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 Supreme Court of Florida

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. Eliminating Proportionality Review from Florida's Capital Sentencing Scheme Results in a System Lacking Sufficient Safeguards Against Arbitrary Sentences.

The State's response misapprehends Petitioner's argument. Petitioner is not arguing that the Court should recede from *Pulley v. Harris*, 465 U.S. 37 (1984), or that *Pulley* required proportionality review. But reliance on *Pulley* to justify *abolishing* proportionality review is based a logical fallacy: that not requiring something is the same as precluding it. Petitioner's argument is that *Pulley* and this Court's Eighth Amendment jurisprudence require safeguards against arbitrary or inconsistent capital sentencing that are no longer present in Florida now that the Florida Supreme Court has decided it will not review capital sentences to ensure that they are imposed only for the most aggravated and least mitigated of offenses. Therefore, Florida's capital sentencing scheme contravenes this Court's Eighth Amendment jurisprudence.[1]

A. Proportionality Review Before and After *Pulley*

Before *Pulley*, this Court had explicitly recognized the safeguard of proportionality review when upholding state capital sentencing statutes against constitutional challenges. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v.*

[1] The petition for certiorari was filed, with Petitioner's knowledge and agreement, on the basis that the Florida Supreme Court has decided an important question of federal law in a manner conflicting with this Court's relevant decisions. *See* Sup. Ct. R. 10(c). Accordingly, Petitioner will not attempt to demonstrate conflict between the Florida Supreme Court's ruling below and decisions of other state high courts or federal courts of appeals.

Florida, 428 U.S. 242 (1976). In *Gregg*, the Court upheld the constitutionality of Georgia's post-*Furman*[2] capital sentencing statute, which required the state supreme court to determine whether any death sentence was "disproportionate compared to those sentences imposed in similar cases." 428 U.S. at 198. The Court began with the premise from *Furman* that, because "the penalty of death is different in kind from any other punishment," *id.*, capital sentencing procedures had to provide safeguards against arbitrary and capricious death sentences by directing and limiting the sentencer's discretion. *Id.* at 189. The Court cautioned that "each distinct [statutory] system must be examined on an individual basis." *Id.* at 195. The Court then considered the distinct system enacted in Georgia after *Furman*, noting Georgia had narrowed the class subject to the death penalty by requiring at least one statutory aggravating circumstance before a death sentence could be imposed. *Id.* at 197 & n.9 (listing ten statutory aggravators). The jury was also "authorized to consider any other appropriate aggravating or mitigating circumstances," ensuring that the jury's attention would be "directed to the specific circumstances of the crime…[and] the characteristics of the person who committed the crime." *Id.* The Court emphasized the function of appellate review in guarding against arbitrary sentencing:

> As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory

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

> aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

Id. at 198 (citation omitted).

In *Proffitt*, which upheld Florida's post-*Furman* capital sentencing statute, the Court noted the requirement of written findings supporting a death sentence, allowing the Florida Supreme Court to conduct meaningful appellate review, and opined that the Florida high court considered its function to be ensuring that similar circumstances led to similar sentences. 428 U.S. at 251. In rejecting arguments that several mitigating factors were too imprecise, the Court reiterated: "The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases." *Id.* at 258. The Court added, citing *Gregg*, that "the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute." *Id.* at 259.

Simultaneously with *Gregg* and *Proffit*, the Court held in *Jurek v. Texas*, 428 U.S. 262, 273-74, 276 (1976), that a Texas capital sentencing statute did not violate the Eighth and Fourteenth Amendments. The statute required one of five aggravating circumstances to be present before a death sentence could be considered, allowed the jury to consider mitigating circumstances at a separate sentencing hearing, and required "prompt judicial review of the jury's decision in a court with statewide jurisdiction." *Id.* at 276. These provisions, taken together, served "to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Id.*

In 1983 this Court again upheld the Georgia and Florida sentencing schemes, in part because of proportionality review. *See Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983). In *Zant*, the Court upheld a death sentence although the jury had been instructed to consider an aggravating circumstance the Georgia high court later invalidated. *See* 462 U.S. at 867-68, 886. After concluding the improper aggravating circumstance did not rise to the level of a constitutional defect, the Court emphasized the "procedural safeguard" of proportionality review:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. […] As we noted in *Gregg*, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances.

Id. at 890.

In *Barclay*, a Florida trial court relied on a non-statutory aggravating circumstance when imposing sentence. 463 U.S. at 939. The Court reasoned that consideration of an improper aggravating factor would not necessarily create a constitutionally defective sentence, *id.* at 956-57 (citations omitted), and gave weight to Florida's practice of proportionality review:

> In this case, as in *Zant* […], our decision is buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether "the punishment is too great."

Id. at 958 (quoting *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973)).

Then, in *Pulley*, this Court approved of a California statute that required appellate review of the defendant's death sentence but 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 Court held the Eighth Amendment did not require comparative proportionality review of death sentences in all cases, finding the California statute had other provisions limiting the availability of the death penalty and preventing arbitrary results, including automatic review of death sentences by the California Supreme Court. *See id.* at 52-53.

After *Pulley*, the Florida Supreme Court continued to perform proportionality review while acknowledging it was not required to do so by *Pulley* or the federal constitution. *See Hunter v. State*, 8 So. 3d 1052, 1073 (Fla. 2008) (declining to extend the scope of proportionality review to include "cases where death was imposed, where death was sought but not imposed, where death could have been but was not sought, and cases from other states and federal decisions"); *State v. Henry*, 456 So. 2d 466, 469 (Fla. 1984) (rejecting challenge to death sentence on grounds the court had not specified in its opinion that it conducted a proportionality review). In short, *Pulley* neither invalidated proportionality review nor prevented the Florida Supreme Court from conducting proportionality review in specific cases.

B. The Eighth Amendment Requires Safeguards Against Arbitrary Sentencing

This Court's Eighth Amendment jurisprudence focuses on whether a statute has sufficient safeguards against arbitrary sentencing. This is true whether the underlying issue is the proportionality of an individual sentence or the overbreadth of aggravating factors, as in *Godfrey v. Georgia*, 446 U.S. 420 (1980) or *Maynard v. Cartwright*, 486 U.S. 356 (1988).

The State's Response cites *McKinney v. Arizona*, 140 S. Ct. 702 (2020), which addressed the "narrow" issue of whether the defendant had to be resentenced by a jury after he obtained a ruling in federal court that the Arizona state courts had failed to consider relevant mitigating evidence. *See id.* at 706. *McKinney* is not relevant here. In *McKinney*, the Arizona Supreme Court had conducted a reweighing of the aggravating and mitigating circumstances pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990) (holding a state appellate court could uphold a death sentence based in part on an invalid aggravating circumstance either by reweighing the evidence or by conducting harmless error review). *See McKinney*, 140 S. Ct. at 706-07. The defendant in *McKinney* argued *Clemons* was no longer good law in light of the holding in *Ring v. Arizona*, 536 U.S. 584 (2002), that capital defendants are entitled to a jury determination regarding the existence of an aggravating circumstance. *See McKinney*, 140 S. Ct. at 707. The Court disagreed, stating, "in a capital sentencing proceeding…a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.* The Court concluded that "the Arizona Supreme Court permissibly conducted a *Clemons* reweighing on collateral review." *Id.* at 709.

This Court stated in *McKinney* that "a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found." *Id.* at 705. However, that does not mean a death sentence can constitutionally be imposed based on the finding of an aggravating circumstance, by itself. The State's

Response conflates the availability of the death penalty for a particular offense with the imposition of the death penalty on a specific defendant. The Eighth Amendment requires not just the presence of an aggravating factor, but "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The sentencer cannot be precluded from considering and cannot refuse to consider, as a matter of law, any relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). Fundamentally, "[a] capital sentencing scheme must…provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *Godfrey*, 446 U.S. at 427-28 (quoting *Gregg*, 428 U.S. at 188 and *Furman*, 408 U.S. at 313).

C. The Federal Death Penalty Act

The State points to the Federal Death Penalty Act (FDPA), 18 U.S.C. §§ 3591-99, as an illustration of a statutory scheme without proportionality review. *See* Response at 10-11, 13-14. Several features of the FDPA bear noting, because that statute contains safeguards not present in Florida's sentencing statute.

First, the FDPA does not allow a "limitless number of aggravators," as the State's Response asserts at pages 13-14. The FDPA lists statutory aggravators, *see* 18 U.S.C. § 3592, one of which must be present before a death sentence can be considered, *see* 18 USC § 3593(e). The FDPA allows consideration of other aggravating circumstances only if a statutory aggravator is proved first. *See id.* In

addition, the aggravators are divided into categories tailoring the aggravating factors to the underlying offenses: espionage and treason, § 3592(b); homicide, § 3592(c); and drug offenses, § 3592(d). The statute contains a "special precaution to ensure against discrimination," § 3593(f), which in jury cases requires not only that the court instruct the jury "it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim," but also that each juror sign a certificate verifying that those improper considerations did not affect his or her verdict. Finally, the court of appeals is required to "consider whether the sentence of death was imposed under the influence of passion, prejudice, or *any other arbitrary factor*." § 3595(c)(1) (emphasis added).

These provisions have repeatedly been cited in response to challenges based on the lack of proportionality review in the FDPA. *See United States v. Aquart*, 912 F.3d 1, 52 (2d Cir. 2018) ("The FDPA contains precisely the sort of checks the Supreme Court recognized in *Pulley* to obviate the need for proportionality review."); *United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998). The FDPA contains checks on arbitrary sentencing not present in Florida's capital sentencing scheme; therefore, that it does not also require proportionality review is not dispositive of whether Florida's capital sentencing scheme satisfies Eighth Amendment standards.

D. The Florida Capital Sentencing Scheme Today

The Florida Supreme Court has an obligation, explicitly imposed by the state constitution, to follow this Court's Eighth Amendment precedents. This means the

Florida high court has a constitutional obligation to ensure that Florida's capital sentencing laws and procedures provide adequate safeguards against arbitrary sentencing.

In the decades since *Furman*, Florida's capital sentencing statute has consistently been interpreted and upheld in light of Florida's judicial requirement of evaluating the proportionality of each death sentence. The statute has also gone through numerous revisions without any legislative limitation on the established judicial practice of reviewing the proportionality of each death sentence. *See* Historical and Statutory Notes, Fla. Stat. Ann. § 921.141 (West 2019). The death sentences invalidated on proportionality grounds demonstrate that the safeguard of proportionality review was both workable and necessary. *See, e.g.*, *Yacob v. State*, 136 So. 3d 539 (Fla. 2014); *Scott v. State*, 66 So. 3d 923 (Fla. 2011); *Johnson v. State*, 720 So. 2d 232 (Fla. 1998); *Thompson v. State*, 647 So. 2d 824 (Fla. 1994).

During the same period, Florida has steadily broadened both the definition of first-degree murder and the number of aggravating circumstances making a death penalty at least theoretically available. Florida considers felony murder a capital offense for statutorily enumerated felonies. Fla. Stat. § 782.04 (1)(a)2. (2020). The number of enumerated felonies has increased from 10 in 1987, to 15 in 2000, to 19 today. *Compare* Fla. Stat. § 782.04 (1)(a)2.a.-j. (1987) *with* Fla. Stat. § 782.04 (1)(a)2.a.-o. (2000) *and* Fla. Stat. § 782.04 (1)(a)2.a.-s. (2020). This is an expansion, not a limitation. Florida's post-*Furman* sentencing statute contained eight aggravating factors. *See Proffitt*, 428 U.S. at 251. The current statute has 16. Fla.

Stat. § 941.141(6)(a)-(p) (2020). As the reach of Florida's capital sentencing scheme has expanded, proportionality review has been one way of ensuring it was not applied arbitrarily or inconsistently.

Before the decision in this case, Florida's sentencing statute was consistent with *Pulley*. That is what the Florida Constitution requires. Now that proportionality review has been eliminated, the statutory scheme that remains no longer has enough safeguards against arbitrary sentencing to be consistent with this Court's Eighth Amendment jurisprudence.

II. Petitioner's Equal Protection Claim was Timely.

In general, when considering decisions of state courts, this Court does not hear issues of federal law that were not first presented to a state court, including issues presented for the first time in a motion for rehearing. *E.g.*, *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997). The equal protection claim advanced in the petition for writ of certiorari was made for the first time in a motion for rehearing filed in the Florida Supreme Court.[3] However, this case presents a special situation in which the State did not challenge the constitutionality of Florida's proportionality review during Petitioner's trial or resentencing and, instead, argued for the first time in its Answer Brief that proportionality review was contrary to Florida's conformity clause. When the direct appeal was briefed, proportionality review not only had been the law of Florida for decades, but also had been upheld as

[3] *See* Motion for Rehearing, Case No. SC18-2061, at 16-17 (available at https://efactssc-public.flcourts.org/casedocuments/2018/2061/2018-2061_motion_123012_motion2drehearing.pdf).

recently as 2014, in *Yacob*, 136 So. 3d at 546, which rejected an identical argument.[4]

Under Florida law, a motion for rehearing is normally not the proper vehicle for presenting issues not previously raised. *See* Fla. R. App. P. 9.330(a)(2)(A) ("The motion shall not present issues not previously raised in the proceeding."). *But see Perez v. State*, 717 So. 2d 605, 606 (Fla. 3d DCA 1998) (noting the general practice of declining to consider new arguments on rehearing "does not deter us from considering such an argument where recent developments in the law or the justice of the cause persuade us to do so"). The illustrative cases cited in the State's Response, however, do not involve changes in the law as occurred here. In *Cleveland v. State*, 887 So. 2d 362 (Fla. 5th DCA 2004), for example, the issue was whether a jury instruction created fundamental error. The State filed a motion for rehearing making a new argument, based on existing law, about why the instruction in question was not fundamentally erroneous. *See id.* at 363-64. In that context, the appellate court noted, "No new ground or position may be assumed in a petition for rehearing." *Id.* at 364 (citing *Corporate Group Service, Inc. v. Lymberis*, 146 So. 2d

[4] The State of Florida did not challenge the constitutionality of proportionality review in *Yacob*, but the decision explicitly rejected an argument "not raised by any party…or previously by any party in the hundreds of death penalty proceedings to come before this Court" that the court was "precluded by the conformity clause of article I, section 17, of the Florida Constitution from engaging in proportionality review of death sentences and that we should recede from our long-standing precedent requiring such review." *Id.* at 546. *See also id.* at 557-63 (Canady, J., concurring in part and dissenting in part) ("Although I agree that the death sentence in this case is not proportionate […] I conclude that comparative proportionality review by this Court is precluded by [the conformity clause].").

745 (Fla. 1962)). Similarly, in *Cook v. State*, 792 So. 2d 1197, 1203 (Fla. 2001), the Florida Supreme Court declined to consider an alleged conflict of interest in an appeal from a denial of a motion for post-conviction relief because the issue "was raised for the first time in a motion for rehearing from the denial of 3.850 relief." No new rule of law was involved. *See id.*

This case, in contrast, involves a departure from well settled precedent and an opinion creating new law for capital appeals in Florida. Petitioner's motion for rehearing in the Florida Supreme Court was Petitioner's first opportunity to argue that the new rule of law would, inter alia, create a violation of his right to equal protection under the law. This Court has recognized that "where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review." *Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot.*, 560 U.S. 702, 712 n.4 (2010). In *Stop the Beach Renourishment*, the Florida Supreme Court had quashed an intermediate appellate court decision because the intermediate court had failed to consider a legal doctrine the parties had not argued. *Id.* at 712-13. A motion for rehearing argued the decision itself created a taking in violation of the petitioners' Fifth and Fourteenth Amendment rights. *Id.* This was sufficient to allow the Court to grant review. *See id.* The Court has also recognized that when the highest court in a state overrules its own precedent, a motion for rehearing arguing that that the new rule of law violates a federal constitutional right is a timely presentation of the federal claim. *E.g.*, *Brinkerhoff-Faris Trust & Sav. Co. v.*

Hill, 281 U.S. 673, 677-68 (1930) ("The additional federal claim thus made was timely, since it was raised at the first opportunity.").

There was no way for Petitioner to know exactly how the current court would respond to the State's argument until the opinion was issued. The court could have decided stare decisis required adhering to a line of cases requiring proportionality review dating back to *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). The court could have decided to adhere to its 2014 decision in *Yacob*, where the dissent made the constitutional argument adopted by the State here. The court could have held that proportionality review was not constitutionally required, consistent with *Pulley*, without eradicating it completely.[5] All these possibilities were speculative until the opinion was issued. In this situation, Petitioner's motion for rehearing in the Florida Supreme Court was the first opportunity Petitioner had to explain how the Florida Supreme Court's opinion would create an equal protection issue.

Regarding a potential equal protection analysis in Petitioner's case, there is no rule that the individuals or entities being compared in a "class of one" equal protection claim be co-conspirators or co-defendants; it is simply required that "the class-of-one challenger and his comparators must be 'prima facie identical in all relevant respects or directly comparable…in all material respects.'" *See United States v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008) (citations omitted). Petitioner's original co-defendant, Jeremiah Rodgers, is one such comparator, but not the only

[5] The court took this approach in *State v. Poole*, 297 So. 3d 487, 504-07 (Fla. 2020), acknowledging a unanimous jury recommendation before a death sentence can be imposed was required by statute, but not constitutionally mandated.

one. The Florida Supreme Court identified several comparable capital defendants when it conducted a proportionality analysis in Petitioner's first direct appeal. *See Lawrence v. State*, 846 So. 2d 440, 454-55 (Fla. 2003). Petitioner identified others in his initial brief in the instant appeal.[6] In effect, the proportionality review conducted in Florida capital cases from 1973 until 2020 served to identify and guard against exactly the kind of "class of one" sentences at issue here.

III. Eliminating Proportionality Review from Florida's Capital Sentencing Scheme Violates Due Process and the Ex Post Facto Clause.

First, the Florida Supreme Court did not merely recede from *Yacob* in this case. It effectively overruled a line of cases dating back to its 1973 decision in *Dixon*. But the court's decision to recede from *Yacob* distinguishes this case from *Metrish v. Lancaster*, 569 U.S. 351, 368 (2013), "where a state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute." Here, the state supreme court was not addressing an issue for the first time. The court was not resolving an issue previously addressed only by lower courts and, in fact, the court had squarely rejected the reasoning adopted in *Lawrence* just a few years earlier.

Second, the argument that Petitioner's due process challenge under *Bouie v. City of Columbia*, 378 U.S. 347 (1964), is not outcome-determinative is speculative.

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[6] *See* Initial Brief, Case No. 2018-2061, at 48-51, available at https://efactssc-public.flcourts.org/casedocuments/2018/2061/2018-2061_brief_134018_initial20brief2dmerits.pdf.

The State asserts that Petitioner's death sentence would be found to be proportional, *see* Response at 20-21, but fails to acknowledge that the mitigation presented at Petitioner's second penalty phase trial was not identical to the mitigation presented in his first penalty phase. Expert testimony and brain scans that were not available when he was first sentenced were reviewed in his second trial; this evidence identified significant neurological findings and explained the link between those findings and traumatic events in Petitioner's background.[7] The Florida Supreme Court did not address the new mitigation in the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] Mitigation was presented through a special counsel following Petitioner's waiver of the right to present mitigation himself. (R. 1442-1585.) A summary was contained in Petitioner's initial brief in the Florida Supreme Court. *See* Initial Brief, Case No. 2018-2061, at 16-20.