

No. 26-78

IN THE
Supreme Court of the United States

MICHAEL H. HUNT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

BRIEF IN OPPOSITION

JAMES UTHMEIER
Attorney General

DAVID M.S. DEWHIRST
Solicitor General
**Counsel of Record*

OFFICE OF THE
ATTORNEY GENERAL
State of Florida
PL-01, The Capitol
Tallahassee, FL
32399-1050
Phone: (850) 414-3300
david.dewhurst@
myfloridalegal.com

JEFFREY PAUL DESOUSA
NATHAN A. FORRESTER
Chief Deputy Solicitors
General

SCOTT BROWNE
Chief Assistant Attorney
General

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

I. Whether the Sixth and Eighth Amendments guaranteed Petitioner the right to a unanimous jury recommendation of death, rather than the supermajority recommendation of death that Florida's death-penalty statute provides for.

II. Whether altering the procedures applicable at Petitioner's penalty phase—namely, the number of jurors required for a recommendation of death—violated the Ex Post Facto Clause.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT	2
REASONS FOR DENYING THE PETITION	6
I. PETITIONER’S SIXTH AND EIGHTH AMENDMENT CLAIMS DO NOT WARRANT REVIEW	6
II. THE EX POST FACTO CLAIM ALSO DOES NOT WARRANT REVIEW	7
A. The decision below is correct	8
B. Lower courts are not divided on the question presented	15
C. The question presented implicates few cases	15
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Barton v. S.C. Dep’t of Prob. Parole & Pardon Servs.</i> , 745 S.E.2d 110 (S.C. 2013)	17
<i>Beazell v. Ohio</i> , 269 U.S. 167 (1925)	15
<i>Calder v. Bull</i> , 3 U.S. 386 (1798)	10
<i>Carmell v. Texas</i> , 529 U.S. 513 (2000)	10, 16
<i>Clay v. Mass. Parole Bd.</i> , 56 N.E.3d 145 (Mass. 2016)	17
<i>Collins v. Youngblood</i> , 497 U.S. 37 (1990)	2, 7, 10, 11, 15, 16
<i>Dobbert v. Florida</i> , 432 U.S. 282 (1977)	2, 7, 11, 12, 15, 16
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	11
<i>Hurst v. Florida</i> , 577 U.S. 92 (2016)	4, 8
<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016)	5
<i>Kansas v. Carr</i> , 577 U.S. 108 (2016)	7, 17
<i>Lynce v. Mathis</i> , 519 U.S. 433 (1997)	9

<i>McKinney v. Arizona</i> , 589 U.S. 139 (2020)	7, 17
<i>Miller v. Florida</i> , 482 U.S. 423 (1987)	9
<i>Peugh v. United States</i> , 569 U.S. 530 (2013)	9, 13, 14
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020)	17
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984)	8
<i>State v. Ardoin</i> , 24 So. 802 (La. 1899)	16
<i>State v. Cohen</i> , 604 A.2d 846 (Del. 1992)	11
<i>State v. Poole</i> , 297 So. 3d 487 (Fla. 2020)	5, 17
<i>Thompson v. Utah</i> , 170 U.S. 343 (1898)	11
<i>United States v. Joyner</i> , 201 F.3d 61 (2d Cir. 2000)	11
<u>Statutes</u>	
Ch. 2016-13, § 3, Laws of Fla.	5
Ch. 2017-1, § 1, Laws of Fla.	5
Ch. 2023-23, § 1, Laws of Fla.	6
Fla. Stat. § 921.141 (2023)	6, 8
Fla. Stat. § 921.141 (2017)	5

Constitutional Provisions

Or. Const. art. I, § 11 (1934)	16
--------------------------------------	----

INTRODUCTION

Petitioner Michael Hunt and an accomplice broke into a home to murder P.O., the complaining witness in a separate prosecution where Petitioner faced charges of sexual assault and trafficking. Petitioner and the other man shot four people inside the house, killing one. A jury unanimously convicted Petitioner of that first-degree murder and unanimously found five aggravating factors. The jury then recommended, by a vote of 10-2, that Petitioner be executed. As Florida has explained in its brief in opposition in a companion case, *see Jackson v. Florida*, No. 26-76, neither the Sixth nor Eighth Amendment required that recommendation to be unanimous. That issue does not warrant certiorari.

But Petitioner raises an additional claim here. Because Petitioner committed the first-degree murder in 2019, several years before Florida Senate Bill 450 took effect, he says that SB 450's provision for non-unanimous death recommendations could not be applied to him without offending the Ex Post Facto Clause.

That is wrong. In multiple cases, this Court has held that similar procedural changes were not impermissibly ex post facto. *See Collins v. Youngblood*, 497 U.S. 37 (1990); *Dobbert v. Florida*, 432 U.S. 282 (1977). And Petitioner has otherwise shown no need for review: Lower courts are not split on the ex post facto question, and the issue affects only a limited class of cases.

STATEMENT

A. To silence a witness to his other crimes, Petitioner and an accomplice went to Lexie Peck's home and shot multiple people, killing Lexie and wounding three others. For the murder, Petitioner is on Florida's death row.

About a year and a half before the shooting, 16-year-old P.O. met Petitioner and began hanging out with him and his girlfriend, Kaitlyn West. Pet. App. 3a. Petitioner owned a "dance studio" called "Polecats," which he used as a hub for sex trafficking. *Id.* Without Kaitlyn's consent, Petitioner photographed Kaitlyn and put the pictures online to sell her for sex. *Id.* Kaitlyn did not object because Petitioner beat her. *Id.* at 4a.

Several months later, P.O.'s mother kicked her out of the house, and P.O. moved in with Petitioner and Kaitlyn. *Id.* One night, P.O. was at the house alone with Petitioner. *Id.* Petitioner gave her a Xanax to treat a headache, covered the living room cameras, and raped P.O. *Id.* Soon after, Petitioner asked P.O. if she was willing to sleep with men for money. *Id.* Fearing what Petitioner might do, P.O. assented. *Id.* Petitioner took P.O. and Kaitlyn various places to prostitute them. *Id.* Once, P.O. was at Polecats with Petitioner when he came up behind her and put a knife to her throat and said that if she ever told anyone, he would kill her. *Id.* P.O.'s trafficking lasted for about a year and a half. *Id.*

After P.O. confided the abuse to her boyfriend's mother, police convinced P.O. to press charges. *Id.* at 5a. When Petitioner heard about this, he told Kaitlyn

that he would “do what he ha[d] to do.” *Id.* at 6a. “[N]o witness, no case.” *Id.*

On April 4, 2019, Petitioner and an accomplice went to Lexie’s house, where P.O. was staying with her boyfriend, to assassinate P.O. Lexie, her family, and several friends were home. *Id.* at 1a–2a, 7a. Around 10:30 p.m., a man knocked on the door claiming to have a pizza delivery. *Id.* at 1a–2a. Lexie’s stepfather Danny answered the door and said that no one had ordered pizza. *Id.* at 2a. When Danny shut the door, the man forced his way in and held a gun to Danny’s chin. *Id.* As the man did so, his face covering slipped and Danny saw that it was Petitioner. *Id.* He also recognized Petitioner’s “very distinctive” voice. *Id.*

Petitioner shot Danny in the neck. *Id.* The accomplice then went through the home, shooting everyone in sight. *Id.* The accomplice shot Lexie in the back of the head, then shot two others. *Id.*

Danny managed to crawl to a neighbor’s house, where the neighbor called 9-1-1. *Id.* Lexie died of her injuries, while the other shooting victims survived. *Id.* at 3a. P.O. and her boyfriend were in the house but stayed hidden. *Id.*

Shell casings and projectiles recovered at the scene revealed that the shooters used a .45 caliber handgun and a .380 caliber semi-automatic pistol—both weapons that Petitioner was known to carry. *Id.* The .380 was later found in a neighbor’s bushes. *Id.*

B. In *Hurst v. Florida*, this Court held that the Sixth Amendment requires that, before a defendant

may be sentenced to death, the jury must unanimously find the fact of an aggravating factor. 577 U.S. 92, 102–03 (2016). And in *Hurst v. State*, the Florida Supreme Court extended *Hurst v. Florida* by requiring that the jury unanimously find that the aggravators outweigh any mitigators and that death is the appropriate sentence. 202 So. 3d 40, 57–58 (Fla. 2016).

Following those decisions, the Florida Legislature amended Section 921.141, Florida Statutes, the State’s death-penalty law. 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 factors are sufficient to warrant death and that they outweigh any mitigating factors; and (3) that death is the appropriate sentence. See Ch. 2016-13, § 3, Laws of Fla. (effective Mar. 7, 2016); Ch. 2017-1, § 1, Laws of Fla. (effective Mar. 13, 2017); see also Fla. Stat. § 921.141(2)–(3) (2017). If any of those findings were not made, the defendant was to be sentenced to life in prison.

In 2019, when Petitioner committed these crimes, that version of Section 921.141 was in effect.

The Florida Supreme Court later overruled *Hurst v. State*. See *State v. Poole*, 297 So. 3d 487 (Fla. 2020). It explained in *Poole* that the jury’s weighing and recommendations functions do not involve “facts” that the Sixth Amendment requires be found by a jury beyond a reasonable doubt; those inquiries instead involve “mostly a question of mercy” and do not lend themselves “to being objectively verifiable.” *Id.* at

503–05. And it observed that under this Court’s precedent, the Eighth Amendment likewise does not require a unanimous jury recommendation. *Id.* at 505.

C. In April 2023, the Governor signed Senate Bill 450, which again amended Florida’s death-penalty statutes. Ch. 2023-23, § 1, Laws of Fla. (effective Apr. 20, 2023); *see also* Fla. Stat. § 921.141 (2023).

Under SB 450, the jury must still unanimously find the fact of an aggravating factor, as required by *Hurst v. Florida*, before the defendant is eligible for the death penalty. *Id.* § 921.141(2)(a)–(b). But the jury’s recommendation of death now need not be unanimous; it is enough that a supermajority of at least eight jurors vote to recommend death. *Id.* § 921.141(2)(b)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 imprisonment or death. *Id.* § 921.141(2)(b)2.a–c. A jury recommendation of life binds the trial court. *Id.* § 921.141(3)(a)1. But if the jury recommends death, the trial court may impose either a sentence of death or a sentence of life. *Id.* § 921.141(3)(a)2.

D. Petitioner’s trial began after SB 450 took effect. Pet. App. 8a. In the guilt phase, the jury unanimously convicted Petitioner of first-degree murder. *Id.* at 10a. And at the penalty phase, the jury unanimously found five separate aggravators. *Id.* at 11a. By a vote of 10–2, it recommended death for the first-degree murder. *Id.* at 12a. The trial court agreed that death was appropriate and imposed that penalty. *Id.*

E. On appeal to the Florida Supreme Court, Petitioner argued that the Constitution required the jury’s recommendation of death to be unanimous. *Id.* at 18a–19a. Citing its prior decision in *Poole*, the court rejected that argument. *Id.* Petitioner also contended that applying SB 450 to his case was impermissibly ex post facto. *Id.* at 21a–22a. The state court rejected that claim as well, citing a line of this Court’s precedents addressing materially identical factual circumstances. *Id.* at 23a–25a (citing *Collins v. Youngblood*, 497 U.S. 37 (1990) and *Dobbert v. Florida*, 432 U.S. 282 (1977)).

The Florida Supreme Court affirmed Petitioner’s death sentences. *Id.* at 29a.

REASONS FOR DENYING THE PETITION

I. PETITIONER’S SIXTH AND EIGHTH AMENDMENT CLAIMS DO NOT WARRANT REVIEW.

Petitioner—incorporating by reference the arguments in a related petition, *see Jackson v. Florida*, No. 26-76—urges the Court to grant certiorari to review whether the Sixth and Eighth Amendments require a unanimous jury recommendation of death. Pet. 7–8. That issue is not certworthy. *See* BIO, *Jackson v. Florida*, No. 26-76, at *7–21 (Aug. 6, 2026).

Without fully rehashing the State’s arguments in *Jackson*, several points bear emphasis. First, the decision below is correct. In *McKinney v. Arizona*, this Court held that the death recommendation need not be made by a jury at all. 589 U.S. 139, 144 (2020). 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,” the Court has said, “to tell the jury that the defendants must deserve mercy beyond a reasonable doubt.” *Id.* *Hurst v. Florida* holds only that the fact of an aggravating circumstance is an element that must be found by a jury, *see* 577 U.S. at 102–03, and Florida’s death-penalty statute complies with that requirement. *See* Fla. Stat. § 921.141(2)(b).

Next, the issue implicates no circuit split. The only two states that depart from the Florida Supreme Court’s approach, Connecticut and Delaware, have since ceased their use of the death penalty. So there is no risk of non-uniform decisions throughout the Nation.

And last, 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.

II. THE EX POST FACTO CLAIM ALSO DOES NOT WARRANT REVIEW.

Certiorari is also unwarranted on the ex post facto question. First, this Court’s precedents demonstrate that the Florida Supreme Court was correct. Second,

the question presented has not divided the lower courts. Third, the question presented has only limited impact.

A. The decision below is correct.

Petitioner invokes the Ex Post Facto Clause of the Fifth Amendment. Pet. 12–21. Relying on *Peugh v. United States*, he claims that SB 450 cannot be “retroactive[ly]” applied to him because the new 8-4 provision creates a “significant risk” that he will receive a higher punishment. *Id.* at 14, 21 (citing 569 U.S. 530 (2013)). But this Court has on multiple occasions rejected ex post facto challenges to materially identical laws. Petitioner’s assertions to the contrary lack merit.

1. The Ex Post Facto Clause bars the states from “pass[ing] . . . any ex post facto Law.” U.S. Const. art. I, § 10. The “central concern[]” of the clause is combatting “the lack of fair notice . . . when the legislature increases punishment beyond what was prescribed when the crime was consummated.” *Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *see also Miller v. Florida*, 482 U.S. 423, 430 (1987) (explaining that the clause ensures that “legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed” (quotation omitted)).

Drawn from *Calder v. Bull*, there are four categories of impermissible *ex post facto* laws: (1) “Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,” (2) “[e]very law that aggravates a crime, or makes it greater than it was, when

committed,” (3) “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,” and (4) “[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.” *Carmell v. Texas*, 529 U.S. 513, 522 (2000) (emphases omitted) (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)). The clause lacks operation “beyond [those] categories.” *Id.* at 539 (emphasis omitted).

SB 450 fits none of them. SB 450 plainly does not implicate categories one, two, or four. By addressing the procedures applicable at a penalty-phase trial, the statute does not criminalize any conduct or impose a penalty for activity that was not previously criminal. That rules out categories one and two. And category four is inapposite because SB 450 does not affect the “legal rules of evidence.”

That leaves category three: laws that “inflict[] a greater punishment” than when the crime occurred. *Id.* at 522. Petitioner relies on that category. *See* Pet. 13–14. For starters, Florida made first-degree murder punishable by death at the time, and long before, Petitioner murdered Lexie Peck. Petitioner’s arguments instead suggest that SB 450’s supermajority recommendation lessens the likelihood of a life sentence. In two cases, however, this Court has held that laws addressing the structure and function of the jury fall outside the ambit of the Ex Post Facto Clause. *See* Pet. App. 23a–25a.

The first, *Collins v. Youngblood*, held that the clause did not bar a statute reducing the number of

jurors required for a conviction. 497 U.S. 37, 47, 50–52 (1990). Years earlier, in *Thompson v. Utah*, this Court had held that a Utah law “reducing the size of juries in criminal cases from 12 persons to 8” was an impermissible ex post facto law. *Id.* at 47 (citing 170 U.S. 343, 352 (1898)). In hindsight, the Court announced in *Collins*, *Thompson* was incorrect. *Id.* at 47, 51–52. Though recognizing that the number of jurors is in a sense a “‘substantial’ [right],” the Court in *Collins* held that “it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause.” *Id.* at 51. Put another way, the requisite number of jurors went to “remedies and modes of procedure[,] which do not affect matters of substance.” *Id.* at 46 (quotation omitted). The Court therefore “overrule[d]” *Thompson* “[t]o the extent that [it] rested on the *Ex Post Facto* Clause.” *Id.* at 51–52.

Collins’ explanation for overruling *Thompson* leaves no doubt that SB 450—which similarly alters the number of jurors required for a particular result—falls outside the “concern” of the *Ex Post Facto* Clause.¹

The second case, *Dobbert v. Florida*, also forecloses Petitioner’s claim. See 432 U.S. 282 (1977). In response to the Court’s 1972 decision invalidating the death penalty, see *Furman v. Georgia*, 408 U.S. 238

¹ See *State v. Cohen*, 604 A.2d 846, 854 (Del. 1992) (understanding *Collins* to bar a nearly identical challenge to Delaware’s amended death-penalty statute); *United States v. Joyner*, 201 F.3d 61, 80 (2d Cir. 2000) (holding that a statutory change eliminating the jury’s role in sentencing was not ex post facto under *Collins*).

(1972), Florida enacted a statute that altered the role of the judge and jury in capital penalty phases. *Dobbert*, 432 U.S. at 288. In some ways, the new law was more beneficial to the defendant. *Id.* at 294–95 (the law eliminated the presumption that death is the appropriate sentence and required weighing of aggravators and mitigators). But in other ways it was less. *Id.* at 294. Whereas the old law made a jury’s recommendation of mercy binding on the judge, for example, the new law permitted the judge to disregard a life recommendation and impose death. *Id.* at 295.

The Court in *Dobbert* rejected the defendant’s ex post facto challenge to Florida’s new law. It described as “well settled” the rule that the Ex Post Facto Clause “does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed.” *Id.* at 293. Rather, “a *procedural change* is not ex post facto” “[e]ven though it may work to the disadvantage of a defendant.” *Id.* (emphasis added). Turning to the Florida statute, the Court found the change to be “clearly procedural.” *Id.* That was so, it wrote, because “[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed.” *Id.* at 293–94. The “crime,” the “punishment prescribed therefor,” and the “quantity or the degree of proof necessary to establish [] guilt” were all “unaffected” by Florida’s new law. *Id.* at 294. Consequently, applying the new law was “no ex post[] facto violation.” *Id.* at 292.

2. Petitioner’s rebuttals are unpersuasive. Consider his reliance on this Court’s opinion in *Peugh* and its “sufficient risk” test. Pet. 13–16. That case does

not hold that *every* new law increasing the chances of a higher sentence is impermissibly retroactive. At issue in *Peugh* was the applicability of a statute Congress adopted after the defendant committed his offense that more than doubled the Sentencing Guidelines range for that offense from 30–37 months to 70–87 months. 569 U.S. at 533–34. In summarizing its ex post facto jurisprudence, the Court cited the familiar four categories from *Calder*. *Id.* at 538. *Peugh* involved the third: laws that “chang[e] the punishment, and inflic[t] a greater punishment, than the law annexed to the crime, when committed.” *Id.* at 539. In construing this category, the Court had “never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause.” *Id.* Rather, the question was whether “a given change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Id.* (quotation omitted). The clause thus forbids the government from “enhanc[ing] the measure of punishment by altering the substantive ‘formula’ that decides the sentence. *Id.* at 550.

A bare majority of the Court found that the new law violated the clause by retroactively increasing the Guidelines.² As the majority observed, “the Guidelines are in a real sense the basis for the sentence”: though a judge has discretion to depart from the Guidelines in special cases, federal law provides that

² Justice Thomas, joined by three Justices, thought that even that holding went too far. *Peugh*, 569 U.S. at 551–52 (Thomas, J., dissenting).

“the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range.” *Id.* at 542 (emphasis omitted); *see also id.* at 543 (citing “empirical evidence” showing that judges “in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government’s motion”). Functionally, then, an increase to the guidelines range amounted to an increase to the available punishment for the crime. And in *Peugh*’s case, the new statute resulted in a bottom of the Guidelines range that was “33 months higher” than the top of the old range. *Id.* at 534 (emphasis added). In the Court’s view, that was a “substantive” change. *Id.* at 550.

Whatever its merits, *Peugh* is irrelevant here. For starters, that decision did not purport to overrule either *Collins* or *Dobbert*. To the contrary, it cited those precedents with approval. *See id.* at 538–39. Thus, whatever else *Peugh* means, it cannot stand for the proposition that applying SB 450 would violate ex post facto principles.

But even ignoring *Collins* and *Dobbert*, *Peugh*’s “significant risk” analysis does not aid Petitioner. *Peugh* dealt with a very discrete question: whether a statute increasing the federal sentencing guidelines retroactively increased the penalty for the offense. It did. In a “real sense,” the Guidelines dictated the available penalty—the Guidelines created the “*substantive ‘formula’*” governing sentencing. *Id.* at 542, 550 (emphasis added). None of that is true with respect to SB 450. The sentencing range—life or death—for first-degree murder is unchanged. All the new law does is alter the procedures governing a jury’s

recommendation—a recommendation that isn’t constitutionally required in the first place.

Petitioner’s responses to *Collins* and *Dobbert* are also incorrect. He attempts to distinguish *Collins* because the Utah law discussed there reduced the number of jurors needed for a conviction (from eight to four) but still required that the jury “be unanimous.” Pet. 20. Thus, he says, “the new law did not necessarily make it easier for the prosecution to carry its burden.” *Id.* But Petitioner overlooks the Court’s reasoning in *Collins*, which controls here despite any minor factual differences. *Collins* held that procedural questions related to the jury and its functions do not have “anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause.” 497 U.S. at 51. “[R]emedies and modes of procedure[]”—like the number of jurors needed for a particular result—“do not affect matters of substance.” *Id.* at 46 (quotation omitted). Any claim the defendant might have, in that circumstance, must therefore travel through the Sixth Amendment, not the *Ex Post Facto* Clause. *See id.* at 51–52.

Petitioner’s answer to *Dobbert* is also inadequate. In his view, *Dobbert* “stressed that the totality of the changes were ‘ameliorative,’ making it *less* likely than before that defendants would be sentenced to death.” Pet. 18. But *Dobbert* took pains to clarify that the procedural and ameliorative natures of the law were “independent bases” for the Court’s decision. 432 U.S. at 292 n.6. Indeed, it pointed to an earlier opinion in which the Court “found a procedural change not *ex post facto* even though the change was by no means ameliorative.” *Id.* (citing *Beazell v. Ohio*, 269 U.S. 167

(1925)). Contrary to Petitioner’s claim (Pet 18–19), *Carmell* does not change that. Cases like *Carmell* and *Collins* merely acknowledged that “a procedural change may constitute an *ex post facto* violation if it ‘affect[s] matters of substance.’” *Collins*, 497 U.S. at 45 (emphasis added). The substance-procedure distinction therefore remains relevant, and *Collins* holds that reducing the size of a jury is *not* a matter of substance. *Id.* at 51–52.

Because Petitioner had “fair warning” in 2019 that “the act of murder” was punishable by death, *Dobbert*, 432 U.S. at 297, SB 450 is not *ex post facto*.

B. Lower courts are not divided on the question presented.

Petitioner also has not shown any conflict among the lower courts. He cites two examples of states declining to retroactively apply laws that dispensed with a jury-unanimity requirement. Pet. 9–10. Yet he concedes that the Louisiana decision he cites, *State v. Ardoin*, 24 So. 802, 803 (La. 1899), became bad law after this Court’s rejection of the “substantial right” test. Pet. 9 (citing *Carmell*, 529 U.S. at 539). Not to mention that the Louisiana Supreme Court lacked the benefit of this Court’s subsequent guidance in *Collins* and *Dobbert*, which would have compelled the opposite conclusion.

The other state, Oregon, involved no judicial decision at all; as Petitioner admits, Oregon declared in a constitutional amendment that its non-unanimity

rule was non-retroactive. Pet. 10 (citing Or. Const. art. I, § 11 (1934)).³

With no plausible split on the question presented, Petitioner resorts to cases addressing an entirely different context: the retroactive application of amendments to parole statutes. See Pet. 10–12 (“If one widens the lens from juries to other actors whose votes determine the severity of a defendant’s punishment, the conflict deepens.”). It appears that two state courts of last resort have held that the Ex Post Facto Clause precludes a state from applying to pre-existing inmates a new law that makes it harder for those inmates to obtain parole. See *Barton v. S.C. Dep’t of Prob. Parole & Pardon Servs.*, 745 S.E.2d 110, 112 (S.C. 2013); *Clay v. Mass. Parole Bd.*, 56 N.E.3d 145, 147–48 (Mass. 2016). But that issue—which does not involve jury sentencing recommendations—differs from the question presented, explaining why neither

³ In *Ramos v. Louisiana*, this Court held that the Sixth Amendment requires jury unanimity on all the elements of the offense. See 590 U.S. 83 (2020). So the non-unanimity rules in Oregon and Louisiana are now defunct. As Florida explains in greater depth in the brief in opposition in *Jackson v. Florida*, No. 26-76, *Ramos* does not forbid Florida’s use of non-unanimous juries for death recommendations because the death recommendation is not an element of the offense. In Florida, a defendant is death-eligible once the jury finds the elements of first-degree murder and an aggravating factor. *Poole*, 297 So. 3d at 501; see also *McKinney*, 589 U.S. at 144–45. The death recommendation merely gives the jury a hand in making the normative judgment—not the factual judgment—that death is the appropriate penalty. Cf. *Carr*, 577 U.S. at 119 (explaining that the related question of weighing aggravators and mitigators is “mostly a question of mercy,” rather than a fact).

Barton nor *Clay* felt bound by this Court's decisions in *Collins* and *Dobbert*.

Whether the Massachusetts and South Carolina precedents were right or wrong about the retroactivity of changes to parole statutes, there will be time enough to take up that issue in a case actually presenting an ex post facto question in the parole context.

C. The question presented implicates few cases.

Finally, the discrete ex post facto issue here is unlikely to recur with any frequency. *Contra* Pet. 21–22. Outside Florida, no state has changed (or recently even proposed to change) its procedures in capital cases to lower the number of jurors required for a death recommendation. Alabama is the only other state to use a similar procedure, but it has done so for many years. A ruling here would thus apply exclusively in Florida.

Even the Florida cases involving the issue will be rare. This issue arises only in cases where the State seeks to apply its new death-recommendation procedure to cases where the offense occurred prior to the law's enactment. So while some other Florida cases will no doubt raise the issue, the number of cases will necessarily be limited.

And because existing precedents like *Collins* and *Dobbert* are clear, Florida courts do not need additional guidance.

* * *

Certiorari is unwarranted. The Florida Supreme Court properly held that applying SB 450 to Petitioner's case complied with the Ex Post Facto Clause, lower courts are not divided on the question, and the question will not regularly recur.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 29, 2026

Respectfully submitted,

JAMES UTHMEIER
Attorney General

DAVID M.S. DEWHIRST
Solicitor General
**Counsel of Record*

OFFICE OF THE
ATTORNEY GENERAL
State of Florida
PL-01, The Capitol
Tallahassee, FL
32399-1050
Phone: (850) 414-3300
david.dewhirst@
myfloridalegal.com

JEFFREY PAUL DESOUSA
NATHAN A. FORRESTER
Chief Deputy Solicitors
General
SCOTT BROWNE
Chief Assistant Attorney
General

Counsel for Respondent