

IN THE
Supreme Court of the United States

JOSEPH ZIELER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

BRIEF IN OPPOSITION

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October 27, 2026

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CAPITAL CASE**QUESTION PRESENTED**

Petitioner Joseph Zieler raped and murdered an 11-year-old girl and an adult woman. A jury convicted him of both murders. At the penalty phase, the jury unanimously found eight aggravating circumstances and, by a vote of 10-2, recommended that the judge sentence Petitioner to death. The judge followed that recommendation and imposed the death penalty.

The question presented is:

Whether the Sixth and Eighth Amendments require a jury to recommend a death sentence only by unanimous agreement, and not by the supermajority that Florida's death-penalty statute allows.¹

¹ The same issue is presented in *Jackson v. Florida*, No. 26-76, and *Hunt v. Florida*, No. 26-78.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT.....	2
REASONS FOR DENYING THE PETITION	7
I. The decision below is correct.	7
A. The Sixth Amendment does not require that the jury unani- mously recommend a death sentence.	7
B. The Eighth Amendment does not require a unanimous jury rec- ommendation.	15
II. Lower courts are not actively divided on the question presented.	16
III. A win for Petitioner would likely prove pyrrhic for Florida capital de- fendants.....	18
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Alleyne v. United States</i> , 570 U.S. 99 (2013)	11, 12
<i>Andres v. United States</i> , 333 U.S. 740 (1948).....	12, 13, 14, 15
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	7, 8, 10, 11, 12, 15, 18
<i>Arthur v. Alabama</i> , 580 U.S. 1099 (2017).....	20
<i>Bell v. Florida</i> , 143 S. Ct. 184 (2022)	20
<i>Bright v. Florida</i> , 592 U.S. 1170 (2021).....	20
<i>Bucklew v. Precythe</i> , 587 U.S. 119 (2019).....	17
<i>Capote v. Alabama</i> , 141 S. Ct. 2518 (2021)	20
<i>City of Grants Pass v. Johnson</i> , 03 U.S. 520 (2024)	17
<i>Craft v. Florida</i> , 142 S. Ct. 490 (2021)	20
<i>Deviney v. Florida</i> , 142 S. Ct. 908 (2022)	20
<i>Doty v. Florida</i> , 142 S. Ct. 449 (2021)	20
<i>Glossip v. Gross</i> , 576 U.S. 863 (2015).....	17
<i>Hurst v. Florida</i> , 577 U.S. 92 (2016)	4, 5, 6, 8, 9, 10, 12, 16, 19
<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016)	5
<i>Kansas v. Carr</i> , 577 U.S. 108 (2016).....	11

<i>McGautha v. California</i> , 402 U.S. 183 (1971).....	14
<i>McKenzie v. Florida</i> , 143 S. Ct. 230 (2022)	20
<i>McKinney v. Arizona</i> , 589 U.S. 139 (2020).....	1, 8, 9, 18
<i>Mosley v. Florida</i> , 143 S. Ct. 1028 (2023)	20
<i>Poole v. Florida</i> , 592 U.S. 1170 (2021).....	20
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020)	8
<i>Randolph v. Florida</i> , 142 S. Ct. 905 (2022)	20
<i>Rauf v. State</i> , 145 A.3d 430 (Del. 2016)	18
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	7, 8
<i>Rogers v. Florida</i> , 592 U.S. 928 (2020).....	20
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984).....	2, 10, 16, 17, 19
<i>State v. Daniels</i> , 542 A.2d 306 (Conn. 1988)	18
<i>State v. Poole</i> , 297 So. 3d 487 (Fla. 2020)	5, 7, 12, 20
<i>Tuilaepa v. California</i> , 512 U.S. 967 (1994).....	8
<i>Wood v. Missouri</i> , 590 U.S. 904 (2020).....	20
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976).....	15
<i>Zieler v. State</i> , 434 So.3d 666, 669 (Fla. 2026)	2

Statutes and Constitutions

18 U.S.C. § 567.....	13
Fla. Stat. § 921.141 (2010).....	4, 10
Fla. Stat. § 921.141 (2017).....	5
Fla. Stat. § 921.141 (2023).....	6, 7, 16
84 Del. Laws 433 (2026)	18
2012 Conn. Acts 5	18
U.S. Const. amend. VI	8

INTRODUCTION

During a home invasion, Petitioner raped and murdered a child and an adult woman. By rights, Florida could execute Petitioner based solely on the jury's unanimous finding of an aggravating factor. But Florida's statutory scheme provides additional safeguards. After a jury unanimously finds an aggravator, and before a judge may impose the death penalty, the jury must also weigh the aggravators and mitigators and then recommend, by a supermajority vote, that death is the appropriate sentence. That act of legislative grace, Petitioner says, violates the Sixth and Eighth Amendments because it does not require the jury to *unanimously* recommend death. But Petitioner is wrong. As he acknowledges, a state does not need to assign the jury a role in the selection of a capital sentence; under this Court's precedents, the only "element" that a jury must find to make the defendant eligible for death is an aggravating factor. Cases like *McKinney v. Arizona* therefore hold that the death recommendation need not be found by a jury. 589 U.S. 139, 144 (2020). By extending defendants the added protection of a jury recommendation, Florida did not tie its hands such that the recommendation must be unanimous.

Petitioner also has not identified any meaningful circuit split. The only two states that depart from the Florida Supreme Court's holding here have since ceased their use of the death penalty. And if accepted, Petitioner's argument might not even benefit other Florida capital defendants. In 2023, the Florida Legislature, hoping to make death recommendations more reflective of the views of the community, reduced the number of jurors needed for a death recommendation from 12 to eight. If this Court now holds that a recommendation must be unanimous, nothing would

prevent the Legislature from eliminating the requirement of a recommendation altogether. *See Spaziano v. Florida*, 468 U.S. 447, 459–65 (1984) (holding that jury sentencing is not required). Capital defendants would likely wind up with fewer protections, not more.

Certiorari should be denied.

STATEMENT

A. Jan C. lived in a condominium in Cape Coral, Florida, with her daughter, 11-year-old R.C., and a friend, 32-year-old L.S., who had recently moved into a spare bedroom to share living expenses. *Zieler v. State*, 434 So. 3d 666, 669 (Fla. 2026). On the evening of May 9, 1990, Jan went to her boyfriend’s home to watch a basketball game on television. *Id.* L.S. and R.C. encouraged her to do so while they remained at home. *Id.* Both were in their beds when Jan left. *Id.*

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. *Id.* However, she fell asleep and did not wake up until 4 a.m. *Id.* Jan then rushed home to get ready for work, and upon arrival, discovered that the front door that had been locked only at the dead-bolt was also locked at the broken door handle. *Id.* When the broken door handle was locked, it prevented entry from outside. *Id.* 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. *Id.*

Jan went upstairs and first reached the door of L.S.’s room where she saw L.S.’s nude body on the bed. *Id.* When she called out to L.S., she did not get a response.

Id. Jan raced to the other bedroom and found R.C. face down on the floor at the foot of the bed. *Id.* at 669–70. R.C.’s legs were spread apart, a vibrator was on the floor between her legs, and a pillow was located underneath her stomach. *Id.* Jan called 911 as she began to administer CPR to R.C. *Id.* at 670. As Jan performed CPR on R.C., she observed nasal congestion that suggested to her that R.C. had been crying a lot. *Id.* Jan heard R.C.’s lungs aspirate. *Id.*

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

Medical examiner testimony indicated that both victims died as a result of asphyxiation. *Id.* The bodies of both victims showed signs of a struggle and signs of sexual battery. *Id.* L.S. suffered extreme anal injuries and bleeding, consistent with an object penetrating her anus. *Id.* R.C. suffered injuries to her vagina that caused significant bleeding and were the result of penetration by an object. *Id.*

Evidence submitted for DNA testing during the initial investigation in 1990 revealed the presence of sperm cells on genital swabbings from both victims and on items found at the crime scene. *Id.* Over decades that followed, evidence was tested

and retested using updated DNA technologies, and a DNA profile for the perpetrator was identified. *Id.* at 670–71. But the case remained unsolved. *Id.* at 671.

In 2016, law enforcement received a CODIS hit for the suspect DNA profile. *Id.* Petitioner’s DNA, which had been obtained as a sample in an unrelated case, was subsequently matched to DNA recovered from both victims and the crime scene. *Id.* After further investigation, including a law enforcement interview in which Petitioner was nervous and evasive, Petitioner was charged with the first-degree murders of L.S. and R.C. *Id.* Petitioner was tried for both murders in May 2023. *Id.* at 672.

B. Florida’s capital sentencing scheme underwent a series of changes in the years leading up to Petitioner’s trial. Prior to 2016, Florida law required that a capital jury issue an “advisory sentence” of life or death. *Hurst v. Florida*, 577 U.S. 92, 95–96 (2016) (quoting Fla. Stat. § 921.141(2) (2010)). Under that scheme, a majority of jurors recommended either life imprisonment or death. Fla. Stat. § 921.141(2) (2010). The jury was told to base that recommendation on its finding of an aggravating factor; its views on the sufficiency of the aggravating factors to warrant death; its views on the relative weight of the aggravating factors and any mitigating circumstances; and whether death was the appropriate penalty. *Id.* But the ultimate decision of which sentence to impose lies with the trial court: “Notwithstanding the recommendation of a majority of the jury,” the trial court “shall enter” a sentence either of life or death. *Id.* § 921.141(3).

C. In *Hurst v. Florida*, this Court held that under the Sixth and Fourteenth Amendments, a jury must find the fact of an aggravating factor beyond a reasonable doubt, not simply issue an advisory recommendation. 577 U.S. at 98–99, 102–03. The Florida Supreme Court subsequently extended *Hurst v. Florida* by requiring that the jury unanimously find not only an aggravator but also that the aggravators outweigh any mitigators and that death is appropriate. *Hurst v. State*, 202 So. 3d 40, 57–58 (Fla. 2016). In response, the Florida Legislature amended the State’s death-penalty statute, section 921.141. In conformity with *Hurst v. State*, the Legislature required that, before the trial court may impose the death penalty, a jury must unanimously find: (1) the existence of an aggravating factor, (2) that the aggravating factor(s) are sufficient to warrant death and that they outweigh any mitigating factors, and (3) that death is the appropriate sentence. Fla. Laws ch. 2016-13, § 3 (effective Mar. 7, 2016); Fla. Laws ch. 2017-1, § 1 (effective Mar. 13, 2017); Fla. Stat. § 921.141(2)–(3) (2017). If the jury did not make all of these findings, the defendant was to be sentenced to life in prison.

The Florida Supreme Court later overruled *Hurst v. State* in *State v. Poole*, 297 So. 3d 487 (Fla. 2020). It explained in *Poole* that the jury’s weighing and recommendation functions do not involve “facts” that must be found by a jury beyond a reasonable doubt; they instead involve “mostly a question of mercy” and do not lend themselves “to being objectively verifiable.” *Id.* at 503–04. And it observed that under this Court’s precedents, the Eighth Amendment likewise does not require a unanimous jury recommendation. *Id.* at 505.

D. In April 2023, prior to Petitioner’s trial, the Governor signed into law Senate Bill 450, which again amended Florida’s death-penalty statute. Fla. Laws ch. 2023-23, § 1 (effective Apr. 20, 2023); Fla. Stat. § 921.141 (2023).

Under SB 450, the jury still must unanimously find the fact of an aggravating factor, as required by *Hurst v. Florida*, before the defendant is eligible for the death penalty. Fla. Stat. § 921.141(2)(a)–(b). (2023). But the jury’s recommendation of death need not be unanimous; it is enough that at least eight jurors vote to recommend death. *Id.* § 921.141(2)(c). The statute provides for the recommendation to be based on the jury’s weighing of whether sufficient aggravating factors exist, whether those aggravators outweigh any mitigating circumstances, and whether the defendant should be sentenced to life without parole or death. *Id.* § 921.141(2)(b)2.a–c. If the jury recommends life, the trial court must impose life. *Id.* § 921.141(3)(a)1. But if the jury recommends death, the trial court may impose either that sentence or life without parole. *Id.* § 921.141(3)(a)2.

E. Petitioner’s jury found him guilty of the first-degree murders of R.C. and L.S. *Zieler*, 434 So. 3d at 672. At the conclusion of a two-day penalty phase, by a vote of 10-2, the jury recommended death for each first-degree murder. *Id.* at 674. It unanimously found four aggravating factors beyond a reasonable doubt. Tr. 2612–13; R. 1536–39. The trial court agreed that death was appropriate. In its sentencing order, the trial court deemed the aggravating factors “horrific,” emphasizing R.C. and L.S.’s gruesome injuries and death by suffocation, and it concluded

that the aggravation “greatly outweigh[ed] the comparatively insignificant mitigating factors.” R. 1662.

F. On appeal to the Florida Supreme Court, Petitioner argued that the Sixth and Eighth Amendments required the jury’s recommendation of death to be unanimous. Pet. App. 23a. Citing *Poole*, the Florida Supreme Court rejected those arguments and affirmed Petitioner’s death sentences. *Zieler*, 434 So. 3d at 679–80.

REASONS FOR DENYING THE PETITION

I. The decision below is correct.

Precedent and history defeat Petitioner’s contention that Florida’s supermajority death recommendation procedure violates either the Sixth or Eighth Amendments.

A. The Sixth Amendment does not require that the jury unanimously recommend a death sentence.

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const. amend. VI. In *Apprendi v. New Jersey*, this Court held that any fact that increases the statutory maximum sentence is an element that the Sixth Amendment requires the jury to find beyond a reasonable doubt. 530 U.S. 466, 490 (2000). And in *Ring v. Arizona*, the Court held that the fact of an aggravating circumstance is an element of the crime of capital murder. 536 U.S. 584, 609 (2002); *see also Hurst v. Florida*, 577 U.S. 92, 102–03 (2016) (applying *Ring* to Florida’s capital sentencing statute). Elements must be found unanimously. *Ramos v. Louisiana*, 590 U.S. 83, 92 (2020).

Seizing on these rules, Petitioner argues that the Sixth Amendment contains an *additional* requirement: that the jury unanimously recommend a sentence of death. Pet. 4–20. His claim fails both as a matter of precedent and history.

1. The precedents are straightforward. In *McKinney v. Arizona*, this Court held that “a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.” 589 U.S. 139, 144 (2020). All the Sixth Amendment requires, *McKinney* explained, is that “a jury must find the aggravating circumstance.” *Id.* Once that is done, the defendant is “death eligible” and what remains is for the sentencer to “exercise discretion . . . *within the range* prescribed by statute.” *Id.* at 144–45 (quoting *Apprendi*, 530 U.S. at 481); *see also Tuilaepa v. California*, 512 U.S. 967, 971–72 (1994) (explaining the difference between the eligibility and selection determinations).²

Petitioner recognizes that the Sixth Amendment does not require juries to find anything other than the fact of an aggravating factor, but argues that *McKinney*

² Petitioner dismisses that part of *McKinney* as “dicta.” Pet. 12. It was not. In *McKinney*, the Ninth Circuit had ruled that the Arizona courts failed to consider McKinney’s posttraumatic stress disorder as mitigation. The issue before this Court was whether, on remand, the Arizona Supreme Court could reweigh the aggravating and mitigating circumstances instead of the jury. *McKinney*, 589 U.S. at 141–42. McKinney argued that *Clemons v. Mississippi*, 494 U.S. 738 (1990), which authorized a similar reweighing by the Mississippi Supreme Court, was no longer good law in light of *Ring* and *Hurst*. This Court rejected that argument on the ground that *Ring* and *Hurst* only require a jury to find an “aggravating circumstance that makes the defendant death eligible,” whereas a jury “is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.” *McKinney*, 589 U.S. at 142–45. This Court stated: “In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances, and *Ring* and *Hurst* did not overrule *Clemons* so as to prohibit appellate reweighing of aggravating and mitigating circumstances.” *Id.* at 145. Thus, this Court’s explanation that a jury is not required to weigh the aggravators and mitigators or make the ultimate sentencing decision was not mere dicta. Rather, it was a fundamental and necessary part of the Court’s reasoning for rejecting McKinney’s claim that *Clemons* was no longer good law.

does not apply to “states like Florida” that give the jury a role in the sentencing-selection decision. Pet. 11–12.

Hurst v. Florida belies that view. In *Hurst*, this Court addressed a Florida capital statute in many ways resembling the statute under which Petitioner was sentenced to death—with the notable exception that the statute in *Hurst* did not require the jury to unanimously find an aggravator. 577 U.S. at 95–96. That statute instead called for a majority of the jury to render an “advisory verdict.” *Id.* The jury would ask whether an aggravator existed, whether the aggravators outweighed any mitigators, and whether, based on those considerations, death was appropriate. Fla. Stat. § 921.141(2)(a)–(c) (2010). But the advisory verdict did not have to specify the factual basis for recommending life or death. *See Hurst*, 577 U.S. at 95–96. Thus the sentencing order had to “reflect the trial judge’s independent judgment about the existence of aggravating and mitigating factors.” *Id.* (quoting *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003) (per curiam)).

It was only this last feature that this Court found problematic in *Hurst*. This Court held that Florida’s statute violated the Sixth Amendment because it allowed a “judge” to impose death “based on her own *factfinding*,” without “a jury’s *findings of fact* with respect to sentencing issues.” *Id.* at 99 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)) (emphasis added). In particular, Florida’s scheme was faulty because it “required the judge alone to find *the existence of an aggravating circumstance*.” *Id.* at 103 (emphasis added). The Court therefore “overruled” two of its

precedents, *Spaziano* and *Hildwin*, but only “to the extent they allow a sentencing judge to find an aggravating circumstance.” *Id.* at 102.

Nothing in *Hurst* suggests that a jury must unanimously recommend death, or must unanimously find aggravators to outweigh mitigators. If Florida’s scheme was infirm because it entrusted the jury with weighing and recommending death only in an advisory verdict, *Hurst* could have said so. Its silence on that point is telling.

Hurst’s emphasis on the aggravators follows from *Apprendi* itself. That decision acknowledged the principle that a jury, consistent with its historical role, must find the “*facts* that increase the prescribed range of penalties.” *Apprendi*, 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)) (emphasis added); *see also Ring*, 536 U.S. at 612 (Scalia, J., concurring) (“What today’s decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.”). Subsequent decisions are similarly confined to jury factfinding. In *Alleyne v. United States*, for example, this Court held that “[j]uries must find any facts that increase either the statutory maximum or minimum.” 570 U.S. 99, 113 n.2 (2013). They do not have to find anything more.

That is dispositive here because the death recommendation is not a “fact.” Like the subsidiary question of “whether mitigating circumstances outweigh aggravating circumstances,” the recommendation is “mostly a question of mercy.” *Kansas v. Carr*, 577 U.S. 108, 119 (2016). “It would mean nothing,” this Court has said, “to tell the jury that the defendants must deserve mercy beyond a reasonable doubt.” *Id.* If Petitioner is correct, however, that is precisely what Florida must do. Because

the Sixth Amendment requires that all elements be proved not only unanimously but beyond a reasonable doubt, juries would have to be instructed that they must find “beyond a reasonable doubt” that the defendant deserves death. That standard of proof is a poor fit for the highly normative selection assessment of whether a defendant should receive the death penalty. The death recommendation, in other words, is not an element.

Even if the death recommendation did involve some “fact,” the Sixth Amendment still would not apply. *Apprendi* applies to a very specific type of fact: one that increases the statutory maximum or minimum sentence. *See, e.g., Alleyne*, 570 U.S. at 113 n.2. Aggravating factors are this sort of fact; absent an aggravator, the statutory maximum penalty is life in prison, not death. *See Hurst*, 577 U.S. at 98–99. So the aggravator effectively increases the sentencing range. But as *Apprendi* explains, “exercis[ing] discretion . . . in imposing a judgment *within the range* prescribed by statute” is not an element that the Sixth Amendment commits to the jury. 530 U.S. at 481; *see also Alleyne*, 570 U.S. at 113 n.2 (“Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment ‘within limits fixed by law.’” (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949))).

Unlike the finding of an aggravator, the jury’s death recommendation does not increase the statutory maximum. The elements of capital murder under Florida law include the ordinary elements comprising first-degree murder plus the existence of an aggravator. Once those elements are found, the defendant is eligible for death. *See State v. Poole*, 297 So. 3d 487, 501 (Fla. 2020). The jury’s death recommendation

thus does not trigger any increase to the available penalty—it merely guides the judge in exercising sentencing discretion. Put another way, once the jury finds an aggravator, the sentencing range is either life or death. And the “selection” of a sentence within that range is the sort of consideration undertaken daily by hundreds of judges throughout this country. Selection is not an element.

Contrary to Petitioner’s claims, *Andres v. United States* does not control here. Pet. 5, 14 (citing 333 U.S. 740, 749 (1948)). *Andres* was not a constitutional case; it involved the “proper construction” of a statute. 333 U.S. at 746. That statute, 18 U.S.C. § 567, provided: “In all cases where the accused is found guilty of the crime of murder in the first degree . . . the jury may qualify their verdict by adding thereto ‘without capital punishment.’” For reasons not explained, both parties agreed that the statute required a unanimous finding both as to guilt and as to whether the penalty should be death. *See Andres*, 333 U.S. at 746. They disagreed instead about whether the jury had to be unanimous on *both* the guilt and penalty findings before it could return its verdict—a simple matter of procedure. *Id.* Owing to the parties’ agreement, this Court did not examine the ancillary question of whether section 567 required unanimity as to the penalty.

To resolve the question presented, the Court concluded that the jury must simultaneously decide the guilt and penalty questions, returning a single verdict unanimously reflecting its views on both. *Id.* at 749. That statutory answer of course supplies no binding constitutional rule.

Rather, Petitioner cites *Andres* because in announcing its statutory holding, the Court remarked that the Sixth Amendment’s unanimity requirement “extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury.” Pet. 5 (quoting 333 U.S. at 748). But he omits key context. Just prior to the language Petitioner cherry-picks, the Court clarified that “[u]nanimity in jury verdicts is required *where the Sixth and Seventh Amendments apply*.” *Andres*, 333 U.S. at 748 (emphasis added) (footnote omitted). That is, when the Sixth Amendment requires the jury to render a finding, the jury must do so unanimously. But the Sixth Amendment does *not* require a jury to make any recommendation regarding death. And at any rate, the Court did not explain the basis for its finding that unanimity applies to matters of “punishment.” *Andres*, 333 U.S. at 748. Everything in the *Apprendi* line of cases suggests otherwise.

Precedent thus shuts the door on Petitioner’s Sixth Amendment claim.

2. History corroborates that conclusion. At the Framing, the death penalty was mandatory if the jury found the defendant guilty of murder. *McGautha v. California*, 402 U.S. 183, 198 (1971), *reh’g granted, judgment vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972). Back then, the jury did not even need to find an aggravating circumstance (only that the defendant committed murder), and certainly did not need to find that death was appropriate. *See id.* As a practical matter, though, a jury that wished to extend mercy could acquit the defendant of murder, thus sparing him from automatic execution. *Id.* at 199.

Beginning in the late 1830s, some states grew frustrated with juries’ “occasion[al]” acts of “nullification.” *Id.* at 199–200. To address the problem, several legislatures gave jurors the “discretion” to decide not only the elements of murder but also the ultimate punishment. *Id.* at 199. By expressly empowering juries to decide the penalty, those states ensured that juries did not need to nullify to negate the possibility of a death sentence. But the first of those reforms came in Tennessee in 1838, well after the Framing. *Id.* at 200. Alabama and Louisiana followed suit in 1841 and 1846. *Woodson v. North Carolina*, 428 U.S. 280, 291 (1976) (plurality opinion). And it was only “[b]y the turn of the century” that 23 states had adopted the practice, with another “two decades” elapsing before an additional 14 states got on board. *Id.* The upshot? Juries at the Founding had no direct role in the capital sentencing decision other than their power to acquit the defendant outright.

Federal juries likewise came by their formal sentencing powers very late. As Justice Frankfurter explained in *Andres*, “[f]or the first hundred years of the establishment of this Government one guilty of murder in the first degree, under federal law, was sentenced to death.” 333 U.S. at 753 (Frankfurter, J., concurring). It was not until 1897 that Congress afforded federal jurors the ability to “qualify their verdict by adding thereto ‘without capital punishment.’” *Id.* (cleaned up). That led Frankfurter to remark that a legislature need not require “unanimous agreement on remission of the death sentence” and may instead “make such remission effective by a majority vote of the jury.” *Id.* at 754.

If they are willing to “disregard[] their oaths,” *Woodson*, 428 U.S. at 293, modern capital juries possess the same power of nullification as a capital jury in 1791. Indeed, even a single juror set on blocking the death penalty can do so by refusing to vote for an aggravator. Because Florida law requires unanimity as to that finding, *see* Fla. Stat. § 921.141(2)(b) (2023), a lone holdout effectively prevents death—the same de facto sentencing role that jurors had at the Framing.

History, in short, refutes Petitioner’s contention that the Sixth Amendment demands a unanimous jury recommendation of death.

B. The Eighth Amendment does not require a unanimous jury recommendation.

For similar reasons, the Eighth Amendment also does not require that the jury’s recommendation of death be unanimous. Petitioner contends that “[r]eliability and fair representation of the community are at least as important” in sentencing as they are in the determination of guilt. Pet. 9. According to Petitioner, the precept that “death is different” mandates jury unanimity on whether death or life in prison is the appropriate sentence. Pet. 8–9, 13. But again, the precedents are against him.

Take *Spaziano*. The Court there upheld Florida’s scheme authorizing a judicial “override” of a jury’s recommendation of a life sentence. *See Spaziano v. Florida*, 468 U.S. 447, 459–65 (1984), *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92 (2016). Neither the Sixth nor Eighth Amendment, the Court stressed, “guarantee[s] a right to a jury determination” of the “appropriate punishment to be imposed.” *Id.* at 459; *see also id.* at 464 (explaining that the “Eighth Amendment” does

not “require[] jury sentencing”). While *Hurst* later overruled *Spaziano* in part, that aspect of *Spaziano*’s holding remains good law.

Attempting to distinguish that precedent, Petitioner argues that because Florida has “chosen to empanel juries” as part of its capital sentencing process, the Eighth Amendment requirement of “heightened reliability” mandates that any decision by the jury “must be unanimous.” Pet. 13–14. But that reasoning makes little sense in light of Petitioner’s underlying acknowledgment that a jury is not required to begin with. If, as *Spaziano* holds, a state can do away with jury recommendations entirely, then the judge’s role alone must be enough to safeguard reliability. *Spaziano* was explicit on that point: “[T]he demands of fairness and reliability in capital cases do not require [jury sentencing].” 468 U.S. at 464. By including the jury in the selection process, the Florida Legislature afforded defendants an additional, extraconstitutional protection not required for reliability.³

II. Lower courts are not actively divided on the question presented.

Petitioner does not even attempt to identify a meaningful split of authority amongst the lower courts. Nor could he. The only two courts that have departed

³ Though Petitioner is careful to avoid using the term “evolving standards of decency” in the petition, his “heightened reliability” argument is laden with that concept. Because his Eighth Amendment arguments turn on the continuing vitality of that doctrine, this Court could grant him relief only after agreeing to extend the doctrine past its current borders. That is yet another reason to deny certiorari. This Court’s more modern Eighth Amendment decisions have looked to text and history, not evolving standards. See *City of Grants Pass v. Johnson*, 603 U.S. 520, 541–43 (2024); *Bucklew v. Precythe*, 587 U.S. 119, 129–33 (2019). Members of this Court have criticized the evolving-standards-of-decency test as unmoored from text and history. See, e.g., *Glossip v. Gross*, 576 U.S. 863, 898–99 (2015) (Scalia, J., concurring).

from the Florida Supreme Court’s approach sit in jurisdictions—Delaware and Connecticut—that no longer use the death penalty.

The Delaware and Connecticut cases were decided before *McKinney*. See *Rauf v. State*, 145 A.3d 430 (Del. 2016); *State v. Daniels*, 542 A.2d 306 (Conn. 1988). Those state courts thus lacked this Court’s guidance in *McKinney*—guidance that could have compelled the opposite result. And even then, the Connecticut Supreme Court did not go as far as Petitioner asks this Court to go. *Daniels* never addressed the recommendation requirement; it discussed only the statutory requirement that the jury unanimously find or reject a mitigating circumstance. See 542 A.2d at 312. To be sure, it held that the jury’s mitigation finding should be unanimous. *Id.* at 314–15. But in doing so, the court did not truly treat the existence of a mitigating circumstance as an element. After all, it required the *defendant* to show, by a preponderance of the evidence, that a mitigator existed. See *id.* at 313, 315. If the court believed this factor to be an element, prosecutors should have borne the burden beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 490.

Regardless, that split is now defunct. Abstract conflicts between the lower courts are not problematic in their own right; they require correction only because they threaten disparate outcomes for similarly situated litigants in different parts of the country. But both Delaware and Connecticut have now discontinued their use of the death penalty. Connecticut abolished its death penalty statute in 2012, see 2012 Conn. Acts 5, and Delaware did so in 2024, see 84 Del. Laws 433. Any split therefore poses no risk of disparate outcomes.

III. A win for Petitioner would likely prove pyrrhic for Florida capital defendants.

Finally, Petitioner dismisses Florida’s choice to require an 8-4 supermajority recommendation for death in lieu of a 12-0 recommendation based on what he calls “[t]he phantom ‘rogue juror’ bogeyman.” Pet. 15–20. But were Petitioner to prevail here, the Florida Legislature would almost certainly respond to that ruling by eliminating the jury’s role in selecting the death penalty altogether.

In 2023, a Florida jury did not unanimously recommend death for the Parkland school shooter. The Florida Legislature reacted by amending section 921.141 to eliminate the requirement of a unanimous jury recommendation. It did not abolish the role of the jury outright, however. The result was the statute applicable at Petitioner’s resentencing: After unanimously finding an aggravator, the jury could recommend death by a supermajority of 8-4. But if forced to choose between accepting the status of the death recommendation as an “element”—with the corresponding obligations of unanimity and the beyond-a-reasonable-doubt standard—or amending section 921.141 again to assign full selection responsibility to the judge, the Legislature might well pick the latter.

That would be constitutional. *See Spaziano*, 468 U.S. at 460. Provided the jury finds the fact of an aggravator, the selection decision can be left entirely to the judge. *Id.* at 465; *Hurst*, 577 U.S. at 102. Petitioner acknowledges as much, noting that “two states” currently “allocate the death-selection decision to the judge alone.” Pet.

12–13 (citing Nebraska and Montana). And so his claim amounts to this: By extending capital defendants a safeguard beyond what the Constitution requires, Florida loses. Quite the message to send to states.

* * *

This petition is one of the first to challenge Florida’s 2023 death-penalty statute and its supermajority recommendation of death. But it is hardly the first to argue that the death recommendation is an “element.” To date, every such petition has been denied.⁴ And the Court has denied many petitions presenting the related question of whether the sufficiency and weight of the aggravators are elements.⁵ It should do the same here.

⁴ See, e.g., *McKenzie v. Florida*, 143 S. Ct. 230 (2022); *Arthur v. Alabama*, 580 U.S. 1099 (2017).

⁵ See, e.g., *Mosley v. Florida*, 143 S. Ct. 1028 (2023); *Deviney v. Florida*, 142 S. Ct. 908 (2022); *Bell v. Florida*, 143 S. Ct. 184 (2022); *Randolph v. Florida*, 142 S. Ct. 905 (2022); *Craft v. Florida*, 142 S. Ct. 490 (2021); *Doty v. Florida*, 142 S. Ct. 449 (2021); *Capote v. Alabama*, 141 S. Ct. 2518 (2021); *Bright v. Florida*, 592 U.S. 1321 (2021); *Poole v. Florida*, 592 U.S. 1170 (2021); *Rogers v. Florida*, 592 U.S. 928 (2020); *Wood v. Missouri*, 590 U.S. 904 (2020).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 27, 2026

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