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

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July 24, 2024

STATEMENT OF THE ISSUES

I. Whether Zieler has demonstrated fundamental error related to the trial court's handling of the initial attempt at selecting a jury.

II. Whether prosecutors violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), when they informed the jury that a recommendation of death was advisory and that the trial court would have final say on whether to impose death.

III. Whether the trial court abused its discretion in allowing the admission of State's Exhibit 110, which once contained hairs found at the crime scene before those hairs were consumed as part of the DNA testing process.

IV. Whether the trial court committed reversible error in its ambiguous statement in the sentencing order that the jury did not find mitigating circumstances.

V. Whether Florida's capital-sentencing regime is cruel and unusual in violation of the Eighth Amendment because the Court does not perform proportionality review, a jury need not unanimously recommend death, and the Legislature has set out sixteen aggravating factors.

VI. Whether the Sixth Amendment requires a unanimous jury recommendation of death before capital punishment may be imposed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Rules

Miscellaneous

STATEMENT OF THE CASE AND FACTS

This is an appeal of two first-degree murder convictions and sentences of death for Joseph Zieler. In 2023, after the Legislature enacted Florida's new death-penalty law, SB 450, Zieler was finally brought to account for the 1990 murders of R.C. and L.S. His identity was discovered only after his DNA was entered into the Combined DNA Index System database after he committed a different crime, allowing law enforcement to link him to semen and hair samples from the scene of these decades-old murders.

A. Zieler rapes and murders a woman and child by suffocation in 1990.

On May 9, 1990, Jan C.[1] was living in Cape Coral with her 11-year-old daughter, R.C., and her friend and colleague, L.S., who had just moved in to help Jan save money. Tr. 1258–59, 1262. After the three hung out that evening, Jan was thinking of going to visit her boyfriend, who lived nearby. Tr. 1266, 1273. Both her daughter and L.S. encouraged her to go. Tr. 1273–74. Jan figured that R.C. wanted alone time to talk on the phone with her friend, and L.S. did not mind

[1] Jan's last name is abbreviated to avoid identifying the victims. *See* § 794.03, Fla. Stat.

babysitting. Tr. 1273–74. When Jan left, both R.C. and L.S. were in their beds. Tr. 1286–87, 1326.

Jan returned home several hours later to signs of a break-in. Tr. 1301, 1307, 1309, 1315. As Jan walked upstairs, she spotted the nude body of L.S. lying on her bed. Tr. 1324. Jan called out to L.S. without response; she then rushed to check on her daughter. Tr. 1324–25. She discovered R.C.'s naked body face-down on the floor in R.C.'s bedroom, her legs spread apart and her stomach propped up with a pillow. Tr. 1325, 1327–29, 1417. A vibrator was between her legs. Tr. 1332, 1417.

R.C. was cold to the touch. Tr. 1333. While Jan performed CPR, she could hear a lot of congestion from R.C.'s nose that sounded like "she had really been crying." Tr. 1334. Jan then heard R.C.'s lungs aspirate and knew she was dead. Tr. 1334. Jan called 911 and stayed with R.C.'s body until law enforcement arrived. Tr. 1334.

Detective Todd Everly responded to the scene and observed R.C. with purple lips like she had been clenching down. Tr. 1419. She also had foaming at the mouth and nose, telltale signs of suffocation. Tr. 1419. He observed bleeding from her vaginal wall. Tr. 1420.

R.C. "did not go down without a fight." Tr. 1421. Wounds to her face and back indicated a struggle. Tr. 1420–21. It appeared that she was pulled from her bed to the floor and, along the way, hit her back on the wooden bed frame. Tr. 1420. Her underwear was probably ripped off, as evidenced by an abrasion on her left thigh and hip and the torn underwear lying nearby. Tr. 1420–21.

L.S.'s body was equally devastated. Everly found her nude on her bed with a pillow partially covering her head. Tr. 1414. Her anal cavity displayed "extreme injuries" and a lot of bleeding. Tr. 1416. She had a broken fingernail indicative of a defensive wound. *Id.* A pornographic magazine was left open on the bed. Tr. 1424.

Autopsies revealed that the manner of death for both L.S. and R.C. was homicide. Tr. 1517–18. The cause of death for each victim was asphyxia, or lack of oxygen. Tr. 1536–37, 1566.

L.S. had an abrasion to her left shoulder and a bruise to the mid-back caused by blunt force trauma. Tr. 1524-25. She also had a blunt force injury to the left side of her neck. Tr. 1527, 1529.

L.S. had an abrasion to her right upper eyelid and a hemorrhage in her right eye. Tr. 1527, 1529. The inside of her left upper lip was lacerated. Tr. 1527, 1532–33. Her tongue was pressed between her

lower teeth. Tr. 1534–35. Her injuries were suggestive of a struggle and of having been smothered. Tr. 1530, 1535–39. Blood covered the opening of her anus and lacerations extending out from the anus were caused by penetration. Tr. 1541-42. She also had hemorrhages under her scalp. Tr. 1540.

R.C. had a contusion to her right shoulder and abrasions to her left eye and back. Tr. 1544–48. She sustained contusions to her right cheek, left corner of the mouth, and chin that were consistent with being pressed to the ground. Tr. 1548–49. There was also bleeding between her scalp and bone. Tr. 1556–57.

R.C. exhibited tears on the wall of her vagina and a tear to the deepest portion of the vagina—the posterior fornix—all caused by penetration. Tr. 1563–65. The little girl had dried blood around her external genitalia and blood within the vaginal canal. Tr. 1560. Sperm was found on swabs taken from her vagina and anus. Tr. 1562.

Law enforcement made numerous efforts in 1990 to identify the perpetrator. FDLE crime scene analyst Joel Cary collected forensic evidence from the scene and the autopsies. Tr. 1469–72, 1481. That included hairs taken from one of the bodies during the autopsies, to

be packaged for evidence. Tr. 1471–72. That package became State's Exhibit 110 at trial. *Id.* The exhibit has Cary's initials and writing on it. Tr. 1472.

FDLE Senior Crime Laboratory Analyst James Pollack, Jr. tested the crime scene evidence for DNA. Tr. 1683–89. A genital swab from R.C. contained a semen sample, from which Pollack developed a male DNA profile. Tr. 1683–84. The semen was left on or inside R.C.'s vagina; it would not have been possible for the sample to have been from a dry semen stain that transferred to her. Tr. 1686.

Pollack also was able to develop a profile from a bedsheet cutting from R.C.'s bedroom, Tr. 1686–87, and from the pillowcase found under R.C. Tr. 1687. The male DNA profiles from each piece of evidence were consistent. Tr. 1688.

Law enforcement investigated hundreds of people, but the case went cold. Tr. 1428–29, 1440.

Over the years, and with advances in DNA testing, the police were able to obtain a more complete DNA profile from the forensic evidence. Tr. 1712–16 (testing in 2000 by analyst Marcella Scott); Tr. 1897 (testing in 2012 by Beth Ordeman of another bedsheet cutting that resulted in a complete DNA profile at all 15 markers). In 2008,

DNA analyst Michelle Boyer tested four hairs that were packaged by Cary and collected from L.S.'s body during her autopsy. Tr. 1837 1840, 1471–72. Boyer got a partial DNA profile from two of the hairs. Tr. 1838.

As it happened, Zieler was arrested in late August 2016 for an offense involving his adult son. Tr. 1741–43, 1810. He was swabbed for DNA at the Lee County Jail, and his profile was entered into the CODIS database. Tr. 1741–43.

Law enforcement received a CODIS hit: Zieler's DNA matched the bedsheet profile. Tr. 1910–12. Additional testing showed that Zieler was a one-in-83 quintillion match to the samples from the bed-sheet. Tr. 1922. He was a one-in-16 million match to the partial DNA profile that Boyer had obtained from the hair sample. Tr. 1948. And the statistics were one-in-450 million for the pillowcase and one-in-360,000 for the genital swab. Tr. 1923.

Zieler was questioned by police about the murders. Tr. 1742-43. He was "nervous" and "evasive"; his "voice was cracking" and he claimed to be unable to answer most of the questions because of an alleged head injury in 1998 that affected his memory. Tr. 1744. When an officer gave him a Pepsi, Zieler remarked that "[t]his is the last

time I'll [be able to] get one." Tr. 2037. Without prompting, Zieler asked about the death penalty in Florida and whether it was done by lethal injection. Tr. 2038. He also asked, "Are y'all going to keep my girl's name out of it?" Tr. 2038.

While in jail, Zieler made recorded phone calls to his longtime girlfriend Bonnie Kniceley. Zieler told her that he was "worried about the other thing they'll be talking about in the past," Tr. 1983, and urged her to have "a backpack for a quick escape." Tr. 1984. During another phone call, Zieler implied that he had been saving money for an emergency like this and that he needed to get out to be "free man." Tr. 1995. He had gone through this before in 1990 (Zieler was arrested in July 1990) and nothing "bit [him] in the ass" then, "so there's a very good chance it won't." Tr. 1997–98.

Yet in a letter, he told Kniceley that "[t]here's a good chance I'm going to prison for the rest of my life because of where things crept." Tr. 2008. "I've hidden in [my] room," he wrote, "afraid of things for the last 20 years, and now this has happened." *Id.* "There will be no more chances to hide if it happens. It's what it is to be." *Id.*

Kniceley told police that Zieler's preferred sexual position was to have intercourse from behind and that he used a pillow under her

pelvis, Tr. 2002–04—the same position in which Zieler's child victim was found.

B. Florida's death-penalty regime at the time of the murders and Zieler's trial.

At the time of the murders, Florida law required that a capital jury issue an "advisory sentence" of life or death. *See* § 921.141(2), Fla. Stat. (1988). Under that scheme, a majority of jurors recommended to the trial court either life imprisonment or death. *Id.* The jury was told to base that recommendation on its views on the sufficiency of the aggravating factors to warrant death; the relative weight of the aggravating factors and any mitigating circumstances; and whether death was the appropriate penalty. *Id.* § 921.141(2)(a)–(c). But the ultimate decision of which sentence to impose lay with the trial court: "Notwithstanding the recommendation of a majority of the jury," the trial court could impose a sentence either of life or death. *Id.* § 921.141(3).

In *Hurst I*, the Supreme Court held that Florida's scheme violated the Sixth Amendment because a jury was not required to find the fact of an aggravating circumstance establishing eligibility for the death penalty. *Hurst v. Florida*, 577 U.S. 92, 97–99 (2016) (explaining

that the Sixth Amendment "requires that each element of a crime be proved to a jury beyond a reasonable doubt"). On remand, this Court expanded *Hurst I*'s holding by requiring that the jury unanimously find not only an aggravator but also that the aggravators outweigh any mitigators and that death is the appropriate sentence. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (*Hurst II*).

That led the Legislature to amend the death-penalty statute. In conformity with *Hurst II*, 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* § 921.141(2)–(3), Fla. Stat. (2017). If any of those findings were not made, the defendant was to be sentenced to life in prison.

This Court later overruled *Hurst II*. *See 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 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 under binding Supreme Court precedent, the Eighth Amendment likewise does not require a unanimous jury recommendation. *Id.* at 505.

The Legislature again amended the State's death-penalty laws in 2023. *See* Ch. 2023-23, § 1, Laws of Fla. (effective Apr. 20, 2023); *see also* § 921.141, Fla. Stat. (2023). Under SB 450, the jury must still unanimously find the fact of an aggravating factor, as required by *Hurst I*, before the defendant is eligible for the death penalty. § 921.141(2)(a)–(b), Fla. Stat. (2023). But the jury's recommendation of death now 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 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 that sentence or a sentence of life. *Id.* § 921.141(3)(a)2.

C. Zieler is convicted and sentenced to death.

Zieler was indicted for two counts of premeditated first-degree murder in November 2016. R. 68-69. The State sought the death penalty. R. 86–87.

The first day of Zieler's trial was set for February 27, 2023. Tr. 2629. The judge asked the parties to review proposed introductory remarks to the venire to make sure they were "an appropriate rendition of the law." Tr. 2645–46; *see also* Tr. 2632, 2656–57. The parties suggested changes to those remarks. Tr. 2656–74. The judge modified them accordingly. Tr. 2680.

In describing to the venire the jury's eventual choice between a life and death recommendation, defense counsel repeatedly emphasized that if Zieler received a life sentence he would be ineligible for parole. *See* Tr. 2745–46, 2748–49, 2818–19. Counsel assured the venire, for example, that "[y]ou don't have to worry about the person being on the street again or anything like that." Tr. 2748–49. The trial court and prosecution made similar statements to the venire. Tr. 2715, 2747.

On the fourth day of voir dire, the parties learned that a group of the venire had been talking about the case together, Tr. 3849–52, with one person calling Zieler a murderer, not merely an "alleged" murderer. Tr. 3851–53. As a result, the defense wanted to strike the venire and start over. Tr. 3857–58.

Things came to a head when the parties advised the court of a "much bigger problem." Tr. 3859. As defense counsel explained, everyone had told the venire that Zieler was ineligible for parole but "we all forgot this is a 1990 case" and "there was parole back then." Tr. 3859; *see also* Tr. 3860 (defense counsel acknowledging telling the venire that "He's never coming out again. They said, Wow, I didn't know that."). "That's not what the Court instructed them," counsel said, "and that's sure as heck not what the State and I instructed them." Tr. 3859–60. This issue could not be "fix[ed]" because "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." Tr. 3860.

Admitting that it was "partially our fault" and "our screw-up," the defense moved to strike the venire. Tr. 3861. Zieler personally agreed to that request. Tr. 3864–67. The judge noted that everything he read had "passed your muster, both sides." Tr. 3863. But because

"the consequences to Mr. Zieler are too grave," it ordered that the venire be stricken. Tr. 3865, 3867.

Though the trial court and prosecution were available to restart jury selection the next week, defense counsel asked that the proceedings be postponed to allow time to review the jury questionnaires. Tr. 3868–71. That would also permit the defense time to finish investigating the mitigation. Tr. 3870–71. The judge set the trial for May. Tr. 3871, 3879.

In the guilt phase, the jury heard DNA analyst Boyer's perpetuated testimony without objection from the defense. Tr. 1823; *see also* Tr. 3873–74. Boyer explained how she tested the hairs from State's Exhibit 110 and developed two partial DNA profiles. Tr. 1830–38. She described Exhibit 110 as containing five items: paper folds V2-3, V2-2 (2), V2-3/1, and V2-2(1), and a manila envelope labeled "several hairs and debris," in which she put paper fold V2-2. Tr. 1832–33. When she opened the exhibit for testing in 2008, four of them had no apparent debris or hairs, and the only evidence she found was within V2-2. Tr. 1833.

As a product of the DNA testing, all four hairs were "consumed," meaning destroyed, which is common in DNA testing. Tr. 1839.

After Boyer's testimony, the prosecutor offered Exhibit 110 into evidence. Tr. 1863. Defense counsel objected, arguing that Exhibit 110 showed signs of tampering because Boyer had testified that four of the five paper folds were empty. Tr. 1864. After inspecting the exhibit, the court determined that the "omission of hairs" was not "inherently evidence of tampering." Tr. 1866–70. It therefore admitted the exhibit.

Though Zieler objected to Exhibit 110—which was not the predicate for the State's DNA evidence—he raised no objection to the actual DNA evidence in the case, including the semen evidence that was unrelated to Exhibit 110. The jury thus heard extensive evidence that Zieler's DNA was at the crime scene, including, with one-in-83 quintillion accuracy, that Zieler's semen was on R.C.'s bedsheet, Tr. 1922, and that he was a match to the DNA found in and around her body and the DNA in the hair samples. Tr. 1686–88, 1711–15, 1830–38, 1897, 1922–23, 1948. Exhibit 110 pertained only to the hair samples, not the semen samples.

The jury also heard Zieler's numerous admissions and Kniceley's testimony about his preferred sexual position. Tr. 1983–98, 2002–08, 2037–38.

Zieler testified. He said his Pepsi statement was facetious, Tr. 2067, and that he could not have committed the murders because he was in jail in Maryland at the time. Tr. 2068, 2075. That alibi was impeached on cross-examination. Tr. 2075–81. In a letter Zieler had written after his 2016 arrest, he claimed to have been in "jail" in Maryland. Tr. 2075–77. During cross, however, he admitted that he might have been "mistaken," Tr. 2079–81, and a record from the Maryland court system showed that he had a complaint for petit theft filed against him, not that he had been jailed in that state. Tr. 2080–81; *see* Tr. 2076 (introduction of Maryland court record, Exhibit 310 at R. 4071). Confronted with that evidence, Zieler changed his story and said simply that he was somewhere in Maryland. Tr. 2076–77.

To explain why his DNA was at the scene, Zieler claimed that he must have slept with Jan and her friend in 1989—a year before the murders—and that they must have been "too much of a pig to wash their sheets." Tr. 2091-93. He theorized that his semen stain from 1989 must have been transferred to the 11-year-old victim when she was sleeping in the bed in 1990.

The jury found Zieler guilty of two counts of first-degree murder. R. 1541.

By the time of the penalty phase, SB 450 had become law. The jury unanimously found four aggravating factors for each murder: (1) Zieler was previously convicted of another capital felony or violent felony, (2) the murders were committed while Zieler was engaged in the commission of a burglary, (3) the murders were especially, heinous, atrocious, or cruel, and (4) the murders were cold, calculated, and premeditated. R. 1536–39. The verdict form did not ask the jury to report its findings on mitigation. *See id.* By a 10-2 vote, it recommended that Zieler be sentenced to death for each murder. *Id.*

The trial court agreed, outlining its decision in an 18-page sentencing order. R. 1618–35, 1646–63. The court found all four aggravators and assigned each great weight. R. 1651–53. In a discussion of the statutory mitigators, the court noted that "[t]he jury found that no mitigating circumstances had been proven by a greater weight of the evidence," R. 1654, and that no "statutory mitigating factors were raised or established." R. 1662. But the court "considered the non-statutory mitigating factors presented by Defendant," R. 1662, concluding that 36 out of 42 of them had been established. R. 1653–61. It assigned varying weight to each. *Id.*

The court deemed the aggravating factors "horrific," emphasizing R.C. and L.S.'s gruesome injuries and death by suffocation. R. 1662. That aggravation "greatly outweigh[ed] the comparatively insignificant mitigating factors." R. 1662. Seeing no basis to override the jury's recommendation, *id.*, the trial court imposed that sentence for each murder. R. 1666–70.

SUMMARY OF ARGUMENT

I. Had Zieler been prosecuted in 1990 when he raped and suffocated his two victims, he could have been sentenced to death based on a jury's bare majority recommendation of death. Current law afforded him greater protections than that. Under SB 450, he could receive death only after the jury's supermajority recommendation of 8-4.

Yet he now asserts a right to be sentenced under an intervening statute requiring that death recommendations be unanimous. That is so, he says, because his trial commenced in February 2023—before SB 450 was enacted—and was aborted only due to the parties' and trial court's alleged errors, pushing his trial until after SB 450's enactment. His claims of ineffective assistance of counsel (IAC) and fundamental error fall short.

Most basically, unpreserved IAC claims cannot be raised on direct appeal. *Steiger v. State*, 328 So. 3d 926, 932 (Fla. 2021). Even if they could, counsel's errors in misinforming the jury venire about parole eligibility were cured when the venire was discharged. And counsel was not ineffective in asking the trial court to discharge the venire because counsel had to act based on the law as it existed at the time—not, as Zieler now claims, based on SB 450, which was then no more than proposed legislation. Zieler also overlooks that defense counsel had an independent strategic reason for wishing to start over with a new venire: numerous prospective jurors had discussed the case, with at least one prejudging his guilt.

His fundamental-error claim is no more successful. For one thing, any errors made by the trial court were invited. Zieler *wanted* the jury instructed on his ineligibility for parole, since his lawyers thought it would make the jury less likely to recommend death. And Zieler *asked* the court to discharge the venire, which the court did. "[I]nvited error precludes fundamental error review." *Baptiste v. State*, 324 So. 3d 453, 455 (Fla. 2021). For another thing, Zieler had no entitlement to be tried under the 12-0 law: SB 450 merely altered the procedures in a capital penalty phase, and no one has a vested

interest in an outmoded procedure. And even setting that aside, Zieler cannot show that the trial court's rulings altered the outcome. The aggravation in Zieler's case was truly overwhelming and a rational jury would have voted to recommend death unanimously if required to do so under the 12-0 law.

II. Next, Zieler cannot succeed in his *Caldwell* claim. Not only were his arguments not presented below, there was no *Caldwell* error. *Caldwell* forbids remarks by prosecutors only when those remarks inaccurately describe the role of the jury in sentencing in a way that diminishes the jury's sense of responsibility. But the comments here were accurate. Prosecutors tracked Florida law when they told the jury that, in the event of a death recommendation, the trial court would have the final say on whether to impose death. This Court has often upheld similar remarks.

III. The trial court did not abuse its discretion in admitting Exhibit 110. At the outset, though, Zieler articulates no conceivable prejudice. He has never objected to any of the DNA evidence in this case, including the proof that his DNA was found in semen collected from the crime scene. That semen was unrelated to Exhibit 110. At most, Exhibit 110 related to the DNA evidence from hairs found at

the scene. But the defense objected only to the introduction of Exhibit 110, which at one point had housed the hairs before they were tested, and never challenged the testimony proving that the hairs were a DNA match to Zieler.

There was no error anyways. Zieler offers nothing to support his supposition that the exhibit was tampered with. His theory turns on a misreading of the testimony. It was unsurprising that hairs were found in only one paper fold in Exhibit 110 because that was the condition of the exhibit in 2008 when DNA analyst Michelle Boyer tested the hairs. And Boyer explained that when hairs are tested for DNA they are commonly "consumed," as these were.

IV. Nor is Zieler entitled to resentencing due to an alleged error in the trial court's sentencing order. Zieler relies on the trial court's written statement that the jury did not find any mitigation. That statement is at worst ambiguous, however, and had Zieler moved for rehearing or clarification, the trial court could have either corrected any error or clarified the record.

Even if preserved, the mitigation claim fails on the merits. In context, the best reading of the disputed statement is that the trial court thought either that the jury found no *statutory* mitigators—

Zieler raised none—or simply that the trial court was not asked to make a special finding on the verdict form as to mitigation. Given the parties' agreement that nonstatutory mitigators existed, coupled with the trial court's own such conclusion, the least plausible reading of the disputed sentence is that the trial court thought the jury had found no mitigation at all.

Last, Zieler was not prejudiced. Whatever the trial court thought the jury did, the court fulfilled its statutory duty to independently consider the mitigation. Indeed, its written order reports having found 36 of Zieler's proposed 42 nonstatutory mitigators, and Zieler alleges no error in those findings. After weighing those mitigators against the overwhelming and "horrific" aggravation in the case, the trial court found that death was warranted. Its views on what the jury did, correct or not, were irrelevant.

V. Florida's death-penalty scheme does not violate the Eighth Amendment. None of the features of that scheme that Zieler criticizes pose a constitutional problem in and of themselves, and, as this Court has often held, the scheme as a whole appropriately channels sentencing discretion and prevents the arbitrary imposition of the death penalty. And having raped and murdered his 11-year-old and

adult victims, Zieler cannot prevail even in an as-applied challenge, let alone the facial challenge he brings.

VI. Zieler argues that the Sixth Amendment requires that any recommendation of death be made by a unanimous jury. Both this Court and the Supreme Court have repeatedly rejected that claim. *See, e.g.*, *State v. Poole*, 297 So. 3d 487, 503–04 (Fla. 2020).

VII. Finally, the evidence was sufficient. Zieler does not dispute that point on appeal. Though he evaded justice for decades, the presence of his DNA in both hairs and semen at the crime scene—including on and around his 11-year-old victim—show that he sexually assaulted and murdered R.C. and L.S. And his pretrial statements virtually admitted guilt. He told his girlfriend that his past was catching up to him and that he had "hidden" in his "room" for the last two decades; told law enforcement that a soda they gave him would be the last he would ever enjoy; and asked if Florida used lethal injection. Finally, Zieler's girlfriend testified that the position in which the child's naked body was found, with a pillow beneath her pelvis, matched Zieler's favorite sexual position.

The Court should affirm.

STANDARD OF REVIEW

I.A. Zieler raises an unpreserved claim of ineffective assistance of counsel. Such claims are not cognizable on direct appeal. *Steiger v. State*, 328 So. 3d 926, 932 (Fla. 2021). If the Court nevertheless addresses the claim, a defendant must show both "deficiency" and "prejudice." *Butler v. State*, 100 So. 3d 638, 647 (Fla. 2012). To meet the first prong, "the defendant must prove that counsel's performance was unreasonable under prevailing professional norms." *Id.* (internal quotation marks omitted). At the second prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (same).

I.B. Zieler also raises a claim of fundamental error related to the trial court's rulings at the February 2023 jury selection. A fundamental error is one "so prejudicial that" it "vitiate[s] the entire trial." *Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997). It "reaches down into the validity of the trial itself" to the extent that a "jury recommendation of death could not have been obtained without the assistance of the alleged error." *Davis v. State*, 136 So. 3d 1169, 1202 (Fla. 2014). But "invited error precludes fundamental error review."

Baptiste v. State, 324 So. 3d 453, 455 (Fla. 2021). "Defendants have no constitutional due process right to correct an unpreserved error, and appellate courts should 'exercise . . . discretion under the doctrine of fundamental error very guardedly.'" *Smith v. State*, 320 So. 3d 20, 27 (Fla. 2021).

II. The *Caldwell* claim is unpreserved. Should the Court reach it, its review is de novo. *Reynolds v. State*, 251 So. 3d 811, 814 (Fla. 2018) (plurality op.).

III. A trial court's decision admitting evidence over a tampering objection is reviewed for an abuse of discretion. *Armstrong v. State*, 73 So. 3d 155, 171 (Fla. 2011). A court abuses its discretion when it "adopts a view that no other reasonable person would take." *Loyd v. State*, 379 So. 3d 1080, 1088 (Fla. 2023). Harmless-error review applies to erroneously admitted evidence. *Philmore v. State*, 820 So. 2d 919, 931 (Fla. 2002).

IV. The mitigation-findings claim is unpreserved. If the Court entertains the claim, "[t]rial court findings on mitigation are reviewed for an abuse of discretion." *Wood v. State*, 209 So. 3d 1217, 1232 (Fla. 2017). Harmless-error review applies. *Ault v. State*, 53 So. 3d 175, 187 (Fla. 2010) (plurality op.).

V. & VI. This Court reviews constitutional challenges de novo. *Correll v. State*, 184 So. 3d 478, 487 (Fla. 2015). Statutes are "clothed with a presumption of constitutionality" and "must be construed . . . to effect a constitutional outcome." *Lewis v. Leon Cnty.*, 73 So. 3d 151, 153 (Fla. 2011). To overcome the presumption of constitutionality, a challenger must demonstrate invalidity "beyond reasonable doubt." *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 87 (Fla. 2024).

VII. Finally, while not challenged by Zieler, the State has analyzed the sufficiency of the evidence to aid the Court in its mandatory review of that question in capital direct appeals. This Court applies the competent, substantial evidence standard to determine whether sufficient evidence supports Zieler's first-degree murder convictions. *Caylor v. State*, 78 So. 3d 482, 501 (Fla. 2011). In conducting this inquiry, the Court views the evidence "in the light most favorable to the State to determine whether a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Id.*

ARGUMENT

I. Zieler has not demonstrated fundamental error in the trial court's handling of the initial jury selection.

Zieler's first issue is a generic claim of unfairness in search of a legal theory. Init. Br. 25–42. His trial was scheduled to begin in February 2023, two months before SB 450 was enacted and signed into law. *See* Ch. 2023-23, §§ 1, 3, Laws of Fla. (effective Apr. 20, 2023). Had he been tried before SB 450, Zieler could have received the death penalty only if jurors voted unanimously to recommend death. But because of errors in instructing the jury venire in February, and because Zieler had evaded justice for decades,[2] the trial had to be aborted and rescheduled for May 2023, after SB 450 took effect. That law permitted the trial court to impose death so long as an 8-4 supermajority of the jury recommended it. Under the guise of claims of both "ineffective assistance of counsel" (IAC) and "fundamental error," Zieler now says that he should not have been tried under SB 450.

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[2] Zieler's arguments ignore that had he been brought to justice in 1990 when the murders took place, a simple majority vote of the jury would have sufficed. *Supra* at 8.

The Court should affirm. Taking those arguments step by step, unpreserved IAC claims are not cognizable on direct appeal. Precedent instead holds that Zieler must show that the trial court committed fundamental error. *Steiger v. State*, 328 So. 3d 926, 928 (Fla. 2021). But his theories of fundamental error lack merit: The only trial court errors he identifies were invited, would not have changed the outcome, and merely resulted in the application of the Legislature's desired sentencing protocols.

A. Unpreserved ineffective assistance of counsel claims are not cognizable on direct appeal.

Zieler's arguments take some untangling. Init Br. 25–42. He raises alternative claims of "fundamental error" and "ineffective assistance rising to the level of fundamental error." *Id.* at 25. The fundamental-error claim is discussed below. *See infra* at 34–39. As for the IAC claim, Zieler's argument proceeds in two parts. He first says that defense counsel should have known that parole was available for murders committed in 1990, and thus should not have told the jury that a sentence of life meant Zieler would never get out of prison. Init. Br. 25, 36, 38–39. He then says that counsel erred in attempting to fix that defect: Counsel should have had the jury "reinstructed on

the correct law" so that his trial could "continue to proceed under the unanimity statute," rather than discharge the venire and start over. *Id.* at 25. Counsel's performance was deficient, in Zieler's estimation, because postponing the trial risked subjecting him to sentencing under SB 450 and its 8-4 recommendation rule, which at that point was pending in the Legislature. *Id.* at 35–37.

1. Zieler's IAC claim was not preserved below. It therefore fails at the threshold because unpreserved IAC claims cannot be raised on direct appeal. *See Steiger*, 328 So. 3d at 932.

Zieler cites *Steiger* but mistakes its import. He reads that precedent as "almost shut[ting] the door on ineffective assistance claims on direct appeal, but le[aving] that door slightly ajar." Init. Br. 37. Not true. *Steiger* made abundantly clear that Section 924.051 "*precludes review* of [] claims of ineffective assistance of trial counsel on direct appeal." 328 So. 3d at 930 (emphasis added); *see also id.* at 928 (unpreserved IAC claims are "preclude[d]"). That statute provides that "[a]n appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error." § 924.051(3), Fla. Stat. *Steiger* therefore held that where the claim of

ineffective assistance of counsel was not first brought to the trial court, it "may not be raised or result in reversal on direct appeal." 328 So. 3d at 932. "Rather, to raise and prevail on any unpreserved claim of error on direct appeal, the defendant must demonstrate fundamental error," *id.*—a separate theory asking whether "the *trial court* erred, not counsel." *Ford v. State*, 350 So. 3d 109, 113 (Fla. 1st DCA 2022).

Zieler can raise his IAC claim in a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. But he cannot bring it on direct appeal.

2. The claim is fruitless at any rate. No one disputes that counsel mistakenly told the jury venire that Zieler was ineligible for parole, since parole was available for first-degree murders committed in 1990. But any taint from that error dissipated once that venire was discharged. Tr. 3859–68. So that cannot warrant reversal.

Nor was counsel deficient for asking to discharge the venire. Under *Strickland v. Washington*, the question is whether "counsel's representation fell below an objective standard of reasonableness," prejudicing the defendant. 466 U.S. 668, 688 (1984). Counsel's performance is deficient only if it "amounted to incompetence under

'prevailing professional norms,'" and merely "deviat[ing] from best practices or most common custom" is not enough. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

It could not possibly be deficient performance for counsel in a death-penalty case to agree to discharging a venire that had been tainted by legally erroneous comments. That was particularly true here given the indications that one or more members of the venire had prejudged the case against counsel's client. *See* Tr. 3851–53 (multiple prospective jurors had discussed the case, with one calling Zieler a "murderer"), 3857–58 (defense counsel moving to strike the panel as a result). Counsel made a "[s]trategic decision[]," which "do[es] not constitute ineffective assistance if alternative courses of action have been considered and rejected." *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987).

It would have made even less sense for defense counsel to have refused to start anew based on speculation that SB 450 might become law before any rescheduled trial. At the time of the first jury selection in February 2023, SB 450 had been referred to legislative committee but had not yet received a committee vote, let alone been

introduced or read on the Senate floor.[3] Reasonable counsel would have acted on the law as it stood, not on "legislative fortune-telling" about how it might change in the months ahead. *Kennedy v. Commonwealth*, No. 2002-ca-000433, 2003 WL 2004245, at *7 (Ky. Ct. App. May 2, 2003) (rejecting similar IAC claim); *cf. Richter*, 562 U.S. at 107 (warning courts not to rely on the "harsh light of hindsight" when evaluating counsel's performance).

"Defense counsel cannot be held ineffective for failing to anticipate [a] change in the law," *Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992), especially when that change stems from "pending legislation." *Welker v. Hartley*, No. C 08–4551, 2011 WL 2581379, at *5 (N.D. Cal.

[3] *See* CS/CS/SB 450: Death Penalty, The Florida Senate (last visited July 24, 2024), https://tinyurl.com/33mpatpm.

June 29, 2011).[4] Thousands of bills are filed each legislative session,[5] yet few become law. Had Zieler's lawyers made critical strategic decisions based on SB 450, only to see that legislation die in committee or fail on the Senate floor, Zieler would undoubtedly be here asking the Court to find *that* decision deficient.[6]

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[4] For those reasons, courts have routinely rejected claims like Zieler's. *See, e.g.*, *Saro v. Covello*, No. 19-cv-5550, 2021 WL 275546 (N.D. Cal. Jan. 27, 2021); *Wilkerson v. United States*, No. 2:16-00218, 2024 WL 706601, at *3 (W.D. Okl. Feb. 20, 2024) ("It is one thing to require counsel to anticipate legislation needing only the signature of the President to become effective; it is quite another to require counsel to anticipate the enactment of [pending] legislation that Congress may pass in the future."); *United States v. Juliano*, No. 2:18-cr-00021, 2020 WL 1814911, at *3 (E.D. Wash. Apr. 9, 2020) (noting that "numerous district courts around the country have rejected similar claims"); *United States v. Frazier*, No. 09-0029, 2015 WL 5595611, at *5–6 (M.D. La. Sept. 21, 2015) (collecting cases); *Brown v. United States*, No. 1:08CR388–1, 2012 WL 12996057, at *2 (M.D.N.C. Dec. 7, 2012) ("At that time, there was absolutely no guarantee that [the pending bill] would ever be passed and signed. Counsel gave advice under the law as it existed at the time and cannot be faulted for failing to correctly anticipate a change in law."); *Kennedy*, 2003 WL 2004245, at *7; *cf. United States v. Abney*, 812 F.3d 1079, 1092–93 (D.C. Cir. 2016) (explaining that counsel could be defective for failing to rely on an enacted law awaiting signature by the President, but not pending legislation.

[5] 1,828 bills were filed in the Florida Legislature in 2023. Bills, The Florida Senate (last visited July 24, 2024), https://tinyurl.com/3cku8yj3.

[6] "Further, counsel cannot be deemed ineffective for pursuing a strategy which the defendant agrees with," *Hilton v. State*, 326 So. 3d

Zieler also fails to show prejudice. Prejudice exists if there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A defendant must do more than speculate that an error affected the outcome," *Bradley v. State*, 33 So. 3d 664, 672 (Fla. 2010), and the likelihood of a different result must be substantial, not just conceivable. *Richter*, 562 U.S. at 112. Yet Zieler's claim of prejudice requires the Court to speculate that had he been tried to a verdict in February and March 2023, the jury would not have recommended death. He cannot know that. *See, e.g.*, *Bradley*, 33 So. 3d at 675–76 (rejecting speculation that defendant "might have fared better" had counsel acted differently); *cf.* Init. Br. 38 (acknowledging that Zieler "cannot conclusively prove" that he would have evaded the death penalty under the pre-SB 450 law). And given the truly heinous nature of his crimes (he raped and murdered an 11-year-old girl and a woman, suffocating them only after inflicting sickening injuries), a death recommendation was likely.[7]

640, 650 (Fla. 2021), as Zieler did. Tr. 3864–66.

[7] Zieler also cannot know that, had the guilt phase continued

B. Any trial court error was invited, and Zieler cannot rely on an amorphous claim about unfair "circumstances."

That leaves the fundamental-error claim. Again, Zieler offers various theories for why he is entitled to relief, which merely repackage his IAC claim to attribute the errors to the trial court. The first is that the "circuit judge" made a "monumental snafu" by instructing the venire that Zieler would not be entitled to parole if he received a life sentence for his 1990 offenses. Init. Br. 22, 25. That misled the venire to believe that a death sentence would be unnecessary to permanently incapacitate Zieler.

As an initial matter, Zieler cannot prevail on this theory because the trial court's comment could not have caused him any prejudice. It was made to a venire that was discharged, and the jury that

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as planned in February and March, his penalty phase would have been completed before SB 450 took effect on April 20, 2023. Counsel admitted in February that mitigation efforts were ongoing and that a month might be needed between a guilty verdict and the start of the penalty phase. Tr. 2636–41 (explaining that it would take time to conduct additional expert testing of Zieler). So Zieler might have found himself in "8-4 land" one way or another. Init. Br. 39. That goes to both the reasonableness of counsel's actions and the lack of prejudice.

convicted Zieler was selected from a venire that did not hear the incorrect comment.

More than that, Zieler invited the error. "[I]nvited error precludes fundamental error review." *Baptiste v. State*, 324 So. 3d 453, 455 (Fla. 2021). In the jury-instruction context, invited error occurs "when a party either proposes (*i.e.*, requests) an instruction" or "is aware a standard instruction or an instruction proposed by another party is incorrect but agrees to its use anyway." *Id.* That includes when "defense counsel . . . relied on that charge as evidenced by argument to the jury or other affirmative action." *Ray v. State*, 403 So. 2d 956, 961 (Fla. 1981). Where this happens, the party "cannot argue against [the instruction's] correctness on appeal." *Baptiste*, 324 So. 3d at 455.[8] Basic fairness compels that result: A party cannot seek reversal based on trial-court conduct that the party wanted to occur and attempted to capitalize on.

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[8] Taken together, *Steiger* and this Court's fundamental-error jurisprudence show that a lawyer's invited errors never supply a basis for reversal on direct appeal. All such claims must be funneled through postconviction proceedings.

So it is here. Zieler admits that defense counsel himself "instructed" the venire that Zieler's 1990 offenses were not eligible for "parole." Init. Br. 25, 28–29 (quoting counsel: "I had a dozen jurors who got up there and I told them, He's never coming out again."). Counsel believed it worked to his advantage to do so, since a jury unworried that Zieler could be paroled (and reoffend) would be less inclined to recommend death. The error was therefore invited. *See Allen v. State*, 662 So. 2d 323, 328 (Fla. 1995) (holding that a defendant "cannot complain about the prosecutor's comments when defense counsel emphasized the same information to the jury as part of the defense strategy").

Likewise, in discharging the original venire, the trial court did no more than Zieler requested. Init. Br. 31–32 (quoting trial court at Tr. 3864: "The Defense is requesting striking the entire panel?" Counsel: "Yes" and "So does our client."). Zieler personally agreed to that course. Init. Br. 33 (quoting Tr. 3864–67).[9]

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[9] Though Zieler's brief is less than explicit, it could be read to imply that it was also fundamental error for the trial court to "schedule" the second jury selection for "May or June," rather than for the "next week." Init. Br. 35. Again, however, any error was invited

So Zieler cannot invoke the fundamental-error doctrine to critique the trial court's rulings. *See Baptiste*, 324 So. 3d at 455.

Even then, any error was not fundamental. Though Zieler presumes an entitlement to the 12-0 statute, "no one has a vested interest in any given mode of procedure." *State v. Kelley*, 588 So. 2d 595, 597 (Fla. 1st DCA 1991); *see also Thompson v. Missouri*, 171 U.S. 380, 386 (1898) ("[I]t is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him."). And the role of the jury in a capital sentencing proceeding is procedural. *See Dobbert v. Florida*, 432 U.S. 282, 293–94 (1977) (explaining that a statutory change to the jury's role in a capital penalty phase "was clearly procedural" because it "simply altered the methods employed in determining whether the death penalty was to be imposed"). The upshot of the trial court's rulings was a trial that followed legislative directives. If that were somehow error, it surely was not fundamental. *Cf. D'Oleo-*

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because "[i]t was defense counsel who had a problem with next week because he said there would be insufficient time to review the juror questionnaires." *Id.* (citing Tr. 3871).

Valdez v. State, 531 So. 2d 1347, 1348 (Fla. 1988) (deeming an error non-fundamental because it "is procedural in nature and does not go to the foundation of the case or to the merits of the cause of action").

Nor was the trial court required to refuse to discharge the tainted venire, on the theory that the trial court should have itself anticipated the potential enactment of SB 450 and substituted its own judgment for defense counsel's. None of that is the responsibility of a trial judge.

As a final consideration, any trial court "error" did not change the outcome. When it comes to penalty-phase errors, an error is fundamental only if a "jury recommendation of death could not have been obtained without the assistance of the alleged error." *Davis v. State*, 136 So. 3d 1169, 1202 (Fla. 2014). In asserting prejudice, Init. Br. 37–38, Zieler overlooks the overwhelming aggravation in his case. The jury unanimously found the HAC, CCP, prior violent felony, and during the course of a burglary aggravators for each murder. R. 1536–39. HAC and CCP are the two most serious aggravators in the statutory sentencing scheme. *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006); *see also Guzman v. State*, 721 So. 2d 1155, 1159 (Fla. 1998) ("The HAC aggravator applies only in torturous murders—

those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."). And those aggravators were amply supported by the evidence that Zieler brutally raped and suffocated both his 11-year-old and adult victims, leaving them with extreme "vaginal" and "anal" injuries. R. 1652. The little girl's underwear "was torn from her body with such force that it left an abrasion," and the evidence showed that she "had been crying heavily" before her death. *Id.* And the adult victim bit her tongue so hard during the attack that it was "nearly severed." *Id.* Zieler is truly one of the worst offenders.

* * *

If nothing else, this Court has emphasized that the fundamental-error doctrine is "discretion[ary]" and should be applied "very guardedly." *Smith v. State*, 320 So. 3d 20, 27 (Fla. 2021). Zieler can raise his claims in a postconviction motion. That is reason enough to deny relief here.

II. Prosecutors did not violate *Caldwell*.

Citing the Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), Zieler argues that it was unlawful for

prosecutors to inform jurors that their recommendation of death was advisory, and that though the judge would give that recommendation "great weight," the sentence is "ultimately determined by the court." Init. Br. 43–50. His claim is both unpreserved and wrong.

A. The claim is unpreserved because Zieler raised a different objection below.

As Zieler admits, he did not contemporaneously object to the prosecutors' comments; rather, he objected to similar comments made in an earlier proceeding that ended with the discharge of the jury venire. *Id.* at 50–53. Preservation requires "a specific contemporaneous objection to [a] comment." *Rimmer v. State*, 825 So. 2d 304, 323 (Fla. 2002). Yet even if those earlier objections somehow relieved Zieler of the obligation to object during the proceeding at issue, *see* Init. Br. 51–52, they failed to advise the trial court of the specific claim he now raises. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Defense counsel first objected because he mistakenly thought the prosecutor was suggesting that the judge could override a jury's

life recommendation. Tr. 2740–43. But the prosecutor was referring to a death recommendation, and Zieler has not reprised that claim on appeal. Counsel then objected based on a misunderstanding of the wording of the 2019 death-penalty statute. Counsel thought that it removed the word "recommendation," such that the jury's sentencing decision was no longer called a recommendation. Tr. 2744. *But see* § 921.141(2)(b)2., (c), Fla. Stat. (2019). That is distinct from the theory Zieler offers on appeal: that any prosecutorial comment diminishing the jury's sense of responsibility violates *Caldwell*, and alternatively that the comments were "not entirely true" because the judge and jury are "co-sentencers." Init. Br. 43–44, 48–49 & n.18. Zieler does not argue fundamental error, and thus the Court need not consider his unpreserved claim. *See, e.g.*, *Williams v. State*, 845 So. 2d 987, 989 (Fla. 1st DCA 2003).

B. Precedent forecloses the *Caldwell* claim because prosecutors did not mislead the jury as to its role in the sentencing process.

There was no *Caldwell* error in any event. In describing *Caldwell*, Zieler misstates the law. He asserts that prosecutors commit constitutional error any time they inform the jury that "responsibility for determining the appropriateness of the defendant's sentence rests

elsewhere." Init. Br. 43 (quoting *Caldwell*, 472 U.S. at 328–29). But the Supreme Court has clarified that *Caldwell* prohibits "only [] certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986)). Properly understood, a violation arises only if a comment "*improperly* described the role assigned to the jury by local law." *Id.* (emphasis added); *see also Allen v. State*, 322 So. 3d 589, 599–600 (Fla. 2021). Zieler is thus incorrect that the statements here were "prohibited" regardless of their "accura[cy]." Init. Br. 48–49.[10]

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[10] Ignoring *Romano*, Zieler reasons that accuracy must be irrelevant because it was improper in *Caldwell* to tell the jury about Mississippi's system of "automatic appellate review." Init. Br. 49. But as this Court has explained, the statement in *Caldwell* was misleading because the Mississippi Supreme Court, though its review was indeed automatic, "applied a presumption of correctness to the jury verdict and could only overturn it under limited circumstances." *Reynolds v. State*, 251 So. 3d 811, 820 (Fla. 2018) (plurality op.). The *Caldwell* prosecutor was therefore wrong to suggest that the ultimate responsibility lay with that court. *Id.* By contrast, a prosecutor's mention of the trial judge's role is "less problematic" because "trial courts are positioned to make"—and are expected to make—"factual findings." *Id.* at 825.

Those statements were undoubtedly accurate. In keeping with Florida law, the prosecutor told jurors that their job was to make a sentencing recommendation, and that, if the recommendation were death, the trial judge could accept or reject it. *See* Init. Br. 44–48 (quoting comments). Section 921.141 in turn provides that if a jury recommends death by a vote of at least 8-4, the trial judge must consider whether to extend leniency—by imposing life—or to accept the recommendation—and impose death. § 921.141(2)(c), (3)(a)2., Fla. Stat. (2023). It makes that determination only after conducting the same thorough review as the jury: finding any aggravators and mitigators, weighing them, and reaching its own assessment of which sentencing option is appropriate. *Id.* § 921.141(3)(a)2. So it was correct to tell the jury that "in the case of a death recommendation" the trial court would afford the recommendation "great weight" but would be "ultimately responsible" for selecting between life and death. Tr. 2743.

Zieler only half-heartedly contests the statements' accuracy, calling them "not *entirely* true," since the judge and jury are "co-sentencers." Init. Br. 49 & n.18 (emphasis added). But while each has a

role in the sentencing process, Section 921.141 is clear: Judge, not jury, has the final word before imposing death.

This Court has therefore consistently permitted comments indistinguishable from the ones here. It has held, for instance, that no *Caldwell* violation arose from the statement that the "[f]inal decision as to what punishment shall be imposed rests solely with the judge of this court." *Combs v. State*, 525 So. 2d 853, 856–57 (Fla. 1988). Similarly, "yours will be an advisory sentence, a recommendation to the Court, because the final decision rests with His Honor," was allowable. *Davis*, 136 So. 3d at 1201. And a trial court did not err in instructing the jury that "the final decision as to what punishment shall be imposed is the responsibility of the judge." *Reynolds v. State*, 251 So. 3d 811, 813, 824–25 (Fla. 2018) (plurality op.); *id.* at 825 (same for "advisory" references).

Either way, Zieler "cannot complain about the prosecutor's comments when defense counsel emphasized the same information to the jury as part of the defense strategy." *Allen*, 662 So. 2d at 328. His own remarks mirrored prosecutors', informing jurors that if "eight of the 12 people vote for death, then the recommendation goes to the judge who makes the *ultimate decision*," Tr. 357 (emphasis

added), and that "it takes eight folks to vote for death in order to send a *recommendation* of death to the judge." Tr. 53 (emphasis added). The Court should affirm.

III. There was no abuse of discretion in the trial court's admission of Exhibit 110.

Zieler next asserts that the trial court abused its discretion by introducing State's Exhibit 110, a manila envelope that had contained hairs from the crime scene that were tested for DNA. Init. Br. 54–68. On his view, there were "indications of probable tampering" with the exhibit because only one of the five folds in the manila envelope contained hairs, rather than all five. *Id.* at 54, 56–64. Yet he ignores the trial testimony that all the hairs tested were contained within only one of the folds to begin with, and that any missing hairs were destroyed as a natural part of the testing process, not due to tampering. On top of that, Zieler does not even attempt to show prejudice. Though Zieler objected to the introduction of Exhibit 110, he raised no issue with the testimony that Zieler's DNA was a match to the hairs found at the scene. Nor did he object to testimony that his DNA matched semen from the scene.

A. Zieler failed to adduce evidence of probable tampering.

Physical evidence is admissible unless there is "evidence of probable tampering." *Murray v. State*, 3 So. 3d 1108, 1115 (Fla. 2009). "In order to demonstrate probable tampering, the party attempting to bar the evidence must show that there was a probability that the evidence was tampered with—the mere possibility is insufficient." *Armstrong v. State*, 73 So. 3d 155, 171 (Fla. 2011). Only then will the burden shift to the proponent of the evidence "to establish a proper chain of custody or submit other evidence that tampering did not occur." *Id.* This Court reviews such a claim for abuse of discretion. *Id.*

The evidence here does not reflect a probability of tampering. Retired FDLE crime scene analyst Joel Cary testified that he was present at the medical examiner's office during the autopsies of L.S. and R.C. Tr. 1463–64. The hairs were recovered from one of their bodies and turned over to FDLE for packaging. Tr. 1471–72. He identified his initials and writing on the packed items. Tr. 1472.

Michelle Boyer, a DNA analyst, then testified via deposition that in 2008 she examined hairs from the crime scene. Tr. 1832–33, 1851–52. Those hairs were packaged in a sealed manila envelope

with five folds. Tr. 1833. That envelope and its contents were introduced as State's Exhibit 110. Tr. 1871. Boyer explained that, at the time of testing, only one of the five folds contained hair or debris. Tr. 1833–34. She was not sure how many hairs were in that fold, but she thought that four of them might produce DNA. Tr. 1836–37, 1849–50. Each of those four hairs was tested, and each was "consumed" by the process. Tr. 1839. That sort of incidental destruction is "common" in DNA testing. *Id.*

Boyer developed partial DNA profiles from two of the four hairs tested. Tr. 1838, 1842–43. The DNA profile Boyer developed from the hair with the most data was a 1-in-16 million match with Zieler. Tr. 1839–40, 1948–49.

Zieler argues that "there was an obvious discrepancy" in Exhibit 110 because "four out of five paper-folds . . . supposedly containing hair and debris [] turned up empty." Init. Br. 65. That misreads the testimony. Cary never testified that all five folds contained hair; and Boyer herself reported that only one of the five folds contained hairs even as far back as 2008. Tr. 1831, 1833–34. Zieler cites no testimony or evidence suggesting that those other four folds *ever* contained hair. And to the extent that any hairs were missing, that was

expected: Boyer explained that the tested hairs were destroyed as a natural part of the DNA-testing process.

What is more, Zieler has offered no reason to believe that anyone other than law enforcement had access to the FDLE evidence lockup where the hairs were stored, or that someone subsequently planted his hairs in the bag to frame him for these decades-old murders. That sort of tampering was not even possible. Law enforcement interviewed hundreds of people over the years and investigated well over 100 potential suspects, to no avail. Tr. 1428–36, 1440. During that time, Zieler was a complete unknown to law enforcement—he was never a suspect because he was never on their radar. Tr. 1440–41. It was not until "26 years later," in 2016, that Zieler became a suspect when the CODIS hit linked his DNA, obtained after he committed a new crime, to the 1990 crime-scene evidence. Tr. 1251, 1439–40. Zieler fails to explain how a DNA profile created in 2008 could have been altered to implicate him when he was not known to police until 2016.

This case is therefore unlike *Armstrong*, on which Zieler relies. Init. Br. 55. The defendant there pointed to bona fide doubts about the evidence: "there were two or three projectile fragments initially,"

and neither the laboratory expert nor law enforcement "was able to provide an explanation for their disappearance." *Armstrong*, 73 So. 3d at 172. The evidence here, in contrast, was neither missing nor unexplained.

More analogous is *Taylor v. State*, 855 So. 2d 1 (Fla. 2003). In *Taylor*, the defendant claimed that his boxer shorts should have been excluded because an unidentified person must have tampered with the bag in which they were kept due to a missing note on the outside of the bag and a loose staple on the bag's seal. *Id.* at 25 (plurality op.). This Court held that though the defendant "may have been able to show differences in the outside condition of the bag, it is not clear that the changes in question gave rise to an indication of probable tampering." *Id.* Rather, "the trial court was in the best position to assess the condition of the stapled seal at trial," and the testimony revealed that "although the bag was not picked up by the FDLE for two weeks, it was stored during this time in a locked cabinet and only the booking officers had access to the cabinet." *Id.*

Similarly, the trial court here did not abuse its discretion in concluding that the omission of the hairs was not evidence of tampering. Tr. 1870; *see also Alahad v. State*, 362 So. 3d 190, 198 n.4

(Fla. 2023) ("[I]f reasonable [people] could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.").

B. Any error in admitting Exhibit 110 was harmless given all the unobjected-to DNA evidence tying Zieler to the murders.

Whatever the Court's view of the merits, Zieler was not harmed by the introduction of Exhibit 110. Quite apart from that exhibit, the State overwhelmingly established Zieler's identity as the perpetrator, including through unchallenged forensic evidence linking his DNA to the crime scene. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).

Exhibit 110 was nothing more than a manila mailing envelope containing five pieces of paper for holding evidence. It was unnecessary for the admission of the State's forensic evidence—all of which came in without objection. To prove that Zieler left his hair at the scene of the murders, the State called DNA analyst Michelle Boyer, whose perpetuated testimony was introduced with "no objection." Tr. 1823. Boyer testified that she developed a partial DNA profile from a hair contained within paper fold V2-2. Tr. 1833-40. The State then

proved that this DNA profile was a 1-in-16 million match to DNA collected from Zieler after his commission of a separate crime. Tr. 1948.

That forensic evidence—which did not hinge on the introduction of Exhibit 110—was damning enough. But Zieler was also linked to the murders by the presence of his DNA in semen found at the crime scene. Tr.1893–98,1922–23. Zieler has never alleged that this evidence was tampered with. Nor did he object to its admission. DNA analyst Beth Ordeman told the jury that she tested the bedsheet from R.C.'s room and developed a full DNA profile at all 15 markers. Tr. 1893–98. FDLE Senior Crime Lab Analyst Vicki Bellino developed a profile from Zieler's buccal swab and compared it to the DNA profile from the bedsheet. Tr. 1912–23. The DNA from the bedsheet matched Zieler's profile with a statistic of one in 83 quintillion people. Tr. 1922.

The complete male profile from the bedsheet was also consistent with the partial DNA profiles retrieved from R.C.'s vaginal swab and the pillowcase under her abdomen. The statistical match for Zieler's DNA profile compared to the pillowcase was one in 450 million, Tr. 1923, while the genital swab was one in 360,000. *Id.* Zieler's sole explanation for the presence of his semen was that it could have been

left on Jan's sheets from a hypothetical threesome he might have had back in 1989, and that Jan must have been "a pig" who did not wash her sheets. Tr. 2091–98. That was implausible enough even without accounting for the presence of his semen in a *vaginal swab* taken from his 11-year-old victim. *See* Tr. 1686 (testimony explaining that it would have been impossible to transfer to R.C. any alleged old stain from the bedsheets).

Given the uncontested admission of this devastating forensic evidence, any error in admitting Exhibit 110 was harmless beyond a reasonable doubt.

IV. The trial court's remark on the jury's mitigation findings was not reversible error.

Zieler also argues that the trial court made a "serious factual error" when it concluded in its sentencing order that "'[t]he jury found that no mitigating circumstances had been proven by a greater weight of the evidence.'" Init. Br. 69 (quoting R. 1654). "That statement," he insists, "is almost certainly false": Though the verdict form contained no special interrogatory asking jurors to reveal whether they found or rejected the mitigation, they must have credited at least some mitigators because the evidence supported them. *Id.* at 69–70

(citing R. 1536–39). Surmising that this mistake may have "influenced" the trial court's decision to impose death, Petitioner requests a new penalty phase. *Id.* at 70. But his claim is unpreserved, incorrect, and harmless.

A. Zieler's failure to seek rehearing or clarification deprived the trial court of an opportunity to correct any error and leaves the record ambiguous.

To begin with, Zieler failed to object to the trial court's written finding. "[W]hen a final order addresses substantive issues or reaches legal conclusions that have not been previously raised or challenged," a party "must file a motion for rehearing to preserve those alleged errors for appellate review." *State v. Clark*, 373 So. 3d 1128, 1131 (Fla. 2023). Doing so furthers the "purpose" of preservation by "notify[ing] the trial judge of possible error and offer[ing] a chance to correct it at an early stage." *Id.* Zieler failed to take that step here. After receiving the written sentencing order, he did not seek rehearing or clarification or otherwise communicate his view that the court misread the jury's findings.

That omission deprived the trial court of the opportunity to correct or clarify any error, while also leaving the record unclear. Had Zieler objected, the trial court could have either clarified its finding

or, if there were some error in it, reconsidered its sentencing decision with a proper understanding of what the jury had found.

His failure to object is also problematic because the statement he relies on is ambiguous—which could have been corrected had he sought clarification. Zieler reads the statement in isolation, *see* Init. Br. 69, but context matters. The trial court subdivided its written discussion of mitigating factors into two sections: "statutory mitigating factors" and "non-statutory mitigating factors." R. 1654–61. In a paragraph introducing that two-part discussion, the court first offered an overview of its findings on statutory mitigation. R. 1654. There, the court correctly noted that Zieler "submitted no statutory mitigating circumstances" and, in the next sentence, made the remark Zieler complains of: "The jury found that no mitigating circumstances had been proven by a greater weight of the evidence." *Id.* The court followed that up by explaining that it "ha[d] independently considered some statutory mitigating factors that may apply in this case." *Id.* Only then did the court turn to its overview of the "other" (*i.e.*, nonstatutory) mitigators, where it made no reference to what the jury may have done. *Id.* Lengthier, separate analyses of the statutory and nonstatutory factors followed. *See* R. 1654–61.

In context, the disputed statement is best read as indicating either that the jury found no *statutory* mitigators—it was never asked to, after all—or, at most, merely that the verdict form was silent as to any mitigation findings the jury made. *See* R. 1536–39 (verdict form). Both interpretations are consistent with the State's acknowledgment during closings that some mitigators "have been proven by the greater weight of the evidence," Tr. 2552, and with the trial court's own recognition that numerous mitigators were either "not in dispute" or had otherwise been proved. R. 1655–61. At a minimum, it is not clear that the trial court believed, as Zieler would have it, that the jury rejected all forms of mitigation.

Had Zieler sought rehearing or clarification, the court could have amended its order or clarified the significance of the disputed finding. His failure to do so leaves the parties and the Court to speculate what the trial court meant. And Zieler does not ask the Court to consider his unpreserved claim under the fundamental-error doctrine, waiving any such theory. *See, e.g.*, *Williams*, 845 So. 2d at 989. The Court need go no further.

B. The most natural reading of the trial court's statement is that it was correct.

On the merits, Zieler has not established error. "In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court." § 924.051(7), Fla. Stat. Yet, as noted, the most natural reading of the disputed line in the sentencing order is that the trial court either was accurately reporting that the jury found no statutory mitigators or that the verdict form simply did not speak to whether the jury found any mitigators, either statutory or nonstatutory. Zieler's contrary reading—that the trial court inferred from the silent verdict form that the jury *rejected* all mitigation—is the least plausible option. As a result, he has not shouldered his burden to show error.

C. Any error was harmless because the trial court properly found the relevant mitigation itself and simply deemed it outweighed by the aggravators.

Any error was harmless in all events. *See Ault v. State*, 53 So. 3d 175, 187 (Fla. 2010) (plurality op.) ("[A] trial court's findings on mitigation are [] subject to review for harmless error[.]"). By statute, a trial court does not simply review the jury's own findings; it must

also conduct its own analysis of any "mitigating circumstances . . . reasonably established by the evidence" and "whether the aggravating factors outweigh the mitigating circumstances," explaining it in writing. § 921.141(4), Fla. Stat. "Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." *Spencer v. State*, 645 So. 2d 377, 385 (Fla. 1994). Since a sentence must rest on the *judge's* independent view of the mitigation, any mistaken view that the *jury* failed to find mitigation ordinarily will not prejudice the defendant.

The sentencing order confirms that the court performed that independent assessment here. It reports that, irrespective of the jury's findings, the trial court "independently considered some statutory mitigating factors that may apply in this case," and, "[m]oreover, . . . considered the possibility that other factors may exist in [Zieler's] character, record, or background that would mitigate against the imposition of the death penalty." R. 1654. As to nonstatutory mitigation, the trial court found that the evidence supported 36 of 42 potential nonstatutory mitigators, giving them various weight. *See* R. 1655–62. And having "carefully considered the nature and

quality of each aggravator and mitigator," the court found death appropriate. R. 1662. In making that judgment, it emphasized that the aggravation was "horrific." *Id.* Each murder was heinous, atrocious, and cruel: "[B]oth victims were alive and conscious when they were raped and subsequently suffocated," leaving their bodies with significant injuries. R. 1652. And the murders were cold, calculated, and premeditated. R. 1653. HAC and CCP are two of the most serious aggravators in the statutory sentencing scheme, and more than justified the imposition of death. *Buzia*, 926 So. 2d at 1216. The Court also considered Zieler's history of violence and the fact that the murders were committed during a burglary. R. 1651.

Against all this, the mitigation was "comparatively insignificant" and "greatly outweigh[ed]" by the aggravators. R. 1662. Consequently, the court found no basis to override the jury's recommendation of death. *Id.*

Two standalone reasons underscore the lack of harm. First, Zieler identifies not a single mitigator that he claims the trial court erroneously neglected to find. *See* Init. Br. 69–70. He simply believes that the trial court mistook what the jury did. But because Zieler does not take issue with the trial court's independent findings on

mitigation, it was irrelevant what the judge thought the jury did; all that matters is that the trial court found the right mitigators, weighed them, and nevertheless believed death was appropriate. That takes the specter of prejudice off the table.

Second, this Court has often deemed mitigation errors harmless when the aggravators were overwhelming. *See, e.g.*, *Ault*, 53 So. 3d at 195 (plurality op.) (holding trial court's failure to consider defendant's brain damage, low IQ, acceptance of responsibility, and remorse to be harmless in light of substantial aggravation); *Wuornos v. State*, 644 So. 2d 1000, 1011 (Fla. 1994) (same for failure to consider defendant's alcoholism, difficult childhood, impaired capacity, and mental disturbances); *Wickham v. State*, 593 So. 2d 191, 194 (Fla. 1991) (same for failure to consider defendant's abusive childhood, alcoholism, and extensive history of hospitalization for mental disorders). It should follow that pattern here. Zieler acknowledges the practical inevitability of the death penalty for a person whose crimes were as heinous as his, writing at one point that if SB 450 applied, he had no "realistic chance to avoid the death penalty." Init. Br. 36. Zieler makes no meaningful effort to show that, faced with these

aggravating factors, the trial court would have imposed a life sentence. *See* Init. Br. 69–70.

The Court should affirm on this ground as well.

V. Zieler's Eighth Amendment facial challenge to Florida's death-penalty regime fails because that regime appropriately narrows the use of the death penalty.

Nor can Zieler win resentencing by challenging Florida's death-penalty laws, including SB 450, as unconstitutional.

Zieler first levels an Eighth Amendment "facial challenge" to Florida's overall approach to the death penalty. Init. Br. 71–124. On his telling, this Court and the Legislature have "systematically stripped away" necessary safeguards against "arbitrary" death sentences. *Id.* at 71. He condemns the "abandonment of proportionality review," *id.* at 71, 91–95, broad aggravating circumstances that he says provide no "genuine narrowing" of death-eligible murderers, *id.* at 71, 99–109, and the Legislature's rejection of the "unanimity requirement" for a jury's death recommendation. *Id.* at 72, 109–17. But Zieler has not stated a valid constitutional challenge, let alone a valid facial one.

A law is facially unconstitutional only if "no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*,

481 U.S. 739, 745 (1987). For decades, the Supreme Court has said that it is not "cruel and unusual punishment[]," U.S. Const. amend. VIII, for a State to impose the death penalty, so long as the State "administer[s] that 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." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds*, *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst I*). Along those lines, the State's scheme must "genuinely narrow the class of persons eligible for the death penalty" by requiring the showing of an aggravating factor, *Zant v. Stephens*, 462 U.S. 862, 877 (1983), and "must [] allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime." *Spaziano*, 468 U.S. at 460. But there is no "one right way for a State to set up its capital sentencing scheme." *Id.* at 464. The point, the Court has stressed, is merely to "minimize[] the risk of wholly arbitrary, capricious, or freakish sentences." *Pulley v. Harris*, 465 U.S. 37, 45 (1984).

Florida's death-penalty regime, including SB 450 and amended Section 921.141, meet those requirements. Before death may be imposed, the jury, after a full-length penalty phase trial, must

unanimously find beyond a reasonable doubt the existence of an aggravating circumstance. § 921.141(2)(a)–(b), Fla. Stat.; Fla. R. Crim. P. 3.780. Next, the jury must consider whether the aggravators are sufficient to justify the death penalty, and whether the aggravators outweigh any mitigators. § 921.141(2)(b)2., Fla. Stat. In making that decision, the jury is aided by the defense's presentation of any mitigating circumstances, *id.* § 921.141(7), often including voluminous biographical information and the testimony of expert witnesses. *See* Fla. R. Crim. P. 3.202. The jury must then recommend to the judge whether to impose life imprisonment or death. § 921.141(2)(b)2.c., (2)(c)., Fla. Stat. If the jury opts for leniency, the judge is bound by that recommendation and must sentence the defendant to life. *Id.* § 921.141(3)(a)1. It is only where a two-thirds supermajority recommends death that the judge may impose that penalty. *Id.* § 921.141(3)(a)2. Even then, the judge has the discretion to extend mercy, *id.*, and must conduct its own assessment of the aggravators and mitigators and explain its order in writing. *Id.* § 921.141(3)(a)2., (4). This Court reviews various portions of that assessment for an abuse of discretion. *See, e.g.*, *Bell v. State*, 336 So. 3d 211, 216–17 (Fla. 2022).

These numerous safeguards minimize the risk of arbitrary death sentences. Zieler's arguments do not change that.

First, Zieler calls Florida's scheme cruel and unusual because appellate review no longer entails a comparative assessment of the defendant's culpability. Init. Br. 91–95. But as this Court explained when discontinuing proportionality review, the Supreme Court itself has rejected the notion that the Eighth Amendment requires the practice. *Lawrence v. State*, 308 So. 3d 544, 548 (Fla. 2020) (citing *Pulley*, 465 U.S. 37). "[W]here," as in Florida, "the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987).

Even if proportionality review were ever required, Zieler brings a facial challenge. Init. Br. 74–77. He must therefore show that, without proportionality review, Florida's regime is unconstitutional in all its applications. *Salerno*, 481 U.S. at 745. Yet he does not allege—nor could he—that the death penalty is disproportionate even to his own crimes, proof that Florida's system is constitutional in at least some applications. Zieler violently raped then suffocated an 11-year-old girl and a woman, killing them. R. 1652. He tore the underwear from one

of their bodies with such force that it left abrasions, while the other bit her tongue so hard that it was "nearly severed." *Id.* Injuries to their faces and bodies were significant. *Id.* And the murders were not Zieler's first violent offenses. R. 1651.

These aggravators, the trial court found, "greatly outweigh[ed]" any mitigation in his case. R. 1662. Because the death penalty is plainly proportionate to Zieler's offenses, he would be an exceedingly poor candidate for an as-applied challenge, never mind the facial challenge he brings. *See United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) ("[T]o prevail" in a facial challenge, "the Government need only demonstrate that [a law] is constitutional in some of its applications; "[a]nd here the provision is constitutional as applied to the facts of [the defendant's] own case.").

His challenge to the list of aggravators fares no better. Zieler asserts that the Legislature has so expanded Section 921.141's statutory aggravating circumstances that "nearly everyone charged with or convicted of first-degree murder has at least one," Init. Br. 99–100, meaning that Florida law no longer "genuinely narrow[s] the class of persons eligible for the death penalty." *Zant*, 462 U.S. at 877. But he offers no support for the factual claim that an aggravator applies in

"nearly every[]" case. And his "well-worn" legal theory has been "repeatedly rejected," most recently in July 2024. *E.g.*, *Cox v. State*, No. SC2022-1553, 2024 WL 3364911, at *8 (Fla. July 11, 2024) (rejecting similar argument about statutory aggravators).

That stands to reason. Take the aggravators alleged in Zieler's case, which undoubtedly fulfilled the narrowing function—proof, again, that the law has constitutional applications. Those aggravators included (1) HAC; (2) CCP; (3) previous commission of a violent felony; and (4) the murders were committed during a burglary. R. 1651–53. Each rationally narrows the class of death-eligible murderers. Indeed, the Supreme Court upheld the death sentence in *Spaziano* based on the presence of just two of those aggravators. 468 U.S. at 466 (HAC and previous commission of felony involving violence). Even as to other offenders, Section 921.141's aggravators appropriately channel sentencing discretion, particularly when considered together with Florida's other safeguards. *Colley v. State*, 310 So. 3d 2, 16 (Fla. 2020); *see also Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (explaining that an individual aggravator is "infirm" only

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

[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.

VII. The evidence of guilt was sufficient.

All that remains is the sufficiency of the evidence. This Court reviews that question in a capital case even when not raised by the defendant. *Miller v. State*, 42 So. 3d 204, 227 (Fla. 2010). "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). The evidence here was sufficient.

The testimony showed that both the 11-year-old child and adult victim were found dead from suffocation in their home. Their bodies showed signs of substantial injuries, including sexual trauma. Tr. 1416, 1420, 1541–42, 1563–65. Zieler's DNA was a 1-in-16 million match to hairs retrieved from one of the bodies, Tr. 1839–40, 1948–49, a 1-in-83 quintillion match to semen found around R.C., Tr. 1922, and a longtime romantic partner of Zieler's testified that the position in which the child was found—with a pillow beneath her pelvis—reflected one of Zieler's favorite sexual positions. Tr. 2003–04.

Zieler also made numerous admissions. Even before being confronted with the evidence against him, he acknowledged that he would likely go to prison for the rest of his life; that he had been hiding in his room for the last twenty years; and that he could not help what happened before he met Kniceley (which was within weeks of committing the murders). Tr. 2008–09. After receiving a soda from law enforcement, Zieler remarked that it would probably be the last soda he would ever have and asked if execution was done by lethal injection in Florida. Tr. 2037–38. And his purported alibi collapsed on the witness stand. Tr. 2068–77.

Competent substantial evidence supports Zieler's first-degree murder convictions.

CONCLUSION

The Court should affirm Zieler's convictions for first-degree murder and corresponding death sentences.

Dated: July 24, 2024

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to the following on this **twenty-fourth** day of July 2024:

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I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 14,738 words.

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