CAPITAL CASE

No. 20-8341

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 FLORIDA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the Florida Supreme Court abolishing proportionality review in capital cases, based on the state constitution, violates the Eighth Amendment or *Pulley v. Harris*, 465 U.S. 37 (1984).

II. Whether the Florida Supreme Court abolishing proportionality review in capital cases violates the Equal Protection Clause.

III. Whether the Florida Supreme Court abolishing proportionality review in capital cases violates due process or *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Florida Supreme Court's opinion is reported at *Lawrence v. State*, 308 So.3d 544 (Fla. 2020) (SC18-2061).

JURISDICTION

On October 29, 2020, the Florida Supreme Court affirmed the death sentence following a resentencing. On November 13, 2020, Lawrence filed a motion for rehearing. The State filed a response to the rehearing. On December 31, 2020, the Florida Supreme Court denied the rehearing. On May 27, 2021, Lawrence filed a

petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d).[1] Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. V.

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

U.S. Const. amend. XIV, § 1.

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[1] This Court extended the deadline to timely file a petition for writ of certiorari from 90 days to 150 days due to COVID-19. *See* Order of March 19, 2020.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petition seeks review of a decision from the Florida Supreme Court affirming a death sentence following a resentencing.

Facts of the murders

On March 29, 1998, approximately six weeks before the capital murder, Lawrence and co-perpetrator Rodgers were driving around looking to find somebody to shoot and kill. *Lawrence v. State*, 846 So.2d 440, 443 n.3 (Fla. 2003). Lawrence had illegally purchased a Lorcin .380 handgun earlier. After Lawrence pulled the truck off to a secluded area near the Smitherman's property, Rodgers got out with the Lorcin handgun. *Id.* at n.3. The elderly victim, Mr. Leighton Smitherman, was sitting in his living room watching a movie with his wife and adult daughter. Rodgers shot Mr. Smitherman in the back through a window. Rodgers returned to the truck and Lawrence drove away. A bullet casing from the Lorcin .380 handgun was found outside the Smitherman residence. Rodgers later used the same Lorcin .380 handgun to shoot the teenage victim in the capital case. *Id.*; *see also Lawrence v. State*, 969 So.2d 294, 298 n.1 (Fla. 2007) (describing the prior attempted murder where Rodgers shot "an elderly victim who was quietly sitting in his living room watching television with his family" in the back).

On April 9, 1998, approximately four weeks before the capital murder, Lawrence, the co-perpetrator Rodgers, and Lawrence's cousin, Justin Livingston, were riding around in Lawrence's truck smoking marijuana. *Lawrence*, 846 So.2d at 443 n.3. After arriving at a remote location, all three exited the truck. Both Lawrence and Rodgers surreptitiously retrieved knives from the toolbox of the truck. Rodgers first stabbed the victim twice in the chest area and then attempted to strangle him. While his cousin was laying facedown, wounded and pleading for mercy, Lawrence stabbed him

in the back multiple times killing him. *Id.*; *see also Lawrence*, 969 So.2d at 298 n.1 (describing the prior murder in which Lawrence and Rodgers "murdered Lawrence's cousin, Justin Livingston, by stabbing him repeatedly and attempting to strangle him"). The murder of the cousin was a federal prosecution because it occurred on Spencer Navy Field. The prior state attempted murder conviction and the prior federal murder conviction were used to establish the prior violent felony aggravating factor in the capital case.

On May 7, 1998, Lawrence and co-perpetrator Rodgers murdered a teenage girl, Jennifer Robinson, following a detailed written plan which included a plan to dismember her. *Lawrence*, 969 So.2d at 442-43; *Lawrence v. State*, 308 So.3d 544, 546 (Fla. 2020) (describing the facts of the capital murder). Rodgers shot the 18-year-old victim in the back of the head. *Lawrence*, 969 So.2d at 442. Lawrence cut off her calf muscle to take as a trophy and tissue consistent with human tissue was recovered from Lawrence's freezer. Lawrence confessed and led detectives to the victim's body. *Id.* at 443.

On March 24, 2000, Lawrence entered a guilty plea to first-degree murder; conspiracy to commit first-degree murder; giving alcoholic beverages to a person under twenty-one; and abuse of a human corpse. *Lawrence*, 846 So.2d at 442; *Lawrence*, 308 So.3d at 546.

In 2003, the Florida Supreme Court affirmed the convictions and death sentence. *Lawrence v. State*, 846 So.2d 440 (Fla. 2003). The Florida Supreme Court concluded that Lawrence's death sentence was proportional. *Id.* at 452-56.

Prior proceedings

Many years of litigation followed, including state postconviction and federal habeas review. *Lawrence v. State*, 969 So.2d 294 (Fla. 2007); *Lawrence v. McNeil*, 2010 WL

2890576 (N.D. Fla. July 21, 2010); *Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464 (11th Cir. 2012).

In 2017, Lawrence, represented by state registry counsel, filed a successive motion for postconviction relief in the state trial court raising three claims based on *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). On March 27, 2017, the state trial court granted the successive postconviction motion and ordered a new penalty phase based on *Hurst v. State*.

In 2018, the state trial court conducted the resentencing. Lawrence waived a penalty phase jury and the presentation of mitigation. So, the second penalty phase was a bench resentencing. The resentencing judge entered a written sentencing order sentencing Lawrence to death finding two aggravating factors: 1) prior violent felony aggravator based on a federal murder conviction for the murder of Justin Livingston and based on a state attempted murder conviction for the attempted murder of Leighton Smitherman and 2) the murder was committed in a cold, calculated and premediated manner (CCP), both of which it gave great weight.

Direct appeal of resentencing

On direct appeal from the resentencing, the Florida Supreme Court affirmed the death sentence without conducting any proportionality review. *Lawrence v. State*, 308 So.3d 544, 552 (Fla. 2020). The Florida Supreme Court receded from its prior precedent requiring proportionality review based on the state constitution. *Id.* at 548 (citing Art. I, § 17, Fla. Const.).

On May 27, 2021, Lawrence, represented by the Public Defender of the Second Judicial Circuit of Florida, filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE PETITION

ISSUE I

WHETHER THE FLORIDA SUPREME COURT ABOLISHING PROPORTIONALITY REVIEW IN CAPITAL CASES, BASED ON THE STATE CONSTITUTION, VIOLATES THE EIGHTH AMENDMENT OR *PULLEY V. HARRIS*, 465 U.S. 37 (1984).

Petitioner Lawrence asserts that the Florida Supreme Court's decision in this case abolishing proportionality review in capital cases, based on the state constitution, violates the Eighth Amendment. Pet. at 5. There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case holding proportionality review is prohibited by the state constitution. This Court in *Pulley v. Harris*, 465 U.S. 37 (1984), held that proportionality review of capital cases was not constitutionally required. The Florida Supreme Court's decision in this case explicitly and repeatedly relied on this Court's decision in *Pulley v. Harris*. The Eighth Amendment does not require proportionality review, regardless of the number of statutory aggravating factors in Florida's death penalty statute. This Court should deny review of this claim.

The Florida Supreme Court's decision

On appeal from the *Hurst* resentencing, Lawrence argued that his death sentence was disproportionate compared to other Florida capital cases. The Florida Supreme Court declined to conduct proportionality review and affirmed his sentence of death. *Lawrence*, 308 So.3d at 552. The Florida Supreme Court held that proportionality review was prohibited by the state constitution. *Id.* at 548-52. The Florida Supreme Court noted that Florida's constitution has a conformity clause requiring Florida courts to interpret the state prohibition against 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.). This state constitutional

provision meant the Florida Supreme 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. The Florida Supreme Court explicitly and repeatedly relied on this Court's decision in *Pulley v. Harris*. *Id.* at 548, 550-51.

No conflict with this Court's Eighth Amendment jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's Eighth Amendment jurisprudence. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). This Court in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), held that proportionality review was not required by the Eighth Amendment. Harris was convicted of a capital crime in a California court and was sentenced to death. *Id.* at 38. In his appeals to the California Supreme Court and his federal habeas petition, Harris 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.

This Court first explained the difference between its traditional proportionality analysis, which compared the sentence to the crime, and the type of proportionality review 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. Harris 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 this Court rejected his reading of both cases. *Harris*, 465 U.S. at 44-50. The *Harris* Court discussed numerous other capital cases noted the

emphasis on those cases was on "the constitutionally necessary narrowing function of statutory aggravating circumstances." *Id.* at 50. The *Harris* 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.* This 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 *Harris* 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, 187 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976). *Harris*, 465 U.S. at 51.

This Court noted that proportionality review in capital cases was required by "numerous state statutes." *Harris*, 465 U.S. at 43 & n.7. This 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 perform proportionality review. *Id.* at 44. In a footnote, the *Harris* majority discussed the Florida Supreme Court's proportionality review. *Id.* at 46 n.8. This 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).

There is no conflict between this Court's decision in *Pulley v. Harris* and the Florida Supreme Court's decision in this case. Indeed, the Florida Supreme Court repeatedly relied on *Pulley v. Harris* in its opinion in this case. *Lawrence*, 308 So.3d at 548, 550, 551.

Lawrence relies heavily upon *Maynard v. Cartwright*, 486 U.S. 356 (1988). Pet. at 10. But *Maynard* was a due process vagueness challenge to Oklahoma's heinous, atrocious, and cruel aggravating factor (HAC), not an Eighth Amendment proportionality review case. *Maynard* certainly did not overrule *Pulley v. Harris*. Indeed, the *Maynard* Court did not even cite *Pulley v. Harris*.

Furthermore, while Lawrence insists that *Furman* and *Maynard* establish the principle that aggravating factors are "not enough, by itself, to warrant imposition of the death penalty," there is no such principle. Pet. at 11. In *McKinney v. Arizona*, 140 S.Ct. 702 (2020), this Court reaffirmed *Clemons v. Mississippi*, 494 U.S. 738 (1990). McKinney argued that under *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 577 U.S. 92 (2016), the jury was required to weigh the aggravation against the mitigation. The *McKinney* Court rejected that argument explaining that the Sixth Amendment only requires that the jury in a capital case find the one aggravator that makes the defendant eligible for the death penalty, not that the jury perform the weighing. *Id.* at 707. This Court stated that "a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found." *Id.* at 705-06 (citing *Tuilaepa v. California*, 512 U.S. 967 (1994), *Zant v. Stephens*, 462 U.S. 862 (1983), and *Gregg v. Georgia*, 428 U.S. 153 (1976)). So, under the reasoning of *McKinney*, an aggravating factor, by itself, is enough to warrant a death sentence.

There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with other federal or state appellate courts

There is no 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. Dep't 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 ("FDPA"), which does not provide for proportionality review either. 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 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).

Furthermore, the federal circuit courts recognize that proportionality review is not constitutionally required and do not conduct any such review in § 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,

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[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. Dep't 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).

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 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). 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*. There is no conflict between the Florida Supreme Court's decision abolishing proportionality review and that of any federal circuit court of appeals or that of any state court of last resort. Because there is no conflict among the lower appellate courts, review should be denied.This Court should deny review of this claim.[3]

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[3] There is a threshold issue in this case that applies to the entire petition. As the Florida Supreme Court noted, before the resentencing, Lawrence explained to the trial court that he did not want a *Hurst* resentencing and that he had been trying for years to get his attorneys to drop all appeals

Proportionality review in capital cases

Lawrence is not actually asserting in his petition that this Court should recede from *Pulley v. Harris*. Rather, his assertion is that when a state has a "myriad" of aggravating factors in its death penalty statute, those particular states are required to have proportionality review as an additional safeguard against arbitrariness. Pet. at 11-12. He claims that the Eighth Amendment requires "some other check" on arbitrariness, such as proportionality review, in those states that fall into the category of having "too many" aggravators including Florida.

But this Court has explained that 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.

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but his attorneys refused to do so. *Lawrence*, 308 So.3d at 547 (reproducing Lawrence's handwritten letter to the trial court). The Florida Supreme Court has a standard policy requiring a direct appeal in all capital cases regardless of the defendant's wishes and, based on that policy, there was a mandatory direct appeal of the resentencing in this case. *Robertson v. State*, 143 So.3d 907 (Fla. 2014); *id.* at 911 (Pariente, J., concurring); *see also Robertson v. State*, 187 So.3d 1207, 1209 & 1218 (Fla. 2016) (noting the defendant wished to forgo a direct appeal but conducting full appellate review regardless of his wishes, including proportionality review of the death sentence). But this Court has held that the decision to forgo an appeal is personal to the defendant. *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018) (explaining that some decisions are reserved for the client including the right to forgo an appeal citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). Indeed, this Court has stated that, even if the Eighth Amendment required proportionality review, it would only be required if the defendant requested such review. *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984) (stating that the question in the case was whether the Eighth Amendment requires "a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases *if requested to do so by the prisoner*") (emphasis added); *id.* at 50-51 (stating that there was no basis in this Court's cases for holding that proportionality review was required in every case in which the death penalty is imposed and "*the defendant requests it*") (emphasis added). This Court should not grant a writ against a petitioner's personal wishes.

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). Florida, by caselaw, 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); Laws of Fla., ch. 2017-1, § 1, eff. March 13, 2017. Under the new death penalty statute, amended by the Florida Legislature in the wake of *Hurst*, a Florida capital jury 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).[4]

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[4] The 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

But 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 is binding on the trial court but the jury's findings regarding mitigation is 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. Additionally, 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. § 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

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FDPA allow a limitless number of aggravators and certainly far more than Florida's 16 statutory aggravators. Under Lawrence's reasoning, the FDPA would also be required to have proportionality review to comply with the Eighth Amendment.

the defendant's favor. It is hard to see how such a statute could possibly violate the Eighth Amendment, regardless of how the Eighth Amendment is interpreted.

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 of this issue.

ISSUE II

WHETHER THE FLORIDA SUPREME COURT ABOLISHING PROPORTIONALITY REVIEW IN CAPITAL CASES VIOLATES THE EQUAL PROTECTION CLAUSE.

Petitioner Lawrence asserts that the Equal Protection Clause mandates proportionality review in capital cases. Pet. at 20. Lawrence, however, did not timely raise the equal protection claim in the Florida Supreme Court. Additionally, there is no conflict between this Court's equal protection jurisprudence and the Florida Supreme Court's decision in this case. Nor is there any conflict with any federal or state appellate court. Lawrence cannot establish an equal protection violation because the person most similarly situated to him is his co-perpetrator, Rodgers, who also received a death sentence. Lawrence is not being treated differently. The Florida Supreme Court abolishing proportionality review does not violate equal protection.

Issue was not properly raised below

This Court does not grant review of questions raised for the first time in this Court. This Court refuses to entertain issues that were not properly presented to the state supreme court. *Adams v. Robertson*, 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"). This 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"); *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); *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).

The issue of equal protection and proportionality review was not properly raised below. Lawrence did not raise a claim that the Equal Protection Clause requires proportionality review in capital cases in his initial brief to the Florida Supreme Court. Nor did he make such an argument in the reply brief, even though the State had advocated that the Florida Supreme Court abolish proportionality review in its answer brief. Instead, the equal protection challenge to the death sentence was raised for the first time in the motion for rehearing. Rehearing at 16. But parties may not raise a new issue for the first time in a motion for rehearing in Florida's appellate courts. Fla. R. App. P. 9.330(a)(2)(A) (providing that a motion for rehearing "shall not present issues not previously raised"); *Cleveland v. State*, 887 So.2d 362, 364 (Fla. 5th DCA 2004) (observing that it is a "rather fundamental principal of appellate practice and procedure that matters not argued in the briefs may not be raised for the first time on a motion for rehearing"). The Florida Supreme Court, like most appellate courts, does not consider issues that were not raised until rehearing. *Cook v. State*, 792 So.2d 1197, 1203 (Fla. 2001) (refusing to consider an issue raised for the first time in a motion for rehearing citing *Preston v. State*, 528 So.2d 896 (Fla. 1988)).

The equal protection claim was not presented to the Florida Supreme Court in due time, as required by *Adams*. And, because the issue was not properly raised, the Florida Supreme Court did not address the issue of whether equal protection requires proportionality review in capital cases in its opinion.

No conflict with this Court's equal protection jurisprudence

There is no conflict between the this Court's equal protection jurisprudence and the Florida Supreme Court's decision in this case. Sup. Ct. R. 10(c). This is not a valid equal protection claim. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (noting that class-of-one equal protection claim is cognizable where an individual alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment). There is no conflict with this Court's views.

No conflict with other federal or state appellate courts

There also is no conflict with any federal appellate court or state court of last resort. Sup. Ct. R. 10(b); *Braxton*, 500 U.S. at 347; *Rockford Life Ins. Co.*, 482 U.S. at 184 n.3. The federal appellate court have rejected arguments that the Equal Protection Clause requires proportionality review. *Sweet v. Delo*, 125 F.3d 1144, 1159 (8th Cir. 1997) (rejecting due process and equal protection challenges to proportionality review citing *Foster v. Delo*, 39 F.3d 873, 882 (8th Cir. 1994) (en banc), and *Murray v. Delo*, 34 F.3d 1367, 1377 (8th Cir. 1994)); *see also Wheeler v. Simpson*, 852 F.3d 509, 520-21 (6th Cir. 2017) (rejecting a due process challenge to proportionality review citing *Bowling v. Parker*, 344 F.3d 487 (6th Cir. 2003)). The petition does not cite any case from any federal circuit court or any state court of last resort holding that the Equal Protection Clause requires proportionality review. There is no conflict among the lower appellate courts.

Equal protection and proportionality review

Lawrence cannot meet the first step of any equal protection analysis which is to establish that he is being treated differently. When an individual is being singled out

by the government, the Equal Protection Clause requires a rational basis for the difference in treatment. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 602 (2008). But Lawrence was not singled out. Equal protection requires that Lawrence show that he was treated differently from other similarly situated capital defendants. And to be considered similarly situated, he and his co-conspirators must be identical in all relevant and material respects. *United States v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008). The most similarly situated capital defendant to Lawrence on Florida's death row is the co-perpetrator, Rodgers. But Rodgers was also sentenced to death. *Lawrence*, 308 So.3d at 546 (detailing the facts of murder and noting that codefendant Rodgers "was also convicted of first-degree murder and sentenced to death"). The Florida Supreme Court, as part of its proportionality review in Rodgers' case, noted that the most similar case was Lawrence's case. *Rodgers v. State*, 3 So.3d 1127, 1134 (Fla. 2009). Both Lawrence and Rodgers received death sentences. There is no possible equal protection violation on such facts.

Regarding Florida's death penalty statute, the safeguards in the statute are more than 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). The State again notes that Florida has jury sentencing plus judge sentencing. There is a perfectly rational basis in Florida's death penalty statute for determining which defendants warrant the death sentences and which defendants do not. Florida's death penalty statute, which does not require proportionality review, does not violate the Equal Protection Clause.

Because the petition presents an issue that was not properly presented to the Florida Supreme Court, which does not involve any conflict among the courts, and is meritless, review should be denied.

ISSUE III

WHETHER THE FLORIDA SUPREME COURT ABOLISHING PROPORTIONALITY REVIEW IN CAPITAL CASES VIOLATES DUE PROCESS OR *BOUIE V. CITY OF COLUMBIA*, 378 U.S. 347 (1964).

Petitioner Lawrence asserts the Florida Supreme Court receding from its prior precedent violates the federal due process clause citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Pet. at 16. In this case, the Florida Supreme Court receded from its prior decision in *Yacob v. State*, 136 So.3d 539, 546-49 (Fla. 2014), which required proportionality review. But the *Bouie* challenge is not outcome determinative of the sentence because Lawrence's death sentence would have been found to be proportional if the Florida Supreme Court had performed its traditional proportionality review in the second appeal, just as it had done in the first appeal. There is no conflict between this Court's due process jurisprudence or any conflict with the lower appellate courts. A state court receding from its prior precedent and joining this Court's view of a matter cannot be said to be unexpected or indefensible, as required to establish a *Bouie* violation. It is hardly indefensible for a state supreme court to follow this Court's precedent or the state's constitution. Additionally, *Bouie* claims are limited to substantive changes in the law that result in a lack of fair warning but the change in the law at issue here involves a procedural change regarding appellate review of death sentences. Lawrence did not lack notice. The Florida Supreme Court receding from *Yacob* does not violate *Bouie*. Review should be denied.

The Florida Supreme Court's decision

The Florida Supreme Court receded from its prior decision in *Yacob v. State*, 136 So.3d 539, 546-49 (Fla. 2014), which required proportionality review. *Lawrence*, 308 So.3d at 552 (stating: "we recede from *Yacob*'s requirement to review death sentences for comparative proportionality and thus eliminate comparative proportionality review

from the scope of our appellate review set forth in rule 9.142(a)(5)"). The Florida Supreme Court explained that its prior decision in *Yacob* rested on three pillars: Florida's death penalty statute and two provisions of the state constitution. *Id.* at 548-49 (citing § 921.141, Fla. Stat.; the due process clause of the state constitution, Art. I, § 9, Fla. Const.; and the exclusive jurisdiction over death appeals provision of the state constitution, Art. V, § 3(b)(1), Fla. Const.). The *Lawrence* Court, however, concluded that none of those three sources of law required proportionality review. *Id.* at 549. The *Lawrence* Court noted that proportionality review was "not referenced anywhere" in the text of Florida's death penalty statute. *Id.* The *Lawrence* Court also noted that "neither provision" of the state constitution cited by the *Yacob* Court imposed any proportionality review requirement. *Id.* The Florida Supreme Court then observed that courts "cannot judicially rewrite our state statutes or constitution to require a comparative proportionality review that their text does not." *Id.* at 550.

The Florida Supreme Court relied mainly on the state constitution's conformity clause. *Lawrence*, 308 So.3d at 548 (stating our precedent requiring proportionality review is erroneous and "must yield to our constitution").

The Florida Supreme Court also explained why *stare decisis* did not protect *Yacob*, focusing on the defendant's lack of reliance interests on the prior decision. *Lawrence*, 308 So.3d at 550-52. The Florida Supreme Court observed that reliance interests are lowest in cases involving procedural and evidentiary rules. *Id.* at 551 (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). The *Lawrence* Court explained that the reliance interests of capital defendants on proportionality review "are low to nonexistent, as defendants do not alter their behavior in expectation of such review." *Id.* The Florida Supreme Court then receded from *Yacob*. *Id.* at 552.

Not outcome determinative

This Court does not grant review of purely theoretical or hypothetical questions that, in the end, will not effect the ultimate judgment. This Court's power is to "correct wrong judgments, not to revise opinions" and if the same judgment would be rendered by the state court after this Court corrected its views, then this Court's opinion would be tantamount to an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). The question before an appellate court is whether the judgment correct, not whether the particular reason given for the judgment were correct. *McClung v. Silliman*, 6 Wheat. 598, 603, 5 L.Ed. 340 (1821).

Lawrence's *Bouie* challenge is not outcome determinative of his sentence because the Florida Supreme Court simply would have concluded that Lawrence's death sentence was proportional again, if the Florida Supreme Court had performed its traditional proportionality review following the *Hurst* resentencing. In the direct appeal from the first sentencing, the Florida Supreme Court had concluded that Lawrence's death sentence was proportional. *Lawrence*, 846 So.2d at 453-55. The Florida Supreme Court had previously concluded that Lawrence's death sentence was proportional based mainly on the "two extremely serious aggravating circumstances." *Id.* at 455. The trial court found the same two "extremely serious" aggravators at the *Hurst* resentencing. *Lawrence*, 308 So.3d at 547 n.2. When the aggravation and mitigation is the same at the second penalty as that presented at the first penalty phase, the Florida Supreme Court will find the death sentence proportional again. *Cf. Doty v. State*, 313 So.3d 573, 578 (Fla. 2020) (explaining that because the aggravation and mitigation presented at the second sentencing proceeding was identical to the aggravation and mitigation presented at the first sentencing proceeding, "we see no reason to depart from our previous proportionality analysis" and affirming the death sentence as proportional); *Hojan v. State*, 307 So.3d 618, 625 & n.8 (Fla. 2020)

(refusing to perform a proportionality review after a *Hurst* resentencing citing *Lawrence* but noting, in a footnote, that the Florida Supreme Court had previously held the defendant's death sentence was proportional in the first appeal). And the *Lawrence* Court itself noted that "substantially the same evidence" regarding aggravation and mitigation was presented at the resentencing. *Lawrence*, 308 So.3d at 545. The Florida Supreme Court would have come to the same conclusion regarding proportionality in the second appeal based on the same facts and "substantially the same" aggravation and mitigation as it had done in the first appeal.

Furthermore, the Florida Supreme Court had also previously found the co-conspirator's death sentence proportional as well. *Lawrence*, 308 So.3d at 546 (noting that codefendant Rodgers "was also convicted of first-degree murder and sentenced to death"); *Rodgers*, 3 So.3d at 1133-35 (concluding that Rodgers' death sentence was proportional). Lawrence and Rodgers are serial killers who murder for the "sheer excitement" of it. *Lawrence*, 846 So.2d at 453; *Rodgers*, 3 So.3d at 1134 (noting as part of the proportionality review that Rodgers and Lawrence "coldly decided to murder Jennifer Robinson solely for the depravity of the act"). So, the Florida Supreme Court would have held Lawrence's death sentence was proportional again, if it had performed a second proportionality review. Under the old law of *Yacob*, which required proportionality review, Lawrence's attack on his death sentence would have been denied.

Under either the old law of *Yacob* or the new law of *Lawrence*, his death sentence would have been affirmed. Regardless of the change in the law, Lawrence's sentence would remain the same. Lawrence has not been injured in any manner from the Florida Supreme Court receding from *Yacob*. A petitioner may not raise a *Bouie* challenge to a change in law that does not affect the outcome of their case or sentence.

No conflict with this Court's due process jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's due process jurisprudence. Sup. Ct. R. 10(c). The Florida Supreme Court receding from *Yacob* does not violate *Bouie v. City of Columbia*, 378 U.S. 347 (1964), or *Rogers v. Tennessee*, 532 U.S. 451 (2001). In *Rogers*, this Court held that the Tennessee Supreme Court's abrogation of the year-and-a-day common law murder rule was not unexpected or indefensible and therefore, did not violate due process. The *Rogers* Court clarified that *Bouie* was premised on the due process principle of fair warning. *Rogers*, 532 U.S. at 459. And, in *Metrish v. Lancaster*, 569 U.S. 351, 368 (2013), this Court rejected a *Bouie* claim where the decision was a reasonable interpretation of the language of the statute. Reasonable readings of the text of a statute are not unexpected or indefensible. The petition fundamentally misunderstands the import of this Court's decisions in *Bouie, Rogers,* and *Metrish.*

The Florida Supreme Court's decision in *Lawrence* aligned Florida law with this Court's decisions in *Pulley v. Harris*. Obviously, a state supreme court's decision that adopts this Court's view of what the Eighth Amendment requires cannot be classified as "indefensible," as required to establish a *Bouie* violation. *Rogers*, 532 U.S. at 461 (quoting *Bouie*, 378 U.S. at 354). It is an odd claim, to say the least, to assert that a state supreme court receding from its prior precedent to join this Court's view violates due process but this Court's original holding does not. A state supreme court agreeing with this Court cannot violate *Bouie*.

As in *Metrish*, the Florida Supreme Court's plain reading of Florida's death penalty statute was not "unexpected or indefensible." The Florida Supreme Court observed that "proportionality review is not referenced anywhere in the text" of Florida's death penalty statute. *Lawrence*, 308 So.3d at 549 (citing § 921.141, Fla. Stat. (2019)). The *Lawrence* Court's reading of the text is not only a plain-meaning reading of the statute,

it is the only natural reading of that statute. There is no debate that Florida's statute is, in fact, silent regarding proportionality review.[5]

And it is certainly defensible for a state supreme court to follow its state constitution. The Florida Supreme Court in *Lawrence* merely followed the state constitution's Eighth Amendment conformity clause. *Lawrence*, 308 So.3d at 545 (citing Art. I, § 17, Fla. Const.). The Florida Supreme Court read Florida constitution's conformity clause as forbidding proportionality review, in the absence of a state statute specifically providing for such review. *Lawrence*, 308 So.3d at 548. The Florida Supreme Court's reading of the conformity clause was a perfectly natural reading of that provision as well. The *Lawrence* Court's reading of the state constitution's conformity clause cannot be siad to be unexpected because such clauses are specifically designed to force state courts to follow this Court's precedent. There was no *Bouie* violation.

Nor was the decision in *Lawrence* unexpected. The *Yacob* majority was comprised of only four of the seven justices of the Florida Supreme Court. *Yacob*, 136 So.3d at 552 (Lewis, J., concurring in result only without opinion). There was an extensive dissent in *Yacob* by two Justices. *Yacob*, 136 So.3d at 557-63 (Canady, J., dissenting). In contrast, only a single justice of the Florida Supreme Court dissented from the decision to recede from *Yacob*. *Lawrence*, 308 So.3d at 552 (Labarga, J., dissenting). The Florida Supreme Court receding from *Yacob* could be expected.

There is no conflict between this Court's decisions in *Bouie*, *Rogers*, and *Metrish* and the Florida Supreme Court's decision in this case.

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[5] The *Yacob* Court had read a general appellate review provision of the statute as authorizing proportionality review. *Yacob*, 136 So.3d at 546.

No conflict with other federal or state appellate courts

There is no conflict between the Florida Supreme Court's decision in this case and that of any federal appellate court or state court of last resort. Several federal circuit courts have read the federal death penalty statute, 18 U.S.C. § 3591, which is silent on proportionality review, as not requiring proportionality review. *Aquart*, 912 F.3d at 51-53 (joining six other circuit in rejecting a constitutional attack on the FDPA for not requiring proportionality review). The Florida Supreme Court's opinion in *Lawrence* joined these federal circuit courts' reading of a similarly silent statute as not requiring proportionality review. A state supreme court's decision that interprets a state statute in a similar manner as the federal circuit courts have interpreted an analogous federal statute cannot be classified as indefensible, as required to establish a *Bouie* violation.

The petition does not cite any case from any federal circuit court or state court of last resort holding that a state court's plain reading of a statute violates *Bouie* and certainly does not cite any such case in the wake of *Metrish*. The petition also does not cite any case from any federal circuit court or state court of last resort holding that a state court receding from its prior precedent and aligning itself with this Court's view on a subject violates *Bouie*. There is no conflict between the lower appellate courts and the Florida Supreme Court's decision in this case.

Bouie and procedural changes in the law

It is lack of notice of the crime or its penalty that is critical to any *Bouie* claim. *Rogers*, 532 U.S. at 459. Fair warning of the crime and the penalty is the core concern of due process in this area. *Gonzalez v. Wong*, 667 F.3d 965, 997 (9th Cir. 2011) (explaining that *Bouie* applies to the situation of a court's reinterpretation of a criminal statute such that conduct which was not criminal before the decision becomes criminal

without prior warning). The petition fundamentally misunderstands this Court's decisions in *Bouie* and *Rogers* which were both mainly concerned with notice. *Bouie* is inapplicable because the Florida Supreme Court's decision in *Lawrence* did not create a substantive rule that raises the specter of turning innocent conduct into criminal conduct without any warning. Rather, it is an appellate practice decision. *Bouie* is limited to substantive changes in the law, such as changes in the definition of the crime or in the penalty, and does not extend to procedural changes in the law, such as appellate review of sentences. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (characterizing *Ring v. Arizona*, 536 U.S. 584 (2002), as procedural rather than substantive because it did not alter the conduct that was subjected to the death penalty). *Lawrence* is a decision regarding appellate review of a death sentence, not the interpretation of a substantive criminal statute. Because the change was procedural rather than substantive, there is no possible *Bouie* violation.

Lawrence did not lack notice that murder was against the law in Florida or that he could face the death penalty for committing first-degree murder when he conspired with his co-perpetrator to murder a teenage girl. He had statutory notice of both the crime and the penalty. *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982); *Atkins v. Parker*, 472 U.S. 115, 130 (1985) (stating that all "citizens are presumptively charged with knowledge of the law"). Lawrence had notice of both the crime and the possible penalty for that crime. § 782.04(1)(a), Fla. Stat. (1998) (defining first-degree murder which "constitutes a capital felony" punishable as provided in § 775.082); § 775.082(1)(a), Fla. Stat. (1998) (providing that "a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in a determination that such person shall be punished by death"). Lawrence had fair warning that following a detailed, written plan to kill would be considered premeditated first-degree murder under Florida law

and that he could be sentenced to death for doing so. And the Florida Supreme Court changing the law regarding appellate review of death sentences over twenty years after this murder is a non-sequitur to that fair warning.

This due process attack on the Florida Supreme Court's decision in *Lawrence* is bizarre. Under that view, it is a violation of due process for the Florida Supreme Court to hold that proportionality review of capital cases is not required, but it somehow is not a violation of due process for this Court to hold likewise, as it did decades ago in *Pulley v. Harris*. Due process and *Bouie* do not operate in that manner. The Florida Supreme Court's receding from *Yacob* does not violate due process or *Bouie*.

The petition raises an issue which is not outcome determinative which involves no conflict. Review should be denied.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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