No. 23-7765

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. SC2021-1778, SC2022-0882 (Headley)

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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The Florida Supreme Court's Opinion is reported at *Davis v. State*, 383 So. 3d 717 (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 Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted. U.S. Const. amend. VIII.

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

Armed with a loaded .357 magnum revolver and equipped with duct tape, a cigarette lighter, gloves and a gasoline can, Davis entered the Headley Insurance Agency on December 13, 2007, at around 3 p.m. *Davis v. State*, 383 So. 3d 717, 722 (Fla. 2024). Two employees, Yvonne Bustamante (Bustamante) and Juanita Luciano (Luciano), were inside. Luciano was twenty-four weeks pregnant. *Id.* Davis forced the women to open the company's safe and cashbox, which contained $900. *Id.* He bound both women with duct tape, poured gasoline on them, and set them on fire. *Id.*

The victims escaped the now burning building. *Davis*, 383 So. 3d at 722. As Bustamante fled, Davis shot her left hand. *Id.* Several people, including Brandon Greisman (Greisman), responded to the scene. *Id.* at 723. Davis shot him in the face. *Id.* Davis then got into his car and drove away. *Id.*

Witness descriptions of Bustamante's condition included: "skin was falling off her;" "She was um, screaming she was hot. And that her skin was rolling off of her body ... It was disgusting. You could smell the burnt skin and flesh;" and "the skin, everywhere I could see it, it was peeling back ... her hair singed off, most of her clothing was burned off, skin was hanging off her back and buttocks." *Davis* 383 So. 3d at 723. Burns covered eighty to ninety percent of her body. *Id.* at 726.

Bustamante told a responding officer that Davis, whom she knew as a former customer, threw gasoline on her and Luciano when they did not give him money and then set them on fire. *Davis*, 383 So. 3d at 725. When they tried to run, Davis continued to throw gasoline on them. *Id.* Five days later, Bustamante died from

complications of thermal burns due to the fire. *Id.* at 726. Her autopsy also revealed bullet fragments from the gunshot to her left hand. *Id.*

Luciano took refuge at a nearby restaurant. *Davis*, 383 So. 3d at 724. Although she was a prior customer of the restaurant, she was so badly burned that the owner did not recognize her. *Id.* at 725. He testified, "I saw a woman that was naked, burned, um, burned from head to toe, no shoes on, or any clothes on, just underwear. But I couldn't recognize her." *Id.* A responding officer described Luciano's injuries as worse than those suffered by Bustamante. *Id.*

After being taken to the hospital, Luciano underwent an emergency Caesarean section, during which she gave birth to a son named Michael Bustamante.[1] *Davis*, 383 So. 3d at 726. He died three days later due to extreme prematurity. *Id.* Luciano died due to complications of thermal burns due to fire; burns covered approximately ninety percent of her body. *Id.*

Within an hour of the robbery, Davis drove to a credit union where he made a cash deposit. *Davis*, 383 So. 3d at 726. His face was covered with apparent scratch marks. *Id.* He later told his brother that he had robbed someone and told another person that he had "hurt someone." *Id.* at 726-27.

The jury convicted Davis of three counts of first-degree murder, one count of attempted first-degree murder, one count of armed robbery, and one count of first-degree arson. *Davis*, 383 So. 3d at 730. At the conclusion of the penalty phase, it unanimously recommended Davis be sentenced to death for the two first-degree

[1] The father was Yvonne Bustamante's brother. *Davis*, 383 So. 3d at 726.

murder convictions (Luciano and Bustamante) and voted eight to four that Davis be sentenced to death for the first-degree murder of Michael Bustamante. *Id.* The trial court ultimately sentenced Davis to death for the first-degree murders of the women and to life imprisonment for the first-degree murder of Michael Bustamante. *Id.* at 731.

Davis raised four issues on direct appeal, including whether photographs of the murder victims were unfairly prejudicial. *Davis v. State*, 207 So. 3d 142, 158 (Fla. 2016). The Florida Supreme Court affirmed the convictions and sentences on January 23, 2016. *Id.* at 175. 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, including: trial counsel failed to object to, and in fact participated in, comments by the trial court that the photographs of the deceased shown to the venire during jury selection were the worst they have seen; and trial counsel failed to object to the trial court's vouching for the Office of the State Attorney when he said to the jury that the state does not seek death in every first-degree murder case. *Davis*, 383 So. 3d at 731-32 n.1. The court held a two-day evidentiary hearing. Ultimately, it denied all claims. *Id.* at 733.

On appeal, the Florida Supreme Court upheld the postconviction court's order denying relief. *Davis*, 383 So. 3d at 743. It held that the trial court never described the photographs as "the worst" relative to other cases. When read in context, the trial

court was properly "stressing to the prospective jurors the importance of providing a candid response when they were individually shown photographs of the victims." *Id.* at 735–36.

Further, trial counsel's performance was not deficient for failing to object to the court's comments regarding the photographs. *Davis*, 383 So. 3d at 736. At the postconviction evidentiary hearing, trial counsel testified that he did not object, because in cases such as this involving emotional aspects such as graphic victim photographs, his strategy is to desensitize the jury as much as possible before the presentation of evidence begins and to exclude any jurors who would be especially affected by viewing graphic photographs. *Id.* at 736.

Finally, Florida's highest court found that trial counsel was not ineffective for not objecting when the trial court advised the jury panel that the state does not seek the death penalty in all first-degree murder cases. *Davis,* 383 So. 3d at 736. It rejected Davis's characterization that the remarks improperly vouched for the state or suggested that he deserved the death penalty. *Id.* at 736-37. Rather, "the trial court emphasized the jury's role in determining whether Davis was guilty and explained that the jury would only reach deliberations on the death penalty if it first found Davis guilty of first-degree murder." *Id.* at 737. Because the trial court's remarks were proper, counsel's performance was not deficient for failing to object. *Id.*

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 *Strickland*[2] determinations related to trial counsel's not objecting to two court voir dire comments. He asserts Florida's high court misinterpreted the import of the remarks and erred when it concluded that counsel was not ineffective for failing to object to them.

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*. The Petition fails to present a conflict with this Court's precedent or that of any state court of last resort. Consequently, certiorari should be denied.

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[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Because the trial court's comments regarding two photographs shown during jury selection were proper, trial counsel was not ineffective for failing to object.

Davis asserts that the trial court's comments to potential jurors about two photographs shown during voir dire "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." Pet. at 12. He continues that trial counsel should have objected as his strategy of desensitizing the jury panel and excusing potential jurors who had an emotional response could have been accomplished without the trial court's comments. Pet. at 13.

The challenged remarks are as follows:

> 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.

Davis, 383 So. 3d at 735-36.

Davis disagrees with the Florida Supreme Court's finding that when read in context, the trial court was stressing to potential jurors the importance of providing candid responses when shown the photographs. *Davis,* 383 So. 3d at 736. The Petition posits: "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." Pet. at 13.

Davis's request that this Court reverse the Florida high court's factual findings as to the import of the trial court's statement is inappropriate. *See United States v. Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949) (this Court "cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error."); *Rudolph v. United States,* 370 U.S. 269, 269-70 (1962) (dismissing writ where primary dispute was over the appellate court's interpretations of the facts that agreed with trial court's findings).

Further, the facts and circumstances of the case on which Davis relies, *Quercia v. United States*, 289 U.S. 466 (1933), have no bearing on the claim before this Court. There, this Court determined that the trial court's statement, "I think that every

single word that man said, except when he agreed with the Government's testimony, was a lie," prejudiced the defendant. *Id.* at 468, 472. This Court reasoned that although a judge may comment on evidence at trial, he or she must "make[ ] it clear to the jury that all matters of fact are submitted to their determination." *Id.* at 469.

Here, the trial judge was not commenting on the photographs following the close of evidence. Rather, he was seeking candid responses from potential jurors regarding their ability to serve. In addition, the trial court made clear during jury selection that it would be their job to determine if Davis was guilty and to recommend a sentence. *Davis*, 383 So. 3d at 737.

Finally, the Florida Supreme Court's holding that trial counsel was not ineffective for failing to make a meritless objection is in harmony with *Strickland*, as there is no reasonable probability that had such an objection been made, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. The trial court would have overruled the objection. Multiple eyewitnesses still would have identified Davis as the perpetrator. The jury would have learned of his admissions. And the trial court still would have found multiple aggravating circumstances for the murder of each victim. "Because no conflict or misapplication of law exists, review should be denied.

B. The trial court did not improperly vouch for the state when it emphasized the jury's role in determining whether Davis was guilty and explained that the jury would only reach deliberations on the death penalty if it first found Davis guilty of first-degree murder. As such, trial counsel was not ineffective for failing to object.

Davis argues that the Florida Supreme Court wrongly concluded that the trial court's voir dire comment explaining capital case procedures and emphasizing the jury's role was proper. He asserts that when considered in the light of its remarks regarding the victims' photographs, the court's statement "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." Pet. at 15-16. He continues that trial counsel should have objected as his strategy could have been accomplished without the trial court's comments. *Id.* at 16.

The challenged remarks are as follows:

> 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 judges 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 found not guilty then

> your job is done. If and only if the Defendant is found guilty of First Degree Murder do you then start considering the issue of penalty.

Davis, 383 So. 3d at 736–37.

As with the subclaim discussed above, Davis's request that this Court reverse the Florida high court's factual findings is inappropriate. *See Rudolph,* 370 U.S. at 269-70) (dismissing writ where primary dispute was over the appellate court's interpretations of the facts that agreed with trial court's findings). Further, the Florida Supreme Court's decision is in harmony with *Quercia* where this Court held that a trial court may explain and comment upon the evidence "provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Quercia*, 289 U.S. at 46. That is precisely what the trial court did when it emphasized the jury's role in determining whether Davis was guilty and explained that the jury would only reach deliberations on the death penalty if it first found Davis guilty of first-degree murder. *Davis*, 383 So. 3d at 737.

Finally, the Florida Supreme Court's holding that trial counsel was not ineffective for failing to make a meritless objection is in harmony with *Strickland*, as there is no reasonable probability that had such an objection be made, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. Because no conflict or misapplication of 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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