having reached the mandatory retirement age of seventy (since amended to seventy-five) retired and were replaced.

For no apparent reason beyond the change in membership[3], on October 29,

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[3] See *Payne v. Tennessee*, 501 U.S. 808, 850 (1991)(Marshall, J., dissenting).

2020, in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), the Florida Supreme Court receded from *Yacob* and adopted the position advocated by Justices Canady and Polston in their dissent in that case. Justice Labarga, who had written a strong concurring opinion in *Yacob*, now found himself the lone dissenter in *Lawrence*. Characterizing the majority decision as its "most consequential step yet in dismantling the reasonable safeguards" in Florida's capital sentencing system, Justice Labarga sought to place the majority's recent decisions in context:

> I cannot overstate how quickly and consequentially the majority's decisions have impacted death penalty law in Florida. On January 23, 2020, this Court decided *State v. Poole*, 297 So.3d 487 (Fla. 2020). As I noted in my dissent in *Poole*, despite the clearly defined historical basis for requiring unanimous jury verdicts in Florida, this Court receded from the requirement that juries must unanimously recommend that a defendant be sentenced to death. *Poole*, 297 So.3d at 513 (Labarga, J. dissenting). After 2016, only the state of Alabama permitted a nonunanimous (10-2) jury recommendation. [Footnote omitted]. Poole paved the way for Florida to return to an absolute outlier status of being one of the only two states that does not require unanimity.
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> On May 14, 2020, this Court decided *Bush v. State*, 295 So.3d 179 (Fla. 2020). In that case, this Court uprooted the long applied heightened standard of review in cases that are wholly based on circumstantial evidence. Under the heightened standard "[e]vidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof of sufficient to convict." *Davis v. State*, 90 So.2d 629,631-32 (Fla. 1956). This standard, applied for more than one hundred years, served as an important check on circumstantial evidence cases. As I noted in my dissent in *Bush*, while circumstantial evidence is a vital evidentiary tool in meeting the State's burden of proof, "circumstantial evidence is inherently different from direct evidence in a manner that warrants heightened consideration on appellate review." *Bush*, 295 So.3d at 216 (Fla. 2020)(Labarga, J.,

concurring in part and dissenting in part). "The solemn duty imposed upon this Court in reviewing death cases more than justifies the stringent review that has historically been applied in cases based solely on circumstantial evidence." Id. at 217.

On May 21, 2020, this Court decided *Phillips v. State*, 299 So.3d 1013 (Fla. 2020). In *Phillips*, this Court receded from *Walls v. State*, 213 So.3d 340 (Fla. 2016) (holding that *Hall v. Florida*, 572 U.S. 701, 134 S.Ct 1986, 188 L.Ed.2d 1007 (2014), is to be retroactively applied). The United States Supreme Court's decision in Hall held that Florida law, which barred individuals with an IQ score above 70 from demonstrating that they were intellectually disabled, "creates an unacceptable risk that persons with intellectual disability will be executed, and this is unconstitutional." Id. at 704, 134 S.Ct 1986. The Supreme Court concluded: "This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Id. at 723, 134 S.Ct 1986. In *Walls*, this Court held that Hall is to be retroactively applied. The majority's recent decision in *Phillips* subsequently receded from *Walls*.

As expressed in my dissent in *Phillips*, in light of the majority's decision to recede from Walls, "an individual with significant deficits in adaptive functioning, and who under a holistic consideration of the three criteria for intellectual disability could be found intellectually disabled, is completely barred from proving such because of the timing of his legal process. This arbitrary result undermines the prohibition of executing the intellectually disabled." *Phillips*, 299 So.3d at 1025 (Labarga, J. dissenting).

In each of these cases, I dissented, and I lamented the erosion of our death penalty jurisprudence. Now today, the majority jettisons a nearly fifty-year-old pillar of our mandatory review in direct appeal cases. As a result, no longer is this Court required to review death sentences for proportionality. I could not dissent more strongly to this decision, one that severely undermines the reliability of this Court's decisions on direct appeal, and more broadly, Florida's death penalty jurisprudence.

Lawrence v. State, 308 So.3d at 553-54 (Labarga, J. dissenting).

## III. Because Florida's capital sentencing scheme (especially as construed by the Florida Supreme Court since 2019) does not otherwise provide adequate safeguards against arbitrary, capricious, and/or biased infliction of the death penalty, the state Supreme Court's abandonment of proportionality review renders Florida's system unconstitutional.

On appeal of petitioner Gordon's convictions and death sentences, this constitutional issue (which could not have been raised earlier, since proportionality review was still available at the time of Gordon's trial and sentencing) was thoroughly argued in an 18-page Point on Appeal, but was summarily rejected by the Florida Supreme Court with a citation to *Lawrence*. [App. 25a].

In *Pulley v. Harris*, 465 U.S. at 879-80, this Court did not address Florida's system, and did not hold that proportionality review is never required by the Eighth Amendment. The Court simply said, "Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without proportionality review, the 1977 California statute is not of that sort" (emphasis supplied).

First of all, we do know that there could be capital sentencing systems lacking sufficient safeguards against arbitrariness, because all of the various states' pre-*Furman* systems were of that sort. So the question is whether Florida's system -- especially as construed by the state Supreme Court since 2019, and now in the absence of appellate review designed to ensure that the death penalty is narrowed to only the most aggravated and least mitigated of first-degree murders -- is of that sort.

Under the 1977 California scheme, a conviction of first-degree murder resulted in a sentence of life imprisonment, unless the state alleged one or more "special circumstances" in the charging document. There were, at the time, only seven of these special circumstances, and they were tried, along with the issues of guilt or innocence, at the initial phase of the trial. Only if the jury found the defendant guilty of first degree murder and found beyond a reasonable doubt the existence of one or more special circumstances would the trial then proceed to a second phase to determine whether death or life imprisonment was the appropriate penalty. In the second phase, additional evidence could be presented, and the jury was given a list of additional factors it could consider. *Pulley v. Harris*, 465 U.S. at 880. California's 1977 system, this Court concluded, was sufficient to limit the death penalty "to a small sub-class of capital-eligible cases." 465 U.S at 831.

The Florida Supreme Court, in contrast, has repeatedly rejected the argument that one or more aggravating circumstances must be alleged in the indictment [see, e.g., *Lott v. State*, 303 So.3d 165 (Fla. 2020); *Pham v. State*, 70 So.3d 485,496 (Fla. 2011)], nor are any findings required in the first phase of the trial to narrow the class of death-eligible defendants. Moreover, while under Florida's earlier (i.e., pre-*Hurst*) incarnation of its capital sentencing system a defendant became death-eligible only upon (inter alia) findings by the co-sentencers of sufficient aggravating circumstances [*Hurst v. Florida*, 577 U.S. 92, 99-100 (2016)], the post-*Hurst* 2019 statute explicitly provides that if the jury unanimously "finds at least one aggravating factor, the defendant is eligible for a sentence of

death." Fla. Stat. §921.141(2)(b)2 (emphasis supplied).

Is such a system sufficient, without at least some form of proportionality review, to limit imposition of the death penalty to a small sub-class of first degree murder defendants? In 1972, when Florida's post-*Furman* death penalty law was enacted, there were eight statutory aggravating factors. *State v. Dixon*, 283 So.2d at 5-6. That number has since doubled to sixteen. Fla.Stat.§921.141 (6)(a through p). This results in what has been described as "aggravator creep"[4], and it undermines the safeguards required by *Furman* against arbitrary imposition of the death penalty. As discussed in Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv.C.R.-C.L. L.Rev. 223 (Winter, 2011):

> Aggravating factors frequently fail to perform this constitutionally required function designated for them by *Furman* and its progeny. Rather than confining death eligibility to the worst offenders, most state death penalty statutes list a litany of aggravating factors that apply to nearly every first-degree murder and are motivated more by political exigency than careful efforts to identify those who are most culpable.
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> . . . . . .
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> In their efforts to draft death penalty statutes that complied with Furman, most state legislatures adopted the Model Penal Code's

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[4] See, e.g., Shatz, *The American Death Penalty: Past, Present, and Future*, 53 Tulsa L.Rev. 349,355-56 (2018). Retired Circuit Judge O.H. Eaton, Jr., one of Florida's most experienced trial judges in death penalty cases, speaking before a Senate Criminal Justice Committee workshop on January 27, 2016, referred to "aggravator creep" and said it would be hard to imagine a Florida first degree murder case without at least one aggravator. Judge Eaton was engaging in slight hyperbole; you can imagine such a case and if you look hard enough you can find some. But they are few and far between.

> guided discretion model, which specified eight aggravating factors and required the jury to find at least one such factor before a defendant could be death eligible. However, since the initial drafting of post-*Furman* statutes, aggravating factors "have been added to capital statutes . . . like Christmas tree ornaments", rendering more and more offenders eligible for the death penalty.

46 Harv. C.R-C.L. L.Rev. at 232-33 (footnotes omitted).

Professors Carol and Jordan Steiker, in *Courting Death: The Supreme Court and Capital Punishment*, 160-62 (2016), noted (in the context of Arizona's system) that the enumeration of numerous and broad aggravating factors in combination with that state's Supreme Court's minimalist policing, subverted *Furman*'s requirement of adequate safeguards against arbitrary imposition of the death penalty.

Florida's current system of sixteen aggravators is very different from the 1977 California system which was upheld in *Pulley v. Harris*. Until the *Lawrence* decision jettisoned five decades of sound precedent and dispensed with meaningful review of whether the death penalty is appropriate under the totality of circumstances of the particular case, it is possible that proportionality review may have saved the continued viability of Florida's system. See *Jones v. State*, 705 So.2d 1364, 1366 (Fla. 1998). But now that the Florida Supreme Court has abandoned proportionality review in favor of minimalist policing (or no policing) based on a flawed conformity clause analysis and on a 38 year old decision by this Court which addressed a very dissimilar state capital sentencing scheme, whatever meaningful safeguards Florida may once have had in order to comply with *Furman* have been

eviscerated.

The core purposes of proportionality review include minimizing the risk of arbitrariness and ameliorating the danger that racial prejudice - - whether based on the race of the defendant or that of the victim[s] - - will infect the capital sentencing decision. [Petitioner Gordon is African-American; the two homicide victims were white]. In the early post-*Furman* case of *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), and later in *Offord v. State*, 959 So.2d 187, 188 (Fla. 2007), the Florida Supreme Court said:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

(emphasis in Offord opinion).

See *Turner v. Murray*, 476 U.S. 28, 35 (1986)("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence"); *Robinson v. State*, 520 So.2d 1, 7-8 (Fla. 1988)("Racial prejudice has no place in our system of justice and has long been condemned by this Court" and "the risk that the factor of race may enter the criminal justice process has required. . . increasing attention", especially in "the context of a capital sentencing proceeding"); *State v. Benn*, 845 P.2d 289, 317 (Wash. 1993)(proportionality review addresses two systemic problems: random arbitrariness and death sentences based on race); *Ronk v. State*, 172 So.3d 1112,

1147 (Miss. 2015)(state's sentencing scheme includes numerous safeguards to ensure that the death penalty is not imposed arbitrarily or in a discriminatory manner); *State v. Cooper*, 731 A.2d 1000, 1007-08 (N.J. 1999)(one of the objectives of proportionality review is to ensure that death penalty decisions are free from discrimination based on race, gender, socioeconomic status, or other impermissible factors).

The federal Second Circuit has recognized that under *Pulley v. Harris* "comparative proportionality review may be constitutionally required only when a capital sentencing system lacks. . . adequate checks on arbitrariness." *United States v. Aquart*, 912 F.3d 1, 52 (2d Cir. 2016). The federal death penalty statute, however, contains an important provision which Florida's lacks:

> The FDPA further channels a capital jury's discretion to impose the death penalty by prohibiting it from considering race, color, religious beliefs, national origin, or sex in its sentencing decision and, indeed, requiring each juror to sign a certificate that such factors did not inform his or her sentencing decision. See 18 U.S.C. §3593(f).

*Aquart*, 912 F.3d at 52

See, e.g., *United States v. Runyon*, 707 F.3d 475, 497 (4th Cir. 2013); *United States v. Taveras*, 585 F.Supp.2d 327, 339 (E.D.N.Y. 2008); *United States v. Haynes*, 269 F.Supp.2d 970, 976-77 (W.D. Tenn. 2003). ". . . [T]he FDPA explicitly provides that a jury may not consider information regarding the defendant for the kind of inadmissible purposes that were at the heart of the [Supreme] Court's concerns in *Furman*." *United States v. Frank*, 8 F.Supp.2d 253, 265 (S.D.N.Y. 1998).

18 U.S.C. §3593(f) provides as follows:

> **Special precaution to ensure against discrimination**. - - In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

Florida's death penalty statute contains no equivalent provision. While there is a very generic standard jury instruction that "Your decisions should not be influenced by feelings of racial or ethnic bias", that pales in comparison with the emphasis conveyed to the jurors by the federal statute and jury instruction. The Florida instruction says nothing about religious or gender discrimination, nor does it make it clear that it applies to the victim[s] as well as the defendant. The Florida instruction does not direct the jurors that they cannot recommend a death sentence unless each of them conclude that they would have made the same recommendation no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim might be. Nor does the Florida instruction require that each juror take individual responsibility by returning a signed certificate that he or she has complied with the non-discrimination directive.

There are two more points which should be made here. First, with regard to

Florida's new practice of minimalist policing, and in light of the Wyoming Supreme Court's recognition in *Olsen v. State*, 67 P.3d at 610, that "the [U.S. Supreme] Court continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective", the Florida Supreme Court since the retirement of Justices Lewis, Quince, and Pariente has reviewed on direct appeal 29 death sentences and affirmed 27 of them[5]. [Contrast *Proffitt v. Florida*, 428 U.S. at 253, finding it significant that the Florida Supreme Court in the mid-1970s had not hesitated to vacate death sentences (8 of 21) when it determined that that sentence should not have been imposed). Importantly, of the eight reversals cited in *Proffitt*, six defendants received life sentences and two (Lamadline and Messer) received

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[5] *Sievers v. State*, __So.3d__ (Fla. 2022)[2022 WL 16984701]; *Gordon v. State*, 350 So.3d 25 (Fla. 2022); *Fletcher v. State*, 343 So.3d 55 (Fla. 2022); *Ritchie v. State*, 344 So.3d 369 (Fla. 2022); *Joseph v. State*, 336 So.3d 218 (Fla. 2022); *McKenzie v. State*, 333 So.3d 1098 (Fla. 2022); *Bell v. State*, 336 So.3d 211 (Fla. 2022); *Noetzel v. State*, 328 So.3d 933 (Fla. 2021); *Alcegaire v. State*, 326 So.3d. 656 (Fla. 2021); *Davidson v. State*, 323 So.3d 1241 (Fla. 2021); *Bargo v. State*, 331 So.3d 653 (Fla. 2021); *Allen v. State*, 322 So.3d 589 (Fla. 2021); *Deviney v. State*, 322 So.3d 563 (Fla. 2021); *Smith v. State*, 320 So.3d 20 (Fla. 2021); *Woodbury v. State*, 320 So.3d 631 (Fla. 2021); *Hojan v. State*, 307 So.3d 618 (Fla. 2020); *Colley v. State*, 310 So.3d 2 (Fla. 2020); *Craft v. State,* 312 So.3d 45 (Fla. 2020); *Lawrence v. State*, 308 So.3d 544 (Fla. 2020); *Craven v. State*, 310 So.3d 891 (Fla. 2020); *Santiago-Gonzalez v. State*, 301 So.3d 157 (Fla. 2020); *Bush v. State*, 295 So.3d 179 (Fla. 2020); *Smiley v. State*, 295 So.3d 156 (Fla. 2020); *Bright v. State*, 299 So.3d 985 (Fla. 2020); *Doty v. State*, 313 So.3d 573 (Fla. 2020); *Newberry v. State*, 288 So.3d 1040 (Fla. 2019); *Rogers v. State*, 285 So.3d 872 (Fla. 2019).

new jury penalty trials[6]. In contrast, in both of the two (of 29) partial reversals since Florida began dismantling its death penalty safeguards - - *Mosley v. State*, 347 So.3d 861 (Fla. 2022) and *Cruz v. State*, 320 So.3d 695 (Fla. 2021) - - the state Supreme Court found no error in the jury penalty trial which resulted in the death verdict, and made no comment on whether the death penalty was appropriate. In *Mosley*, the case was remanded for a new post-trial "Spencer hearing" before the judge alone, due to the trial court's failure to address Mosley's request for self-representation in that proceeding. In *Cruz*, the reversal was "for the limited purpose" of a new evaluation and sentencing order by the trial judge alone. [Cruz's judge has already reimposed the death penalty and the case [case no. SC21-1767] was orally argued before the Florida Supreme Court on December 6, 2022, with the state urging that Court to jettison yet another safeguard: intra-case comparative culpability review]. So 27 out of 29 is likely to become 29 out of 29.

Another potential complication down the road is the question of jury unanimity. At the time Justices Canady and Polston first proposed in *Yacob* their theory that the conformity clause precluded the Florida Supreme Court from reviewing whether death sentences are proportionally warranted there was yet another significant difference between the safeguards provided by the California

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[6] *Taylor v. State*, 294 So.2d 648 (Fla. 1974); *Lamadline v. State*, 303 So.2d 17 (Fla. 1974); *Slater v. State*, 316 So.2d 539 (Fla. 1975); *Swan v. State*, 322 So.2d 485 (Fla. 1975); *Tedder v. State*, 322 So.2d 908 (Fla. 1975); *Halliwell v. State*, 323 So.2d 557 (Fla. 1975); *Thompson v. State*, 328 So.2d 1 (Fla. 1976); *Messer v. State*, 330 So.2d 137 (Fla. 1976).

system and those available in Florida, in that Florida was an outlier jurisdiction which did not require a unanimous jury verdict to find an aggravating circumstance or to authorize imposition of the death penalty. See *State v. Steele*, 921 So.2d 538, 550 (Fla. 2005). However, to comply with *Hurst v. Florida*, 517 U.S. 92 (2016) and *Hurst v. State*, 202 So.2d 40 (Fla. 2016) the Florida legislature reluctantly amended the statute to require jury unanimity. Then in 2020, after the shift in membership, the Florida Supreme Court in *State v. Poole,* 297 So.2d 487 (Fla. 2020) receded from *Hurst v. State* (except to the extent that it requires a unanimous verdict of one aggravating factor). The *Poole* majority "acknowledge[d] that the Legislature has changed our state's capital sentencing law in response to *Hurst v. State*. Our decision today is not a comment on the merits of those changes or whether they should be retained. We have simply restored discretion that *Hurst v. State* wrongly took from the political branches." 297 So.3d at 507.

As a consequence of the overturning of *Hurst v. State* in *Poole*, there is a substantial risk during every legislative session that the political branches will choose to return Florida to its outlier status by removing the current statutory requirements that each aggravating factor be found by an unanimous jury, and that a jury verdict for the death penalty must be unanimous[7]. In fact, under the *Poole* majority's crimped view of the Sixth and Eighth Amendment requirements, while a

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[7] In overreaction to the Broward County jury's decision to spare the life of Nikolas Cruz, the Parkland school shooter, Governor Ron DeSantis has publicly called for elimination of the unanimity requirement.

jury must determine death eligibility by unanimously finding a single aggravator (of the sixteen, at least one of which is present in nearly every first-degree murder case), there need not be any jury participation at all on the issue of death selection. If a spur-of-the-moment fatal shooting occurs during a "robbery gone bad" (as in *Yacob*), the jury's first-phase verdicts of murder and robbery would suffice, and there would be no constitutional impediment to a judge-only penalty phase. Similarly, in cases involving two or more victims - - for example a murder and an attempted murder - - first phase convictions of the contemporaneous crimes would suffice. In addition, many of Florida's proliferation of aggravating factors would require only a pro forma jury finding. If the defendant had a ten year old conviction of strong arm robbery, or if he was on felony probation, or if the victim was a law enforcement officer or a child under twelve, death-eligibility would be virtually automatic, and there would be no requirement that the jury even hear mitigating evidence, much less weigh the aggravating and mitigating factors or reach a verdict (unanimous or otherwise) on whether the death penalty or life imprisonment is the appropriate punishment.

That being said, Gordon recognizes that since he was tried under the current statute the constitutional question of whether it was *Poole* or *Hurst v. State* which correctly applied *Hurst v. Florida* is not at issue in this petition.[8] However, what is

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[8] In the event that the Florida legislature sees fit to dismantle safeguards even further by dispensing with jury unanimity requirements, the absence of proportionality review will become (if there is such a concept) even more unconstitutional.

at issue is whether the state Supreme Court's jettisoning of proportionality review renders Florida's capital sentencing scheme arbitrary, capricious, and therefore unconstitutional. Gordon maintains that without proportionality review Florida's system, especially as administered by the state's supreme court since 2019, lacks the safeguards against arbitrariness which were present in California's 1977 system and are required by *Furman*, and consequently it has become "that sort" of capital sentencing scheme envisioned in *Pulley v. Harris*, 465 U.S. at 879-80; "so lacking in other checks on arbitrariness that it [does] not pass constitutional muster."

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN L. BOLOTIN (FBN 236365)
Assistant Public Defender
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
(863) 534-4200
*sbolotin@pd10.org*

*ATTORNEY FOR MICHAEL A. GORDON*

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