No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH ZIELER
*Petitioner*,

v.

STATE OF FLORIDA
*Respondent*.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

| APPENDIX | DOCUMENT |
|---|---|
| A (p.1a-13a) | Opinion of the Florida Supreme Court in Zieler v. State, 434 So.3d 666 (Fla. 2026) (case no. SC2023-1003), opinion rendered on April 16, 2026 |
| B (p. 14a) | Order of the Florida Supreme Court denying rehearing [2026 WL 1745851], rendered on June 17, 2026 |
| C (p. 15a-16a) | Florida Statutes §921.141 (in relevant part) |
| D (p.17a-37a) | Excerpts from appellant's Initial Brief in Zieler v. State, 434 So.3d 666 (Fla. 2026) |
| E. (p.38a-42a) | Excerpts from the state's Answer Brief in Zieler v. State |
| F.(p.43a-53a) | Excerpts from appellant's Reply Brief in Zieler v. State |

# Appendix A

434 So.3d 666
Supreme Court of Florida.

Joseph ZIELER, Appellant,

v.

STATE of Florida, Appellee.

No. SC2023-1003
|
April 16, 2026

**Synopsis**

**Background:** Following denial of defendant's motion in limine seeking to exclude DNA evidence based on alleged tampering, defendant was convicted in the Circuit Court, 20th Judicial Circuit, Lee County, Robert Branning, J., of two counts of first-degree murder, and sentenced to death, for the killings of one adult and one child victim, which had occurred more than 25 years earlier. Defendant appealed.

**Holdings:** The Supreme Court held that:

prosecutor's comments did not impermissibly diminish the jury's responsibility for its verdict;

there was no abuse of discretion in admitting the results of DNA testing on hairs found at crime scene into evidence;

any error in admitting into evidence results of DNA testing conducted on hairs found at crime scene was harmless;

any error in sentencing order's statement that jury found no mitigating circumstances proven by greater weight of the evidence was harmless; and

competent, substantial evidence supported first-degree murder convictions.

Affirmed.

Tanenbaum, J., filed concurring opinion.

Labarga, J., filed opinion concurring in the result.

**Procedural Posture(s):** Appellate Review; Pre-Trial Hearing Motion.

An Appeal from the Circuit Court in and for Lee County, Robert Joseph Branning, Judge, Case No. 362016CF000455000ACH

**Attorneys and Law Firms**

Blair Allen, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida, for Appellant

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James Uthmeier, Attorney General, Jeffrey Paul DeSousa, Acting Solicitor General, and Christina Pacheco, Senior Assistant Attorney General, Tallahassee, Florida, for Appellee

**Opinion**

PER CURIAM.

***669** The appellant, Joseph Zieler, was sentenced to death for the 1990 first-degree murders of R.C. and L.S. in Lee County. Zieler was unknown to investigators of the double homicide until 2016, when his DNA was entered into the Combined DNA Index System (CODIS) and triggered an alert. This is Zieler's direct appeal. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. As we explain, we affirm Zieler's convictions and sentences.

## BACKGROUND

### Events Surrounding the Murders

Jan C. lived in a condominium in Cape Coral with her daughter, 11-year-old R.C., and a friend/colleague, 32-year-old L.S. L.S. had recently moved into a spare bedroom in the condominium to share living expenses. On the evening of May 9, 1990, Jan went to her boyfriend's home to watch a basketball game on television. L.S. and R.C. encouraged her to do so while they remained at home. Both were in their beds when Jan left.

Jan, who had to get up early the next morning for work at a local hospital, had intended to return home after the game concluded. However, she fell asleep and did not wake up until 4 a.m. Jan then rushed home to get ready for work, and upon arrival, discovered that the front door that had been locked only at the deadbolt was also locked at the broken door handle. When the broken door handle was locked, it prevented entry from the outside.

Jan did not immediately sense that there was a problem; instead, she thought that L.S. probably forgot about the broken door handle and mistakenly locked it before going to bed. Jan then walked around the unit to the patio and discovered that the sliding glass door was open, and the vertical blinds were blowing out the door.

After Jan entered the previously organized unit, she began to notice signs of disarray. She went upstairs and first reached the door of L.S.'s room where she saw L.S.'s nude body on the bed. When she called out to L.S., she did not get a response. Jan raced to the other bedroom and found R.C. face down on the floor at ***670** the foot of the bed. R.C.'s legs were spread apart, a vibrator was on the floor between her legs, and a pillow was located underneath her stomach. Jan called 911 as she began to administer CPR to R.C. As Jan performed CPR on R.C., she observed nasal congestion that suggested to her that R.C. had been crying a lot. Jan heard R.C.'s lungs aspirate.

When law enforcement arrived, evidence indicated that an intruder entered the condominium, attacked, sexually battered, and suffocated both victims, and ransacked the unit.

L.S. was found lying in her bed on her right side with a pillow partially covering her head. She sustained extreme injuries to her anal cavity and significant bleeding. There were scratches on her body, and a broken fingernail on her hand appeared to be a defensive wound. An open pornographic magazine was found on her bed. Injuries to the mucosa of her lips and the presence of a pillow suggested that she may have been smothered to death.

The search of L.S.'s room revealed an empty wallet with items missing, and an empty watch box that previously contained a watch that L.S. recently bought as a present. The watch was never located.

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R.C. had bruising and scrapes on her cheekbones and her lips were purple, which indicated that she had been suffocated. There was significant bleeding from her vaginal area. She had a cut in the middle of her back, possibly caused by being dragged across sharp wood at the foot of the bed. R.C. also had an abrasion on her left thigh which was likely caused when her underwear was ripped off. A pair of ripped underwear was found in the room. R.C.'s wounds indicated that there was a struggle before her death.

**The Autopsies**

Medical examiner testimony indicated that both victims died as a result of asphyxiation. The bodies of both victims showed signs of a struggle and signs of sexual battery. L.S. suffered extreme anal injuries and bleeding, consistent with an object penetrating her anus. R.C. suffered injuries to her vagina that caused significant bleeding and were the result of penetration by an object. The penetration of L.S. and R.C. occurred contemporaneously with their deaths, but the medical examiner was unable to determine with certainty whether penetration occurred before or after their deaths. However, the initial lead detective testified that in his experience, based on the amount of bleeding from the anal cavity of L.S. and the vaginal area of R.C., they were likely both alive when they were penetrated.

Various items of evidence including genital swabbings and hair evidence were obtained from the victims' bodies.

**DNA Evidence**

During the investigation, DNA testing excluded many persons of interest. Evidence submitted for DNA testing in 1990 revealed the presence of sperm cells in the genital gauze swabbing, vaginal slides, and anal slides obtained from R.C., the genital gauze swabbing obtained from L.S., and a pillowcase and bedsheet that were found in the bedroom with R.C.

The bedsheet, the pillowcase, and the genital swabbing from R.C. all tested positive for semen in a sufficient quantity to develop a DNA profile. These items were first tested using RFLP testing in 1990, then they were sent for additional testing in 2000 and again in 2012 due to advancements in DNA technology.

RFLP DNA testing performed on the pillowcase and on the genital swabbing from R.C. yielded DNA profiles that were ***671** consistent with one another. The sample size from the genital swab indicated that the semen was deposited onto R.C. as opposed to being transferred onto her. At the time, the results of these tests were not entered into CODIS, which only accepts STR DNA test results. The genital swabbing obtained from L.S. and the anal swabs obtained from R.C. were insufficient for further testing.

STR DNA testing was conducted in 2000. The genital swabbing obtained from R.C. and the pillowcase retrieved from R.C.'s bedroom yielded partial DNA profiles, and a cutting from the bedsheet yielded a complete DNA profile. The three DNA profiles were consistent with one another. The profile from the bedsheet was entered into CODIS.

In 2008, STR DNA testing was conducted on hairs obtained from L.S.'s body. Among several hairs and debris or fibers, the analyst found four hairs suitable for DNA testing. Two of the hairs were very light in color and yielded no DNA. The other two hairs were darker in color and yielded partial DNA profiles that were consistent with one another. Each of the four hairs was less than 15 millimeters long and, due to the small size, completely consumed during the DNA testing.

In 2012, in response to further advancements in DNA analysis, the bedsheet was resubmitted for STR DNA testing. The results revealed a complete DNA profile that was consistent with the profile obtained in 2000. The profile was entered into CODIS.

In 2016, law enforcement received a CODIS hit, or lead, in the L.S. and R.C. double homicide case. Zieler's DNA, obtained as a DNA sample in an unrelated case, was determined to be a match to DNA obtained from the bodies of L.S. and R.C. and the crime scene.

DNA analysts testified that when comparing the DNA obtained from R.C.'s bedsheet to Zieler's DNA profile, one would expect to see that profile in one in 83 quintillion people. As to the comparison between the DNA obtained from R.C.'s pillowcase and Zieler's DNA profile, one would expect to see that profile in one in 450 million people. The statistics were one in 16 million with respect to the hair obtained from the body of L.S., and one in 360,000 with respect to the genital swabbing from R.C.

**Zieler Identified as a Suspect and Interviewed by Detectives**

Once Zieler was identified as a suspect in the murders, detectives conducted an interview during which he was described as "nervous" and "evasive." Zieler stated that he could not make decisions for himself and that he could not remember anything due to a head injury he sustained in an accident. When shown photographs of L.S. and R.C., Zieler denied having seen either of them before.

After Zieler's interview concluded and an officer offered to get him a soda, Zieler said, "It'll probably be the last one I ever get." Before the interview, no one had mentioned to Zieler that he was a suspect in the murders, and Zieler had only been identified as a suspect via the CODIS hit the day before.

In contrast to the memory challenges Zieler asserted during the September 2016 interview, a detective testified at trial that following Zieler's arrest on an unrelated charge in August 2016, Zieler demonstrated good memory and gave very detailed responses to all questions. During that interview, Zieler discussed how he was raised by his parents, and he specifically recalled an event that occurred in 1991. He explained that he had been in a relationship with his girlfriend Bonnie for 25 years ***672** and that he had previously worked in a boatyard until he suffered an injury.

Similar to the testimony from the detective, the trial testimony of Zieler's long-time partner, Bonnie, also contradicted Zieler's purported significant memory loss. She also stated that over the years, Zieler vaguely referred to his past and described himself without explanation as "dirty." Additionally, she recalled that when having intercourse with Zieler, he preferred to place a pillow underneath her pelvis.

**Charges Filed**

In addition to the indictments for first-degree murder, Zieler was initially charged with sexual battery on a child under 12 years of age, sexual battery with a deadly weapon or great force, and first-degree burglary. The sexual battery and burglary counts were dismissed in 2022. However, evidence of sexual battery as to both victims and of the burglary was introduced during the guilt phase and relied on by the State during the penalty phase as proof of aggravating factors.

**Zieler's First Jury Selection and the Subsequent Amendment to the Statute Requiring Jury Unanimity in Sentencing**

Zieler's first jury selection lasted from February 27 to March 2, 2023, and it ended with the prospective jurors being dismissed because they were given an incorrect statement of the law as it stood at the time of the murders in 1990. The jurors were incorrectly told that if convicted, Zieler would be subject to a minimum sentence of life imprisonment without the possibility of parole instead of life imprisonment with the possibility of parole after 25 years.

Before Zieler's trial began anew in May 2023, the Legislature amended the statute governing capital sentencing in Florida, set forth in section 921.141, Florida Statutes. The amendment changed the then-existing requirement of jury unanimity in capital sentencing to allow a judge to impose a sentence of death upon the recommendation of eight or more jurors. *See* ch. 2023-23, § 1, Laws of Fla. (amending § 921.141(2)(c), Fla. Stat.); § 921.141(2)(c), Fla. Stat. (2023).

**Guilt Phase**

Zieler's new jury selection took place May 8-11, 2023, followed by the guilt phase May 15-18, 2023. At the conclusion of the State's case-in-chief, Zieler was the only defense witness. He maintained his innocence and asserted that he was in Maryland at the time of the murders. Before trial, he sent letters to the state attorney's office stating that he was in jail at the time of the murders. However, the prosecutor confronted Zieler with evidence that the state of Maryland certified that there was no record of Zieler ever being arrested there.

Zieler also claimed that his DNA could only have been in the condominium where the murders occurred if, in 1989, he had sex with R.C.'s mother or her friend Leeann. Zieler also admitted to sending letters to R.C.'s family, in which he made the same allegation. The State called R.C.'s mother in rebuttal, who denied ever meeting or having any contact with Zieler.

The jury convicted Zieler of the first-degree murders of R.C. and L.S.

**Penalty Phase**

The State and the defense presented testimony and other evidence during the penalty phase. The State sought to prove four aggravating factors: (1) Zieler was previously convicted of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of a burglary; (3) the capital felony was especially heinous, atrocious, or cruel ***673** (HAC); and (4) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP).

To prove the prior violent felony aggravating factor, the State relied on evidence of the contemporaneous murders of R.C. and L.S., as well as a stipulation that Zieler was previously convicted of resisting an officer with violence and felony battery. To set forth a factual basis for the resisting with violence conviction, the State also presented a portion of the offense report detailing the officer/victim's statement.

To prove the aggravating factor that the capital felony was committed while Zieler was engaged in the commission of a burglary, the State relied on evidence of the condition of the condominium as observed by investigators and Jan, including descriptions of missing property.

To prove the CCP aggravating factor, the State referred to the testimony of the medical examiner who testified that deaths through asphyxia by suffocation take three to five minutes to occur, before which there is a 60- to 70-second period of loss of consciousness.

To prove the HAC aggravating factor, the State referred to the testimony of the medical examiner who testified that the cause of death for one victim was asphyxia by suffocation and that the cause of death for the other victim was asphyxia suggestive of suffocation. The State discussed the various physical injuries suffered and the evidence that both victims struggled and resisted being attacked.

The State also presented victim impact evidence on behalf of L.S. and R.C.

The defense presented the testimony of a forensic psychologist and a neurologist. Dr. Julie Harper, a clinical and professional psychologist who works as a forensic psychologist, testified based on her review of the records that as a child, Zieler showed symptoms of what is now diagnosed as ADHD.

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Additionally, Dr. Harper testified regarding Zieler's recollections of his unstable childhood, which included Zieler being verbally and physically abused, and Zieler witnessing his father physically abuse his mother and brothers. Dr. Harper concluded that Zieler's unstable home life contributed to his history of low self-esteem and depression. Zieler also indicated to Dr. Harper that he had been sexually abused as a child.

Dr. Harper noted Zieler's recall of a childhood memory where he slipped on the first day of school and injured his head, "which [Zieler] feels impaired his concentration and ability to focus during school." She also testified regarding her review of Zieler's hospital and disability records documenting a vehicle accident-related closed head injury in 1998 and another accident-related head injury in 2014. She opined that the 1998 accident particularly affected Zieler's memory and ability to carry out activities of daily living.

Dr. Harper administered to Zieler an Inventory of Legal Knowledge and testified that there was no evidence that Zieler was malingering. She also administered the Wechsler Adult Intelligence Scale, fourth edition (WAIS-IV), and determined that Zieler has a low average overall I.Q. score.

Zieler's performance on the Kaplan Baycrest Neurocognitive Assessment, also administered by Dr. Harper, demonstrated adequate ability in attention and concentration and average immediate recall. Zieler demonstrated delayed recall and recognition memory, as well as difficulty with reasoning, conceptual shifting, spatial processing, and the verbal recall aspect of verbal fluency.

***674** Dr. Harper diagnosed Zieler, who was previously diagnosed with adjustment disorder, with major depressive disorder recurrent and mild neurocognitive disorder. She indicated that Zieler has a tremor and that the tremor and Zieler's difficulties in verbal fluency are symptoms consistent with a diagnosis of Parkinson's disease.

Dr. Mark Rubino, a neurologist, testified that Zieler does not have Parkinson's disease, but he has Parkinsonism, which differs from Parkinson's disease in that it does not respond to Parkinson's treatment.

Dr. Rubino also reviewed hospital and disability records regarding Zieler's 1998 and 2014 accidents and noted that after the 1998 accident, Zieler began displaying symptoms typical of those caused by a head injury. Dr. Rubino also testified to Zieler's account of falling and hitting his head at school, stating, "I don't think [Zieler] really remembers [any effects from the fall], other than he said he didn't do very well after that."

Dr. Rubino administered a PET scan and the Montreal Cognitive Assessment. He testified that the PET scan results indicated low metabolic activity in Zieler's brain, and he opined that Zieler's score on the Montreal Cognitive Assessment indicated that Zieler is "very impaired."

Dr. Rubino suggested that Zieler's PET scan results could be indicative of a concussion, a brain injury, or frontotemporal dementia.

During rebuttal, the State presented the testimony of two psychologists. Dr. Karim Yamout testified to administering to Zieler at least 20 cognitive tests. The results of six tests designed to detect malingering did not reveal malingering by Zieler. However, Dr. Yamout evaluated the reliability of Zieler's self-reports via a symptom validity test, which evaluated whether Zieler was reporting in a valid manner. Zieler failed the test, which indicated that Dr. Yamout could not assume at face value the accuracy of anything Zieler claimed related to his mental disorders.

Dr. Yamout concluded that Zieler's memory is not impaired, he does not have dementia, his intellect falls in the low average to average range, and his I.Q. score is in the normal range. Dr. Yamout diagnosed Zieler with mild neurocognitive impairment, similar to Dr. Harper's diagnosis of minor neurocognitive disorder, but said that this diagnosis would not cause a person to be disabled. Based on the evidence, Dr. Yamout opined that Zieler did not have a traumatic brain injury.

Dr. Keegan Culver, a psychologist, administered to Zieler the Minnesota Multiphasic Personality Inventory. However, the test was invalidated because Zieler "endorsed so many atypical, nonrealistic symptoms that it invalidated the entire protocol." Zieler also admitted to "play[ing] up my head injury when it suits my situation." Zieler denied being actively anxious or depressed but was taking a typical antidepressant at the time.

**Jury Recommendation, *Spencer* Hearing, and Sentencing**

At the conclusion of the two-day penalty phase, the jury recommended by a vote of 10-2 that Zieler be sentenced to death for each murder.

The State and the defense submitted sentencing memoranda but neither presented additional evidence at the *Spencer*[1] hearing. However, Zieler testified again at the *Spencer* hearing and denied committing the murders.

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

Upon determining that sufficient aggravating factors existed to impose a sentence of death for each murder and that the ***675** aggravating factors outweighed the mitigating circumstances found to exist, the trial court sentenced Zieler to death for the murders of R.C. and L.S. The court found that each of the four aggravating factors argued by the State applied to both murders: (1) Zieler was previously convicted of a felony involving the use or threat of violence to the person (great weight); (2) the capital felony was committed while the defendant was engaged in the commission of a burglary (great weight); (3) HAC (great weight); and (4) CCP (great weight).

The trial court also considered 42 nonstatutory mitigating circumstances, finding the existence of and affording weight to 36 of them.[2] The court rejected three statutory ***676** mitigating circumstances.[3] This direct appeal of Zieler's convictions and sentences follows.

2 The trial court considered the following 42 nonstatutory mitigating circumstances and assigned weight as indicated: (1) Zieler's age (61 years) (minimal weight); (2) Zieler suffers from anxiety (minimal weight); (3) Zieler suffers from symptoms of Parkinson's disease, including a neurocognitive disorder, tremors, memory loss, and head jerking (minimal weight); (4) Zieler sustained a traumatic closed-head injury as a result of a severe motorcycle accident (moderate weight); (5) Zieler sustained a right leg fracture and a "degloving" injury to his foot (established but no weight); (6) Zieler has a neurodegenerative disorder, manifesting in mildly reduced uptake in the bilateral frontal lobes, which raises the possibility of frontotemporal dementia per FDG/PET scan (minimal weight); (7) Zieler suffers from vascular disease (established but no weight); (8) Zieler has a history of traumatic brain injury (minimal weight and duplicative with other nonstatutory mitigating circumstances); (9) Zieler has been diagnosed with cognitive impairment, manifesting as a borderline score on processing speed (minimal weight); (10) Zieler suffered from a heart attack and stent surgery (established but no weight); (11) Zieler has high blood pressure (established but no weight); (12) Zieler was diagnosed with adjustment disorder with a depressed mood (minimal weight); (13) Zieler was diagnosed with an amnestic disorder (minimal weight); (14) Zieler has strengths in testing, with variable performance (minimal weight); (15) Zieler exhibits significant weakness in conceptual shifting (minimal weight); (16) Zieler falls in the low average to average range of intellectual disability (minimal weight); (17) Zieler has experienced episodic depression throughout his life and suffers from a major depressive disorder (not established; no weight); (18) Zieler suffers from adaptive functioning deficits (established but no weight); (19) Zieler had symptoms of inattention during middle school, which resulted in poor grades (established but no weight); (20) Zieler was never referred for remedial services, retained, or tested for services by the school system for academic assistance (partly established but no weight); (21) Zieler had good attendance at school (partly established but no weight); (22) Zieler did not graduate high school and had a 10th grade education (established but no weight); (23) Zieler was exposed to drugs at an early age and was smoking marijuana when he was nine years old (established but no weight); (24) Zieler sustained head trauma as a child when he slipped on ice, which resulted in a scar and a permanent lump on the back of his head (minimal weight); (25) Zieler has witnessed domestic violence between his father and his mother (minimal weight); (26) Zieler was physically and emotionally neglected by his parents as a child growing up (minimal weight); (27) Zieler was

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physically and verbally abused by his father (minimal weight); (28) Zieler witnessed the physical and verbal abuse of his brothers by his father (minimal weight); (29) Zieler often sought refuge at the home of his maternal grandmother after school to avoid his father's abuse (minimal weight); (30) Zieler's father relocated the family to an Illinois town that was farther away from his grandmother, preventing Zieler from going to her house and avoiding his abusive home environment (minimal weight); (31) Zieler is uncertain of his paternity and believes his uncle may be his biological father (not established); (32) Zieler never received grief counseling or other services after the loss of his maternal grandmother, mother, and other close relatives (minimal weight); (33) Zieler's father was fired from the Cape Coral Police Department for conduct unbecoming an officer after he admitted to burglarizing a restaurant (not established); (34) Zieler got married when he was 20 years old (not established; no weight); (35) Zieler became a father at 21 years of age when his eldest son was born (established but no weight); (36) Zieler was divorced when he was 23 years old, and Zieler was not allowed to see his son (not established; no weight); (37) Zieler held several jobs prior to his motorcycle accident, including working for a family-owned business, Goodwill Industries, Silco Industries, and Marine Concepts, and working with boats (minimal weight); (38) Zieler attempted to stop an armed gunman and called the police to protect his family (not established; no weight); (39) Zieler has low self-esteem (established but no weight); (40) Zieler told Bonnie not to worry about visitation to take the stress off of her (moderate weight); (41) Zieler cooperated with law enforcement and did not resist them (minimal weight); and (42) Zieler is capable of redemption (not established; no weight).

3 The trial court rejected the following statutory mitigating circumstances: (1) the capital felony was committed while Zieler was under the influence of extreme mental or emotional disturbance; (2) Zieler's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) Zieler's age at the time of the crime.

## ANALYSIS

### I. Fundamental Error

Zieler argues that after the original jury panel was dismissed, defense counsel failed to realize the urgency of resetting a new trial in light of the then-potential change to the statute requiring juries to unanimously recommend the death penalty. He maintains that defense counsel provided ineffective assistance of counsel resulting in fundamental error when his trial was held after the statutory jury unanimity requirement was eliminated. However, we proceed without further discussion, as Zieler's claim is not cognizable in this direct appeal. *See Steiger v. State*, 328 So. 3d 926, 932 (Fla. 2021) (stating that to raise and prevail on any unpreserved claim of error on direct appeal, the defendant must demonstrate fundamental error).

### II. Prosecutorial Comments

Zieler argues that during his second jury selection, the prosecutor made constitutionally impermissible comments to prospective jurors that diminished the jury's responsibility for its verdict. He argues that in doing so, the prosecutor violated the rule set forth in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). We review this question of law de novo. *See Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014). Moreover, the fundamental error standard applies because it was incumbent upon defense counsel to object again to comments made during the second jury selection that began anew more than two months after the first panel of jurors was dismissed entirely. We hold that there was no *Caldwell* violation.

Zieler's second jury selection began with instructions from the trial court in which the trial court explained that if the jury found at least one aggravating circumstance, it would be required to make a recommendation on sentencing. The court explained the weighing on which the recommendation must be based and that a vote of eight to four or greater would result in a recommendation of death. The jury's recommendation would be life imprisonment with the possibility of parole after 25 years if fewer than eight jurors determined that Zieler should be sentenced to death.

Zieler cites several but not all of the instances during individualized questioning where the prosecutor referred to the jury's duty to make a "recommendation." Indeed, the prosecutor consistently questioned similar to the following: "And will you give a fair chance to either the death penalty or the life without possibility of parole for 25 years as the jurors—as your ***677**

recommendation as a juror and as the jury's recommendation?"; "Do you appreciate that although you might make a death recommendation or you might make a possibility of parole—of life without parole for at least 25 years, the judge is actually the person who sentences the defendant?"; "And you feel comfortable with that recommendation?"

Additionally, Zieler highlights comments made to two prospective jurors that were ultimately seated on his jury: jurors 1221 and 1372. To prospective juror 1221, the prosecutor asked, "And you understand that what you're asked to do between those two options [of either death or life without the possibility of parole for 25 years] is a recommendation to the Court? ... And that the sentencing is actually done at the discretion of the Court?" To prospective juror 1372, the prosecutor asked, "Do you understand that that's a recommendation and really, the sentence is ultimately determined by the court?"

There is a significant distinction between what the prosecutor said in *Caldwell* and what was said in Zieler's case. In *Caldwell*, the United States Supreme Court reversed a death sentence and remanded the case for further proceedings because the prosecutor's penalty phase closing argument lessened the jurors' sense of their responsibility in determining sentencing by improperly assuring them that their decision was "automatically reviewable" by the state supreme court. *Caldwell*, 472 U.S. at 341, 105 S.Ct. 2633.

The comments that Zieler complains of—particularly their mention of a jury's recommendation—are substantively different from those in *Caldwell*. Unlike *Caldwell*, there was no mention of automatic appellate review by this Court that would have lessened jurors' sense of their responsibility with respect to Zieler's sentencing. *See Allen v. State*, 322 So. 3d 589, 597 (Fla. 2021) (concluding that a prosecutor's statement asking the jury to return a "recommendation" of death was not error "because the statement did not 'improperly describe[ ] the role assigned to the jury by local law' ") (alteration in original) (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994)). Importantly, "[u]nder the plain text of Florida's death penalty statute, a sentencing 'recommendation' is precisely what the penalty-phase jury provides." *Id.* at 597-98 (citing § 921.141(2), Fla. Stat. (2018)).

Moreover, to properly evaluate *Caldwell* claims, we must "look to the 'total trial scene,' including jury selection, the guilt phase of the trial, and the sentencing hearing, examining both the court's instructions and counsel's arguments to the jury." *Id.* at 600 (quoting *Barrientes v. Johnson*, 221 F.3d 741, 777 (5th Cir. 2000)). Here, the jury was told from the beginning of jury selection that it would be responsible for making a recommendation to the court. During the penalty phase, the jury heard evidence in both aggravation and mitigation, and it was instructed on four aggravating circumstances and 42 nonstatutory mitigating circumstances. Further, Zieler's jury received thorough instructions that explained, consistent with Florida law, its responsibility and the process for determining whether to recommend that Zieler receive life imprisonment with the possibility of parole in 25 years or the death penalty. As we observed in *Allen*:

> [T]he jury was properly informed as to its role in [the defendant's] sentencing, including that if the jury found [the defendant] guilty of first-degree premeditated murder, a separate penalty-phase trial would occur in which the jury's role would be to determine [the defendant's] eligibility for the death penalty and recommend the appropriate sentence.

***678** *Id.* As in *Allen*, significant jury selection discussion was "devoted to addressing the jury's role should the case proceed to a penalty phase, including the death qualification of the jury, and the trial court properly instructed the jury regarding its role during the penalty phase." *Id.*

Thus, Zieler is not entitled to relief.

### III. Admission of Hair Evidence

Zieler also argues that the absence of evidence in four paper folds contained in State's exhibit 110 is evidence of probable tampering that should have prevented the admission of the hair DNA evidence linking him to L.S.'s murder. Before trial, Zieler filed a motion in limine seeking to exclude hairs and related DNA evidence that linked him to the body of L.S., contending that

other hairs had been collected but "were either lost or mishandled by the investigating agency and not subject to DNA testing." The trial court denied the motion, noting that the matter was suitable for cross-examination.

The admissibility of evidence is within the discretion of the trial court, and this Court reviews the trial court's ruling for an abuse of discretion. *See Armstrong v. State*, 73 So. 3d 155, 171 (Fla. 2011) (citing *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000)).

Additionally, "[r]elevant physical evidence is admissible unless there is an indication of probable tampering." *Peek v. State*, 395 So. 2d 492, 495 (Fla. 1981). The mere possibility of tampering is insufficient to shift the burden to the State to rebut any evidence of tampering. *See Murray v. State*, 838 So. 2d 1073, 1082-83, 1082 n.8 (Fla. 2002). Here, Zieler did not meet his burden of demonstrating probable tampering, and we conclude that the trial court did not abuse its discretion by admitting the hair DNA evidence over Zieler's objection.

Moreover, any potential error is harmless given the other physical evidence in this case. The evidence found at the condominium demonstrated that in a single series of events, L.S. and R.C. were sexually battered and murdered in their bedrooms. Substantial and conclusive DNA evidence linked him to the murder and sexual battery of R.C. Thus, we conclude beyond a reasonable doubt that excluding the challenged evidence would not have affected Zieler's guilty verdicts. *See State v. DiGuilio*, 491 So. 2d 1129, 1135, 1138-39 (Fla. 1986).

**IV. Sentencing Order**

Zieler argues that the trial court made an error in the sentencing order that may have affected the weight accorded to the jury's recommendation that he be sentenced to death. However, the trial court did not err.

In section G, paragraph 43 of its sentencing order, the trial court said the following:

> Defendant submitted no statutory mitigating circumstances under Fla. Stat. 921.141(7). The jury found that no mitigating circumstances had been proven by a greater weight of the evidence. However, the Court has independently considered some statutory mitigating factors that may apply in this case. Moreover, the Court considered the possibility that other factors may exist in the Defendant's character, record, or background that would mitigate against the imposition of the death penalty. Specifically, the Court has considered the following mitigating factors, beginning with the statutory mitigating factors under Fla. Stat. § 921.141(7) that may be applicable.

***679** Zieler claims the trial court's statement that "[t]he jury found that no mitigating circumstances had been proven by a greater weight of the evidence" constitutes reversible error. We conclude that this claim is meritless.

When viewed in context, the court's statement is not ambiguous, let alone erroneous. The statement appears between two sentences where the court specifically discusses *statutory* mitigating circumstances. The jury was not presented with any statutory mitigating circumstances, only the 42 nonstatutory mitigating circumstances, which means that it did not have the opportunity to find the existence of any statutory mitigating circumstances by a greater weight of the evidence. Moreover, a later portion (paragraph 53) of the sentencing order states as follows: "No statutory mitigating factors were raised or established, but the Court considered the non-statutory mitigating factors presented by Defendant. Out of 42 enumerated non-statutory mitigating factors, the Court found that 36 have been established."

Moreover, any error here is harmless because the record is clear that the trial court independently considered 42 nonstatutory mitigating circumstances, found 36 of them, and assigned varying weights. The court also stated that it gave great weight to the jury's recommendation "by a vote of ten to two ... that the death penalty be imposed." The court ultimately found that death was warranted upon concluding that the aggravating factors it described as "horrific" "greatly outweigh[ed] the comparatively insignificant mitigating factors."

**V. Constitutionality of Florida's Death Penalty**

Zieler also challenges the facial constitutionality of Florida's capital sentencing scheme. In particular, he argues that the current death penalty violates the Eighth Amendment due to Florida's elimination of comparative proportionality review, the elimination of the statutory requirement that a jury unanimously recommend a death sentence, and a lack of a sufficient narrowing of the class of individuals subject to the death penalty. We reject Zieler's argument as these factors, neither individually nor cumulatively, render Florida's capital sentencing scheme unconstitutional.

"We have repeatedly rejected the argument that the death-penalty statute violates the Eighth Amendment because it fails to sufficiently narrow the class of murderers eligible for the death penalty." *Wells v. State*, 364 So. 3d 1005, 1015 (Fla. 2023) (rejecting a claim of insufficient narrowing after the addition of a sixteenth statutory aggravating factor). Moreover, we have concluded that the "abandonment of comparative proportionality review [in *Lawrence v. State*, 308 So. 3d 544, 548-50 (Fla. 2020)] does not alter our analysis." *Id.*

Nor does the absence of a requirement that a jury unanimously recommend death further Zieler's argument of unconstitutionality. "[N]either the Eighth Amendment nor any provision in our state constitution requires jury sentencing in capital cases, or a unanimous jury recommendation, or indeed any jury recommendation at all." *Herard v. State*, 390 So. 3d 610, 622-23 (Fla. 2024) (citing *State v. Poole*, 297 So. 3d 487, 503-05 (Fla. 2020)).

**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 ***680** 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 this 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").

As to Zieler's sentences of death involving the contemporaneous first-degree murders of the two victims, where the aggravating factors in this case included the finding that Zieler "was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person,"[4] there is no dispute that his sentences satisfy the constitutional requirements we explained in *Poole*.

4 § 921.141(6)(b), Fla. Stat.

**VII. Sufficiency of the Evidence**

Although Zieler does not challenge the sufficiency of the evidence supporting his convictions, this Court has an independent obligation to review the record to determine whether there is sufficient evidence to support Zieler's murder convictions. *See Miller v. State*, 379 So. 3d 1109, 1120, 1129 (Fla. 2024). "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001) (citing *Banks v. State*, 732 So. 2d 1065, 1067 n.5 (Fla. 1999)). Competent, substantial evidence supports Zieler's convictions.

Zieler was not a suspect until 26 years after the murders, when his DNA sample was obtained in an unrelated case. That sample led to a CODIS hit, and upon further testing, Zieler's DNA profile was determined to be a one-in-83 quintillion match to the DNA samples obtained from R.C.'s bedsheet, a one-in-450 million match to the pillowcase that was located under R.C., a one-in-16 million match to hairs obtained from the body of L.S., and a one-in-360,000 match to the genital swabbing from R.C. A DNA analyst testified that the DNA obtained from the genital swabbing of R.C. could not have been transferred onto her. Zieler attempted to explain the presence of his DNA at the crime scene by stating that he had visited the condominium the year before, but R.C.'s mother rebutted this claim. Additionally, Zieler's claim that he was in jail in another state at the time of the murders was shown to be false.

**CONCLUSION**

For these reasons, we affirm Zieler's convictions and sentences of death.

It is so ordered.

MUÑIZ, C.J., and COURIEL, GROSSHANS, FRANCIS, and SASSO, JJ., concur.

TANENBAUM, J., concurs with an opinion.

LABARGA, J., concurs in result with an opinion.

TANENBAUM, J., concurring.

There simply cannot be a cognizable, "unpreserved" claim on appeal from a judgment that a criminal defendant received ineffective assistance of trial counsel, even if that ineffectiveness purports to appear "on the face of the record." *See* ***681** *Steiger v. State*, 328 So. 3d 926, 928, 932 (Fla. 2021). As far back as writ-of-error days, this court has said that the purpose of direct review is to consider "the different *rulings made by a trial court*, whether upon the pleadings or during the trial of the action," it being "incumbent" on the appellant "to show that the *different rulings of the trial court*, or certain of them, are so infected with error as to call for and compel a reversal of the judgment." *McKinnon v. Lewis*, 60 Fla. 125, 53 So. 940, 942 (1910) (emphases supplied).

An unpreserved claim regarding counsel's ineffectiveness necessarily is unrelated to any opportunity for a trial court ruling. Notably, there could be any number of tactical reasons, known only to trial counsel, for the purported action or inaction by counsel. It is unclear, then, where in a proceeding a trial court might intervene to head off or correct a decision made by trial counsel. It is a misnomer to call any ineffectiveness "error" in the absence of any clear opportunity for the trial court to have acted. This court's suggestion in *Steiger*—that there could possibly be consideration of an unpreserved claim of ineffectiveness of counsel in an appeal—makes no sense and should be revisited.

In this appeal, I agree with the majority's full analysis supporting affirmance, save for its reliance on *Steiger*. On that excepted point, I instead would reject the argument as non-cognizable on direct review.

LABARGA, J., concurring in result.

I fully agree that competent, substantial evidence supports Zieler's convictions for the first-degree murders of R.C. and L.S.

I concur in result, however, because I continue to adhere to the views expressed in my dissenting opinion in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) (abandoning this Court's decades-long practice of conducting comparative proportionality review in cases involving the direct appeal of a sentence of death).

**All Citations**

434 So.3d 666, 51 Fla. L. Weekly S94

**End of Document**

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# Appendix B

2026 WL 1745851
Only the Westlaw citation is currently available.
Supreme Court of Florida.

Joseph ZIELER, Appellant(s)

v.

STATE of Florida, Appellee(s)

SC2023-1003

|

JUNE 17, 2026

Lower Tribunal No(s).: 362016CF000455000ACH

**Opinion**

***1** Appellant's Motion for Rehearing is hereby denied.

MUÑIZ, C.J., and LABARGA, COURIEL, GROSSHANS, FRANCIS, SASSO, and TANENBAUM, JJ., concur.

**All Citations**

Not Reported in So. Rptr., 2026 WL 1745851

**End of Document**

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# Appendix C

West's Florida Statutes Annotated
Title XLVII. Criminal Procedure and Corrections (Chapters 900-999) (Refs & Annos)
Chapter 921. Sentence (Refs & Annos)

West's F.S.A. § 921.141

# 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

Effective: October 1, 2025 to September 30, 2026
Currentness

**(1) Separate proceedings on issue of penalty.--**Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating factors enumerated in subsection (6) and for which notice has been provided pursuant to s. 782.04(1)(b) or mitigating circumstances enumerated in subsection (7). Any such evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

**(2) Findings and recommended sentence by the jury.--**This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

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a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If at least eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of death. If fewer than eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of life imprisonment without the possibility of parole.

**(3) Imposition of sentence of life imprisonment or death.--**

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence of life.

2. Death, and at least eight jurors recommend a sentence of death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury. The court may impose a sentence of death only if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt.

(b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

**(4) Order of the court in support of sentence of life imprisonment or death.--**In each case in which the court imposes a sentence of life imprisonment without the possibility of parole or death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence. The court must include in its written order the reasons for not accepting the jury's recommended sentence, if applicable. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082.

**(5) Review of judgment and sentence.--**The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court.

# Appendix D

IN THE SUPREME COURT OF FLORIDA

| | | | |
|---|---|---|---|
| JOSEPH ZIELER, | : | | |
| Appellant, | : | | |
| vs. | : | Case No. | SC23-1003 |
| STATE OF FLORIDA, | : | | |
| Appellee. | : | | |

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

# INITIAL BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER 0236365
Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

STATEMENT OF THE CASE

After a 2016 CODIS DNA hit, Joseph Zieler was arrested, charged, and eventually tried and convicted for the 1990 murders of L.S. and R.C. in Cape Coral, Lee County, Florida. The state sought the death penalty (R86-87; 326-27). After a number of continuances, jury selection began on February 27, 2023 before Circuit Judge Robert Branning. At that time, Florida's death penalty statute still required a unanimous jury verdict to impose the death penalty, but in the wake of perceived public outcry and political outcry after the Parkland mass shooter Nikolas Cruz received a life sentence on a 9-3 jury vote, bills had already been filed in both houses of the Florida legislature - - with the highly publicized support of the Governor - - to amend the statute to allow the death penalty to be imposed upon the recommendation of 8 or more jurors. [See p. 27, 35, 133-135, infra].

Jury selection for Zieler's trial proceeded for three full days (R2629-3807). Then, during a bench conference on the fourth day, March 2, 2023, the two defense attorneys, three prosecutors, and the trial judge realized they had "a much bigger problem" (T3859; see 3859-72, 2877-79). Apparently - - even though a pretrial plea

offer had been discussed in the context of parole being available after 25 years (R2154-55, 2652-54), and even though they were all aware two weeks before jury selection that it was a 1990 case (and therefore the child victim aggravator could not be used)(R4316) - - "we all forgot this is a 1990 case" (T3859). As a result, throughout the three days of jury selection, jurors had been repeatedly instructed by the judge and informed by the prosecutors and the defense lawyers that a sentence of life imprisonment meant that a defendant would never be released and that parole is unavailable. There were mea culpas all around - - "We're just, if not, more guilty", "It's . . . partially our fault." [defense counsel Shirley]; "It's our screw-up" [defense counsel Hollander]; "I apologize personally. . . for not having caught that", "[W]e let you down. We let ourselves down. . ." [prosecutor Feinberg]; "I will agree, I've got some culpability in this" [Judge Branning] (T3860-61, 3863).

Prosecutor Thornburg expressed that there were really only two things that could be done; either re-instruct the jury on the law and allow further voir dire examination, or "scrap the jury and start over" (T3863-64). The prosecutor further stated that "whichever of these two options the Defense wants I think is the one we have to

go with" (T3864). The defense would have to agree and Mr. Zieler would have to be queried (T3965). Defense counsel moved to strike the jury panel; "If you try and fix it, the jury is going to either think that we don't know what we're doing or we've been lying to them, and that's not acceptable" (T3860-61, 3864-65). Judge Branning agreed that "the panel has to be released based on this grievous oversight" (T3865).

The judge said "Bring him up" and Mr. Zieler joined the bench conference (T3865). The judge told Zieler "I didn't want to proceed without you understanding the consequences of this"; it meant that the panel would be discharged and "we will start this over" in May or June, depending on the calendar (T3866). Zieler began talking about a change of venue motion he wanted filed, and when the judge redirected his attention to the matter at hand he agreed to striking the panel (T3866-67).

The state brought up whether there was a possibility of starting next week instead of May or June; all three prosecutors could have a clear schedule and be available either way (T3868, 3871). If was defense counsel who had a problem with next week because there would be insufficient time to review the juror

questionnaires (T3871). If it were moved to May, there would obviously be sufficient time to get the mitigation together "so we can go right straight from the guilt phase to the penalty phase without skipping a beat" (T3870). Judge Branning set the trial for the first Monday in May (T3871-72); then assembled the jury panel and discharged them (T3877-79).

On April 13, 2023, the amendment allowing the death penalty to be imposed based on a non-unanimous vote of 8 or more jurors was passed by the Florida Legislature. It was signed into law, effective immediately, by Governor DeSantis on April 20. On May 3 the defense filed a motion to declare the amended statute unconstitutional on multiple grounds (R1393-96). In a hearing the next day defense counsel argued that application of the new 8-4 provision to Zieler would violate the constitutional guarantee against ex post facto laws; the trial judge disagreed based on Dobbert v. Florida, 432 U.S. 282 (1977)(R2176-91, 1405-07).

The second jury selection proceeding commenced on May 8, 2023. A jury was selected and sworn. The first phase of the trial resulted in verdicts of guilty of first degree murder on both counts (R1541; T2204-06). The penalty phase was conducted under the

newly enacted 8-4 statute, and it resulted (on each count) in a death verdict by a vote of 10-2 (R1536-39; T2612-17).

ISSUE VI

BEFORE THE DEATH PENALTY CAN BE IMPOSED THE SIXTH AND EIGHTH AMENDMENTS AND THE FLORIDA CONSTITUTION REQUIRE A UNANIMOUS JURY DETERMINATION THAT DEATH IS THE APPROPRIATE SENTENCE

At the outset, undersigned counsel for Mr. Zieler recognizes that this constitutional issue has been decided adversely to him by this Court in State v. Poole, 297 So.3d 487, 504 (Fla. 2020), and, according to Poole, by the U.S. Supreme Court in Spaziano. In Hurst v. State, 202 So.3d 40, 59 (Fla. 2016), in which this Court determined - - correctly in Zieler's view - - that the Sixth and Eighth Amendments and Article 1, section 22 of the Florida Constitution require unanimous jury agreement that death is the appropriate sentence, the Court said (on the Eighth Amendment issue) that the United States Supreme Court had not yet ruled on the question. However, less than four years later in State v. Poole, 297 So.3d 487, 504 (Fla. 2020), when the Court made a 180-degree turn and concluded that jury unanimity in the life-or-death decision was not required by any of those constitutional provisions, the Court said (on the Eighth Amendment issue), "The Supreme Court rejected

that exact same argument in Spaziano." 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.[59] 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 v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972), as would be expected if unanimity was at issue in Spaziano and/or Harris. Rather, the essential holding of those cases - - now overruled at least in significant part by Hurst v. Florida, 577 U.S. 92, 102 (2016) - - was that the Sixth Amendment is not violated when the death penalty is imposed by a judge rather than a jury, and the Eighth Amendment is not necessarily violated

[59] 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)(Sotomayer, J., dissenting from denial of certiorari). Alabama's has also been repealed (in 2017), though the repeal has not as yet been made retroactive.

every time a state administers its criminal laws differently than a majority of its sisters.

So, contrary to the Poole Court's observation, Spaziano did not address "the exact same argument" which is being raised in this appeal. But Zieler will concede that his Sixth and Eighth Amendment and state constitutional arguments were rejected in Poole, so he is raising them now to urge this Court to reconsider[60], and for preservation purposes especially in light of Ramos v. Louisiana, 590 U.S. __, 140 S.Ct 1390 (2020).

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

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[60] If Zieler is right about the actual holding in Spaziano (and Harris), the conformity clause of the Florida Constitution does not preclude reconsideration. See Smallwood v. State, 113 So.3d 730 (Fla. 2013)(to be automatically controlling, U.S. Supreme Court decision must be factually and legally on point).

is necessary for imposition of the death penalty." Then came Hurst v. State followed by 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 the United States Supreme 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 verdicts[61], 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 under-

[61] 10-2 in Oregon, 9-3 (later changed to 10-2) in Louisiana.

standing 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. These laws were purposely crafted in order to dilute the influence of minorities on Louisiana and Oregon juries. 140 S.Ct at 1393, 1401 and 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. 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 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).

A discussed in the last Point on Appeal, 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 this Court, have rejected defendants' arguments that this weighing process is governed by the "beyond a reasonable doubt" standard.[62] 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"[63] 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

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[62] 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 (!st. 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).

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

> 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.

This 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 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].[64] It is especially noteworthy that Justice Thomas meant "the moral judgment between life and death"; not a mere 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 com-

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[64] Justice Thomas was responding to Justice Breyer's dissent in Glossip, asserting that geography plays an important role in disparate death penalty outcomes. 576 U.S. at 918-20.

parison 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.' "

In light of the foregoing, and especially in light of Ramos v. Louisiana, the Sixth and Eighth Amendments and Article 1, section 22 of the Florida Constitution preclude the imposition of the death penalty based on a less-than-unanimous jury vote.

And, 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**.[65]

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, 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:

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

> "[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. 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).

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

Other 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, this 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 United States

Supreme 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."[66] 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 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 [see also Issue V, supra] which, especially after Ramos, is constitutionally invalid on its face.

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[66] Florida Standard Jury Instructions in Criminal Cases 7.11.

# Appendix E

Filing # 203289380 E-Filed 07/24/2024 09:54:02 PM

SC23-1003

# In the Supreme Court of Florida

JOSEPH ZIELER,
*Appellant,*

*v.*

STATE OF FLORIDA,
*Appellee.*

ON APPEAL FROM A FINAL JUDGMENT OF THE
CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
L.T. NO. 36-2016-CF-455

## ANSWER BRIEF ON THE MERITS

ASHLEY MOODY
*Attorney General*

HENRY C. WHITAKER (FBN1031175)
*Solicitor General*
JEFFREY PAUL DESOUSA (FBN110951)
*Chief Deputy Solicitor General*
CHRISTINA PACHECO (FBN71300)
*Senior Assistant Attorney General*
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
jeffrey.desousa@myfloridalegal.com
christina.pacheco@myfloridale-gal.com
capapp@myfloridalegal.com
jenna.hodges@myfloridalegal.com

*Counsel for State of Florida*

July 24, 2024

if "the sentencer fairly could conclude that [it] applies to *every* defendant eligible for the death penalty").[11]

Last, Zieler wrongly insists that a jury must unanimously recommend death. Init. Br. 109–17 (citing 8-4 provision of SB 450). This Court's precedents foreclose that claim. *See State v. Poole*, 297 So. 3d 487, 504–05 (Fla. 2020); *Lawrence*, 308 So. 3d at 552 (observing that Florida's 12-0 death-penalty statute, in effect between 2016 and 2023, "exceed[ed] what the federal and state constitutions require by mandating . . . that the jury's recommendation for death be unanimous"). The Supreme Court has said the same thing. *See Spaziano*, 468 U.S. at 457–65. In *Spaziano*, it approved an earlier version of Florida's death-penalty law that permitted a judge to override a jury's recommendation of life and impose death. *Id.* "[A] judge," the Court wrote, "may be vested with sole responsibility for imposing the penalty." *Id.* at 465. It follows that Florida complies with the Eighth

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[11] Florida's scheme greatly exceeds the protections a capital defendant would have received at the Framing, when death was automatic upon the jury's bare finding that the defendant committed murder. *McGautha v. California*, 402 U.S. 183, 197–98 (1971).

Amendment by offering capital defendants the still greater protection of a jury's supermajority recommendation of death.

Individually, then, Zieler's arguments amount to nothing. Even taking them together, Zieler has not shown cruel and unusual punishment because Florida's scheme incorporates the multiple safeguards described above. *Supra* at 61–62.

## VI. The Sixth Amendment does not require a unanimous death recommendation.

Zieler's other challenge to SB 450 retreads old ground, contending that both the Sixth Amendment and Article I, Section 22 of the Florida Constitution require a "unanimous jury determination that death is the appropriate sentence." Init. Br. 125. He acknowledges (*id.* at 127) that these arguments were "rejected in *Poole*" but "urge[s] this Court to reconsider" "in light of" *Ramos v. Louisiana*, 590 U.S. 83 (2020). It should decline that invitation.

In *Ramos*, the Supreme Court held that the constitutional right to a jury commands that "the verdict should be unanimous" as to "all the essential elements" of a crime. *Id.* at 92–93. And in *Hurst I*, the Supreme Court held that the existence of an aggravating circumstance is an element. 577 U.S. at 94, 102. But a capital jury's

recommendation of death is not an element. That was this Court's express holding just three years ago in *Poole*. There, the Court receded from the part of *Hurst II* that required a unanimous weighing determination and death recommendation. *Poole*, 297 So. 3d at 503–04, 508. As it explained, the Supreme Court's *Apprendi* and *Hurst* decisions interpreting the Sixth Amendment have held that any fact that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" is considered an "element" that must be found by the jury. *Id.* at 503 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). That includes the finding of an aggravator necessary to make a first-degree murder eligible for the death penalty. *Id.* at 501–03.

"Sentencing recommendations," however, "are neither elements nor facts." *Id.* at 504. Like the jury's weighing determination, a jury's recommendation of death is not a "purely factual determination"—it "is mostly a question of mercy." *Id.* at 503 (quoting *Kansas v. Carr*, 577 U.S. 108, 119 (2016)); *cf. Spaziano*, 468 U.S. at 465 (holding that the ultimate question of whether to impose death is not one the Constitution requires be decided by a jury), *overruled on other grounds by Hurst I*, 577 U.S. 92. Such a "discretionary judgment" "cannot be

analogized to an element of a crime," *Poole*, 297 So. 3d at 503, and need not be made by the jury. *Id.* at 504.

The Supreme Court confirmed that holding soon after in *McKinney v. Arizona*, 589 U.S. 139 (2020). Interpreting *Hurst I*, the Court explained that all the Sixth Amendment requires in a capital penalty phase is that the jury "find the aggravating circumstance that makes the defendant death eligible." *Id.* at 144. By contrast, a jury is "not constitutionally required . . . to make the ultimate sentencing decision within the relevant sentencing range. *Id.*

*Ramos* does nothing to alter that conclusion. It certainly does not purport to overrule *McKinney*, which was decided just two months prior. Indeed, the two cases are consistent. *Ramos* holds that the "elements" of an offense must be found unanimously by the jury, 590 U.S. at 92–93, while *Poole* and *McKinney* explain that the death recommendation is not an "element."[12]

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[12] Zieler offers no support for his assertion that Article I, Section 22 of the Florida Constitution requires a unanimous death recommendation, *see* Init. Br. 125–39, and thus has waived any argument that *Poole* was clearly erroneous in rejecting that theory. 297 So. 3d at 503–05. His Eighth Amendment jury-unanimity claim was discussed above. *Supra* at 66–67.

# Appendix F

Filing # 205750038 E-Filed 08/28/2024 12:12:40 PM

IN THE SUPREME COURT OF FLORIDA

JOSEPH ZIELER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. SC23-1003

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

# REPLY BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FL BAR NUMBER 0236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." Furman, 408 U.S. at 313 (White, J., concurring).

Aside from its "no one right way" observation, the state has little to say about Zieler's showing (p. 113-117 of his initial brief) that Florida has by far the weakest safeguards of any state or federal jurisdiction which allows capital punishment. And it's true that - - to risk a sports analogy - - if there were 29 major league teams[16], somebody's got to finish last. But to stretch the analogy further, Florida is now about fifteen games out of 28th place. Every other jurisdiction provides either proportionality review or jury unanimity, and many provide both. The state cites Spaziano v. Florida, 468 U.S. 447, 460 (1984)(in its Issue Five safeguards/Furman response) for the proposition that a judge, rather than a jury "may be vested with the sole responsibility for imposing the [death] penalty" [SB 66], and it cites McKinney v. Arizona, 589 U.S. 139 (2020)(in its Issue Six unanimity/Ramos[17] response) for the proposition that the

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[16] Representing 27 states, the federal government, and the U.S. military.

[17] Ramos v. Louisiana, 590 U.S. 83 (2020).

constitution does not require that the ultimate sentencing decision be made by a jury [SB 69]. While it is true the McKinney (in dicta)[18] 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 Espinosa 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

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[18] 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).

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 the state's argument in Issue Six that McKinney trumps Ramos (SB 69) doesn't hold water. But as to Issue Five, Zieler need not show that the Sixth and Eighth Amendments categorically require jury unanimity; he need only show that unanimity is a significant safeguard[19] whose abandonment in combination with the abandonment of many other safeguards,[20] renders the Florida scheme no longer capable of ensuring against the arbitrary infliction of death.

There are currently only two jurisdictions which fit McKinney's category of "states that leave the ultimate life-or-death decision to the judge" - - Nebraska (three-judge panel, who must unanimously agree in order to impose a death sentence) and Montana (which

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[19] See Zieler's initial brief, p. 109-11.

[20] See Justice Labarga's dissenting opinion in Lawrence v. State, 308 So.3d 544, 552-54 (Fla. 2020).

barely even has the death penalty).[21] Florida's scheme, from the standpoint of providing Furman-required safeguards, is much worse than either. Both Nebraska and Montana provide proportionality review on appeal (as does Alabama, the only state other than Florida which allows a death sentence to be imposed pursuant to a nonunanimous (there 10-2) jury vote). [See Zieler's initial brief, p. 114-16]. Moreover, the aggravating circumstances in those states are at least somewhat more adequate than Florida's in performing the constitutionally necessary function of genuinely narrowing death-eligibility.[22] Nebraska has nine aggravators and Montana ten (in contrast to Florida's sixteen). More importantly, it is much less true in Nebraska and Montana that nearly everyone convicted of first-degree murder starts off with at least one aggravator. Neither Nebraska nor Montana has anything resembling Florida's broad felony-murder aggravator, under which

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[21] Montana has two individuals on death row: Richard Allen Smith (sentenced in 1983) and William Jay Gollohon (sentenced in 1992). Montana has had only three executions in the last 49 years, the most recent one in 2006.

[22] Compare Fla.Stat.§921.141(6) with Neb.Rev.St. §29-2523 and MCA 46-18-303.

anyone convicted of a murder occurring during the course of a robbery, burglary, kidnapping, sexual battery, aggravated child abuse, arson, or a number of other enumerated offenses starts off with an aggravator (making them death-eligible right from the get-go). [Nebraska has no felony-murder aggravator at all, while Montana's statute contains only a single very specific such aggravator for aggravated kidnapping resulting in death]. Neither Nebraska nor Montana has the "cold, calculated, and premeditated" (CCP) aggravator or its equivalent, while in Florida CCP requires only slightly more time for reflection than does simple premeditation, and there is no bright-line rule for how much reflection will suffice. And while Nebraska has a "prior violent felony" aggravator, Montana - - again with a couple of very specific exceptions - - does not[23]. Neither Nebraska's nor Montana's statutes contain a child victim aggravator (with the sole exception being a Montana provision which applies only when a deliberate

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[23] Montana's statute contains aggravators for (1)(a)(ii) when the offender has previously been convicted of another deliberate homicide, and (4) when both the current and prior offenses involved sexual batteries, and serious bodily injury was inflicted during the course of each offense.

killing occurs during the course of a sexual assault and the victim is under 18), while Florida's statute provides an aggravator (and thus automatic death-eligibility) whenever "[t]he victim of the capital felony was a person less than 12 years of age."

In view of the state's acknowledgment that, to pass constitutional scrutiny, a state must administer the death penalty "in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not" [SB 61], Zieler has shown that Florida's current capital sentencing scheme - - at the eligibility stage (no genuine narrowing), the selection stage (no jury unanimity) and the appeal stage (no proportionality review, and no review at all - - as long as one

aggravator exists - - of whether death is the appropriate penalty)[24] - - utterly fails to comport with the Eighth Amendment's standards.

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[24] As was pointed out in Zieler's initial brief, p. 107-08, it used to be in Florida that death was presumptively inappropriate in single-aggravator cases, and could only be upheld when there was very little or nothing in mitigation. Now, in contrast, one aggravator makes a defendant death-eligible, and there is no appellate review of whether death is appropriate. The initial brief, p. 122 n.56, also points out that of the last 36 death penalties before this Court on direct appeal, 33 have been affirmed. It is now 36 out of 39. See Cox v . State, __ So.3d__ (Fla, July 11, 2024)[2024 WL 3364911]; Johnson v. State, __So.3d__ (Fla. July 11, 2024)[2024 WL 3364657]; Herard v. State, __ So.3d__ (Fla. July 3, 2024)[2024 WL 3281897]. Moreover, the three reversals - - Figueroa-Sanabria v. State, 366 So.3d 1035 (Fla. 2023)(new penalty trial); Mosley v. State, 349 So.3d 861 (Fla. 2022)(new Spencer hearing); and Cruz v. State, 320 So.3d 695 (Fla. 2021)(resentencing by trial judge) - - have all come back with reimposed death sentences (and Cruz's has already been affirmed).

ISSUE SIX [SIXTH AND EIGHTH AMENDMENT REQUIREMENT OF JURY UNANIMITY]

As in the previous Point on Appeal, the state's argument that Ramos doesn't apply is based on the observation in McKinney that states which leave the life-or-death selection decision to the judge may continue to do so. But - - again - - there are only two states which allocate the selection decision to the judge: Nebraska (3-judge panel) and Montana. Florida, like the federal government, the U.S. military, and 24 sister states does not leave the life-or-death decision to the judge. Florida is a hybrid system in which the jury is the co-sentencer; if its verdict is for life imprisonment it is binding, and if it is for death it is accorded great weight. 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 nonunimous (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. The state will argue that Ramos applies only to guilt phases and not penalty phases, but that stands the "death is different" principle[25] 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 "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

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[25] See, e.g., Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000); quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion).

hypothetically necessary in the first place. On that theory, could 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 horribles", 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, not McKinney, controls.

*Dated: September 14, 2026*

Respectfully submitted,

/s/ Steven L. Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
(863) 534-4200
*sbolotin@pd10.org*

*ATTORNEY FOR JOSEPH ZIELER*