NO. 23-7391

IN THE SUPREME COURT OF THE UNITED STATES

MARKEITH LOYD,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether Petitioner's death sentence violates the Eighth and Fourteenth Amendment—specifically, whether the state's remarks during penalty phase closing arguments minimized the individualized role of the capital jury in violation of *Romano v. Oklahoma*, 512 U.S. 1 (1994) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

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The petition seeks review of a decision of the Florida Supreme Court affirming the death sentence of Loyd for the first-degree murder of Lieutenant Debra Clayton; that decision appears as *Loyd v. State*, 379 So. 3d 1080 (Fla. 2023).

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent acknowledges that section 1257 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 PROVISIONS INVOLVED

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

FACTS AND PROCEDURAL BACKGROUND

Early on January 9, 2017, Loyd—on the run for the murders of his girlfriend, Sade Dixon, and their unborn baby[1]—entered a Walmart where a witness familiar with Loyd and his previously committed murders spotted Loyd in the checkout line wearing a bulletproof vest. This witness immediately exited the store and alerted a uniformed police officer that Loyd was inside. The officer was Lieutenant Debra Clayton. Soon after, Lieutenant Clayton confronted Loyd as he exited the store into

[1] In 2019, before the trial in this case, Loyd was convicted of these murders and sentenced to life.

the parking lot. Lieutenant Clayton commanded that he "get on the ground." Loyd responded by rushing behind a pillar and then hastily reemerged with his gun drawn. Loyd fired at Lieutenant Clayton, and she returned fire. Lieutenant Clayton was shot and fell to the ground. Loyd then moved towards Lieutenant Clayton until he stood over her and delivered a fatal shot into her neck.

Loyd then fled the Walmart parking lot in his vehicle. After dispatch radioed the news of Lieutenant Clayton's shooting, Captain Joseph Carter pursued Loyd into the parking lot of an apartment complex. As Captain Carter emerged from his vehicle, Loyd shot at him twice, but hit only his hubcap. Captain Carter then maneuvered his vehicle to block in Loyd's vehicle, and Loyd took off running. Loyd then approached a resident of the apartment complex, Antwyne Thomas, and pointed his gun at Thomas's face. Loyd demanded that Thomas hand over his car keys. Frightened, Thomas threw his keys into the air and ran into his apartment.

Loyd evaded arrest until law enforcement officers found him inside a house on January 17, 2017. At the scene of the arrest, law enforcement recovered a bulletproof vest, the gun used to murder Sade Dixon, her unborn child, and Lieutenant Clayton, and the gun used in the attempted murder of Captain Carter.

The jury found Loyd guilty as charged as to each of the five counts of the indictment- first-degree murder, attempted first-degree murder, aggravated assault

with a deadly weapon, carjacking with a firearm, and possession of a firearm by a convicted felon; and was sentenced to death.

After penalty phase deliberations, the jury returned with a unanimous recommendation for death, finding the state proved the existence of all the proposed aggravating factors beyond a reasonable doubt. The trial court agreed with the jury recommendation and sentenced Loyd to death[2] finding three aggravators: (1) the defendant was previously convicted of a felony and on felony probation when the first-degree murder was committed (slight weight); (2) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (great weight); and (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest/the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws/the victim of the capital felony was a law enforcement officer engaged in the performance of her official duties (merged) (great weight).[3] *Loyd v.*

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[2] The court also sentenced Loyd to life in prison for attempted first-degree murder; five years in prison for aggravated assault with a deadly weapon; life in prison for carjacking with a firearm; and fifteen years in prison for possession of a firearm by a convicted felon. *Id.*

[3] Regarding the statutory age mitigator, the court found that the defendant did prove the defendant's age at the time of the crime (forty-one years old) but gave the mitigator no weight. The court found five nonstatutory mitigators: the defendant's psychological and psychiatric mitigators (moderate weight); the defendant's childhood trauma (moderate weight); the defendant's trauma as an adult (some weight); the trauma of racism (minimal weight); and circumstances related to defendant's offer to surrender and his arrest (minimal weight). *Id.* at 1087.

State, 379 So. 3d 1080,1086-87 (Fla. 2023), reh'g denied, No. SC2022-0378, 2024 WL 472283 (Fla. Feb. 7, 2024).

Direct Appeal

Loyd filed a notice of appeal on March 23, 2022, raising thirteen issues. *Id.* The Florida Supreme Court affirmed the sentences and convictions on November 16, 2023. *Id.* at 1098. Loyd filed a motion for rehearing that was denied on February 7, 2024. The mandate was issued on February 23, 2024.

On May 23, 2024, Loyd, represented by the Public Defender of the Seventh Judicial Circuit of Florida, filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

This Court should not grant certiorari to review the Florida Supreme Court's denial of relief on Loyd's claims pursuant to *Romano v. Oklahoma*, 512 U.S. 1 (1994) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Loyd requests that this Court review the Florida Supreme Court's opinion rejecting his claim that he is entitled to relief pursuant to *Romano v. Oklahoma*, 512 U.S. 1, (1994) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Specifically, Loyd argues that the state minimized the jury's individualized roles during the state's penalty phase closing argument by arguing "that the jurors should, or must, do their best to achieve unanimity as to the ultimate question before them".[4] *See* Pet. at 3. The Florida Supreme Court ruled otherwise, finding there was nothing improper about the state's remark; the remark did not misstate the law; nor did the state minimize the jurors' individualized roles, especially when considered in the context of the state's entire closing argument. *Loyd v. State*, 379 So. 3d 1080 (Fla. 2023).

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[4] As Loyd did in his briefing to the Florida Supreme Court, Loyd again misquotes the record, as the prosecutor never used the word "should" or "must", but rather that "they try their best" in reference to a unanimous verdict. As noted in the Florida Supreme Court opinion, "Loyd asserts that the State improperly remarked in its penalty phase closing that the jurors "ha[d] an obligation to ... try [their] best to reach a unanimous verdict." But Loyd misstates the record. What the State actually said is: "I would suggest to you that as the instructions point out, you have an obligation to give meaningful consideration to everything. And not only that, but that you try your best to reach a unanimous verdict." *Loyd v. State,* 379 So. 3d 1080, 1090 (Fla. 2023).

Petitioner presents no significant issue on an important or unsettled question of law for this Court to review. The Florida Supreme Court was correct in finding no error under this Court's established precedent. This Court described the narrow scope of *Caldwell* in *Romero v. Oklahoma*, 512 U.S. 1, 9 (1994) (cleaned up):

> [W]e have since read Caldwell as relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Thus, to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.

See Davis v. Singletary, 119 F.3d 1471, 1482 (11th Cir. 1997) (Finding no constitutional error under *Caldwell* because the challenged instructions "accurately characterize the jury's and judge's sentencing roles under Florida law.").

In evaluating the challenged statements, it is necessary to examine the context in which they were made. *Darden v. Wainwright,* 477 U.S. 168, 179(1986) (finding it helpful as an initial matter to place the remarks in context); *Neill v. Gibson*, 278 F.3d 1044, 1053 (10th Cir. 2001) (finding that although the prosecutor did, at one point, misstate Oklahoma law, his argument as a whole did not mislead the jury); *Davis v. Singletary*, 119 F.3d 1471, 1485 (11th Cir. 1997) (holding that where remarks made during the course of the trial considered in isolation would cause concern, our decisions teach that such remarks must be considered in the context of the entire trial); *Waters v. Thomas*, 46 F.3d 1506, 1524 (11th Cir. 1995) (holding that the court's evaluation must focus not upon the challenged instruction in

isolation, but upon the entire sentencing instruction and the entire sentencing proceeding); *Dutton v. Brown,* 812 F.2d 593, 596-97 (10th Cir. 1987) (finding that when taken in context, the statement of the prosecutor was not constitutionally impermissible).

After analyzing the statements made by the prosecutor as a whole, the Florida Supreme Court determined that the prosecutor did not misstate the law and noted that the trial court, in accordance with Standard Criminal Jury Instruction 3.10, instructed the jury, "Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict." Nor did the state court find that the prosecutor minimized the jurors' individualized roles, especially when considered in the context of the prosecutor's entire closing argument, in which the prosecutor also made the following remarks:

> And while it is true, as you have been told several times, that your decision as to whether or not a sentence of death is appropriate is an individualized decision, that is nothing new to you. That is something you have already done, because what the instructions and the law tell you is that each of you reach an individualized decision, and only if you're unanimous that death is the appropriate punishment can it be imposed.
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> ...
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> So you're going to be – it's going to be emphasized to you and I will emphasize to you that you're making an individualized decision.
>
> ...
>
> This is an important decision and all I am suggesting is that you-all collaborate together understanding you will make an individualized decision to

> reach a decision that is commiserate [sic] with the task in front of you.
>
> In those comments, the State emphasized rather than minimized the jurors' individualized roles. The trial court did not abuse its discretion in allowing the statement.

Loyd v. State, 379 So. 3d 1080, 1090–91 (Fla. 2023).

The Florida Supreme Court correctly followed this Court's precedent when it analyzed whether the remarks to the jury improperly described the role assigned to them. Loyd's disagreement with the Florida Supreme Court's ultimate decision is not a sufficient basis to grant certiorari review.

Looking at the single statement alone, there was no legal misstatement of the law, nor did the statement misrepresent the law regarding the jury's individualized role in the sentencing process. The prosecutor correctly told the jurors that it was their duty to deliberate and try to come to a unanimous verdict, but he in no way implied that the jury was required by law to return one. Even if one would consider the statement to be problematic, one cannot myopically focus on a single statement or instruction. Rather, *Caldwell* claims are properly evaluated by "look[ing] to the 'total trial scene,' including jury selection, the guilt phase of the trial, and the sentencing hearing, examining both the court's instructions and counsel's arguments to the jury." *Barrientes v. Johnson*, 221 F.3d 741, 777 (5th Cir. 2000) (quoting *Montoya v. Scott*, 65 F.3d 405, 420 (5th Cir. 1995)).

The comment by the prosecutor here was made in the context of his explanation to the jury of the steps needed to reach a verdict in accordance with the jury instructions and Florida law. The prosecutor emphasized that the decision as to whether a sentence of death was appropriate was not only an individualized decision, but one that was required to be unanimous.[5] The prosecutor stressed that the process itself was important and asked that they not deviate from that process, which included a duty to deliberate. The prosecutor then asked the jury to give meaningful consideration to everything and **to try their best to** reach a unanimous verdict, knowing that they could just as well unanimously decide that Loyd deserved life in prison without parole.

Contextually, the comments made by the state repeatedly emphasized the juror's individual role in the sentencing process and explained that only if they are unanimous that death is the appropriate punishment, can it then be imposed. No obligation to return a unanimous verdict was ever conferred onto them by the state. The closing argument made by the state conveyed what the jury instructions

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[5] In 2017 Florida law required a unanimous jury verdict supporting a death sentence as a precondition to imposition of that sentence. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in State v. Poole*, 297 So. 2d 487 (Fla. 2020).

informed the jury; unanimity is required only to impose the death penalty, not to avoid it.[6]

Loyd asserts that the Court of Appeals decision in *Hooks v. Workman, 606 F. 3d 715, 719 (10th Cir. 2010)* conflicts with the Florida Supreme Court decision in this case. While the Court of Appeals found that the prosecution's closing argument improperly described the role assigned to the jury by Oklahoma law, that was not the basis for their decision. Habeas relief in *Hooks* was predicated on the impermissibly coercive *Allen*[7] charge given during penalty phase deliberations, and the Oklahoma appellate courts' decision to the contrary as an unreasonable application of *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *Id.* at 719. Loyd has not shown any persuasive, much less compelling reasons for this Court to grant certiorari, other than a general disagreement with the state court's ruling and reference to a case that was ultimately decided on an issue not before this Court.

More to the point, the Florida Supreme Court's decision in this case does not conflict with *Hooks* because the comments at issue here are in no way comparable to those in *Hooks*. The *Hooks* majority described the prosecutors' comments as

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[6] Even assuming for a moment some error could be discerned from the prosecutor's comment, it had no impact upon the outcome of this heavily aggravated case. Lloyd murdered a police officer by standing over her and shooting her in the neck after wounding and incapacitating her. Lloyd committed the capital murder shortly after murdering his girlfriend and their unborn child.

[7] *Allen v. United States,* 164 U.S. 492 (1896).

misleading the jury in several respects and amounted to intentional misconduct: "(1) the jury's work would be wasted if it failed to reach a unanimous verdict, (2) defense counsel's argument that it took the vote of only one juror to prevent imposition of the death penalty constituted a request for "jury nullification," and (3) failure to deliberate in a manner leading to a unanimous verdict would amount to operating outside the law." *Hooks*, 606 F.3d at 742–43 (footnote omitted).

The comments challenged here pale in comparison to *Hooks* in both number and severity. There is no conflict for this Court to resolve. The prosecutor in this case did not argue that failing to deliberate and reach a unanimous decision would be operating outside of the law.[8] This Court should accord deference to the Florida Supreme Court's finding that the jurors were not misled and there was no prosecutorial misconduct, as an objectively reasonable application of federal law.

Since the Florida Supreme Court's decision does not conflict with any decision by any court and does not decide any important, unsettled question of federal law, certiorari review should be denied.

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[8] Aside from the obvious factual distinction, there was also a strong dissent in *Hooks* by Circuit Judge O'Brien in which he criticizes the Court of Appeals finding that the jury was misled by the prosecutors' intentional misstatements of law. Circuit Judge O'Brien observed that, "[t]o decide whether the OCCA's decision to the contrary is "objectively unreasonable," or even wrong, we must take a close look at the events, especially the prosecutors' arguments, in context. The majority does so selectively, and thus fails to provide necessary context". *Id.* at 759–60. *Hooks v. Workman*, 606 F.3d 715, 764–65 (10th Cir. 2010).

CONCLUSION

For the foregoing reasons, the Court should DENY the petition for certiorari review of the decision of the Florida Supreme Court entered below.

Respectfully submitted,

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