

DOCKET NO. 17-9325

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA D. NELSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

**PAMELA JO BONDI
ATTORNEY GENERAL**

**LISA MARTIN
Assistant Attorney General
Florida Bar No. 72138**

**Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
lisa.martin@myfloridalegal.com**

COUNSEL FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

[Capital Case]

WHETHER THIS COURT HAS JURISDICTION TO REVIEW A CLAIM THAT THERE WAS AN IMPROPER PROPORTIONALITY ANALYSIS CONDUCTED BY THE FLORIDA SUPREME COURT SOLELY BASED ON STATE LAW REQUIREMENTS AND THE UNDERLYING DECISION DOES NOT CONFLICT WITH ANY OF THIS COURT'S PRECEDENT, OR PRESENT AN IMPORTANT OR UNSETTLED ISSUE OF CONSTITUTIONAL LAW FOR THIS COURT'S REVIEW?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	i
TABLE OF CITATIONS	iii
CITATION TO OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT	8
THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI REVIEW OF THE FLORIDA SUPREME COURT’S DECISION REJECTING PETITIONER’S RELATIVE CULPABILITY CHALLENGE TO HIS DEATH SENTENCE BECAUSE HIS JUVENILE CODEFENDANT WAS INELIGIBLE FOR THE DEATH PENALTY AS A MATTER OF LAW. THE FLORIDA SUPREME COURT’S DECISION WAS BASED ON STATE LAW AND IS NOT CONTRARY TO ANY DECISION FROM THIS COURT, NOR DOES IT DECIDE AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE.	8
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF CITATIONS

Cases

<i>Asay v. State</i> , 210 So. 3d 1 (Fla. 2016)	6
<i>Brennan v. State</i> , 754 So. 2d 1 (Fla. 1999)	5, 12, 15
<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969)	10
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	9
<i>Fox Film Corp. v. Muller</i> , 296 U.S. 207 (1935)	9
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016)	6
<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016)	6
<i>Jeffries v. State</i> , 222 So. 3d 538 (Fla. 2017)	11
<i>Lewis v. Jeffers</i> , 497 U.S. 764 (1990)	10
<i>McCloud v. State</i> , 208 So. 3d 668 (Fla. 2016)	14
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	9
<i>Murray v. Giarratano</i> , 492 U.S. 1(1989)	10

<i>Nelson v. Jones</i> , 2018 WL 798255 (Fla. Feb. 9, 2018)	1, 7
<i>Nelson v. Jones</i> , No. SC17-2034 (Fla. Feb. 9, 2018).	9
<i>Nelson v. Secretary, Fla. Dept. of Corrections</i> , 671 Fed. Appx. 770 (11th Cir. 2016), <i>cert. denied</i> , 138 S. Ct. 332 (2017)	6
<i>Nelson v. State</i> , 235 So. 3d 308 (Fla. 2018)	6
<i>Nelson v. State</i> , 73 So. 3d 77 (Fla. 2011)	5, 14, 15
<i>Nelson v. State</i> , 748 So. 2d 237 (Fla. 1999), <i>cert. denied</i> , 528 U.S. 1123 (2000)	passim
<i>Pulley v. Harris</i> , 465 U.S. 37 (1984)	10
<i>Rockford Life Insurance Co. v. Illinois Department of Revenue</i> , 482 U.S. 182 (1987)	8, 16
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	12, 15
<i>Street v. New York</i> , 394 U.S. 576 (1969)	10
<i>Walton v. State</i> , 2018 WL 2251447 (Fla. May 17, 2018).....	14
<i>Wright v. State</i> , 19 So. 3d 277 (Fla. 2009)	11
<i>Yacob v. State</i> , 136 So. 3d 539 (Fla. 2014).....	9, 11

Other Authorities

§ 921.141(4), Fla. Stat. (2008).....	1, 9
28 U.S.C. § 1257(a)	1
28 U.S.C. § 2254.....	6
Sup. Ct. R. 10	8, 16

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court in this cause appears as *Nelson v. Jones*, 2018 WL 798255 (Fla. Feb. 9, 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on February 9, 2018 and rehearing was denied March 13, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited in the Petitioner's brief, Respondent adds Section 921.141(4) of the Florida Statutes (2008):

The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

STATEMENT OF THE CASE

Petitioner Nelson was convicted of the first-degree murder of Tommy Owens and robbery with a deadly weapon in 1996. Nelson and his friend, Keith Brennan, lured another friend, Mr. Owens, to a remote area, so they could kill him and steal his car. Nelson and Brennan picked up two sisters they met by prior arrangement, and they all traveled to New Jersey, where Nelson and Brennan were ultimately arrested.

Following Nelson's penalty phase, the jury recommended imposition of a death sentence by a vote of 12 to 0. This Court followed the recommendation, finding three aggravating factors (during the course of a robbery; especially heinous, atrocious or cruel; cold, calculated and premeditated), which outweighed the statutory mitigating factor of age (18) and other non-statutory mitigation. The Florida Supreme Court affirmed the convictions and sentences. *Nelson v. State*, 748 So. 2d 237 (Fla. 1999), *cert. denied*, 528 U.S. 1123 (2000). On direct appeal, the Florida Supreme Court described the facts of Owens' murder:

The evidence presented at trial established the following facts. Nelson and Keith Brennan wanted to leave the city of Cape Coral. The two devised a plan to murder Tommy Owens and steal his car. Nelson and Brennan knew that Owens kept a baseball bat in his car. On the evening of March 10, 1995, Owens was lured under false pretenses to a remote street. Nelson and Brennan were able to convince Owens to exit his car, whereupon Nelson hit Owens with the bat. After a number of blows, Owens eventually fell to the ground. Nelson and Brennan tied Owens'

legs and arms. Owens pleaded for his life, stating that the two could take his car. After a brief discussion, Nelson and Brennan concluded that to avoid being caught, they should kill Owens. Brennan attempted to slice Owens' throat with a box cutter. Owens was not unconscious when the attacks began and he begged Nelson to hit him again with the bat so as to knock him unconscious before the stabbing continued. Nelson did as Owens requested and Brennan continued to attack Owens with the box cutter. Nelson and Brennan also continued to strike Owens a number of times with the bat. The two eventually dragged Owens' body to nearby bushes, where Owens later died.

Nelson and Brennan picked up Tina Porth and Misty Porth and the four left the city in Owens' car. After stopping in Daytona Beach, the four left the state and drove to New Jersey. At different times during the trip, Nelson and Brennan informed Tina and Misty that they had murdered Owens. Both Tina and Misty testified at trial.

Nelson and Brennan were apprehended by law enforcement officers in New Jersey. Nelson gave a video- and audio-taped confession. In the confession, Nelson detailed his account of the murder, both at the crime scene and at the place where the bat was recovered. The video-taped confession was played to the jury. Additionally, an analyst for the Florida Department of Law Enforcement testified that blood stains on Nelson's shoes, the box cutter, and a pair of underwear that the box cutter was wrapped in all matched Owens' DNA.

Nelson was found guilty of first-degree murder and robbery with a deadly weapon. At the penalty phase, the jury recommended death by a twelve-zero vote. The trial court found three aggravators: (1) the murder was committed in the course of a robbery; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP). The trial court also found that one statutory mitigator (age of eighteen at the time of the crime) and fifteen nonstatutory mitigators [FN1] were established. The statutory mitigator was given great weight. The first nonstatutory mitigator was given substantial weight, and the remaining nonstatutory mitigators were given from moderate to little weight. The trial court

concluded that Nelson failed to establish the following statutory mitigators: (1) that he acted under the effect of extreme emotional disturbance, (2) that he was an accomplice with minor participation, (3) that he acted under the domination of another person, and (4) that his capacity to appreciate the criminality of his conduct was impaired. The trial court followed the jury's recommendation and imposed the death penalty for the first-degree murder conviction. The trial court sentenced Nelson to 189 months in prison for the robbery conviction.

[FN1] The following nonstatutory mitigators were presented during the penalty phase: (1) Nelson gave a voluntary confession, (2) Nelson was not the person who killed the victim, (3) death was caused by the codefendant Brennan, (4) Nelson suffered from a deprived childhood, (5) Nelson's childhood saddled him with emotional handicaps, (6) outside influences saddled Nelson with emotional handicaps, (7) Nelson suffered great situational stresses leading up to the time of the homicide, (8) Nelson was suffering emotional turmoil before and at the time of the homicide, (9) Nelson's anger stems from circumstances beyond his control, (10) Nelson suffered physical, mental, and sexual family abuse, (11) Nelson has no prior criminal convictions for violent felonies, (12) the homicide was committed for emotional reasons, (13) there was a conditional guilty plea subject to a life sentence which was refused by the State, (14) Nelson has potential for rehabilitation in prison, and (15) the death penalty as applied to Nelson is disproportionate.

Nelson v. State, 748 So. 2d 237, 239-40 (Fla. 1999), *cert. denied*, 528 U.S. 1123 (2000).

Nelson's codefendant, Keith Brennan, was also tried, convicted, and sentenced to death for the first-degree murder of Tommy Owens. However, on direct appeal, the Florida Supreme Court reversed his death sentence based on the

reasoning that because Brennan was sixteen (16) years old when he committed the homicide, it would be cruel and unusual punishment to uphold his death sentence. *Brennan v. State*, 754 So. 2d 1 (Fla. 1999). Ultimately, Brennan received a life sentence.

Postconviction proceedings were initiated in state court on January 5, 2001. In Nelson's initial motion for postconviction relief, he raised a newly discovered evidence claim asserting that his sentence was subject to collateral attack on the basis that codefendant Keith Brennan's death sentence was reversed on appeal because Brennan was sixteen years old at the time of the homicide. *Nelson v. State*, 73 So. 3d 77, 89 (Fla. 2011). A postconviction evidentiary hearing was conducted on October 29, 2009, and relief was denied on March 18, 2010. The Florida Supreme Court upheld this ruling, and the mandate was issued on July 28, 2011. *Nelson v. State*, 73 So. 3d 77 (Fla. 2011). The Florida Supreme Court affirmed the denial of the relative culpability claim because "the life sentence of Brennan as a matter of law does not constitute newly discovered evidence for Nelson because Brennan's ineligibility for the death penalty stemmed from his ineligibility *as a matter of law*—not from the circumstances that surrounded the homicide or Brennan's character and emotional maturity". *Nelson*, 73 So. 3d at 91.

On December 3, 2012, Nelson filed an amended petition for writ of habeas

corpus in the Middle District of Florida, pursuant to 28 U.S.C. § 2254. Following the filing of a response by the State, along with a copy of the state court record, as well as a reply by Nelson, the court denied each of the claims raised in the petition on August 20, 2014, but granted a certificate of appealability as to Nelson's confrontation clause issue. The Eleventh Circuit Court of Appeals upheld the denial of Nelson's federal petition for writ of habeas corpus. *Nelson v. Secretary, Fla. Dept. of Corrections*, 671 Fed. Appx. 770 (11th Cir. 2016) (unpublished), *cert. denied*, 138 S. Ct. 332 (2017). This Court denied certiorari on October 10, 2017.

On January 11, 2017, Nelson filed a successive 3.851 postconviction motion in the state trial court raising a claim based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). On April 19, 2017, the trial court denied the successive postconviction motion, citing *Asay v. State*, 210 So. 3d 1 (Fla. 2016). Nelson then appealed the denial of his successive postconviction *Hurst* motion to the Florida Supreme Court, and that appeal was affirmed on January 31, 2018. The mandate issued on February 16, 2018. *Nelson v. State*, 235 So. 3d 308 (Fla. 2018). A petition for certiorari is pending before this Court, in case number 17-9554.

On November 16, 2017, Nelson filed a state habeas petition raising a claim that his death sentence violates the Eighth Amendment, asserting that his relative

culpability is less than that of his codefendant Keith Brennan. On February 9, 2018, the Florida Supreme Court denied the petition because Nelson's codefendant was a juvenile at the time of the homicide, thereby making him ineligible for capital punishment. Nelson's motion for rehearing was denied March 13, 2018. *Nelson v. Jones*, 2018 WL 798255 (Fla. Feb. 9, 2018). This petition follows.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI REVIEW OF THE FLORIDA SUPREME COURT'S DECISION REJECTING PETITIONER'S RELATIVE CULPABILITY CHALLENGE TO HIS DEATH SENTENCE BECAUSE HIS JUVENILE CODEFENDANT WAS INELIGIBLE FOR THE DEATH PENALTY AS A MATTER OF LAW. THE FLORIDA SUPREME COURT'S DECISION WAS BASED ON STATE LAW AND IS NOT CONTRARY TO ANY DECISION FROM THIS COURT, NOR DOES IT DECIDE AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE.

Petitioner Nelson's conviction and resulting death sentence for the brutal murder of Tommy Owen became final following certiorari review in 2000. *Nelson v. State*, 748 So. 2d 237, 239-40 (Fla. 1999), *cert. denied*, 528 U.S. 1123 (2000). Petitioner's instant petition asserts that he is entitled to a life sentence because codefendant Keith Brennan, who was sixteen (16) years old at the time of the murder, received a life sentence. Certiorari review should be denied because the issue below was decided on the basis of state law and this case does not present a fairly debatable or important unsettled question of constitutional law for this Court's review. *See* Sup. Ct. Rule 10 and *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n.3 (1987). As no compelling reason for review has been offered by Nelson, certiorari should be denied.

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the

ruling independent of the federal grounds, “our jurisdiction fails.” *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Michigan v. Long*, 463 U.S. 1032, 1038, 1041-42 (1983). In this case, the claim presented was rejected in state court based upon Florida’s proportionality analysis. The court stated:

Petitioner Joshua D. Nelson, a prisoner under a sentence of death, has filed a petition for writ of habeas corpus contending that he is entitled to relief pursuant to *McCloud v. State*, 208 So. 3d 668 (Fla. 2016). Having considered the petition, the response, and the reply, the petition is hereby denied. See *id.* at 689 n. 5 (noting that a codefendant’s ineligibility as a matter of law to receive the death penalty does not provide a basis for concluding that a defendant’s death sentence is disproportionate); *Jeffries v. State*, 222 So. 3d 538, 547 (Fla. 2017) (noting that a relative culpability analysis cannot be performed if a codefendant is ineligible for the death penalty because of age or intellectual disability).

Nelson v. Jones, No. SC17-2034 (Fla. Feb. 9, 2018).

Florida’s requirement to conduct a proportionality analysis is rooted in Florida’s capital punishment statute, found in Section 921.141(4) of the Florida Statutes. *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014) (“because this [proportionality] review is not required by the Eighth Amendment, we conclude that our proportionality review flows from Florida’s capital punishment statute—section 921.141, Florida Statutes”). Because the Florida Supreme Court did not decide the

instant claim on federal grounds, any federal claim addressed or discussed by this Court on certiorari review would amount to nothing more than an advisory opinion. Therefore, this Court lacks jurisdiction and this claim must be denied. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *see also Street v. New York*, 394 U.S. 576, 581-82 (1969) (same).

Even if this Court were to find basis for jurisdiction, Nelson’s claim has no merit. Nelson argues that the Eighth Amendment requires that he receive the same sentence as his codefendant, Keith Brennan. However, the Eighth Amendment does not include such a protection. In fact, the Eighth Amendment does not require relative culpability or proportionality review, even in capital cases. *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990) (noting that “proportionality review is not constitutionally required”); *Murray v. Giaratano*, 492 U.S. 1, 9 (1989) (declining to hold that the Eighth Amendment required appellate courts to perform proportionality review of death sentences); *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (holding that the Eighth Amendment does not require comparative proportionality review in death penalty cases).

It is the state of Florida, and not the federal constitution, which requires

proportionality review. *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014) (“our proportionality review flows from Florida’s capital punishment statute”, relying on *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973)). Florida *may* also require relative culpability review if there are multiple defendants. *Wright v. State*, 19 So. 3d 277, 305 (Fla. 2009) (“In cases where more than one defendant is involved, the Court performs an additional analysis of relative culpability guided by the principle that equally culpable codefendants should be treated alike in capital sentencing and receive equal punishment”). However, relative culpability review is not required where there is the legal impossibility of imposing a death sentence. *Jeffries v. State*, 222 So. 3d 538, 547 (Fla. 2017) (“However, a relative culpability analysis is not always conducted. For example, we have held that such a review cannot be performed if a codefendant is ineligible for the death penalty because of age or intellectual disability”).

The Florida Supreme Court has already conducted a proportionality analysis and determined that Nelson’s death sentence is not disproportionate. Nelson’s codefendant Keith Brennan was sentenced to death at the trial level; however, the death sentence was reversed on appeal because the Florida Supreme Court held that Brennan’s sentence of death violated the Florida Constitution’s prohibition against cruel and unusual punishment, based solely on the fact that he was sixteen

(16) at the time of the offense. *Brennan v. State*, 754 So. 2d at 5-6. As the Florida Supreme Court stated in Brennan’s direct appeal, “There is no doubt that the murder in this case is a deplorable crime and one for which the defendant should spend the rest of his life in prison. However, we cannot impose the death penalty on this defendant who was sixteen at the time of the crime, consistent with our case law and our Constitution.” *Id.* at 11. The Florida Supreme Court’s decision in *Brennan* was based on the Florida Constitution, and predated *Roper v. Simmons*, 543 U.S. 551 (2005); however, the *Brennan* opinion is consistent with the federal constitutional protections for juvenile homicide offenders outlined in *Roper*.

Nelson wants this Court to review his sentence based on a relative culpability comparison, which is a legal impossibility. The law specifically disallows codefendant Brennan from being executed for his crimes because he was sixteen (16) at the time of the charged offenses, and not due to any measure of culpability. In Nelson’s case, the Florida Supreme Court conducted a proportionality analysis on direct appeal and found Nelson’s sentence for his responsibility in the homicide was not a disproportionate sentence. *Nelson*, 748 So. 2d at 246. In describing Nelson’s role in the murder of Tommy Owens, the Florida Supreme Court stated that,

Nelson and Keith Brennan wanted to leave the city of Cape Coral. The

two devised a plan to murder Tommy Owens and steal his car. Nelson and Brennan knew that Owens kept a baseball bat in his car. On the evening of March 10, 1995, Owens was lured under false pretenses to a remote street. Nelson and Brennan were able to convince Owens to exit his car, whereupon Nelson hit Owens with the bat. After a number of blows, Owens eventually fell to the ground. Nelson and Brennan tied Owens' legs and arms. Owens pleaded for his life, stating that the two could take his car. After a brief discussion, Nelson and Brennan concluded that to avoid being caught, they should kill Owens. Brennan attempted to slice Owens' throat with a box cutter. Owens was not unconscious when the attacks began and he begged Nelson to hit him again with the bat so as to knock him unconscious before the stabbing continued. Nelson did as Owens requested and Brennan continued to attack Owens with the box cutter. Nelson and Brennan also continued to strike Owens a number of times with the bat. The two eventually dragged Owens' body to nearby bushes, where Owens later died.

Nelson v. State, 748 So. 2d 237, 239 (Fla. 1999). The Florida Supreme Court also rejected Nelson's relative culpability claim in postconviction proceedings.¹

Notably, in reaching our conclusion in *Farina*, the Court relied upon our decision with regard to Nelson's codefendant, Keith Brennan. *See id.* In *Brennan v. State*, 754 So. 2d 1 (Fla. 1999), this Court held that Brennan—although as equally culpable as Nelson—was ineligible for the death penalty as a matter of law because he was sixteen years old at the time of the homicide, for which a sentence of death constituted cruel and unusual punishment under the Florida Constitution. *See id.* at 11. In this case, the life sentence of Brennan as a matter of law does not constitute newly discovered evidence for Nelson because Brennan's ineligibility for the death penalty stemmed from his ineligibility *as a matter of law*—not from the circumstances that surrounded the homicide or Brennan's character and emotional maturity. Therefore, the trial court did not err when it denied Nelson's claim that the life sentence

¹ Although the Florida Supreme Court did not address the procedural bar, Respondent asserts that the claim raised by Petitioner is procedurally barred by the law of the case doctrine and *res judicata*.

of Brennan constituted newly discovered evidence.

Nelson v. State, 73 So. 3d 77, 90-91 (Fla. 2011).

Despite the legal impossibility of Brennan being sentenced to death for his role in the homicide of Tommy Owens, Nelson suggests that he should be ineligible-by-association. Nelson claims that the holding in *McCloud v. State*, 208 So. 3d 668 (Fla. 2016), supports a basis to reverse his death sentence and impose a life sentence in its place. However, Nelson's case is factually distinguishable from *McCloud* as Defendant McCloud was specifically found to be less culpable compared to his codefendants, who were not barred from capital sentencing due to age or intellectual disability. *McCloud v. State*, 208 So. 3d at 688 ("Rather, the record taken as a whole sufficiently demonstrates that McCloud was, in fact, less culpable than those who escaped the death penalty"). Additionally, the *McCloud* opinion notes (in footnote 5) that a defendant's death sentence will not be disturbed based on the relative culpability analysis where the death penalty is not a valid punishment option for the codefendant. The Florida Supreme Court's recent opinion, *Walton v. State*, 2018 WL 2251447 (Fla. May 17, 2018), reinforces the concept that "*McCloud* is inapposite because Walton's codefendants received lesser sentences due to purely legal reasons". Therefore, *McCloud* does not provide a basis of relief for Nelson.

In Nelson’s case, it was not disproportionate to sentence him to death because he was an adult when he committed the charged offenses, and Nelson was specifically determined to be at least equally, and not less, culpable than codefendant Brennan. *Nelson*, 73 So. 3d at 90 (“This Court supported its decision with the fact that the defendant and codefendant had comparable criminal records, were about the same age, had similar low IQs, and had equal culpability in the homicide”). Nevertheless, Nelson asserts that he was less culpable, and less deserving of the death penalty, than Brennan. (Petition, p. 15) However, the argument may be made that Nelson was more culpable. At Nelson’s trial, the medical examiner determined that Tommy Owens’ cause of death was blunt force trauma to the head, and since Nelson confessed it was he who took the bat and struck Owens with the fatal blow(s), he certainly cannot be seen as less culpable than Brennan. Moreover, it has already been determined that Brennan was legally less culpable than Nelson simply based on the class of offenders to which Brennan belongs. *See Roper; Brennan v. State*, 754 So. 2d at 6. Children are constitutionally different from adults as it pertains to sentencings; therefore, although Nelson and Brennan may be equally culpable under the facts of this case, they are not equally culpable in the eyes of the law.

The Florida Supreme Court’s proportionality analysis in Petitioner’s case is not contrary to any decision of this Court; rather, the decision is in accord with the

precedent of this Court. Furthermore, Petitioner cannot show that the Florida Supreme Court's opinion decided an important question of federal law in a manner that conflicts with a decision of this Court. *See* Sup. Ct. R. 10. Although the failure to meet any of these considerations is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 184 n.3 (1987). As no compelling reason for review has been offered under Rule 10, certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should DENY the petition for certiorari review of the decision of the Florida Supreme Court entered below.

PAMELA JO BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

/s/ Lisa Martin

LISA MARTIN
Assistant Attorney General
Florida Bar No. 72138
Counsel of Record
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
lisa.martin@myfloridalegal.com

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been submitted using the Electronic Filing System. I further certify that a copy has been sent electronically and by U.S. mail to: John Abatecola, Counsel for Mr. Nelson and Linda McDermott, Designated Counsel for Mr. Nelson, McClain & McDermott, P.A., 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928, **jabatecola@comcast.net** and **lindammcdermott@msn.com** on this 11th day of July, 2018. All parties required to be served have been served.

/s/ Lisa Martin

LISA MARTIN

COUNSEL FOR RESPONDENT