

26-5446

**In The
SUPREME COURT OF THE UNITED STATES**

October Term 2025

LEO LOUIS KACZMAR,
Petitioner,
V.

FLORIDA, and SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS
Respondent.

CAPITAL CASE

*On Petition for Writ of Certiorari to the
Supreme Court, State of Florida*

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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October 1, 2026

LIST OF PARTIES:

Leo Kaczmar – Petitioner

State of Florida – Respondent

Secretary, Florida Department of Corrections

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I. REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Petitioner responds to the State of Florida's Brief in Opposition as follows:

The Presumption Jurors Follow the Law : In arguing jurors' actions cannot be examined post-conviction, the State of Florida oddly analogizes this situation to the holding in *Strickland v. Washington*, 466 U.S. 668 (1984), where this Court endorsed the lower court's view that testimony from the trial judge on his or her thinking about the effect of post-conviction issues on their decision process was not an appropriate factor to consider in a post-conviction proceeding. (Brief in Opposition at 26-27). From that, the State extrapolates it would be improper to ask jurors whether they had researched the case on the internet and by implication, whether it is error to fail insist on instructing them on that issue as required by Florida law/rules.

That is a much different issue. Justice Scalia wrote, in *Richardson v. Marsh*, 481 U.S. 200 (1987) in the face of *affirmative* instructions from the court to juries:

"The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that

the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”

480 U.S. at 211. Justice Scalia doesn’t explain how this pragmatic accommodation promotes the interests of a criminal defendant, although the Petitioner will happily concede it promotes the interests of the government (immensely) and the courts (somewhat). Justice Scalia however does contextualize the decision and implies a limiting principle that is generally lost on lower courts who gravitate to the easily recited rule (i.e. “jurors follow the courts instructions”¹²). He distinguished *Richardson* from this Court’s previous decision in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) where a co-defendant’s confession directly implicated Bruton, This Court wrote:

“‘[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial....’ 391 U.S., at 135–136, 88 S.Ct., at 1627–1628 (citations omitted).”

¹ Assuming, *arguendo*, they are in fact instructed.

² While acknowledging the existence of jury pardons. *See, e.g., Crapser v. Fl Dept. Corr.* 855 Fed.Appx. 626 (11th Cir. 2021)

Richardson, 480 U.S. at 207.

Here, there was no jury instruction to avoid social media investigation of the case. The process Mr. Kaczmar was “due” was specific instructions on not doing such an investigation. The State argues this Court should deny cert because the trial judge, or the Florida Supreme Court can just assume the jurors did no such investigating. If Florida can truly make such an assumption, they would have had no need to create and insist upon trial judges instructing the venire and the jury itself on the importance of avoiding such activities. Amazingly, the Florida Supreme Court ruled a reasonable attorney could make a strategic decision not to insist the court instruct the jury on this. Their comments on this issue in their decision only dealt with deficient performance. They wrote:

“In his postconviction motion below, Kaczmar faulted counsel for not making sure that all standard preliminary instructions were read to the jury. For example, Kaczmar’s jury was not instructed on notetaking or cell phone usage during penalty-phase proceedings. Though these, and other omitted instructions, appear to us to be accurate and useful, we cannot say that every reasonable defense lawyer in trial counsel’s position would have insisted that the court give them or object to their omission. See *Jackson*, 347 So. 3d at 304. Consequently, Kaczmar cannot show that his counsel’s

conduct in relation to these instructions was unreasonable and thus deficient.”

(App. at 69). The Florida Supreme Court finds their own instructions “accurate and useful.” *Id.* In their own rules, however, they go much farther-- absolutely prohibiting such actions by jurors and singling it out the required instruction on it in the form of a specific rule. *See, Fla. R. Jud. Admin 2.451(b)*, cited in the original Petition at page 5. The Florida Supreme Court imagines a competent defense attorney would make a decision to leave it to jurors to decide whether to “Google” the defendant’s name and read up on what the case is all about before they hear any evidence. No attorney has the legal authority to waive compliance with the Florida Supreme Court’s rule on this subject, but the Florida Supreme Court does not see that as an obstacle. This thinking is Justice Scalia’s “pragmatic accommodation” notions run wholly amok. And it isn’t even an *affirmative* instruction not to do something as was the case in *Richardson*. It is the failure to give an instruction that since the advent of portable internet access, courts across the country have enacted instructions directing jurors not to utilize it. But according to the State, it would be of no interest to inquire of this jury whether they did something they didn’t know they weren’t supposed to do, a behavior so

ingrained in our nature at this point that the rule forbidding it is mandatory. Note also the Florida Supreme Court limits its analysis to saying that a reasonable attorney might want the jury looking the case up on the internet.(!)(?) They dared not try to minimize the prejudice on the record before them because the State and the trial court successfully thwarted that at the trial court level by denying jury interviews.

Kaczmar “invited” death sentence. The record in this case does not support the State of Florida’s assertion Kaczmar invited his death sentence. (Brief in opposition at 15). The Florida Supreme Court’s decision, at App. 12, notes mitigation evidence was presented regarding a stipulation read, with the Defendant’s approval, about his age at the time of the offense.

But let us turn the question around. The State of Florida has made a policy decision to invest millions of dollars in pursuing the penalty of death in its state. This is of course their prerogative. That said, they necessarily accept the costs naturally flowing from that prerogative. With that acceptance they agree to underwrite the housing of inmates for decades. They accept the responsibility to allocate millions to underwrite the prosecution of these cases, in terms of the trials, the appeals, the post-

conviction process and briefing before this Court and in the 11th Circuit. They accept the responsibility to allocate more millions underwriting the defense of these cases, both in terms of the public defenders who defend the cases, the appellate attorneys who challenge the convictions, the post-conviction attorneys who challenge the performance of trial and appellate counsel, and the investigators and experts who assist the attorneys along the way. Finally, there are the judges themselves. The members of this Court certainly know how much of their time is spent on capital cases. But a quick back of the envelope calculation by undersigned counsel of just the Florida Supreme Court's time, just on written output shows that about 50 percent of their written opinions are rewriting their rules of procedure and about 30 percent of their written opinions are on death penalty cases. In each of these death cases, the State is advocating, or inviting (to use their term), the death sentence. In for a penny...

Finality and Integrity: The State repeatedly invokes the systemic interests at stake vis-à-vis the concepts of finality, costs and integrity in their brief. (Brief in Opposition at 24, 27 fn. 18, 28, 29, 30, 31). They invoke those concepts in an attempt to abbreviate the post-conviction process. Lynchings promoted finality back in the day. They

cost less than due process as well. Clearly they lacked integrity though. At one time, this Court, in *Glossip v. Gross*, 576 U.S. 863 (2015), confidently stated “Glossip hired Justin Sneed to kill his employer, Barry Van Treese. Sneed entered a room where Van Treese was sleeping and beat him to death with a baseball bat.” *Id.* at 874. Now, this Court has ordered a new trial for Mr. Glossip, finding that a jury should decide the case anew in the face of overwhelming evidence of prosecutorial misconduct (underwritten by the taxpayers of Oklahoma). *See, Glossip v. Oklahoma*, 604 U.S. 226 (2025).³ None of this is meant as a criticism of the 2015 court, as the issue of prosecutorial misconduct was not before the Court, only the manner of execution. Like it or not, and there are certainly many who clearly don’t like it one bit, we have decided upon a system of justice that does not rush people to the gallows to dance the Tyburn Jig.

³ Mr. Glossip is set for trial in December and is out of jail on bond. <https://www.news9.com/crime/richard-glossip-attorneys-seek-key-witness-records-ahead-of-new-trial>. Mr. Glossip ate his last meal three times. <https://www.msn.com/en-us/news/other/oklahoma-s-richard-glossip-who-was-nearly-executed-3-times-granted-bond-while-awaiting-retrial/ar-AA23d5bG?ocid=BingNewsVerp>

Here, the State of Florida has boxed the Petitioner in so that he is unable to find out whether he obtained his constitutional guarantee of a fair and impartial jury. In part this occurred because of the sheer incompetence of his lawyer, who for all intents and purposes was not rendering any assistance to his client when the critical act of instructing the jury at the beginning of the trial was in progress. *See, e.g., Williams v. Sec, Florida Department of Corr.* 638 Fed.Appx. 965 (11th Cir. 2015)(lawyer asleep, but not during critical stage, but adding “[a] defendant is entitled to a presumption of prejudice if defense counsel's conduct resulted in a “complete denial of counsel ... at a critical stage” of trial). So to the extent the State argues in opposition the error is not structural, the 11th Circuit begs to differ. *Id.* The trial judge, who should know the requirements of the rules of judicial administration and the standard jury instructions before handling a death penalty case is responsible for this error as well, though he is not the subject of post-conviction analysis. Likewise, the prosecutor, who is not just there to seek convictions and death sentences, but is supposed to yield to a higher calling and ensure justice is done, escapes scorn though certainly having

had at least some inkling the jury was not being properly instructed.⁴ See, e.g., *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). To be sure, this was a wholesale failure of the justice system, but at this point, it falls to defense counsel to defend the Petitioner's due process rights to have a properly instructed jury. He failed miserably. The damage is incalculable. Literally incalculable, as there is no method permitted to calculate the damage as the Florida Supreme Court reimagines an absolute prohibition under its own rules as a quaint idea and didn't touch the prejudice question despite the fact it involved a critical stage – jury selection. See, e.g., *Peretz v. U.S.* 501 U.S. 923 (1991)

⁴ At the time of this resentencing (August 2013), this very same prosecutor had already been selected for appointment by then Governor Rick Scott to be a Circuit Judge. <https://circuit8.org/courts-judges/judge-james-m-colaw/> He was selected in June 2013 and began presiding in September 2013, yet between these dates he didn't know the standard jury instructions under the best of circumstances, or deliberately omitted to correct his soon to be fellow judge at worst.

II. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Petitioner prays this Court grant certiorari review for the reasons outlined herein and in the initial petition.

Respectfully submitted:

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