DOCKET NO. 20-8048

IN THE SUPREME COURT OF THE UNITED STATES

JAMES TERRY COLLEY, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied where the Florida Supreme Court's affirmance of the heinous, atrocious and cruel aggravator is a matter of primarily state law, does not present conflict with any court, does not involve an important federal question, and the issue was properly decided by the Florida Supreme Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

CITATION TO OPINION BELOW

The opinion of the of the Florida Supreme Court affirming Petitioner's convictions and sentences can be found at *Colley v. State*, 310 So.3d 2 (Fla. 2020).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on December 16, 2020. (Pet. App. A). Petitioner asserts that this Court's jurisdiction is 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

Petitioner was convicted of several crimes including the first-degree murders of his estranged wife, Amanda Colley[1], and her friend, Lindy Dobbins. *Colley v. State*, 310 So.3d 2, 7 (Fla. 2020). At the time of the murders in August 2015 he was living at his sister's house while Amanda resided in the marital home because she had obtained a domestic violence injunction against him. *Id.* Colley and his wife had separated a few months prior and although he was in another relationship, he wanted to reconcile with Amanda but suspected she had started dating another man. *Id.*

In the early morning hours of August 27, 2015, Petitioner drove to Amanda's home, and when he found she wasn't there, started to search the house. *Id.* He found sex toys and men's clothing that weren't his, confirming his suspicions that she had moved on, which drove him into a rage causing him to ransack the house, including breaking televisions. *Id.* Amanda arrived home around 9 a.m. to discover the damage and called her boyfriend, Lamar Douberly, and two of her friends, Lindy Dobbins and Rachel Hendricks, to assist with the mess. *Id.* Douberly called the police department's nonemergency line to get an officer to the residence but Amanda ultimately declined to file any formal charges at that time. *Id.*

Meanwhile, Petitioner was at a courthouse for a plea hearing for violating the injunction Amanda had against him. *Id.* His plea colloquy was recorded via the courtroom's video and audio system and showed that Colley was calm and

[1] Petitioner's wife will be referred to by her first name to avoid confusion.

cooperative and denied being under the influence of any intoxicants. *Id.* Colley had been texting and calling Amanda throughout the morning, mostly going unanswered, prior to the hearing and continued to do so after leaving the courthouse. *Id.* He was finally able to reach Amanda at 9:41 a.m. after his plea hearing, and the two talked for about fourteen minutes. *Id.*

Cell phone tower data and video surveillance allowed the State at trial to establish his movements following that phone call. *Id.* at 9. Petitioner first drove to his sister's home instead of Amanda's, where the evidence suggested he procured guns and ammunition. *Id.* at 8. He next stopped at a nearby gas station to buy a small amount of gas and other items. *Id.* Only then did he start the twenty-minute drive to his wife's house. *Id.* However, instead of driving directly to the home, he went to an adjacent street and parked in the driveway of an unoccupied house. *Id.* He walked along a trail that led to Amanda's backyard and approached the house from the rear armed with two handguns, a 9mm and a .45 caliber. *Id.* Amanda, Dobbins, Douberly, and Hendricks were all inside at the time. *Id.*

Petitioner started shooting from outside the home, shouting, "Where is he? Where is he?" *Id.* Douberly recognized the sounds as gunshots and, telling everyone to run, fled from the home through the garage. *Id.* The three women instead took refuge in the master bedroom, where Amanda hid in the bathroom while Dobbins and Hendricks barricaded themselves in a small side closet. *Id.* At this time, 10:36 a.m. Dobbins and Amanda both made calls to 911, which recorded theirs and Petitioner's voices, as well as the subsequent gunshots. *Id.* Colley first encountered

Amanda, where he continued to shout at her looking for Douberly. *Id.* He also heard the people in the closet and tried to break down the door hoping to find Amanda's boyfriend but was initially unsuccessful. *Id.* Both Amanda and Dobbins protested that it was Dobbins in the closet, not Douberly. *Id.*

Petitioner then went back to Amanda, shooting her, but not fatally. *Id.* He returned to the closet and when he still couldn't open the door, he shot through it, grazing Hendricks and causing her to lose her grip on the door. *Id.* The bullet also struck Dobbins's foot. *Id.* at 9. Colley barged in, and fortuitously for Hendricks, directly past the first woman to approach Dobbins. *Id.* As Rachel ran to escape the home, she heard the gunshots Colley fired that executed Dobbins in the back of the closet, as Dobbins attempted to hide behind a chest. *Id.* After killing Dobbins, Petitioner found Amanda still in the bathroom. *Id.* He shot her until his 9mm ran out, and when it did he dropped that gun, pulled out his .45, and continued to shoot until she stopped moving, for a total of nine gunshot wounds. *Id.* Petitioner left the home, abandoned his cell phone, and fled the state before eventually being arrested in Virginia hours later after a traffic stop. *Id.*

At trial, the State's medical examiner, Dr. Predrag Bulic, testified as to the wounds suffered by the two victims. Dobbins had three gunshot wounds, one on her right temple, one on her shoulder, and one on her foot. *Id.* at 9. The temple and shoulder wounds were at a steep downward angle, consistent with the shooter being above the victim, and were immediately lethal. Amanda received nine gunshot wounds, only one of which would have been immediately lethal while

simultaneously paralyzing her from the neck down. *Id.* at 8-9. Her arms and legs showed several defensive wounds that could have only been inflicted while she was still capable of movement, and the bullets had alternate trajectories that showed some were inflicted while she was standing and some while she was on the ground. *Id.* Dr. Bulic testified that she knew what was happening to her, stating, "She was aware. She had a—a knowledge of what's happening and—throughout the entire shooting process." *Id.* at 9.

Because of the brazen nature of his crimes, defense counsel at trial did not advance an actual innocence defense but instead argued that Petitioner had been caught up in an emotional roller coaster because of the fractious nature of the relationship with his wife, and that the murders and other crimes were a result of a "snap reaction" and not premeditation. *Id.* The jury rejected this argument and on July 18, 2018, found Colley guilty of the first-degree murders of Amanda and Dobbins under both theories of premeditation and felony murder. They also found him guilty as charged of the five other counts of the indictment: attempted first-degree murder of Douberly; attempted felony murder of Hendricks; burglary of a dwelling with an assault or battery; burglary of a dwelling; and aggravated stalking after an injunction. *Id.*

Following a penalty phase, the jury unanimously recommended a sentence of death by 12-0. *Id.* at 11. The judge and jury found the existence of five aggravating factors for Amanda's murder and four for Dobbins's. *Id.* at 11-12. The four they had in common were: 1) Colley was previously convicted of another capital or violent

felony (for the contemporaneous murder and attempted murder convictions); 2) Colley committed each murder while engaged in the commission of a burglary; 3) each murder was especially heinous, atrocious, or cruel; and 4) Colley committed each murder in a cold, calculated, and premeditated manner. *Id.* at 11. The fifth aggravator unique to Amanda was that Colley committed murder while subject to a domestic violence injunction and the victim of the murder was the person who obtained the injunction. *Id.* Although the judge rejected defense arguments that Colley was impaired at the time of the murders by a combination of Ambien, alcohol, and lack of sleep, he did find the existence of twenty-three mitigating circumstances relating to Colley's otherwise crime-free life and good character, both professionally and personally. *Id.* at 12. In finding that the aggravators far outweighed the mitigators, the judge sentenced Colley to death for both murders. *Id.*

Colley appealed to the Florida Supreme Court advancing several arguments, the only one of which is relevant here being that the aggravating factor that the murders were especially heinous, atrocious, or cruel, was misapplied in his case. *Id.* at 14. That court found no merit to any of his arguments and affirmed his convictions and sentences. *Id.* at 19.

This petition follows.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because the Florida Supreme Court's decision on the applicability of an aggravating factor in a particular case is a matter of primarily state law and does not conflict with any decision of this Court or involve an important, unsettled

question of federal law, and that application does not render Florida's death penalty sentencing scheme unconstitutional.

Petitioner requests this Court review the Florida Supreme Court's decision finding the aggravating factor that the murders were especially heinous, atrocious, or cruel (HAC) applied to the killings of Amanda and Dobbins. He argues that applying the aggravator under the facts of his case means Florida is failing to sufficiently narrow death-eligible defendants, and therefore the state's capital sentencing scheme is unconstitutional.

Petitioner states his question for review as whether the Florida Supreme Court's expansion of the applicability of the heinous, atrocious or cruel aggravating circumstance renders the death penalty scheme unconstitutional as applied because it does not sufficiently narrow the class of death-eligible first-degree murders. (Petition at i, ii, 14, 18).

As Applied Challenge

Petitioner's "as applied" argument cannot be the basis for federal review. In *Lewis v. Jeffers,* 497 U.S. 764, 778-80 (1990), this Court stated clearly that the question whether state courts properly have applied an aggravating circumstance is separate from the question whether the circumstance, as narrowed, is facially valid. Petitioner does not, and cannot, argue Florida Statute §921.141(5)(h)—the statute on the "especially heinous, atrocious or cruel" aggravating circumstance—is facially invalid. In fact, Petitioner does not cite or recognize *Proffitt v. Florida*, 428 U.S. 242 (1976), which upheld the aggravating circumstance that the murder was "especially

heinous, atrocious, or cruel" on the express ground that a narrowing construction had been adopted by the Florida Supreme Court. *Proffitt*, 428 U.S. at 255.

Instead, Petitioner contends, as did the petitioner in *Walton v. Arizona,* 497 U.S. 639, 655-656, (1990), that the heinous, atrocious, or cruel ("HAC") factor has been *applied* in an arbitrary and capricious manner. (Petition at 14). This "arbitrariness" seems to be based on Petitioner's claim that the Florida Supreme Court has redefined HAC by originally requiring "that the murderer intend to specifically torture the victim" but more recently "only focuses on the mind of the victim, specifically whether the victim suffered unnecessarily." (Petition at 16).

In *Jeffers*, this Court rejected the "as applied" challenge, citing *Walton v. Arizona*, 497 U.S. 639, 655-656 (1990):

> This Court held in *Walton:*
>
> > The Arizona Supreme Court's construction also is similar to the construction of Florida's "especially heinous, atrocious, or cruel" aggravating circumstance that we approved in *Proffitt v. Florida*, 428 U.S., at 255-256, 96 S.Ct., at 2968 (joint opinion of Stewart, Powell, and STEVENS, JJ.). Recognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer. Nor can we fault the state court's statement that a crime is committed in an especially "depraved" manner when the perpetrator "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing. *See* 159 Ariz., at 587, 769 P. 2d, at 1033.
>
> > Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it.

> This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed-and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." *McCleskey v. Kemp*, 481 U.S. 279, 306, 308, 107 S.Ct. 1756, 1774, 1775, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, 465 U.S. 37, 43, 104 S.Ct. 871, 875-876, 79 L.Ed.2d 29 (1984). Furthermore, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

Walton v. Arizona, 497 U.S. 639, 655-656 (1990) (overruled by *Ring v. Arizona,* 536 U.S. 584 (2002) to the extent Arizona allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty); *Jeffers*, 497 U.S. at 778-779. *See also Arave v. Creech*, 507 U.S. 463, 476-477 (1993) (a federal court may consider state court formulations of a limiting construction to ensure that they are consistent, but our decisions do not authorize review of state court cases to determine whether a limiting construction has been applied consistently.).

This Court further noted in *Jeffers*:

> Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting ... the sentencer's discretion in imposing the death penalty," *Cartwright*, 486 U.S., at 362, 108 S.Ct., at 1858, has been satisfied.

Jeffers, 497 U.S. at 779. Petitioner fails to present any basis for which this Court

should grant certiorari review.

Argument that Florida Has Redefined HAC.

In an attempt to breathe life into a non-viable claim, Petitioner asserts that the Florida Supreme Court has "redefined" HAC and applied that aggravating circumstance inconsistently, resulting in an insufficient narrowing of death eligible individuals. (Petition at 16, 18). Petitioner presents no important federal question or cite to the case of any other court with which the decision in this case may conflict. Further the Florida cases cited by Petitioner do not support his argument, which is completely without merit. To the contrary, HAC has been, and continues to be, applied consistently by the Florida Supreme Court.

Petitioner cites to *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), and *Cheshire v. State*, 568 So. 2d 908, 912 (1990), for the premise that: "Initially, the Supreme Court of Florida required that the murderer intend to specifically torture the victim." Neither *Dixon* nor *Cheshire* support this argument.

The Florida Supreme Court in *Dixon* explained HAC as:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Dixon, 283 So. 2d at 9 (Fla. 1973). Nowhere in the explanation does the court require that the murderer intend to specifically torture the victim. The only

mention of the defendant's mental state is "indifference, or even enjoyment of" the pain inflicted. Nowhere does the *Dixon* interpretation state that a requirement of the HAC aggravating circumstance is the specific intent of the defendant to torture. Rather, the focus is the effect on the victim: that the murder is wicked, evil or vile and designed to inflict a high degree of pain *on the victim.* The circumstances must be unnecessarily torturous *to the victim.* As outlined below, the focus has always been the suffering of the victim, both mental and physical.

Neither did *Cheshire* hold that HAC can only be found if the murderer intends to specifically torture the victim. In *Cheshire,* the two victims were shot while nude in bed in the early morning hours. Residents of the trailer park heard a gunshot, a scream that lasted "just a few seconds," and another gunshot. Regarding HAC, the court held:

> The physical evidence simply does not support such a finding here. At best, we can only conjecture as to the exact events of the murder. Since the evidence at hand is entirely consistent with a quick murder committed in the heat of passion, we believe the state has failed to prove beyond a reasonable doubt that the factor of heinous, atrocious or cruel existed.

Cheshire, 568 So. 2d 912.

Not only does *Cheshire* contradict Petitioner's argument, but also the finding supports the Respondent's position that the Florida Supreme Court scrutinizes each application of HAC and, under the facts of *Cheshire*, HAC did not apply to a "quick murder" in which the only evidence the victims were aware of impending death was one scream for a few seconds.

The Florida Supreme Court has consistently held that HAC applies when there are extraordinary circumstances which cause heightened awareness of impending death, mental anguish, and extended suffering. Petitioner cites only to *Farina v. State*, 801 So. 2d 44 (Fla. 2001), and *Barnhill v. State*, 834 So. 2d 836 (Fla. 2002) as affecting a "change" in Florida law. He fails to recognize established Florida law consistent with *Farina* and *Barnhill* despite the fact those established cases are cited in *Farina* and *Barnhill*. In *Farina*, the court found:

> The HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. *See Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). "Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992). Additionally, this aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. *See Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990).
>
> In the instant case, the trial court cited Van Ness's "real and excruciating" mental anguish and her acute awareness of her impending death to support its HAC finding. There is testimony that Van Ness was very upset throughout the crime and had to be calmed by her co-workers. The record also shows that she had her hands tied behind her back and was conscious as two of her co-workers were shot. Before being shot in the head, Van Ness witnessed Jeffery shoot one of her co-workers in the chest, shoot a second in the jaw, and attempt to shoot the second in the chest as well, only being thwarted when the gun misfired. Thus, the record supports the HAC aggravating circumstance. (Emphasis supplied)

Farina, 801 So. 2d at 53. In *Hitchcock v. State*, 578 So. 2d 685, 692-693 (Fla. 1990) the court held:

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the

> circumstances than to the perpetrator's. *Stano v. State*, 460 So. 2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Hitchcock stated that he kept "chokin' and chokin' " the victim, and hitting her, both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. *Adams v. State*, 412 So. 2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). As Hitchcock concedes in his brief, "[s]trangulations are nearly per se heinous." *See Doyle v. State*, 460 So. 2d 353 (Fla. 1984); *Adams*; *Alvord v. State*, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). The court did not err in finding this murder to have been heinous, atrocious, or cruel. (Emphasis supplied)

In *Stano* the defendant pleaded guilty to first-degree murder for the strangulation/drowning death of one woman in 1975 and the shooting/drowning death of another woman in 1977. Stano struck both women, thereby stunning them, to keep them from leaving the car, drove to isolated areas and then, after ordering the women to leave the car, strangled one and shot the other in the head. The court held:

> The trial court's finding heinous, atrocious, or cruel in aggravation is also amply supported. Both women had been struck by Stano and then driven considerable distances. Each must have known what was going to happen to her. Stano argues that, after being struck, the women could have been too dazed to have contemplated their fates. In fact, however, each woman was conscious and left the car under her own power when told to do so. On the totality of the circumstances each of these cases meets the standard of *State v. Dixon,* 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), and supports a finding of heinous, atrocious, or cruel.
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> Stano also argues that the court's use of the same facts to support both of these aggravating circumstances is an improper doubling of these two factors. As we have discussed before, heinous, atrocious, or cruel pertains more to the nature of the killing and the surrounding circumstances while cold, calculated, and premeditated pertains more to state of mind, intent, and motivation. *Mason v. State*, 438 So. 2d 374 (Fla. 1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984).

Stano, 460 So. 2d at 893 (Fla. 1984). This short history illustrates that the Florida Supreme Court has consistently held that it is the totality of the circumstances which must be considered for HAC, and the victim's suffering and knowledge of death is one factor.

The other case cited by Petitioner – *Barnhill* – as "only focusing on the mind of the victim" (Petition at 20) does not support his argument at all. In *Barnhill*, the court made extensive fact findings:

> Barnhill argues that HAC was improperly found under the circumstances of this case. The HAC aggravating factor applies in physically and mentally torturous murders which can be exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *See Williams v. State*, 574 So. 2d 136 (Fla. 1991). **HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death.** *See Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). Thus, if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference. *See id.* **Because strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC.** *See Mansfield v. State*, 758 So. 2d 636, 645 (Fla. 2000); *Orme v. State*, 677 So. 2d 258, 263 (Fla. 1996).
>
> Although the evidence is unclear exactly how long Gallipeau was conscious before he was killed, we only consider whether there is competent, substantial evidence to support the trial judge's finding. In the sentencing order, the trial judge found HAC based on the following facts: the victim was 84 years old; Barnhill stalked the victim in his own home; Barnhill struck him in the head and drove him to the ground and began to manually strangle him; the victim was forced to view Barnhill and knew who he was; the victim had always shown Barnhill kindness and generosity; Barnhill failed to manually strangle the victim so he got a towel to use as a ligature; and the towel was

> ineffective, so Barnhill took the victim's belt from his pants and wrapped it around the victim's neck four times. The trial judge further found that the victim never regained consciousness from the initial attempt at manual strangulation.
>
> The trial judge relied on Barnhill's description of the strangulation and said it took six or seven minutes to strangle the victim. The trial judge also relied on Barnhill's statement that the victim struggled and fought and tried to yell for help. The trial judge relied on these facts because they were corroborated by other evidence in the record. A trial judge is not prevented from relying on specific statements made by the defendant if they have indicia of reliability, even if the defendant has given several conflicting statements. *See Hildwin v. State*, 531 So. 2d 124, 128 n. 2 (Fla. 1988). Consistent with Barnhill's rendition, the medical examiner testified that the victim lost consciousness within one to two minutes after being manually strangled, and would have died within one to seven minutes. **This evidence demonstrates that the victim was aware of his impending death.** *See Capehart v. State*, 583 So. 2d 1009 (Fla. 1991) (HAC applies where victim's death was painful, and where the smothering was not instantaneous because the victim remained conscious for two minutes).
>
> **The trial judge reasonably found that the victim suffered a physically and mentally cruel, torturous death.** *See Mansfield*, 758 So. 2d at 645. Barnhill focuses on his own intent to strangle the victim quickly. **As stated above, HAC focuses on the means and manner in which the death is inflicted, not the intent and motivation of a defendant.** See *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). The record supports the trial court's finding of HAC.

Barnhill, 834 So. 2d at 849-850. Again, this case cites to established precedent and does not create a "new" construction of HAC.

To the extent Petitioner argues that Florida applies HAC inconsistently in shooting deaths, he cites no federal case or decision of any court to support this argument. To the contrary, the cases Petitioner cites exemplify that the court is very discriminating in requiring additional circumstances when the death is caused by shooting. *See Lynch v. State*, 841 So. 2d 362 (Fla. 2003) (child held hostage for

extended period, mother shot in front of her, child forced to open door and let murderer in because mother shot, child shot). *See also Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988) (victim abducted, driven to remote location, raped, shot nine times).

The Opinion Below Does Not Conflict with the Decision of Any Other Court or Present an Important Federal Question.

Petitioner's "as applied" argument is not appropriate for certiorari review, does not present an important federal question, and does not conflict with any other court's decision. The "HAC is redefined" argument is based on an inaccurate analysis, and an accurate analysis demonstrates there is no conflict with any court's decision and presents no important federal question. Petitioner does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10.

This case involves neither conflict nor unsettled federal law. This Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987).

This case does not merit consideration by this Court. Petitioner cites generally to *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). (Petition at 14-15). However, the generalities for which those cases are cited are not relevant to whether Florida courts apply HAC arbitrarily. *Woodson* addressed the North Carolina death penalty statute which required a mandatory sentence of death for all persons convicted

first-degree murder. *Maynard* held that Oklahoma's statute on HAC was unconstitutionally vague. Petitioner also cites generally to *Espinosa v. Florida*, 505 U.S. 1079 (1992) and *Sochor v. Florida*, 504 U.S. 527 (1992); however, he makes no argument as to how those cases apply to, or conflict with, the present case. (Petition at 16). *Espinosa* and *Sochor* involved Florida's HAC jury instruction, not whether the HAC aggravating circumstance was being applied indiscriminately to the extent Florida's death penalty is unconstitutional because it does not sufficiently narrow the class of death-eligible first-degree murders.

The remainder of Petitioner's argument simply compares state cases and makes no argument addressing an important federal question. Likewise, Petitioner identifies no case with which the Florida Supreme Court decision conflicts.

Where no compelling federal question is presented, certiorari review is inappropriate. *See Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Zucht v. King*, 260 U.S. 174 (1922). Further, there is no important federal question presented, and this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184 n. 3 (1987). *See also 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).

The Case Was Properly Decided Below

The Florida Supreme Court properly decided the claim raised on direct

appeal: whether the HAC aggravating circumstance applies in this case. This case was decided correctly through an independent analysis of the totality of the circumstances. Petitioner argues on page 17 that HAC was inappropriately applied in his case.[2] The Florida Supreme Court held:

> Colley claims that HAC does not apply to either victim's murder because there is no evidence that the victims experienced terror and fear prior to their deaths. He maintains that "all of the killing was accomplished in under a minute," so neither murder victim had much time to agonize over her impending death. Colley also disputes the trial court's finding that Colley shot Amanda once, then killed Lindy, then returned to kill Amanda. He claims that the evidence shows that he shot and killed Lindy first and only then proceeded to shoot and kill Amanda. Colley's takeaway is that Lindy therefore did not hear her friend being shot and that Amanda had only seconds to contemplate Lindy's shooting before being shot herself. Colley says that if this Court upholds HAC here, the aggravator will be so broad as to apply in every case.
>
> Colley's arguments are unpersuasive. For starters, this Court's role is not to reweigh the evidence, and the trial court's findings as to the sequence of the shootings are supported by testimony from Rachel Hendricks and the medical examiner. And their testimony strongly supports an inference that the murder victims experienced terror in the moments preceding their deaths. Both women fled to the master bedroom area only after being shot at by Colley from outside the house. They knew that Colley was on a murderous rampage. After Colley found Amanda, he shot her once, left her to kill Lindy, and then returned to inflict the gunshots that caused Amanda's death. The

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[2] This argument shows that Petitioner's real complaint is the application of HAC in his case. Certiorari is inappropriate because the issue presented in this petition is of no significance to anyone other than Petitioner. This claim cannot be decided without engaging in the sort of fact-specific discussion of the case that this Court has repeatedly refused to undertake. This Court's precedent is well-settled that a writ of certiorari is not issued to review evidence and find facts. *United States v. Johnston*, 278 U.S. 220, 227 (1925); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Because the fact-specific issue contained in the petition is of extremely limited significance, it is unworthy of this Court's attention. *Rice v. Sioux City Cemetery, supra.*

> medical examiner testified that Amanda likely sustained painful wounds before the shot that killed her. Similarly, Lindy cowered in fear behind a chest, heard her friend being shot, and then was executed upon Colley's return to the closet. The totality of these circumstances demonstrates that both murder victims experienced exceptional anguish before their deaths. *See Allred v. State*, 55 So.3d 1267, 1280 (Fla. 2010) (upholding HAC where the defendant entered victim's home by shooting the glass doors, causing the victim to hide in the bathroom, where she "undoubtedly heard the screams of her helpless friends and [the defendant]'s repeated gunshots" before being shot six times). Colley's argument that facts like these are common to all first-degree murders is untenable. We deny relief on this claim.

Colley, 310 So.3d at 15.

This very fact-specific analysis establishes that Amanda and Dobbins underwent excruciating panic and anguish before they were brutally murdered. Petitioner seems to believe that the mere fact that a gun was used rather than a knife or rope or other deadly weapon, the murder is not heinous, atrocious, or cruel. He ignores several facts that support this aggravator: that Petitioner alerted the victims to his presence via gunshots while he was still outside the house, causing them to flee and seek somewhere to hide; both victims had time to call 911; Dobbins could not see, but could hear Amanda being shot, and likely assumed her friend was dead as Petitioner started breaking into the closet; Dobbins was shot in the foot during Petitioner's rampage, and had to watch him walk up to her before her execution; that Amanda would have heard her friend being murdered in the closet before seeing Petitioner walk out and confront her again; and that Amanda suffered eight non-fatal gunshot wounds, some exhibiting she was in a defensive posture, before eventually succumbing to a ninth and final shot. Most importantly, the

sufficiency of the evidence supporting an aggravating factor is primarily a matter of state law. *See*, *Arave v. Creech*, 507 U.S. 463 (1993)(noting that sufficiency of evidence supporting an aggravating circumstance is primarily a matter of "state law" and will violate the Constitution if "no reasonable sentencer" could find the circumstance to exist.)(citing *Lewis v. Jeffers*, 497 U.S. 764, 783 (1990)).

Claiming the state court is inconsistently applying HAC, Petitioner cites to *Buzia v. State*, 926 So. 2d 1203 (Fla. 2006), and *Aguirre-Jarquin v. State*, 9 So.3d 593 (Fla. 2009), and attempts to distinguish those two cases. Ironically, Buzia argued, as Petitioner does here, that the murder happened quickly, and therefore the victim was not conscious during the attack or aware of his fate. *Buzia,* 926 So. 2d at 1213. The Florida Supreme Court, as it always does, made an independent determination of the totality of the circumstances in arriving at the conclusion that Buzia's victim was painfully aware of the torturous events as he was slammed in the head with an ax. In *Aguirre-Jarquin*, the 69-year old stroke victim was confined to a wheelchair and heard her daughter being murdered in the next room. The victim was stabbed once through the heart; however, because of the totality of the circumstances: the victim's helplessness, terror, and emotional suffering, HAC was appropriate. Petitioner's comparison of the cases to attempt to establish inconsistency is unavailing. The detailed analysis conducted by the state supreme court shows that HAC is being applied in the most egregious cases and the court is conducting an independent analysis in each case. The HAC aggravating circumstance was properly applied in this case.

Any Error Would Be Harmless On These Facts

Finally, even if this issue had merit, this Court should deny review because even if this Court found error with regard to the HAC factor it would not affect the judgment or sentence. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991)("When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. ' 1257, it is reviewing the judgment; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do."); *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) ("However, if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy."); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

The trial court found five aggravating factors for Amanda's murder and four for Dobbins's, assigning great weight to every factor except that the murders were committed in a cold, calculated, and premeditated manner, assigning that factor only moderate weight. *Colley* 310 So.3d at 11-12 (n.3 and n.4). Although the trial court found the existence of twenty-three mitigating circumstances, only three were given more than slight weight, all three of which only received moderate weight: his history of drug and chronic alcohol abuse; that Colley had previously been

diagnosed with depression; lack of prior felony convictions. *Id.* at 12 (n. 5).

Even if this Court believes that the Florida Supreme Court improperly expanded the HAC aggravator to Petitioner's case, the HAC finding would have no impact on the outcome below. First, Florida recently receded from its requirement that all death penalty cases receive a proportionality review comparing each case to other death penalty cases. *Lawrence v. State*, 308 So.3d 544 (Fla. 2020). Striking one of the five aggravators for Amanda and four for Dobbins would not have affected the Florida Supreme Court's decision because Petitioner remains death-eligible due to the other several aggravators. Additionally, even had a proportionality analysis been used, this case is one of the most highly aggravated up against very uncompelling mitigation. The mitigation evidence established that Petitioner was a good father, uncle, coworker, neighbor, employee, and little league coach, but was devoid of any weighty mitigation such as severe abuse, mental illness, or brain damage. Thus, on the face of the record, if the HAC factor were stricken, the error would be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

Petitioner has offered this Court no reason to accept certiorari review, and accordingly this Court should deny review.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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