**No.**

*In the*
*Supreme Court of the United States*

JONATHAN HUEY LAWRENCE,
*Petitioner*,
v.

STATE OF FLORIDA,
*Respondent*.

**On Petition for a Writ of Certiorari to the Supreme Court of Florida**

# PETITION FOR A WRIT OF CERTIORARI

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**May 28, 2021**

**CAPITAL CASE**

## QUESTIONS PRESENTED

In the decision below, the Florida Supreme Court held that maintaining conformity with this Court's Eighth Amendment jurisprudence required eliminating Florida's practice of conducting proportionality review of death sentences. *Lawrence v. State*, 308 So. 3d 544, 548 (Fla. 2020). The questions presented are:

I. Whether eliminating proportionality review from Florida's capital sentencing scheme contravenes this Court's Eighth Amendment jurisprudence, including *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (upholding Florida's then-current capital sentencing statute) and *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (holding a state's capital sentencing scheme is not required to include comparative proportionality review to satisfy the Eighth Amendment, as long as the scheme adequately narrows the class of cases in which death sentence may be imposed).

II. Whether eliminating a comparative review of the basis for imposing death sentences leaves individual defendants in Florida susceptible to being treated differently from those similarly situated without a rational justification for or appellate review of the distinction, in violation of the right to equal protection under the law guaranteed by the Fourteenth Amendment to the Federal Constitution.

III. Whether eliminating proportionality review from Florida's capital sentencing scheme violates due process and the ex post facto prohibition of Article I, section 10 of the Federal Constitution.

## STATEMENT OF RELATED PROCEEDINGS

*Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), No. SC18-2061 (Fla. opinion and judgment rendered on October 9, 2020; order denying rehearing issued on December 31, 2020; mandate issued on January 19, 2021).

*Lawrence v. State*, 969 So. 2d 294 (Fla. 2007), No. SC06-352 and No. SC06-1152 (Fla. opinion and judgment rendered November 1, 2007; mandate issued on November 26, 2007).

*Lawrence v. State*, 846 So. 2d 440 (Fla. 2003), No. SC00-1827 (Fla. opinion and judgment rendered on March 20, 2003; mandate issued May 14, 2003, petition for certiorari denied October 14, 2003).

*State v. Lawrence*, No. 57 1998 CF 270 (Fla. 1st Cir. Ct. judgment entered on September 12, 2018).

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## OPINION BELOW

The opinion below is reported at *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), and a copy is attached to this Petition as Appendix A. The order of the Florida Supreme Court denying Petitioner's motion for rehearing, which was rendered on December 31, 2020, is attached to this Petition as Appendix B.

## JURISDICTION

The Florida Supreme Court issued its judgment affirming Petitioner's death sentence on October 29, 2020 and denied Petitioner's motion for rehearing on December 31, 2020. This Court has extended the time for filing petitions for certiorari to 150 days for petitions due on or after March 19, 2020. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, of the United States Constitution provides in relevant part that "No State shall … pass any … ex post facto Law…."

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## INTRODUCTION AND STATEMENT OF THE CASE

On March 24, 2000, Mr. Lawrence entered a plea of guilty, as a principal, of the first-degree murder of Jennifer Robinson. *See Lawrence v. State*, 846 So. 2d 440, 442 (Fla. 2003). The trial court accepted, and the State did not attempt to refute, Mr. Lawrence's assertion that his co-defendant, Jeremiah Rodgers, actually killed Ms. Robinson by shooting her. *Id.* n.1. Mr. Lawrence entered a guilty or no contest plea in two other cases in which Mr. Rodgers was a co-defendant; Mr. Rodgers was the alleged shooter in one of those cases as well. *Id.* at 444 n.3. Experts testified at Mr. Lawrence's first trial that he suffered from organic brain damage and mental illness, including schizophrenia. *Id.* at 445-46. Following a penalty phase trial, a jury recommended a sentence of death by a vote of eleven to one; the trial court imposed that penalty, and the Florida Supreme Court affirmed the conviction and sentence on direct appeal. *Id.* at 444, 456. The court was convinced Mr. Lawrence's ability to conform his conduct to the requirements of the law was impaired, but not that it was substantially impaired. *Id.* at 445-46. A petition for writ of certiorari was denied on October 14, 2003, in *Lawrence v. Florida*, 124 S. Ct. 394 (2003).

The Florida Supreme Court affirmed the denial of a post-conviction claim that Mr. Lawrence's plea was not voluntary because of Mr. Lawrence's mental illness. *See Lawrence v. State*, 969 So. 2d 294, 301 (Fla. 2007). The decision acknowledges Mr. Lawrence's Mr. Lawrence's petition for writ of habeas corpus in federal court was similarly denied, and the Eleventh Circuit Court of Appeals

affirmed the denial in 2012. *See Lawrence v. Secretary, Florida Dep't of Corrections*, 700 F. 3d 464 (11th Cir. 2012).

Subsequently, this Court found Florida's death penalty statute to be unconstitutional because the statute allowed the judge, rather than the jury, to make the determinations based upon the recommendations from the jury required for the imposition of the death penalty. *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme Court, on remand, held that a unanimous jury must make the findings necessary to impose a death sentence. *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016), *receded from by State v. Poole*, 297 So. 3d 487 (Fla. 2020). Following an Amended Successive Motion to Vacate Death Sentence, and Alternatively Motion to Correct Illegal Sentence, the parties stipulated Mr. Lawrence was entitled to resentencing pursuant to *Hurst v. State*.

Mr. Lawrence waived his right to a penalty phase jury, to present mitigation, and to challenge the State's evidence. The trial court found his waivers were knowing and voluntary following a hearing. The trial court then appointed special counsel for the purpose of assisting the court with mitigation. *See Lawrence v. State*, 308 So. 3d 544, 547 (Fla. 2020). The trial court resentenced Mr. Lawrence to death, finding the aggravating circumstances "greatly" outweighed the mitigating circumstances, "inclusive of the *significant mental mitigation*." *Id.* at 548 (emphasis supplied).

On appeal, the State of Florida argued that review of the proportionality of a death sentence, although expressly required by court rule, was precluded by the

conformity clause of article 1, section 17 of the Florida Constitution. *See Lawrence*, 308 So. 3d at 548. This argument had been rejected six years earlier in *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014), which held that Florida's comparative proportionality requirement was derived from Florida's capital punishment statute and grounded in 40 years of precedent. The *Lawrence* court receded from *Yacob* and "eliminate[d] comparative proportionality review" from the appellate review of death sentences. *Lawrence*, 308 So. 3d at 552.

## REASONS FOR GRANTING THE PETITION

### I. Eliminating Proportionality Review from Florida's Capital Sentencing Scheme Contravenes this Court's Eighth Amendment Jurisprudence.

#### A. This Court's Decisions Expressly Allow States to Include Proportionality Review as a Necessary Component of a Capital Sentencing Scheme.

Ever since its decision in *Furman v. Georgia*, 408 U.S. 238 (1972), this Court has affirmed that "channeling and limiting of the sentencer's discretion is imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 352 (1988). As the majority decision below notes, the Florida Supreme Court established comparative proportionality review in Florida's post-*Furman* sentencing scheme "to ensure that the statute would be implemented in a way that would avoid the constitutional concerns articulated in *Furman*." *Lawrence*, 308 So. 3d at 549 (citing *State v. Dixon*, 283 So. 2d 1 (Fla. 1973)). This Court noted favorably Florida's practice of reviewing the proportionality of death sentences in its decision upholding Florida's post-Furman capital sentencing scheme. *See Proffit v. Florida*, 428 U.S. 242, 251 (1976).

This Court held in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), that comparative proportionality analysis is not the only way to limit the sentencer's discretion in imposing the death penalty. The Florida Supreme Court relied on *Pulley* and the State's conformity clause in the decision below when overruling *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973), which had required comparative proportionality review since 1973. *See Lawrence*, 308 So. 3d at 548. The majority

below held that the state constitution's conformity clause limited the court's authority to review death sentences and that this Court's decision in *Pulley* foreclosed the Florida Supreme Court from recognizing a comparative proportionality requirement predicated on the Eighth Amendment. *Lawrence*, 308 So. 3d at 550-51. That holding misapplied *Pulley*, which expressly authorized proportionality review as part of a capital sentencing scheme. *See Pulley*, 465 U.S. at 42. The Florida Supreme Court's holding in this case, which receded from nearly 50 years of precedent, is not faithful to this Court's Eighth Amendment jurisprudence, including the *Pulley* decision.

### B. Eliminating Comparative Proportionality Review from Florida's Capital Sentencing Scheme Leaves the Scheme Lacking Checks on Arbitrary or Inconsistent Imposition of Death Sentences, Which Violates the Eighth Amendment.

The *Pulley* court's holding that comparative proportionality analysis is not the only way to satisfy the Eighth Amendment must be reconciled with the principle that a constitutional sentencing scheme has to include a meaningful basis for distinguishing the small number of cases in which the death penalty is appropriate from the much larger number of cases in which an offense is charged that could lead to a capital sentence.

In *Pulley*, this Court approved of a California statute that did not require the California Supreme Court to compare the defendant's sentence with sentences imposed in similar cases. 465 U.S. at 44. The statute at issue required the finding of at least one special circumstance before the death penalty could be considered,

limited the jury's sentencing discretion with a list of seven statutory factors, and required review by the California Supreme Court. *See id.* at 53. The Court held this was adequate to limit the death penalty to a small sub-class of capital-eligible cases and prevent the danger of arbitrary results. *Id.* The Court reviewed three cases in which it had upheld state statutes both with and without a mandate to review proportionality. *See id.* at 45-48 (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976)). In each case, the applicable statute limited the sentencer's discretion through bifurcated proceedings, the requirement of aggravating circumstances, and the consideration of mitigating circumstances; proportionality review was an additional safeguard, but not a constitutionally required one. *See id.* In discussing the Texas sentencing scheme, which lacked a statutory or judicially created requirement of comparative proportionality review, the Court nevertheless noted the "prompt judicial review of the jury's decision in a court with statewide jurisdiction." *Id.* at 48-49 (quoting *Jurek v. Texas*, 428 U.S. at 276).

The Court further noted that the Texas statute at issue effectively limited the sentencer's discretion by requiring the finding of one of five statutory aggravators to make a defendant eligible for a death sentence. *Id.* at 48 n.9. By narrowing its definition of capital murder, the Texas statute limited the death penalty to a "narrowly defined group of the most brutal crimes and aim[ed] at limiting its imposition to similar offenses under similar circumstances." *Id.* at 50 n.10 (quoting *Jurek*, 428 U.S. at 278-79).

In contrast, Florida's capital sentencing scheme makes a defendant eligible for a death sentence if any one of 16 statutory aggravators is found. § 941.141(6)(a)-(p) (2020). The Florida statute does not, on its face, meaningfully limit the number of persons who are subject to the death penalty or provide a meaningful basis for ensuring that death is imposed only for similar offenses occurring under similar circumstances. Florida's long-standing practice of comparative proportionality review does that. *See Lawrence*, 308 So. 3d at 544-55 (Labarga, J., dissenting); *see also Yacob*, 136 So. 3d at 546-47.

In another line of cases addressing the constitutionally required narrowing of the death penalty, but not involving the constitutionality of comparative proportionality, the Court has recognized that the sentencer's discretion to make findings regarding aggravating circumstances must be channeled and limited in a manner that avoids arbitrary sentencing. *See, e.g.*, *Godfrey v. Georgia*, 446 U.S. 420 (1980). In *Godfrey*, the defendant was convicted of shooting his estranged wife and mother-in-law, and of the aggravated assault of his daughter, following a heated argument. The aggravating circumstance at issue, under Georgia law, was that the capital offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 422 (quoting Ga. Code § 27–2534.1(b)(7) (1978)). The statutory language had previously been upheld as not unconstitutional on its face. *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153). Although the state conceded there was no allegation of torture or aggravated battery, the jury was instructed using the statutory language

above, and made findings beyond a reasonable doubt that the two killings were "outrageously or wantonly vile, horrible and inhuman." *Id.* at 426.

This Court found the language at issue did nothing to restrain the "arbitrary and capricious infliction of the death sentence," as "[a] person of ordinary sensibility could fairly characterize almost every murder in those terms. *Id.* at 428-29. The Court noted that the Georgia Supreme Court had previously affirmed two death sentences based on that statutory language alone: one case involved a victim who was beaten, burned, raped, and then strangled, and the other involved children who were sodomized and then strangled. *Id.* at 429-30. And, in other cases involving that language, the state high court had concluded the aggravating circumstances had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 431. However, in *Godfrey*, none of these circumstances were present. *Id.* at 432. Despite this, the Georgia Supreme Court held the verdict was "factually substantiated." *Id.*

This Court explained why the state court did not apply a "constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman":

> The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. …[A]s was said in Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393, it "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."
>
> That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.

*Godfrey*, 446 U.S. at 433. Inherent in the Court's observation about distinguishing a case where a death sentence is imposed is a comparative review of the aggravating circumstances in a particular case.

*Maynard*, decided four years after *Pulley*, involved a similar vagueness challenge to the "especially heinous, atrocious, or cruel" aggravator under Oklahoma law. In post-conviction proceedings the Court of Appeals for the Tenth Circuit held that language did not give the jury sufficient guidance to avoid the danger of arbitrary sentencing, and found the state court had not adopted any limiting construction of the phrase that would cure its vagueness. *See Maynard*, 486 U.S. at 359-60. This Court upheld the conclusion that the language was unconstitutionally vague:

> The Court of Appeals, with some care, reviewed the evolution in the interpretation of the "especially heinous, atrocious, or cruel" aggravating circumstance by the Oklahoma Court of Criminal Appeals up to and including its decision in this case. Its reading of the cases was that while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, that court had "refused to hold that any one of those factors must be present for a murder to satisfy this aggravating circumstance." 822 F. 2d, at 1491. Rather, the Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance. Ibid. We normally defer to courts of appeals in their interpretation of state law, and we see no reason not to accept the Court of Appeals' statements about state law in this case, especially since the State does not challenge this reading of the Oklahoma cases.

*Maynard*, 486 U.S. at 360-61 (emphasis in original).

The Court rejected the State of Oklahoma's argument that the death penalty could be affirmed in a specific case based on the factual circumstances of that case. *Id.* at 361. The Court explained the State's argument was a due process "notice" argument that "fail[ed] to recognize the rationale of our cases construing and applying the Eighth Amendment." *Id.* Under the Eighth Amendment, the issue was not what was proved at trial, but whether the challenged provision adequately informed juries of what was necessary or, alternatively, left both juries and appellate courts with "the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." *Maynard*, 486 U.S. at 362. The Court stated its analysis was controlled by *Godfrey*, which "plainly rejected the submission that a particular set of facts surrounding a murder, however, shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." *See Maynard*, 486 U.S. at 363.

From *Furman*, *Godfrey*, and *Maynard*, the principle can be derived that the presence of facts demonstrating aggravating circumstances is not enough, by itself, to warrant the imposition of the death penalty: "A capital sentencing scheme 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*, 446 U.S. at 427-28 (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) and *Furman v. Georgia*, 408 U.S. at 313). In a capital sentencing scheme where the available aggravating factors do not serve that purpose, some other check on arbitrary sentencing must be in place. The decision below leaves Florida without a necessary check on arbitrary

sentences resulting from prosecutorial discretion, race, geography, rejection of mitigating circumstances, or simple chance.

Given the breadth of the myriad statutory aggravators in Florida's death penalty statute, *see, e.g.*, *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992), it is impossible to say they "channel the sentencer's discretion by clear and objective standards" as required by, inter alia, *Godfrey*, 446 U.S. at 428.[1] Moreover, the sheer number of aggravating factors in Florida's scheme serve a broadening, not a narrowing, function, resulting in nearly all first-degree murder cases being death-eligible. *See generally* Stephen K. Harper, *The False Promise of* Proffitt, 67 U. Miami L. Rev. 413, 417-23 (2013) (noting the number of statutory aggravating factors in Florida has doubled since this Court's decision in *Proffitt*).

A meaningful narrowing of the group of defendants who may face execution must involve more than a mechanical verification of whether the State proved a particular aggravator. Without viewing the nature and proof of aggravating circumstances in an individual case within the context of the body of decisions in which death sentences have been upheld, there is no limit on the sentencer's discretion, and this does not comport with Eighth Amendment standards.

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[1] Consistent with the general principle of narrowing death-eligible offenses to a small, well defined group, an individual aggravating factor that is impermissibly vague on its face can survive Eighth Amendment scrutiny if the trial court, in sentencing, is guided by appropriately narrowing judicial constructions of the factor. *See Sochor v. Florida*, 504 U.S. 527, 536-37 (1992) (holding the facially overbroad "heinousness" factor under the then-current Florida capital sentencing statute did not violate the Eighth Amendment because it had consistently been limited in application by the Florida Supreme Court).

## II. Eliminating a Comparative Review of the Basis for Imposing Death Sentences Leaves Individual Defendants in Florida Susceptible to Being Treated Differently from Those Similarly Situated without a Rational Justification for or Appellate Review of the Distinction, in Violation of the Right to Equal Protection Under the Law Guaranteed by the Fourteenth Amendment to the Federal Constitution.

The Equal Protection clause guarantees that similarly situated persons are treated similarly under the law. *See, e.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Distinctions or classifications in the law must have some rational basis, *see id.* at 440, such as a "different or special hazard" posed by those who are treated more strictly, *see id.* at 449. Equal protection claims can be brought by a "class of one" when the claimant "allege[s] that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000). The Fourteenth Amendment guarantee of equal protection is negated when a capital sentencing scheme does not include some rational way of ensuring that an individual defendant is not sentenced to death when other, similarly situated defendants received a lesser penalty. *Cf. Engquist v. Oregon Dep't of Ag.*, 553 U.S. 591, 602 (2008) ("As we explained long ago, the Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.") (quoting *Hayes v. Missouri*, 120 U.S. 68, 71-72, 7 S.Ct. 350, 30 L.Ed. 578 (1887)). This Court has stated that what is significant in "class of

one" cases is "the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed." *Id.*

The proportionality review required under Florida law until the *Lawrence* decision furthered the goal of ensuring the death penalty would not be imposed when the circumstances of an individual defendant were either unlike those of other defendants against whom the death penalty had been imposed, or similar to those of other defendants whose lives had been spared. This review furthered the goal of reserving a death sentence for "only the most aggravated and unmitigated of most serious crimes" when Florida revised its death penalty laws after *Furman*. *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973), *superseded by statute on other grounds as stated in State v. Dene*, 533 So. 2d 265, 267 (Fla. 1988). The Florida Supreme Court described Florida's post-*Furman* statute as "a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges." *Id.* In the years following *Furman*, a substantial body of case law developed in which the Florida Supreme Court reversed death sentences based on its detailed comparative proportionality review of the aggravators and mitigators present in a given case. *See generally* Ken Driggs, *"The Most Aggravated and Least Mitigated Murders": Capital Proportionality Review in Florida*, 11 St. Thomas L. Rev. 207, 232-54 (1999)

(identifying common themes among cases in which proportionality relief was granted or denied).[2]

The Florida Supreme Court's holding that its previous proportionality review is prohibited by the state's conformity clause means there will be no meaningful appellate review of the decision to impose death in one case but not another. This means a death sentence in Florida will increasingly result from chance, bias, prosecutorial discretion, and geography[3] rather than from consistent application of the capital sentencing statute. In effect, each capital defendant will be a "class of one," with no way to demonstrate he has been treated differently from someone similarly situated without a rational basis for the distinction.

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[2] *See, e.g.*, *Sager v. State*, 699 So. 2d 619 (Fla. 1997) (vacating a death sentence on proportionality grounds, despite finding the "especially heinous, atrocious, or cruel" aggravator was present, where the defendant suffered from mental illness and had only recently been released from a mental health facility, and where evidence suggested his co-defendant was the leader in the charged offense).

[3] According to the Death Penalty Information Center, "[f]ewer than 2% of counties in the U.S. account for more than half of the nation's death-row population... [and f]ewer than 2% of U.S. counties also account for more than half of all executions carried out across the country since the Supreme Court upheld the constitutionality of capital punishment in 1976. *See* "The 2% Death Penalty: The Geographic Arbitrariness of Capital Punishment in the United States," available at deathpenaltyinfo.org/stories/the-clustering-of-the-death-penalty. The geographic disparities in seeking and applying the death penalty cannot be attributed to differences in population. *See* Fair Punishment Project, "Too Broken to Fix: Part 1/An In-depth Look at America's Outlier Death Penalty Counties," at 14, available at http://mediad.publicbroadcasting.net/p/wjct/files/201608/FPP-TooBroken.pdf ("Between 2010 and 2015, roughly one-quarter of Florida's death sentences came from Duval County, a county that holds only five percent of the state's population."). *See also* Driggs, *supra*, at 272-73 (describing geographic disparities in the application of the death penalty in Georgia and Texas).

## III. Eliminating Proportionality Review from Florida's Capital Sentencing Scheme Violates Due Process and the Ex Post Facto Prohibition of Article I, section 10 of the Federal Constitution.

Article I, § 10 of the United States Constitution prohibits ex post facto laws. The federal due process clause creates a similar limitation on judicial precedent: "retroactive application of precedent is governed by the due process clause, which requires that the retroactive application cannot result in an unforeseeable enlargement of [a] criminal statute." *Leftwich v. Florida Dept. of Corrections*, 148 So. 3d 79, 83 (Fla. 2014) (citing *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964)); *see also Marks v. United States*, 430 U.S. 188, 191-92 (1977) (recognizing the Due Process Clause of the Fifth Amendment limits judicial action in the manner the ex post facto clause limits the powers of the legislative branch).

The due process clause, like the ex post facto clause, protects individuals from unforeseeable changes in how the law is applied. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court held that South Carolina could not interpret its trespass statute in a way it had not previously been applied to uphold the petitioners' criminal convictions. The petitioners, participants in a sit-in at an Eckerd's Drug Store lunch counter, were arrested for a breach of the peace, and subsequently charged. *Id.* at 361-62. In affirming the convictions, the South Carolina Supreme Court construed the applicable statute to prohibit not only entering after being warned not to enter, but also remaining after being asked to leave. *See id.* at 362. In doing so, this Court held, the state court "deprived petitioners of rights guaranteed to them by the Due Process Clause." *Id.* The Court's reasoning focused on the

foreseeability of the ruling — "whether [the] state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him." *Id.* at 354.

The holding in *Bouie* rested in part on the vagueness doctrine and the due process violation that results from "a deprivation of the right of fair warning." *See* 378 US. 352-53 (citing Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 73-74 n.34 (1960)). But fair warning is only one of the concerns underlying both due process and the ex post facto doctrine; in a larger sense, they protect defendants from unpredictable legal rules that "inject[…] into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically…." Amsterdam, supra, at 90.

A central concern of the federal ex post facto clause was to restrain federal and state legislatures "from enacting arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 430 (1987). In addition, even when fair warning is not directly implicated, "the Clause also safeguards 'a fundamental fairness interest…in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.'" *Peugh v. United States*, 569 U.S. 530, 544 (2013) (quoting *Carmell v. Texas*, 529 U.S. 513, 533 (2000)). Restraining the power of the government to change the law retroactively was central to the creation of the ex post facto clause in the Bill of Rights. *See, e.g.*, *Kring v. Missouri*, 107 U.S. 221, 227 (1883) (overruled on other grounds by *Collins v. Youngblood*, 497 U.S. 37, 50 (1990)). The clause was

understood to prohibit "any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925). Due process protects against judicial changes in the law that accomplish the same result.

In *Rogers v. Tennessee*, 532 U.S. 451 (2001), where the petitioner argued he had been denied due process of law when a Tennessee court refused to give him the benefit of the common-law "year and a day" rule precluding prosecution for murder if a death occurred beyond that period, the Court observed that "limitations on ex post facto judicial decisionmaking are inherent in the notion of due process." *Id.* at 456. Citing *Bouie*, the court stated due process limits retroactive application of judicial decisions when they are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." *Id.* at 461 (citing *Bouie*, 378 U.S. at 354). The Court reasoned this limitation gives courts the flexibility they need to develop and apply the common law; in addition, it "adequately respects the due process concern with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law." *Id.* at 462. The Court then engaged in a thorough review of the history of the "year and a day" rule, finding it was "widely viewed as an outdated relic of the common law," *id.*, and noting that it had been

abolished in the vast majority of jurisdictions, *id.* at 463. Because the rule was obsolete and little-used, abrogating it did not violate due process. *Id.*

Proportionality review is neither obsolete nor little-used. Proportionality review, as noted in the dissenting opinion below, is conducted in a majority of jurisdictions maintaining the death penalty, typically but not always pursuant to a statutory mandate. *Lawrence*, 308 So. 3d at 556-57 (Labarga, J., dissenting).

Until this case, the Florida Supreme Court had repeatedly upheld the requirement of proportionality review. *See, e.g.*, *Yacob*, 136 So. 3d at 546-49. Moreover, until its decision in this case, the Florida Supreme Court conducted a proportionality review in connection with every capital appeal. This review has resulted in the vacating of numerous death sentences since the death penalty was reinstated in Florida. The most recent example of this was in 2017, when the court vacated a death sentence in *Wood v. State*, 209 So. 3d 1217 (Fla. 2017). In that case, after striking two of the three aggravating factors the trial court had relied on to impose a death sentence, the court reviewed the totality of the remaining aggravating and mitigating circumstances and concluded the death penalty was disproportionate. *Id.* at 1235. The court also noted the defendant's level of culpability relative to a co-defendant whose DNA was found on the murder weapon and who, according to evidence adduced at trial, likely fired the fatal shot. *Id.* at 1229, 1235-36; *see also McCloud v. State*, 208 So. 3d 668, 688-89 (Fla. 2016) (vacating a death sentence where the defendant was less culpable than a codefendant who received a life sentence in a plea agreement); *Phillips v. State*, 207

So. 3d 212, 221-22 (Fla. 2016) (vacating the death sentence of a defendant who was 18 years old at the time of the capital offenses and whose subaverage intelligence made him especially susceptible to the influence of others); *Scott v. State*, 66 So. 3d 925, 935-37 (Fla. 2011) (vacating a death sentence where the capital offense did not appear planned and nine non-statutory mitigating factors were present).

Discarding proportionality review is an "unjustified and unpredictable" break with decades of precedent in this state. The holding in *Lawrence* is a departure from established law of a magnitude that violates due process and the prohibition against ex post facto laws.

## CONCLUSION

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

Respectfully submitted,

JESSICA J. YEARY
Public Defender

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