No. 22-6725

In The
Supreme Court of the United States

MICHAEL A. GORDON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Counsel of Record

Rick A. Buchwalter
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

Capital Case

QUESTION PRESENTED

Whether the Florida Supreme Court's decision eliminating its use of proportionality review of capital cases, because its use violates the state constitution violates the Eighth and Fourteenth Amendments, when Florida currently employs multiple means to narrow down a defendant's eligibility for a death sentence?

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

OPINION BELOW

The Florida Supreme Court's decision petitioned for review appears as *Gordon v. State,* 350 So. 3d 25 (Fla. 2022).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on September 1, 2022. A motion for rehearing was denied on October 17, 2022, and the mandate issued November 2, 2022. Gordon adduces that this Court's certiorari jurisdiction is based on 28 U.S.C. § 1257(a). The State acknowledges that § 1257 sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees with Petitioner that the constitutional provisions involved are the Fifth Amendment and the Eight Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

This certiorari petition arises from the Florida Supreme Court's affirmance of Gordon's convictions and sentences of death for the first-degree murders of Patricia Moran and Deborah Royal, burglary with assault or battery, conspiracy to commit armed robbery, robbery with a firearm, grand theft, fleeing or attempting to elude, three counts of attempted first-degree murder of a police officer with a firearm, two counts of attempted first-degree murder of a police officer with a vehicle, and grand theft of a vehicle.

The brutal slayings of 72-year-old Patricia Moran and her 51-year-old daughter, Deborah Royal resulted from Gordon's attempt to avoid arrest while fleeing a pawn shop robbery in which he was involved. Some of the store's jewelry and jewelry cases, including a ring case that was stolen, contained GPS tracking devices installed by 3SI Security Systems, and the device in the ring case was activated during the robbery. (DT:3285-87, 3787, 3799, 3855-56). This permitted the Polk County Sheriff's Office to track the robbers as they fled from the pawn shop. (DT:3788-92, 3797). Three Haines City police officers that chased the fleeing vehicle came under repeated fire from the vehicle as it fled, and two of the patrol vehicles were struck by the shots fired. (DT:2260-61; 2293, 2346-49). The fleeing vehicle then turned into a residential subdivision followed by the pursuing patrol cars that were fired upon and numerous patrol cars that were waiting for the vehicle.

Residents of the subdivision spotted an unknown black male at a property next to the one behind the home where the murder victims, Patricia Moran and Deborah Royal, were later discovered. (DT:2305-06, 2665-68, 2702, 2706-07). He told them he was running from people trying to shoot him and insisted that he lived in neighborhood, which they knew was false. (DT:2666, 2704). When one of the neighbors ran down the block to flag down a police car, the man turned and ran in the direction of 618 Astor Drive. (DT:2669, 2679, 2705). They then called 911after noticing scattered clothing and finding a rifle in a yard. (DT:2671-72, 2706-08, 2713-14). An officer then used a dog to track from the clothing and rifle to 618 Astor Drive. (DT:2306-10, 2579, 2707-08). Also, a resident called and reported she heard

screaming from her neighbors' residence at 618 Astor Drive. (DT:2536-2537, 2737-39, 4117-18).

Numerous law enforcement officers formed a perimeter surrounding the residence. (DT:2542, 4149). Deputies cleared the fenced-in backyard so that they and others could search it. (DT: 2537, 2540-41, 3433, 4121, 4132, 4152- 53). While searching the backyard, Deputy Russo and Detective Turner shined their weapon-mounted flashlights through a window to light up the interior of the home and spotted a great deal of blood and the motionless bodies of two women. (DT:2542, 3436, 4122, 4132, 4154, 4172). Deputy Russo and Detective Turner yelled out to the surrounding officers and deputies what they saw, and Deputy Freese shouted it out to a supervisor. This was immediately broadcast over the radio. (DT:2543-44; 3437; 4122). As the deputies were about to enter the residence, a car engine started up in the garage, Gordon burst through the closed garage door, and nearly ran over officers before crashing the car as law enforcement officers opened fire on it. Gordon was apprehended about 20-25 yards away from the crashed vehicle (DT:3533, 3563-3566).

Meanwhile, the SWAT Team cleared the residence. (DT:2545-2550, 3441-3445, 4140, 4162-65). According to the entry team, no other suspects were found in the residence. (DT:2552, 3443, 4129, 4164, 4171). Members of the entry team observed, and Crime Scene Investigator Trevor Atkinson saw and photographed, what appeared to be blood located throughout the house: in two bedrooms, the hallway, the family room, the bathroom, and the laundry room; on doorways, floors, carpets, windowsills, walls, the tub, a toilet seat, and two t-shirts found in the washing

machine. (DT:2807-2817, 3443-46, 3453-57, 4165). According to Chief Medical Examiner Dr. Stephen Nelson, the location where the two victims were found was an "especially bloody scene." (DT: 3935, 3995).

Gordon slashed the throats of and repeatedly stabbed Moran and Royal. (DT:3061-62, 3660-3667, 3942-3952, 3958-59, 3977). Moran suffered 57 different injuries, consisting of stabs, incisions, and abrasions in 38 different areas of 10 her body. (DT:3681-82, 3689-91). In addition to Gordon slashing her throat open nearly eight inches across, she had defensive wounds on her hands, her aorta and both lungs were perforated – her right lung once in front and three times in back and her left lung ten times in back – six of her ribs were fractured, and the tip of her nose was sliced. (DT:3661, 3690, 3696, 5039-40, 5045-46). Because she bled to death, she took time to die and remained alive for several minutes. (DT:3689- 91, 3702-03, 3721-22). Deborah Royal suffered 54 stab wounds to her head, neck, chest and back. She also had a large gaping wound to her neck – over five inches across – that sliced both her carotid artery and jugular veins, cut open her trachea, exposed and sliced completely through her larynx, and continued all the way down to her spine. (DT:3958-59, 3977). Dr. Nelson concluded that it took Gordon "a fair amount of time" to inflict all the wounds and a few minutes for her to die. (DT:3981-83). According to the medical examiners, one who conducted the autopsy on Moran and one who conducted the autopsy on Royal, each woman lived through the entire attack on her and had defensive wounds indicating she attempted to defend herself before she died. (DT:3689-90, 3953, 3963).

Following the penalty phase, the jury recommended sentencing Gordon to death for the murders of both Moran and Royal. The jury found the following aggravators with regard to both murders: prior capital felony, prior violent felony, the murder was committed during the commission of a burglary, the murder was committed for the purpose of avoiding or preventing lawful arrest, and the murder was especially heinous, atrocious, or cruel. The jury further found that the aggravating factors were sufficient to warrant a possible sentence of death, one or more individual jurors found that one or more mitigating circumstances was established by the greater weight of the evidence, that the jury unanimously found that the aggravating factors outweighed the mitigating circumstances, and recommended that Gordon should be sentenced to death. (DT:6000-10).

The court, in sentencing Gordon, found the following aggravating factors existed with regard to each count of murder: prior capital felony, prior violent felony, the murder was committed during the commission of a burglary, the murder was committed for the purpose of avoiding or preventing lawful arrest, and the murder was especially heinous, atrocious, or cruel. The court expressly acknowledged the "doubling doctrine" and stated that as a result of the doctrine, the court excluded any consideration of the homicides in finding that the murder was committed during the commission of a burglary. In addition, the court acknowledged that two of the aggravators, that the murder was committed during the commission of a burglary and that the murder was committed for the purpose of avoiding or preventing lawful arrest, merge with one another as one aggravating factor. With regard to the weight

to be assigned to each aggravator, the court assigned great weight to both the heinous, atrocious, or cruel and prior capital felony or prior violent felony aggravators, and the court assigned moderate weight to the combined committed during the commission of a burglary and for the purpose of avoiding or preventing an arrest.

The court found Gordon established the following mitigating circumstances and assigned them the following weight: he was under the influence of extreme mental or emotional disturbance (little weight), he suffered from mental illness (little weight), he suffered from Toxic Stress Syndrome (moderate weight), he was not receiving proper treatment (little weight), he was abused and abandoned by his family (little weight), he was smoking K2 or Spice on the date of the murders (little weight). The court found Gordon failed to establish the following mitigating circumstances he argued applied: his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired, he was an accomplice in the murders and his participation was relatively minor, and finally, there were other factors in his background or life or the circumstance of the offense that should mitigate his sentence. Based on the court's review of the evidence, its weighing of the aggravating factors and mitigating circumstances, taking into consideration the jury's sentencing recommendation, and noting that the court would reach the same conclusion even in the absence of the aggravator of avoiding or preventing a lawful arrest, the court sentenced Gordon to death for each murder on February 7, 2020. (DR:6760-90).

On February 26. 2020, Gordon filed his Notice of Appeal in the Florida Supreme Court. On September 1, 2022, the Florida Supreme Court affirmed the judgment and sentence of the trial court. On October 17, 2022, rehearing was denied. On February 2, 2023, Gordon filed his petition for writ of certiorari in this case, from which this response follows.

REASONS FOR DENYING THE WRIT

Whether the Florida Supreme Court's decision eliminating its use of proportionality review of capital cases, because its use violates the state constitution, violates the Eighth and Fourteenth Amendments when Florida currently employs multiple means to narrow down a defendant's eligibility for a death sentence?

Gordon asserts that his rights under the Eighth and Fourteenth Amendments were violated when the Florida Supreme Court refused to conduct a proportionality review of his death sentence. Pet. at 5. He contends that proportionality review remains necessary in Florida because the state lacks adequate safeguards against arbitrary, capricious, and/or biased infliction of the death penalty, particularly with regard to an increase in the number of aggravating factors that a jury may consider in determining whether a person is eligible for a death sentence and a reduction in the number of death penalty cases that the court has reversed. Pet. at 15-26.

However, there is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision to no longer employ use of proportionality review. *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), *cert. denied* 142 S. Ct. 188 (2021) (abolishing the court's use of proportionality review in capital cases because its use violates the "conformity clause" in Article I, Section 17 of the Florida

Constitution). This Court held in *Pulley v. Harris*, 465 U.S. 37 (1984) that proportionality review of capital cases is not constitutionally required, and the Florida Supreme Court's decision in *Lawrence* explicitly and repeatedly relied on this Court's decision in *Pulley v. Harris*. Moreover, there remains a meaningful basis in Florida for distinguishing cases in which the death penalty is applied from those in which it is rejected. Because Florida's capital sentencing scheme provides sufficient guidance on how to employ its multiple methods to narrow down a murderer's eligibility for a death sentence, the Eighth Amendment does not require proportionality review regardless of the number of statutory aggravating factors in Florida's death penalty statute or the number of death sentences that the state supreme court affirms. Therefore, the Court should deny review of this claim.

A. The Florida Supreme Court's *Lawrence* Decision

The defendant in *Lawrence* argued on appeal to the Florida Supreme Court from his *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) resentencing, that his death sentence was disproportionate compared to other Florida capital cases. The Florida Supreme Court declined to conduct proportionality review, holding that proportionality review was prohibited by the state constitution, and affirmed his sentence of death. *Lawrence*, 308 So. 3d at 548-552. The Florida Supreme Court noted that Florida's constitution contains a clause requiring Florida courts to interpret the state prohibition against "cruel or unusual punishment and cruel and unusual punishment" "in conformity with decisions of the United States Supreme Court" interpreting the Eighth Amendment. *Id.* at 548 (citing Art. I, § 17, Fla. Const.). The

court determined that the state constitutional provision meant the court had a state "constitutional obligation" to follow this Court's precedent regarding proportionality review. *Id.* at 550. The Florida Supreme Court explained that its prior precedent requiring proportionality review was erroneous and "must yield to our constitution." *Id.* at 548. In reaching its decision, the court explicitly and repeatedly relied on this Court's decision in *Pulley v. Harris*. *Lawrence* at 548, 550-51.

In *Pulley v. Harris*, the defendant was convicted of a capital crime in a California court and sentenced to death. *Id.* at 38. In his appeal to the California Supreme Court and in his federal habeas petition, he argued that California's death penalty statute violated the Eighth Amendment because the statute did not require that the California Supreme Court compare his death sentence with the sentences imposed in other similar capital cases. *Id.* at 39-40, 40-41 & n.2.

The Court initially explained the difference between its traditional proportionality analysis, which compared the sentence to the crime, and the type of proportionality review the defendant in *Harris* was seeking, which compared the sentence in a particular case to the sentence imposed on others convicted of the same crime. *Harris*, 465 U.S. at 42-44. The defendant relied mainly on *Furman v. Georgia*, 408 U.S. 238 (1972) and *Zant v. Stephens*, 462 U.S. 862 (1983) to support his view that the constitution mandated proportionality review in capital cases, but the Court rejected his reading of both cases. *Pulley v. Harris*, 465 U.S. at 44-50. The Court discussed numerous other capital cases and noted the emphasis on those cases was on "the constitutionally necessary narrowing function of statutory aggravating

circumstances." *Id.* at 50. The Court explained that proportionality review was considered to be "an additional safeguard against arbitrarily imposed death sentences," but "we certainly did not hold that comparative review was constitutionally required." *Id.* The Court concluded that there was "no basis in our cases for holding" that proportionality review by an appellate court was required in every capital case. *Id.* The Court observed that to hold that the Eighth Amendment mandates proportionality review would require the Court to "effectively overrule" *Jurek v. Texas*, 428 U.S. 262 (1976), and "would substantially depart from the sense of" both *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976). *Harris*, 465 U.S. at 51.

The defendant in *Lawrence* sought this Court's review, claiming that Florida's refusal to provide him proportionality review violates the United States Constitution. This is the same argument Gordon now makes. This Court correctly declined to exercise its discretion to review this issue in the *Lawrence* case, more recently in *Joseph v. State*, 366 So.3d 218 (Fla. 2022) *cert. denied* 143 S. Ct. 183 (2022), and should do so again in Gordon's.

B. Florida's Capital Sentencing Scheme

Florida limits the death penalty as a possible penalty to first-degree murder which encompasses both premeditated murder and felony murder, but the murder statute limits the underlying felonies for felony murder to 19 enumerated felonies. § 782.04(1)(a), Fla. Stat. (2020); *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018) (explaining capital murder in Florida). In addition, by caselaw, Florida has

trifurcated proceedings, not merely bifurcated proceedings. Florida has a guilt phase and a penalty phase in front of the jury, as is typical of capital trials, but then Florida has another bench penalty phase where the defendant can present sensitive mitigation, such as illegal drug abuse, to the judge alone. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). Most importantly and unlike many other state's death penalty statutes, Florida's new death penalty statute is jury sentencing plus judge sentencing. § 921.141, Fla. Stat. (2017); Ch. 2017-1, § 1, Laws of Fla.

Furthermore, under the new death penalty statute, amended by the Florida Legislature in the wake of *Hurst*, a defendant is only eligible for a sentence of death if the jury unanimously finds the existence of one or more aggravating factors. Florida capital juries must find each aggravating factor unanimously. § 921.141(2)(b), Fla. Stat. (2017). The judge is bound by the jury's findings regarding the aggravating factors. § 921.141(3)(a)1, Fla. Stat. (2017) ("The court may consider only an aggravating factor that was unanimously found to exist by the jury."). If the jury does not "unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death." § 921.141(2)(b)1, Fla. Stat. (2017). And under Florida caselaw, the prosecution is limited to statutory aggravating factors and may not present nonstatutory aggravating factors. *Oyola v. State*, 158 So. 3d 504, 509-10, 513 (Fla. 2015) (reversing because the trial court improperly relied on nonstatutory

aggravation which "cannot be harmless" under Florida law and remanding for a new penalty phase).[1]

Moreover, there is no limit on the type of mitigating circumstances that a defendant may present under the "catch-all" statutory mitigating circumstance. § 921.141(7)(h), Fla. Stat. (2017) ("the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty"). The jury then finds mitigating circumstances and whether the aggravation "outweighs" the mitigation before making a sentencing recommendation to the judge. § 921.141(2)(b)2, Fla. Stat. (2017). Under the current statute, the jury's findings regarding the aggravation are binding on the trial court, but the jury's findings regarding mitigation are not. A jury can reject all the mitigation, but the trial court is free to disagree with the jury's assessment and find mitigation that was rejected by the jury.

In addition, any death recommendation from the jury must be unanimous. § 921.141(2)(c), Fla. Stat. (2017). A Florida jury's recommendation of a life sentence is binding on the judge, but the jury's recommendation of a death sentence is not. §

---

[1] The Federal Death Penalty Act ("FDPA") allows the prosecution to present nonstatutory aggravating factors, unlike Florida's scheme. *United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998) (rejecting a constitutional attack on the FDPA based on a combination of lack of proportionality and the prosecution being allowed to use and define nonstatutory aggravation and concluding that the FDPA is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of proportionality review). In effect, the FDPA allow a limitless number of aggravators and certainly far more than Florida's 16 statutory aggravators. Under Gordon's reasoning, the FDPA would also be required to have proportionality review to comply with the Eighth Amendment.

921.141(3)(a)1, Fla. Stat. (2017) (stating that if the jury recommends a life sentence, "the court shall impose the recommended sentence"). A Florida trial judge is free to disagree with the jury's death recommendation and impose a life sentence. The jury has the last word on a life sentence but not on a death sentence. As is clear from this description, Florida's death penalty statute has better safeguards against arbitrariness than proportionality review. *United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998) (upholding the constitutionality of the FDPA regarding proportionality review on similar grounds).

Under Florida's new death penalty statute, a Florida capital defendant gets a second bite at the life apple from the judge. A Florida judge is free to disagree with the jury provided it benefits the defendant. A Florida capital defendant gets all the benefits of either actor's findings in his favor. Florida's statute is a one-way street in the defendant's favor.

Furthermore, simply because Florida has more aggravating factors in its death penalty statute than Gordon desires does not mean the "the safeguards required by *Furman* against arbitrary imposition of the death penalty" are undermined. Pet. at 17. It is hard to see how such a statute could possibly violate the Eighth Amendment, regardless of how the Eighth Amendment is interpreted.

1. No Conflict with this Court's Eighth Amendment Jurisprudence

Gordon does not assert in his petition that this Court should recede from *Pulley v. Harris*. Rather, he asserts that unlike California's capital sentencing system, which the Court determined is the sort of system that can pass constitutional muster

without proportionality review, Florida's capital sentencing system is the type that is required to have proportionality review as an additional safeguard against arbitrariness. Gordon contends that this is the case because Florida's system fails to limit eligibility of the death penalty to a "small sub-class of first-degree murder defendants[.]" Pet. at 17.

Gordon, initially, contrasts Florida's sentencing scheme to that of the California scheme reviewed by the Court in *Pulley v. Harris* by pointing out that Florida does not require that aggravators be alleged in the indictment, or any death eligibility requirements be found in the penalty phase of a capital defendant's trial. However, Gordon provides no explanation as to why these differences matter.

Instead, Gordon's arguments center on the increase in the number of statutory aggravators (which he describes as "aggravator creep" Pet. at 17) in combination with what he refers to as "minimalist policing." (Gordon appears to define this as "a state supreme court's willingness to set aside death sentences when warranted" Pet. at 22). He implies that a reduction in the number of death sentence cases the Florida Supreme Court has reversed on direct appeal since the mid-1970s demonstrates the court's unwillingness to set aside death sentences when warranted. Pet. at 22. It is never made clear as to how one determines whether reversing a death sentence is "warranted."

However, as this Court has explained, a death penalty statute that limits the number of death-eligible crimes, requires bifurcated proceedings, demands proof of at least one aggravating factor, gives the jury broad discretion to consider mitigating

circumstances, and provides the jury with standards to guide its use of aggravating and mitigating information, is sufficient to minimize "the risk of wholly arbitrary, capricious, or freakish" death sentences. *Harris*, 465 U.S. at 45 (discussing *Gregg*, 428 U.S. at 197-98). Florida's death penalty system does all those things and more.

Moreover, Gordon's contention that "aggravator creep" differentiates Florida's capital sentencing scheme from that of the California scheme the Court found constitutional in *Pulley v. Harris*, miscomprehends the role that aggravators play in the narrowing down function of the jury in determining a defendant's eligibility for a sentence of death. As the Court pointed out, in *Furman* it explained that the underlying problem leading to the arbitrary and capricious enforcement of the death penalty is unguided sentencing discretion in juries and judges:

> [C]apital punishment, as then administered under statutes and *vesting unguided sentencing discretion in juries and trial judges*, had become unconstitutionally cruel and unusual punishment. The death penalty was being imposed so discriminatorily, 408 U.S., at 240, 92 S. Ct., at 2727 (Douglas, J., concurring), so wantonly and freakishly, id., at 306, 92 S. Ct., at 2760 (Stewart, J., concurring), and so infrequently, id., at 310, 92 S. Ct., at 2762 (WHITE, J., concurring), that any given death sentence was cruel and unusual.

Pulley v. Harris at 44. (emphasis added). Furthermore, the Court pointed out that it had discussed in *Gregg v. Georgia*, 428 U.S. 153 (1976) how these problems can be addressed:

> Indeed, in summarizing the components of an adequate capital sentencing scheme, Justices Stewart, Powell, and Stevens did not mention comparative review:
>
> > "[T]he concerns expressed in *Furman* . . . can be met by a carefully drafted statute that ensures that the sentencing authority be given adequate information and guidance. As

> a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." Id., at 195, 96 S.Ct., at 2935.

Pulley v. Harris at 46.

Florida has addressed, in the manner suggested in *Gregg*, the concerns the Court raised in *Furman* by using aggravating factors and mitigating circumstances to ensure that both judges and jurors are all focused on the same lawful considerations. The Court never suggested a state is required to limit the number of circumstances that qualify a person's eligibility for a sentence of death to avoid arbitrary and capricious death sentences, as Gordon argues. Rather, Florida's system of considering aggravating factors and mitigating circumstances serves to provide to the jury and judge considering a death sentence the necessary information and guidance needed to limit their sentencing discretion in a way that avoids imposing the death penalty in an arbitrary or capricious manner.

Nor does any reduction in the number of death penalty reversals over a period of time suggest there is a need to retain proportionality review. Gordon ignores the fact that one would anticipate a reduction in reversals of death sentences following earlier reversals and other clarifications from the court that provide guidance to juries and sentencing judges on the lawful manner of sentencing capital defendants to death. The improvement in sentencing that results in fewer reversals is hardly a reason to warrant the addition of a form of review that violates the state's constitution

without a determination that its use is required by federal constitutional law or statute.

There is no conflict between this Court's decision in *Pulley v. Harris* and the Florida Supreme Court's decision that it will no longer perform a proportionality review in its capital cases. Indeed, the Florida Supreme Court repeatedly relied on *Pulley v. Harris* in its opinion in *Lawrence*. *See Lawrence*,308 So. 3d at 548, 550, 551. Therefore, there is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case refusing to reconsider its holding in *Lawrence* eliminating its use of proportionality review.

2. No Conflict with Other Federal or State Appellate Courts

Nor is there any conflict between the Florida Supreme Court's decision in this case and that of any federal appellate court or state court of last resort. Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dept. of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

The federal circuit courts of appeals have rejected similar attacks on the Federal Death Penalty Act which also fails to provide for proportionality review. 18

U.S.C. § 3591; *United States v. Aquart*, 912 F.3d 1, 51-53 (2d Cir. 2018) (citing cases from six other circuits); *United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998) (rejecting a constitutional attack on the FDPA based on a combination of lack of proportionality and the prosecution being allowed to use and define nonstatutory aggravation before concluding that the FDPA is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of proportionality review). Furthermore, the federal circuit courts recognize that proportionality review is not constitutionally required and do not conduct any such review in 28 U.S.C. § 2254 federal habeas cases.[2]

Nor is there any conflict between the Florida Supreme Court's decision in this case and other state supreme courts. While many state supreme courts perform proportionality review in capital cases, they do so as a matter of state law. Often, proportionality review is explicitly mandated by the particular state's death penalty statute. *Lawrence*, 308 So.3d at 556 (Labarga, J., dissenting) (noting fourteen states

---

[2] *Copenhefer v. Horn*, 696 F.3d 377, 392 & n.5 (3d Cir. 2012); *Hooks v. Branker*, 348 Fed. Appx. 854, 864 (4th Cir. 2009); *Fisher v. Angelone*, 163 F.3d 835, 854-55 (4th Cir. 1998); *Cobb v. Thaler*, 682 F.3d 364, 381 (5th Cir. 2012); *Thompson v. Parker*, 867 F.3d 641, 653 (6th Cir. 2017); *Silagy v. Peters*, 905 F.2d 986, 1000 (7th Cir. 1990); *Middleton v. Roper*, 498 F.3d 812, 821 (8th Cir. 2007); *Allen v. Woodford*, 395 F.3d 979, 1018 (9th Cir. 2005); *Mendoza v. Sec'y, Fla. Dept. of Corr.*, 659 Fed. Appx. 974, 981 & n.3 (11th Cir. 2016); *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996); *Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987).

have death penalty statutes that require proportionality review in capital cases). For example, Missouri's death penalty statute explicitly provides that the state supreme court should determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." *State v. Wood*, 580 S.W.3d 566, 590 (Mo. 2019) (en banc) (quoting Missouri's statute, § 565.035.3(3)), *cert. denied, Wood v. Missouri*, 140 S. Ct. 2670 (2020). But Florida's death penalty statute does not contain any equivalent language. *Lawrence*, 308 So. 3d at 549 (noting proportionality review is "not referenced anywhere" in the text of Florida's death penalty statute).

The Court noted that proportionality review in capital cases was required by "numerous state statutes." *Pulley v. Harris*, 465 U.S. at 43 & n.7. The Court also noted that in the states whose death penalty statute did not require proportionality review, some states, such as Florida, the appellate court performs proportionality review despite the absence of a statutory requirement, while in other states, such as California and Texas, the appellate courts did not. *Id.* at 44. In a footnote, the majority discussed the Florida Supreme Court's proportionality review. *Id.* at 46 n.8. The Court stated that, while some states provide proportionality review, that "does not mean that such review is indispensable." *Id.* at 45. *See also Murray v. Giarratano*, 492 U.S. 1, 9 (1989); *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990).

That a state supreme court performs proportionality review, as required by their respective state's death penalty statute, does not create conflict with a state supreme court that refuses to perform proportionality review because the state's

constitution has a conformity clause. In both situations, these state supreme courts are simply following their respective state laws. There is no conflict between the Florida Supreme Court's decision in this case and that of any other state court of last resort.

The petition does not cite any federal circuit court or state court of last resort holding that the Eighth Amendment requires proportionality review in capital cases for the obvious reason that this Court held otherwise in *Pulley v. Harris*. Because the Florida Supreme Court's decision to eliminate proportionality review neither violates the Eighth Amendment nor conflicts with any decision of this Court or any other federal or state appellate courts, and Gordon provides no other compelling reason for the Court to now exercise its discretion to review the same issue it previously chose not to review, the Court should deny Gordon's petition. Sup. Ct. R. 10.

C. Racial Considerations Were Not Raised Below

In addition, it appears that Gordon is at least suggesting that proportionality review is required to "ameliorate the danger of racial prejudice" from affecting sentencing decisions in capital cases. Pet. at 19. However, Gordon did not present this argument in the Florida Supreme Court.

This Court does not grant review of questions raised for the first time before the Court. The Court is "a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta.*, 534 U.S. 103, 110 (2001); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005). This Court's traditional rule precludes a grant of certiorari when the question raised in the petition was either not presented to the lower court or was

not ruled upon by the lower court. *United States v. Williams*, 504 U.S. 36, 41 (1992) (discussing the concept of "not pressed or passed upon below"); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing the writ of certiorari as improvidently granted where the issue was not raised, preserved or passed upon in the state courts below); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875). This Court refuses to entertain issues that were not properly presented to the state supreme court. *Adams v. Roberston*, 520 U.S. 83, 88 (1997) (dismissing the writ as improvidently granted where the issue was not raised with "fair precision and in due time"); *Howell v. Mississippi*, 543 U.S. 440, 441 (2005) (dismissing the writ of certiorari as improvidently granted where the issue was not raised as a federal constitutional issue).

Gordon's argument in his petition is virtually a verbatim repetition of the argument he made in the brief he filed before the Florida Supreme Court. (See Pet. at 6-19; 21-26 and Gordon's Initial Brief in the Florida Supreme Court at 68-86), However, beginning on page 19 and running through all but the last line of page 21, Gordon adds in an argument that he did not make in his Florida Supreme Court brief. In these pages, he argues for the first time that proportionality review is required to combat the effects of racial discrimination.

Moreover, although Gordon points out that the federal death penalty statute requires that a federal capital jury certify that race did not affect the jurors' sentencing decision and cites a string of cases[3] that recognize the risk racial prejudice

[3] *Turner v. Murray*, 476 U.S. 28, 35 (1986); *Robinson v. State*, 520 So. 2d 1, 7-8 (Fla.

presents in the criminal justice system, he cites no case of this Court that states the Eighth Amendment requires proportionality review to avoid racial prejudice in capital cases. Indeed, none of the cases cited by Gordon state that the failure of a court to perform a proportionality review to avoid racial prejudice violates the Eighth Amendment.

Because Gordon failed to previously present this issue to the Florida Supreme Court for its review, the Court should disregard this argument.

D. Juror Unanimity is Not an Issue in This Case

Finally, Gordon suggests that jury unanimity is "[a]nother potential complication down the road." The issue of jury unanimity is a red herring. First, a unanimous jury found Gordon eligible to be sentenced to death and recommended Gordon be sentenced to death under a Florida law requiring that the verdict finding him eligible for a death sentence and recommending one be unanimous. Therefore, an unanimity requirement under the scheme in which Gordon was sentenced to death is not an issue in this case.

Second, Florida has amended its capital sentencing laws to comply with this Court's holding in *Hurst* that a unanimous jury must find a defendant eligible for a death sentence. Gordon's eluding to the possible elimination of an unanimity requirement based on a statement of Florida's governor does not refer to the unanimity requirement for death eligibility this Court announced in *Hurst*. Rather,

---

1988); *State v. Benn*, 845 P.2d 289, 317 (Wash. 1993); *Ronk v. State*, 172 So. 3d 1112, 1147 (Miss. 2015); *State v. Cooper*, 731 A.2d 1000, 1007-08 (N.J. 1999).

the governor's statement refers only to the number of jurors required to recommend a death sentence to the judge after the jury has unanimously found the defendant eligible for a sentence of death, and this Court has never held that a jury must unanimously decide to sentence a defendant to death (or unanimously recommend the judge sentence a defendant to death).

Given this Court's clear directive that proportionality review of capital cases is not required by the Eighth Amendment, there is no basis for granting certiorari review in this case.[4]

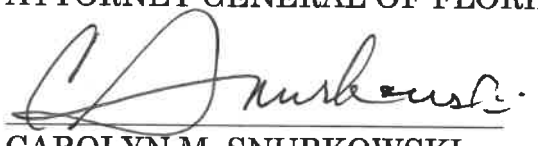
[4] This case also presents a particularly poor vehicle for the Court to consider whether proportionality review is required because proportionality review would not change the outcome of this case given the extreme aggravation and limited mitigation this case involves. Had the Florida Supreme Court conducted a proportionality review, the result in this case would not change. See *Francis v. State*, 808 So. 2d 110 (Fla. 2009) (upholding the death sentence involving the murder of sixty-six year-old twin sisters stabbed to death during the course of a robbery by a neighbor who was mentally ill or emotionally disturbed and suffering from an extreme mental or emotional disturbance at the time of the offense).

CONCLUSION

The Florida Supreme Court's decision below does not present any conflict with any decision of this Court or any other state court of last resort, nor is any unsettled question of federal law involved. Therefore, the State respectfully requests that this honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Florida Bar No. 158541
Counsel of Record

Rick A. Buchwalter
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT