FLORIDA'S REMOVAL OF SAFEGUARDS FOR DEFENDANTS ON DEATH-ROW: COMPARATIVE PROPORTIONALITY REVIEW

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INTRODUCTION

Since 1973, 186 individuals in the United States have been exonerated after being wrongfully convicted and sentenced to death.[1] Given the severity of a death sentence, the United States has developed safeguards for defendants on death-row, such as comparative proportionality review prior to its abolishment (in Florida) in *Lawrence v. State*.[2] Proportionality review is the part of the post-conviction process where an appellate court reviews a case to determine whether the death sentence imposed on a defendant is proportional to the crime committed.[3] Two types of proportionality review exist.[4] The first is where the court seeks to determine whether the death penalty is excessive, inherently

1. This statistic is accurate as of February 2021. *DPIC Adds Eleven Cases to Innocence List, Bringing National Death-Row Exoneration Total to 185*, DEATH PENALTY INFORMATION CENTER (Feb. 18, 2021), https://deathpenaltyinfo.org/news/dpic-adds-eleven-cases-to-innocence-list-bringing-national-death-row-exoneration-total-to-185 [https://perma.cc/9XPR-SKF5].

2. Lawrence v. State, 308 So. 3d 544, 551 (Fla. 2020).

3. Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1166 (2001).

4. *Id.*

disproportionate, or cruel and unusual based on the gravity of the offense.[5] The second, and the one discussed in this Note, is comparative proportionality review, which refers to the court's inquiry into whether the death sentence in one case is disproportionate to the punishment imposed upon others convicted of the same crime.[6]

The Florida Supreme Court has historically conducted comparative proportionality review in an effort to determine whether punishments imposed were proportional and to foster uniformity among the severity of punishments defendants receive.[7] Given the unique and finite nature of the death penalty,[8] comparative proportionality review was created to ensure cases were reviewed thoughtfully and deliberately[9] and to prevent "unusual" punishments contrary to the State's constitution. When conducting a comparative proportionality review, courts utilize a totality of the circumstances test to determine whether the death penalty is warranted in a particular case,[10] considering the gravity of the offense, the severity of the penalty imposed in comparison to other crimes, and sentencing practices in other jurisdictions.[11] Thus, rather than a quantitative review of the number of aggravating and mitigating circumstances present, the court reviewing the case must thoughtfully and deliberately[12] conduct a qualitative analysis of the basis for each of these circumstances.[13]

In *Lawrence v. State*, the Florida Supreme Court reviewed the appellant's death sentence, which was imposed after a finding of first-degree murder and held to be proportional by the court seventeen years prior.[14] In reviewing the case on appeal, the court considered whether conducting a comparative proportionality review is required under Florida law and determined that it was not.[15] The court reasoned that necessitating this review was contrary to the Conformity Clause in article I, section 17 of Florida's constitution—which requires the prohibition against cruel and unusual punishment to be construed in conformity with the decisions of the United States Supreme

5. *Id.* at 1166-67.

6. Pulley v. Harris, 465 U.S. 37, 43 (1984).

7. Rogers v. State, 285 So. 3d 872, 891-92 (Fla. 2019).

8. Hurst v. State, 819 So. 2d 689, 700 (Fla. 2002) (citing Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)).

9. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990).

10. *Id.*

11. *Pulley*, 465 U.S. at 43.

12. *Porter*, 564 So. 2d at 1064.

13. Wade v. State, 41 So. 3d 857, 879 (Fla. 2010); Simpson v. State, 3 So. 3d 1135, 1148 (Fla. 2009).

14. Lawrence v. State, 308 So. 3d 544, 551 (Fla. 2020), *aff'g* 846 So. 2d 440 (Fla. 2003).

15. *Id.* at 550-52.

Court[16]—and concluded that there was no "valid reason *why not* to recede"[17] from its prior decision in *Yacob v. State*,[18] which established the comparative proportionality review requirement.[19] While the Florida Supreme Court's decision in *Lawrence v. State* abolished the requirement for a comparative proportionality review in death penalty cases,[20] questions exist regarding the implications of this decision on future death penalty cases.

This Note will examine the Florida Supreme Court's 2020 decision that conducting a comparative proportionality review of sentences of death is not constitutionally required and conflicts with the Conformity Clause of article I, section 17 of Florida's constitution. An introduction to comparative proportionality review was provided above. Part I will discuss the establishment and history of the comparative proportionality review requirement and the different state approaches to comparative proportionality review, emphasizing Florida's approach. Part II will turn to the establishment and function of Florida's Conformity Clause. Part III will examine the interaction between this clause and Florida's former comparative proportionality review requirement. Part IV recommends that Florida adopt a statutory requirement for comparative proportionality review for death sentences. Part V will examine and respond to critiques of comparative proportionality review. Lastly, Part VI examines the consequences of Florida's elimination of comparative proportionality review.

I. ESTABLISHING COMPARATIVE PROPORTIONALITY REVIEW

The United States Supreme Court initially considered the arbitrariness of the imposition of the death penalty in 1972 in *Furman v. Georgia*.[21] In a five-to-four vote, the Court determined that Georgia's death sentences constituted cruel and unusual punishments in violation of

16. *Id.* at 548, 550 ("The conformity clause of article I, section 17 of the Florida Constitution provides that '[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.' ") ("When confronted with the issue in *Yacob*, this Court should have held that a judge-made comparative proportionality review requirement violates article I, section 17 of the Florida Constitution . . . .").

17. *Id.* at 551 (quoting State v. Poole, 297 So. 3d 487, 507 (Fla. 2020)).

18. Yacob v. State, 136 So. 3d 539 (Fla. 2014).

19. *Id.* at 548-49 ("For decades since *Proffitt*, *Gregg*, and *Dixon*, this Court has consistently explained—unchallenged by the State in any proceeding, including this one—that Florida's capital sentencing scheme mandates that this Court review the sentence of death in every capital case to determine whether the punishment is proportionate . . . . This requirement is embodied in the rules promulgated by this Court for review of death penalty cases . . . requiring the Court to review the proportionality of the death sentence regardless of whether the issue is raised by the defendant.").

20. Lawrence v. State, 308 So. 3d 544, 552 (Fla. 2020).

21. Furman v. Georgia, 408 U.S. 238 (1972).

the Eighth and Fourteenth Amendments.[22] The concern surrounding the arbitrary manner in which the death penalty was being imposed was further expressed by Justices White, Brennan, Douglas, Marshall, and Stewart in their concurring opinions.[23]

Following *Furman*,[24] roughly two-thirds of the states redrafted their capital sentencing statutes, some of which were subsequently reviewed by the United States Supreme Court,[25] to limit jury discretion and avoid arbitrary and inconsistent results.[26] Florida's newly revised statute, under which the court compared the circumstances of a case under review with previous cases in which the death sentence had been imposed, was upheld by the United States Supreme Court in 1976 in *Proffitt*.[27] The United States Supreme Court determined that "following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute."[28]

That same year, the United States Supreme Court upheld a Texas statute that provided for "prompt judicial review" of jury decisions,[29] reasoning that it assured death sentences would not be applied "wantonly" or "freakishly."[30] Seven years later, in 1983, the United States Supreme Court revisited a Georgia death penalty statute in *Zant v. Stephens*.[31] The Georgia statute under review mandated meaningful appellate review of every death sentence but failed to follow the Model

22. *Id.* at 239-40.

23. *Id.* at 313 (White, J., concurring) (noting the "great infrequency" in which it was being imposed and the absence of any "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *id.* at 293 (Brennan, J., concurring) (explaining that the death penalty was being imposed as arbitrarily as a "lottery system"); *id.* at 253-57 (Douglas, J., concurring) (explaining that judges and juries have "uncontrolled discretion" on whether defendants "should die or be imprisoned" and that "these discretionary statutes are unconstitutional in their operation"); *id.* at 364 (Marshall, J., concurring) ("[C]apital punishment is imposed discriminatorily. . . ."); *id.* at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

24. *Furman*, 408 U.S. 238.

25. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

26. Pulley v. Harris, 465 U.S. 37, 44 (1984) (explaining that the new state statutes provide for automatic appeal of death sentences, while some states, such as Florida, conduct a proportionality review despite the absence of a statute, and others, such as Texas and California, do not); *see also Proffitt*, 428 U.S. 242 (upholding the constitutionality of a Florida statute under which the trial judge, who served as the sentencing authority, must weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty should be imposed); *Jurek*, 428 U.S. 262 (upholding the constitutionality of a Texas statute that required the jury to consider five categories of aggravating circumstances, and permitted consideration of mitigating circumstances).

27. *See Proffitt*, 428 U.S. at 242.

28. *Id.* at 259.

29. *Jurek*, 428 U.S. at 276.

30. *Id.*

31. Zant v. Stephens, 462 U.S. 862 (1983).

Penal Code's recommendation that the jury's discretion in weighing aggravating and mitigating circumstances against each other be governed by specific circumstances.[32] Nonetheless, the Court upheld the statute, reasoning that it was constitutional because it required the appellate court to review the sentencing decision and determine whether it was "arbitrary, excessive, or disproportionate."[33]

Most notable of the Court's review of the newly modified statutes was its 1976 decision in *Gregg v. Georgia*.[34] In *Gregg*, the Court upheld the constitutionality of a Georgia statute that required the jury to be instructed on aggravating and mitigating factors and the Georgia Supreme Court to review each death sentence to determine whether it was disproportionate to the punishment imposed in similar cases.[35] The Court reasoned that a comparative proportionality review was appropriate given the "uniqueness" of the death penalty and irrevocability of its consequences.[36]

The Court determined that in affirming a death sentence, a reviewing court must include in its decision reference to similar cases it has taken into consideration.[37] In this particular case, the Georgia statute's provision for appellate review of Georgia capital sentencing cases "serve[d] as a check against the random or arbitrary imposition of the death penalty."[38] Further, the statute was found to comply with the *Furman* Court's mandate that where discretion is afforded to a sentencing body in a matter as grave as the taking of a human life, that discretion must be "suitably directed and limited" to minimize the risk of wholly arbitrary and capricious action.[39] Although the substantial discretion granted to the jury through the Georgia statute was concerning, the Court determined that this was remedied where a proportionality review eliminated the possibility of a deviant jury imposing the death penalty.[40]

32. *Id.* at 875.

33. *Id.* at 879-80.

34. Gregg v. Georgia, 428 U.S. 153 (1976).

35. *Id.* at 155.

36. *Id.* at 187.

37. *Id.* at 167.

38. *Id.* at 206.

39. *Id.* at 189.

40. Gregg v. Georgia, 428 U.S. 153, 206 (1976) ("In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.").

*A. Comparative Proportionality Review Post-*Gregg

While the constitutionality of a statute requiring comparative proportionality review was upheld in *Gregg*,[41] the United States Supreme Court had not ruled as to whether such a review was required. However, the Court in 1984 directly addressed this issue in reviewing a California death penalty statute, which did not afford defendants a comparative proportionality review, in *Pulley v. Harris*.[42] The Court determined that the California statute, which required the jury to find at least one special circumstance beyond a reasonable doubt, provided adequate safeguards against arbitrary and capricious action by limiting the death sentence to a small sub-class of capital-eligible cases,[43] and correspondingly upheld the statute.[44] In doing so, the Court determined that although some schemes requiring comparative proportionality review are constitutional, that does not mean they are "indispensable" or required.[45]

B. Comparative Proportionality Review Throughout the States

Of the twenty-five states that impose the death penalty,[46] sixty percent require comparative proportionality review,[47] and it is statutorily mandated in fourteen of those states, including Alabama, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, and Virginia.[48] Of the states that do not statutorily require comparative proportionality review, some states, such as Utah, still conduct this review as a part of their appellate review of death sentences.[49]

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41. *Id.* at 153-57.

42. Pulley v. Harris, 465 U.S. 37, 37-40 (1984).

43. *Id.* at 53.

44. *Id.* at 53-54.

45. *Id.* at 44-45.

46. Lawrence v. State, 308 So. 3d 544, 556 n.10 (Fla. 2020) (Labarga, J., dissenting) ("The list of death penalty states, which does not include three states with a gubernatorial moratorium (California, Oregon, and Pennsylvania), is as follows: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.").

47. *Id.* at 556.

48. *Id.*

49. *Id.* at 557 (citing State v. Honie, 57 P.3d 977, 988 (Utah 2002); State v. Wood, 648 P.2d 71, 77 (Utah 1982)).

*C. Comparative Proportionality Review in Florida Post-*Furman

After the *Furman* decision forced the national and the states' legislatures to revisit their statutes for capital offenses[50] and voided every state's existing death penalty statute,[51] Florida was the first state to pass a new death penalty statute.[52] Comparative proportionality review has been enforced in Florida for at least 50 years since its recognition in *State v. Dixon*,[53] one year after the *Furman* decision. In *Dixon*, the Florida Supreme Court upheld a statute that allowed comparative proportionality review, arguing that where "reason is required" by the court, such a review avoids "[d]iscrimination or capriciousness" and is thus an essential element to protect defendants.[54] Furthermore, the court determined that the review ensured the death sentence was equitable in comparison to other cases and was not reached on account of race or sex.[55]

Florida courts have utilized a qualitative, totality of the circumstances approach[56] and based their proportionality analysis on "objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions,"[57] in addition to examining the sufficiency of the evidence.[58] The courts have consistently considered "whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity

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50. *See* Furman v. Georgia, 408 U.S. 238, 253 (1972) (Douglas, J., concurring) ("[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.").

51. *U.S Supreme Court: June 29 Marks 40th Anniversary of* Furman v. Georgia, DEATH PENALTY INFORMATION CENTER (June 26, 2012), https://deathpenaltyinfo.org/news/u-s-supreme-court-june-29-marks-40th-anniversary-of-furman-v-georgia.

52. *History of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida#:~:text=Milestones%20in%20Abolition%2FReinstatement,all%20existing%20death%20penalty%20laws [https://perma.cc/5AY5-YWDY] (explaining that Florida passed a new capital punishment statute in 1972 which was upheld by the United States Supreme Court in *Proffitt v. Florida*, and that the Supreme Court also reinstated the death penalty when it upheld Georgia's statute in *Gregg v. Georgia*).

53. State v. Dixon, 283 So. 2d 1 (Fla. 1973).

54. *Id.* at 8.

55. *Id.* at 10 ("No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex.").

56. Wade v. State, 41 So. 3d 857, 879 (Fla. 2010).

57. Adaway v. State, 902 So. 2d 746, 749 (Fla. 2005) (holding that a sentence of death was not disproportionate to the crime of sexual battery on a minor).

58. Caylor v. State, 78 So. 3d 482, 500-01 (Fla. 2011) (citing Phillips v. State, 39 So. 3d 296, 308 (Fla. 2010)).

in the application of the sentence."[59] Conducting a review of the proportionality of a death sentence was viewed as so fundamental that this review has traditionally been conducted on direct appeal even if proportionality was not an issue presented for review.[60]

As a result of comparative proportionality review, multiple states have vacated death sentences where the courts determined that the sentences were not justified by the defendants' crimes or personal histories.[61] The State of Florida has reversed several death sentences on the ground that they were not proportional to sentences in previous cases.[62] Since the establishment of proportionality review in Florida, the Florida Supreme Court has determined that the death sentence imposed was not proportional in 43 cases.[63] In an additional four cases, the court reversed or remanded after noting it did not have sufficient information to make a determination of proportionality.[64] However, the majority of cases before the court on proportionality review have

59. Offord v. State, 959 So. 2d 187, 191 (Fla. 2007) (quoting Anderson v. State, 841 So. 2d 390, 407-08 (Fla. 2003)).

60. *See* Lawrence v. State, 308 So. 3d 544, 554 (Fla. 2020) (Labarga, J., dissenting) (citing FLA. R. APP. P. 9.142(a)(5)) ("On direct appeal in death penalty cases, whether or not . . . proportionality is an issue presented for review, the court shall review the issue and, if necessary, remand for the appropriate relief.").

61. Pulley v. Harris, 465 U.S. 37, 72-73 (1984) (citing Henry v. State, 647 S.W.2d 419, 425 (Ark. 1983); Sumlin v. State, 617 S.W.2d 372, 375 (Ark. 1981); People v. Gleckler, 411 N.E.2d 849, 856-61 (Ill. 1980); Smith v. Commonwealth, 634 S.W.2d 411, 413-14 (Ky. 1982); State v. Sonnier, 380 So. 2d 1, 5-9 (La. 1979); Coleman v. State, 378 So. 2d 640, 649-50 (Miss. 1979); State v. McIlvoy, 629 S.W.2d 333, 341-42 (Mo. 1982); Munn v. State, 658 P.2d 482, 487-88 (Okla. Crim. App. 1983)).

62. *See, e.g.*, McCloud v. State, 208 So. 3d 668 (Fla. 2016); Phillips v. State, 207 So. 3d 212 (Fla. 2016); Yacob v. State, 136 So. 3d 539 (Fla. 2014); Scott v. State, 66 So. 3d 923 (Fla. 2011); Crook v. State, 908 So. 2d 350 (Fla. 2005); Williams v. State, 707 So. 2d 683 (Fla. 1998); Jones v. State, 705 So. 2d 1364 (Fla. 1998); Voorhees v. State, 699 So. 2d 602 (Fla. 1997); Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

63. As of April 13, 2021, this statistic is accurate. This statistic was obtained by running a search on Westlaw (advanced: proportionality & SY(remand! OR vacate!) & LE(remand! OR vacate!)) and reviewing the results for cases where the court overturned or remanded a death sentence on the basis of a comparative proportionality review.

64. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) (reversing based on the inability to conduct a proportionality review based on the scant record); Crump v. State, 654 So. 2d 545, 547-48 (Fla. 1995) (vacating a sentence of death based on the court's inability to conduct a proportionality review absent a clear understanding of the mitigating circumstances considered by the trial court); Hudson v. State, 708 So. 2d 256, 258-59 (Fla. 1998) (remanding and stating that "the trial court's order on this resentencing is so lacking in detail that we cannot decide the proportionality issue"); Harris v. State, 843 So. 2d 856, 869-70 (Fla. 2003) (reversing and stating that "this Court is deprived of the tools to meaningfully review the sentence imposed or to undertake a proportionality review").

not been found to be disproportionate, nor were the defendants released when the court found the punishment to be disproportionate; instead, they were sentenced to life imprisonment.[65]

II. FLORIDA'S CONFORMITY CLAUSE

The Conformity Clause, found in article I, section 17 of the Florida Constitution, was adopted in 2002[66] after the Florida Supreme Court overturned the Florida Preservation of the Death Penalty Amendment, Amendment 2 (1998) (hereinafter "Amendment 2") in 2000.[67] When Amendment 2 was proposed, the ballot stated the following:

> BALLOT TITLE: PRESERVATION OF THE DEATH PENALTY; UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT
>
> BALLOT SUMMARY: Proposing an amendment to Section 17 of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.[68]

Under article XI, section 5, of the Florida Constitution,[69] a proposed amendment must be accurately represented on a ballot, otherwise voter approval would be null.[70] In reviewing the ballot, the Florida Supreme Court determined that the title and second sentence of the ballot summary of Amendment 2 violated the accuracy requirement from article XI, section 5, of the Florida Constitution by misleading voters.[71] Specifically, the court noted that the title of the proposed amendment implied that Amendment 2 would promote the rights of Florida

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65. Lawrence v. State, 308 So. 3d 544, 555 (Fla. 2020) (Labarga, J., concurring) (explaining that overturning a sentence of death does not result in defendants receiving a "get out of jail free" card); *see also* Reba Kennedy, *Florida Supreme Court Ends Comparative Proportionality Review in Death Penalty Cases Overturning Longstanding Precedent*, DEATH PENALTY BLOG (Nov. 4, 2020), https://www.deathpenaltyblog.com/florida-supreme-court-ends-comparative-proportionality-review-in-death-penalty-cases-overturning-longstanding-precedent/ [https://perma.cc/82LQ-TE8V] (explaining that defendants who have their death sentences overturned are then sentenced to the statutory maximum sentence).

66. FLA. CONST. art. I, § 17.

67. Armstrong v. Harris, 773 So. 2d 7, 22 (Fla. 2000).

68. *Id.* at 16.

69. FLA. CONST. art. XI, § 5.

70. *Armstrong*, 773 So. 2d at 12 (citing Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982); Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976); Crawford v. Gilchrist, 59 So. 963, 968 (Fla. 1912); James Bacchus, *Legislative Efforts to Amend the Florida Constitution: The Implications of* Smathers v. Smith, 5 FLA. ST. U. L. REV. 747 (1977)).

71. Armstrong v. Harris, 773 So. 2d 7, 16-17 (Fla. 2000).

citizens through the rulings of the United States Supreme Court.[72] Regarding the second sentence of the proposal, the use of the word "or" rather than "and" in the phrase "cruel or unusual" punishment indicates the framers' intent to interpret "cruel" and "unusual" individually and disjunctively within the clause's proscription.[73] Through the amendment's modification of the phrase "cruel or unusual" to "cruel and unusual" punishment, and by requiring that the state clause be interpreted in conformity with its federal counterpart, Amendment 2 made it so Florida's law would constitute the floor rather than the ceiling of freedoms.[74] This conflicts with the well-established notion that Florida's government is grounded on the principle of "robust individualism" and that the State's constitutional rights provide greater freedom than do their federal counterparts.[75] Accordingly, in the court's view, the title and second sentence of Amendment 2's proposal may have mislead voters into thinking they were voting to protect state constitutional rights when they were in fact voting to nullify them.[76]

In 2001, a year after the court determined Amendment 2 was misleading, the Conformity Clause of article I, section 17 was proposed.[77] When enacted, the ballot summary read:

> The amendment would prevent state courts, including the Florida Supreme Court, from treating the state constitutional prohibition against cruel or unusual punishment as being more expansive than the federal constitutional prohibition against cruel and unusual punishment or United States Supreme Court interpretations thereof. The amendment effectively nullifies rights currently allowed under the state prohibition against cruel or unusual punishment which may afford greater protections for those subject to punishment for crimes than will be provided by the amendment. Under the amendment, the protections afforded those subject to punishment for crimes under the "cruel or unusual punishment" clause, as that clause currently appears in Section 17 of Article I of the State Constitution, will be the same as the minimum protections provided under the "cruel and unusual" punishments clause of the Eighth Amendment to the United States Constitution.[78]

Although the ballot clarifies that voters are nullifying rights provided under the state constitution which may allow greater freedoms than its federal counterpart, it still provides that Florida's protections are the floor rather than the ceiling of protections and prohibits

72. *Id.* at 17.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Fla. HJR 951 (2001).

78. Yacob v. State, 136 So. 3d 539, 558 (Fla. 2014) (Canady, J., concurring) (citing Fla. HJR 951 (2001) (proposing amendment to art. I, § 17 of the Florida Constitution and providing ballot summary)).

Florida courts from finding that a sentence constitutes cruel and unusual punishment if "a decision of the United States Supreme Court makes clear that the sentence does not violate the Eighth Amendment of the federal constitution."[79] It further establishes that the Eighth Amendment of the United States Constitution constitutes the ceiling rather than the floor of basic freedoms in death penalty cases because it prohibits the State of Florida from providing defendants with greater protections against cruel and unusual punishment than those provided by the Eighth Amendment.[80]

Accordingly, by establishing that the Eighth Amendment of the United States Constitution is the ceiling rather than the "floor for basic freedoms," Florida's Conformity Clause conflicts with the notion of state autonomy and individualism.[81] In effect, the addition of the Conformity Clause to the Florida Constitution resulted in a reduced number of safeguards for defendants who have been sentenced to death, as demonstrated by the Florida Supreme Court's decision in *Lawrence*.[82]

III. THE INTERACTION BETWEEN FLORIDA'S CONFORMITY CLAUSE AND COMPARATIVE PROPORTIONALITY REVIEW

Of all the Florida cases based on comparative proportionality review, *Yacob v. State*[83] has been the most influential. In 2014 in *Yacob*, the Florida Supreme Court addressed the effect of Florida's Conformity Clause on comparative proportionality review.[84] In reversing a death sentence, the court expressly rejected Justice Canady's argument in his concurring opinion that the Conformity Clause precluded comparative proportionality review[85] and determined that there was

79. *Id.*

80. *Id.* ("Under this provision of article I, section 17—commonly referred to as the conformity clause—the courts of Florida are precluded from determining that a sentence is cruel and unusual if a decision of the United States Supreme Court makes clear that the sentence does not violate the Eighth Amendment of the federal constitution. Moreover, a sentence may be invalidated as cruel and unusual under the Florida Constitution by a Florida court only if a decision of the United States Supreme Court requires invalidation of the sentence as cruel and unusual.").

81. Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992) (citing Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983)).

82. Lawrence v. State, 308 So. 3d 544 (Fla. 2020) (holding that proportionality review is contrary to the Conformity Clause of article I, section 17 of Florida's constitution).

83. Yacob v. State, 136 So. 3d 539 (Fla. 2014).

84. *Id.* at 546.

85. *Id.* at 562 (Canady, J., concurring) (citing Pulley v. Harris, 465 U.S. 37, 50-51 (1984)) (arguing that "the United States Supreme Court has held that comparative proportionality review in death cases is not required by the Eighth Amendment's prohibition on cruel and unusual punishments" and "the conformity clause of article I, section 17, precludes Florida courts from imposing requirements under the State's prohibition on cruel and unusual punishment that go beyond those required by the United States Supreme Court").

no reason to recede from its "long-standing precedent" of conducting such review.[86] It further noted that the requirement of comparative proportionality review flowed from the Florida Statutes, which provided for "automatic review,"[87] and asserted that to recede from decades of precedent sua sponte would "raise substantial constitutional questions."[88]

The Florida Supreme Court revisited the effect of the Conformity Clause on comparative proportionality review on October 29, 2020 in *Lawrence v. State*[89] where the appellant appealed his death sentence for first-degree murder, which the court had previously determined to be proportional.[90] In holding that proportionality review is not required, the court determined that requiring comparative proportionality review is contrary to Florida's Conformity Clause,[91] which requires the prohibition against cruel and unusual punishment to be construed in conformity with decisions of the United States Supreme Court.[92]

The court determined that in the absence of a statute mandating comparative proportionality review, the Florida Constitution forbids such a review[93] and found that there was no "valid reason *why not* to recede"[94] from its prior decision in *Yacob*, which initially established the requirement.[95] It reasoned that it erred in *Yacob* in concluding that proportionality review was not contrary to the Conformity Clause and erred in reasoning that this review flows from (1) Florida's capital punishment statute,[96] (2) the due process clause of the Florida

86. *Id.* at 546.

87. *Id.*; *see also id.* at 552-53 (Labarga, J., concurring) (arguing that the duty to conduct proportionality review partially stems from the law set forth by the United States Supreme Court that has established that the death penalty is reserved for the most "culpable defendants committing the most serious offenses," and therefore there must be a mechanism to ensure that a particular case falls within the narrow category of cases where the death penalty is appropriate).

88. *Id.* at 549 (citing Duncan v. Moore, 754 So. 2d 708, 712 (Fla. 2000) (explaining that equal protection requires that "persons similarly situated be treated similarly")).

89. Lawrence v. State, 308 So. 3d 544 (Fla. 2020).

90. Lawrence v. State, 846 So. 2d 440, 453 (Fla. 2003).

91. *Lawrence*, 308 So. 3d at 550.

92. *Id.* at 548 ("The conformity clause of article I, section 17 of the Florida Constitution provides that '[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.' ").

93. *Id.* at 545.

94. *Id.* at 551.

95. Yacob v. State, 136 So. 3d 539 (Fla. 2014) (stating that in accordance with Florida Statute 921.141, every judgment of conviction and sentence of death shall be subject to automatic review by the court).

96. *Id.* at 546.

Constitution,[97] and (3) article V of the Florida Constitution[98]—which grants the Supreme Court of Florida "mandatory, exclusive jurisdiction over appeals from final judgments of trial courts imposing the death penalty."[99] The court determined that none of those provisions require comparative proportionality review, nor has comparative proportionality review ever been interpreted to be a requirement.[100]

In determining that the review has not been interpreted to be a requirement, the court departed from the *Yacob* court's reasoning that *Dixon* "interpreted section 921.141 as including proportionality review of death sentences."[101] The *Lawrence* court relied on Justice Canady's dissenting opinion in *Yacob* in determining that the reasoning in *Dixon* does not tie section 921.141 to comparative proportionality review but instead can be understood as a "judicial-created means" of ensuring the statute would be implemented in such a way to avoid the constitutional concerns regarding cruel and unusual punishment addressed in *Furman*.[102] The court further argued that *Yacob* erred in reasoning that the pre-Conformity Clause *Tillman* decision imposed a comparative proportionality review requirement,[103] and asserted that although the *Tillman* decision sought to prevent "disagreement over controlling points of law," this could be achieved without requiring comparative proportionality review.[104]

Accordingly, the court eliminated any possibility of defendants obtaining a comparative proportionality review of their death sentences, reasoning that it could not "judicially rewrite our state statutes or constitution to require a comparative proportionality review that their text does not."[105] It further noted that it could not ignore its "constitutional obligation to conform [its] precedent respecting the Florida Constitution's prohibition against cruel and unusual punishment to the

97. *Id.* at 549 (arguing that the proportionality review requirement is sourced in the Due Process Clause of article I, section 9 of the Florida Constitution).

98. *Id.* at 547.

99. Lawrence v. State, 308 So. 3d 544, 548-49 (Fla. 2020).

100. *Id.* at 549-50.

101. *See id.* at 549 (citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973)).

102. *Id.* (citing Yacob v. State, 136 So. 3d 539, 561 (Fla. 2014) (Canady, J., concurring in part and dissenting in part)). According to Canady's dissent in *Yacob*, the *Dixon* court understood that comparative proportionality review would be consistent with section 921.141, although the statute did not require or specifically authorize comparative proportionality review.

103. *Id.* (explaining that the *Tillman* court cited two provisions as requiring comparative proportionality review when neither of the two impose such a requirement).

104. *Id.* at 549-50 (quoting *Yacob*, 136 So. 3d at 561-62 (Canady, J., concurring in part and dissenting in part)).

105. Lawrence v. State, 308 So. 3d 544, 550 (Fla. 2020) (explaining that the court had wrongly written the comparative proportionality review requirement into its procedural rules governing the scope of its appellate review to " 'make the rule consistent with this Court's practice' concerning the scope of its appellate review").

Supreme Court's Eighth Amendment precedent by requiring a comparative proportionality review that the Supreme Court has held the Eighth Amendment does not."[106]

In his dissenting opinion, Justice Labarga argued that the concept of conducting a proportionality review is consistent with the Eighth Amendment and not a violation of Florida's Conformity Clause.[107] He reasoned that because proportionality review has been recognized by the United States Supreme Court as an "additional safeguard" against arbitrary death sentences—which is what the Eighth Amendment protects against—and because that Court has not found it to be unconstitutional, the majority could have concluded that it does not conflict with the Conformity Clause.[108] Justice Labarga further highlighted that a majority of other death penalty states conduct a proportionality review, some of which have adopted a statutory requirement for such a review and some which have not.[109]

IV. DIVERGENT INTERPRETATIONS OF FLORIDA'S CONFORMITY CLAUSE AND THE NEED FOR STATUTORY REFORM

The Florida Supreme Court has established that the Federal Constitution constitutes the floor rather than the ceiling of basic freedoms.[110] In fact, the court has previously held that in the absence of a controlling U.S. Supreme Court decision, Florida courts are "free to provide [their] citizens with a higher standard of protection . . . than that afforded by the Federal Constitution."[111] Specifically, the court addressed the scope of the Conformity Clause in article I, section 12, which applies to searches and seizures, and provides that:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means . . . . shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.[112]

106. *Id.*

107. *Id.* at 555 (Labarga, J., dissenting).

108. *Id.* at 556.

109. *Id.* at 556-57.

110. Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992) ("[T]he federal Constitution . . . represents the floor for basic freedoms; the state constitution, the ceiling.").

111. Soca v. State, 673 So. 2d 24, 26-27 (Fla. 1996) (citing State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983); *Traylor*, 596 So. 2d at 961).

112. FLA. CONST. art. 1, § 12.

Similar to the Conformity Clause of article I, section 17, which governs cruel and unusual punishments, under the Conformity Clause of article I, section 12, Florida can provide its citizens no greater protections against searches and seizures than those provided by the United States Supreme Court. Interestingly, in contrast to the Florida Supreme Court's interpretation of article I, section 17,[113] the Florida Supreme Court in *Soca*[114] determined that in the absence of United States Supreme Court precedent addressing the particular issue under review, the State can grant heightened protections.[115] In *Soca*, the defendant was on probation when an investigator from the Monroe County State Attorney's office contacted the defendant's probation officer to conduct a warrantless search of the his residence for narcotics.[116] Since the United States Supreme Court had not addressed the issue presented in *Soca*, the court looked to its precedent established in *Grubbs*, which limited the fruits of such a search to probation proceedings, and held that the evidence obtained through the probationary search was only admissible in a probation revocation proceeding and not in a new criminal proceeding.[117] By doing so, the court granted the defendant in *Soca* protection from a warrantless search that exceeded protections granted by the United States Supreme Court.[118]

In contrast to *Soca*, the Florida Supreme Court cannot judicially interpret the comparative proportionality review requirement given the United States Supreme Court's holding that the Eighth Amendment does not require such a review.[119] However, the Florida

113. Lawrence v. State, 308 So. 3d 544, 545 (Fla. 2020) ("We agree with the State and hold that the conformity clause of article I, section 17 of the Florida Constitution forbids this Court from analyzing death sentences for comparative proportionality in the absence of a statute establishing that review.").

114. The Florida Supreme Court's holding in *Soca* was based on the absence of a United States Supreme Court ruling addressing the issue at hand. *Soca*, 673 So. 2d at 27 (stating that "when the United States Supreme Court has not previously addressed a particular . . . issue which comes before us for review, we will look to our own precedent for guidance"). The holding in *Soca* has since been overturned in accordance with a subsequent United States Supreme Court ruling. *See* Bamberg v. State, 953 So. 2d 649, 653-54 (Fla. 2d DCA 2007). The *Soca* court's statement that in the absence of a United States Supreme Court decision addressing the precise issue at hand the court will turn to its own precedent remains good law.

115. *Soca*, 673 So. 2d at 26-27 (citing State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983); *Traylor*, 596 So. 2d at 961).

116. *Id.* at 25.

117. Soca v. State, 673 So. 2d 24, 28 (Fla. 1996).

118. *Id.* at 27 (stating that the United States Supreme Court had not specifically addressed the issue in this case, although it had addressed similar issues dealing with instances where a defendant's property was searched for one purpose and the evidence discovered was then admissible against the defendant for other purposes).

119. Pulley v. Harris, 465 U.S. 37, 50-51 (1984) ("There is . . . no basis [in Supreme Court case law] for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."); Lawrence v. State, 308 So. 3d 544, 550 (Fla. 2020) (explaining that where there is no source

Legislature is not precluded from requiring this review through the adoption of a statute.[120] Accordingly, for such a requirement to exist, the Florida Legislature must adopt a statute mandating it.[121] The Florida Supreme Court has recognized the practicality of adopting this review and acknowledged that it would be "good policy."[122] The court has also noted that comparative proportionality review is a matter of state law.[123] Indeed, other state legislatures, such as the Missouri Legislature, have implemented statutes requiring this kind of review.[124]

While there is a need to grant defendants protection from government intrusion in the context of searches and seizures, there is a greater need to confer defendants a comparative proportionality review of their death sentences given the finality of the sentence. In the context of a search and seizure, determining what constitutes an unreasonable search or seizure in accordance with United State Supreme Court decisions provides citizens with notice of what is permissible because the State's decision will be based on previous United States Supreme Court decisions. Further, requiring the Florida courts to conform to the United States Supreme Court's interpretation of the Fourth Amendment fosters uniformity amongst the courts and limits the ability of judges and juries to apply the law arbitrarily. In comparison, where the Conformity Clause in article I, section 17 allows for the elimination of safeguards for defendants on death row, the effect is the opposite. The removal of the requirement for comparative proportionality review invites unrestricted judicial discretion into sentencing and limits reliance on previous cases as guidelines.

The need for such a review is further evidenced through the prevalence of the death penalty in Florida. Florida has had the highest

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in state law for comparative proportionality review following the implementation of the Conformity Clause in 2002, the court cannot judicially mandate such a requirement) ("[A] judge-made comparative proportionality review requirement violates article I, section 17 of the Florida Constitution in light of the Supreme Court's precedent establishing that comparative proportionality review is not required by the Eighth Amendment.").

120. *Lawrence*, 308 So. 3d at 551 n.4 ("We note, however, that Florida's conformity clause does not preclude the Legislature from requiring comparative proportionality review of death sentences by statute.").

121. *Id.* at 545 ("[T]he conformity clause of article I, section 17 of the Florida Constitution forbids this Court from analyzing death sentences for comparative proportionality in the absence of a statute establishing that review.").

122. *Id.* at 551 n.5 ("We recognize our valued colleague's dissent and its argument that reviewing death sentences for comparative proportionality would be good policy.").

123. Garcia v. State, 492 So. 2d 360, 368 (Fla. 1986) ("Our proportionality review is a matter of state law."); *see also* State v. Henry, 456 So. 2d 466, 469 (Fla. 1984) ("We note that proportionality review is not a requirement of the federal constitution, but rather a feature of state law. Thus, the parameters of that duty are set forth in our cases interpreting that duty." (citations omitted)).

124. *See* State v. Wood, 580 S.W.3d 566, 590 (Mo. 2019) (explaining that section 565.035.3, Mo. Rev. Stat., requires the Supreme Court of Missouri to undergo a proportionality review to determine whether the sentence of death imposed is excessive or disproportionate to the penalty imposed in similar cases).

number of death row exonerations of any state, leading at thirty.[125] Moreover, the error rate for executions is significant, with one innocent person on death row being exonerated for every three persons executed.[126] Without additional safeguards provided to defendants to ensure a death sentence is appropriate, there may be a greater need for exonerations in the future, many of which may come to light past the defendant's execution.

Given that people of color are exonerated in Florida at a greater rate than their counterparts,[127] the elimination of comparative proportionality review could disproportionately impact these populations. Three-fourths of exonerated death row survivors in Florida are people of color.[128] In Duval County, 80% of people sentenced to death from 2009-2012 were African American, and 100% were African American in 2011.[129] Thus, the increased judicial discretion resulting from the abolition of comparative proportionality review may result in fewer exonerations overall, which would likely have a greater effect on minority populations based on the statistics above.

A. Florida Lacks Other Safeguards to Counterbalance the Elimination of Comparative Proportionality Review.

The United States Supreme Court has held that comparative proportionality review is not constitutionally mandated, but did so where there were other safeguards in place to limit arbitrariness and capriciousness.[130] The Florida Supreme Court has recognized that the California statute reviewed by the United States Supreme Court in *Pulley* listed the "checks on arbitrariness" that existed in California at the time, including the requirement that at least one "special circumstance[]" be proven to the jury beyond a reasonable doubt.[131] In

125. *Florida Death Penalty Fact Sheet*, FLORIDIANS FOR ALTERNATIVES TO THE DEATH PENALTY, https://www.fadp.org/florida-death-penalty-fact-sheet/ [https://perma.cc/YQ6N-JMAW].

126. *Id.*

127. *Id.* (explaining that of the 30 individuals exonerated in Florida, seventeen were Black, five were Latino, and eight were White).

128. *Id.*

129. *Id.*

130. Pulley v. Harris, 465 U.S. 37, 50-51 (1984) ("There is . . . no basis [in Supreme Court case law] for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."); *id.* at 55 (Stevens, J., concurring) (arguing that the statutes in *Gregg*, *Proffitt*, and *Jurek* all provided an effective mechanism for categorically narrowing the class of offenses for which the death penalty could be imposed and provided "special procedural safeguards including appellate review").

131. Yacob v. State, 136 So. 3d 539, 549 n.2 (Fla. 2014) ("We acknowledge, as the dissenting-in-part opinion points out, that the Supreme Court, in *Pulley v. Harris,* held that the Eighth Amendment does not require comparative proportionality review by an appellate court in every case in which the death penalty is imposed and the defendant requests

contrast, several of the checks on arbitrariness that were identified in *Pulley* and those contemplated in *Furman* are not present in Florida's capital sentencing system.[132]

In addition to overturning its precedent requiring comparative proportionality review, the Florida Supreme Court has limited other safeguards available to defendants facing death sentences by overturning its decisions regarding unanimous jury decisions in death sentences, intellectual disability determinations, and heightened scrutiny of circumstantial evidence.[133]

In January 2016, in *Hurst v. Florida*, the United States Supreme Court found that Florida's death penalty scheme was unconstitutional because it relied on the judicial factfinder to sentence a defendant to death and treated the jury as advisory.[134] In October 2016, the Florida Supreme Court determined, in *Hurst v. State*, that the United States Supreme Court decision required that "all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury."[135] Included in these findings was "the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances."[136] The court held that in accordance with the Eighth Amendment of the Federal Constitution and Florida law, the jury's recommended sentence of death must be unanimous.[137]

In January 2020, in *State v. Poole*, the Florida Supreme Court overturned its decision in *Hurst v. State*, reasoning that the *Hurst* court conflated the "eligibility" decision, which is a finding that a defendant is guilty of a crime and at least one aggravator sufficient to impose death, and the "selection" decision, which is a finding that the

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proportionality review of the sentence. In *Pulley*, however, the Supreme Court also proceeded to list the panoply of 'checks on arbitrariness' that existed in the California statute being reviewed, including that at least one 'special circumstance' must be unanimously found by the jury in order for the case to proceed to a penalty phase and each 'special circumstance' must be proven to the jury beyond a reasonable doubt. Several of the 'checks on arbitrariness' identified in *Pulley* as the kind contemplated by *Furman* are not present under Florida's capital sentencing system, which is also currently one of the only death penalty statutes in the country to permit a non-unanimous jury recommendation of death." (citations omitted)).

132. *Id.*

133. *Florida Supreme Court Overturns Precedent Throughout 2020*, AMERICAN BAR ASSOCIATION (Jan. 25, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/florida-supreme-court-continues-to-overturn-precedent-throughout-2020/.

134. State v. Poole, 297 So. 3d 487, 499 (Fla. 2020) (citing Hurst v. Florida, 577 U.S. 92 (2016)).

135. Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016).

136. *Id.*

137. *Id.*

defendant should be sentenced to death.[138] The *Poole* court determined that *Hurst v. Florida* was about eligibility, not selection.[139] Accordingly, the court receded from its decision in *Hurst v. State*, except to the extent it requires a jury to unanimously find the existence of a statutory aggravating circumstance.[140] As a result of the *Poole* decision, some defendants were left in various stages of the resentencing process and prosecutors seeking reinstatements of vacated death sentences.[141] Moreover, 34 prisoners who were eligible for *Hurst* relief were resentenced to life, four were resentenced to death, and two were exonerated.[142]

In March 2020, in *Phillips v. State*,[143] the Florida Supreme Court receded from its 2016 decision in *Walls v. State*,[144] which retroactively applied the Court's decision in *Hall v. Florida*.[145] In *Hall*, the Court determined that because the Eighth and Fourteenth Amendments to the Constitution forbade the execution of persons with intellectual disabilities,[146] Florida's law, which allowed the execution of persons with an IQ over 70, was unconstitutional.[147] By receding from the *Walls* decision, the *Phillips* court eliminated a potential safeguard for defendants whose cases predated the *Walls* decision.[148]

The court once again reversed its precedent in May 2020 in *Bush v. State*, where it abandoned the state standard requiring a higher level of scrutiny, a "special standard," to apply at the appellate stage for criminal proceedings based solely on circumstantial evidence.[149] In

138. State v. Poole, 297 So. 3d 487, 501 (Fla. 2020).

139. *Id.*

140. *Id.* at 503, 507-08 (finding that a jury must only make an eligibility finding, not a selection finding).

141. *Florida Supreme Court Overturns Precedent Throughout 2020*, AMERICAN BAR ASSOCIATION (Jan. 25, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/florida-supreme-court-continues-to-overturn-precedent-throughout-2020/.

142. *Florida Supreme Court "Recedes" from Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases*, AMERICAN BAR ASSOCIATION (Mar. 10, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/florida-supreme-court-state-v-poole/ ("As of January 2020, 34 prisoners who were eligible for *Hurst* relief had been resentenced to life, four had been resentenced to death, [and] two had been exonerated . . . .").

143. Phillips v. State, 299 So. 3d 1013, 1015 (Fla. 2020).

144. Walls v. State, 213 So. 3d 340, 345 (Fla. 2016).

145. Hall v. Florida, 572 U.S. 701, 704 (2014).

146. *Id.* (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002)).

147. *Id.* at 711-12 (The court reasoned that a strict cutoff limited the court's ability to consider factors beyond the defendants IQ score, which may be "imprecise," in determining whether an intellectual disability existed.).

148. *See Phillips*, 299 So. 3d at 1015.

149. Bush v. State, 295 So. 3d 179, 199 (Fla. 2020).

reasoning that this special standard[150] was "unwarranted, confusing, and out of sync with both the jury instructions currently used in this state and the approach to appellate review used by the vast majority of the courts in this country," the court discontinued its use.[151]

Since 2011, the number of death sentences in Florida decreased, until 2016 when it again began to rise.[152] Given the court's recent diminishment of safeguards surrounding death sentences, the number of defendants sentenced to death is likely to continue to increase. Even if the United States Supreme Court has recognized that comparative proportionality review is dispensable,[153] it has acknowledged that such review plays a vital role in ensuring the death penalty is not arbitrarily applied.[154] Adopting a statutory requirement for comparative proportionality review would likely limit this increase by ensuring the court does not impose a death sentence where its imposition is a vastly different outcome than in similar cases.

V. CRITIQUES OF COMPARATIVE PROPORTIONALITY REVIEW

Opponents of comparative proportionality review argue that it should be abolished as an unnecessary draining of judicial resources which diverts the courts' focus, distends the post-conviction process, and denies the imposition of justice on the guilty.[155] While requiring comparative proportionality review would necessitate additional funding, administrative convenience does not justify an increased risk of error where a person's life is at stake. Similarly, even if conducting comparative proportionality review prolongs the post-conviction process, the impact of an extended period of time to resolve a case is outweighed by potentially avoiding any gravely disproportionate sentences. Finally, comparative proportionality review does not deny justice upon the guilty, as suggested by opponents of requiring such review; rather, it prevents excessive punishment where it is not warranted. Individuals whose sentences are found to be disproportionate

150. *Id.* at 200 (citing Knight v. State, 107 So. 3d 449, 455-57 (Fla. 5th DCA 2013), *approved*, 186 So. 3d 1005 (Fla. 2016)) ("The special standard is most often articulated by Florida's appellate courts this way: 'Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.' ").

151. *Id.* at 199.

152. *History of the Death Penalty*, *supra* note 52.

153. Pulley v. Harris, 465 U.S. 37, 44-45 (1984) (arguing that proportionality review is not "indispensable").

154. *See* Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) ("To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983))).

155. Latzer, *supra* note 3, at 1166.

in comparison to other similar cases are not released or left unpunished; instead, their death sentences are converted to sentences of life in prison.[156]

Although death sentences are reserved for the most egregious crimes, there is still the inherent risk that someone accused of committing a grave crime is innocent and thus may be mistakenly sentenced to death.[157] Since 1973, there have been 186 exonerations of wrongly-convicted individuals sentenced to death in the United States,[158] and at least twenty-three of those exonerations took place in Florida.[159] Absent safeguards for these individuals, the risk of executing them before a finding of innocence is increased. A comparative proportionality review checks whether the death sentence was proportional to the sentence imposed in similar cases and affords the reviewing court an opportunity to review the factors that the trial court considered. In some circumstances, the reviewing court will determine that the trial court's record is so deficient that there is insufficient information for it to compare the cases; the reviewing court would then remand for a more thorough consideration of factors, reverse the lower court's holding, or vacate the death sentence.[160]

Opponents of comparative proportionality review further argue that a comparative proportionality review requirement will eventually seep past capital cases, extending to cases such as robbery, and "cast doubt upon the entire American system of justice, which, because it vests local institutions with capacious discretion in enforcing state law, must generate vast inequities across the entire range of sentences."[161] However, this fails to consider fundamental differences between crimes in which a death sentence can be imposed and lesser

156. Lawrence v. State, 308 So. 3d 544, 555 (Fla. 2020) (Labarga, J., dissenting) (explaining that overturning a sentence of death does not result in defendants receiving a "get out of jail free" card. Rather, the statutory maximum punishment for first-degree murder, a sentence of life imprisonment, will be required by law.); *see also* Kennedy, *supra* note 65 (explaining that defendants whose death sentences are overturned are then sentenced to the statutory maximum sentence).

157. *Innocence*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/policy-issues/innocence.

158. This statistic is accurate as of February 2021. *DPIC Adds Eleven Cases to Innocence List, Bringing National Death-Row Exoneration Total to 185*, *supra* note 1.

159. *Id.*

160. *See* Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) (reversing based on the inability to conduct a proportionality review based on the scant record); Crump v. State, 654 So. 2d 545, 547-48 (Fla. 1995) (vacating a sentence of death based on the court's inability to conduct a proportionality review absent a clear understanding of the mitigating circumstances considered by the trial court); Hudson v. State, 708 So. 2d 256, 258-59 (Fla. 1998) (remanding and stating that "the trial court's order on this resentencing is so lacking in detail that we cannot decide the proportionality issue"); Harris v. State, 843 So. 2d 856, 869-70 (Fla. 2003) (reversing and stating that "this Court is deprived of the tools to meaningfully review the sentence imposed or to undertake a proportionality review").

161. Latzer, *supra* note 3, at 1174.

crimes where it cannot be. Since the establishment of comparative proportionality review, it has consistently been recognized as a unique review limited to death sentences because of their unique and finite nature.[162] Accordingly, courts have been reluctant to extend comparative proportionality review to any crimes where the potential punishment is less than death. Thus, the risk of courts extending proportionality review to crimes where the punishment is less than death is minimal.

VI. THE IMPACT OF FLORIDA'S ABOLISHMENT OF COMPARATIVE PROPORTIONALITY REVIEW

Since the *Lawrence* court abolished comparative proportionality review in Florida,[163] the Florida Supreme Court has refused to consider any claims based on proportionality, beginning with its decision in *Craft v. State*,[164] a mere month after the *Lawrence*[165] decision. In *Craft*, the defendant appealed his death sentence for first-degree murder.[166] Although the State raised the issue of comparative proportionality review, the court determined that in light of its decision in *Lawrence*,[167] such a review would not be conducted.[168]

A month after the *Craft* decision, the Florida Supreme Court addressed another case involving comparative proportionality review. In *Hojan v. State*, the defendant appealed a death sentence for two counts of first-degree murder, one count of attempted first-degree premeditated murder, three counts of armed kidnapping, and two counts of armed robbery.[169] Like in *Craft*,[170] the Florida Supreme Court again refused to hear the defendant's claim that the death sentence was disproportionate because its decision in *Lawrence* precluded a comparative proportionality review from being conducted.[171]

In *Colley v. State*, the defendant appealed a conviction of first degree murder and the subsequent sentence of death.[172] Once again, the Florida Supreme Court denied hearing claims based on comparative proportionality review.[173] This pattern of the Florida Supreme Court

162. Hurst v. State, 819 So. 2d 689, 700 (Fla. 2002) (citing Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)).

163. Lawrence v. State, 308 So. 3d 544, 545 (Fla. 2020).

164. Craft v. State, 312 So. 3d 45 (Fla. 2020).

165. *Lawrence*, 308 So. 3d 544.

166. *Craft*, 312 So. 3d at 47.

167. *Lawrence*, 308 So. 3d 544.

168. *Craft*, 312 So. 3d at 52 n.3.

169. Hojan v. State, 307 So. 3d 618, 619-20 (Fla. 2020).

170. Craft v. State, 312 So. 3d 45, 52 n.3 (Fla. 2020).

171. *Hojan*, 307 So. 3d at 625.

172. Colley v. State, 310 So. 3d 2, 6 (Fla. 2020).

173. *Id.* at 13 n.7.

refusing to conduct a comparative proportionality review persisted in *Cruz v. State*,[174] *Deviney v. State*,[175] *Smith v. State*,[176] and *Woodbury v. State*.[177] Justice Labarga's concurrence based on his dissenting opinion in *Lawrence*, in which he argued that the court erred in abolishing comparative proportionality review,[178] has persisted throughout the following cases: *Craft*,[179] *Hojan*,[180] *Colley*,[181] and *Smith*.[182] Justice Labarga further concurred in *Cruz*,[183] *Allen*,[184] and *Woodbury*,[185] and dissented in *Deviney*.[186]

CONCLUSION

Traditionally when a defendant's life is at stake, the United States Supreme Court has been particularly sensitive to ensure that all safeguards are observed.[187] In reducing the protections granted to defendants, the Florida Supreme Court "inhibit[ed] the independent protective force of state law . . . ."[188] Recently, legal experts have increasingly agreed that the death penalty cannot be administered fairly or impartially.[189] To mitigate the damage that will be incurred by defendants on death row following the court's decision in *Lawrence*, such as a likely increase in the number of death sentences imposed and executions performed, the State of Florida should statutorily mandate comparative proportionality review. Such a review would ensure

174. Cruz v. State, 320 So. 3d 695 (Fla. 2021).

175. Deviney v. State, 322 So. 3d 563 (Fla. 2021).

176. Smith v. State, 320 So. 3d 20 (Fla. 2021).

177. Woodbury v. State, 320 So. 3d 631 (Fla. 2021).

178. Lawrence v. State, 308 So. 3d 544, 552-58 (Fla. 2020) (Labarga, J., dissenting).

179. Craft v. State, 312 So. 3d 45, 58 (Fla. 2020) (Labarga, J., concurring).

180. Hojan v. State, 307 So. 3d 618, 626 (Fla. 2020) (Labarga, J., concurring).

181. Colley v. State, 310 So. 3d 2, 19 (Fla. 2020) (Labarga, J., concurring).

182. Smith v. State, 320 So. 3d 20, 33-34 (Fla. 2021).

183. Cruz v. State, 320 So. 3d 695, 732 (Fla. 2021).

184. Although the court made no mention of comparative proportionality review in its opinion, Justice Labarga concurred based on his dissent in *Lawrence*. Allen v. State, 322 So. 3d 589, 604 (Fla. 2021) (Labarga, J., concurring) ("I adhere to the view expressed in my dissenting opinion in [*Lawrence*] (receding from proportionality review requirement in death penalty direct appeal cases), and consequently, I can only concur in the result" (citation omitted)); *see also* Lawrence v. State, 308 So. 3d 544, 552-58 (Fla. 2020) (Labarga, J., dissenting).

185. Woodbury v. State, 320 So. 3d 631, 656 (Fla. 2021).

186. Deviney v. State, 322 So. 3d 563, 589 (Fla. 2021).

187. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (citing Powell v. Alabama, 287 U.S. 45, 71 (1932); Reid v. Covert, 354 U.S. 1, 77 (1957)).

188. State v. Poole, 297 So. 3d 487, 514 (Fla. 2020) (Labarga, J., dissenting) (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)).

189. Lauren Sudeall Lucas, *Proportionality Skepticism in a Red State*, 130 HARV. L. REV. F. 276, 281 (2017) (citing CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH 282-84 (2016)) ("[T]he authors emphasize recent trends in legislative abolition and legal experts' increasing consensus that the death penalty cannot be administered in a fair or impartial manner.").

defendants on death row have ample protections and would provide an additional safeguard against the arbitrary imposition of a sentence to death.

Disproportionality amongst sentences given to different defendants can only be eliminated after the sentencing disparities have been identified, and the most logical way to identify these disparities is to compare cases where death sentences have been imposed.[190] In Florida, some form of proportionality review "has been a staple of automatic appellate review" for years,[191] with comparative proportionality review having been conducted for at least 50 years since it was initially recognized in *Dixon*.[192] By eliminating comparative proportionality review, the Florida Supreme Court took a "huge step backwards in Florida's death penalty jurisprudence,"[193] which runs contradictory to the United States Supreme Court's determination that a court's judgment is most dependable when it is informed and within narrow limits.[194] As a result of recent decisions, the court has opened the door to increased judicial discretion and reduced safeguards available to mitigate the arbitrary imposition of the judicial system's gravest sentence.

190. Pulley v. Harris, 465 U.S. 37, 70-71 (1984) (Brennan, J., dissenting).

191. Yacob v. State, 136 So. 3d 539, 556 (Fla. 2014) (Labarga, J., concurring) (arguing that it cannot reasonably be said that proportionality review conflicts with the Supreme Court's jurisprudence governing death sentences in light of the Eighth Amendment).

192. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

193. *Poole*, 297 So. 3d at 514 (Labarga, J., dissenting).

194. Gregg v. Georgia, 428 U.S. 153, 175 (1976).