CAPITAL CASE
No. 22-6725

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

PETITIONER'S REPLY IN SUPPORT OF 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

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

REPLY BRIEF

I. (ALMOST) EVERYBODY IS DEATH-ELIGIBLE AND NOBODY GETS PROPORTIONALITY REVIEW: THE COMBINATION VIOLATES THE EIGHTH AMENDMENT

The state, in its reworking of the Question Presented, claims that "Florida currently employs multiple means to narrow down a defendant's eligibility for a death sentence" (Brief in Opposition, p. ii, see also p. 7, 8).[1] It doesn't. Maybe it used to, but no longer. As state Supreme Court Justice Labarga lamented and warned in his dissenting opinion in *Lawrence v. State*, 308 So.3d 544, 552-58 (Fla. 2020), Florida - - over a (now) three-year period since early 2020 - - has been systematically "dismantling the reasonable safeguards" which were formerly provided by the state's capital sentencing scheme. 308 So.3d at 552-53.[2]

As a result of the combination of (1) Florida's abandonment of proportionality review based on the state Supreme Court's misunderstanding of *Pulley v. Harris*, 465 U.S. 37 (1984); (2) the extreme proliferation of statutory aggravating factors (including a felony-murder aggravator which merely repeats an element necessary for conviction in the vast majority of felony-murder cases); and (3) the fact that the existence of even a single aggravator makes a Florida first-degree murder defendant death-eligible,

---

[1]All emphasis in this Reply is supplied unless the contrary is indicated

[2] "I cannot overstate how quickly and consequentially the majority 's decisions have impacted death penalty law in Florida." *Lawrence*, 308 So.3d at 553 (Labarga, J., dissenting).

Florida's current capital sentencing scheme does not meaningfully narrow the class of death-eligible defendants, nor does it provide a principled way for a jury, trial judge, or the state reviewing court (to the limited extent that review still occurs in Florida) to separate the few cases in which the death penalty is imposed from the many cases in which it is not. Therefore, Florida's current death scheme fails to protect against the arbitrary and capricious infliction of capital punishment, and it violates the Eighth Amendment under the principles of *Furman*[3].

The state correctly points out that "the Florida Supreme Court repeatedly relied on *Pulley v. Harris* in its opinion in Lawrence" (Brief in Opposition, p. 17). Unfortunately, it is also true that the Florida Supreme Court repeatedly misconstrued *Pulley v. Harris* in its opinion in *Lawrence*. First, *Pulley* neither held nor categorically asserted that proportionality review is never required as a safeguard against the arbitrary infliction of death. To the contrary, *Pulley* expressly envisioned as a possibility that, absent proportionality review, a given state's capital sentencing scheme might lack sufficient other safeguards to comport with the Eighth Amendment. That possibility has now come to fruition in Florida. California's 1977 death penalty statute which was at issue in *Pulley* bears little resemblance to Florida's current, or even its former, scheme.

Without proportionality review, a finding of a single aggravating factor cannot be an adequate safeguard - - especially when there are so many of them, and even

---

[3] *Furman v. Georgia*, 408 U.S. 238 (1972).

more especially when it's hard to conceive of a Florida first-degree murder case that wouldn't have at least one of them.[4] In *Zant v. Stephens*, 462 U.S. 862, 876 (1983), this Court observed that its :

> approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty. This conclusion rested of course on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman* itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 428 U.S., at 195, n. 46, 96 S.Ct., at 2935, n. 46. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

(footnote omitted)

While it is true that *Pulley* revisited *Zant*, it certainly did not overrule it. *Pulley* simply states that "the emphasis [in *Zant*] was on the constitutionally necessary narrowing function of statutory aggravating circumstances", while "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences." 465 U.S. at 50. And as this Court explained in *Zant* itself, the two aggravating factors "adequately differentiate this case in an

---

[4] See Gordon's petition for certiorari, p. 17, n.4.

objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." 462 U.S. at 879.

In Florida in 2023 - - since there are so many aggravators, and so many of those (like the felony-murder aggravator to name one) are so broadly applicable, and since it only takes one to make a first-degree murder death-eligible - - there are very few Florida murder cases in which the death penalty may not be imposed. That, of course, doesn't mean that death will be imposed in nearly every case [selection decision]; only that it can be imposed in nearly every case [eligbility determination]. And the fact that almost everyone is death-eligible presents an unacceptable risk that jurors and/or judges may impose it arbitrarily or for impermissible reasons. That is the fatal flaw prohibited by the Eighth Amendment and by *Furman* and its progeny, and by jettisoning proportionality review just when it is most needed - - for no apparent reason other than a change in membership and a misreading of *Pulley v. Harris* - - the Florida Supreme Court has left itself without a mechanism to correct it. [How arbitrary is it, for example, that in 2014 and 2015, all seven Florida Justices - - including the two who were already advocating for abandoning proportionality review - - believed that in Michael Yacob's (weak single aggravator) and Humberto Delgado's (compelling mental mitigation) cases the death penalty was disproportionate under then-longstanding Florida precedent; yet after 2020 Yacob and Delgado would have

been denied even the opportunity to present such an argument and have it considered by the Court?][5]

The important distinction between the eligibility determination and the selection decision was explained in Judge Garza's specially concurring opinion in *Flores v. Johnson*, 210 F.3d 456, 459 (5th Cir. 2010):

> Supreme Court jurisprudence guiding consideration of death penalty cases has produced two cardinal principles. First, the "eligibility" phase of a state's capital sentencing scheme - - the phase where a state legislature decides which particular homicides could, given sufficiently egregious circumstances, warrant the death penalty - - must "provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980) (citations and internal quotation omitted); See also *Arave v. Creech*, 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993)("[A] State's capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty . . . [and] must provide a principled basis for doing so.") (citations omitted). Accordingly, under this restriction, a state's capital sentencing scheme must limit a sentencer's discretion to impose the death penalty, in a principled manner, to the most extreme of cases as rationally defined by state law.

For five-plus decades after *Furman*, Florida's capital sentencing system might have complied with this bedrock Eighth Amendment principle because it was the sufficiency of the aggravating circumstance[s] - - not the mere existence of one - - which determined death-eligibility, and proportionality review provided a meaningful (and often used) appellate remedy to further distinguish those cases which were death-appropriate and those which were not. Now, however, the Eighth Amendment

---

[5] See Gordon's petition for certiorari, p.10-12; *Yacob v. State*, 136 So.3d 539 (Fla. 2014); *Delgado v. State*, 162 So.3d 971 (Fla. 2015).

principle has been turned on its head in this state: almost every first-degree murder defendant is death-eligible right out of the starting gate; then the jury and the trial judge make the selection decision; and while appellate review still exists for other purposes (although its efficacy has become doubtful)[6], it is no longer available to ensure that the death penalty is limited to the most extreme cases. In other words, Florida's one-aggravator no-proportionality system now separates the many first-degree murder defendants - - the overwhelming majority - - who are death-eligible from the very few who are not.

To further illustrate the point, under the now-abolished proportionality safeguard the death penalty was reserved for only the most aggravated and least mitigated of first-degree murders. See, e.g., *State v. Dixon*, 283 So.2d 1 (Fla. 1972); *Delgado v. State*, *supra*, 162 So.3d at 982; *Yacob v. State*, *supra*, 136 So.3d at 549-50; *Crook v. State*, 908 So.2d 350, 357 (Fla. 2005). For that reason, a death sentence could not be upheld where only a single aggravator existed, unless that aggravator was especially egregious under the facts of the case, or unless there was very "little or nothing" in mitigation. See, e.g., *Yacob*, at 549-52; *Almeida v. State*, 748 So.2d 922, 933-34 (Fla. 1994); *Besaraba v. State*, 656 So.2d 441, 446-47 (Fla. 1995); *Thompson v. State*, 647 So.2d 824, 827 (Fla. 1994); *Nibert v. State*, 524 So.2d 1059, 1063 (Fla. 1990).

---

[6] See Gordon's petition for certiorari, p.22-23.

Now, in sharp contrast, as long as a defendant is rendered death-eligible by a single aggravating factor - - even if it is an "auto-ag" like felony-murder[7] or a 15 year old prior conviction for a strong-arm robbery - - there no longer exists a mechanism in Florida to narrow imposition [or affirmance] of a death sentence to the most aggravated or least mitigated first-degree murders, or to safeguard against arbitrary infliction of death.

II. "MINIMALIST POLICING"

In his petition (p.8, 22-23, and n.5 and 6) Gordon cited *Olson 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"). Gordon argued that the current Florida Supreme Court's abolition of proportionality review, as part of an ongoing and successful effort to

---

[7] By "auto-ag" Gordon means a death-eligibility aggravator which merely repeats an element necessary for the underlying first-degree murder conviction, such as robbery in a robbery-murder case or arson in an arson-murder case. Such an aggravator performs absolutely no narrowing function. See *State v. Cherry*, 257 S.E.2d 551,567-68 (N.C. 1979); *Engberg v. Meyer*, 820 P.2d 70,89-91 (Wyo.1991); *State v. Middlebrooks*, 840 S.W.2d 317,346 (Tenn. 1992); *McConnell v. State*, 102 P.3d 606, 620-24 (Nev. 2004); *State v. Harte*, 194 P.3d 1263, 1265 (Nev. 2008); see also *Blanco v. State*, 706 So.2d 7, 12-15 (Fla. 1997)(Anstead, J., specially concurring). [The Wyoming, Tennessee, and Nevada cases are all based on the Eighth Amendment narrowing requirement, and each distinguishes *Lowenfield v. Phelps*, 484 U.S. 231 (1988)].

dismantle safeguards, has resulted in a practice of "minimalist policing" in which nearly every death sentence is approved on appeal.

The state, in its response, has unintentionally made Gordon's point. It says :

> 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.

(Brief in Opposition, p.16)

The state characterizes this as "[t]he improvement in sentencing that results in fewer reversals" [Brief in Opposition, p. 16].

In other words proportionality review works. Over the course of many years the (pre-2020) Florida Supreme Court has affirmed many highly aggravated and/or insubstantially mitigated death cases, and has reversed for life imprisonment many less aggravated and/or more mitigated death cases; thereby (1) ensuring fair and reliable results for individual defendants, and (2) educating prosecutors, trial judges, and (to a lesser extent) the public as to which kinds of murders (the few) warrant the ultimate penalty, and which kinds (the many) do not. Over time, prosecutors are more likely to offer life pleas or take the death penalty off the table before trial if they know from precedent that any death sentence that might be imposed is likely to be overturned on appeal. Similarly, trial judges are less inclined to impose death if they know they are likely to get reversed. So, yes, one would anticipate a reduction in the number of reversals if the system is working properly. The state's argument, boiled

down to its essence, seems to be that proportionality review has been working so lets get rid of it.

III. THE STATE'S FDPA COMPARISON

Contrary to the state's complaint, Gordon is not raising a new issue that he "failed to previously present . . . to the Florida Supreme Court for its review" [Brief in Opposition, p. 22, see 20-21]. Gordon is simply addressing a comparison to the federal death penalty statute [FDPA] which the state did not make in his direct appeal in the state Court (nor in Jonathan Lawrence's or Marlin Joseph's direct appeals in the state Court), but one which the state has been making in its briefs in opposition to petitions for certiorari in this Court. Since the state never tried to analogize the FDPA on direct appeal, Gordon (whose seven-issue initial brief exceeded the page limit, necessitating a motion to accept it, which the state unsuccessfully opposed) had no reason to distinguish the FDPA in either his initial brief or reply brief.

To the best of the undersigned's knowledge, the state first offered its FDPA analogy in its Brief in Opposition to Jonathan Lawrence's petition for certiorari (Case No. 20-8341, p.10 and 26) which was filed three months after Gordon's reply brief. Undersigned counsel - - having read the state's Brief in Opposition in *Lawrence* - - thus became aware for the first time that this was an argument the state was making, so he addressed it anticipatorily in his initial direct appeal brief (filed April 8, 2022, and pending in the Florida Supreme Court) in Reynaldo Figueroa-Sanabria's case (No. SC21-1070). In July 2022, the state made the same FDPA comparison in its Brief in Opposition to Marlin Joseph's petition for certiorari (Case No. 21-8177, p. 31-32).

Therefore, anticipating (correctly) that the state would make the same FDPA argument in opposing Gordon's petition for certiorari (see Brief in Opposition, p. 17-18) - - undersigned counsel pointed out that the FDPA contains safeguards, notably including strong protections against racial, ethnic, religious, and gender discrimination, which the Florida capital sentencing scheme does not have. [Petition for Certiorari, p. 19-21)]. Gordon cannot be faulted or penalized for "failing" to rebut in the state court a comparison which the state did not make in the state court.

Also regarding the FDPA, the state suggests that it provides weaker safeguards than Florida because "in effect, the FDPA allows a limitless number of aggravators and certainly far more than Florida's 16 statutory aggravators" [Brief in Opposition, p. 12 n.1]. What the state gets wrong is that under the FDPA the "limitless" non-statutory aggravators cannot be used to establish death eligibility. They can come into play - - for consideration along with the mitigating factors - - only in the selection stage, and only if and after the constitutionally-required narrowing function has been satisfied in the eligibility stage. Death-eligibility under the FDPA requires not only a finding of at least one statutory aggravator, but also a finding beyond a reasonable doubt of at least one of four statutory intent factors set forth in 18 U.S.C. §3591. See, e.g., *United States v. Lecroy*, 441 F.3d 914, 920 (11th Cir. 2006); *United States v. Runyon*, 707 F.3d 475, 486 (4th Cir. 2013); *United States v. Torrez*, 869 F.3d 291, 304-05 (4th Cir. 2017). In its clear separation of the eligibility and selection stages, the FDPA more closely resembles the 1977 California's scheme which was at issue in *Pulley v. Harris*, then it does the current Florida scheme in which (1) it only takes a

single statutory aggravator to make a defendant death-eligible; (2) the aggravators are so numerous and so broad that nearly every Florida first-degree murder defendant will have at least one; and (3) in the vast majority of felony murder cases an element necessary for conviction (e.g., the robbery, the burglary, the arson, etc.) doubles - - even without a finding of any intent beyond what is necessary to support the underlying conviction - - as an aggravating factor which, standing alone, establishes death-eligibility. Such a system performs no meaningful narrowing function so it violates the Eighth Amendment. Perhaps in the past the probability of arbitrary and/or discriminatory infliction of the death penalty in Florida was ameliorated somewhat, or even to a great extent, by proportionality review. So the Florida Supreme Court has now seen fit to discard it; thereby exacerbating the constitutional invalidity of its entire capital sentencing scheme exponentially.

IV. NOT HARMLESS ERROR

In its footnote 4 on page 23 of its Brief in Opposition the state speculates that "[h]ad the Florida Supreme Court conducted a proportionality review, the result in this case would not change." First of all, this is not an "as applied" challenge; Gordon's contention in the Florida Supreme Court and here is a *Furman*-type claim that Florida's abandonment of proportionality review, in combination with the lack of other adequate safeguards and the failure to meaningfully narrow the class of death-eligible first-degree murder defendants, has rendered Florida's death penalty scheme facially unconstitutionally, across the board. When *Furman* invalidated death penalty laws

nationwide for failure to guard against the arbitrary and capricious infliction of death, everyone facing execution under those unconstitutional laws was afforded relief.

Moreover, while the Florida Supreme Court refused to even consider Gordon's contention that the death penalty was disproportionate in his individual case [see *Gordon v. State*, 350 So.3d 25, 36 (Fla. 2022)], it did recognize the following penalty-phase mitigating evidence:

> 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 show a variety of mental health diagnoses, including schizophrenia, schizoaffective disorder depressive type, bipolar disorder, psychosis not otherwise specified (NOA), and post traumatic 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.

350 So.3d at 32-33 (footnote omitted)[8]

Before *Lawrence* obliterated five decades of protective precedent, the Florida Supreme Court conducted a two-pronged inquiry to determine whether the crime falls within the category of <u>both</u> (1) the most aggravated, and (2) the least mitigated of murders." *Davis v. State*, 121 So.3d 462,499 (Fla. 2018); *Crook v. State*, 908 So.2d 350,357 (Fla. 2005); *Cooper v. State*, 739 So.2d 82,85 (Fla. 1999); *Almeida v. State*, 748

---

[8] The state presented no expert witnesses in rebuttal, but it did call Gordon's father, who denied that he ever abused his children.

So.3d 922,933 (Fla. 1999)(emphasis in opinions); see also *Delgado v. State*, 162 So.3d 971,982 (Fla. 2015). Thus, even in cases where the "most aggravated" prong is satisfied, "we are next required to determine whether [the] case also falls within the category of the least mitigated of murders for which the death penalty is reserved." *Crook*, 908 So.2d at 357 (emphasis in opinion); see also *Cooper,* 739 So.2d at 85-86.

As he did in *Crook*, 908 So.2d at 356, undersigned counsel conceded in Gordon's direct appeal that the "most aggravated" prong was satisfied, but he argued that the "least mitigated" prong was not. Before *Lawrence*, Florida case law had consistently held that "substantial mental deficiencies merit great consideration in evaluating a defendant's culpability in a proportionality assessment." *Crook*, 908 So.2d at 358. See *Miller v. State*, 373 So.2d 882,886 (Fla. 1979) (recognizing legislative intent "to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse"); *Davis v. State*, *supra*, 121 So.3d at 501 ("We have held sentences of death to be disproportionate in a large number of other cases involving substantial mental health mitigation").

In its opinion affirming Gordon's death sentence, the Florida Supreme Court took issue with none of the above; it merely reaffirmed the overbroad misinterpretation of *Pulley v. Harris* which it had announced in *Lawrence* ; i.e., that the Eighth Amendment does not require - - indeed categorically never requires - - proportionality review of death sentences. 350 So.3d at 36.

The state, in essence, is asking this Court to conclude - - in the absence of a record of the penalty phase evidence, and in the face of the Florida Supreme Court's own recitation of some pretty compelling mitigating evidence - - that the state Court's refusal to consider Gordon's proportionality argument was "harmless error". Even if this Court were in a position to engage in such an analysis, the error was far from harmless.

V. UNANIMITY

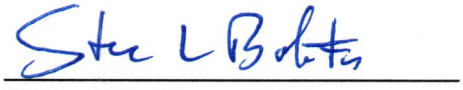
The state and Gordon are in agreement that the unanimity question is not yet ripe [Petition, p. 25; Brief in Opposition, p. 22]. However, the state's suggestion that jury unanimity is only required for the eligibility determination and not for the selection decision should be briefly addressed. First, Gordon certainly does not concede that a unanimous verdict to impose the death penalty is not required by the Sixth and/or Eighth Amendments. Second, even apart from the question of whether unanimity in the selection decision is constitutionally required, it has been recognized that jury unanimity is an especially important safeguard to ensure the reliability of a death sentence. *State v. Daniels*, 542 A.2d 306,389 (Conn. 1988), quoted with approval by an earlier incarnation of the Florida Supreme Court in *State v. Steele*, 921 So.2d 538,549 (Fla. 2005); see also *State v. Davis*, 266 S.W.3d 896,907 (Tenn. 2008). The FDPA requires a unanimous jury verdict; so did the 1977 California scheme which was at issue in *Pulley v. Harris*; so does every state which still retains the death penalty except Alabama (where unanimity legislation is pending); and so even does Florida - - for the next few days anyway - - which is moving in the opposite

direction and is on the verge of becoming even more of an outlier by permitting 8-4 death recommendations.[9] For the time being at least, Florida has a daily double (no proportionality review, no meaningful narrowing of death-eligibility) of deficiencies which in combination make its system violative of the Eighth Amendment; it is now in the process, by eliminating unanimity, of going for the trifecta.

CONCLUSION

Gordon's petition for a writ of certiorari should be granted.

Respectfully submitted,



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

ATTORNEY FOR MICHAEL A. GORDON

Dated: March 14, 2023

[9] House Bill 555; Senate Bill 450.