

No. 23-7764

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**In The  
Supreme Court of the United States**

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**LEON DAVIS, JR.,**  
*Petitioner,*

v.

**STATE OF FLORIDA, AND SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,**  
*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA  
Lower Court No. SC2021-1779, SC2022-0883 (BP)**

**RESPONDENTS' BRIEF IN OPPOSITION**

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## **Capital Case**

### **QUESTION PRESENTED**

Whether this Court should grant certiorari review of the Florida Supreme Court's decision and analysis that trial counsel's performance was not ineffective under *Strickland v. Washington*, where there is no misapplication of the law and there is no conflict with this Court's jurisprudence, or any state court of last resort?

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## CITATION TO OPINION BELOW

The Florida Supreme Court's Opinion is reported at *Davis v. State*, 383 So. 3d 743 (Fla. 2024).

## STATEMENT OF JURISDICTION

Title 28 U.S.C. § 1257 authorizes this Court's jurisdiction and limits it to federal constitutional issues that were properly presented below. A principle purpose of certiorari jurisdiction "is to resolve conflicts among 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); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate and state supreme courts as a consideration in the decision to grant review). Cases that do not divide the federal or state courts or present important, unsettled questions of federal law, usually do not merit certiorari review. *Rockford Life Ins. Co. v. Ill. Dept. of Revenue*, 482 U.S. 182, 184 n.3 (1987).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel." U.S. Const. amend VI, § 1.

The Fourteenth Amendment to the United States Constitution states in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.” U.S. Const. amend. XIV, § 1.

## STATEMENT OF THE CASE AND FACTS

### I. State Court Trial Proceedings

A grand jury indicted Davis for two counts of first-degree murder, one count of attempted first-degree murder, one count of attempted armed robbery, and one count of possession of a firearm by a convicted felon. Davis committed the crimes on December 7, 2007, at a BP gasoline station and convenience store. He waived a jury trial in favor of a bench trial. *Davis v. State*, 383 So. 3d 743, 749-50 (Fla. 2024).

On the day of the murders, Davis bought a Wesson .357 magnum revolver. His cousin gave him .38 caliber bullets that were compatible with the revolver. Between 6 and 7 p.m., he left his house, which was approximately twenty-two to twenty-three minutes away from the BP gasoline station. He drove a black Nissan Altima. Davis returned home between 9 and 9:30 p.m. *Davis*, 383 So. 3d at 750.

Around 8:51 p.m., a BP employee and his friend exited the store in order to change the prices on a front sign. Another employee remained in the store, which by then was closed. Surveillance footage showed a man, about six feet tall, approach and pull on the locked store door. He had a large build and was dressed in dark clothing and wore a hood and a mask. When the employee in the store indicated that the store was closed, the masked man raised a gun and shot into the building towards the employee. The shooter then directed his attention to the two men outside the store. Surveillance footage showed the men with their hands in the air. After shooting the two men in the head at approximately 8:53 p.m., the shooter returned to the store and once again tried to open the door. He then ran from the scene. *Davis*, 383 So. 3d

at 748-49.

Witnesses described a Nissan that was possibly black parked in an isolated area near the gas station. Davis's driver license, two dark jackets, and a pair of black gloves were later found in a black Nissan Altima. *Davis*, 383 So. 3d at 749. At trial, Davis testified that he was driving a black Nissan Altima on December 7, 2007. *Id.* at 751.

Davis was positively identified as the perpetrator of another crime involving multiple shootings, arson and robbery (the *Headley* case),<sup>1</sup> which took place on December 13, 2007. *Davis*, 383 So. 3d at 750-51. The state's ballistics expert testified that the same gun was used in this case and the *Headley* case. *Id.* at 751. He also testified that .38 caliber projectiles could be fired from a .357 magnum firearm, and that the projectiles obtained during the BP investigation were consistent with having been fired from a Wesson .357 magnum revolver. *Id.* at 750.

The court found Davis guilty as charged. *Davis*, 383 So. 3d at 752. He waived a penalty phase jury. *Id.* Following the penalty phase and a *Spencer*<sup>2</sup> hearing, the court sentenced him to death for the murders, life imprisonment with a twenty-year minimum mandatory sentence for the attempted murder, twenty years of imprisonment with a twenty-year minimum mandatory sentence for the attempted robbery, and fifteen years of imprisonment with a three-year minimum mandatory sentence for the possession of a firearm by a convicted felon. *Id.*

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<sup>1</sup> *Davis v. State*, 207 So. 3d 142, 148 (Fla. 2016).

<sup>2</sup> *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

Davis raised twelve issues on direct appeal to the Florida Supreme Court. *Davis v. State*, 207 So. 3d 177, 188-89 (Fla. 2016). The Court affirmed the convictions and sentences on November 10, 2016. *Id.* This Court denied Davis's petition for writ of certiorari on June 5, 2017. *Davis v. Florida*, 581 U.S. 1020 (2017).

## II. State Postconviction Proceedings

Davis filed his initial motion for postconviction relief raising twenty-two claims and several subclaims. *Davis*, 383 So. 3d at 753. The trial court held a two-day evidentiary hearing to address certain claims, including claim 20(a) (trial counsel failed to thoroughly investigate firearms identification evidence), claim 20(b)(3) (trial counsel failed to question the State's firearm expert as to his qualifications, methods, protocols, and the basis for his conclusions), and claim 20(b)(4) (trial counsel failed to present expert testimony challenging the state's firearms expert's findings regarding comparison evidence). *Id.* at 753-54. At the postconviction evidentiary hearing, the court heard testimony from lead trial counsel, the state's trial firearms analyst, the state's postconviction ballistics expert, the defense's postconviction forensic expert, a detective, and Davis. *Id.* at 754. The postconviction court ultimately denied relief on all the claims. *Id.*

On appeal, the Florida Supreme Court upheld the postconviction court's order denying relief. *Davis*, 383 So. 3d at 764. It held that neither trial counsel's cross-examination of the state's firearms expert nor his failure to obtain an expert to challenge the state's firearm and tool mark evidence constituted deficient performance and thus counsel was not ineffective. *Id.* at 757-58.



Davis now seeks certiorari review of the Florida Supreme Court's decision affirming the denial of postconviction relief.

## REASONS FOR DENYING THE WRIT

### **I. The Florida Supreme Court's determination that trial counsel was not ineffective under *Strickland* was proper and does not conflict with this court's jurisprudence.**

Davis asks this Court to review the Florida Supreme Court's deficient performance analysis related to two *Strickland*<sup>3</sup> claims raised in his initial state postconviction motion. Florida's high court's deficient performance analysis, he asserts, failed to account for the admission of prior bad act and collateral crime evidence when assessing whether trial counsel's strategy was sound.

This Court's rules state that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (explaining that error correction is outside the mainstream of the Court's function and is not among the compelling reasons for granting certiorari review). This Court has stated the "*Strickland* standard is a general one, so the range of reasonable applications is substantial." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

As discussed below, Davis's claims are fact-intensive and case specific, not warranting review. The Petition primarily offers a *factual* re-discussion of the issues and does not present a misapplication of *Strickland*. It fails to present a conflict with

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<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

this Court's precedent or that of any state court of last resort. Consequently, certiorari should be denied.

**A. The Florida Supreme Court properly analyzed trial counsel's strategic decisions in light of the circumstances trial counsel faced at the time of trial.**

Davis argues that when evaluating whether trial counsel's strategic decisions were sound, Florida's highest court took "a very myopic view of counsel's performance ... fail[ing] to consider the critical circumstance of [prior bad act and collateral crime] testimony admitted at Petitioner's trial." Pet. at 16. His assertion that the Florida Supreme Court failed to properly account for the admission of bad act and collateral crime evidence when determining whether counsel's strategic choices were sound is wrong.

The decision first sets forth the evidence in this case and the *Headley* case. *Davis*, 383 So. 3d at 748-51. The court's ineffective assistance of counsel analysis then begins with a recitation of the *Strickland* standard, including "[t]he defendant bears the burden to 'overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 756 (quoting *Strickland*, 466 U.S. at 689).

The court further recounts counsel's preparation to counter the *Headley* case evidence. *Davis*, 383 So. 3d at 757-58. Counsel testified at the postconviction evidentiary hearing that he researched trial techniques for challenging ballistics evidence and consulted with an experienced ballistics experts with whom he had consulted in prior cases. *Id.* Further, he filed a motion to ensure that the defense expert had access to the state's evidence. *Id.* at 758.

After examining the state's ballistics evidence, the defense expert concluded that the bullets and bullet fragments in the BP case and the Headley case were fired from the same firearm. *Davis*, 383 So. 3d at 758. Because counsel could not disprove the conclusion of the state's expert, he did not believe that arguing general criticisms about firearms examination was an effective strategy. *Id.* Counsel chose instead to focus on the fact that multiple types of firearms other than the type Davis purchased from his cousin could have been used in the shootings. *Id.*

It is with this factual background and the testimony of counsel, Florida's highest court analyzed his strategic decisions. Moreover, Davis's ineffective assistance of counsel claims regarding the ballistics evidence match and the cross-examination of the state's firearms expert, by their very nature, necessitated consideration of the impact of the *Headley* case evidence on trial counsel's strategic choices as is illustrated in the decision.

Finally, the Florida Supreme Court's decision is in harmony with the one case Davis cites in support of his argument, *Kimmelman v. Morrison*, 477 U.S. 365 (1986). There, this Court found that counsel's pretrial actions had to be considered when analyzing whether strategic decisions were reasonable. *Id.* at 386-87. That is precisely what the Florida Supreme Court did; it did not analyze trial counsel's strategic decisions in a vacuum. Instead, the Court examined them in light of the circumstances faced by counsel after conducting a reasonable investigation. Because no conflict or misapplication of the law exists, review should be denied.

**B. Trial counsel's strategic decisions were informed by a reasonable pretrial investigation.**

Davis argues that the Florida Supreme Court wrongly concluded that trial counsel's strategic decisions regarding cross-examination of the state's firearms expert were not deficient. He asserts those strategic decisions were unsupported by a reasonable pretrial investigation. Such an investigation, Davis continues, would have led to effective cross-examination regarding the expert's conclusions, focusing on the ballistics match rather than whether the same firearm was used in this and the *Headley* case.

Davis is wrong. As set forth in the previous subclaim, trial counsel's strategic decisions were supported by a reasonable investigation including researching trial techniques for challenging ballistics evidence and consulting with an expert. *See Davis*, 383 So. 3d at 757-58. Further, this Court has explained that "*Strickland* [did] not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Harrington*, 562 U.S. at 111. Often, defense counsel's cross-examination of the prosecution's expert witness "will be sufficient." *Id.*

This is precisely what the Florida Supreme Court found. When the defense expert determined that the bullets and bullet fragments in this and the *Headley* case were fired from the same firearm, trial counsel did not believe that arguing general criticisms about firearms examination was an effective strategy. Instead, he chose to focus on the fact that multiple firearms other than that purchased by Davis could have been used in the shootings. Trial counsel was able to gain concessions from the

state's firearms expert that the murder weapon could have been a different caliber of firearm than the .357 magnum that Davis bought on the day of the BP murders, and that twenty-one different firearms could have produced the same firing characteristics. *Davis*, 383 So. 3d at 757-58.

Davis cites two cases regarding reasonable investigations as they relate to counsel's strategic decisions. In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court found that the defendant was denied the effective assistance of counsel when despite discovering evidence of potential mitigation evidence, counsel chose to "retry" the guilt phase of the trial during the penalty phase and to forego further investigation of Wiggins' social history and family background. *Id.* at 516-18. Under the circumstances, counsel's strategic choice was not reasonable "in light of the evidence counsel uncovered in the social services records-evidence that would have led a reasonably competent attorney to investigate further." *Id.* at 533. And *Kimmelman* involved counsel's failure to conduct any discovery, rendering his subsequent failure to file a suppression motion deficient. 477 U.S. at 372, 385.

The facts and circumstances in *Wiggins* and *Kimmelman* have no bearing on the claim before this Court. This is not a case where the Florida Supreme Court "merely assumed that trial counsel's investigation was adequate." Pet. at 18. Nor is it a case where counsel failed to pursue promising leads without explanation or failed to demand discovery. Finally, the alternative strategies advanced in the Petition fail to account for the "distorting effects of hindsight," which the "highly deferential" review of strategic decisions is meant to eliminate. *Strickland*, 466 U.S. at 689.

Because no conflict or misapplication of law exists, review should be denied.

**C. Because Davis made an insufficient showing that trial counsel's performance was deficient, Florida's highest court was not required to engage in *Strickland* prejudice analysis.**

Lastly, Davis combines the two subclaims discussed above and asserts that this Court should grant a writ of certiorari and remand the case for an evaluation of *Strickland* prejudice. The Florida Supreme Court found that Davis had failed to establish deficient performance and therefore did not conduct a *Strickland* prejudice analysis. This is a perfectly acceptable application of this Court's controlling precedent. *See Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."). Because no conflict or misapplication of the law exists, review should be denied.


In sum, Davis has not established any reason for this Court to grant review of these fact-specific claims. There is no conflict between the Florida Supreme Court and this Court or any other state supreme court regarding the denial of relief under *Strickland*.

## CONCLUSION

The Petition before the Court does not present any conflict between the Florida Supreme Court's decision and any decision of this Court. Nor are unsettled questions of federal law involved. Therefore, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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