CASE NO. 20-6060

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN SMILEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ASHLEY MOODY
ATTORNEY GENERAL
STATE OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar No. 158541
*Counsel of Record

MARILYN M. BECCUE
Senior Assistant Attorney General
Florida Bar No. 0539181

Office of the Attorney General
Capital Litigation
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: 850-414-3300
carolyn.snurkowski@myfloridalegal.com
marilyn.beccue@myfloridalegal.com
capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

1. Whether the Florida Supreme Court's decision in Smiley v. State, 295 So. 3d 156 (2020) finding no error, fundamental or otherwise, regarding the jury instructions and verdict form that asked the jury to separately indicate findings on each of Smiley's prior violent felony convictions and finding no merit to Smiley's argument that the jury instructions regarding mitigating circumstances failed to comport with standard instructions approved after his sentencing, violate the Eighth Amendment ban on cruel and unusual punishment and the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the jury's separate findings on each of Smiley's multiple prior violent felony convictions, and the sentencing court's merger of multiple aggravators and grouping of dissimilar non-statutory mitigators unconstitutionally skewed the weighing analysis such that Smiley's death sentence violates the Eighth Amendment ban on cruel and unusual punishment and the Fourteenth Amendment's Equal Protection Clause when the Florida Supreme Court found no error regarding the jury's findings and harmless error regarding the sentencing court's merger analysis in this highly aggravated murder?

3. Whether the Florida Supreme Court's affirmance of the denial of the motion to strike the venire finding that the prosecutor "did not make an argument of any kind, much less a 'direct, unambiguous appeal'"[1] that potential jurors give weight to the State's decision to seek the death penalty violates the Sixth Amendment right to a fair trial by an impartial jury and the Fourteenth Amendment's Equal Protection Clause?

[1] Smiley v. State, 295 So. 3d 156, 170-71 (2020).

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at Smiley v. State, 295 So. 3d 156 (Fla. 2020).

JURISDICTION

The judgment of the Florida Supreme Court was entered on May 14, 2020 and the mandate issued June 4, 2020. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Late one spring night in 2013, as he put away his bicycle, Mark Wilkerson heard rattling coming from the chain link fence behind the Lakeland, Florida home he shared with his mother, his brother, and his stepfather, Clifford Drake. Wilkerson investigated the source of the noise and saw two men, clad in dark sweatshirts, standing on the other side of the chain link fence. Wilkerson did not recognize either man. He called out to the men asking them what they were doing. One of the men, later identified as Benjamin Smiley, responded by pointing a gun at

Wilkerson and demanding Wilkerson to come toward them. As Wilkerson approached the men, they both jumped over the fence. Smiley ordered Wilkerson at gunpoint to take off his clothes. Smiley demanded to know where Wilkerson's stepfather, Drake, kept the safe or money. An unclothed Wilkerson begged for his life and denied any knowledge of a safe or money.

Smiley went through the pockets of Wilkerson's pants taking a cellphone, a small amount of cash, and the keys to the home, before ordering Wilkerson to put back on his pants. As the three men walked toward the house Smiley kept the gun trained on Wilkerson and continually threatened to kill him if he made any noise. Once inside the house, Smiley demanded that Wilkerson lead the two men to Drake's bedroom. Wilkerson complied. Smiley entered the darkened bedroom, where Drake lay sleeping, and searched for the safe. Unable to find a safe, Smiley came out of the bedroom and ordered Wilkerson to enter the room and turn on a light.

When Wilkerson turned on the light, Smiley hit the still-sleeping Drake in the head with the gun. Smiley shouted at the startled and disoriented Drake demanding to know where Drake kept his money. Smiley pointed the gun at Drake's face and continually demanded to know where the money was kept. Drake denied having any money. In response, Smiley shot Drake in the

hip and continued shouting at him demanding to know where Drake kept the money. Receiving no satisfactory answer from Drake, Smiley fatally shot him in the chest.

Smiley turned his focus once again to Wilkerson. Smiley ordered Wilkerson, at gunpoint, to find Drake's money. Wilkerson ransacked the bedroom while Smiley stood watch. No money or safe was found. At this point, the other man told Smiley that someone was coming. Smiley ordered Wilkerson to get on the ground. Smiley and the other man ran from the home leaving behind a backpack.

During the police investigation, an analysis of the bullets recovered at the scene showed that the gun used to murder Drake was also used to murder Carmen Riley less than a month earlier under similar circumstances. The gun was never found. Nearly two years later, the police learned that the DNA found on the backpack and on a sweatshirt found near the crime scene matched Smiley's DNA profile. Wilkerson identified Smiley in a photo lineup as the man who assaulted him and who fatally shot Drake. The police revisited the records from Wilkerson's stolen cellphone and discovered that the phone was used minutes after the Drake murder for a three-way call. Two of the participants in that call were John McDonald and Samantha Lee—Smiley's cousin and aunt, respectively.

McDonald testified at trial that during a card came, Mario Wilkerson, Mark Wilkerson's brother, bragged that his stepfather, Drake, kept money in a safe at their home. Within days, McDonald, Lee, and Smiley hatched the plan to rob Drake. The night of the murder McDonald picked up Smiley and "BigJit," whom McDonald did not know and was surprised to see, from Lee's house and drove them to the parking lot of an apartment building behind Wilkerson and Drake's home. Smiley and "BigJit" were to carry out the robbery and McDonald was to pick them up afterward. McDonald drove away from the scene when he saw Wilkerson on his bike ride up to the house. Later, McDonald received a call from Lee who connected Smiley into a three-way call so that McDonald could find out where to pick up Smiley and "BigJit".

When McDonald picked up Smiley and "BigJit," Smiley angrily told him that it had been a "blank mission" and that the proceeds of the robbery consisted only of Wilkerson's cellphone and a small bag of marijuana. Smiley also said that he shot the "dude that was asleep" because it "looked like he was reaching for something."

Smiley testified in his own defense. He acknowledged that Lee is his aunt and that McDonald is his cousin. He also admitted to a friendship with "BigJit," whose actual name is

Casey Bisbee. He denied having anything to do with the planning or commission of the robbery. He denied murdering Drake and claimed he was not even in Lakeland, Florida on the night of the murder. Smiley was found guilty as charged of first-degree felony murder of Drake, robbery with a firearm of Wilkerson, aggravated assault with a firearm of Wilkerson, and burglary of a dwelling with an assault or battery while armed with a firearm.

The penalty phase was conducted some months later in front of a different jury. In addition to presenting evidence regarding the instant case, the State presented evidence that Smiley was convicted of the March 2013 first-degree murder of Carmen Riley. McDonald testified that he selected Riley as a victim for a robbery, but it was Smiley's role to carry out the robbery. After the robbery, Smiley told McDonald that he had to shoot Riley because she would not cooperate. Smiley shot and killed Riley with the same gun that he later used to murder Drake.

In mitigation, the defense presented evidence that Smiley sustained two ruptured brain aneurysms less than a year before the murders. According to the defense, the brain aneurysms affected Smiley's impulse and rage control. An expert called by the State in rebuttal agreed that the ruptured aneurysms

constituted severe brain trauma. The defense called family and friends to testify about Smiley's markedly changed behavior after suffering the ruptured brain aneurysms. The defense also presented evidence of Smiley's childhood, which included episodes of corporal punishment at the hands of his stepfather who was a strict disciplinarian. Lastly, the defense argued that the jury should consider that Lee and McDonald escaped responsibility for their roles in the murders. As described in the Florida Supreme Court's direct appeal opinion the jury unanimously found the following was proven beyond a reasonable doubt:

> (1) Smiley was previously convicted of another capital felony, the murder of Carmen Riley; (2) Smiley was previously convicted of a felony involving the use or threat of violence to the person, robbery with a firearm regarding Carmen Riley; (3) Smiley was previously convicted of a felony involving the use or threat of violence to the person, robbery with a firearm regarding Mark Wilkerson; (4) Smiley was previously convicted of a felony involving the use or threat of violence to the person, aggravated assault regarding Mark Wilkerson; (5) Smiley was previously convicted of a felony involving the use or threat of violence to the person, burglary with an assault or battery while armed regarding Clifford Drake and Mark Wilkerson; (6) Smiley committed the Drake murder while engaged in the commission of robbery regarding Mark Wilkerson; (7) Smiley committed the Drake murder while engaged in the commission of burglary with an assault or battery while armed with a firearm regarding Clifford Drake and Mark Wilkerson; and (8) Smiley committed the murder for pecuniary gain regarding Clifford Drake.

Smiley, 295 So. 3d at 164 (Fla. 2020).

The state supreme court also detailed the jury's findings regarding mitigation.

> The jury's votes on Smiley's proposed mitigating circumstances were as follows: no significant history of prior criminal activity, 5 yes to 7 no; the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, 0 to 12; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, 0 to 12; the age of the defendant at the time of the crime, 0 to 12; mitigation related to the defendant's character, 7 to 5; mitigation related to the defendant's background, 0 to 12; mitigation related to the life of the defendant, 0 to 12; and mitigation related to the circumstances of the offense, 1 to 11.
>
> After performing the statutorily required assessment and weighing of aggravating factors and mitigating circumstances, the jury unanimously recommended that the trial court sentence Smiley to death.

Smiley, 295 So. 3d at 164–65.

The court held a Spencer[2] hearing on November 13, 2017. The State did not put on additional evidence at the hearing. Smiley called one witness, Dr. Hartig. The Florida Supreme Court's opinion accurately described Dr. Hartig's Spencer-hearing testimony.

> Dr. Hartig's testimony was similar to her testimony at the penalty phase. Dr. Hartig explained information from Smiley's background that assertedly related to mitigation. She discussed (1) Smiley's lack of relationship with his biological father; (2) Smiley's lack of relationship with his stepfather; (3) Smiley being the subject of corporal punishment; (4) Smiley

[2] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

> running away from home and essentially being homeless; (5) Smiley's persistence in pursuing his education despite his circumstances; (6) Smiley's various paying jobs and good work ethic; (7) Smiley's aneurysms; (8) Smiley's lack of juvenile criminal history; and (9) Smiley's remorse for the victims. Dr. Hartig also testified that Smiley seemed to lack problem-solving abilities, which she linked to his traumatic brain event.

Smiley, 295 So. 3d at 164-65.

The trial court sentenced Smiley to death for the first-degree felony murder of Drake.[3] The court found that the State proved eight aggravating factors beyond a reasonable doubt and the defense established five mitigating circumstances by the greater weight of the evidence. The court gave the jury's recommendation "great weight" and concluded that "the mitigation pales in comparison to the proven aggravating factors." Id.

Relevant to the Petition, the Florida Supreme Court resolved the following issues raised in Smiley's direct appeal:

> Smiley's next argument is about certain comments made by the prosecutor during the penalty phase voir dire. Because context is important for evaluating claims of this nature, we present the relevant exchange in some detail.
>
> The prosecutor prefaced the comments at issue by observing that there are some people who feel "so strongly about first-degree murder that if someone commits first-degree murder there should be no question" that the death penalty should be imposed. Then, addressing a potential juror who earlier had described himself as a strong proponent of the death

[3] The court ordered the sentences for the other convictions to run concurrently with the death sentence.

penalty, the prosecutor asked: "Do you think that just because someone is convicted of first-degree murder it should be an automatic death sentence?" The juror started to answer the question, but the prosecutor interrupted, asking: "[D]o you understand that in Florida not every case meets the qualifications for a death penalty?" The prosecutor continued:

> We have, you know, 60 death—60 first-degree murder cases pending in our circuit. Okay? Probably nine of them are death eligible. So just because you're charged with first-degree murder does not mean that your case qualifies as a case that we would seek the death penalty in. Do you understand that?

In response, the juror indicated that he understood and answered "yes" when the prosecutor asked if he "agree[d] with that." The prosecutor then wrapped up by noting that the juror had said that he was a "strong proponent of the death penalty" and by asking: "In this case can you assure us you are going to listen to the law and hold the State to the burden that we have proved at least one aggravating factor beyond a reasonable doubt, you consider the mitigating circumstances before you would make a sentence of death?"

Defense counsel did not immediately object. The prosecutor then moved on to question the next potential juror, who also had earlier described herself as a strong death penalty proponent. Once again, the prosecutor began by asking if the juror believed in the automatic imposition of the death penalty as punishment for first-degree murder. The juror answered "no." Then the prosecutor continued: "And do you understand that in the State of Florida that there are certain criteria that must be met before the State can even seek the death penalty?" After the juror answered, "I understand that now," the prosecutor said: "All right. So like I said, we have lots of cases but we don't—there are only cases that meet that—" At that point, defense counsel objected and asked to approach the bench.

Defense counsel explained that he anticipated that the

prosecutor was going to repeat her comments about the number of pending murder cases in the circuit that are eligible for the death penalty. Defense counsel acknowledged: "I fear that I did not make a contemporaneous objection at that time." But counsel went on to argue that the prosecutor's comment was "very prejudicial" and counsel ultimately asked the trial court to strike the venire. The trial court sustained the objection to the prosecutor's comments but denied the request to strike the panel.

Smiley now argues that the denial of his motion to strike the venire was reversible error and that a new penalty phase is required. We review a decision of the trial court to deny a motion to strike the jury panel for abuse of discretion. *See Guzman v. State*, 238 So. 3d 146, 155 (Fla. 2018).

To support his argument, Smiley relies on *Pait v. State*, 112 So. 2d 380 (Fla. 1959), *Brooks v. State*, 762 So. 2d 879 (Fla. 2000), and *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010). We discussed these same decisions in *Braddy v. State*, 111 So. 3d 810 (Fla. 2012). In *Braddy*, we described the earlier cases as ones where prosecutors had violated the principle that "the State may not add legitimacy to its case by vouching for the death penalty during its closing argument." *Id.* at 847. We were careful to observe that, in *Pait*, *Brooks*, and *Ferrell*, "the prosecutors clearly appealed to the jurors to give weight to the fact that the State had decided to seek the death penalty." *Id.* We emphasized that the prosecutors' comments in those cases involved "a direct, unambiguous appeal" to the jury to give weight to the State's decision. *Id.*

Even assuming that precedents involving prosecutors' closing arguments apply in assessing comments made during voir dire, the comments at issue here do not violate the principle we described in *Braddy*. Viewing the prosecutor's statements in context, she was conveying the point that the law does not permit jurors to vote for the death penalty as an "automatic" punishment for first-degree murder. Just after making the disputed comment, the prosecutor in fact asked the juror for assurance that he could hold the State to

> its burden of proving an aggravating factor beyond a reasonable doubt. The prosecutor did not make an argument of any kind, much less a "direct, unambiguous appeal" for the potential jurors to give weight to the State's decision to seek the death penalty.
>
> We do not condone the prosecutor's comments. The State can and should explain the concepts of death eligibility, aggravation, and mitigation without telling the jury that the government seeks the death penalty only in a subset of first-degree murder cases. But the prosecutor's statements here fall far short of what would be required to justify striking the venire and starting over again, and the trial court did not abuse its discretion in denying Smiley's request. (In light of our resolution of this issue, we need not address the State's argument that Smiley did not lodge a contemporaneous objection and therefore waived this claim.) We deny this claim.

Smiley, 295 So. 3d at 169-71.

Smiley also contended that the verdict form and jury instructions were deficient. The Florida Supreme Court noted that Smiley did not object to the verdict form or jury instructions and, therefore, evaluated the claim for fundamental error.

> Smiley contends that reversible error occurred because the verdict form and the trial court's jury instructions allowed the jury to treat each of Smiley's five prior violent felony convictions as a separate aggravator. Specifically, the verdict form identified and listed each prior violent felony individually and asked the jury to record its vote on each. Smiley claims that this deviated from the verdict form and jury instructions that we approved in *In re Standard Jury Instructions in Capital Cases*, 214 So. 3d 1236 (Fla. 2017). Smiley further argues that this caused him prejudice by overstating the number of aggravators proven in his case. Because Smiley did not object to the verdict form or jury instructions, we evaluate this claim under the fundamental error

standard. To constitute fundamental error, an alleged error must reach down into the validity of the sentencing proceeding itself such that the sentence could not have been obtained without the assistance of the alleged error. *See, e.g., Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996).

There is nothing in the death penalty sentencing statute or in our case law that prohibits asking the jury to separately indicate its findings on any prior violent felony underlying the prior violent felony aggravator. Indeed, we have observed that in evaluating the weight of the prior violent felony aggravator, "the facts upon which the aggravator is based are critical to our analysis." *Bevel v. State*, 983 So. 2d 505, 524 (Fla. 2008). Voting separately on each underlying conviction also adds clarity to the jury's findings and could be helpful if any particular conviction is subsequently invalidated. We find no error in this regard.

But Smiley makes a separate argument that the presentation of Smiley's prior violent felonies in this case skewed the jury's weighing of aggravating factors and mitigating circumstances. Under our case law, "[i]f a defendant has multiple convictions for prior violent felonies, the trial court can find only a single aggravating circumstance, but it may give that circumstance greater weight based upon the existence of multiple convictions." *Bright v. State*, 90 So. 3d 249, 261 (Fla. 2012). Presumably this applies to the jury's findings and weighing calculus as well. Thus, even though a jury is entitled to weigh multiple prior violent felonies more heavily than a single violent felony, the jury instructions here were erroneous to the extent they suggested that each prior violent felony conviction constituted a separate aggravating factor. Nonetheless, any error falls far short of the high bar for establishing fundamental error.

The aggravating factors here included Smiley's prior conviction for the Carmen Riley murder (a capital felony), a particularly weighty aggravator. The Drake episode involved contemporaneous felony convictions involving crimes against a separate victim. The

> verdict form shows that the jury found this to be a case involving very little mitigation. Indeed, the verdict form suggests that the jury unanimously rejected Smiley's principal argument in mitigation, that his ruptured aneurysms and resulting brain damage lessened his culpability. Finally, the trial court properly instructed the jury that the weighing process is not "mechanical or mathematical" and that the jury therefore "should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances." Under these circumstances, we find no fundamental error.
>
> We also see no merit in Smiley's challenge to the jury instructions and verdict form as they related to mitigating circumstances. Smiley bases this claim on alleged deviations from standard jury instructions approved after his sentencing proceeding, and he points to no independent authority to support his argument that the trial court committed reversible error. We therefore deny this claim as well.

Smiley, 295 So. 3d at 174-75.

Smiley further argued that the sentencing court overcounted what should have been two aggravating factors and instead grouped the aggravating factors in the following way: "one combined aggravator for the two prior convictions involving the Riley murder; one combined aggravator for the prior convictions involving the robbery and assault of Mark Wilkerson and for the fact that the Drake murder was committed during the robbery of Wilkerson; one combined aggravator for the contemporaneous conviction for burglary with an assault or battery while armed and for the fact that the Drake murder was committed during a burglary; and one aggravator for the fact that the murder was

committed for pecuniary gain." Smiley, 295 So. 3d at 175-76.

The Florida Supreme Court held that any error in the combining aggravators was harmless stating:

> We find that any error in the trial court's merger analysis was harmless. As the trial court found, this was a highly aggravated murder, given both the contemporaneous crimes committed against Mark Wilkerson and, most importantly, Smiley's previous conviction for the Riley murder. All of the facts underlying the aggravating factors proven in this case—regardless of how those factors are grouped for merger purposes—were properly subject to consideration by the trial court. All of those facts would have added weight to whatever subset of aggravating factors remained at the conclusion of any different merger analysis. And balanced against this aggravation, the trial court found very little mitigation. Indeed, the trial court explicitly acknowledged that its balancing of aggravation and mitigation was qualitative not quantitative, and it found that "the nature and quality of the mitigation pales in comparison to the proven aggravating factors." Under these circumstances, we conclude that there is no reasonable possibility that, absent any error in the trial court's merger analysis, the court would have imposed a lesser sentence. *See, e.g., Lukehart v. State*, 776 So. 2d 906, 925 (Fla. 2000) (applying harmless error analysis to claim of improper doubling of aggravating factors).

Smiley, 295 So. 3d at 174-76.

Finally, Smiley argued that the sentencing court did not properly consider each mitigating circumstance and that the resulting sentencing order did not comply with the standards the Florida Supreme Court articulated in Campbell v. State, 571 So. 2d 415 (Fla. 1990). The state supreme court held that the

sentencing court erroneously bundled substantively dissimilar mitigating circumstances but, noting that this murder was "highly aggravated," the court found the error was harmless beyond a reasonable doubt. Smiley, 295 So. 2d at 177.

Smiley now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) SMILEY DID NOT RAISE, AND THE FLORIDA SUPREME COURT DID NOT ADDRESS, THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED TO THIS COURT; (2) THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE STATE COURT'S INTERPRETATION OF STATE LAW; (3) SMILEY'S ARGUMENT IS WITHOUT MERIT BECAUSE HIS DEATH SENTENCE DOES NOT VIOLATE THE SIXTH, EIGHTH, OR FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND (4) SMILEY HAS NOT ESTABLISHED CONFLICT AMONG STATE HIGH COURTS, FEDERAL DISTRICT COURTS, OR PRESENTED AN UNSETTLED QUESTION OF FEDERAL LAW.

Smiley did not raise the federal constitutional questions presented to this Court; instead, the Florida Supreme Court's decision is based on state law, which this court does not have jurisdiction to review.

A party's failure to raise a federal question in state court is a jurisdictional bar to this Court's certiorari review. See State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 160 (1945) (stating "Since the Wisconsin Supreme Court did not pass on the question, we may not do so."); Harding v. People of State of Illinois, 196 U.S. 78, 86 (1904)(stating that this Court cannot consider an alleged federal question when the federal right "relied upon had not been, by adequate specification, called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause.")

On occasion, though, this Court has treated the rule against deciding claims "not pressed nor passed on" by the state

courts as something less than a complete jurisdictional bar. See Illinois v. Gates, 462 U.S. 213, 219 (1983). Nonetheless, whether a matter of lack of jurisdiction, or as a reason not to exercise jurisdiction, due regard for the "appropriateness of the relationship of this Court to state courts" demands that state courts be given an opportunity to pass on questions of federal law. Gates, 462 U.S. at 221 (internal citation omitted). "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . ." See Adams v. Robertson, 520 U.S. 83, 86-87 (1997) citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987); See also Street v. New York, 394 U.S. 576, 582 (1969)(stating when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to the want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.")

Additionally, comity and respect for federalism require that this Court defer to the decisions of state courts on issues of state law. Bush v. Gore, 531 U.S. 98, 112 (2000). This Court intervenes "only to correct wrongs of constitutional dimension." Dickerson v. United States, 530 U.S. 428, 438-39 (2000) citing Smith v. Phillips, 455 U.S. 209, 221 (1982) This practice

recognizes that the "decisions of state courts are definitive pronouncements of the will of the States as sovereigns." Id.

Moreover, where a state court does address a federal question this Court's review is a matter of judicial discretion rather than a matter of right. U.S. Sup. Ct. R. 10. The state court's decision should present a compelling reason justifying this Court's discretionary review. The primary purpose for which this Court exercised its certiorari jurisdiction is to resolve conflicts among the United States courts of appeal and state courts "concerning the meaning and provisions of federal law." Braxton v. United States, 500 U.S. 344, 348 (1991). Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. Rockford Life Insurance Co. v. Illinois Dept. of Revenue, 482 U.S. 182, 184, n. 3 (1987). This Court rarely grants a writ of certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

Finally, this Court does not review a state court's interpretation of federal law if the state court's decision is supported by adequate and independent state law grounds. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate

state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." Id.

Penalty phase jury instruction and verdict form:

On direct appeal to the Florida Supreme Court, Smiley alleged reversible error occurred because the verdict form and jury instructions allowed the jury to treat each of Smiley's prior violent felony convictions as separate aggravating circumstances. Smiley did not object either to the jury instructions or the verdict form. Consequently, pursuant to state law the Florida Supreme Court reviewed the issue for fundamental error. Archer v. State, 673 So. 2d 17, 20 (Fla. 1996)(stating, "jury instructions are subject to the contemporaneous objection, and absent an objection at trial, can be raised on appeal only if fundamental error occurred.)(internal citations omitted); See also § 924.051 (3), Fla. Stat.[4]

---

[4]An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was

The court held that "there is nothing in the *death penalty sentencing statute* or in *our case law* that prohibits asking the jury to separately indicate its findings on any prior violent felony underlying the prior violent felony aggravator." Smiley, 295 So. 3d at 174 (emphasis added). Likewise, in response to Smiley's argument that the presentation of Smiley's prior violent felonies skewed the weighing of aggravators and mitigators, the state supreme court held, "*Under our case law*,'[if] a defendant has multiple convictions for prior violent felonies, the trial court can find only a single aggravating circumstance, but may give that circumstance greater weight based upon the existence of multiple convictions. Id. quoting Bright v. State, 90 So. 3d 249, 261 (Fla. 2012) (emphasis added). The court held, assuming the same proposition applied to the jury's determination of the weight to be given aggravating factors, that in this case "any error falls well short of the high bar for establishing fundamental error." Smiley, 295 So. 3d at 174.

Smiley's complaint to the state supreme court about the jury instructions and verdict form regarding the mitigating circumstances was based entirely on the fact that the trial court did not use a standard instruction that was approved after

---

properly preserved in the trial court or, if not properly preserved, would

his sentencing proceedings. Smiley, 295 So. 3d at 175. The Florida Supreme Court rejected Smiley's argument specifically stating that other than referencing the inapplicable standard instruction, Smiley pointed to "no independent authority to support his argument that the trial court committed reversible error." Id.

Smiley does not even attempt to establish that he raised the use of the jury instructions and verdict form as federal constitutional violations in his direct appeal to the state supreme court. Instead, Smiley takes a result driven approach claiming that the Florida Supreme Court's determination of state law violates his federal constitutional rights. This Court's certiorari jurisdiction involves review of state courts' decisions interpreting federal constitutional provisions. This Court does grant certiorari to superimpose federal law on state court decisions that do not involve an interpretation or analysis of federal constitutional law in the first place.

Even if Smiley had raised the constitutional dimensions of these claims in the Florida Supreme Court, his failure to comply with Florida's contemporaneous objection rule is an adequate and independent state law ground prohibiting this Court's review. The Florida Supreme Court expressly stated that any error in the

---

constitute fundamental error. § 924.051 (3), Fla. Stat.

unobjected-to jury instructions and verdict form did not meet the "high bar" for establishing fundamental error pursuant to Florida law. Smiley, 295 So. 3d at 174. This Court does not have jurisdiction to review this adequate and independent state law ground supporting the judgment.

***Errors in the Sentencing Order*:**

The Florida Supreme Court held that sentencing court erred in combining Smiley's prior violent felony convictions and the contemporaneous felonies committed during the course of the Drake murder into four rather than two aggravating circumstances. However, the court found the error to be harmless in this highly aggravated murder. This Court does not have jurisdiction to review the application of the harmless-error rule where it "involves only errors of state procedure or state law." Chapman v. California, 386 U.S. 18, 21 (1967).

The specific requirements necessary for a death-penalty sentencing order are mandated by Florida law. § 921.141(4),(5), Fla. Stat. (2017) (describing the requirements for a written sentencing order and mandating direct review of all death sentences in the Florida Supreme Court, respectively); Campbell, 571 So. 2d 415 (stating that sentencing court must consider and evaluate all mitigating circumstances), receded from in part by Trease v. State, 768 So. 2d 1050 (Fla. 2000); Lukehart, 776 So.

2d 906 (applying harmless error to improper doubling of aggravators).

The statutory aggravators at issue are: (1) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, (2) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit a robbery and a burglary. § 921.141, (b), (d), Fla. Stat.

The sentencing court combined the two prior convictions related to the Riley murder as one aggravator. Additionally, the court combined the robbery of Wilkerson and the fact that the Drake murder was committed during the robbery of Wilkerson as a single aggravator. The sentencing court combined the contemporaneous conviction for burglary with an assault or battery while armed and the fact that the Drake murder was committed during a burglary as a single aggravator. Finally, the court considered the fact that the murder was committed for pecuniary gain as one aggravator. Smiley, 295 So. 3d at 175-76.

In Bright v. State, 90 So. 3d 249, 260-61 (Fla. 2012), the Florida Supreme Court held that the prior violent felony aggravator constitutes one statutory aggravating factor regardless of how many prior violent felony convictions were

proven. Previously, the court held that the "in commission of" an enumerated felony aggravator is a single aggravating factor even if the murder occurred during the commission of multiple enumerated felonies. Tanzi v. State, 964 So. 2d 106, 117 (Fla. 2007).

However, recognizing that the number of the defendant's prior violent felony convictions or the fact a murder occurred during the course of multiple felonies is pertinent to an individualized sentencing analysis, the Florida Supreme Court ruled that the sentencing court can accord the aggravators greater weight when the State proves multiple prior or contemporaneous felonies. Tanzi, 964 So. 2d at 117.

In this case, the Florida Supreme Court agreed with the sentencing court's assessment that:

> . . . this was a highly aggravated murder, given both the contemporaneous crimes committed against Mark Wilkerson and, most importantly, Smiley's previous conviction for the Riley murder. All of the facts underlying the aggravating factors proven in this case—regardless of how those factors are grouped for merger purposes—were properly subject to consideration by the trial court. All of those facts would have added weight to whatever subset of aggravating factors remained at the conclusion of any different merger analysis. And balanced against this aggravation, the trial court found very little mitigation. Indeed, the trial court explicitly acknowledged that its balancing of aggravation and mitigation was qualitative not quantitative, and it found that "the nature and quality of the mitigation pales in comparison to the proven aggravating factors."

Smiley, 295 So. 3d at 176 (internal citations omitted).

Under these circumstances, the Florida Supreme Court concluded there is no reasonable possibility that the trial court would have imposed a lesser sentence absent any error in the merger analysis. Id.

The state supreme court also found the sentencing court's error in grouping dissimilar mitigating circumstances was harmless. The court reiterated that a sentencing court must evaluate each proposed mitigating circumstance and determine whether it is supported by the evidence and, regarding non-statutory mitigators, whether it is in fact mitigating. Smiley, 295 So. 3d at 176 citing Campbell, 571 So. 2d 415 receded from in part by Trease, 768 So. 2d 1050. 1055 (Fla. 2000). That said, the court has also encouraged sentencing courts to group mitigating circumstances into categories of related conduct or issues and address them accordingly. Id. at 177. Here, the Florida Supreme Court found that the sentencing court erred by grouping together dissimilar mitigating circumstances; however, the error was harmless.[5] The state supreme court noted:

> Smiley's previous conviction for the Riley capital felony and for the contemporaneous violent felonies committed against Mark Wilkerson made this a highly

[5] The court also observed that the sentencing court was not compelled to treat any of Smiley's proposed non-statutory mitigators as actually mitigating or to give them any weight. Smiley, 295 So. 3d at 177.

> aggravated case. Moreover, the sentencing order leaves no doubt that the trial court was aware of and considered the nonstatutory mitigating circumstances that Smiley proposed. Significantly, the sentencing order shows that the trial court—like the penalty phase jury—was unpersuaded that Smiley's aneurysms and resulting brain injury constituted significant mitigation. The trial court found that Smiley had established the statutory mitigators for extreme mental or emotional disturbance and for substantially impaired ability to conform to the law, but the court still assigned each of these mitigators only "little weight." This was the heart of Smiley's case for mitigation, and the trial court was largely unmoved by it. On this record, there is no reasonable possibility that disaggregating Smiley's proposed nonstatutory mitigation—which the trial court assigned "moderate weight" in the aggregate—could have changed the trial court's weighing calculus and resulted in a life sentence.

Smiley, 295 So. 3d at 177-78.

In addition to implicating a question of state law, Petitioner's challenge to the correctness of the finding of harmlessness is a factual determination with no implications beyond the parties involved in this case. Accordingly, certiorari should be denied. See Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction).

Prosecutor's comments during jury selection:

Further, the Florida Supreme Court relied on state law to reject Smiley's claim that the prosecutor's comments required

that the trial court grant the motion to strike the venire. Smiley cited the following state cases addressing "vouching for the death penalty" in support of his contention that the trial court abused its discretion in denying the motion to strike the venire: Pait v. State, 112 So. 2d 380 (Fla. 1959); Brooks v. State, 762 So. 2d 879 (Fla. 2000); and Ferrell v. State, 29 So. 3d 959 (Fla. 2010).

In analyzing this issue, the state court noted that it had previously discussed Smiley's cited cases in Braddy v. State, 111 So. 3d 810 (Fla. 2012). In Braddy, the Florida Supreme Court recognized that in Pait, Brooks, and Ferrell the prosecutors violated the principle that "the State may not add legitimacy to its case by vouching for the death penalty during closing argument." Id. at 847. In this case, the Florida Supreme Court noted that "[w]e were careful to observe that, in *Pait*, *Brooks*, and *Ferrell*, 'the prosecutors clearly appealed to the jurors to give weight to the fact that the State had decided to seek the death penalty.' We emphasized that the prosecutors' comments in those cases involved 'a direct, unambiguous appeal' to the jury to give weight to the State's decision." Smiley, 295 So. 3d at 170 (internal citations omitted).

The Florida Supreme Court found that "the prosecutor's statements here fall far short of what would be required to

justify the striking of the venire and starting over again, and the trial court did not abuse its discretion in denying Smiley's request." Id. at 171. In doing so, the Florida Supreme Court recognized that the State can and should explain the concepts of eligibility, aggravation, and mitigation to potential jurors in death penalty cases, but cautioned prosecutors against informing potential jurors that the "government seeks the death penalty only in a subset of first-degree murder cases." Id. at 171. The prosecutor's comments here, though, did not violate the court's previous pronouncements prohibiting the State from "vouching for the death penalty." Id.

Comity and respect for federalism require that this Court defer to the decisions of state courts on issues of state law. Therefore, this Court should deny the writ.

Smiley's claim that the Florida Supreme Court's decision violates his Sixth, Eighth, and Fourteenth Amendment rights is meritless.

Smiley was tried by a fair and impartial jury:

This Court has "squarely held that an impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'" Lockhart v. McCree, 476 U.S. 162, 178 (1986) quoting Wainwright v. Witt, 469 U.S. 412, 423 (1985). Smiley does not direct this Court's attention to any statement by any juror or any conduct of any juror from which

one could conclude that the jury was not fair and impartial in adjudicating this case. Even so, Smiley contends that the prosecutor's comments at jury selection impermissibly prejudiced the jury against him.

Other than the previously mentioned state decisional law, Smiley relies on Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) to support his argument. Notably, like the state cases Smiley cited, the objectionable comments in Brooks were made during closing argument not jury selection. Nonetheless, the Brooks court found that, when viewed in context, there was no "reasonable probability that, but for those arguments, the death verdict would not have been given." Brooks, 762 F.2d 1383, 1413 (11th Cir. 1985), cert. granted on other grounds, judgment vacated, 478 U.S. 1016 (1986).

Here, the Florida Supreme Court likewise considered the prosecutors' comments in context and found that the comments made during jury selection did not require the trial court to grant the motion to strike the venire. Smiley, 295 So. 3d at 171. The court stated, "[v]iewing the prosecutor's statements in context, she was conveying the point that the law does not permit jurors to vote for the death penalty as an 'automatic' punishment for first-degree murder. Just after making the disputed comment, the prosecutor in fact asked the juror for

assurance that he could hold the State to its burden of proving an aggravating factor beyond a reasonable doubt. The prosecutor did not make an argument of any kind, much less a 'direct, unambiguous appeal' for the potential jurors to give weight to the State's decision to seek the death penalty." Smiley, 295 So. 3d at 170-71. There is no basis to conclude that Smiley's jury was anything other than fair and impartial or gave any consideration to the prosecutor's comments regarding the number of cases in which the Office of the State Attorney seeks the death penalty.

Further, Smiley incorrectly asserts that the alleged Sixth Amendment violation was particularly prejudicial because this Court struck down "judge-determinate sentencing" in Hurst v. Florida, 577 U.S. 92 (2016) and that "the jury in Florida is now the sentencer". Both propositions are incorrect.

This Court's decision in Hurst plainly does not require jury sentencing. Instead, this Court held that Florida's prior capital sentencing scheme was unconstitutional because it "required the judge alone to find the existence of an aggravating circumstance." Hurst, 577 U.S. 92 at 102(2016).[6]

[6] The Supreme Court of Florida recently recognized its erroneous expansion of this Court's Hurst v. Florida decision and receded from Hurst v. State, 202 So. 3d 40 (Fla. 2016) except to the extent it requires a jury unanimously to find the existence of a

Further, this Court expressly stated that it was overruling its prior decisions in Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 577 U.S. 92 at 102. In both Spaziano and Hildwin this Court held that jury sentencing was not constitutionally required. Hildwin, 490 U.S. at 638-40; Spaziano, 468 U.S. at 458-65. That portion of the holdings were left untouched by Hurst. See McKinney v. Arizona, 140 S. Ct. 702, 707 (2020) ("Under *Ring [v. Arizona,* 536 U.S. 584 (2002),] and *Hurst* [*v. Florida*], a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary 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.").

In Florida, the judge remained the sentencer even after this Court's Hurst decision. Section 921.141 (3)(a), Fla. Stat. (2017) provides that if the jury has recommended a death sentence "*the court*, after considering each aggravating factor

---

statutory aggravating circumstance. State v. Poole, 297 So. 3d

found by the jury and all mitigating circumstances, *may* impose a sentence of life imprisonment without the possibility of parole or a sentence of death. *The court may* consider only an aggravating factor that was unanimously found to exist by the jury." This Court has never held or even suggested that judge-determinate sentencing is unconstitutional. See Proffitt v. Florida, 428 U.S. 242, 252 (1976) (approving Florida's capital sentencing statutory scheme stating that "it would appear that judicial sentencing should . . . lead to even greater consistency in the imposition . . . of capital punishment.")

Smiley's jury understood that it was entirely their decision whether the State proved one or more aggravating factors beyond a reasonable doubt. As noted, the prosecutor herself sought assurances from the jury that they would hold the State to its burden. There was no Sixth Amendment violation.

***Smiley's death sentence does not violate the Eighth Amendment ban on Cruel and Unusual Punishment or the Fourteenth Amendment's Equal Protection Clause*:**

This Court has recognized that both the eligibility and selection factors are "not susceptible of mathematical precision." Tuilaepa v. California, 512 U.S. 967, 973 (1994). Any deviation from the standard application of Florida law in Smiley's case does not render his death sentence

---

487, 508 (Fla. 2020).

unconstitutional. "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.'" Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) quoting Zant v. Stehens, 462 U.S. 862, 877 (1983).

Florida law accomplishes the initial narrowing function by asking the jury to determine "if the state has proven, beyond a reasonable doubt, the existence of *at least one* aggravating factor" as listed in the statute. § 921.141 (2)(a), (6), Fla. Stat. (emphasis added). As the Florida Supreme Court noted, Florida law does not prohibit a jury from specifying its findings on any or all prior violent felony convictions that form the basis for the prior violent felony aggravator. Separate findings add clarity and specificity to the jury's determination thereby enhancing the reliability of the sentence, not diminishing it.

Further, the jury heard and considered Smiley's proposed mitigation and was unmoved by most of it. Like the jury, the sentencing court considered Smiley's proposed mitigation and found that "it pales in comparison to the proven aggravating factors." Smiley, 295 So. 3d at 176. The sentencing court

understood the necessary considerations for imposing a death sentence as evidence by the court's statement that balancing of aggravation and mitigation was "qualitative not quantitative." Id. at 176. Smiley's sentence comports with this Court's death penalty jurisprudence. Proffitt, 428 U.S. at 251-52; Gregg v. Georgia, 428 U.S. 153 (1976); Zant v. Stephens, 462 U.S. 862, 876 (1983). There is no reason, never mind a compelling reason, for this Court to grant certiorari review. U.S. Sup. Ct. R. 10.

Smiley's claim that his sentence violates the Equal Protection Clause of the Fourteenth Amendment also fails. The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' This provision creates no substantive rights." Vacco v. Quill, 521 U.S. 793, 799 (1997) citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. Plyler v. Doe, 457 U.S. 202, 216 (1982).

Smiley, just like any other death-sentenced inmate in Florida, received a death sentence based on an evaluation of the circumstances of the crime and his character as an individual. Harmless procedural errors do not rise to the level of an equal protection violation. Both the jury and the sentencing court

considered Smiley's prior and contemporaneous offenses and his proposed mitigation and concluded that Smiley should be sentenced to death. The constitution requires nothing more.

Smiley has not presented a compelling reason involving an unresolved question of federal law or a conflict among state supreme courts necessitating this Court's resolution.

Finally, certiorari review should not be granted because Smiley has not shown that his case falls under any of the provisions of Rule 10 governing certiorari review or is otherwise appropriate for review.

Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. Rockford Life Insurance Co. v. Illinois Dept. of Revenue, 482 U.S. 182, 184, n. 3 (1987). No conflict or unsettled question of federal law is presented in Smiley's petition. Therefore, this Court should deny the writ.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL
STATE OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar No. 158541
*Counsel of Record

MARILYN M. BECCUE
Senior Assistant Attorney General
Florida Bar No. 0539181

Office of the Attorney General
Capital Litigation
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: 850-414-3300
carolyn.snurkowski@myfloridalegal.com
marilyn.beccue@myfloridalegal.com
capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT