

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH ZIELER
Petitioner,

v.

STATE OF FLORIDA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under Florida's capital sentencing law, a judge may impose the death penalty only if the jury first determines that the defendant shall be sentenced to death. Under a 2023 amendment the jury's decision need not be unanimous, but can be made by a vote of eight (out of twelve) jurors. Only Florida and Alabama (10-2) permit the imposition of the death penalty based on a nonunanimous jury vote. The question presented is whether the recently enacted Florida nonunanimity provision is impermissible under the Sixth Amendment and/or the Eighth Amendment.

There are two other petitions raising the same issue: Michael James Jackson v. State of Florida, No. 26-76; and Michael H. Hunt v. State of Florida, No. 26-78. Review should be granted in Zieler's case, or in the alternative this case should be held pending resolution of the Jackson and Hunt petitions.

PARTIES TO THE PROCEEDINGS

The petitioner is Joseph Zieler. He was the defendant below.

The respondent is the State of Florida. It was the plaintiff below.

STATEMENT OF RELATED PROCEEDINGS

Zieler v. State, 434 So.3d 666 (Fla. 2026) (Florida Supreme Court opinion and judgment rendered April 16, 2026); order denying rehearing issued on June 17, 2026; mandate issued on July 6, 2026).

State v. Zieler, No. 362016CF000455000ACH (Florida Twentieth Judicial Circuit Court; judgment and sentence entered on June 26, 2023, and amended on June 28, 2023).

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OPINION BELOW

The opinion of the Florida Supreme Court (App. 1a-13a) is reported at Zieler v. State, 434 So.3d 666 (Fla. 2026). The order of the Florida Supreme Court denying Petitioner’s motion for rehearing (App. 14a) is reported at Zieler v. State, No. SC2023-1003, 2026 WL 1745851 (Fla. June 17, 2026).

JURISDICTION

The Florida Supreme Court issued its judgment affirming Petitioner’s convictions and death sentence, and denied Petitioner’s motion for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides in relevant part “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury.”

The Eighth Amendment provides in relevant part that “cruel and unusual punishments [shall not] be inflicted.”

The statute at issue, Fla. Stat. §921.141, is reproduced in relevant part at App. 15a-16a.

STATEMENT OF THE CASE

Petitioner, JOSEPH ZIELER, was tried and convicted in the 1990 cold-case first-degree murders of R.C. and L.S. in Lee County, Florida. Zieler was unknown to investigators until 2016, when his DNA was entered in the CODIS system and triggered an alert. Jan C. discovered the bodies of her eleven year old daughter R.C. and 32 year old L.S. (Jan's roommate). They had each been sexually battered and suffocated. In 2016, Joseph Zieler's DNA sample was obtained in an unrelated (non-homicide) case and was determined to be a match to DNA obtained from the bodies of R.C. and L.S. at the crime scene [App. 1a-3a].

Jury selection for Zieler's trial commenced on February 27, 2023, nearly two months before Florida's amended death penalty law - - which replaced the unanimous jury death verdict law with a provision allowing the death penalty to be imposed based on a vote of eight or more (out of twelve) jurors - - was enacted. Accordingly, prospective jurors were correctly instructed that a unanimous vote was necessary to make death a possible penalty, and otherwise the trial judge would be required to impose a life sentence. Jury selection proceeded for three full days, and then on the fourth day the two defense attorneys, three prosecutors, and the trial judge realized they had a big problem; they had all forgotten that this was a 1990 crime (when the sentencing options were death or life imprisonment with the possibility of parole after 25 years), and they had instead been misinforming each juror on individual voir dire that life meant life and the only options were death or life imprisonment without

parole. Consequently, by agreement of all involved, the jury was discharged. By the time a second jury selection proceeding began on May 8, 2023, the 8-4 amendment had gone into effect (on April 20), and the penalty phase of Zieler’s trial would be governed by that provision. The defense’s motion challenging the constitutionality of the new version of the statute was denied, Zieler was convicted as charged on both counts, the jury recommended the death penalty on each count by a nonunanimous 10-2 vote, and death sentences were imposed [see App. 18a-22a].

On direct appeal, Zieler contended, inter alia, that in a state which employs a jury as co-sentencer the Sixth and Eighth Amendments require juror unanimity in its determination that death is the appropriate sentence, and that Florida’s newly enacted amendment allowing the judge to impose the death penalty based on an 8-4 jury vote is constitutionally impermissible [App. 23a-37a, 44a-53a]. The Florida Supreme Court rejected Zieler’s argument on the merits based on its earlier decision in State v. Poole, 297 So.3d 487 (Fla. 2000):

VI. Unanimous Jury Recommendation

As a separate matter, Zieler urges this Court to reconsider our conclusion in Poole, that is, a jury must unanimously determine that death is the appropriate sentence before the death penalty can be imposed. However, we have conclusively rejected Zieler’s argument that the United States Constitution or the Florida Constitution requires that a jury unanimously recommend the death penalty, and we decline to revisit the issue. See Poole, 297 So.3d at 504-05 (rejecting unanimity argument on Sixth and Eighth Amendment grounds and under the Florida Constitution); Zack v. State, 371 So.3d 335, 350 (Fla. 2023) (stating that “the Supreme Court’s Eighth Amendment precedent to which we are bound does not require a unanimous jury recommendation for death during the penalty phase”).

[App. 11a]

On a related constitutional issue the Florida Supreme Court opined that nothing in the Eighth Amendment “requires jury sentencing in capital cases, or a unanimous jury recommendation, or indeed any jury recommendation at all” [App. 11a]. Zieler’s convictions and death sentences were affirmed [App. 2a, 12a].

REASONS FOR GRANTING THE WRIT

In a nutshell, resolution of this issue turns on whether Ramos v. Louisiana, 590 U.S. 83 (2020) or McKinney v. Arizona, 589 U.S. 139 (2020) controls. In a state like Florida, in which - - by statute - - the jury participates in the death selection decision as co-sentencer, and in which the jury’s decision is critical and frequently outcome-determinative as to whether a person is sentenced to death or life imprisonment, do the Sixth and Eighth Amendments require juror unanimity, as with any other kind of jury verdict in a criminal case? Ramos. Or does the fact (as the state and the Florida Supreme Court perceive a McKinney dictum to hold) that, as long as a jury unanimously finds a single eligibility aggravator to exist, the selection decision could hypothetically (but not in Florida) be made by the judge alone mean that the constitutional requirements governing jury verdicts do not apply?

The Florida Supreme Court’s decision rejecting on the merits Zieler’s unanimity argument is based on that Court’s earlier decisions in State v. Poole, 297 So.3d 487, 504 (Fla. 2020) and Zack v. State, 371 So.3d 335, 350 (Fla. 2023) [App. 11a]. Poole

and Zack, are in turn, based on Spaziano v. Florida, 468 U.S. 447 (1984), and the Florida Supreme Court's mistaken assumption that "Spaziano is still good law." However, the foundation of Spaziano pertaining to the jury's role and the unanimity requirement has been supplanted by this Court's much more recent decisions in Ramos and Hurst v. Florida, 577 U.S. 92 (2016). Spaziano is no longer good law, at least not on the issue of jury unanimity, and neither are Apodaca v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 256 (1972).

Moreover, by determining that Apodaca and Johnson were wrong from the start, Ramos essentially resurrects Andres v. United States, 333 U.S. 740, 748 (1948) as applied to the states including Florida: "In criminal cases this [Sixth and Seventh] Amendment requirement of unanimity extends to all issues - - character or degree of the crime, guilt and punishment - - which are left to the jury" (emphasis supplied). [Andres specifically involved a death sentence]. See also State v. Schooley, 345 A.3d 78, 86 (Maine 2025) (citing Andres and Ramos that "[t]here can be no question . . . that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."

In Hurst v. State, 202 So.3d 40 (Fla. 2016), the Florida Supreme Court - - correctly in Zieler's view - - determined that the Sixth and Eighth Amendments, as well as the state constitution, require unanimous jury agreement that death is the appropriate sentence. The Florida Supreme Court's decision was consistent with those of the Delaware Supreme Court in State v. Rauf, 145 A.3d 430 (Del. 2016) and the Connecticut Supreme Court in State v. Daniels, 542 A.2d 306 (Conn. 1988). See

Hurst v. State, 202 So.3d at 59-61 and n.17, quoting Daniels and discussing Rauf. The Florida Supreme Court also noted that the United States Supreme Court had not yet ruled on the Eighth Amendment question. 202 So.3d at 59.

However, less than four years later - - after a membership change replacing four Justices of the Florida Supreme Court - - the reconstituted state court made a 180-degree turn and now concluded that jury unanimity was not required by the Sixth and Eighth Amendments or the state constitution. On the Eighth Amendment question, the Poole majority said “The [U.S.] Supreme Court rejected that exact argument in Spaziano.” State v. Poole, 297 So.3d at 504. But that is not entirely accurate.

Spaziano and Harris v. Alabama, 513 U.S. 504 (1995) upheld, in the context of the former Florida system and the former Alabama system respectively, provisions which allowed the trial judge to override a jury’s life recommendation and impose a death sentence instead.¹ Both Spaziano and Harris are heavily premised on the majority’s oft-repeated characterization of the jury’s role at the time as “advisory”. Unanimity is not discussed in either opinion, and there is no mention of the then-leading cases on nonunanimous juries, Apodaca and Johnson, as would be expected if unanimity was at issue in Spaziano and/or Harris. Rather, the essential holding of the latter cases - - now overruled in significant part by Hurst v. Florida, 577 U.S.

¹ The 1972 Florida statute’s life override provision was never used after the turn of the 21st century. See Woodward v. Alabama, 134 S.Ct 405, 408 and n.6 (2013)(Sotomayor, J., dissenting from denial of certiorari). Alabama’s has also been repealed (in 2017), though the repeal has not as yet been made retroactive.

92, 102 (2016) - - was that the Sixth Amendment is not necessarily violated when the death penalty is imposed by a judge rather than a jury, and the Eighth Amendment is not necessarily violated every time a state administers its criminal laws differently than a majority of its sisters.

In her 2013 opinion (joined in part by Justice Breyer) dissenting from denial of certiorari in Woodward v. Alabama, 134 S.Ct 405 (2013), Justice Sotomayor expressed the view that the rationale of Harris (and by extension Spaziano) had been undermined by more recent decisions of the Court, and should be reconsidered. Three years later, Hurst v. Florida partially overruled Spaziano “to the extent that [it allows] a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.” Then - - in Florida - - came Hurst v. State followed by its about-face in State v. Poole. As previously mentioned, the Poole Court’s rejection of Poole’s (and Hurst v. State’s) Sixth Amendment position was based in large part on Spaziano [297 So.3d at 504], and its rejection of Poole’s and the Hurst Court’s Eighth Amendment analysis was based entirely on Spaziano and Harris [297 So.3d at 504].

However any remnant of constitutional viability Spaziano (and therefore Poole) might have retained on the issue of jury unanimity after Hurst v. Florida was put to pasture by this Court’s decision in Ramos (issued three months after Poole), which abrogated its 1972 decisions in Apodaca and Johnson. Oregon and Louisiana were the only two states which allowed criminal convictions based on

nonunanimous jury verdicts², and, as the Nebraska Supreme Court emphasized in State v. Hochstein, 632 N.W.2d 273, 282 (Neb. 2001), even Oregon and Louisiana had express provisions that nonunanimous verdicts were impermissible in capital cases. This capital case exception “reflects the understanding that such cases are qualitatively different and require an added measure of reliability.” 632 N.W.2d at 282.

In Ramos, Justice Gorsuch recounts the Jim Crow-era history of racial bias which motivated Louisiana to dispense with jury unanimity, and the history of racial, ethnic, and religious bigotry (and the rise of the Ku Klux Klan in that state) which motivated the adoption of Oregon’s nonunanimity provision in the 1930s. Those laws were purposely crafted in order to dilute the influence of minorities on Louisiana and Oregon juries. 590 U.S. at 87-88, 99 n.44.

See, e.g., Raoul G. Cantero and Robert M. Kline, Death is Different: The Need for Jury Unanimity in Death Penalty Cases, 22 St. Thomas L.Rev. 4, 31-32 (2009) (“The unanimity requirement also gives meaning to each juror’s vote, thereby preventing a simple majority of the jury from ignoring an individual juror’s voice when imposing a death sentence against a fellow citizen. Put another way, courts that allow a non-unanimous jury to render a verdict empower superficial, narrow, and prejudiced arguments that appeal only to certain groups”); Jennifer Eisenberg, Ramos, Race, and Juror Unanimity In Capital Sentencing, 55 Loyola L.A.L.Rev.

² 10-2 in Oregon, 9-3 (later changed to 10-2) in Louisiana.

1085, 1104-05 (2022) (“Because Ramos also emphasized that unanimity enhances the quality of juror deliberations, in addition to the racial concerns of non-unanimity, juror unanimity as to death should arguably be considered a requisite procedural safeguard per *Gregg v. Georgia* and the Eighth Amendment”).

If the state of Florida contends that the unanimous jury constitutional principles of Ramos apply only to the conviction stage of a capital trial, the state will be wrong. Reliability and fair representation of the community are at least as important, if not more so, in the decision whether a person’s life should be taken or spared. That is the Eighth Amendment’s “death is different” precept in a nutshell:

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion).

The federal death penalty law [FDPA] - - like nearly every American jurisdiction in which death is a possible punishment - - requires a unanimous jury verdict on whether the aggravating factors sufficiently outweigh the mitigating factors as to justify a sentence of death. However, federal Circuit Courts of Appeal, like the Florida Supreme Court, have rejected defendants’ arguments that this

weighing process is governed by the “beyond a reasonable doubt” standard.³ The Sixth Circuit in United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013) highlighted the significant difference between a jury’s finding of fact (amenable to and subject to the reasonable doubt standard) and its weighing of aggravating and mitigating circumstances, which involves a “complex moral judgment”⁴ which is not amenable to a reasonable doubt standard:

[Factual] findings - - that a particular statement might influence its recipient, or that the defendant acted with a particular state of mind, or possessed a particular quantity of drugs, or was himself the triggerman, rather than just an accomplice - - are different in kind from the “outweighs” determination required by §3593(e). Apprendi findings are binary - - whether a particular fact existed or not. Section 3593(e), in contrast, requires the jury to “consider” whether one type of “factor” “sufficiently outweigh[s]” another so as to “justify” a particular sentence. These terms - - consider, justify, outweigh – reflect a process of assigning weights to competing interests, and then determining based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral - - for the root of “justify” is “just.” What §3593(e) requires, therefore, is not a finding of fact but a moral judgment.

(emphasis supplied)

The Florida Supreme Court recently in Loyd v. State, 379 So.3d 1080, 1096 (Fla. 2023)(quoting Justice Thomas’ concurring opinion in Glossip v. Gross, 576 U.S. 863, 902-03 (2015)) stated that trials before a local jury “ensure that capital

³ See, e.g., United States v. [Edward] Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Sampson, 456 F.3d 13, 31-32 (1st Cir. 2007); United States v. [Sherman] Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); Wells v. State, 364 So.3d 1005, 1014 (Fla. 2023); Ault v. State, 53 So.3d 175, 206-07 (Fla. 2010).

⁴ See United States v. Runyon, 707 F.3d 475, 516 (4th Cir. 2013).

defendants are given the option to be sentenced by a jury of their peers who, collectively, are better situated to make the moral judgment between life and death than are the products of [empirical studies].⁵ It is especially noteworthy that Justice Thomas meant “the moral judgment between life and death”; not a mere (and frequently indisputable) finding of fact that, say, a particular defendant had a prior robbery conviction or a particular victim was a law enforcement officer. As expressed in Jones v. United States, 527 U.S. 373, 382 (1999), “. . . [W]e have long been of the view that ‘[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves’ [Citation and footnote omitted]. We have further recognized that in a capital sentencing proceeding the Government has ‘a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.’ ” (emphasis supplied).

In light of the foregoing, and especially in light of Ramos v. Louisiana, the Sixth and Eighth Amendments preclude the imposition of the death penalty based on a less-than-unanimous jury vote.

The state of Florida will undoubtedly rely on McKinney v. Arizona, 589 U.S. 139 (2020) and the remnants of Spaziano and Harris for the proposition that the constitution does not require that the ultimate sentencing decision be made by a

⁵ Justice Thomas was responding to Justice Breyer’s dissent in Glossip, which asserts that geography plays an important role in disparate death penalty outcomes. 576 U.S. at 918-20.

jury. While it is true the McKinney (in dicta)⁶ says that “States that leave the ultimate life-or-death decision to the judge may continue to do so” [589 U.S. at 145], it is critically important to recognize that Florida is not such a state. Florida uses, and has used since Furman, a hybrid system in which the jury and the judge are co-sentencers. See Espinoza v. Florida, 505 U.S. 1079 (1992); Snelgrove v. State, 921 So.2d 560, 571 (Fla. 2005); Johnson v. Singletary, 612 So.2d 575 (Fla. 1993). A jury’s life verdict is binding on the judge, while a jury’s death recommendation - - while not binding - - is accorded great weight in the ultimate life-or-death decision. McKinney, at most, addresses whether a jury - - after finding a single aggravator for eligibility purposes - - needs to be involved in the selection decision at all. McKinney does not discuss unanimity or nonunanimity, and does not purport to decide what constitutional requirements apply to jurors and jury verdicts in states like Florida (and 26 others, as well as the federal and military systems) where juries do have an important and often outcome-determinative role in the death selection decision. Therefore, Florida’s argument that McKinney trumps Ramos [App. 42a] doesn’t hold water.

There are currently only two states which allocate the death-selection decision to the judge alone - - Nebraska (3-judge panel which must unanimously agree before a death sentence may be imposed) and Montana (which barely has a

⁶ The issue decided in McKinney was whether a state appellate court may conduct a Clemons reweighing of aggravating and mitigating circumstances. 589 U.S. at 141-47, citing Clemons v. Mississippi, 94 U.S. 738 (1990).

death penalty).⁷ So the question is not about what Nebraska and Montana can do; it is whether jurisdictions like Florida (8-4) and Alabama (10-2) can avoid the generally applicable Sixth and Eighth Amendment jury unanimity principles recognized in Ramos. Florida and Alabama are to the death penalty what Louisiana and Oregon were to noncapital trials, and the answer is no.

The Sixth Amendment requires that jurors be impartial and the Eighth Amendment requires heightened reliability in the decision to impose the death penalty. Even when it was wrongly thought that the Louisiana and Oregon laws allowing nonunanimous (9-3 and 10-2 respectively) verdicts for noncapital convictions was permissible, even those states required unanimous verdicts to convict in cases where death was on the table as a potential punishment. Florida will argue that Ramos applies only to guilt phases and not penalty phases, but that stands the “death is different” principle on its head. To conclude that the Sixth and Eighth Amendments require jury unanimity in all cases except for the life-or-death decision would make “death is different” all right; it would afford less protection and less reliability. In a state like Florida which has chosen to empanel juries which are assigned an important and frequently dispositive role in the death-selection decision, the constitutional guarantees which apply to juries cannot be dispensed with on the deeply flawed theory that a jury was not hypothetically necessary in the first place.

⁷ Montana has two individuals on death row - - one sentenced in 1983, the other in 1992 - - and has not executed anyone since 2006.

This is where the Andres holding comes into play: A jury's decision on all issues, guilt and punishment including the death penalty, which are left to the jury must be unanimous. Florida will try to get around this by saying the judge is the ultimate sentencer and the jury's role in the death-selection decision is not constitutionally required. But Florida law does require a jury determination that death is the appropriate sentence, and the judge is precluded from imposing a death sentence without it. A Florida jury is a critical and frequently dispositive co-sentencer, so Andres, Ramos, and the Sixth and Eighth Amendments apply, and they require unanimity.

The logical repercussions of the state's theory should also be considered. Would the seating of a biased juror be permissible (or, if error, harmless) since McKinney appears to allow a state legislature - - if it chooses - - to dispense with a jury entirely? Could the state employ a six-person jury, or nine, or four, to be the sentencer or co-sentencer? If so, could the death penalty be imposed after a 4-2, or 6-3, or 3-1 vote? Could Florida, if it kept the jury size at 12, provide that five death votes, or three, are sufficient? That may be a "parade of horrors"⁸, but under the state's McKinney logic what - - other than arbitrary line-drawing - - would prohibit it?

Given that Florida has chosen to employ a jury in the death-selection decision, Ramos, and Andres, not Spaziano and McKinney, control.

⁸ In keeping with that theme, how about a jury of twelve orangutans? See Hunter v. United States, 146 S.Ct. 1702, 1712 (2026).

Finally, Florida's scheme which allows imposition of the death penalty even when four out of twelve jurors have voted for life imprisonment makes the constitutional violation that much more glaring. How did Florida settle on 8-4? The answer is that a Broward County jury voted 9-3 to spare the life of Nikolas Cruz, whom it had just convicted of multiple counts of first-degree murder in the Parkland school shootings. As stated in an April 20, 2023 news release from the Office of Governor Ron DeSantis:

TALLAHASSEE, Fla. - - Today, Governor Ron DeSantis was joined by parents of the victims of the Parkland mass murder to sign Senate Bill (SB) 450, which reforms Florida's death penalty statutes including reducing the number of jurors needed to administer capital punishment from unanimous to a supermajority of eight out of twelve.

"Once a defendant in a capital case is found guilty by a unanimous jury, one juror should not be able to veto a capital sentence." said **Governor Ron DeSantis**. "I'm proud to sign legislation that will prevent families from having to endure what the Parkland families have and ensure proper justice will be served in the state of Florida."

"A few months ago, we endured another tragic failure of the justice system. Today's change in Florida law will hopefully save other families from the injustice we have suffered," said **Ryan Petty, father of Alaina**. "I'd like to thank Governor DeSantis and the Florida Legislature for this important legislation."

"Thank you, Governor DeSantis, Senator Ingoglia, and Representative Jacques for enacting this legislation that changes the death penalty law," said **Hunter Pollack, brother of Meadow**. "While we cannot go back and change the past, we can ensure that no community will ever have to endure the injustice and pain that we did when the Parkland shooter did not receive the death penalty."

"This bill is about victims' rights, plain and simple. It allows the victims of heinous crimes a chance to get justice and have the perpetrators punished by the full extent of the law," said **Tony Montalto, father of Gina**. "Thank you to everyone who worked so hard

on this bill.”

“Thank you, Governor DeSantis, Senator Ingoglia, and Representative Jacques for their passionate hard work on victims’ rights,” said **Tom and Gena Hoyer, mother and father of Luke**. “This bill will bring full accountability to the perpetrators of wicked crimes and help victims receive justice.”

“The victims of the most evil crimes and their families deserve to see criminals punished to the full extent of the law,” said **Senator Blaise Ingoglia**. “One rogue juror should not be the sole arbiter of justice. Thank you to the Parkland families, Governor DeSantis, and Representative Jacques for ensuring this doesn’t happen again.”

“Florida will no longer allow a small handful of activist jurors to derail the full administration of justice when individuals are found guilty beyond a reasonable doubt and meet the qualifications for the death penalty,” said **Representative Bernie Jacques**.⁹

What exactly is a “rogue juror” anyway? As expressed in Nodal v. Cal-West Rain, Inc., 249 Cal.Rptr.3d 607, 609 (Cal.App. 2019) “[a] ‘rogue juror’ is someone who, in a mischievous way, wanders apart from fellow jurors, does not follow the court’s instructions, and violates the juror’s oath.”

There is no presumption, in Florida or elsewhere, that whenever a party loses a civil trial or the state doesn’t like the outcome of a criminal trial that it happened because one or more jurors “went rogue.” The presumption is just the opposite. Absent evidence - - as opposed to rank speculation - - that a juror lied during voir dire, refused to follow the trial court’s instructions, or violated his or her oath:

“[It is]the almost invariable assumption of the law that jurors follow their instructions.” Richardson v. Marsh, 481 U.S. 200, 206, 107.S.Ct.

⁹ The self-congratulatory web address for this is <http://flgov.com/2023/04/20/governor-desantis-signs-bill-to-ensure-justice-in-capital-cases/>

1702, 1707, 95 L.Ed.2d 176 (1987). “[W]e presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.” *Francis v. Franklin*, 471 U.S. 307, 324, n.9, 105 S.Ct. 1965, 1976, n.9. 85 L.Ed.2d 344 (1985).

United States v. Olano, 507 U.S. 725, 740-41 (1993), quoted in *Davis v. State*, 121 So.3d 462, 492 (Fla. 2013).

Florida decisions recognizing that in the absence of evidence to the contrary it is presumed that jurors comply with their oaths and follow the trial court’s instructions include *Joseph v. State*, 336 So.3d 218, 243 (Fla. 2022); *Lowe v. State*, 259 So.3d 23, 52 (Fla. 2018); *Crain v. State*, 894 So.2d 59, 70 (Fla. 2004); and *Burnette v. State*, 157 So.2d 65, 70 (Fla. 1963). Similarly, it is presumed, absent evidence to the contrary, that prospective jurors - - under oath - - respond truthfully to questions on voir dire. *United States v. Droge*, 961 F.2d 1030, 1036 (2nd. Cir. 1992).

As previously discussed, the state Supreme Court held in *Hurst v. State* in 2016 that jury unanimity is constitutionally required, and then it reversed its field in *Poole* in January 2020 and concluded that it is not. Zieler submits that, especially in light of the this Court’s April 2020 decision in *Ramos*, *Hurst v. State* had it right. And *Hurst v. State* was manifestly right in anticipatorily rejecting the Florida Governor’s and Legislature’s purported “rogue juror” - - or more accurately “four rogue jurors” - - rationale:

We also note that there is no valid basis for concern that such requirement will allow a single juror with a fixed objection to the death penalty to impede the proper conduct of the penalty phase process.

Although a prospective juror who voices only general objections to the death penalty cannot be excluded from the jury on that basis, *Guardado v. State*, 176 So.3d 886, 898 (Fla. 2015) (citing *Witherspoon*, 391 U.S. at 522, 88 S.Ct 1770), a prospective juror may be found unqualified to serve if he or she expresses an unyielding conviction and rigidity toward the death penalty. *Conde v. State*, 860 So.2d 930, 939 (Fla.2003). This Court has made clear that, although a juror's initial response to questioning about the death penalty alone will not automatically provide good cause to remove that juror, a juror's "[p]ersistent equivocation or vacillation. . . on whether he or she can set aside biases or misgivings concerning the death penalty in a capital penalty phase supplies the reasonable doubt as to the juror's impartiality which justifies dismissal." *Johnson v. State*, 969 So.2d 938, 947-48 (Fla.2007). This is in accord with the United States Supreme Court's holding in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d. 841 (1985), that a prospective juror may be excused for cause when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id* at 433, 105 S.Ct. 844 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct.2521, 65 L.Ed.2d 581 (1980)).

Furthermore, it is presumed that jurors will, in good faith, follow the law as it is explained to them. See *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000)(citing *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). "[We] presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Davis v. State*, 121 So.3d 462, 492 (Fla.2013)(quoting *United States v. Olano*, 507 U.S. 725, 740-41, 113 S.Ct. 1770, 123 L.Ed.508 (1993)(quoting *Francis v. Franklin*, 471 U.S. 307, 324, n.9. 105.S.Ct. 1965, 85 L.Ed.2d 344 (1985))). In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law. Thus, there is no basis for concern that requiring a unanimous death recommendation before death may be imposed will allow a single juror, who for personal reasons would under no circumstances vote to impose capital punishment, to derail the process of meaningful jury deliberation on all the facts concerning aggravating factors and mitigating circumstances, and on the ultimate finding of whether death has been proven to be the appropriate penalty in an individual

case.

202 So.3d at 62-63.

The phantom “rogue juror” bogeyman is not a constitutionally valid rationale for dispensing with unanimity, and every other state and federal jurisdiction - - save Florida and Alabama - - which has the death penalty is able to function without lowering the bar to 8-4 or 10-2. Moreover, in Florida imposition of the death penalty is never required by law [see Smith v. State, 866 So.2d 51, 67 (Fla.2004)], and Florida jurors are specifically instructed “Regardless of the results of each juror’s individual weighing process - - even if you conclude that [a] [the] sufficient aggravator[s] outweigh[s] the mitigator[s] – the law neither compels nor requires you to recommend that the defendant should be sentenced to death.”¹⁰ Therefore, it is impossible for a Florida juror to violate his or her oath or the judge’s instructions by voting for life over death. The only way the “rogue juror” scenario could theoretically occur is if a prospective juror who would never consider voting for a death sentence were to lie under oath on voir dire, and then somehow get past the state’s ten peremptory challenges. [Apparently the state legislature was comfortable that five rogue jurors would not be able to pull this off in order to block a death verdict]. Florida’s Legislature, spurred on by its Governor, hastily overreacted to a high-profile verdict it didn’t like, and in so doing enacted a one-of-a-kind capital sentencing scheme which - - especially after Ramos - - is

¹⁰ Florida Standard Jury Instructions in Criminal Cases 7.11.

constitutionally invalid on its face, and, in light of the 10-2 jury votes in Zieler's penalty trial, as applied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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