No. _____

IN THE
Supreme Court of the United States

LEON DAVIS, JR.,

Petitioner,

V.

STATE OF FLORIDA, AND SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida
Lower Court No. SC21–1778 (Headley)

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

Stacy R. Biggart
Fla. Bar No. 0089388
Special Assistant CCRC-North
767 Dunham Street
Charleston, SC 29492
(850) 459-2226
stacybiggart@gmail.com

*COUNSEL OF RECORD

QUESTION PRESENTED - CAPITAL CASE

Counsel failed to object to the capital trial court's multiple misleading and inappropriate comments during jury selection about the uniquely gruesome nature of the evidence and the prosecution's exercise of discretion to seek death only in appropriate cases. Under these circumstances, should *Strickland* prejudice be found where counsels' cumulative failures to object to the improper comments created a reasonable probability of a different outcome but for counsels' deficient performance?

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:
Circuit Court of Polk County, Florida
State of Florida v. Leon Davis, Case No. 2007-CF-009386
Judgment entered: March 29, 2011

Direct Appeal:
Florida Supreme Court (No. SC11–1122)
Davis v. State, 207 So. 3d 177 (Fla. 2016)
Judgment entered: November 10, 2016
Rehearing denied: January 5, 2017

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 16-8569)
Davis v. Florida, 581 U.S. 1020 (2017)
Cert denied: June 5, 2017

Postconviction Proceedings:
Circuit Court of Polk County, Florida
Davis v. State, 2007-CF-009386
Judgment entered: November 29, 2021

Florida Supreme Court (Nos. SC21–1778; SC22–882)
Davis v. State, 383 So. 3d 717 (Fla. 2024)
Judgment entered: February 1, 2024
Rehearing denied: March 22, 2024

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

DECISION BELOW

The decision of the Florida Supreme Court has yet to be reported but is available at 383 So. 3d 717 (Fla. 2024) and is reprinted in the Appendix (App.) 1.[1]

JURISDICTION

The Florida Supreme Court's judgment was entered on February 1, 2024. App. at 1. Rehearing was denied on March 22, 2024. App. at 53. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense."

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall … 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.

[1] Citations to non-appendix material from the record below are as follows: References to Petitioner's trial proceedings in volumes 67 through 99 are designated as "T. __." References to the record of Petitioner's direct appeal of his trial are designated as "R. __." References to Petitioner's postconviction proceedings are designated as "PCR. __." All other references are self-explanatory or otherwise explained herein.

STATEMENT OF THE CASE AND FACTS

I. Relevant Trial Court Proceedings And Facts

The victims, Yvonne Bustamante and Juanita Luciano died from traumatic burn injuries sustained at Headley Insurance Company on December 13, 2007. Michael Bustamante died from extreme prematurity because of the injuries sustained by his mother, Juanita Luciano.

The Polk County Grand Jury indicted Petitioner on January 9, 2008, on three counts of first-degree murder (Yvonne Bustamante, Juanita Luciano, and Michael Bustamante), one count of attempted first-degree murder (Brandon Greisman), one count of armed robbery, one count of first-degree arson, and one count of possession of a firearm by a convicted felon. (R2. 73–78). The firearm charge was severed from the other charges. (R8. 1251).

That same day, the Polk County Grand Jury also indicted Petitioner on two counts of first-degree murder (Pravinkumar Patel and Dashrath Patel), one count of attempted armed robbery, and one count of possession of a firearm by a convicted felon for crimes committed at the BP station located at CR 557 and I–4 in Polk County on December 7, 2007. (BP R1. 46–50).

The instant case was scheduled for trial before the BP case. The first attempt at a jury trial began on October 11, 2010, and ended in a mistrial partway through the State's case due to a witness's superfluous comment. (R55. 9169–96).

The second jury trial attempt occurred in January and February 2011.

During jury selection, three photographs of the victims were shown during individual voir dire. While the jurors were still together in the courtroom, Judge Hunter gave the venire some basic facts of the case and then made the following statement:

> **This case is truly not for the faint of heart. The photographs alone in this case are graphic.**
>
> For the last three and a half years, I have handled all of the first-degree murder cases in this circuit, and I have been doing this for 16 years, so **I have seen a lot in my service on the bench.** And I typically tell jurors that you are going to see photographs, because in every homicide case, the jury is shown photographs of the crime scene and they are typically shown photographs from an autopsy, where a medical examiner performs an autopsy on the victim, and I tell people typically that yes, you may see some blood and it is not something you particularly want to look at, but it is no worse than you probably see on television any more. As you will know, between movies and television, it's become so graphic that I don't see jurors shocked as maybe 10 or 15 years ago**. These photographs are graphic.**
>
> There are some people, and I don't fault you if you fall in this category, but there are some folks that may not be able to handle the emotional aspect of this case and the graphic nature of this case.
>
> **I don't normally give this kind of presentation for my other cases**, we just simply tell folks there may be some semi-graphic photographs, if you have a weak stomach, let us know, we'll talk about it. **But I don't do it quite like we're doing this.** And the reason I'm doing this, I don't want to pick a jury, and you see how much time we're spending to get this done correctly, and then the first day that you are shown photographs, one of you absolutely can't take it and emotionally and I have lost a juror or two or three.

(R71. 803–06) (emphasis added). Then, the jurors were called in one by one and shown graphic photographs of the victims.

Before conducting individual voir dire, the trial court also made this comment to the jury:

> We're going to talk to you about two issues in private. And that is whether you know anything about the case from having seen it in the media in whatever form. Or whether you know people involved and have heard about it and so on. The other thing we're going to talk about is your views on the death penalty. Without a doubt the most difficult issue we ask judge and jurors to decide is the issue of capital punishment. The State of Florida has a statutory procedure set up in dealing with this. And I read to you the bifurcated instruction, but it starts very simply, and that is the State must put someone on notice of seeking the death penalty. The death penalty is not appropriate in all First Degree Murder cases, and the State does not seek it in all First Degree Murder cases. Once that occurs, if the Defendant is found guilty of First Degree Murder, and First Degree Murder only, not some lesser. If the Defendant is found guilty of some lesser crime or not found guilty then your job is done. If an only if the Defendant is found guilty of First Degree Murder do you start considering the issue of penalty.

(T68. 241).

On February 15, 2011, the jury found Petitioner guilty on all counts. (R64. 10697–702).

The penalty phase began on February 17, 2011. On February 18, 2011, the jury voted 8–4 to recommend a death sentence for the murder of Michael Bustamante and unanimously recommended death sentences for the murders of Yvonne Bustamante and Juanita Luciano. (R64. 10714–16). After a *Spencer*[2] hearing on March 29, 2011, the court followed the jury's recommendation and sentenced Petitioner to death for the murders of Ms. Bustamante and Ms. Luciano. The court overrode the death recommendation for the murder of Michael Bustamante and sentenced Petitioner to life in prison. The court also sentenced Petitioner to life in prison for the attempted

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

first-degree murder of Brandon Greisman and armed robbery while in possession of a firearm and thirty years in prison for first-degree arson. (R66. 10843–64).

The court found the following aggravating factors: (1) Petitioner was previously convicted of a felony and on felony probation (great weight); (2) the murders were committed in a cold, calculated, and premeditated manner (great weight); (3) Petitioner was contemporaneously convicted of three first-degree murders, the attempted murder of Brandon Greisman, and armed robbery with a firearm (very great weight); (4) the murders were committed while Petitioner was engaged in the commission of an armed robbery with a firearm and first-degree arson (moderate weight); (5) the murder of Yvonne Bustamante was committed to avoid or prevent arrest (some weight); (6) the murders were committed for financial gain (little weight); and (7) the murders were especially heinous, atrocious or cruel (great weight). (R66. 10845–56).

The court found one statutory mitigating circumstance: the crime was committed while Petitioner was under the influence of extreme mental or emotional disturbance (little weight). (R66. 10862–63).

The trial court also considered fifteen nonstatutory mitigating factors: (1) Petitioner was the victim of bullying as a child (moderate weight); (2) he was the victim of sexual assault as a child (moderate weight); (3) he was the victim of physical and emotional child abuse by a caretaker (moderate weight); (4) his overall family dynamics (little weight); (5) he served in the U.S. Marine Corps (little weight); (6) he had been suicidal as a child and as an adult (slight weight); (7) he had a diagnosed

personality disorder (slight weight); (8) he had a history of depression (slight weight); (9) he was experiencing stressors at the time of the incident (little weight); (10) he was a good person in general (very slight weight); (11) he was a good worker (little weight); (12) he was a good son, sibling, and husband (moderate weight); (13) he was a good father to a child with Down Syndrome (moderate weight); (14) he displayed good behavior during trial as well as other court proceedings (slight weight); and (15) he displayed good behavior while in jail and prison (little weight). (R66. 10857–62).

The Florida Supreme Court affirmed Petitioner's convictions and sentences on direct appeal. *Davis v. State*, 207 So. 3d 177 (Fla. 2016). Rehearing was denied on January 5, 2017. The mandate was issued on January 23, 2017.

This Court denied certiorari review on June 5, 2017. *Davis v. Florida*, 137 S. Ct. 2218 (2017).

II. Relevant Postconviction Facts And Proceedings

On May 19, 2018, Petitioner filed his initial motion for postconviction relief. (PCR. 548–909). He filed amended motions on November 6, 2018 (PCR. 1042–406), October 14, 2019 (PCR. 1752–95), and July 16, 2020. (PCR. 2024–41).

Petitioner raised twenty-two claims for relief, including a claim that trial counsel failed to object to and participated in, comments by the trial court that the photos of the deceased shown to the venire during jury selection were the worst they have seen, and a claim that trial counsel failed to object to the trial court's vouching for the Office of the State Attorney when the judge told the jury that the State does not seek death in every first-degree murder case.

The evidentiary hearings in the instant and BP cases were consolidated and held on August 23-24, 2021.

Trial counsel testified at the evidentiary hearing. His comments about the trial court's description of the photographs of the victims were brief. Trial counsel testified that he did not object to those comments because: "I'm not gonna stick my head in the sand. These are horrible photos." (PCR.2759).

Trial counsel was familiar with the phrase "worst of the worst" as it relates to death penalty cases. "That's a reference to considering the overall aggravation and lack of mitigation in the case, which cases are deserving of the death penalty." (PCR.2758).

The circuit court issued an order denying all postconviction claims on November 29, 2021. (PCR. 3624–814). Petitioner timely appealed, and on February 1, 2024, the Florida Supreme Court denied relief. Rehearing was denied on March 22, 2024.

REASONS FOR GRANTING THE WRIT

I. The Court Should Certiorari To Determine If Counsel's Failure To Object To The Capital Trial Court's Multiple Misleading And Inappropriate Comments During Jury Selection About The Uniquely Gruesome Nature Of The Evidence And The Prosecution's Exercise Of Discretion To Seek Death Only In Appropriate Cases Created A Reasonable Probability Of A Different Outcome But For Counsels' Deficient Performance.

Petitioner is sentenced to death, and this Court has consistently emphasized that capital punishment must be limited to those who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. *See Roper v. Simmons*, 543 U.S. 551, 568–69 (2005). This principle is grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, which applies with particular force to the death penalty. *See id.* at 568.

The application of the death penalty requires a rigorous judicial process to ensure that it is not imposed arbitrarily or capriciously. *See Spaziano v. Florida*, 468 U.S. 447, 460 (1984). For over ninety years, this Court has emphasized the need for judicial restraint and neutrality to maintain the fairness of the trial process and recognized that while judges have the privilege to comment on the evidence at trial, this privilege has inherent limitations and must be exercised carefully to avoid misleading the jury or appearing one-sided. *Quercia v. United States*, 289 U.S. 466, 470, 470 (1933). In *Quercia*, the trial court told the jury his opinion of the truth and veracity of the defendant's testimony. *Id.* at 471–72. This Court found the trial court's behavior to be highly prejudicial error that "was of the sort most likely to remain

firmly lodged in the memory of the jury and to excite a prejudice that would preclude a fair and dispassionate consideration of the evidence." *Id.* at 472. This Court emphasized that a judge may analyze and dissect evidence but must not distort or add to it. The judge's comments should be given in a manner that does not mislead and especially should not be one-sided. Deductions and theories not warranted by the evidence should be avoided, and the judge must not charge the jury upon a supposed or conjectural state of facts for which no evidence has been offered. *Id.* at 470. Furthermore, this Court has underscored a trial judge's significant influence on the jury, noting that even "his lightest word or intimation from the judge is received with deference and may prove controlling." *Id.* at 470.

The need for judicial impartiality is critical in capital cases due to the unique severity and irrevocability of the death penalty. This Court has emphasized that death is different in both its severity and its finality, which necessitates a higher standard of scrutiny in the processes that lead to a death sentence. *See Gardner v. Florida*, 430 U.S. 349, 357 (1977). This perspective is crucial to ensuring that any decision to impose the death sentence is based on reason rather than impulse, emotion, or the jury's sense that the judge thinks the death penalty is appropriate. *See id.* at 358.

In *Gardner*, this Court has also highlighted the importance of individualized sentencing in death penalty cases, recognizing that the defendant has a significant interest in the character of the procedure, which leads to the imposition of the sentence. *Id.* This is because the death penalty, unlike other punishments, involves

the state taking the life of a citizen, which is a profound act that differs dramatically from any other legitimate state action. *Id*. at 357. Furthermore, this Court has established that the sentencing process in capital cases must satisfy the requirements of the Due Process Clause, ensuring that the defendant receives effective assistance from counsel and that the sentencing decision is based on a comprehensive consideration of all relevant factors. *Id*.

Trial court errors must be reviewed during the direct appeal of the trial and not in a postconviction posture, so this Court should analyze this claim as an ineffective assistance of counsel claim. Petitioner is a death row inmate guaranteed the right to counsel under the Sixth Amendment. This Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Counsel owes basic duties to the client, including loyalty, avoiding conflicts of interest, advocating for the client's interest, consulting with the client on important decisions, and keeping them informed of developments in their case. *Id*. at 688.

In *Strickland v. Washington*, this Court established a two-pronged test to determine whether a defendant is granted collateral relief for ineffective assistance of counsel in a postconviction proceeding. The defendant is entitled to postconviction relief if counsel's conduct was outside the range of reasonable professional judgment and counsel's ineffective representation prejudiced the defendant. *Id.* at 690. This Court stressed that although the *Strickland* test should guide a court's decision in a

claim of ineffective counsel, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id*. at 696. Counsel's conduct should be evaluated from their perspective at the time of conduct and in light of all of the circumstances of the trial. *Id*. at 690.

Moreover, *Strickland*'s mandate that counsel's conduct should be evaluated from their perspective at the time of the alleged error and in light of all circumstances is primarily used to prevent one single act of ineffectiveness from resulting in a grant of postconviction relief. "Since '[t]here are countless ways to provide effective assistance in any given case,' unless consideration is given to counsel's overall performance, before and at trial, it will be 'all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'" *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (quoting *Strickland*, 466 U.S. at 689).

To prove prejudice, the defendant is not required to show that counsel's conduct more likely than not altered the outcome of his case. *Strickland*, 668 U.S. at 693. The defendant can prove prejudice when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

A. The Trial Court Made Improper Comments To The Venire That The Photographs Of The Victims Were Uniquely Gruesome And He Was Handling Petitioner's Case Differently From All Other Murder Cases.

Like the trial judge in *Quercia*, the judge presiding over Petitioner's trial made comments about the evidence at Petitioner's trial that were extremely prejudicial and "w[ere] of the sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice that would preclude a fair and dispassionate consideration of the evidence." *Quercia,* 289 U.S. at 472. During jury selection, the court gave some basic facts of the case and then made the following statement to the jury about the photographs they were soon to view:

> **This case is truly not for the faint of heart. The photographs alone in this case are graphic.**
>
> For the last three and a half years, I have handled all of the first-degree murder cases in this circuit, and I have been doing this for 16 years, so **I have seen a lot in my service on the bench.** And I typically tell jurors that you are going to see photographs, because in every homicide case, the jury is shown photographs of the crime scene and they are typically shown photographs from an autopsy, where a medical examiner performs an autopsy on the victim, and I tell people typically that yes, you may see some blood and it is not something you particularly want to look at, but it is no worse than you probably see on television any more. As you will know, between movies and television, it's become so graphic that I don't see jurors shocked as maybe 10 or 15 years ago**. These photographs are graphic.**
>
> There are some people, and I don't fault you if you fall in this category, but there are some folks that may not be able to handle the emotional aspect of this case and the graphic nature of this case.
>
> **I don't normally give this kind of presentation for my other cases**, we just simply tell folks there may be some semi-graphic photographs, if you have a weak stomach, let us know, we'll talk about it. **But I don't do it quite like we're doing this.** And the reason I'm doing this, I don't want to pick a jury, and you see how much time we're

> spending to get this done correctly, and then the first day that you are shown photographs, one of you absolutely can't take it and emotionally and I have lost a juror or two or three.

(R71. 803–06) (emphasis added). Then, the jurors were called in one by one and shown graphic photographs of the victims.

This improper comment on the evidence was not a minor misstep by the trial court. In a case where the maximum punishment for Petitioner was death, the trial court's comments to the jurors about the uniquely graphic nature of the photographs telegraphed that this was the most gruesome case the judge had ever presided over. The judge told Petitioner's jurors that he had been on the bench for over fifteen years and presided over all the murder cases in his circuit for over three years. Yet, he had never treated another murder case like Petitioner's. The court told the jurors that in every homicide case, jurors view photographs from the crime scene and autopsy. Still, in fifteen years, he had never had a case so bad that he had to bring the jurors in individually and show them the graphic photographs during jury selection to make sure they could "stomach" a murder trial. The court communicated to the jurors who would decide whether Petitioner lived or died that, in his opinion, this crime was one of the narrow categories of the most severe crimes deserving of execution. Before the State presented its first aggravating factor in the penalty phase, Petitioner's jury knew this case was different from [worse than] all other murder cases.

Trial counsel's endorsement of the court's opinion on the evidence and failure to object to the court's vouching for the State further harmed Petitioner. Trial counsel should have objected to the court's characterization of the evidence. Reasonable trial

counsel under these circumstances would have argued that although the jurors should view photographs of the victims during individual voir dire, the trial court should not single Petitioner's case out as worse than any other cases. Trial counsel's strategy to weed out jurors who could not manage the graphic nature of the victims' injuries could have been accomplished without the court's gratuitous comments about the uniquely gruesome nature of this case among all other murder cases he has overseen. Instead, the jurors heard the trial court's comments about aggravation before the attorneys delivered their opening statements. The trial judge significantly influences the jury; even the "lightest word or intimation from the judge is received with deference [by the jurors] and may prove controlling." *Quercia*, 289 U.S. at 470.

The Florida Supreme Court refused to examine the context of the trial court's comments and found that because he did not "describe the photographs as 'the worst' relative to other cases," his comments were not objectionable, and counsel's failure to object to the remarks was not deficient performance. App. at 31–33. No, the trial court did not use the specific phrase "the worst" in his comments to the jury, but the only way to interpret what he *did* say is this: He has been on the bench for a long time, and he has seen a lot of murder cases. Yet, Petitioner's case is unique to all those other murder cases because the victims' injuries are so gruesome. In fact, for the first time, he must interview jurors individually to make sure they can manage the graphic nature of the photographs of the victim's injuries.

B. The Trial Court Improperly Vouched For The State's Charging Decisions.

The harm to Petitioner was exacerbated by the trial court's vouching for the charging decisions of the State of Florida. Before conducting individual voir dire, the trial court also made this comment to the jury:

> We're going to talk to you about two issues in private. And that is whether you know anything about the case from having seen it in the media in whatever form. Or whether you know people involved and have heard about it and so on. The other thing we're going to talk about is your views on the death penalty. Without a doubt the most difficult issue we ask judge and jurors to decide is the issue of capital punishment. The State of Florida has a statutory procedure set up in dealing with this. And I read to you the bifurcated instruction, but it starts very simply, and that is the State must put someone on notice of seeking the death penalty. The death penalty is not appropriate in all First Degree Murder cases, and the State does not seek it in all First Degree Murder cases. Once that occurs, if the Defendant is found guilty of First Degree Murder, and First Degree Murder only, not some lesser. If the Defendant is found guilty of some lesser crime or not found guilty then your job is done. If an only if the Defendant is found guilty of First Degree Murder do you start considering the issue of penalty.

(T68. 241).

Here, the trial court informed the jury that the State does not seek death in every murder case, but they sought death in Petitioner's case. The Florida Supreme Court found that the comment was not objectionable. Trial counsel could not have been ineffective for failing to object because the comments "emphasized the jury's role in determining whether [Petitioner] was guilty and explained that the jury would only reach deliberations on the death penalty if they first found [Petitioner] guilty of first-degree murder." App. at 35. The Florida Supreme Court reviewed each comment individually without analyzing their net effect on the jury. However, these two

gratuitous comments by the trial judge, taken together, gave a clear message to the jury before the State had presented its first aggravator in the penalty phase that Petitioner's case was the most gruesome the trial court had overseen, and although the State does not consider the death penalty to be appropriate in all cases, they sought death in Petitioner's case.

This Court should find that the trial court's comments about the victim's photographs and vouching for the State were highly prejudicial comments about the aggravating factors of Petitioner's case. Further, this Court should find trial counsel's failure to object to these comments was deficient performance. The Florida Supreme Court did not address *Strickland's* prejudice prong in the decision below. App. at 31–35. Therefore, this Court should reverse the Florida Supreme Court's decision that Petitioner's trial counsel was effective and remand the case for an evaluation for prejudice.

C. This Case Is A Proper Vehicle To Decide The Question.

This case presents an excellent opportunity for this Court to decide the question because this Court's jurisdiction to hear the case is not affected by an independent or adequate state law ground. The Florida Supreme Court based its holding on *Strickland v. Washington.* App. at 25. As this Court has noted, "whether a state law determination is characterized as entirely dependent on, resting primarily on, or influenced by a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to our

jurisdiction." *Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016) (cleaned up). Therefore, there is no impediment to this Court reviewing the question's merits.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

Respectfully submitted,

/s/ STACY R. BIGGART
Stacy R. Biggart
Fla. Bar No. 0089388
Special Assistant CCRC-North
767 Dunham Street
Charleston, SC 29492
(850) 459-2226
stacybiggart@gmail.com

COUNSEL OF RECORD

JUNE 17, 2024