CASE NO. 21-8177

IN THE UNITED STATES SUPREME COURT

October 2021, Term

MARLIN LARICE JOSEPH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Issue I - Whether certiorari review should be denied because (1) the issue of alleged arbitrariness of Florida's capital sentencing was not raised before the Florida Supreme Court; (2) Florida's capital sentencing does not violate the Eighth Amendment as it narrows the class of defendants eligible for the death penalty; and (3) the Florida Supreme Court's opinion does not conflict with any decision of this Court, a federal circuit court, or state supreme court? (restated)

Issue II - Whether certiorari review should be denied where Petitioner failed to raise a federal constitutional claim below and the Florida Supreme Court resolved the discovery issue based on state law and that decision does not conflict with a case from this Court, a federal circuit court or another state supreme court? (restated)

Issue III – Whether certiorari review should be denied as the Florida Supreme Court correctly declined to conduct a proportionality review under *Lawrence v. State* and that ruling does not conflict with *Pully v. Harris* or this Court's Eighth Amendment jurisprudence and it does not involve an important, unsettled question of federal law? (restated)

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The decision of which Petitioner seeks discretionary review is reported as *Joseph v. State*, 336 So. 3d 218 (Fla. 2022).

JURISDICTION

Petitioner, Marlin Larice Joseph ("Joseph"), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida ("State"), accepts as accurate Petitioner's recitation of the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS[1]

The instant capital case is before this Court upon the Florida Supreme Court's affirmance of Petitioner's, Marlin Larice Joseph ("Joseph"), capital conviction and sentencing on two counts of first-degree murder and one count of possession of a firearm by a convicted felon. In addition to other issues presented to the Florida Supreme Court, Joseph challenged: (1) the admission of the testimony of a firearms expert following a discovery violation; (2) the constitutionality of Florida's capital sentencing as proportionality review was no longer mandatory; and (3) that section 921.141, Fla. Stat. is unconstitutional because it does not narrow the class of defendants eligible for the death penalty. The Florida Supreme Court determined the trial court had resolved correctly the discovery violation and affirmed his convictions and sentences without conducting a proportionality review or commenting on the constitutional challenges to Florida's capital sentencing beyond stating in a footnote that the court repeatedly had rejected similar challenges. *Joseph v. State*, 336 So. 3d 218, 227 FN5, 231-32 (Fla. 2022), *reh'g denied*, SC20-1741, 2022 WL 831661 (Fla. Mar. 21, 2022). Joseph's Petition for Writ of Certiorari followed.

On January 18, 2018, Joseph was indicted for two counts of first-degree murder with a firearm for the deaths of Kalandaa Crowell ("Crowell") and her eleven-year-old daughter, Kyra Inglett ("Kyra"). Joseph was also indicted for one count of a felon

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[1] The State rejects Joseph's argument-riddled "Pertinent Facts and Background" which fails to follow the spirit and direction of Rules 10 and 14.1(g), Rules of the Supreme Court of the United States. The State provides its statement of the case and facts.

in possession of a firearm. The firearm charge was bifurcated for trial.

Nine people lived in the West Palm Beach, Florida home where the crimes took place. Joseph lived in the home with his eight-year-old daughter, Kamare Canty ("Canty"), his mother, Robin Denson ("Denson"), and his three brothers,[2] Also living in the home were Denson's girlfriend, Crowell and her daughter, Kyra, and Denson's goddaughter, fifteen-year-old Jeshema Tarver ("Tarver"). *Joseph*, 336 So. 3d at 224. On December 23, 2017, five days before the murders, Canty and Kyra had two disagreements, but later reconciled. That day, Jeshema overheard Joseph shouting at Denson about Kyra and stating she "'ha[d] one more time to make [him] mad or to bother, she needs to leave my daughter alone.'" *Id.* at 225.

Late in the day of December 28, 2017, Kamare, Kyra and Jeshema were sitting on the living room couch laughing and talking. Crowell was in her bedroom while Denson was talking to Joseph about Kamare's mother. Shortly thereafter, Denson went outside with her sons, leaving the young girls, Crowell, and Joseph in the house. While Jeshema was taking a shower, she heard Joseph and Crowell arguing about Kyra's treatment of Kamare. After hearing three "loud bangs," Jeshema heard Crowell screaming and crying for help and for someone to call 911 then she heard another bang. Upon exiting the bathroom, Jeshema learned that Crowell and Kyra had been shot and she saw "blood all over the floor and Crowell flat on her face" between the living and dining room areas. *Id.* at 225-26. Kamare and Jeshema hid

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[2] Parice Joseph, Patrick Joseph, and Cordarius Joseph. Each will be referred to by their first name.

under the bed and called 911 using Joseph's phone. *Id.* at 225. Parice heard gunshots as he sat on the front porch and saw Kyra run outside looking over her shoulder as Joseph followed her out of the front door. *Id.* at 225. Parice saw Joseph with a gun in his hand. Returning inside for the keys to Crowell's car, Joseph re-exited the house and drove off in Crowell's car as Kyra lay dying on the front walkway. Both Crowell and Kyra suffered multiple gunshot wounds to their bodies and heads. Crowell died at the scene and Kyra died at the hospital a couple of hours later. *Id.* at 225-26. The firearm used was never recovered. A few days later, Joseph was arrested and indicted for the murders. The State gave timely notice it was seeking the death penalty and listed the aggravators upon which it would rely. *Id.* at 224-26.

On February 24, 2020, the jury found Joseph guilty of two counts of first-degree murder.[3] The State pressed for convictions on a premeditated murder theory alone, not felony murder. The jury was so instructed and returned convictions finding Joseph guilty of first-degree murder of Crowell and Kyra as charged in the indictment. *Id.* at 226. Two days later, the jury convicted Joseph of possessing a firearm by a convicted felon. On the same day, the penalty phase was conducted with the Florida Supreme Court finding:

> The State presented two witnesses—Joseph's then-probation officer and a latent print examiner. Through these witnesses, the State introduced evidence of Joseph's prior [December 14, 2014] conviction for battery on a child. The defense called 15 witnesses, most of whom were lay witnesses.

[3] The count of Felon in Possession of a Firearm was bifurcated and after trial, Joseph was adjudicated on that charge as well.

On February 26, 2020, the jury rendered unanimous verdicts recommending a penalty of death on both counts of first-degree murder with a firearm, determining the aggravating factors outweighed the mitigating circumstances. The jury found that the State had established beyond a reasonable doubt the existence of the following aggravating factors: (1) Joseph was previously convicted of a felony and was on felony probation; (2) Joseph was previously convicted of another capital felony or a felony involving the use or threat of violence to another person; (3) the first-degree murder was especially heinous, atrocious, or cruel (HAC); and (4) the first-degree murder was committed in a cold, calculated, and premeditated (CCP) manner. As to Kyra, the jury also found a fifth aggravator—the victim was a person less than 12 years of age. The jury found no mitigating circumstances.

A *Spencer* hearing was held on October 16, 2020, and sentencing occurred on November 19, 2020. The trial court followed the jury's recommendation and sentenced Joseph to death. The trial court found four aggravating factors that applied to both counts: (1) Joseph was previously convicted of a felony and under sentence of imprisonment or on felony probation (moderate weight); (2) Joseph was previously convicted of another capital felony or a felony involving the use or threat of violence (great weight); (3) the first-degree murder was especially heinous, atrocious, or cruel (great weight); and (4) the first-degree murder was committed in a cold, calculated, and premeditated manner (great weight). The trial court found an additional aggravator for the charge related to Kyra—the victim of the first-degree murder was a person less than 12 years of age (great weight).

The trial court considered and found as proven one of the three statutory mitigators proffered by Joseph—Joseph had no significant history of prior criminal activity (little weight). The trial court further found seven nonstatutory mitigators: (1) Joseph's family background (little weight); (2) Joseph was a good employee with an excellent work ethic as well as a talented football player who exhibited this work ethic on and off the field (little weight); (3) Joseph was a caring and attentive parent (moderate weight); (4) Joseph had the support of his family (little weight); (5)

> Joseph regularly attended church and was a devout Christian (little weight); (6) Joseph suffered from a delusional disorder of a persecutory type (little weight); and (7) Joseph had a low IQ (little weight).

Joseph, 336 So. 3d at 226–27 (footnote omitted).

On direct appeal, Joseph raised sixteen claims. Pertinent here, the Florida Supreme Court identified the claims as: "(1) the trial court's denial of a motion to exclude witness testimony. . . (7) the constitutionality of Florida's death penalty scheme in light of this Court's decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) . . . (12) the constitutionality of Florida's death penalty statute. . . ." *Joseph*, 336 So. 3d at 227. With respect to Joseph's demand for a proportionality review and assertion that the lack of a proportionality review and the increase in the number of aggravating factors included in section 921.141(6), Fla. Stat. (2018), Florida's capital sentencing was unconstitutional, the Florida Supreme Court decided:

> We do not further address ***Claims 8 and 12*** because we have repeatedly rejected these arguments. *See Bush v. State*, 295 So. 3d 179, 214 (Fla. 2020) (concluding that the defendant was not entitled to relief on his claim that Florida's death penalty statute is unconstitutional because it does not sufficiently narrow the class of individuals eligible to receive the death penalty); *Newberry v. State*, 288 So. 3d 1040, 1047 (Fla. 2019) (*citing Rogers v. State*, 285 So. 3d 872, 878-79 (Fla. 2019)); *see also Rogers*, 285 So. 3d at 886 (holding that "the sufficiency and weight of the aggravating factors and the final recommendation of death" are not elements and "are not subject to the beyond a reasonable doubt standard of proof"). Further, as to ***Claims 7 and 11***, we do not review the proportionality of Joseph's sentence of death. *See Lawrence v. State*, 308 So. 3d 544, 551-52 (Fla. 2020) (receding from the judge-made requirement to review the comparative proportionality of death sentences).

Joseph, 336 So. 3d at 227, FN.5 (emphasis supplied).

In his first claim on direct appeal, Joseph asserted it was error to permit the State to call a firearms expert who had reviewed the shell casing found at the scene and delivered a report on the day before trial. The report stated that all of the casings came from the same unknown firearm. The direct appeal court found:

> The first day of jury selection, Joseph filed a motion to exclude, specifically seeking to exclude Felix from testifying because of the State's discovery violation and resulting prejudice to him. During jury selection, Joseph brought the motion to the trial court's attention, arguing that a *Richardson*[4] hearing needed to be held and that he was prejudiced by the late discovery. Joseph moved for the appointment of a firearms expert, and the trial court granted Joseph's motion. Joseph also deposed Felix during this time. After the jury had been sworn but before opening statements, the trial court held a hearing on Joseph's motion to exclude.

Joseph, 336 So. 3d at 228. The record shows that after hours on February 12, 2020, during trial preparations, the prosecutor discovered he had not received a firearms report and that the lead detective had failed to send the casings to the lab for testing. That oversight was remedied first thing on February 13, 2020, and a report was delivered to the defense the same day stating all of the casings came from the same unknow firearm. *Joseph*, 336 So. 3d at 229. On February 14, 2020, Joseph moved for the appointment of a firearms expert and noted the late disclosure of discovery. Joseph did not press for a *Richardson* hearing when offered the opportunity later that day, but noted he had nothing to discuss because the court had authorized the

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[4] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971) (announcing standard for reviewing claims of discovery violations).

appointment of a defense firearms expert.

On January 20, 2020, after the State had presented some witnesses, the defense announced it had deposed the State's firearms expert and had consulted with the defense expert who suggested that a tool marking expert was needed, but the defense was unable to find such an expert. In the *Richardson* hearing that followed, Joseph complained that given the late disclosure by the State, a discovery violation should be found, and that the State's expert be excluded as the defense was prejudiced in its trial preparation. The trial court found an inadvertent violation, but that no prejudice resulted. On appeal, the Florida Supreme Court found:

> Here, the record shows that the trial court conducted an adequate *Richardson* inquiry. The trial court first determined that the State's disclosure of its firearms expert and firearms report was a discovery violation due to the State not disclosing this information until a day before trial. The trial court next determined that the State's discovery violation was inadvertent, and the record supports this finding. The State told the trial court that the cartridge casings had been in evidence since the day of the murders, but after going through the evidence with Detective Creelman on the eve of trial, it realized there was no firearms report because Detective Creelman forgot to send the casings to the lab for analysis. The State had the casings analyzed the same day it discovered there was no firearms report and then filed a supplemental list of witnesses and Felix's firearms report later that day. There is no record evidence that the State willfully delayed analyzing the cartridge casings and generating a firearms report. The trial court then said it needed to determine whether the State's violation was trivial or substantial, but it did not make an explicit finding.
>
> The trial court finally determined that the State's discovery violation did not have a prejudicial effect on Joseph's trial preparation. "Prejudice in this context means procedural prejudice significantly affecting the opposing

party's preparation for trial." *McDuffie*, 970 So. 2d at 321. "[T]he defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." *State v. Schopp*, 653 So. 2d 1016, 1020 (Fla. 1995). "Trial preparation or strategy should be considered materially different if it reasonably could have benefited the defendant." *Id.* A court's analysis of procedural prejudice "considers how the defense might have responded had it known about the undisclosed piece of evidence and contemplates the possibility that the defense could have acted to counter the harmful effects of the discovery violation." *Scipio v. State*, 928 So. 2d 1138, 1149 (Fla. 2006).

The trial court properly ruled that the State's discovery violation did not procedurally prejudice Joseph. The trial court first turned to the State and asked why its discovery violation would not prejudice Joseph. Once the State provided its reasons—that the cartridge casings had been in evidence since the crimes and that Felix's testimony would merely corroborate other expected testimony—the trial court then asked the defense how Felix's testimony impacted its ability to prepare for trial. Defense counsel said the defense would have retained its own firearms expert who could testify that the cartridge casings did not come from the same firearm. However, even if the defense had been able to retain their own expert to contradict Felix's testimony, there is no reasonable possibility that the defendant's trial preparation or strategy would have been materially different. Felix's testimony would not have changed the defense's theory of the case, which was that Joseph was not the shooter. Felix's testimony did not involve the identity of the shooter; it was merely corroborative of other witness testimony. Therefore, Joseph's theory that he was not the shooter would be just as plausible after Felix's testimony as it was prior to its admission into evidence. *See Cox v. State*, 819 So. 2d 705, 713 (Fla. 2002) (concluding that the State's discovery violation did not materially hinder the defendant's trial preparation where the defense's theory of the case was just as viable after the challenged testimony as it was prior to the introduction of the testimony). There was no evidence suggesting there was more than one gun or more than one

> shooter involved in these crimes. The trial court also gave defense counsel time to find a firearms expert and an opportunity to depose Felix. Further, even if the trial court erroneously denied Joseph's motion to exclude, any error was harmless. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Accordingly, we deny relief on this claim.

Joseph, 336 So. 3d at 231–32.

Joseph seeks certiorari review of that decision.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) THE ISSUE OF ALLEGED ARBITRARINESS OF FLORIDA'S CAPITAL SENTENCING WAS NOT RAISED BEFORE THE FLORIDA SUPREME COURT; (2) FLORIDA'S CAPITAL SENTENCING DOES NOT VIOLATE THE EIGHTH AMENDMENT AS IT NARROWS THE CLASS OF DEFENDANTS ELIGIBLE FOR THE DEATH PENALTY; AND (3) THE FLORIDA SUPREME COURT'S OPINION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, A FEDERAL CIRCUIT COURT OR STATE SUPREME COURT (Restated)

Joseph asserts that this Court should find Florida's death penalty statute unconstitutional "because the arbitrariness, capriciousness, imprecision, and unconstitutionality of the death penalty and its application is long and well-established." (Pet. At 9). Neither the claim of constitutional infirmity nor the arguments presented here were raised before the Florida Supreme Court. As such, this Court should deny certiorari. Moreover, Florida's capital sentencing scheme has been found constitutional and the instant decision of the Florida Supreme Court does not conflict with a case from this Court or with a case from a federal circuit court of

appeals or state supreme court. Also, Joseph has not raised an important and unsettled question of federal law. Joseph has failed to present a "compelling" reason for this Court to review his case. Certiorari should be denied.

On direct appeal, Joseph asserted that Florida's capital sentencing under section 921.141, Fla. Stat. was unconstitutional because it did not substantially narrow the class of defendants subject to the death penalty. For support he argued that when the death penalty was reinstated following *Furman v. Georgia*, 408 U.S. 238 (1972) the statute contained eight enumerated aggravators and now it contains sixteen. He noted in his initial brief that the increase expanded, not narrowed, the class eligible for the death penalty and that it was the required narrowing that implemented the Eighth Amendment's "demand that the death penalty be free from 'arbitrary or irrational imposition.'" (St. Appx A-110). Without elucidation, Joseph asserted that section 921.141, "falls afoul of the Eighth Amendment when it fails to provide objective criteria that limits the application of the death penalty to the worst of the worst, i.e., the most aggravated and least mitigated of murders. *Furman* . . . ." (St. Appx. A-110). He maintained that the added aggravators violate the Eighth Amendment as the statute "fails to sufficiently narrow the class of cases eligible for consideration of imposition of the death penalty." (St. Appx. A-111).

In the instant petition, Joseph focuses on allegations of "the arbitrariness, capriciousness, imprecision, and unconstitutionality of the death penalty" arising from the decision not to apply or seek the death penalty in cases where Intellectual

Disability,[5] mental health evidence, plea agreements, or other considerations peculiar to those defendants[6] who may have killed more victims than Joseph. Because of the unique situations noted in those cases, they have no bearing on the application of the death penalty in Joseph's case nor do they further his Eighth Amendment argument here. The two remaining cases cited by Joseph, both Nikolas Cruz ("Cruz") and Dayonte Resiles ("Resiles") are out of Broward County, Florida. Nikolas Cruz has yet to have his penalty phase completed. *See State v. Nikolas Cruz*, case no. 062018CF001958A (Fla. Cir. Ct. 2022). Regarding Dayonte Resiles, the trial court imposed a life sentence following the State's post-verdict waiver of its intent to

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[5] On remand following *Hall v. Florida*, 572 U.S. 701 (2014), the Florida Supreme Court found that Hall had demonstrated Intellectual Disability, thus making him ineligible for the death penalty and remanding for a life sentence. *See Hall v. State*, 201 So. 3d 628, 638 (Fla. 2016).

[6] Zacarias Moussaoui's life sentence, as Joseph notes, was decided by a jury and as such should not enter into the Eighth Amendment analysis here as it would be improper to delve into the jury's deliberations. Jared Loughner pled guilty to the murder and attempted murder charges. *See* United States Department of Justice News Release dated August 7, 2012) (stating "Jared Lee Loughner, 23, of Tucson, Ariz., pleaded guilty today in federal district court to charges stemming from the January 8, 2011 shooting outside a supermarket that killed six people and wounded 13 others. Under the terms of the plea agreement, Loughner will be sentenced to life in prison with no eligibility for parole."). Like Moussaoui, it was a jury decision that controlled the sentence imposed upon James Holmes. There, according to The Denver Post, August 7, 2015, Jordan Steffen and Noelle Phillips, Holmes' jury did not recommend death unanimously, thus, under Colorado law, only a life sentence was available. https://www.denverpost.com/2015/08/07/aurora-theater-shooting-juror-one-juror-refused-death-penalty. *See also* Colo. Rev. Stat. Ann. § 18-1.3-1201 "(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment. "With respect to Dzhokhar Tsarnaev's conviction and sentence, this Court reinstated the death penalty sentences imposed. *See United States v. Tsarnaev*, 142 S. Ct. 1024, 1041 (2022).

seek death.[7] Joseph offers no analysis beyond pointing out the defendant received a life sentence for one count of murder. The pith of Joseph's argument rests on the "evolving standards of decency" and legislative or executive decisions in removing death as a possible penalty.[8] Those arguments were "not pressed nor passed upon" in state court and as such this Court should refuse to consider his claims not raised or addressed below. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218–220 (1983).

Even if this Court considers this unpreserved claim, certiorari should be denied as Florida's statute does not run afoul of the Eighth Amendment. The ruling below does not conflict with a decision of this Court or a federal circuit court or another state supreme court. Likewise, it does not address an important or unsettled question of federal law. *See* Rule 10, Rules of the Supreme Court of the United States. This Court has recognized that cases which have not developed conflicts between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. *Rockford Life Insurance Co. v. Illinois Department of*

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[7] On March 18, 2022, the jury convicted Resiles of first-degree murder. *See State v. Dayonte Resiles*, case no. 062014CF012657A (Fla. 17th Cir. Ct. 2022). Following the ordered disclosure of the defense mental health expert's data from the evaluation of Resiles, on April 29, 2022, the State waived the death penalty. *Id.*

[8] Of course, States have considerable discretion to set policy and enact and enforce legislation. *See FERC v. Mississippi*, 456 U.S. 742, 761 (1982)("Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature.")(citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 360, 97 S. Ct. 2691, 2697, 53 L.Ed.2d 810 (1977))

Revenue, 482 U.S. 182, 184, n.3 (1987). The law is well-settled that this Court does not grant certiorari for the purpose of reviewing evidence and/or discussing specific facts. *United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts). Further, this Court has rejected requests to reassess or re-weigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1924) (same).

This Court has reviewed Florida's capital sentencing under Eighth Amendment challenges and has found section 921.141 constitutional as it requires the sentencer to weigh aggravating and mitigating factors against each other and to focus on the "circumstances of the crime and the character of the individual defendant." *Proffitt v. Florida*, 428 U.S. 242, 251-52 (1976). *See also, Spaziano v. Florida*, 468 U.S. 447, 463 (1984), *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92 (2016) (finding Florida's capital sentencing unconstitutional under Sixth Amendment challenge). Moreover, a capital sentence remains constitutional despite imperfections in the criminal justice system. *Kansas v. Marsh*, 548 U.S. 163, 181 (2006).

To the extent that Joseph claims he was sentenced under a statute that is arbitrary and capricious (P. at 9), the argument fails. An aggravating factor must afford "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1994) (*quoting Furman v. Georgia*, 408 U.S. 238 at 313 (1972).

Aggravators "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." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

As noted above, the jury and trial court found four aggravators applicable to the death of Crowell and Kyra: (1) previously convicted of and felony and under sentence of imprisonment or on felony probation; (2) previously convicted of another capital felony or a felony involving the use or threat of violence; (3) murder was especially heinous, atrocious, or cruel ("HAC"); and (4) murder was committed in a cold, calculated, and premeditated manner. An additional aggravator, victim less than twelve, was found to apply to Kyra's death. These are longstanding aggravating factors as explained below and there can be no dispute that they narrow the class of defendants eligible for the death penalty.

Since 1973, section 921.141 contained the aggravators of: (a) murder committed by a person under sentence of imprisonment; (b) defendant previously convicted of another capital felony or of a felony involving the use or threat of violence; and (h) felony was especially heinous, atrocious, or cruel. *See* section 191.141(5)(a)-(b) and (h). Fla. Stat. (1973).[9] In 1979, the cold, calculated and premeditated ("CCP") aggravator was added to the statute. *See* section 921.141, Fla. Stat. (1979). In 1996, the aggravator of "victim of the capital felony was a person less than twelve" was

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[9] Under the current version of the statute, aggravating factors are found under section 921.141(6), Fla. Stat (2019).

added. *See* section 921.141(5)(l), Fla. Stat. (1997) and the term "under sentence of imprisonment" was amended to include those on felony probation. *See Merck v. State*, 763 So. 2d 295, 299 (Fla. 2000). Each of the aggravators focuses on the defendant's criminal history and manner in committing the crime or the particular vulnerability and/or suffering of the victim. These aggravating factors differentiate the death eligible murders from other killings and narrow the class of defendants subject to the death penalty.

The "under sentence of imprisonment"[10] and prior violent felony aggravators are long-standing sentencing factors addressed to the defendant's criminal history and recognized as narrowing the class. Such aggravators distinguish recidivist and violent defendants eligible for capital sentencing from those who have committed petty non-violent crimes prior to the capital murder. Joseph has not explained how the application of these aggravators render Florida's death penalty unconstitutional.

For HAC, the jury instruction gives direction and narrows the class of defendants eligible for death. The standard jury instruction provides:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts

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[10] Felony probation was added in 1996 and the Florida Supreme Court defined what that term meant under state law. *See Merck*. This Court leaves to the states to be the final arbiters of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (noting "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

> that show the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Fla. Std. Jury Instr. 7.11 (Crim.). As the Florida Supreme Court explained in *Joseph*:

> The HAC aggravator applies to murders that are both "conscienceless or pitiless and unnecessarily torturous to the victim. . . . The focus is "on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." . . . Gunshot murders can qualify as HAC if the events preceding the death "cause the victim fear, emotional strain, and terror." . . . To support HAC, "the evidence must show that the victim was conscious and aware of impending death." . . . "However, the victim's perception of imminent death need only last seconds for this aggravator to apply."

Joseph, 336 So. 3d at 236–37 (citations omitted). Clearly, this is not arbitrary or vague; it narrows the class of death eligible defendants by looking at the manner the crime was committed and the pain the victim suffered.

For CCP, the State must establish beyond a reasonable doubt that:

> (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification.

Lynch v. State, 841 So. 2d 362, 371 (Fla. 2003). The current CCP instruction does not run afoul of the dictates in *Espinosa v. Florida*, 505 U.S. 1079 (1992). These factors circumscribe the aggravator and narrows the class of premeditated murder defendants eligible for death. Likewise, the victim under twelve is a limiting factor.

Under Florida law, these factors must be proven beyond a reasonable doubt

and be found by both the jury and trial court before a death sentence may be imposed. These are limiting sentencing factors and are specific to the defendant, such as his prior violent criminal history, specific to the manner the crime was committed, such as HAC and CCP, and specific to the victim the defendant chose to kill, such as the young age of his victim. The fact that other aggravators have been added to section 921.141 since 1972, does not render the statute unconstitutional overall or as applied to Joseph. Those other aggravators too, narrow the eligible class of defendants.

In addition to the statute being found constitutional, *Proffitt*, the HAC aggravator as instructed and applied in Florida has been found constitutional. "Florida has sufficiently limited its 'heinous, atrocious, or cruel' aggravating circumstance to pass constitutional scrutiny." *Scott v. Singletary*, 38 F.3d 1547, 1554 (11th Cir. 1994) (quotation marks and citation omitted), *abrogated on other grounds, Jones v. CDCP Warden*, 815 F.3d 689 (11th Cir. 2016). The CCP aggravator and instruction given in Joseph's case has not been found unconstitutional and Joseph has not pointed to a case to the contrary. Florida's statute is constitutional, and Joseph has failed to identify any case from this Court, a federal circuit court, or another state supreme court which is in conflict with *Joseph*.

Turning to Joseph's unpreserved claims that under the evolving standards of decency, and the fact that fewer states have death penalty statutes in 2022 (twenty-seven) than had in 1976 (thirty-five) he has not shown entitlement to relief. As set forth above, the Florida statute narrows the class of defendants eligible for the death penalty and does so in a constitutional manner. Moreover, the fact that fewer

defendants may have been sentenced to death and/or executed, does not establish arbitrariness. Instead, it speaks to a more selective, narrow application of the death penalty. Joseph's selection of high-profile cases (P. at 8-11) is misleading as it contains cases where the penalty phase has not been included. Under this Court's jurisprudence, as long as the state capital sentencing system: "(1) rationally narrow[s] the class of death-eligible defendants; and (2) permit[s] a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime" "a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." *Kansas v. Marsh*, 548 U.S. at 174. As such, the fact that a 9/11 conspirator or mass shooters who may have had mitigation or other factors supporting life sentences does not establish that Florida's death penalty statue or its application is unconstitutional or in conflict with this or other courts identified in Rule 10. Here, Joseph received individualized sentencing based on a constitutional statute. Certiorari must be denied.

ISSUE II

CERTIORARI SHOULD BE DENIED WHERE PETITIONER FAILED TO RAISE A FEDERAL CONSTITUTIONAL CLAIM BELOW AND THE FLORIDA SUPREME COURT RESOLVED THE DISCOVERY ISSUE BASED ON STATE LAW AND THAT DECISION DOES NOT CONFLICT WITH A CASE FROM THIS COURT OR ANY OTHER FEDERAL CIRCUIT OR STATE SUPREME COURT (Restated)

It is Joseph's position that the Florida Supreme Court violated his "due process

and equal protection rights, confrontation rights, and compulsory process rights" (P. at 13-14) when it affirmed the trial court's denial of Joseph's motion to exclude a state expert after conducting a hearing pursuant to *Richardson v. State*, 246 So. 2d 771 (Fla. 1971) due to the late disclosure of a ballistic report. Not only were these constitutional claims not presented below, but the Florida Supreme Court's resolution of the discovery issue rested on state law. Furthermore, that resolution does not conflict with a case from this Court, a federal circuit court, or other state supreme court and it does not raise an important, unsettled question of federal law. Certiorari should be denied.

The test ordinarily applied for determining whether a claim arises under federal law is whether a federal question appears on the face of the plaintiff's well-pleaded complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). "As a general rule, a case arises under federal law only if it is federal law that creates the cause of action." *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8–10 (1983)). In *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995), this Court concluded that in order to give state courts meaningful opportunity to correct alleged violations of prisoners' federal rights, these courts "must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." This Court found that merely arguing that a state evidentiary ruling was erroneous and a "'miscarriage of justice" was insufficient to put the state court on notice that a federal claim was being asserted. *Id.* Mere similarity of claims is insufficient to satisfy the requirement of

exhaustion. *Id. See also Picard v. Connor*, 404 U.S. 270, 275 (1971), (reasoning that exhaustion of state remedies requires petitioners "fairly presen[t]" federal claims to the state courts in order to give those courts the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" (some internal quotation marks omitted). "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." *Duncan*, 513 at 566 (citing *Anderson v. Harless*, 459 U.S. 4 (1982).

In Joseph's direct appeal initial brief, he argued that the trial court erred in denying his motion to exclude the State's firearms expert and that the error should be reversed as it was a "miscarriage of justice" and the "*Richardson* error" deprived Joseph of a "fair trial and substantial, meaningful due process." (St. Appx. A-37, A-40). Joseph also asserted that he was cut off on relevancy ground from delving into the existence of another firearms database known as National Integrated Ballistic Information Network. (St. Appx. A-40). Joseph failed to cite to any federal cases or reference a federal constitutional amendment nor did he assert the denial of compulsory process or confrontation clause rights. His argument rested on *Richardson* and the state harmless error standard of *State v. DiGuilio*, 491 So. 2d 1121 (1984). As will be discussed below, *Richardson* focuses on the procedural prejudice a party may suffer in its defense preparation due to a discovery violation. Joseph did not alert the state courts that he was claiming any federal constitutional violation. The pith of his argument was that a discovery violation occurred and that

he was prejudiced when the trial court permitted the state's expert to testify over a defense objection. This Court should conclude that a federal question was not fairly presented in state court and deny certiorari.

However, if a federal question is found to have been presented, the Florida Supreme Court's opinion is not in conflict with a decision of this Court, nor does it provide a basis for review under Rule 10. Joseph was provided an opportunity to find an expert; he deposed the state's firearms expert, Omar Felix ("Felix"), and Felix's testimony merely corroborated eyewitness testimony. Hence, Joseph's trial preparations or strategy were not materially impacted.

Before the trial court and Florida Supreme Court, Joseph sought to have the testimony of the State's expert excluded as the state had disclosed the expert's report on the day before trial commenced. Following a *Richardson* hearing[11] the trial court

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[11] When a claim of a discovery violation is presented, Florida law provides that a defendant is not entitled to have his conviction reversed unless the record discloses that non-compliance with the rule at issue resulted in prejudice or harm to him. *Richardson v. State*, 246 So. 2d 771 (Fla. 1971). As the Florida Supreme Court explained:

> "Where exclusion of evidence ... is sought because of a discovery violation, Richardson holds that the trial court's discretion can be properly exercised only after an adequate inquiry is made into three areas: (1) whether the discovery violation was willful or inadvertent; (2) whether it was trivial or substantial; and (3) whether it had a prejudicial effect on the opposing party's trial preparation." *McDuffie v. State*, 970 So. 2d 312, 321 (Fla. 2007). When a trial court conducts a *Richardson* hearing, "[t]his Court will review the record to determine if the inquiry was properly made and if the trial court's actions pursuant to the inquiry were proper." *Delhall v. State*, 95 So. 3d 134, 160 (Fla. 2012).

found a discovery violation, but determined it was inadvertent and the discovery had been turned over as soon as the State knew of it; moreover, the casings had been in evidence since the crime. *Joseph*, 336 So. 3d at 229, 232. With respect to the issue of prejudice for defense trial preparation, the trial court noted that Felix's testimony would only corroborate expected witness testimony, thus, Joseph was not prejudiced. *Id.* at 231. The trial court announced that it would give the defense time to find an expert and would make accommodations, noting it could not imagine the defense would be unable to find an expert in two weeks. *Id.* After deposing Felix and consulting with the defense firearms expert, Joseph's counsel claimed he was unable to locate a tool mark expert that he needed. *Id.* Over a defense objection, Felix was permitted to testify and stated the casings he examined came from the same unknown gun. *Id.*

The Florida Supreme Court concluded:

> However, even if the defense had been able to retain their own expert to contradict Felix's testimony, there is no reasonable possibility that the defendant's trial preparation or strategy would have been materially different. Felix's testimony would not have changed the defense's theory of the case, which was that Joseph was not the shooter. Felix's testimony did not involve the identity

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Joseph v. State, 336 So. 3d 218, 231 (Fla. 2022). "The purpose of a *Richardson* inquiry is to ferret out procedural, rather than substantive, prejudice." *Wilcox v. State*, 367 So. 2d 1020, 1023 (Fla. 1979). In order to decide whether prejudice exists, "a trial judge must be cognizant of two separate but interrelated aspects. First, the judge must decide whether the discovery violation prevented the defendant from properly preparing for trial." *Id.* "The second aspect of procedural prejudice deals with the proper sanction to invoke for a discovery violation. Subsections (j)(1) and (2) of Florida Rule of Criminal Procedure 3.220 authorize the imposition of a broad spectrum of sanctions, ranging from an order to comply, to exclusion of evidence, or even a mistrial." *Id.*

> of the shooter; it was merely corroborative of other witness testimony. Therefore, Joseph's theory that he was not the shooter would be just as plausible after Felix's testimony as it was prior to its admission into evidence. See Cox v. State, 819 So. 2d 705, 713 (Fla. 2002) (concluding that the State's discovery violation did not materially hinder the defendant's trial preparation where the defense's theory of the case was just as viable after the challenged testimony as it was prior to the introduction of the testimony). There was no evidence suggesting there was more than one gun or more than one shooter involved in these crimes. The trial court also gave defense counsel time to find a firearms expert and an opportunity to depose Felix. Further, even if the trial court erroneously denied Joseph's motion to exclude, any error was harmless. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Accordingly, we deny relief on this claim.

Joseph, 336 So. 3d at 232.

Florida's law on discovery violations, as discussed in *Richardson*, is similar to that embodied in the federal rules. Under federal jurisprudence, "[a] discovery violation under [Rule 16] or a standing discovery order is reversible error only when it violates a defendant's substantial rights." *United States v. Camargo–Vergara,* 57 F.3d 993, 998 (11th Cir.1995). "Substantial prejudice exists when a defendant is unduly surprised and lacks an adequate opportunity to prepare a defense, or if the mistake substantially influences the jury." *Id.* at 998–99. "Inadvertence does not render a discovery violation harmless; rather, the purpose of Rule 16 is to protect a defendant's right to a fair trial rather than to punish the government's non-compliance." *Id.* at 999. "A discovery violation, however, does not automatically prohibit the use by the Government at trial of the unrevealed evidence." *United States v. Rodriguez*, 799 F.2d 649, 652 (11th Cir. 1986). The Florida Supreme Court's

affirmance that Joseph's defense preparation and strategy were not impacted by the disclosure that the casings, already known to Joseph, all came from the same weapon does not conflict with constitutional underpinnings for discovery rules and orders as reviewed in cases of this Court or federal circuit courts. Joseph's claim that he was not the shooter remained intact as the murder weapon was never found. It was the eyewitness accounts that put the gun in Joseph's hand.

Joseph points to *United States v. Hennis*, 79 M.J. 370 (C. A. A. F. 2020) for support. He claims he was denied an opportunity to fully challenge the state's expert. However, as the record reflects, the defense theory was that Joseph was not the shooter. Nothing in Felix's testimony negated that theory; Felix merely testified that the casings found all came from the same gun. The eyewitnesses had already placed Joseph at the scene with a gun and no other shooters or guns were identified. Joseph was not denied an opportunity to call witnesses or to press his theory that he was not the shooter. With or without Felix's testimony, the evidence showed that Joseph was the sole person with a gun and that he shot the victims.

Likewise, neither *United States v. Bess*, 75 M.J. 370 (C. A. A. F. 2016) nor *United States v. Israel*, 60 M.J. 485 (C. A. A. F. 2005) assist Joseph in his plea for certiorari review. In *Bess*, the court found that giving recently disclosed "reports to the panel without affording Appellant an opportunity to (a) cross-examine Ms. Wilson, (b) call HM1 Odom as a rebuttal witness, or (c) have his counsel comment on the new evidence in front of the members deprived Appellant of his constitutionally protected ability to present a complete defense, and constituted an abuse of

discretion." *Id.* at 75. Such is not the case here. Joseph has failed to explain what ***relevant*** information he was precluded from presenting and how that impacted his defense. Assuming Joseph is pointing to his attempted cross-examination of Felix on the National Integrated Ballistic Information Network, he has yet to set forth how that information is relevant. "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *Israel* provides that a Sixth Amendment violation occurs where an entire relevant area of cross-examination was precluded. This Court found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (citing *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Washington v. Texas*, 388 U.S. 14, 22–23 (1967). Joseph has not explained how the testimony about another network is relevant here. Furthermore, the fact that the trial court found cross-examination of a national network not utilized by the state's expert here does not impact any weighty constitutional concerns.

As a final argument, Joseph claims irrelevant evidence was presented at his trial through Jeshema Tarver. Joseph asserts it was error to permit Tarver to testify that she had heard Joseph "yelling about Kyra 'two days ago.'" (P. at 17). In support he points only to state cases defining relevant evidence. He does not identify the federal question at issue or the constitutional amendment that allegedly was violated. Joseph offers no reason for certiorari review as set out in Rule 10.

In his direct appeal, the Florida Supreme Court identified Joseph's claim as,

"[s]pecifically, Joseph argues this testimony was irrelevant, unduly prejudicial, and involved no prior bad act or collateral crime." *Joseph*, 336 So. 3d at 235. It then pointed to Florida law to resolve the issue reasoning:

> "The prerequisite to the admissibility of evidence is relevancy." *Wright v. State*, 19 So. 3d 277, 291 (Fla. 2009). "***Under Florida law***, all relevant evidence, defined as that tending to prove or disprove a material fact, is admissible unless otherwise provided by law." *Morris v. State*, 219 So. 3d 33, 42 (Fla. 2017).
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> ***
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> Jeshema's testimony was relevant to show Joseph's motive for committing the murders. We have explained that "evidence may be admitted in a criminal case if it is relevant as to the motive for the crime involved." *State v. Riechmann*, 777 So. 2d 342, 365 (Fla. 2000). Jeshema's testimony about what she heard Joseph tell Denson provided a reason for Joseph's eventual aggression towards Crowell and Kyra—Joseph was upset with Kyra because she kept bothering his daughter, Kamare. Joseph's statement to Denson that Kyra had one more time to make him mad, when coupled with testimony that Kyra and Kamare got into an argument on the day of the murders, is highly probative. Kyra and Kamare's argument on the day of the murders served as the "one more time" to make Joseph mad, explaining why he killed Kyra and Crowell that night. Accordingly, we deny relief on this claim.

Joseph, 336 So. 3d at 235-36 (emphasis supplied).

This Court has found that merely arguing that a state evidentiary ruling was erroneous and a "'miscarriage of justice" was insufficient to put the state court on notice that a federal claim was being asserted. *Duncan v. Henry*, 513 U.S. at 365-66. Furthermore, the law is well-settled that this Court does not grant certiorari for the purpose of reviewing evidence and/or discussing specific facts. *Johnston*, 268 U.S. at

220; *Page*, 286 U.S. at 269 (rejecting request to review/re-weigh fact questions).

The Florida Supreme Court's ruling on Joseph's challenge to the evidence admitted against him was resolved under Florida law. What was presented below was a routine evidentiary question of relevancy. Joseph has not identified an important unsettled federal question. As such, this Court should deny certiorari.

ISSUE III

CERTIORARI SHOULD BE DENIED AS PROPORTIONALITY REVIEW IS NOT REQUIRED UNDER THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE (Restated)

Joseph asserts that the Florida Supreme Court's refusal to conduct a proportionality review in his case based on *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), *cert denied, Lawrence v. Florid*a, 142 S. Ct. 188 (2021) violates the Eighth and Fourteenth Amendments. Contrary to his position, there is no conflict between the Florida Supreme Court's interpretation of state constitutional law and this Court's Eighth Amendment jurisprudence.

In his direct appeal brief, Claim VII, Joseph pressed for proportionality review and asserted without such, Florida's capital sentencing statute was unconstitutional under the Eighth Amendment. (St. Appx A-63-73 and A-92-102). This Court has held that proportionality review was not required by the Eighth Amendment. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). There, Harris was convicted of a capital crime in California state court and was sentenced to death. *Id.* at 38. In his appeals to the California Supreme Court and federal habeas courts, Harris argued that California's death penalty statute violated the Eighth Amendment because the statute did not

require the California Supreme Court to compare his death sentence with sentences imposed in other similar capital cases. *Id.* at 39-40, 40-41 & n.2.

In this Court's review in *Harris*, it first explained the difference between the traditional proportionality analysis, which compared the sentence to the crime, and the type of proportionality review Harris was seeking, which compared the sentence in a particular case to the sentence imposed on others convicted of the same crime. *Harris*, 465 U.S. at 42-44. Harris relied mainly on *Furman v. Georgia*, 408 U.S. 238 (1972), and *Zant v. Stephens*, 462 U.S. 862 (1983), to support his view that the constitution mandated proportionality review in capital cases. However, this Court rejected his reading of both cases. *Harris*, 465 U.S. at 44-50.

Deciding *Harris*, this Court discussed numerous other capital cases and recognized that the focus of those cases was on "the constitutionally necessary narrowing function of statutory aggravating circumstances." *Id.* at 50. This Court explained that proportionality review was considered to be "an additional safeguard against arbitrarily imposed death sentences," but "we certainly did not hold that comparative review was constitutionally required." *Id.* Further, it found "no basis in our cases for holding" that proportionality review by an appellate court was required in every capital case. *Id.* It observed that to hold that the Eighth Amendment mandates proportionality review would require this Court to "effectively overrule" *Jurek v. Texas*, 428 U.S. 262 (1976), and "would substantially depart from the sense of" both *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976). *Harris*, 465 U.S. at 51.

While this Court noted proportionality review in capital cases was required by "numerous state statutes" *Harris*, 465 U.S. at 43 & n.7, including Florida, proportionality review by the appellate courts was not required by other states such as California and Texas. *Id.* at 44. In a footnote, the majority in *Harris* discussed Florida's proportionality review, *Id.* at 46 n.8, stating, while some states provide proportionality review, that "does not mean that such review is indispensable." *Id.* at 45. *See also Murray v. Giarratano*, 492 U.S. 1, 9 (1989); *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990).

Other than citing to *Harris* in his certiorari petition, Joseph relies on Florida Supreme Court cases to press his case for mandated proportionality review. However, there is no conflict between this Court's decision in *Pulley v. Harris* and the Florida Supreme Court's decision in this case to follow *Lawrence* and its interpretation of Florida's constitutional provision[12] as explained in *Lawrence*.

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[12] Article 1, section 17 of the Florida Constitution provides:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not

Indeed, the Florida Supreme Court repeatedly relied on *Pulley v. Harris* in its opinion in *Lawrence*, 308 So. 3d at 548, 550, 551. In Joseph's case, the Florida Supreme Court reiterated "we do not review the proportionality of Joseph's sentence of death. *See Lawrence v. State*, 308 So. 3d 544, 551-52 (Fla. 2020) (receding from the judge-made requirement to review the comparative proportionality of death sentences)." *Joseph*, 336 So. 3d at 227, n.5.

There is no conflict between the Florida Supreme Court's decision in *Joseph* and that of any federal circuit court or state supreme court. This Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

The federal circuit courts of appeals have rejected similar attacks on the Federal Death Penalty Act ("FDPA"), which does not provide for proportionality review either. 18 U.S.C. § 3591; *United States v. Aquart*, 912 F.3d 1, 51-53 (2d Cir. 2018) (citing cases from six other circuits); *United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998) (rejecting a constitutional attack on the FDPA based on a combination

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> be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

of a lack of proportionality and the prosecution being allowed to use and define nonstatutory aggravation and concluding that the FDPA is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of proportionality review).

Furthermore, the federal circuit courts recognize that proportionality review is not constitutionally required and do not conduct any such review in 28 U.S.C. §2254 federal habeas cases.[13] Likewise, there is no conflict between the Florida Supreme Court's decision in this case and other state supreme courts. While many state supreme courts perform proportionality review in capital cases, they do so as a matter of state law. Often, proportionality review is explicitly mandated by the particular state's death penalty statute. *Lawrence*, 308 So. 3d at 556 (Labarga, J., dissenting) (noting fourteen states have death penalty statutes that require proportionality review in capital cases). For example, Missouri's death penalty statute explicitly provides that the state supreme court should determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." *State v. Wood*, 580 S.W.3d 566, 590 (Mo. 2019) (en banc) (quoting Missouri's statute, §

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[13] *See Copenhefer v. Horn*, 696 F.3d 377, 392 & n.5 (3d Cir. 2012); *Hooks v. Branker*, 348 Fed. Appx. 854, 864 (4th Cir. 2009); *Fisher v. Angelone*, 163 F.3d 835, 854-55 (4th Cir. 1998); *Cobb v. Thaler*, 682 F.3d 364,381 (5th Cir. 2012); *Thompson v. Parker*, 867 F.3d 641,653 (6th Cir. 2017); *Silagy v. Peters*, 905 F.2d 986, 1000 (7th Cir. 1990); *Middleton v. Roper*, 498 F.3d 812, 821 (8th Cir. 2007); *Allen v. Woodford*, 395 F.3d 979, 1018 (9th Cir. 2005); *Mendoza v. Sec'y, Fla. Dep't of Corr.*, 659 Fed. Appx. 974, 981 & n.3 (11th Cir. 2016); *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996); *Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987).

565.035.3(3)), *cert. denied, Wood v. Missouri,* 140 S. Ct. 2670 (2020). But Florida's death penalty statute does not contain any equivalent language. *Lawrence*, 308 So. 3d at 549 (noting proportionality review is "not referenced anywhere" in the text of Florida's death penalty statute). That a state supreme court performs proportionality review, as required by its particular state's death penalty statute, does not create conflict with a state supreme court that refuses to perform proportionality review because the state's constitution has a conformity clause requiring it to follow this Court's Eighth Amendment jurisprudence. In both situations, these state supreme courts are simply following their respective state laws. There is no conflict between the Florida Supreme Court's decision in this case and that of any other state court of last resort.

Joseph's petition does not cite any federal circuit court or state court of last resort holding that the Eighth Amendment requires proportionality review in capital cases for the obvious reason that this Court has held otherwise in *Pulley v. Harris.* There is no conflict between the Florida Supreme Court's decision abolishing proportionality review and that of any federal circuit court of appeals or that of any state court of last resort. Because there is no conflict among the lower appellate courts, certiorari review should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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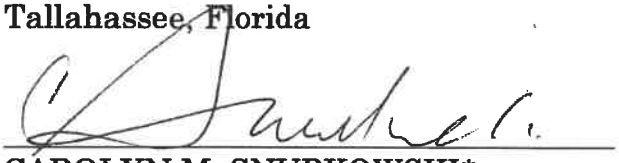

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