

**IN THE
SUPREME COURT OF THE UNITED STATES**

LEO LOUIS KACZMAR, III,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

Kaczmar murdered Maria Ruiz by stabbing her nearly 100 times in December 2008. He refused the State's offer to plea to a life sentence before his operative penalty phase and all but waived mitigation. In his own sworn words: "I have to get a death sentence" because then "I'm guaranteed an attorney all the way up through federal proceedings and all." (RS:1121–32.) He received the death sentence he asked for.

But then in postconviction he began challenging that death sentence by claiming the counsel, whose hands he tied, ineffectively failed to object to a pre-jury-selection comment by the resentencing judge and the lack of certain penalty phase jury instructions. He asks this Court to use its scarce judicial resources reviewing three challenges to the death sentence he invited and wanted to ensure Congress and Florida would pay for his postconviction lawyers. This Court should decline certiorari over the following three questions:

- I. Do either due process or the Sixth Amendment require a specific jury instruction telling juries not to use electronic media to investigate the case?
- II. Does counsel's failure to request an instruction prohibiting a jury from using electronic media to investigate a case automatically satisfy *Strickland's* prejudice prong if the state court refuses juror interviews?
- III. Does the failure to object to a resentencing judge's pre-jury-selection comment that the defendant previously had a death sentence, but that sentence was vacated by a higher court, automatically satisfy *Strickland's* prejudice prong?

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OPINION BELOW

Kaczmar seeks certiorari review over the Florida Supreme Court’s decision rejecting his initial postconviction challenges. *State v. Kaczmar*, 431 So. 3d 212 (Fla. 2026), *reh’g denied*, No. SC2022-1671, 2026 WL 1009187 (Fla. Apr. 14, 2026).

JURISDICTION

This Court lacks statutory jurisdiction over Kaczmar’s untimely Petition. 28 U.S.C. § 2101 (c), which applies to civil cases, governs the time to file certiorari petitions challenging postconviction decisions. *Heflin v. United States*, 358 U.S. 415, 418 n.7 (1959) (explaining postconviction certiorari petitions are governed by 28 U.S.C. § 2101 (c)).¹ Civil litigants have 90 days from the lower court’s denial of rehearing to file a certiorari petition. 28 U.S.C. § 2101 (c); *Limtiaco v. Camacho*, 549 U.S. 483, 487 (2007) (explaining the time to file a petition runs from when the lower court denies rehearing if a rehearing motion is filed). That 90-day time limit is jurisdictional. *See, e.g., Bowles v. Russell*, 551 U.S. 205, 212 (2007) (explaining this Court has repeatedly held 28 U.S.C. § 2101 (c)’s “statute-based filing period for civil cases is jurisdictional” while 28 U.S.C. § 2101(d) is not); *Gibson Distrib. Co., Inc. v. Downtown Dev. Ass’n of El Paso, Inc.*, 439 U.S. 1000 (1978) (dismissing a petition for “want of jurisdiction” because it was not timely filed under § 2101(c)).

It appears Kaczmar did not timely file his Petition under 28 U.S.C. § 2101(c).

¹ *See also Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987) (explaining a postconviction proceeding is “not part of the criminal proceeding itself, and it is in fact considered to be civil in nature”); *Murray v. Giarratano*, 492 U.S. 1, 8 (1989) (plurality opinion) (applying *Finley* to capital proceedings).

The Florida Supreme Court denied rehearing on April 14, 2026, so the Petition was due on July 13, 2026. Undersigned counsel checked the docket several times before and after that date, yet no Petition was timely docketed. Nor did Kaczmar seek an extension from a “justice of the supreme court.” *See* 28 U.S.C. § 2101(c). In an August email, counsel for Kaczmar indicated there was a filing issue.

Notwithstanding the jurisdictional July 13, 2026, due date for the Petition, the undersigned received an email that the Petition was filed on September 1, 2026. The electronic docket backdates the Petition’s filing to July 13, 2026, but the Petition itself is dated “August 26, 2026.” Based on all this, it seems the Petition was neither properly nor timely filed but improperly backdated on the docket. *Cf. Missouri v. Jenkins*, 495 U.S. 33, 49 (1990) (“The time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time.”). It therefore appears this Court lacks jurisdiction because—due to filing issues—the Petition is untimely. *See* 28 U.S.C. § 2101(c). This Court should deny² the Petition for lack of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The State accepts Petitioner’s statement of the constitutional provisions.

STATEMENT OF THE CASE AND FACTS

Kaczmar murdered Maria Ruiz nearly twenty years ago and comes to this Court seeking review from the denial of initial state postconviction relief.

² This Court denies certiorari petitions even when it lacks jurisdiction over them as a matter of efficiency. *See Davis v. Jacobs*, 454 U.S. 911, 912 (1981) (Stevens, J., concurring in denial of certiorari).

A. Facts of the Crime

In December 2008, Kaczmar lived with his wife, children, father's girlfriend Maria Ruiz, and other family members in a home in Green Cove Springs, Florida. *State v. Kaczmar*, 431 So. 3d 212, 224 (Fla. 2026) (*Kaczmar III*). One day that month, Kaczmar's wife and children went to spend the night with family, leaving him alone in the home with Ruiz "from roughly 11:00 p.m. to 2:00 a.m." *Id.* at 224 & n.2, 234. Around 5:00/5:30 a.m., two neighbors awoke to Kaczmar and someone else shouting. *Id.* at 224, 233. Kaczmar then left the house and purchased \$2.00 worth of gasoline from a gas station less than a mile from his house. (DA15:526–28; DA16:630–34, 645.) He purchased the gas at 5:59 a.m., and the gas station's surveillance cameras recorded the transaction.³ *Id.*

While Kaczmar purchased gas, two witnesses passed by his still-intact home around 6:00 a.m. (DA14:287–92, 298; DA16:640.) But when these witnesses returned less than ten minutes later, they found Kaczmar's home ablaze and reported the fire. *Id.* Fire investigators "identified and collected six areas of fire debris" from the home, "five of which would later test positive for the presence of gasoline." *Kaczmar III*, 431 So. 3d at 224. And law enforcement located Ruiz' burned and bloodied body near the kitchen. *Id.* She had suffered nearly 100 stab wounds. *Id.*

Law enforcement interviewed Kaczmar. *Id.* at 224. Kaczmar admitted he was alone with Ruiz in the home from 11:00 p.m. to 2:00 a.m. but claimed he left the home

³ At trial, Kaczmar's wife identified him as the person on video purchasing the gas. (DA17:838.)

to go fishing after 2:00 a.m. and arrived at his fishing spot around 3:45 a.m. (DA14:352; DA15:550–52, 572, 582, 587–590.) His cell phone records proved he left his home area around 6:26 a.m. and went towards Jacksonville (and his supposed fishing location) then. *Kaczmar v. State*, 104 So. 3d 990, 996 (Fla. 2012) (*Kaczmar I*).

During the interview, law enforcement noticed Kaczmar had cuts on his hands and blood on his socks. (DA14:374; DA15:550–51.) Kaczmar claimed he injured himself while fishing. *Id.* But he then “smeared his own blood” on the socks during a break in the interview before leaving them with law enforcement. *Kaczmar III*, 431 So. 3d at 225. A DNA expert determined that Maria Ruiz was the major donor to DNA on one of the bloodstains on Kaczmar’s socks. *Id.* at 234.

Kaczmar later confessed to his cellmate that:

He had wanted to get lucky and “f—[Ruiz]” the night of the murder. Filancia testified that Kaczmar told him that he chased Ruiz into the bathroom and eventually ended up in a struggle in the kitchen where Kaczmar cut his thumb on a knife Ruiz had pulled out from the kitchen drawer. This sent Kaczmar into a rage and he killed Ruiz with a knife he kept in his pants pocket for fishing. Filancia testified that Kaczmar told him that after he killed Ruiz, he changed his clothes, put them into a garbage bag, buried it in the backyard, bought \$2 worth of gas to burn down the house, and then drove to Jacksonville to create an alibi that he was fishing all night.

Kaczmar I, 104 So. 3d at 997.⁴

B. Trial and Direct Appeal

At trial, the State “presented overwhelming evidence” Kaczmar murdered Ruiz. *Kaczmar III*, 431 So. 3d at 235. A jury convicted him of first-degree murder and

⁴ The cellmate’s testimony jibes with trial counsel’s credited postconviction testimony that Kaczmar wanted to raise self-defense to the victim’s murder at first. (PCR:2669, 2761, 2775.)

arson, and recommended death by an 11-1 vote. *Kaczmar I*, 104 So. 3d at 995.⁵ A judge followed the jury's recommendation and imposed death for Ruiz' murder. *Id.*

The Florida Supreme Court affirmed Kaczmar's first-degree murder conviction but vacated his capital sentence and remanded for a new penalty phase. *Id.* at 1008.

C. 2013 Resentencing

Kaczmar's resentencing occurred in August 2013. (RS:617–1107.)

1. Life Offer and Mitigation Refusal

In preparation for Kaczmar's second penalty phase, the resentencing court held a hearing in July 2013. (RS:570.) There, Kaczmar stated he would not take a life-sentence offer from the State because he wanted to maximize his conviction-related challenges in state and federal court. (RS:573–76.) He also refused to put on mitigation witnesses. (RS:578.) This strategy was against counsel's advice. (RS:576.)

2. Mitigation Waiver Hearing

On August 8, 2013, the [resentencing] court held a *Koon*⁶ hearing, at which Kaczmar waived his right to present mitigation against his counsel's advice, including the presentation of any live mitigation witnesses or the testimony of the mitigation witnesses from the first penalty phase read into the record.

Kaczmar v. State, 228 So. 3d 1, 6 (Fla. 2017) (*Kaczmar II*); RS at 1110–42. During that hearing, Kaczmar explained he wanted a death sentence to ensure a postconviction attorney would represent him in state and federal court.

THE COURT: Now, have you given this some thought as to whether or

⁵ The jury also convicted Kaczmar of attempted sexual battery, but the Florida Supreme Court vacated that conviction. *Kaczmar I*, 104 So. 3d at 1001.

⁶ *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993).

not you ought to let them present all the mitigation they can?

THE DEFENDANT: My -- my best -- *my best position for myself is not to get a -- a life sentence, sir. That's why I have to get a death sentence.*

THE COURT: Well, what -- what's that based on?

THE DEFENDANT: I'm not a rich person so I can't afford to go hire a \$150,000 lawyer and I cannot -- my next round of appeals I can't file myself so I've got to be able to make sure I've got an appeal attorney.

. . . .

I -- I'm guaranteed a attorney on death. I'm not guaranteed an attorney on life.

THE COURT: Well, I'm not sure about that. . . . I've never heard of that.

THE DEFENDANT: -- I've read the statutes very well. On life sentences, on 3.8 fi- -- well, it would be 3.850, if I was a life sentence I'm not guaranteed a attorney. On . . . 3.851, I'm guaranteed an attorney all the way up through federal proceedings and all.

(RS:1121–22 (emphasis added).)

3. Pre-Jury-Selection Comment

The resentencing court held penalty-phase jury selection on August 19, 2013, and made the following statement after the prospective jurors entered the courtroom:

Be seated, please. All right. Good morning, ladies and gentlemen. My name is William Wilkes, and I'm the Judge that will be handling this case. This case has a little history to it so let me explain your duty today. It's different than most trials we ever have.

The defendant was found guilty of murder in the first degree on 8/12/10, sentenced on 11/5/10 *to life -- to death in this case*. Anyway, the Supreme Court always reviews any type of death case so the case went to the state Supreme Court, Florida State Supreme Court. They affirmed his conviction, that is they confirmed his conviction for the first-degree murder. However, the Supreme Court sent the case back here with instructions that the defendant is to have a new trial to decide what sentence should be imposed.

(RS:622–23 (emphasis added.) No one objected. And Kaczmar’s prior death sentence was never mentioned again.

4. Jury Selection

The judge, State, and defense counsel then spent the next 169 pages questioning the venire and settling on twelve jurors and an alternate. (RS:623–792.)

These thirteen individuals were sworn⁷ as Kaczmar’s penalty phase jury. (RS:792.)

5. Opening Statement

The prosecutor’s opening statement recounted Kaczmar’s crime and the two aggravators he intended to prove: heinous, atrocious, or cruel (HAC) and prior violent felony. (RS:795–808.) Defense counsel’s opening argued that life meant life in Florida, emphasized how important it was that the jury was attentive and followed the instructions they were given, and that the sentencing judge would give their recommendation great weight. (RS at 808–13.) The defense expected to prove five mitigators: (1) Kaczmar was under the influence of extreme mental or emotional disturbance; (2) Kaczmar’s ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired; (3) Kaczmar was young during the crime; (4) Kaczmar was respectful in court; and (5) an alleged “co-suspect,” Ryan Modlin, got a lighter sentence. (RS:813–14.)⁸

⁷ Florida Rule of Criminal Procedure 3.360 sets out the oath jurors must take when being sworn as follows: “Do you solemnly swear (or affirm) that you will well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and the evidence, so help you God?”

⁸ Kaczmar provided no evidence that Modlin was involved in the crime. (RS:514.) As the sentencing court explained while finding this mitigator not proven, Modlin was

6. Prior Violent Felony Evidence

The State and Kaczmar stipulated that Kaczmar was convicted of a prior violent felony (a robbery) with the following underlying facts:

The robbery the defendant was convicted of involved the defendant and a co-defendant. The defendant and co-defendant repeatedly struck and kicked the victim about the head and then forcefully took his jewelry and wallet for themselves against the victim's will. The defendant was 17 years of age at the time of the offense that was committed which was on March 22, 2001 but was charged and sentenced as an adult.

(RS:815–16.)

7. HAC Evidence

Kaczmar's jury heard the following live testimony supporting the HAC aggravator from a medical examiner: (1) there were five cuts in the back of the victim's jacket/body and one to her upper right chest area (RS:976, 988–89); (2) there was no alcohol or drugs found in the victim's system (RS:982); (3) the victim "bled to death from multiple stabs" including to her neck (RS:982–83); (4) the victim's numerous wounds were labeled from "A through quadruple O" on the pictures provided (RS:983–84); (6) the victim had "two wounds" on the scalp that went "into the outside of the bone of the skull" from hard stabs (RS:984–85, 997–98); (7) the victim had "multiple" defensive "wounds" on "the fingers and hands and wrists" and upper arm, including one that went entirely through her thumb (RS:985, 989–91, 1000–01); (8) the victim had nonfatal wounds on her cheekbone, eyebrow, and

"initially questioned by law enforcement because he had been at 3159 Dothan Road earlier in the night, but was subsequently cleared of having any involvement in the case. Modlin was sentenced to prison on an unrelated Robbery charge where he was a principal and testified against his co-defendant." (RS:514.)

forehead that, in combination with other nonfatal wounds, could have helped her bleed to death (RS:985–86); (9) the victim had stab wounds “in front of her ear” and others that “went down her face” (RS:986); (10) some of the cuts would have “severe[d] nerves and cause[d] a lot of pain” (RS:986); (11) the victim had stab wounds that pierced the soft tissue of her “cheek” (RS:987); (12) a slash across her jaw area went “all the way down to the bone” and exposed the victim’s “jawbone” but (while painful) was nonfatal in isolation (RS:987–88); (13) the victim had stab wounds in her neck, collarbone, and chest (RS:988); (14) the victim suffered approximately “93” sharp force injuries to her body consistent with a “single-edged long slender blade” (RS:991–92); (15) the victim also had blunt force injuries to her “right face, the left chest, the right forearm, and the left elbow” (RS:993–94); (16) the victim suffered eleven stabs/slashes to her neck that were fatal; two of her major arteries were cut in three places (RS:994–95); (17) the victim’s larynx was severed all the way through, her esophagus was almost completely severed, and five stab wounds pierced her right lung (RS:995–96); (18) the victim’s major wounds occurred toward the end of a prolonged attack while her defensive wounds came earlier (RS:999–1000, 1004); and (19) it was “pretty obvious” the victim “put up quite a fight for her life” (RS:1001-02). The jury saw pictures of the victim’s injuries. (*E.g.*, RS:983-84.)

8. Defense Case

Kaczmar confirmed he waived all mitigation except his age and any guilt-phase mitigation before the defense began its penalty-phase case. (RS:1040–42.) The sole defense evidence presented in mitigation was a stipulation that Kaczmar was 24

(nearly 25) when the crime occurred. (RS:1066.)

9. Closing Arguments

The prosecutor's closing argument focused on the HAC and prior violent felony aggravators, minimal mitigation presented by Kaczmar, and urged the jury to recommend death. (RS:1051–62.)

Defense counsel argued the jury should show mercy and the State failed to establish HAC. (RS:1065–74.) Separately, counsel urged the jury to find the following seven mitigating circumstances: (1) Kaczmar committed the murder while under extreme mental or emotional disturbance; (2) his capacity to appreciate the criminality of his conduct or conform his actions to law was substantially impaired; (3) Kaczmar was only 24 at the time of the crime; (4) he was impaired by illegal drugs; (5) Kaczmar behaved well in court; (6) another suspect—Christopher Modlin—only got two years in prison; and (7) Kaczmar is a loving father. (RS:1074–1078.)

10. Final Jury Instructions

The court then instructed the jury:

All right. Ladies and gentlemen of the jury, the defendant has been found guilty of murder in the first degree. *An Appellate Court has reviewed and affirmed the defendant's conviction. However, the Appellate Court sent the case back to this Court with the instruction that the defendant is to have a new trial to decide what sentence should be imposed.*

Consequently, you will not concern yourselves with the question of his guilt. The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to which punishment shall be imposed rests with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to which punishment should be imposed upon the defendant.

It is now your duty to advise the Court as to the punishment that should be imposed upon the defendant for the crime of first degree murder. *You must follow the law that will now be given to and render an advisory sentence based on your determination as to which sufficient aggravating circumstance exists to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.*

....

Your advisory sentence *should be based on the evidence of the aggravating and mitigating circumstances that has been presented to you in these proceedings.*

....

You must follow the law as it is set out in these instructions. If you fail to follow the law your recommendation will be a miscarriage of justice. There's no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

Your recommendation must be decided only upon the evidence published [sic] you have heard from the testimony of the witnesses, have seen in the form of exhibits in evidence and these instructions.

....

It is to the evidence introduced during this proceeding and to it alone that you're to look for [proof of aggravating circumstances].

....

The aggravating circumstances that you may consider *are limited to any of the following that you find is established by the evidence [prior violent felony and heinous, atrocious, or cruel].*

....

Your recommendation must be based on the evidence and on the law contained in these instructions.

....

The sentence that you . . . recommend to the Court *must be based on the facts that you find them [sic] from the evidence and law.*

(RS:1081–82, 1085–88, 1091 (emphases added).) The written jury instructions mirrored the trial court’s oral instructions and did not mention Kaczmar’s prior death sentence. (RS:164–68.)

11. Jury Recommendation and Sentencing

The jury began its deliberations at 1:15 p.m. and unanimously recommended death an hour and seventeen minutes later. (RS:1095, 1097–1099.) The court followed that recommendation and sentenced Kaczmar to death in a detailed, written sentencing order. (RS:493–516, 587–94.) It determined the State proved both the prior violent felony and HAC aggravators and gave both great weight. (RS:498–502.) And it rejected all mitigation argued at the jury portion of Kaczmar’s penalty-phase except for his impairment by drugs the night of the murder and respectful behavior in court (both of which received slight weight). *See Kaczmar II*, 228 So. 3d at 6–7 & n.7, 12; RS:502–15. But the court found some other mitigators proven through the non-jury *Spencer*⁹ hearing. *Id.*¹⁰

The sentencing order recognized Kaczmar “specifically advised this Court that he wanted to receive the death penalty so that he would be guaranteed legal services for future appeals and collateral attacks, and there would be greater appellate

⁹ *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

¹⁰ Kaczmar affirmed he did not want to introduce new evidence at the *Spencer* hearing, but counsel asked the court to review admitted evidence from the prior penalty phase proceedings. (RS:1100–05.)

scrutiny of his case.” (RS:502.)

D. Relevant State Postconviction Claims Below

Kaczmar challenged his death sentence in state postconviction proceedings raising two relevant claims: (1) penalty-phase counsel ineffectively failed to object to the judge’s pre-jury-selection comment that Kaczmar was previously sentenced to death; and (2) penalty-phase counsel ineffectively failed to have the jury instructed it was prohibited from researching his case using electronic media. *See Kaczmar III*, 431 So. 3d at 228–31, 246. He also asked to interview all resentencing jurors to determine whether they conducted outside research. (RS:331–33.)

The state postconviction court denied jury interviews. *Id.* It found Kaczmar failed to present “sworn allegations of juror misconduct, which he acknowledges, but rather presents speculative and conclusory allegations that there may have been misunderstandings of the instructions or the possibility that jurors committed misconduct because of the lack of instructions.” (RS:333.) Later, the court found neither deficient performance nor prejudice in counsel’s failure to request a jury instruction on outside research via electronic devices. (RS:1815.) But it found both deficient performance and prejudice based on counsel’s failure to object to the pre-jury-selection comment that Kaczmar had been sentenced to death. (RS:1815–17.) The state postconviction court therefore granted Kaczmar a new penalty phase on that claim while denying the rest.

The Florida Supreme Court reversed the grant of penalty phase relief but otherwise affirmed. *Kaczmar III*, 431 So. 3d at 228–31, 246, 251. It found that

Kaczmar suffered no prejudice on the pre-jury-selection comment claim, and counsel performed adequately without requesting a jury instruction on researching the case via electronic media. *Id.* The opinion neither addressed prejudice on the electronic-media-instruction claim nor analyzed any freestanding constitutional claim of entitlement to the instruction. *Id.*

E. Certiorari Petition

Kaczmar filed a certiorari petition seeking review of three questions presented:

1. Does the Sixth Amendment right to a properly instructed jury and the right to Due Process under the Fifth Amendment include the right to have the jury instructed on the prohibition against using electronic media to investigate the case when every jurisdiction in the United States, state and federal, requires this instruction?
2. Does the failure to properly instruct the jury as outlined above, coupled with the trial court's refusal to allow jury interviews about the effect of that failure to instruct the jury, obviate the need to satisfy the prejudice requirement under *Strickland*^[11] when such a regime makes an inquiry impossible?
3. Does the failure to object to a prohibited instruction regarding a prior jury's recommendation of death likewise require a finding of ineffective assistance of counsel when no inquiry on the effect of the instruction on the jury (the prejudice component of *Strickland*) is permitted?

(Pet. at i.) The State opposes certiorari.

¹¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

REASONS FOR DENYING THE PETITION

Kaczmar asks this Court to review the death sentence he invited to ensure Florida and Congress would fund his state and federal postconviction litigation over the next decades. He raises three questions. (1) Does either due process or the Sixth Amendment compel states to instruct juries not to conduct outside research using electronic media? (2) Does failing to instruct the jury not to conduct outside research using electronic media, coupled with a refusal to allow jury interviews, require automatically finding *Strickland* prejudice? (3) Does the failure to object when a resentencing judge comments, once before jury selection, that the defendant was previously sentenced to death require automatically finding *Strickland* prejudice?

This Court should not expend its scarce judicial resources reviewing the death sentence that Kaczmar invited. He decided “to play chicken with the state and federal courts” by inviting a death sentence to ensure Florida and Congress would pay for his postconviction counsel to attack his guilt phase. *Cf. Bell v. Lynaugh*, 858 F.2d 978, 986 (5th Cir. 1988) (Jones, J., concurring). That was certainly his choice. *See McCoy v. Louisiana*, 584 U.S. 414, 422–23 (2018) (explaining the right to autonomy includes the right to give up the best chance of avoiding a death sentence to challenge guilt; a defendant “may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration”).

But Kaczmar cannot now come here complaining about the death sentence he invited. *See Schriro v. Landrigan*, 550 U.S. 465, 475–80 (2007) (holding a capital defendant who waived mitigation and instructed counsel not to present mitigation

could not prevail on a penalty-phase ineffectiveness claim). “In the constellation of refusals to have mitigating evidence presented . . . this case is surely a bright star. No other case could illuminate the state of the client’s mind and the nature of counsel’s dilemma quite as brightly as this one.” *Id.* at 477 (quoting *Landrigan v. Stewart*, 272 F.3d 1221, 1226 (9th Cir. 2001)). This Court should not let Kaczmar invoke the extraordinary power of certiorari to review the death sentence he asked for so he could get free state and federal postconviction counsel. (RS:1121–22.)

His failure to even try explaining why his questions presented are important enough for this Court’s review provides another threshold reason to deny his Petition. Kaczmar does not noticeably assert any usual certiorari criteria apply. *See* Sup. Ct. R. 10. Instead, Kaczmar lumps his three questions together in a merits brief that relies on broad, not directly applicable principles of law. But the importance of Kaczmar’s questions *to him* provides no reason to grant certiorari. *See Coleman v. Balkcom*, 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting from denial of certiorari) (recognizing a capital defendant’s questions presented were important “only to petitioner himself and therefore” were “not suitable candidates for the exercise of our discretionary jurisdiction”). This Court should deny review because Kaczmar abdicated his duty to explain why his questions are important enough for certiorari.

In any event, not one question Kaczmar presents warrants this Court’s review. The decision below properly stated and applied all governing federal principles, does not implicate an important unsettled question of federal law, does not conflict with another state court of last resort or a United States Court of Appeals, and does not

conflict with this Court's precedent. Review should be denied. *See* Sup. Ct. R. 10. Despite Kaczmar's failure to make any effort to explain why this Court should take his case, the State will separately address each question he presents below.

QUESTION PRESENTED 1

I. This Court Need Not Decide Whether Due Process or the Sixth Amendment Requires an Express Jury Instruction Prohibiting Use of Electronic Media to Research the Case.

Kaczmar's first question asks this Court to decide whether due process or the Sixth Amendment requires an express jury instruction prohibiting jurors from investigating the case using electronic media. But Kaczmar did not raise this question below; there is no conflict on it; Florida now provides the standard instruction Kaczmar wants to constitutionalize; and Kaczmar's arguments fail under this Court's existing precedent. This question does not deserve this Court's review.

A. Not Raised Below.

Kaczmar did not argue either due process or the Sixth Amendment required an express instruction prohibiting jurors from using electronic media to research the case below. He instead raised a smorgasbord of ineffectiveness claims based on the failure to request several jury instructions. *Kaczmar III*, 431 So. 3d at 246. The Florida Supreme Court did not address any freestanding due process or Sixth Amendment right to have certain instructions read to the jury. *Id.*

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb v. Webb*, 451 U.S. 493, 495 (1981). This Court seldom grants certiorari when a

defendant fails to “carry that burden.” *See Adams v. Robertson*, 520 U.S. 83, 90 (1997). And Kaczmar cannot here. His Initial Brief below raised ineffectiveness claims, not freestanding claims of constitutional entitlement to specific jury instructions.

Had he raised this issue in state court, it would have been procedurally barred on independent and adequate state law grounds. *Rodriguez v. State*, 919 So. 2d 1252, 1280 (Fla. 2005) (“Claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal.”). That provides, at minimum, a strong prudential reason to decline certiorari over this question. *See Illinois v. Gates*, 462 U.S. 213, 222 (1983) (explaining the requirement a petitioner present the same issue below allows a state court to deny relief “on an adequate and independent state ground”). This “Court does not ordinarily decide questions that were not passed on below.” *City & County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 609 (2015).

Indeed, Kaczmar’s failure to assert the freestanding jury instruction claim below may deprive this Court of jurisdiction over this question. *See Adams*, 520 U.S. at 90 (declining to resolve whether failure to raise an issue below is a jurisdictional or prudential reason for denying certiorari). Congress gave this Court jurisdiction over “final judgments or decrees rendered by the highest court of a State” only when a federal question is “*specially set up or claimed under the Constitution*.” 28 U.S.C. § 1257(a) (emphasis added). Kaczmar’s Initial Brief below did not specially claim any freestanding constitutional right—untethered from ineffective assistance—to specific jury instructions. *See Adams*, 520 U.S. at 88–90 (dismissing certiorari as improvidently granted where the petitioner failed to raise the issue in his initial brief

below, the respondent raised it, and the state supreme court did not address it).

Either way, Kaczmar's failure to raise this question below provides a strong reason to deny certiorari over it. After all, this Court is one of "final review, not of first view." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017).

B. No Important Question.

This question is not important enough for this Court to review. Kaczmar's Petition explains that, based on his research, all jurisdictions now have jury instructions prohibiting jurors from researching the case via electronic media. (*See* Pet. at 10–11.) Florida adopted standard jury instructions with that preemptive prohibition in 2010. *See In re Standard Jury Instructions in Crim. Cases--Rep. No. 2010-01 & Standard Jury Instructions in Civ. Cases-Rep. No. 2010-01*, 52 So. 3d 595, 597 (Fla. 2010) (guilt phase instructions). *See also* Fla. Std. Jury Instr. (Crim) 7.10 & 7.11 (current penalty phase instructions).¹²

This Court need not consider constitutionalizing an issue that other means have resolved. *Cf. Bond v. United States*, 572 U.S. 844, 855 (2014) (reiterating the "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"). A constitutional question every jurisdiction has effectively resolved by adopting the same protection through non-constitutional means is not an important one for this Court to review.

¹² It appears the prohibition on electronic research was added to the penalty-phase standard jury instructions (7.10 and 7.11) sometime well after 2010, which likely explains why it was omitted from Kaczmar's 2013 standalone resentencing.

C. No Conflict.

The lack of conflict on constitutional entitlement to a preemptive jury instruction on electronic media also weighs against certiorari here. *See Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 587 U.S. 490, 493 (2019) (explaining this Court’s “ordinary practice of denying petitions insofar as they raise legal issues” considered by only one federal appellate court). It appears no appellate court has ever held there is a constitutional right to that specific jury instruction. Nor has any court apparently held such an instruction required where, as here, the jury was told its “recommendation must be decided only upon the evidence publish [sic] you have heard from the testimony of the witnesses, have seen in the form of exhibits in evidence and these instructions,” and there is no evidence the jury did any outside research. (RS:1085.)

No one doubts “outside research by a juror is prohibited because the sixth amendment guarantee of a trial by jury requires the jury verdict to be based on the evidence produced at trial.” *United States v. Ifediba*, 46 F.4th 1225, 1240 (11th Cir. 2022). But that rule is separate from a due process or Sixth Amendment right to preemptive instructions about researching the case via electronic media, particularly when the jury is told it must decide the case based only on the evidence before it. The lack of conflict militates against granting certiorari on this question.

D. No Merit.

Kaczmar’s first question fails on the merits, so there is no reason to review it further. “The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a

state court’s judgment is even greater than the showing required to establish plain error on direct appeal.” *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). That burden is “especially heavy” with omitted instruction claims. *Id.* “An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.” *Id.*

The prejudice from omitted instructions should be “evaluated by comparison with the instructions that were given.” *Id.* at 156. And the bottom-line constitutional question is whether “the omission of more complete instructions” so “infected the entire trial that the resulting conviction violated due process.” *Id.* at 156–57. “Speculative” assumptions do not clear that hurdle. *Id.*

The Constitution did not provide Kaczmar with a right to have the jury preemptively prohibited from conducting outside research under *Kibbe*. The jury was instructed that its recommendation had to be based on the admitted penalty-phase evidence. (RS:1085.) And Kaczmar does not suggest the jury conducted outside research or ignored that instruction. His speculation they might have is not enough to establish any constitutional entitlement to his proposed instruction. *See id.*

For all these reasons, this Court should not review Kaczmar’s first question.

QUESTION PRESENTED 2

II. This Court Need Not Decide Whether Failing to Preemptively Prohibit Jurors from Outside Research and Precluding Postconviction Juror Interviews Requires Automatic Prejudice under *Strickland*.

For his second question, Kaczmar asks this Court to decide whether failing to preemptively prohibit jurors from outside research, coupled with the failure to permit postconviction juror interviews, requires automatic prejudice under *Strickland*. This

case is a poor vehicle to decide this question since the appellate court below did not address *Strickland*'s prejudice prong; Kaczmar failed to establish any conflict over this question; Kaczmar's position is meritless; and any new rule adopting his position would not be federally retroactive. This Court should decline review.

A. Poor Vehicle.

Kaczmar's case presents an exceptionally poor vehicle to analyze whether the failure to instruct the jury on outside research and lack of postconviction jury interviews requires finding prejudice under *Strickland* for two reasons.

First, the question is purely academic to Kaczmar. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari should not be granted when the issue is only academic); *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) (stating certiorari is the power “to correct wrong judgments, not to revise opinions”). The Florida Supreme Court held Kaczmar failed to show deficient performance without addressing prejudice. *Kaczmar III*, 431 So. 3d at 246 (holding not “every reasonable defense lawyer in trial counsel's position would have insisted that the court give” these instructions or “object to their omission,” so there was no deficient performance).

No question presented by Kaczmar attacks the deficient performance holding. *See* Sup. Ct. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”); *Yee v. City of Escondido*, 503 U.S. 519, 535–38 (1992) (explaining the importance of this rule).¹³ So any decision from this

¹³ To be sure, Kaczmar's meandering Petition does at points take issue with the deficient performance analysis. But that does not matter because deficient

Court on *Strickland*'s prejudice prong related to outside-research instructions would be purely advisory. The Florida Supreme Court's decision denying Kaczmar relief on the ineffectiveness claim underlying this question would remain completely unaffected. Given that, Kaczmar likely lacks Article III standing to ask this question at all. *See Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017) (explaining Article III "standing is not dispensed in gross," and "a plaintiff must demonstrate standing for each claim he seeks to press"); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (explaining litigants must have Article III standing to seek appellate review).

Second, the Florida Supreme Court did not analyze whether the failure to request instructions on outside research and electronic media prejudiced Kaczmar. This Court does not decide questions that went undecided below, even when properly asserted, because it is a court of "review, not of first view." *Whitton v. Dixon*, 146 S. Ct. 1368, 1371 (2026) (declining to decide an issue the State properly raised below because the court of appeals did not address it). And while the state postconviction court addressed this question, it provided no explanation for its no-prejudice finding.

Kaczmar's case is a poor vehicle to decide this second question for both reasons.

B. No Conflict.

Kaczmar's Petition also fails to establish conflict. He cites no court in the country holding that *Strickland*'s prejudice analysis changes based on whether jury

performance is not encompassed in any question he presents. (*See* Pet. at i.) And it is hard to see how counsel performed deficiently given Kaczmar expressly told counsel that his penalty phase objective was to receive a death sentence so he could maximize his chances of postconviction exoneration by having Florida and Congress fund his future postconviction litigation. *See McCoy v. Louisiana*, 584 U.S. 414, 422–23 (2018).

interviews are allowed, that the failure to preemptively prohibit a jury from conducting outside research automatically satisfies *Strickland*'s prejudice prong, or any combination thereof. Kaczmar's failure to establish conflict in his Petition counsels against certiorari here. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) (explaining certiorari is primarily used to resolve lower-court conflicts on federal law); *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987) (recognizing issues that have "divided neither the federal courts of appeals nor the state courts" rarely merit this Court's review).

C. No Merit.

This Court's established precedent already answers this question against Kaczmar. *See Weaver v. Massachusetts*, 582 U.S. 286, 296-305 (2017) (holding unpreserved structural error does not equate to automatic prejudice in postconviction when raised in an ineffectiveness claim); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding evidence "about the actual process of decision" outside the trial record "should not be considered in the prejudice determination").

Start with *Weaver*. This Court there held that what would be structural error on direct appeal does *not* automatically equate to *Strickland* prejudice in postconviction. *Weaver*, 582 U.S. at 299–305 (requiring the defendant to show *Strickland* prejudice—a reasonable probability of a different outcome at trial—for a public-trial violation that would have been structural on direct appeal).

Weaver's rationale for imposing a prejudice requirement on structural errors raised in postconviction is the greater systemic costs for remedying the error, the finality interests, and the fact that one round of appellate review is already complete.

Id. at 300–02. “These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.” *Id.* at 303. Any argument Kaczmar need not show prejudice now in *postconviction* is flatly contradicted by *Weaver*’s explicit holding that a structural, public-trial violation—which is structural because of the “difficulty of assessing the effect of the error”—does not absolve a defendant of proving *Strickland* prejudice. *Id.* at 298–305.¹⁴

Weaver defeats any notion that ineffectiveness claims based on omitted instructions need not satisfy *Strickland*’s usual prejudice prong. Notably, even on direct appeal, an omitted instruction claim like the one Kaczmar asserts here is not structural. *E.g.*, *Hedgpeth v. Pulido*, 555 U.S. 57, 60–61 (2008) (holding instructing the jury on valid and invalid alternative theories of guilt is not structural error and noting this Court previously held failure to instruct on an element of the offense, misstating an element of an offense, giving an erroneous accomplice instruction, and giving an erroneous burden-shifting instruction, were all not structural errors).¹⁵ *Cf.*

¹⁴ There are, of course, narrow circumstances in right-to-counsel claims where prejudice is presumed and need not be shown. *See Strickland*, 466 U.S. at 692–93 (recognizing prejudice is presumed for actual or constructive denials of counsel, certain forms of state interference with counsel, and when counsel labors under an actual conflict of interest); *Weaver*, 582 U.S. at 308 (Alito, J., concurring) (same). But Kaczmar does not try to fit this square issue into any of those round holes.

¹⁵ It appears the reasonable-doubt instruction is the *only* instruction that constitutes structural error if not given, or if misstated. *See Greer v. United States*, 593 U.S. 503, 513 (2021) (listing several structural errors with the only instruction-related one being failure to convey that guilt must be proved beyond reasonable doubt).

Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (noting the “especially heavy” burden of establishing an omitted instruction merits reversal in postconviction).¹⁶

Strickland likewise defeats Kaczmar’s premise that prohibiting jury interviews lightens the prejudice he must prove on an ineffectiveness claim. In *Strickland*, Florida introduced the sentencing judge’s testimony at a federal evidentiary hearing. 466 U.S. at 678. The district court, relying in part on the judge’s testimony that the defendant’s proposed mitigation would not have altered the sentence, held the defendant suffered no prejudice. *Id.* at 679.¹⁷ On appeal, the court held that the sentencing judge’s testimony “was not to be considered admitted into evidence to explain the judge’s mental processes in reaching his sentencing decision.” *Id.* at 683.¹⁸

¹⁶ A final point of clarification on *Weaver*. This Court’s analysis in that case rested on the assumption *Strickland* prejudice could be shown either by demonstrating a reasonable probability of a different outcome or a showing that attorney error “rendered the trial fundamentally unfair.” *Weaver*, 582 U.S. at 300 (stating the Court “need not decide that question here”). But as Justices Alito, Gorsuch, and Thomas all pointed out, there is only one way to demonstrate attorney error rendered a guilt phase fundamentally unfair under *Strickland*: showing a reasonable probability of a different outcome but for the error. *See Weaver*, 582 U.S. at 306 (Thomas, J., concurring, with Gorsuch, J.), 307–09 (Alito, J., concurring with Gorsuch, J.) That an error may be properly labeled “structural” has nothing to do with *Strickland*’s prejudice inquiry. *See id.* at 308 (Alito, J., concurring) (“*Weaver* attempts to escape this framework by stressing that the deprivation of the right to a public trial has been described as a ‘structural’ error, but this is irrelevant under *Strickland*.”). *See also Williams v. Taylor*, 529 U.S. 362, 391–94, 399 (2000) (holding the Virginia Supreme Court violated clearly established law by focusing on fundamental fairness for an ineffectiveness claim instead of reasonable probability of a different outcome).

¹⁷ *See also Washington v. Strickland*, 693 F.2d 1243, 1249 & n.10 (5th Cir. 1982) (en banc).

¹⁸ *See also Strickland*, 693 F.2d at 1262–63 (holding “the portion of Judge Fuller’s

This Court agreed. It held a sentencing judge’s testimony is *irrelevant* to the prejudice analysis. *Id.* at 694–95. In crafting the now-familiar prejudice standard for ineffectiveness claims, the Court held the analysis must “presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law” and “must exclude the possibility of arbitrariness, whimsy, caprice, nullification; and the like.” *Id.* Further, the “assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker.” *Id.* at 695.

This Court then emphatically held: “*evidence about the actual process of decision, if not part of the record of the proceeding under review*” should “**not** be considered in the prejudice determination” and is, in fact, “*irrelevant* to the prejudice inquiry.” *Id.* (emphases added.) Later, this Court reemphasized the sentencing judge’s testimony was “irrelevant to the prejudice inquiry.” *Id.* at 700.

Kaczmar’s proposed jury interviews (searching for evidence jurors conducted outside research and used it while recommending death rather than basing their decision exclusively on the admitted penalty-phase evidence) are exactly the inquiry this Court held irrelevant to *Strickland* prejudice forty years ago. No matter what

testimony in which he explained his reasons for imposing the death sentence and his probable response to the evidence adduced at the habeas hearing is inadmissible evidence that may not be considered by the district court”). The court listed several reasons for discounting Judge Fuller’s testimony from the prejudice determination, including: (1) inability to accurately reconstruct thought processes years later; and (2) the importance of finality and integrity of judgments. *Id.*

the jurors might say, it would be irrelevant to proving prejudice under *Strickland*. Instead, the proper resolution of Kaczmar’s ineffectiveness claims requires assuming the jury was reasonably, *conscientiously*, and impartially applying the standards governing their recommendation rather than flouting the final instructions and letting outside-trial evidence influence its recommendation. *Id.* at 694–95, 700. Extra-trial-record evidence to the contrary, like jury interviews, are “irrelevant” to that determination and could “not be considered.” *Id.*

Strickland prohibits using extra-trial-record evidence like postconviction jury interviews as part of its prejudice analysis. *Id.* See also *Tanner v. United States*, 483 U.S. 107, 120 (1987) (“Allegations of” juror “inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process” and it is not “at all clear” the “jury system could survive” intrusive, post-verdict, investigation). Stopping Kaczmar from fishing for evidence this Court held irrelevant to proving prejudice does nothing to modify *Strickland*’s prejudice prong.

Indeed, it appears no court permits jury interviews based on the sheer speculation that the jury may have committed misconduct. *E.g.*, *United States v. Ifediba*, 46 F.4th 1225, 1238–41 (11th Cir. 2022) (requiring a “colorable showing of extrinsic influence” and holding that, after receiving a credible tip, a court properly dismissed a juror who conducted outside research without further inquiry because the allegations other jurors committed misconduct were “purely speculative”); *United States v. Benjamin*, 958 F.3d 1124, 1136 (11th Cir. 2020) (holding speculation “that the jury improperly viewed prejudicial evidence” is not enough for jury interviews;

the defendant must instead show “clear, strong, substantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred”). It would be strange indeed to hold *Strickland*’s prejudice prong changes if a defendant speculates, with no evidence, the jury committed misconduct and courts then deny motions for jury interviews based on speculation.

Kaczmar’s position has no merit and seemingly no support from any court. This Court has recognized ineffectiveness claims “can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, thus undermining the finality of jury verdicts. *For this reason, the rules governing ineffective-assistance claims must be applied with scrupulous care.*” *Weaver*, 582 U.S. at 303, 305 (emphasis added). The rule applicable to Kaczmar’s second question is the usual one. “When an ineffective-assistance-of-counsel claim is based on counsel’s performance at the sentencing phase of a capital case, a defendant is prejudiced *only* if there is a reasonable probability” he would not have received a death sentence absent counsel’s error. *Thornell v. Jones*, 602 U.S. 154, 163 (2024) (cleaned up; emphasis added). Kaczmar’s unfounded speculation he would have received a life sentence if the jury had been expressly prohibited from conducting outside research does not come close. *See Harrington v. Richter*, 562 U.S. 86, 111 (2011).

This Court’s existing precedent gives lower courts all the guidance they need to analyze—and reject—Kaczmar’s arguments about *Strickland*’s prejudice prong and automatic prejudice. There is no need to grant review.

D. Not Federally Retroactive.

This Court should also decline review because the answer to Kaczmar’s second question presented does not retroactively apply to him. Retroactivity is a threshold issue decided before the merits. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (“[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must” determine retroactivity “before considering the merits of the claim.”); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (refusing to reach the merits when the petitioner asked for a new rule to be applied to his case because any decision would not have been retroactive). That remains true even when ineffectiveness claims are involved. *See Chaidez v. United States*, 568 U.S. 342, 347–58 (2013) (holding an ineffectiveness claim that required the Court to create a new rule was not retroactive). Determining federal retroactivity requires analyzing three questions. (1) When did Kaczmar’s death sentence become final? (2) Is the rule this Court announces actually new when viewed from the legal landscape existing at finality? (3) Is the new rule substantive and therefore retroactive? *See Beard v. Banks*, 542 U.S. 406, 411 & n.3 (2004).

Under that analysis, any decision from this Court holding *Strickland*’s prejudice prong changes if a defendant is denied jury interviews would not retroactively apply to Kaczmar or affect his sentence. His death sentence finalized in June 2018. *Kaczmar v. Florida*, 585 U.S. 1011 (2018). A rule that *Strickland*’s prejudice prong analysis hinges on the availability of juror interviews was not “dictated by then-existing precedent” and “apparent to all reasonable jurists” in 2018.

See Beard, 542 U.S. at 413. *Weaver* and *Strickland* squarely foreclosed Kaczmar's position on prejudice in 2018. So, his second question seeks a new rule.

Therein lies the rub for Kaczmar. New rules only apply retroactively if they forbid the State from punishing certain conduct or prohibit a category of punishment on a class of defendants. *Edwards v. Vannoy*, 593 U.S. 255, 263–76 & n.3 (2021) (eliminating the watershed procedural rule exception to nonretroactivity and recognizing substantive rules are automatically retroactive). Holding failure to permit jury interviews on an omitted-instruction ineffectiveness claim requires automatic prejudice under *Strickland* does neither. The most Kaczmar can get from his proposed new rule is another penalty phase to invite a second death sentence, not an exemption from death.

Respect for the State's resources, the victims, and almost a decade of finality counsels against taking this case considering the threshold retroactivity question here. This Court should deny certiorari over Kaczmar's second question presented.

QUESTION PRESENTED 3

III. This Court Need Not Decide Whether Failing to Object to a Judge's Pre-Jury-Selection Comment that the Defendant Was Previously Sentenced to Death Automatically Creates *Strickland* Prejudice.

Kaczmar's final question presented asks this Court to decide whether the resentencing judge's pre-jury-selection comment required a finding of automatic prejudice. The Florida Supreme Court analyzed this claim by determining whether Kaczmar established a "reasonable probability that the sentencer would have imposed a lesser sanction" under *Strickland*. *Kaczmar III*, 431 So. 3d at 229–31.

The Florida Supreme Court gave four reasons for holding Kaczmar failed to establish *Strickland* prejudice. *Id.* First, the court found the pre-jury-selection comment about Kaczmar's prior death sentence less prejudicial, in context, than Kaczmar claimed. He overlooked "other statements by the judge that would substantially ameliorate the effect of the death-sentence remark," such as indications the Florida Supreme Court had invalidated Kaczmar's past death sentence and it was no longer "somehow deserving of continued respect or deference." *Id.* at 229. Second, the statement was brief, taking up "less than four lines in a penalty phase transcript that spans nearly 700 pages," and not a "model of clarity" given the court misspoke during the critical part. *Id.* at 230. Third, Kaczmar's prior death sentence was never mentioned again during the resentencing. *Id.* Finally, the court instructed the jury "to consider only the *evidence* it received at the penalty-phase hearing in determining the proper sentencing recommendation" and no evidence of that sentence appears in the penalty phase. *Id.*

Kaczmar now asks this Court to review that decision and find him exempt from proving prejudice under *Strickland*. But there is no reason to review this question, much less agree with him. The decision below is correct under this Court's precedent; Kaczmar makes no attempt to establish conflict; and any holding adopting Kaczmar's position is not federally retroactive to him. This Court should decline review.

A. The Decision Below Is Correct and There Is No Conflict.

The Florida Supreme Court correctly decided the prejudice issue and Kaczmar does not try to establish conflict. The decision below is a straightforward application of *Strickland* and perfectly consistent with this Court's precedent. "When a defendant

challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

“In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently.” *Harrington v. Richter*, 562 U.S. 86, 111 (2011). Instead, the reasonable probability standard requires Kaczmar to show a just-under 50% chance his penalty phase would have turned out differently but for counsel’s error. *Id.* (explaining “the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is *slight* and matters only in the rarest case”) (emphasis added). *Strickland* also requires conducting the prejudice analysis by determining the effect any errors would have had on an objectively reasonable decisionmaker following the law and precludes evidence “about the actual process of decision.” 466 U.S. at 694–95.¹⁹

This Court has never recognized any relevant way to rebut that presumption or presume prejudice under *Strickland*. The only time it considered an automatic prejudice exception to *Strickland*’s prejudice prong, it held none existed. *Weaver v.*

¹⁹ See also *Brady v. Maryland*, 373 U.S. 83, 90–91 (1963) (rejecting a “sporting theory of justice” that assumed the jury might have violated a judge’s ruling and instructions when evaluating materiality); *Glossip v. Oklahoma*, 604 U.S. 226, 250 (2025) (citing *Strickland* for the premise that a proper prejudice analysis asks “what a reasonable decisionmaker would have done” if the error had not occurred). Notably, *Strickland* uses *Brady*’s prejudice prong for ineffectiveness cases. 466 U.S. at 694.

Massachusetts, 582 U.S. 286, 294–305 (2017). And three Justices explained why structural error has nothing to do with *Strickland*’s prejudice analysis. See *Weaver*, 582 U.S. at 306 (Thomas, J., concurring, with Gorsuch, J.), 307–09 (Alito, J., concurring with Gorsuch, J.) Indeed, this Court has held focusing on fundamental unfairness instead of reasonable probability of a different outcome is an unreasonable application of *Strickland*. *Williams v. Taylor*, 529 U.S. 362, 391–94, 399 (2000).

Outside *Strickland*, the presumption jurors follow their instructions defeats a direct-appeal due process claim very similar to Kaczmar’s postconviction ineffective assistance of counsel claim. See *Romano v. Oklahoma*, 512 U.S. 1, 3 (1994). In *Romano*, the defendant murdered two individuals (Thompson and Sarfaty) a year apart. *Id.* He was convicted of the Thompson murder first and sentenced to death before he went to trial on the Sarfaty murder. *Id.* At the Sarfaty murder trial, a different jury found him guilty and sentenced him to death after learning (at sentencing) that he was previously sentenced to death for the Thompson murder. *Id.*

Before penalty-phase closing arguments, the resentencing court instructed the jury that it could not impose death unless it found an aggravating circumstance and that the aggravation outweighed the mitigation. *Id.* at 4–5. The jury imposed a capital sentence after finding four aggravating circumstances and that they outweighed the mitigation. *Id.* at 5. The defendant appealed from the Sarfaty judgment and, while that appeal was pending, his conviction and capital sentence for the Thompson murder was vacated by an appellate court. *Id.*

In this Court, the defendant argued that the admission of evidence that he had

been previously sentenced to death violated the Eighth and Fourteenth Amendments. *Id.* at 3, 10. On his Fourteenth Amendment due process claim, the Supreme Court held the correct question was “whether the admission of evidence regarding petitioner’s prior death sentence so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process.” *Id.* at 12.

As part of its due process analysis, this Court recognized that evidence of the defendant’s prior capital sentence was irrelevant under Oklahoma law. *Id.* at 13.

However, if the jurors followed the trial court’s instructions, *which we presume they did, this evidence should have had little—if any—effect on their deliberations.* Those instructions clearly and properly described the jurors’ paramount role in determining petitioner’s sentence, and they also *explicitly limited the jurors’ consideration of aggravating factors to the four which the State sought to prove.* Regardless of the evidence as to petitioner’s death sentence in the Thompson case, the jury had sufficient evidence to justify its conclusion that these four aggravating circumstances existed. Although one of the aggravating circumstances proved invalid when petitioner’s conviction for the Thompson murder was overturned on appeal, the other three remained untainted and still outweighed the mitigating circumstances. *In short, the instructions did not offer the jurors any means by which to give effect to the evidence of petitioner’s sentence in the Thompson murder, and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case.*

Id. at 13 (cleaned up; emphases added). In light of the presumption the jury followed the court’s instructions, and the reality the jury had no legal way to include the information about the Thompson capital sentence into their Sarfaty penalty-phase verdict, this Court rejected the defendant’s due process claim.

This Court also took issue with the contention that hearing about a prior death sentence would make the jury more likely to sentence the defendant to death.

Even assuming that the jury disregarded the trial court’s instructions and allowed the evidence of petitioner’s prior death sentence to influence its decision, it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so. Either conclusion necessarily rests upon one’s intuition. To hold on the basis of this record that the admission of evidence relating to petitioner’s sentence in the Thompson case rendered petitioner’s sentencing proceeding for the Sarfaty murder fundamentally unfair would thus be an exercise in speculation, rather than reasoned judgment.

Id. at 13–14.²⁰

The holding below that Kaczmar failed to prove prejudice is consistent with *Strickland*, *Harrington*, and *Romano*. The Florida Supreme Court evaluated the record, assessed the prejudicial impact of the comment against the record, found it less prejudicial than it first appeared, and relied on *Strickland*’s presumption the jury followed the law as it was instructed. *Kaczmar III*, 431 So. 3d at 229–31. Other courts have done the same. *See id.* at 230 (citing cases from three different federal circuits

²⁰ The decision below illustrates why a jury inclined to disregard the trial court’s instructions might be *less* inclined to impose death after the judge’s pre-jury-selection comment. *See Kaczmar III*, 431 So. 3d at 229 (recognizing the prior death sentence comment “necessarily implies that we invalidated the death sentence”). The resentencing judge told Kaczmar’s jury that Kaczmar had been previously sentenced to death, but the highest Court in Florida sent the case back for a do-over. In that context, it is not at all clear even a rogue jury would favor resentencing Kaczmar to death after knowing the Florida Supreme Court disagreed with the prior death sentence. That said, *Strickland*’s prejudice prong should not, and does not, rest on a court’s intuition about what the jurors here would have done any more than it rested on what the actual sentencing judge who testified at the federal evidentiary hearing would have done in *Strickland*. 466 U.S. at 694–95. *See also Collier v. Turpin*, 177 F.3d 1184, 1203 (11th Cir. 1999) (holding the district court could not use the jurors “righteous anger” to find no prejudice because “such considerations run afoul of *Strickland*” even though the district court’s analysis might have given it “a more accurate idea of whether a 1978 Catoosa County jury would have opted for a” life sentence had more mitigating evidence been introduced).

to show “we are not alone in relying on this presumption to deny *Strickland* relief”). Kaczmar’s jury had no legal way to consider the judge’s pre-jury-selection comment about Kaczmar’s prior death sentence and there is no trial-record evidence it did.

That ends the matter under *Strickland*’s prejudice prong. 466 U.S. at 694–95; *United States v. Olano*, 507 U.S. 725, 740 (1993) (recognizing the invariable presumption jurors follow the law is well-established, including for *Strickland* purposes). *Cf. Samia v. United States*, 599 U.S. 635, 647 (2023) (reaffirming the direct-appeal presumption that jurors follow the law and recognizing that to “disregard or to make unnecessary exceptions to” that presumption “would make inroads into the entire complex code of criminal evidentiary law, and would threaten other large areas of trial jurisprudence”). *Strickland* does not let Kaczmar rebut the presumption the jury followed the law with jury interviews. 466 U.S. 668, 695 (prohibiting “evidence about the actual process of decision, if not part of the record of the proceeding under review”).

Kaczmar’s choice to introduce essentially no mitigation while the State proved both “HAC and prior violent felony, two of the weightiest factors” in Florida’s capital system, further bolsters the no-prejudice holding below. *See Hall v. State*, 107 So. 3d 262, 278 (Fla. 2012); *see also Thornell v. Jones*, 602 U.S. 154, 170 (2024) (holding there was no *Strickland* prejudice because “the weakness of Jones’s mitigating evidence contrasts sharply with the strength of the aggravating circumstances”).

The Florida Supreme Court correctly held Kaczmar failed to prove prejudice. Its decision adheres to—and is indeed compelled by—this Court’s own precedent.

There is no support for Kaczmar’s position that a single pre-jury-selection comment by a resentencing judge automatically creates *Strickland* prejudice no matter how brief the comment, how slight the mitigation, and how strong the aggravation. And Kaczmar makes no attempt to argue the decision below conflicts with any other appellate court.²¹ This Court should decline review because the Florida Supreme Court faithfully applied this Court’s *Strickland* precedents and reached the correct result, which does not conflict with any other court.

B. Not Retroactive.

This Court should also decline to review Kaczmar’s final question because the answer does not retroactively apply to him. His death sentence finalized in 2018. But the new rule he seeks to create—that a pre-jury-selection comment the defendant was sentenced to death before automatically satisfies *Strickland*’s prejudice prong even if the jury is instructed to base its sentencing decision only on the admitted evidence, specific aggravation, and mitigation—was far from dictated by existing precedent at that time. *See Beard v. Banks*, 542 U.S. 406, 413 (2004). Indeed, *Strickland*’s long established prejudice analysis cuts against the rule Kaczmar seeks. *See Strickland*, 466 U.S. at 694–95.

Kaczmar cannot benefit from the new automatic-prejudice procedural rule he

²¹ Below, Kaczmar cited a pre-*Strickland* case, *Arthur v. Bordenkircher*, 715 F.2d 118, 119 (4th Cir. 1983), to support his position. But that case applied the harmless-error standard from *Chapman v. California*, 386 U.S. 18 (1967) rather than *Strickland*’s prejudice prong. *Arthur*, 715 F.2d at 120. And the jury in that case was told the defendant’s prior conviction for the offense at issue on retrial was reversed “on procedural grounds”—in other words, that the defendant got off on a technicality—a far more harmful comment than the one Kaczmar’s jury heard. *See id.*

asks this Court to establish in postconviction. *See Edwards v. Vannoy*, 593 U.S. 255, 263–76 & n.3 (2021); *Chaidez v. United States*, 568 U.S. 342, 347–58 (2013). This Court should not grant certiorari, or potentially unsettle a state-court judgement, to answer a question that does not apply to the postconviction defendant under settled federal retroactivity principles.

For all these reasons, this Court should deny certiorari on Kaczmar’s final question presented and deny his Petition in its entirety.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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