IN THE SUPREME COURT OF FLORIDA

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

_____ _____:

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

# INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

## STATEMENT OF FACTS

### A. FIRST PHASE – STATE'S CASE

The following summary of the evidence presented by the state is from the trial court's sentencing order (R1619-22), with citations to the trial transcript added by undersigned appellate counsel. The homicide victims and the child victim's mother are referred to herein by their initials.

J.C. testified that on the evening on May 9, 1990, her daughter R.C. was 11 years old. They lived together in a condominium in Cape Coral near the Cape Coral Hospital, where J.C. worked. On the previous day, one of J.C.'s friends, 32 year old L.S., moved into the condo's spare bedroom to allow the women to share living expenses. L.S. also worked at the hospital as part of the office responsible for charitable fundraising. Earlier in the evening, L.S. showed J.C. and R.C. a Seiko watch she had recently purchased for her fiancé for his birthday with a personalized message engraved on the back. She asked J.C. for scissors and tape to wrap the watch in wrapping paper, still in its box. Between

10:30 and 11:00 p.m., J.C. was considering going to her boyfriend Donny Batista's house to watch the end of a basketball game, but she felt it was too late in the evening to go out. Her daughter, R.C., and L.S. encouraged her to go. R.C. told J.C. to tell Donny not to be late to pick her up from school the next day. The mother and daughter said goodbye to each other, and J.C. left to go to Donny's. house, which was only a few minutes away. [T1257-64,1269,1272-74,1284-90,1353,1366,; see T1609-13, 1632-33].

J.C. arrived at Donny Batista's house around 11:00 p.m. Although she only intended to stay a short while to watch the end of the basketball game, she accidentally fell asleep and woke up again around 4:00 a.m. on May 10, 1990. She rushed home because it was almost time for her to be at work at the hospital around 4:30 a.m. She discovered she was locked out of the house when she reached for the front door. She testified that the front door had two locks, a deadbolt, and a lock for the door handle. The handle lock was broken and could not be unlocked outside, with or without a key. J.C. testified that both her daughter and L.S. knew that the handle lock was broken and to lock the front door with the deadbolt

only. J.C. also testified that she heard footsteps inside while knocking on the front door. At this point, she did not think anything unusual was happening and believed L.S. may have forgotten about not using the handle lock. She walked around the back sliding glass doors of the condo, hoping they may be unlocked and she could get inside that way. However, when she approached the sliding glass doors, she found they were open, and the vertical blinds were blowing out from the inside. [T1274-76, 1297-1302, 1306, 1356-63; see T1613].

J.C. testified that the home appeared in disarray when entering the condominium from the open sliding doors. Many items were moved or out of place from where they had been when she left earlier that night. Notably, on an open ironing board, several photos of R.C. and her older sister . . . were laid out in a row. These photos had been removed from a wall furniture unit, which appeared to be pulled away from the wall. J.C. testified that she knew something was wrong then, and she ran up the stairs calling her daughter's name. [T1305,1307,1313-26,1335-41,1355,1363-72, 1409-11, 1425, 1449, 1451-55].

Once upstairs, she saw L.S. lying on her bed through the open door to the spare bedroom. However, she ran into the bedroom she shared with her daughter first and did not check on L.S. She found R.C. lying face down on the floor near the front of the bed, with a bed pillow rolled up and placed under her body to prop up her pelvis. Her pajama shirt was pulled up to her neck, and her underwear was missing, rendering her nearly nude. Her legs were spread apart, exposing her genitals. A sex toy was on the floor between her legs. (The investigation later concluded that the item belonged to L.S.). J.C. testified that R.C. felt cold and [she] could tell she was dead, but she flipped her on her back and attempted CPR while on the phone with 911. J.C. testified that while performing CPR, she heard her daughter's lung aspirate; it appeared to her that R.C. had been crying heavily before her death. [T1307-09, 1324-35, 1343-44, 1417, 1423, 1455-56, 1487-88, 1638].

Todd Everly, at the time employed by the Cape Coral Police Department, was the lead detective first assigned to this case in

1990 and was one of the detectives who responded to the scene on May 10, 1990. He testified that when he went upstairs, he found L.S.'s body on her bed, lying on her right side in a fetal position, with a pillow over her head. She had injuries to her mouth and nose area, cuts and scrapes to her neck and back, and "extreme" injuries to her anus and anal cavity, causing "significant" bleeding. One of her fingernails was broken and bleeding, indicative of a defensive wound. There was a pornographic magazine left open on L.S.'s bed near her body. [T1407-08,1412-16,1424-26,1442-43,1453-55].

The empty box of the engraved Seiko watch L.S. purchased for her fiancé's birthday was found unwrapped and on her bed near her body. The watch was missing from the crime scene and has never been found. Items from L.S.'s purse were strewn about; her wallet was lying open and contained no cash or credit cards. Several items of jewelry that L.S. wore daily were missing and have never been found. [T1319-20,1339-41,1366,1372-74,1377,1414-15,1441-42].

Regarding R.C., Mr. Everly testified that he found her lying on her back, consistent with what J.C. told them about flipping her over to perform CPR. R.C. had severe injuries to her vaginal area that were apparent to investigators at the scene due to visible bleeding. R.C. also had bruises and abrasions to her face, purplish lips, foaming at the mouth and nose, and an abrasion injury to her back on the right side of her spine. R.C.'s torn underwear was found nearby; abrasions on the front of her thigh were consistent with her underwear being forcibly torn off. Mr. Everly testified that the scene presented to law enforcement indicated some struggle and that R.C. attempted to defend herself. [T1333-34,1408-09,1417-21,1484-85].

Mr. Everly testified that based on his career experience as a police officer and detective, it was clear that both L.S and R.C. were alive when they were sexually assaulted due to the amount of bleeding caused by their injuries. [T1416,1420,1445].

Dr. Noelia A. Hernandez, the substitute medical examiner[1], testified to the full extent of the victims' injuries. L.S. had severe injuries to her anus, including several lacerations to the anal opening and internal bleeding. These injuries were caused by some foreign object being forced into her anus. Later testing of L.S.' rape kit revealed the presence of sperm cells in swabs from her anus. She also had blunt force injuries to her left shoulder and mid-back, a bruised right eyelid and hemorrhaging to the right eye, and an abrasion on her neck. She also had a laceration to her upper lip and bit down on her tongue so hard that it almost severed. These injuries, when taken together with the fact that L.S. was found with a pillow over her head, indicate that she was killed by asphyxiation via smothering. Finally, L.S. had an injury to the fingernail on the third finger of her right hand. [T1517-18,1523-43,1566,1571,1574].

As for R.C., Dr. Hernandez testified that she had bruising to her right shoulder, linear abrasions to her left eye, a linear abrasion

[1] Dr. Hernandez testified as a substitute medical examiner because the doctor who performed the autopsies in 1990 was deceased (T1516). Dr. Hernandez testified that she formed her opinions independently based on the autopsy report and photographs (T1519; see T1489-1509,1516-19,1534-35,1557,1561-62).

to her left thigh, and abrasions to her mid-back. She also had bruises below her left eye, to her right cheek, at the left corner of her mouth, and to her chin. She had petechial hemorrhaging on her eyes, the inside of her scalp, heart, and lungs, which is consistent with death by asphyxiation. There were laceration injuries to R.C.'s inner vaginal walls, which caused internal bleeding, and lacerations to her posterior fornix, where the vaginal wall meets the cervix. These injuries were consistent with an object being inserted into her vagina. Samples of the bloody fluid inside R.C.'s vagina were taken, and her outer genitals and anus were swabbed; the samples and the swabs tested positive for sperm. The medical examiner testified that all of R.C.'s injuries were contemporaneous with her death, including the injuries to her vagina. [T1518-19,1544-46,1571].

The medical examiner testified that when a person is smothered, he or she will lose consciousness after approximately 60 to 70 seconds, and death will result after about three to five minutes. She also testified that while the injuries to R.C.'s vagina and L.S.'s anus were inflicted contemporaneous to their deaths, she

could not definitively say whether they were incurred premortem or post-mortem. [T1558-60,1570,1574-77].

Rape kits were administered to both victims. Numerous items of evidence were collected from the scene to obtain DNA samples. There was semen containing sufficient DNA for analysis on the bed sheet from R.C.'s bed, the pillow found beneath R.C.'s body, and the genital swabbing of R.C. The DNA within these samples was consistent with each other. Over the investigation in the decades that followed, over one hundred individuals' DNA was tested, but a match was not found. For twenty-six years after the crime, the case remained open but unsolved [T1429,1433-39,1443-46,1449,1464-71,1481-83,1615,1636-37,1653-60,1666-73,1683-91,1712-20,1724-28,1736-40,1898,1909-10].

In 2016, Defendant was arrested for an unrelated crime, and a DNA sample was taken while booking him into jail. This sample was entered into CODIS (Combined DNA Index System) as a matter of standard procedure, and unexpectedly, it matched the 1990 rapes and murders of R.C. and L.S. Following this match, a second

buccal swab was obtained from Defendant; this sample was also a match. When questioned by law enforcement, Defendant denied involvement in the crimes and claimed no memory of anything occurring in 1990 due to a motorcycle accident in 1998. However, his claimed lack of memory did not comport with his interview with police a few weeks earlier regarding the new offense for which he had been arrested, in which he appeared to have no cognitive or memory issues. Moreover, in letters and jail calls to his longtime girlfriend, Bonnie Kniceley, Defendant made incriminating statements indicating that he was worried about being caught for past offenses. Bonnie Kniceley testified that one of Defendant's preferred sexual positions involved putting a pillow beneath her pelvis in the same manner that R.C.'s body was found. J.C. testified that she had no idea whom Defendant was and had never heard of him nor met him before or after the murders. He was also unknown to law enforcement during the entire twenty-six year investigation of this case and was never considered a suspect before the CODIS hit. [T1699-1702,1715,1740-1808,1812-21,1887-89,1895-1900,1903-05,1910-14,1920-32,1955-2029,2032,2038-39].

## B. FIRST PHASE – ZIELER'S TESTIMONY

Joseph Zieler testified on direct that he was in Maryland on May 9 and 10, 1990 (T2062,2068). He was a resident of that state at the time (T2057,2058). He has never been inside the apartment where the homicides occurred (T2058). Therefore it was not possible for his semen or bodily fluids to have been placed on R.C.'s bed sheet, pillow, or genitals, nor could any of his hair be in the apartment (T2062-63, 2068). He did not know L.S., R.C., or R.C.'s mother J.C., nor did he know Leanne Deller[2]; he became aware of those names via pretrial discovery (T2057).

Zieler has always had very dark brown hair, but his brothers (or half-brothers), who lived in Cape Coral in December 1989, have light sandy hair (T2052-55). His father (who Zieler believes is actually his uncle) - - a former Cape Coral police officer who lost his job when he was arrested for theft - - was still living in the area at that time. (T2054-56,2074-75).

[2] Leanne Deller was J.C.'s former part-time housemate, who moved out shortly before L.S. moved in (T1260, 1352-53).

On cross-examination and redirect, Zieler stated that he was in Cape Coral in December 1989, and he was part of the bar scene and was sexually active, so it was possible that he might have had sex with J.C. or Leanne Deller, and he speculated that that was the only way his DNA could have gotten on the sheets (T2090-93,2102-03). [The state recalled J.C. as a rebuttal witness. She testified that she never met Zieler, and she washes her sheets weekly. She does not know if Leanne Deller knew Zieler (T2105-07)].

## C. PENALTY PHASE

Zieler was examined by four mental health experts; Drs. Harper and Rubino for the defense, and Drs. Yamout and Culver for the state (T2496; see T2284, 2305-17, 2361-62, 2409-29, 2481-82).

Dr. Julie Harper, a psychologist, testified that Joseph Zieler grew up in a home beset with domestic violence. Ostensibly, his father was Bob Zieler, a police officer who was very aggressive and domineering. There was concern in the family that Bob might be a pedophile. [Joseph was not sure who his biological father was, but from what he learned from other family members he believed it was

most likely his Uncle Walter]. Joseph was very frightened of Bob, who subjected him to intense verbal abuse (although it was his mother and brother who were on the receiving end of most of the physical abuse). Joseph and his brothers would go and stay with their grandmother to escape the stress. (An option which was foreclosed when Bob moved his family to a different Chicago suburb). Joseph told Dr. Harper that he had been sexually abused as a child. Constant fear of Bob Zieler's violent and unpredictable behavior, and the harsh consequences of angering him, made Joseph hyperalert, and also depressed to the point where he attempted suicide at age 12 (T2288-94,2312-13,2320).

In July 1990, Joseph Zieler's Uncle Walter and Walter's four-year-old son drowned under suspicious circumstances. Some family members suspected that Bob Zieler had something to do with the death of his brother and nephew; that Bob was participating in illegal activities that Walter learned about (T2292-94,2321-25).

Dr. Harper testified that Joseph Zieler has a history of closed head injuries; the most severe of which occurred when he was struck by a car in 1998 (T2285,2290-91,2298-99,2332-33,2237). A Social Security disability evaluation made at that time resulted in

findings of cognitive impairment and memory loss (T2298-2302). Dr. Harper found no evidence of malingering (T2304-05,2328). As a child, Joseph's school records indicated learning difficulties which today would be diagnosed as ADHD (T2286-88). [The PSI shows that Joseph Zieler dropped out of school after the ninth grade; that he has been on disability since the car vs. motorcycle accident in 1998; and that his last employment was at Marine Concepts in 1998 (R4116-17)].

Dr. Harper's diagnosis was (1) major depressive disorder, recurrent; (2) mild neurocognitive disorder; and (3) adjustment disorder with anxiety (T2313,2315,2318-19). Zieler's physical ailments include cardiovascular disease (resulting in a 2014 heart attack) and a very apparent tremor which, along with his neuro-cognitive symptoms, is consistent with Parkinson's (T2303,2316, 2319-20).

Dr. Mark Rubino, a neurologist, evaluated Zieler, who has a history of traumatic head injury (T2358-61,2364-65). Dr. Rubino found multiple abnormalities and significant cognitive impairment (T2373-74). Dr. Rubino also observed physical symptoms indicative of Parkinson's, including tremors, rigidity, and swelling. A CAT scan

revealed that Zieler does not have Parkinson's disease, but he does have Parkonsonism (which may actually be worse because it does not respond to treatment). Parkonsonism is a degenerative neurological disease which is eventually fatal (T2362-63,2374-75). The PET scan showed decreased frontal lobe activity suggestive of frontotemporal dementia, which is also progressive and terminal. However, Dr. Rubino cannot say whether Zieler's cognitive impairment is a "moving target"; he doesn't know how long it has been this bad. In any event, "something's very wrong" (T2370-75,2399). On top of that, Zieler has HIV (T2375).

Dr. Karim Yamout, a psychologist and neuropsychologist called by the state in rebuttal, agreed with Dr. Harper that Zieler has a mild neurocognitive impairment, but disagreed with Dr. Rubino's findings of traumatic brain injury and dementia (T2434-42, 2451-52). Zieler's IQ is 89, and his intellectual functioning is in the average to low average range (T2419,2468). According to Dr. Yamout, Zieler malingered in symptom reporting but did not malinger on performance tests (T2426-29). Another state witness, Dr. Keagan Culver, a psychologist, administered the MMPI, and concluded that the results were invalid due to Zieler's exaggerated

responses (T2477,2482-87,2500-04). She testified that Zieler admitted to her that he plays up his head injury symptoms when it suits his situation, as in the context of Social Security disability benefits (T2495).

SUMMARY OF ARGUMENT

I. Zieler was unfairly deprived of his opportunity to be tried under the statute requiring jury unanimity to impose a death sentence as a result of a momumental snafu in his February – March jury selection on the part of the defense lawyers, prosecutors, and judge, and by ineffective assistance of defense counsel rising to the level of fundamental error.

II. Zieler's jury selection was unconstitutionally tainted by Caldwell error[3] in which the state diminished the jury's responsibility for their verdict.

III. The trial court erred by allowing the state to introduce two hairs recovered from L.S.' body, and more importantly DNA comparisions from those hairs, because there were unexplained indications of probable tampering (four of the five paper-fold envelopes - - all of which were contained within a larger envelope - - which were labeled as holding hairs and debris from the crime

[3] Caldwell v. Mississippi, 472 U.S. 320 (1985).

scene were empty), and the state failed to establish a chain of custody.

IV. The "great weight" which the judge gave to the jury's 10-2 death recommendation was improperly enhanced by the judge's erroneous statement in his sentencing order that the jury found no mitigating circumstances.

V. Florida's capital sentencing law is unconstitutional on its face due to lack of adequate safeguards against the arbitrary infliction of death. There is no genuine narrowing at the eligibility stage, no jury unanimity requirement at the selection stage, and no proportionality review at the appeal stage. Florida is the only jurisdiction in the nation - - 27 states that allow capital punishment, the federal government, and the U.S. military - - that is 0 for 3.

VI. Especially in light of the U.S. Supreme Court's recent Ramos decision[4], the Sixth and Eighth Amendments and Article 1, section 22 of the Florida Constitution forbid a death sentence based

[4] Ramos v. Louisiana, 590 U.S. __, 140 S.Ct. 1390 (2020).

on a nonunanimous (much less 8-4) jury vote, and Florida's newly amended capital sentencing scheme is constitutionally invalid on its face for this reason as well.

ARGUMENT

ISSUE I

FUNDAMENTAL ERROR, AND INEFFECTIVE ASSISTANCE RISING TO THE LEVEL OF FUNDAMENTAL ERROR, DEPRIVED ZIELER OF THE OPPORTUNITY HE WOULD OTHERWISE HAVE HAD TO BE TRIED UNDER THE STATUTE REQUIRING A UNANIMOUS JURY VERDICT IN ORDER TO IMPOSE THE DEATH PENALTY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Two monumental and inexcusable blunders - - one committed by three death-qualified prosecutors, two death-qualified defense attorneys, and one death-qualified circuit judge, and the other committed by the defense attorneys when they declined to have the jury reinstructed on the correct law and thus allow Zieler's trial to continue to proceed under the unanimity statute - - deprived Zieler of the opportunity to be tried under the Florida law which required a unanimous jury verdict in order to impose the death penalty. As a result the trial was postponed, and Zieler received a death sentence despite two juror votes for life imprisonment.

See State v. Maske, 591 S.E.2d 521, 535 (N.C. 2004), in which Justice Brady, concurring, wrote:

> . . . to emphasize that this Court has, in the present case, been confronted with and remedied what I believe to be a serious error in a capital proceeding. This Court guards fair play and the integrity of our justice system, even amid a furor of criticism regarding purported problems with our system of capital punishment. Our decision today reflects that our judicial system is capable of correcting itself and will, in fact, do so.
>
> . . .
>
> . . . [I]nadvertent mistakes requiring this Court to reverse a defendant's death sentence should rarely occur. In this case, all relevant parties literally "dropped the ball." The trial judge neither gave the requested instructions to the jury panel nor allowed the parties an opportunity to object. The State was clearly not attentive to the contents of the instructions when they were presented in open court, and the defense attorney did not, as he ideally should have, contemporaneously object to the instructions. These critical omissions are unacceptable given the gravity of the setting, the dwindling resources available to our judiciary, and the expanding caseload of the judiciary.[5]

In the instant case, even worse than in Maske, everyone dropped the ball, by somehow forgetting that since the charged crimes occurred in 1990 the alternative sentences in the event of a first-degree murder conviction were death or life imprisonment without the possibility of parole for 25 years. The backdrop is that, prior to jury selection finally getting underway on February 27,

[5] All emphasis in this brief is supplied unless the contrary is indicated.

2023, the trial date had been continued numerous times - - over Zieler's pro se protests and his in-vain efforts to invoke the speedy trial provisions of Fla.R.Crim.P. 3.191[6] - - for reasons ranging from COVID to Hurricane Ian to prosecutor Feinberg's wife's surgery to defense counsel Shirley's hernia operation to the state's late disclosure of a box of documents (which turned out to be largely duplicative)[7]. In the meantime, especially after the 9-3 life verdict in the Parkland school shooting case in the fall of 2022 sparked a firestorm of outrage in Tallahassee, a highly publicized move to amend Florida's death penalty law to no longer require jury unanimity but instead allow death to be imposed by an 8-4 vote was advanced by Governor DeSantis and prominent legislators. Bills were introduced in the Florida House and Senate on January 30 and 31, 2023 to accomplish this result,[8] and the legislative session was projected to end on May 5. Any competent death-qualified Florida lawyer would, or certainly should, have been well

[6] See, e.g. R267-68,275-80,420-22,435, 439-40, 451-55, 585-601, 620-21, 626-28, 853-59, 916, 992, 1419, 1851, 1855, 1874-75.

[7] See, e.g., 282-87, 322-23, 333, 459-60, 747-48, 1061-63, 1864-67, 2013-20, 2249-68.

[8] SB 450, filed January 30, 2023. HB 555, filed January 31, 2023.

aware of these developments. But Zieler was fortunate enough to get in under the wire, because jury selection for his capital trial began on February 27.

Three full days of voir dire took place, and then, on March 2, a bombshell went off, and it sounded like this:

> MR. SHIRLEY [defense counsel 1]: May we approach?
>
> THE COURT: On this issue?
>
> MR. SHIRLEY: No, we - - a much bigger problem.
>
> THE COURT: Okay. I want to - - okay.
>
> (Bench conference begins.)
>
> MR. SHIRLEY: I'm trying to keep it quiet because WINK is now here. The Court instructed the jury and we questioned the jury about the possible penalty of life. The problem is, we all forgot this is a 1990 case.
>
> THE COURT: Uh-huh.
>
> MR. SHIRLEY: There wasn't - - there was parole back then and you had to go a minimum of 25 years before - -
>
> THE COURT: Uh-huh.
>
> MR. SHIRLEY: - - you were paroled. That's not what the Court instructed them, and that's sure as heck not what the State and I instructed them.
>
> We, as a group, don't believe we can fix this. If you try and fix it, the jury is going to either think that we don't know what we're doing or we've been lying to them, and that's not acceptable. So I don't know how we cure it. I don't think we can cure it.

We just informed them improperly on the law. And it's not - - I'm not pointing a finger at any group. We're just, if not, more guilty. I mean, the State has been adjusting all of their jury instructions. We threw out one of the aggravators that wasn't in effect until 1997. We've done our homework. We just missed this point.

And if you recall, and I'm sure you do, I had a dozen jurors who got up there and I told them, He's never coming out again. They said, Wow, I didn't know that.

THE COURT: Hmm.

MR. SHIRLEY: So they're taking that to the bank. And we're concerned that we have poisoned the well to the extent where we can't go forward with the panel that we've got.

So we're moving to strike the panel. It's part - - partially our fault, but, nevertheless, it's - - it's something we feel has to be done in this case.

MR. HOLLANDER [defense counsel 2]: It can't be corrected, Judge, and that's why I was asking to strike the panel. It's not just juror misconduct. It's our screw-up.

THE COURT: State?

MR. FEINBERG [prosecutor 1]: The instructions with both the recommendations being death or life without parole are incorrect. Somehow or another, that has to be corrected, and making the correction, how that's done, could create other problems.

I don't know - - that's what, I think, we were discussing in the outside room, was, could we come up with a solution so the case doesn't proceed with an incorrect instruction that wouldn't cause it - - cause other issues.

I guess the flip side is, if the Court does correct the instruction, at this point to the jury, there's two issues: One, it will reemphasize that particular instruction and

the inference from telling them now that actually it's not life without parole, which means you never get out of prison, it's life with parole after 25 where you potentially could get out of prison.

And candidly, Mr. Shirley questioned every single juror on that issue as part of his voir dire. And I know that I did the reverse with maybe nine or ten jurors where I talked about, Would it make it less likely you would recommend death if you knew that the juror (sic) was - - the - - that the person convicted would spend the rest of their life in prison?

So both the State and the Defense went down that road, which is incorrect, which could have an impact on how the jury sees us. And with all due respect, the Court - - I went through the preliminary instructions - - referred to life without parole at least six times in the preliminary instruction, over 14 pages.

THE COURT: I did.

MR. FEINBERG: And I - -

THE COURT: And to be - - and to be clear, I did it after having given it to counsel to make sure it comported with what y'all wanted me to say.

MR. FEINBERG: Absolutely.

MR. HOLLANDER: Absolutely.

THE COURT: I told everyone that I was prepared to modify any and all of that based on your instructions. So I will agree, I've got some culpability in this - -

MR. FEINBERG: Well - -

THE COURT: - - but everything I read passed your muster, both sides.

MR. FEINBERG: You have my sincere apology because I - - I'm the one here who actually has done parole hearings. I'm the one who worked as a prosecutor when parole was an issue, and that - - it didn't - - I didn't catch it after reviewing.

I apologize personally - -

THE COURT: Uh-huh.

MR. FEINBERG: - - for not having caught that. And when I became aware of this, it - - I mean, it affected me that we - - we - -

MR. SHIRLEY: May I? I got a phone call at 10:00 last night.

MR. FEINBERG: We - - we - - we let you down. We let ourselves down in that matter. The question we were trying to figure out outside is, is there a way to fix this or not?

MR. THORNBURG [prosecutor 2]: And the way we see it, Judge, there are really only two things that can be done: One is to instruct this panel of 60 as to the law, and then to have an opportunity to question each one of them about whether that changes their ability to be fair and impartial; and the other is to scrap the jury and start over. And at the end of the day, I think the State's position has to be that whatever - - whichever of those two options the Defense wants I think is the one we have to go with.

If they're saying that they are prejudiced by this, it's hard to argue against being prejudiced by a misstatement of the law to the jurors.

THE COURT: The Defense is requesting striking the entire panel?

MR. SHIRLEY: Mr. Hollander, do you agree?

MR. HOLLANDER: Yes.

MR. SHIRLEY: So does our client.

MR. HOLLANDER: And we sincerely apologize, Judge.

MR. FEINBERG: May, I add one comment?

THE COURT: Sure.

MR. FEINBERG: I've been spinning this in my head trying to figure out what would be the way to correct this. And whether or not I think we have a good correction or not, the correction has to pass through the Defense. The Defense has to agree to that, and Mr. Zieler would have to be queried. I think under the - -

THE COURT: This - - the consequences to Mr. Zieler are too grave and the nature of this case should not bear that kind of scrutiny. I don't think there's any - - I don't think there's any question that the panel has to be released based on this grievous oversight.

MR. HOLLANDER: Do you want to bring him up here to make sure?

MR. SHIRLEY: Well, no. I've talked to him. He agrees.

MR. HOLLANDER: Well, I understand. But we're asking for a mistrial.

MR. SHIRLEY: Right.

MR. THORNBURG: Not technically a mistrial because no one - - no one is sworn yet.

MR. HOLLANDER: Oh, that's true.

THE COURT: The jury's not sworn.

MR. HOLLANDER: That's true.

MR. SHIRLEY: That's true.

THE COURT: All right. Bring him up.

MR. HOLLANDER: Joe?

(Mr. Zieler joins the bench conference.)

THE COURT: Mr. Zieler, your attorneys have asked to release the entire panel based on an error regarding the instruction on the potential of life imprisonment. I didn't want to proceed without you understanding the consequences of that. That means the entire panel that we spent three days selecting would be discharged and we will start this over, in all honesty, May - - May or June, depending on –

MR. ZIELER: That's fine, sir.

THE COURT: - - the calendar. But I didn't want to make that kind of a decision without at least giving you an opportunity to say whatever you want to say.

MR. ZIELER: Well, I have a couple of things that I would like to say - -

THE COURT: Okay.

MR. ZIELER: - - to you personally, sir.

MR. HOLLANDER: Do you want to do it from the table, or where do you want to - -

MR. ZIELER: I'd - - I'd rather do it here.

MR. HOLLANDER: Okay.

MR. ZIELER: And I want you here when I say it.

MR. HOLLANDER: Okay.

THE COURT: I'm listening.

MR. ZIELER: Judge, I have a concern that all of Lee County is - - all of Lee County is against me because of all the stuff they put on the media. I want a change of venue. That's the one thing I'd like. And I would like a bunch of black people in the jury pool because they have a well-deserved suspicion of court and policemen, and I think it's prejudicial not to have them on the jury.

MR. HOLLANDER: Well, that will have to wait until the next time.

MR. ZIELER: That's fine. That's fine.

MR. HOLLANDER: Okay.

THE COURT: So my question, Mr. Zieler, was not about any of that. The motion for change of venue is something that you can discuss with your attorney, and the population of the potential jury pool is a matter of record.

Regarding my question to you about whether or not to strike the panel, per the request of your attorneys, what is your position?

MR. ZIELER: Yes.

THE COURT: Thank you, sir.

MR. ZIELER: Thank you.

THE COURT: Anything further?

MR. FEINBERG: Not from the State.

THE COURT: From the Defense?

MR. HOLLANDER: No, sir.

(T3859-68).

The state brought up whether there was a possibility of starting next week instead of May or June; all three prosecutors could have a clear schedule and be available either way (T3868, 3871). It was defense counsel who had a problem with next week because he said there would be insufficient time to review the juror questionnaires (T3871). If it were moved to May, there would obviously be sufficient time to get the mitigation together "so we can go right straight from the guilt phase to the penalty phase without skipping a beat" (T3870). Judge Branning set the trial for the first Monday in May (T3871-72); then assembled the jury panel and discharged them (T3877-79).

On April 13, 2023, the amendment allowing the death penalty to be imposed based on a non-unanimous vote of 8 or more jurors was passed by the Florida Legislature. It was signed into law, effective immediately, by Governor DeSantis on April 20. On May 3, the defense filed a motion to declare the amended statute unconstitutional on multiple grounds (R1393-96). In a hearing the next day defense counsel argued that application of the new 8-4

provision to Zieler would violate the constitutional guarantee against ex post facto laws; the trial judge disagreed based on Dobbert v. Florida, 432 U.S. 282 (1977)(R2176-91, 1405-07).

The second jury selection proceeding commenced on May 8, 2023. A jury was selected and sworn. The first phase of the trial resulted in verdicts of guilty of first-degree murder on both counts (R1541; T2204-06). The penalty phase was conducted under the newly enacted 8-4 statute, and it resulted (on each count) in a death verdict by a vote of 10-2 (R1536-39; T2612-17).

This astonishing combination of blunders - - the first by everyone and the second by the defense attorneys - - deprived Zieler of his only realistic chance to avoid the death penalty. The likelihood of persuading a single juror to vote for life is exponentially greater than the likelihood of persuading five jurors (which is precisely the rationale advanced by the Governor and the sponsoring legislators for lowering the statutory bar in the first place).[9]

What is the remedy for this extraordinary snafu, and when is a remedy available? Undersigned counsel submits that this is a

[9] See Issue VI, p. 133-135, infra.

combination of fundamental error and ineffective assistance of counsel rising to the level of fundamental error, and it can be remedied now or later.[10] In Steiger v. State, 328 So.3d 926 (Fla. 2021), this Court almost shut the door on ineffective assistance claims on direct appeal, but left that door slightly ajar, holding that "[s]uch ineffective assistance of counsel claims may. . . only be raised in the context of a fundamental error argument." 328 So.3d at 928. See also Patlan v. State, 336 So.3d 82 (Fla. 2d DCA 2022)(citing Steiger and finding that fundamental error occurred). Among the definitions of fundamental error is one in which the verdict could not have been obtained without the assistance of the error. See, e.g., Knight v. State, 286 So.3d 147, 151 (Fla. 2019); Carmack v. State, 377 So.3d 1242 (Fla. 1st DCA 2024). In the instant case, the combination of grievous - - Judge Branning's adjective - - mistakes by the judge, the prosecutors, and especially the defense lawyers deprived Zieler of the unanimous verdict requirement which would otherwise have applied, and ultimately

[10] In the event that the Court concludes that these errors are not cognizable on direct appeal, Zieler reserves the right to raise them in postconviction proceedings. See, e.g., Gonzalez v. State, 369 So.3d 368 (Fla. 6th DCA 2023); Contreras v. State, 367 So.3d 1262 (Fla. 3d DCA 2003).

resulted in a death sentence based on a 10-2 jury vote; a verdict which would have necessitated a life sentence but for the combination of mistakes. That amounts to the very definition of fundamental error.[11]

Another definition is that fundamental error is equivalent to a denial of due process. See, e.g., Figueroa-Sanabria v. State, 366 So.3d 1035, 1055 (Fla. 2023); Cromartie v. State, 70 So.3d 559, 563 (Fla. 2011). The very randomness of the circumstances which caused Zieler's loss of his opportunity to have the life-or-death decision made by a unanimous jury - - the "struck by lightning " analogy - - runs afoul of the Sixth, Eighth, and Fourteenth Amendments and violates due process.

It was bad enough to conduct three full days of jury selection for a cold case trial where "we all forgot this is a 1990 case" (T3859), so that prospective jurors were misinformed that the alternative to a death sentence was life imprisonment without the possibility of parole. That mistake was on everyone, and the judge, prosecutors,

[11] Undersigned counsel recognizes that Zieler cannot conclusively prove that he would have received the two life votes if he had been tried - - as he should have been - - under the unanimity statute. More significantly, however, the state cannot show that he would not have received those two crucial juror votes.

and defense lawyers all apologized profusely and admitted it was "our screw-up" (T3860-63). But, as the judge noted, the "too grave" consequences were on Mr. Zieler (T3865). [A mere two weeks earlier the attorneys and the judge expressed awareness that because it was a 1990 case the child victim aggravating factor did not apply (R4316)]. But it was not too late at that point for defense counsel to preserve Zieler's valuable opportunity to be tried under the unanimity law. When the judge and attorneys were discussing whether to reinstruct the jurors on the correct sentencing alternatives or else discharge the jury panel and start over later, the prosecutor took the position that it should be whatever the defense wanted (T3863-65). It was defense counsel who insisted upon striking the jury panel (T3860-61,3864-65)[12].

There was simply no acceptable reason to push the case forward into potential (and, as it turned out, actual) 8-4 land, and any competent death-qualified attorney with an upcoming capital

[12] And it might still not have been to late to protect Zieler's opportunity to be tried under the unanimity law, when the state suggested that the trial could begin the following week, noting that all three prosecutors could have a clear schedule and be available. It was defense counsel who balked.

trial would have seen that freight train coming a mile down the track.

Florida Rule of Criminal Procedure 3.112 provides in its Statement of Purpose that "[m]inimum standards that have been promulgated concerning representation for defendants in criminal cases generally and the level of adherence to such standards required for noncapital cases should not be adopted as sufficient for death penalty cases. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation" who is "zealously committed to the capital case." As court-appointed death penalty attorneys, Mr. Shirley and Mr. Hollander were, or certainly should have been, aware of the highly publicized developments in Florida - - including the vigorous advocacy of the Governor and the filing of bills in the House and Senate - - which were widely understood to mean that the unanimity requirement was on its last legs. Getting Zieler's case tried under the wire was their client's last best hope to avoid a death sentence, and every effort should have been put forth to make that happen. And, after years of delay for various reasons, it was going to happen, until the opportunity was blown, first by the

"screw-up" (T3860-63), on the part of all involved which wasted three days of voir dire, and then by the defense attorneys' utter failure to protect their client's interests. If they had accepted the prosecutors' alternative remedy of re-instructing the jurors and resuming voir dire, they could have avoided subjecting Zieler to the much more onerous burden of persuading five jurors, as opposed to a single juror, to vote for life over death. Their failure to do so, combined with the original shared error in bollixing the February 27-March 1 voir dire, amounted to fundamental error. Zieler's death sentences should be reversed, and the case remanded for a new jury penalty trial governed by the unanimous verdict statute (as he would have received but for the combination of fundamental error and ineffective assistance which culminated in his being sentenced to death notwithstanding two juror votes for life). Alternatively, this Court should reduce Zieler's sentence to life imprisonment.

See Lafler v. Cooper, 566 U.S. 156, 170 (2012); Alcorn v. State, 121 So.3d 419, 428 (Fla. 2013)("Sixth Amendment remedies should be tailored to the injury suffered" so as to "neutralize the taint" of the violation); United States v. Carmichael, 216 F.3d 224, 227 (2d

Cir. 2000)(remedy for ineffective assistance of counsel "is one that as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error"); United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994)("[T]he remedy for counsel's ineffective assistance should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred").[13] See also People v. Mooney, 124 N.E.2d 1068, 1074 (Ill.App.2019), recognizing that in the context of ineffective assistance of counsel "[a] right without a remedy is no remedy at all."

[13] See, e.g., United States v. Marshall, 669 F.3d 288, 295 (D.C. Cir. 2011); McIver v. United States, 307 F.3d 1327, 1331 (11th Cir. 2002); Pope v. Kemper __F.Supp3d__ (E.D. Wis. 2023)[2023 WL 5672593], p. 12]; Alexander v. Williams, 641 F.Supp.3d 1082, 1112 (D. Colo. 2022); United States v. Wilson, 719 F.Supp.2d 1260, 1275 (D. Oregon 2010); Edwards v. Commonwealth, 644 S.E.2d 396, 403 (Va.App.2007).

ISSUE II

THE PROSECUTOR MADE CONSTITUTIONALLY IMPERMISSIBLE COMMENTS TO PROSPECTIVE JURORS (INCLUDING TWO WHO SERVED ON ZIELER'S JURY) IN WHICH HE DIMINISHED THE JURY'S RESPONSIBILITY FOR THEIR VERDICT BY ASSURING THEM THAT THE ULTIMATE SENTENCE WOULD BE DETERMINED BY THE COURT (JUROR 1372) AND AT THE COURT'S DISCRETION (JUROR 1221)

## A. CALDWELL VIOLATION

"[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's sentence rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985). The United States Supreme Court "has always premised its . . . decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility'." Caldwell, at 341; see also Sawyer v. Butler, 881 F.2d 1273, 1286 (5th Cir. 1989). Accordingly, jurors must never be given permission to "look down the road for someone to pass the buck to." Wiley v. State, 449 So.2d 756, 762 (Miss. 1984). A jury verdict influenced

by prosecutorial assurances that their life-or-death decision will be subject to review by a higher and more knowledgeable authority - - whether it be the trial judge or an appellate court - - "does not meet the standard at reliability that the Eighth Amendment requires." Caldwell, at 341; see Williams v. State, 544 So.2d 782, 797-98, 799-800 (Miss. 1987).

In the instant case, for both the aborted February 27-March 2, 2023 jury selection proceeding and the subsequent May 8-11 jury selection, there was individual and sequestered voir dire regarding inter alia, jurors' views on the death penalty. The very first juror questioned was number 429, and the prosecutor almost immediately launched into a Caldwell violation by diminishing the jury's responsibility. "Do you understand that even if the jury makes a death sentence recommendation, it is the judge, not the jury or jurors, who ultimately impose the sentence?" (T2740). Defense counsel objected, and after a bench conference, the judge directed the prosecutor to clarify his comment (T2740-43); whereupon the prosecutor arguably made it worse:

> MR. FEINBERG: So in the case of a death recommendation, sir, a judge must give great weight to that jury's recommendation but must also review the

case and law to make sure that recommendation is appropriate.

Do you understand that?

JUROR 429: Yes sir.

MR. FEINBERG: How do you feel about that?

JUROR 429: About - -

MR. FEINBERG: That the jury makes the recommendation and the Court is ultimately responsible.

JUROR 429: That's the way that the justice system is designed to work.

MR. FEINBERG: And you feel comfortable following that law?

JUROR 429: Yes, sir.

(T2743)

Defense counsel objected again, arguing that the state was denigrating the jury's responsibility in a death penalty case, while the prosecutor countered that he was "giving . . . an exact statement of the law. . . . [W]hat I'm saying is, if they make a death recommendation, the Court must review that and it has to agree with the law and ultimately impose sentence. The Court imposes the sentence. The jury makes a recommendation" (T2744). After reviewing the 2022 statute, Judge Branning overruled defense counsel's objection (T2745-46).

After the trial court's ruling, the prosecutor made a number of similar comments to jurors.[14] [A particularly egregious example is his comment to juror 761: "{I]f the jury does give a recommendation of death, it's still one that is imposed - - if it's imposed by the Court ultimately. So it's a recommendation; and if it is actually imposed, it's a - - in a position that is left to the Court" (T3633)]. Then came the stunning realization on March 2 that everyone had forgotten it was a 1990 case, and defense counsel's disastrous decisions to (1) request that the jury panel be stricken and (2) oppose the prosecutor's suggestion that a new jury selection proceeding (and trial and penalty phase) should commence the following week. So, instead, a second attempt to empanel a jury began on May 8, after the jury unanimity requirement had been repealed, and the new 8-4 statute had been signed into law. And, throughout the individual voir dire portion of the May jury selection proceeding, the prosecutors[15] resumed their practice of assuring jurors, in violation

[14] Jurors 526 (T2786); 448 (T2793-94); 534 (T2816-17); 62 (T3268-69); 669 (T3285); 76 (T3297); 229 (T3583); 517 (T3595-96); 761 (T3633).

[15] The improper comments were made to jurors by two of the three prosecutors, Mr. Feinberg and Mr. Thornburg.

of Caldwell, that they were not ultimately responsible for determining whether Zieler should live or die.[16]

Two of those jurors, 1221 and 1372, served on Zieler's jury and participated in the penalty phase deliberations which resulted in a death verdict (T1171, 2616-17). To juror 1221 the prosecutor said:

> And you understand that what you're asked to do between those two options is a recommendation to the Court?
>
> JUROR 1221: Yes, sir.
>
> MR. FEINBERG: And that the sentencing is actually done at the discretion of the Court?
>
> JUROR 1221: Absolutely.
>
> MR. FEINBERG: Are you comfortable with that system, let's say, with those parameters?
>
> JUROR 1221: Yes, sir.

(T196).

[16] Jurors 1177 (T185); 1221 (T196); 1372 (T498); 1260 (T505); 1614 (T762); 1729 (T920); 1509 (T982).

To juror 1372 the prosecutor said "Do you understand that that's a recommendation and really, the sentence is ultimately determined by the court?", and the juror replied "Yes" (T498).[17]

These prosecutorial statements (1) were designed to diminish the jurors' sense of personal responsibility for deciding Zieler's sentence; and (2) conveyed the assurance that a higher and more knowledgeable authority - - the judge - - would have the final say. The state may argue, as it did below, that the prosecutors' comments accurately informed the jurors of Florida statutory

[17] During defense counsel's subsequent examination of juror 1372 he asked her "When the State says that the ultimate sentence is determined by the court, does that make you think that maybe your recommendation doesn't mean as much. . . ?" She replied "No, I would think that the jury's decision would have some weight." Defense counsel said "Just some?" The juror answered that she was not familiar with the court but she would think that "if a jury of your peers is put in place to pass some sort of judgment" that would weigh heavily in the final decision (T498-99).

As for juror 1221, who was told by the prosecutor that the sentencing was actually done at the court's discretion, no follow-up questioning on this subject occurred (see T197-202).

procedure, but that is not entirely true[18], and even if it were it would not obviate the prohibited effect of the Caldwell violations. While a Florida trial judge does retain the (rarely used) statutory authority to impose a life sentence notwithstanding a death verdict that does not entitle the state to invite jurors to pass the buck. For example, it is equally true that every death sentence imposed in this state is subject to mandatory review by the Florida Supreme Court. [And, until recently, that review included a determination of whether the death sentence is proportionally warranted. See Issue V, infra). Yet the fact that appellate review of every death sentence in Florida is available and mandatory does not mean that capital jurors should be told that that will occur. Caldwell itself arose from a prosecutor's reference to automatic appellate review. See Williams v. State, supra, 544 So.2d at 799-802 (as modified on rehearing 1989); see also Ingram v. Zant, 26 F.3d 1047, 1050 (11th Cir. 1994); Stone v. State, 798 S.E. 2d 561, 573-74 (S.C. 2017);

[18] In Florida the judge and jury are co-sentencers. See Espinosa v. Florida, 505 U.S. 1079, 1082 (1992); Snelgrove v. State, 921 So.2d 560, 571 (Fla. 2005); Kormondy v. State, 845 So.2d 41, 54 (Fla. 2003); Johnson v. Singletary, 612 So.2d 575 (Fla. 1993). To belittle the jury's crucial role by saying "the sentencing is actually done at the discretion of the court" and "really, the sentence is ultimately determined by the court" is misleading at best.

Commonwealth v. Lesko, 15 A.3d 345, 395 (Pa. 2011); State v. Robertson, 712 So.2d 8, 39 (La. 1998). [Nor would it be appropriate, or constitutionally permissible, for a prosecutor to inform jurors of Florida's post-verdict Spencer hearing procedure, in which both parties can present additional evidence and argument].

For the same reason, Caldwell prohibits a prosecutor from telling jurors that "actually" (T196) or "really" (T498) the life-or-death decision will be made by the judge. As a practical matter it's not even true, and it inevitably tends to diminish the jurors' sense of personal and moral responsibility for their decision.

## B. PRESERVATION

The state is likely to contend on appeal that the trial court's Caldwell error in allowing the prosecutors to make those comments to prospective (and two actual) jurors is waived because defense counsel did not repeat his previously overruled objection during the May 2023 jury selection proceeding. However, in Sawyer v. Butler, 881 F.2d 1273, 1286 (5th Cir. 1989) the Fifth Circuit Court of

Appeals differentiated Caldwell error from Batson[19] error in this regard:

> An objection is plainly central to a Batson claim. Caldwell, by contrast, rests on "the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" Caldwell, 105 S.Ct. at 2646. It instructs that if the State seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we cannot say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. In Caldwell, unlike in Batson, the constitutional defect - - if it exists - - is observable and measurable by a reviewing court even absent any objection. We reject the suggested analogy between these two very different doctrines.

Here, defense counsel did raise an objection when the prosecutor began violating Caldwell with his comment to the very first juror in the February/March jury selection proceeding, "Do you understand that even if the jury makes a death sentence recommendation, it is the judge, not the jury or jurors, who ultimately impose the sentence?" Defense counsel objected a second time when the prosecutor, ostensibly to "clarify" his previous comment, made it even worse by saying that, while the judge must give the jury's recommendation great weight, he must also review

[19] Batson v. Kentucky, 476 U.S. 79 (1986).

the case and the law to make sure the jury's recommendation is appropriate, "and the Court is ultimately responsible." Defense counsel correctly argued that the prosecutor was denigrating the jury's responsibility, and the prosecutor countered that he was simply giving "an exact statement of the law." After reviewing the 2022 statute Judge Branning overruled the defense's objection (T2740-46).

Once the trial court clearly overruled his objection, defense counsel could reasonably have concluded that repeating the objection every time the prosecutor did it (either in the February/March or the May jury selection proceeding) would be an exercise in futility.[20] "[F]utile efforts are not required to preserve matters for appeal." Hunt v. State, 613 So.2d 893, 898 n.4 (Fla. 1992), and that principle is especially apt with regard to Caldwell violations in a death penalty case. See Sawyer v. Butler, supra.

[20] See, e.g., Wong v. State, 212 So.3d 351, 357 (Fla. 2017); Gonzalez v. State, 306 So.3d 1124, 1134 (Fla. 3d DCA 2020); Stokes v. State, 914 So.2d 514, 516 (Fla. 4th DCA 2005); Tucker v. Allstate Ins. Co., 842 So.2d 1029, 1030 (Fla 2d DCA 2003); Gonzalez v. State, 777 So.2d 1068, 1072 (Fla. 3d DCA 2001); Layman v. State, 728 So.2d 814, 817 (Fla. 5th DCA 1999); Howard v. State, 616 So.2d 484, 485 (Fla. 1st DCA 1993); Webb v. Priest, 413 So.2d 43, 46 (Fla. 3d DCA 1982).

The grounds were the same, the judge was the same, and the prosecutors' comments were substantially the same. To interpose a waiver under these circumstances would elevate form over substance. Accordingly, the Caldwell error is preserved, and Zieler's death sentence should be reversed for a new penalty trial.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE TWO HAIRS RECOVERED FROM L.S.' BODY, AS WELL AS DNA COMPARISONS INVOLVING THOSE HAIRS, WHERE THERE WERE INDICATIONS OF PROBABLE TAMPERING AND THE STATE FAILED TO ESTABLISH A PROPER CHAIN OF CUSTODY

## A. APPLICABLE LAW

Physical evidence is generally admissible unless there is an indication of probable tampering. Armstrong v. State, 73 So.3d 155, 171 (Fla. 2011); Peek v. State, 395 So.2d 492, 495 (Fla. 1980). The initial burden is on the objecting party to show the probability of tampering; then the burden shifts to the proponent of the evidence to demonstrate that tampering did not occur. Compare Murray v. State, 838 So.2d 1073, 1082-83 (Fla. 2003) [Murray I] (based on "obvious discrepancy, the defendant has met his burden of showing the probability of evidence tampering, and hence the burden shifted to the State to explain the discrepancy or to submit evidence that tampering did not occur. As the State failed to meet its burden, the trial court erred in finding the challenged evidence admissible") with

Murray v. State, 3 So.3d 1108, 1115-16 (Fla. 2009) [Murray II] (on appeal after retrial, finding that this time "the State adequately explained the earlier discrepancy" so there was no error in admitting the evidence).

In Armstrong, supra, this Court found that Armstrong "correctly asserts that he met his initial burden of demonstrating that probable tampering occurred", based on Murray I and Dodd v. State, 537 So.2d 626 (Fla. 3d DCA 1988), where the state introduced a bullet fragment over defense objection, and "Dr. Vincent Karag and Detective John Auer testified that there were two or three projectile fragments initially. When asked about the missing fragment or fragments, neither Dr. Karag nor Detective Auer was able to provide an explanation for their disappearance. The absence of the projectile fragments is certainly suspect and indicative of tampering." Armstrong, 73 So.3d at 1171-72. (Nothwithstanding its conclusion that Armstrong met his initial burden, this Court found that the single bullet fragment was admissible, but only because "unlike in Murray I and Dodd", once the burden had shifted to the state to show a proper chain of custody or submit other evidence to refute the claim of probable

tampering, the state successfully did so via the testimony of the custodial supervisor for the Broward County Clerk's office. 73 So.3d at 172).

B. THIS CASE

In a pretrial motion in limine the defense sought to exclude certain hair and related DNA evidence, asserting that numerous hairs collected from the crime scene 'were purportedly placed in evidence bags and transported to the Cape Coral Police Department for testing and preservation as potential exhibits at trial"; yet "[s]ome of the envelopes that were submitted for inspection, processing and testing [by the FBI and FDLE] did not contain any of the hairs." The defense submitted that hairs which may have implicated other individuals had been lost or mishandled (and therefore were not subject to DNA testing), and therefore the two hairs, and any DNA evidence pertaining to those two hairs, which the state sought to introduce should be disallowed (R1389). The trial court denied the motion in limine, stating that "the evidentiary issues raised in the motion are a matter to be explored during cross-examination" (R1408).

At trial, in her opening statement, prosecutor Russell said to the jury that in 2008 [which was 18 years after the homicides] the Cape Coral Police Department sent to the laboratory "a hair that was found on [L.S.'] body, and they analyzed it and the profile matches the defendant at one in 16 million" (T1247-48).

The state called Joel Cary, a retired FDLE crime scene analyst, who testified that hairs which were recovered from the bodies of either L.S. or R.C. were transported to the medical examiner's office and were ultimately turned over to the FDLE to be packaged (T1471-72). The prosecutor showed Cary State Exhibit 110, consisting of a plastic bag within an external bag. He opened the plastic bag and identified two of the items as items he had collected at the medical examiner's office; "The others appear to be samples that were curated by the analyst at the [FDLE]" (T1472). The prosecutor returned Exhibit 110 to the clerk, saying he would wait for that witness [Michelle Boyer] to introduce it (T1472).

On cross, he was asked by defense counsel:

> Mr. Cary, were you responsible for forwarding the hairs, State's Exhibit 110, to the FBI or FDLE?
>
> A. No.

Q. Okay. Do you know whether the hairs showed up at either of those labs?

A. I do not.

Q. Were you ever questioned concerning why none of the hairs of the FBI of FDLE showed up, arrived?

A. No.

Q. The packages were empty. Do you know how that happened?

A. I do not.

Q. Would you like to - - I apologize, FBI and DNA Labs, not FDLE.

A. Not to my - - I know nothing about those.

Q. Okay, and nobody ever questioned you about why there was no hairs in the package.

A. No.

(T1473)

The prerecorded testimony of Michelle Boyer, who in 2008 was a DNA analyst at DLI Labs International, was played to the jury (T1822-26). The prosecutor showed her the exhibit marked as State's 110, which she recognized from the seal, label, and her initials as the package she had examined in 2008 (T1830-31). At the state's request, subject to being connected, the exhibit was provisionally admitted into evidence (T1832). Upon examining its

contents, Boyer testified that it contained five items inside a larger envelope (T1832-33, 1851-52).

> So we have a paper fold here which is V2-3. We have another paper fold, V2-2 and (2) in parentheses.
> "We also have V2-3/1. V2-2 and (1) in parentheses.
> "And then I had a manila envelope that I actually had put in, to contain the paper fold for V2-2. And the - - what was inside the paper fold at the time, which is - - or which I put in - - I had put it in here in order to contain the - - the - - what I have labeled as 'several hairs and debris.'
>
> MS. RUSSELL [prosecutor]: When you opened all of these smaller envelopes inside of Exhibit 110, what was contained inside?
>
> A. So in - - from my notes, I have it: <u>For four of them there were no apparent debris or hairs, and those, the only evidence that I found was within the V2-2</u>.

(T1833)

V2-2 - - the only one of the paper-folds which actually contained any hair or debris - - was labeled "Hairs collected from the body of [L.S.]" (T1834). [Defense counsel objected on hearsay grounds, noting that there were already issues regarding the missing hairs. The prosecutor responded that it is standard practice for forensic experts to rely on how items are labeled; "[s]he has no idea where they originated from, only that they are titled what she is told they are titled." The judge overruled the hearsay

objection, and stated that the matter could be explored on cross-examination (T1835-36). Item V2-3, which was labeled "Hair from mouth, [L.S.]" was one of the four paper-fold envelopes which turned out to be empty (T1833-34).

On cross, Boyer testified that paper-folds are a normal evidence-carrying method; it is basically just folded up paper, but you can make it secure by the way you fold it and you can secure the sides with tape (T1846-48). She agreed with defense counsel that four of the five paper folds "even though they say they contained evidence, were empty", but one of them did contain a note (T1850-51). [Here defense counsel objected to hearsay; the judge replied that just saying that a note existed is not hearsay; defense counsel clarified that he was assuming the witness was about to read the note; and the judge said he didn't know if she was about to do that or not. He told her to only answer the questions being asked by counsel. Boyer never did read the note, nor did the prosecutor go into it in her very brief redirect (T1863), nor did the judge ever rule on whether the contents of the note (whatever they might have been) were admissible. So when the prosecutor later

complained that Boyer "wasn't allowed to read the note out loud" (T1867), that assertion was inaccurate].

Boyer did not know how many hairs were contained in the one envelope which contained some hair, but there were four which she thought, based on microscopic examination, might produce DNA (T1836-37, 1849-50). She water-washed those as a precaution against contamination within the laboratory, "but if something happens prior . . . I would not have any indication of that" (T1830, 1837, 1860). Two of the four hairs yielded no DNA at all, while Boyer was able to get a partial DNA profile (one even more limited than the other) from the other two hairs (T1838-43, 1853-54). While limited, the data obtained from those two hairs was consistent (T1843). Boyer explained that she would expect some kind of degradation to occur in an 18-year (1990-2008) time frame (T1841-42, 1857-59). Each of the four hairs which were tested was less than 15 millimeters in length, and each was consumed during the testing process (T1839). Asked whether consuming during DNA testing is common, Boyer answered yes (T1839).

At the time she did the testing in 2008, Boyer made a note of the color of the four hairs. Of the two which produced partial DNA

results, "I had them both indicated as being darker blond or light brown", while the two which did not produce DNA were even lighter, "very blond" (T1855).[21]

At the conclusion of Boyer's recorded testimony, the prosecutor stated:

> Your Honor, based on testimony from Joel [Cary] yesterday, he was present at the autopsy of [L.S.]. He collected the hairs which he identified yesterday. The State would move what's been marked previously as State's Exhibit 110 into evidence.

(T1863)

Defense counsel objected, arguing that the fact that four of the five paper-fold envelopes labeled as containing hair and debris were empty was an indication of probable tampering. While the expert witness Boyer had indeed testified that the four hairs which she was actually able to test in 2008 were consumed in the testing process, defense counsel pointed out that there was no evidence that that was what happened to the hairs or debris which were once contained in the empty envelopes. The prosecutor replied "Like I

[21] Evidence at trial, including Zieler's testimony, that of his former girlfriend (now extremely hostile to him), and a near-contemporaneous photograph, show that Zieler had very dark hair circa 1990 (T2017-19, 2052-54; R2355-56).

said previously, Your Honor, that's an argument he can make to the jury." The prosecutor further took the position that "the only relevant package" was the one out of five which was found to contain hairs. "So you want us to bring in 33 years of every analyst that's tested these? We don't care about these, we care about the ones that we have that she actually tested" (T1863-69).

The trial judge, citing Murray II (but not Murray I), Taylor v. State, 855 So.2d 1, 25 (Fla. 2003), and Taplis v. State, 703 So.2d 453 (Fla. 1997), recognized that once the objecting party makes a showing of probable tampering the burden shifts to the proponent of the evidence to establish a proper chain of custody or submit other evidence that tampering did not occur. However, he said "The omission of the hairs I do not believe is inherently evidence of tampering. It'll be admitted." The judge assured defense counsel that his objections was preserved (T1869-70).

The state subsequently called DNA analyst Rachel Oefelein, who, at the state's request, had compared the partial DNA profile generated by Michelle Boyer in 2008 - - identified as coming from a hair from the body of L.S. - - with the known standard of Joseph Zieler. The partial profile indicated one male contributor, Zieler

could not be excluded, and the chances of an unrelated random person from the general population being the contributor would be expected to be one in every 16 million individuals (T1948-49). The DNA profile obtained from the second hair did not contain the required six or more loci to permit statistical analysis, and would be defined under current standards as inconclusive (T1951-53). However, the limited data obtained from the second hair was consistent with the first (T1953-54).

### C. THE INTRODUCTION OF THE HAIR AND THE DNA COMPARISON OBTAINED THEREFROM WAS REVERSIBLE ERROR

The state argued the DNA statistical comparison from the hair to devastating effect: "The light brown, again light brown hair that was found on [L.S.'] body, one in 16 million. It was Joseph Zieler. So if he had sex, I guess, in [J.C.'s] house at some time, he left some hairs floating around as well that just happened to be on [L.S.'] naked body the night she's murdered, very unlucky" (T2143-44). The prosecutors vociferously opposed defense counsel's effort to exclude the hair evidence, so obviously they believed it would have a significant impact on the jury. See State v. DiGuilio, 491

So.2d 1129 (Fla. 1986); see also Gunn v. State, 78 Fla. 599, 604-05, 83 So.511 (Fla. 1919); Farnell v. State, 214 So.2d 753, 764 (Fla. 2d DCA 1968)("Who can say that the testimony . . . did not and could not have the effect that the state attorney intended").

Just as in Murray I and Armstrong, there was an obvious discrepancy - - here, four out of five paper-folds (within the same larger envelope) supposedly containing hair and debris which turned up empty - - and in stark contrast to Murray II and Armstrong the state failed to show a proper chain of custody, and no other evidence explained the discrepancy. Instead - - regarding the four empty envelopes - - prosecutor Russell opined "We don't care about these"; in the state's view the only relevant items were the ones the DNA experts actually tested and compared (T1865-66, 1867, 1868-69). [If that approach were valid, the prosecution in Armstrong could have prevailed by saying "we don't care" about the two missing bullet fragments. To the contrary, this Court held that Armstrong had satisfied his initial burden of showing probable tampering, but the state had also satisfied the now-shifted burden of establishing a proper chain of custody].

In Armstrong, 73 So.3d at 171, and Hildwin v. State, 141 So.3d 1178, 1187 (Fla. 2014), this Court observed that "a sufficient showing of the chain of custody is made where the object has been kept in proper custody since the time it was under possession and control until the time it is produced at trial." See also Ehrhardt, Florida Evidence §901.03, at 1099 (2013 ed.) (quoted in Hildwin) ("Normally, this showing is made by establishing a chain-of-custody of the evidence from the time it was first acquired by the police"). But in their argument below prosecutor Russell balked at the very idea ("So you want us to bring in 33 years of every analyst that's tested these")[22], and prosecutor Thornburg chimed in (incorrectly) "Most importantly the case law says you don't have to" (T1868-69).

The state, and the trial judge, are wrong. When four of the five paper-folds proved to be empty, that - - under the applicable case law - - was an indication of probable tampering which shifted the burden to the state to submit evidence explaining the discrepancy or showing a proper chain of custody. The prosecutors failed on both counts. On chain of custody they declined to even try. On

[22] Actually it was 18 years between the time the hairs were collected and packaged and the time DNA analyst Boyer discovered that four of the five paper-folds in the larger envelope were empty.

explaining the discrepancy they relied on speculation as to what might have happened, instead of evidence of what actually happened. Michelle Boyer had no knowledge of why the paper-folds were empty; any more than Joel Cary - - the crime scene analyst who originally collected and packaged them - - did (see T1473). Testimony that physical evidence can be consumed in the DNA testing process is not evidence that specific items were consumed in the testing process (especially in the absence of proffered testimony as to whether all - - or any - - of the hairs and debris from the four empty paper-folds were previously tested).

When Michelle Boyer opened the outer envelope in 2008 she found only one paper-fold containing hair, and four paper-folds which were supposed to contain hair and debris but were in fact empty. [And even assuming some hairs could have been consumed, what happened to the debris?][23]. The prosecutors never explained the discrepancy; they just made a self-serving guess.

The hairs, and more importantly the DNA statistical comparison derived from one of those hairs, provided the state with

[23] Ms. Boyer testified that debris "can be anything", such as dirt or little pieces of rock. She didn't know what kind of debris was meant by whoever wrote that notation on the envelope (T1833, 1848-50).

its main and virtually only linkage between Zieler and L.S. Its introduction over defense objection was harmful and reversible error.

ISSUE IV

THE TRIAL JUDGE MADE A SERIOUS FACTUAL ERROR IN HIS SENTENCING ORDER WHICH MAY HAVE AFFECTED THE WEIGHT HE ACCORDED TO THE JURY'S DEATH RECOMMENDATION

Before getting to the two constitutional challenges to Florida's newly amended capital sentencing scheme, a glaring error in Judge Branning's sentencing order should be addressed. He incorrectly stated that "[t]he jury found that no mitigating circumstances had been proven by a greater weight of the evidence" (R1654; see R1626). That statement is almost certainly false. The jury was specifically instructed on 42 nonstatutory mitigating factors, many of which were not in dispute (T2578-82). The prosecutor broke them down into six categories, and argued that some were not proven (T2551) and the others - - while "they have been proven by the greater weight of the evidence" (T2552) - - should be accorded little weight (T2539-41,2552-53). The prosecutor also correctly told the jurors that whatever evidence the defense submitted "might be a mitigator to any one of you" (T2542). The jury was correctly instructed that "whether a mitigating circumstance has been

established is an individual judgment by each juror" (T2248). Nor does the verdict form indicate whether the jury as a whole or any individual jurors found any mitigating circumstances. Rather, the verdict form simply shows the jury's findings of the aggravating factors, and their 10-2 verdict on each count recommending the death penalty (R1536-39, T2612-14). Moreover, the very fact that two jurors voted for a life sentence is a strong indication (though not absolutely certain in light of the mercy instruction) that they found mitigating circumstances.

Judge Branning's sentencing decision may have been influenced by his erroneous assumption that no juror found any mitigating circumstances. Zieler's death sentence should be reversed for reconsideration. See, e.g., Smith v. State, 866 So.2d 51, 67 (Fla. 2004); Cruz v. State, 320 So.3d 695, 725, 731-32 (Fla. 2021).

ISSUE V

## FLORIDA'S CURRENT CAPITAL SENTENCING SCHEME IS CONSTITUTIONALLY INVALID BECAUSE IT NO LONGER CONTAINS ANY MEANINGFUL SAFEGUARDS AGAINST ARBITRARY AND CAPRICIOUS INFLICTION OF THE DEATH PENALTY

### A. INTRODUCTION

Whatever safeguards this state may have once had have been systematically stripped away, and Florida now has - - by far - - the fewest and weakest protections against arbitrary infliction of the death penalty of any jurisdiction, state or federal, which still allows capital punishment. The combination of (1) Florida's 2020 abandonment of proportionality review; (2) Florida's 2023 elimination of the unanimous jury requirement to determine that death is the appropriate sentence; and (3) the lack of any genuine narrowing of the class of first-degree murder defendants who are eligible to receive the death penalty, results in a capital sentencing scheme which violates the Eighth Amendment and the principles of Furman v. Georgia, 408 U.S. 238 (1972).

In this regard, Zieler would note that his argument on this issue is not dependent on a finding that the Sixth Amendment and/or the Eighth Amendment categorically require jury unanimity[24], any more than that the Eighth Amendment categorically requires proportionality review in all jurisdictions. Rather, his argument in this Point on Appeal is that the Constitution requires something to guard against arbitrary infliction of death, and the Florida Legislature's recent removal of the unanimity requirement and its replacement with an 8-4 vote - - plainly motivated by a desire to lower the bar and make it much easier for the state to obtain a death sentence (not just for hypothetical future Parkland shooters but for anyone for whom the prosecution is seeking death) - - has essentially sawed off the third leg of a tripod. This state's capital sentencing scheme now has no constitutional leg to stand on.

In a development foreshadowed by Justice Labarga at the beginning of his dissenting opinion in Lawrence v. State, 308 So.3d 544, 552-53 (Fla. 2020) in which he described the dismantling of

[24] That is a separate and independent constitutional claim raised in Issue VI, infra.

this state's death penalty safeguards, Florida has now made itself the extreme outlier, joining only Alabama (10-2 vote) in allowing a death verdict to be returned by a less-than-unanimous jury, but even Alabama has retained proportionality review by the state's highest court to ensure that the sentence of death is not "excessive or disproportionate to the penalty imposed in similar cases."[25] Nearly twenty years ago in State v. Steele, 921 So.2d 538, 550 (Fla. 2005) (addressing Florida's pre-Hurst[26] statute allowing death to be imposed upon a 7-5 jury vote), this Court said "Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state." Now - - based on its elimination of the post-Hurst unanimity requirement in 2023, and the rationale advanced by the amendment's proponents, it is abundantly clear that the Legislature does want Florida to remain the outlier state, so the remaining question is whether the nearly safeguardless scheme they have

[25] Ala.Code §13A-5-53(b)(3) (1975) (Current through Act 2024-33 and including 2024-35 of the 2024 Regular Session); see, e.g. Petric v. State, 157 So.3d 176, 250 (Ala.Crim.App. 2013).

[26] Hurst v. Florida, 577 U.S. 92 (2016).

crafted can withstand constitutional scrutiny. The answer is a resounding No.

## B. THIS IS AN ISSUE OF FIRST IMPRESSION

Zieler's trial, which commenced two weeks after the 8-4 statute was signed into law, was one of the first, if not the first, in which the death penalty was imposed under the current statute. This is likely to be this Court's first opportunity to address the constitutional invalidity of the new and current statutory scheme.[27]

## C. FACIAL UNCONSTITUTIONALITY CAN BE RAISED AND ADDRESSED FOR THE FIRST TIME ON APPEAL

"While the constitutional application of a statute to a particular set of facts must be raised at the trial level [footnote omitted], a facial challenge to a statute's constitutional validity may be raised for the first time on appeal." Westerheide v. State, 831

[27] After this Court abandoned proportionality review in Lawrence - - at a time when the jury unanimity requirement was still in effect – it continued to reaffirm its decision in that case. See, e.g., Joseph v. State, 336 So.3d 218, 227 n.5 (Fla. 2022); Gordon v. State, 350 So.3d 25, 36 (Fla. 2022); Miller v. State, 379 So.3d 1109, 1127 (Fla. 2024).

So.2d 93, 105 (Fla. 2002); see State v. Johnson, 616 So.2d 1, 3-4 (Fla. 1993); Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1982); Edenfield v. State, 379 So.3d 5, 6 n.1 (Fla. 1st DCA 2023).

The legal issue raised here asserts the constitutional invalidity of Florida's recently amended death penalty statute on its face. The argument applies to all defendants who have been or will be sentenced to death under this newly enacted scheme, and is conceptually similar to the constitutional argument which prevailed in Furman five-plus decades ago; that Florida's capital sentencing scheme provides insufficient safeguards against arbitrary infliction of the death penalty. This constitutional infirmity is entirely independent of Joseph Zieler or the facts and circumstances of his case (aside from the fact that he was sentenced to death under a facially unconstitutional statute.) Accordingly, this issue can be raised for the first time on appeal, and ordinary preservation requirements do not apply.

[That being said, Zieler's attorneys did file several boilerplate[28] motions, prior to the legislative amendment jettisoning the jury unanimity requirement and replacing it with an 8-4 vote,

[28] See R 1023, 4314-15.

challenging the constitutionality of a number of aggravating factors; asserting, inter alia, that they failed to genuinely narrow death-eligibility and that they rendered Florida's capital sentencing scheme arbitrary and capricious, in violation of the Eighth Amendment (R1034-43, 1049-60, 4311-17; denied at R1135-38, 1141-44). Then, thirteen days after the 8-4 statute was signed into law and five days before the second attempt - - successful this time - - to select a jury began, Zieler's attorneys filed a motion to declare the amended statute unconstitutional on its face on multiple grounds (R1393-96). After a hearing the day before jury selection commenced, in which defense counsel mainly argued that use of the 8-4 statute would violate the Ex Post Facto Clause[29], that

[29] While undersigned counsel believes that any substantive vs. procedural litmus test from Dobbert v. Florida, 432 U.S. 282 (1977) for when a new law violates the Ex Post Facto Clause [see R1406-07] has been superseded by more recent Supreme Court case law, including Collins v. Youngblood, 497 U.S. 37 (1990) and Peugh v. United States, 569 U.S. 530 (2013), he is not raising that issue here because the charged homicides took place in 1990. The Ex Post Facto issue as applied to crimes committed during the 2017-2023 period when the unanimity statute was in effect was briefed by Amicus Curiae in Support of Neither Party in Gonzalez v. State, 375 So.3d 886 (Fla. 2023)(petition for writ of prohibition and for relief under all–writs power denied on jurisdictional grounds), and can be expected to be briefed in future direct appeals where appropriate.

motion was also denied (R1405-07, 2176-91)].

While undersigned appellate counsel acknowledges that the basis for his contention that Florida's current capital sentencing scheme - - absent jury unanimity, proportionality review, and genuine narrowing of death-eligibility - - lacks sufficient safeguards against arbitrary infliction of the death penalty to satisfy the Eighth Amendment and the concerns of Furman is substantially different and much more extensive than what was argued below, that does not preclude or impede this Court's review of the facial unconstitutionality of the current scheme. And that would be true even if trial counsel had filed no constitutional motions below. Weaterheide; Johnson; Trushin; Edenfield.

## D. NO PROPORTIONALITY REVIEW – MISREADING OF PULLEY V. HARRIS

Four years ago in Lawrence v. State, 308 So.3d 544 (Fla. 2020), this Court misapprehended the United States Supreme Court's then-36-year-old decision in Pulley v. Harris, 465 U.S. 37 (1984) as holding that the Eighth and Fourteenth Amendments never require proportionality review in death penalty cases, when in

fact Pulley contains no such sweeping holding. To the contrary - - in the specific context of California's 1977 death penalty statute - - the Supreme Court held that proportionality review is not constitutionally mandated so long as a state's capital sentencing scheme otherwise provides sufficient safeguards against arbitrary imposition of the death penalty. Pulley expressly assumed the possibility that a state's system can be so lacking in checks on arbitrariness that it would not pass constitutional muster without proportionality review, but "the 1977 California statute is not of that sort." 465 U.S. at 51. Florida's, as will be shown, is of that sort, and this Court's recent jettisoning of proportionality review, for no apparent reason other than its mistaken belief that Pulley requires that result in light of this state's conformity clause, renders Florida's entire capital sentencing scheme violative of the Eighth and Fourteenth Amendments and the core principles of Furman. On top of that, as far as safeguards are concerned, Florida - - alone among the states which permit the death penalty as well as the federal system [FDPA] - - has opted for "none of the above"; neither genuine narrowing at the eligibility stage, nor jury unanimity at the selection stage, nor proportionality review at the appeal stage. In

its zeal to expand the infliction of its death penalty, Florida now has a "wild West" system unlike any other jurisdiction; one in which practically everyone convicted of first degree murder might receive a death sentence, and in which the appropriateness of that sentence is not subject to meaningful review.

## E. HOW WE GOT HERE – FURMAN TO PULLEY TO LAWRENCE

An historical overview of the rise and fall of proportionality review in Florida sheds light on its importance (and indeed its necessity in the absence of jury unanimity and meaningful narrowing). It has been recognized since 1972 that the death penalty cannot be imposed under sentencing procedures which create a substantial risk that it will be inflicted in an arbitrary and capricious manner. Furman. There must be a meaningful basis for distinguishing the few cases in which capital punishment is imposed from the many in which it is not. Gregg v. Georgia, 428 U.S. 153,188 (1976), citing Justice White's concurring opinion in Furman. Accordingly, when this Court first upheld the constitutional validity of Florida's post-Furman capital sentencing statute it recognized that "[d]eath is a unique punishment in its

finality and in its total rejection of the possibility of rehabilitation"; therefore the Florida legislature properly chose to reserve its application to only the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So.2d 1,7 (Fla. 1973).

For nearly five decades, this Court had considered proportionality review to be "a unique and highly serious function of [the] Court, the purpose of which is to foster uniformity in death-penalty law." Crook v. State, 908 So.2d 350,356 (Fla. 2005); Urbin v. State, 714 So.2d 411,417 (Fla. 1998). "The inquiry is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. . . so as to justify the imposition of death as the penalty." Crook, 908 So.2d at 357 (emphasis in opinion). Thus, even when the aggravation prong is satisfied, imposition of the death penalty is unwarranted when there is compelling mitigating evidence. Crook, at 357-58; see also Cooper v. State, 739 So.2d 82,83-86 (Fla. 1999); Davis v. State, 121 So.3d 462,499-502 (Fla. 2013).

In Urbin, 714 So.2d at 416, this Court recognized that "[t]he

requirement that death be administered proportionately has a variety of sources in Florida law", one of which was the state constitution's prohibition against unusual punishments. Another source, however, is legislative intent to comply with Furman's prohibition of the arbitrary imposition of death:

> In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So.2d 1,7 (Fla. 1973). See also Jones v. State, 705 So.2d 1364,1366 (Fla. 1998)(reasoning that "[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes'")(footnote omitted).

Urbin, at 416.

When the United States Supreme Court upheld the constitutionality of Florida's post-Furman death penalty law in 1976, it emphasized that any risk of arbitrary or capricious imposition is minimized by Florida's system of appellate review, to determine whether the ultimate penalty is or is not warranted. Proffitt v. Florida, 428 U.S. 242,252-53 (1976). Trial judges' decisions to impose death "are reviewed to ensure that that they are

consistent with other sentences imposed in similar circumstances", and thus in Florida it is no longer true that there is "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." Proffitt, 428 U.S. at 253. The Court found it noteworthy that the Florida Supreme Court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed", having vacated 8 of the 21 death sentences it had reviewed to date. Proffitt, 428 U.S. at 253. See Olsen v. State, 67 P.3d 536,610 (Wyo.2003)("As seen in Pulley v. Harris . . . the Court continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective").

In 1983, the U.S. Supreme Court granted certiorari on the question of whether California's 1977 capital punishment statute was constitutionally invalid because it failed to require that state's supreme court to conduct comparative proportionality review. Pulley v. Harris, 460 U.S. 1036 (1983); Pulley v. Harris, 465 U.S. 37,38-41 (1984). The Florida Supreme Court - - well aware of the pending issue regarding the California death penalty scheme - -

stated in Booker v. State, 441 So.2d 148,153 (Fla. 1983) that Pulley v. Harris "is of no significance to the instant case. The United States Supreme Court has stated that the issue will not apply to states which are already conducting proportionality review. The United States Supreme Court has already approved of this Court's method of review in a specific statement in Proffit and this Court has repeatedly stated that we conduct proportionality review in all cases".

The U.S. Supreme Court subsequently decided in Pulley v. Harris that comparative proportionality review was not required in California, because that state's 1977 statutory scheme provided adequate safeguards to prevent arbitrary and capricious imposition of the death penalty. 465 U.S. at 51-54. Pulley v. Harris does not categorically hold that proportionality review is never constitutionally required; it depends on the presence or absence of sufficient other "checks on arbitrariness." See also State v. Welcome, 458 So.2d 1235, 1249 (La. 1984) (in Pulley v. Harris the Supreme Court held that the Eighth Amendment does not necessarily require proportionality review; "[t]he principal constitutional consideration is that the overall system contain

sufficient checks and safeguards against the arbitrary imposition of capital punishment"); Walker v. Georgia, 555 U.S. 979 (2008) (statement of Justice Stevens respecting the denial of the petition for writ of certiorari)(Pulley v. Harris' statement that the Eighth Amendment does not require proportionality review of every capital sentence "was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them").

In 2002, the Florida Constitution was amended to provide that the state's prohibition against cruel and unusual punishment shall be construed in conformity with decisions of the U.S. Supreme Court which interpret the Eighth Amendment's prohibition against cruel and unusual punishment. Art. 1, §17, Fla. Const.; see Lightbourne v. McCollum, 969 So.2d 326,334-35 (2007). Florida has a similar conformity clause regarding search and seizure law. Art. 1, §12, Fla. Const. The question of whether a U.S. Supreme Court decision automatically modifies Florida law depends on whether the Supreme Court decision "is both factually and legally on point" and "whether it is controlling." Smallwood v. State, 113 So.3d 724, 730 (Fla. 2013).

Since Pulley v. Harris expressly decides only the question of whether California's 1977 capital sentencing scheme - - a very different system than Florida's (especially now that jury unanimity is gone) - - provides sufficient safeguards against arbitrary imposition of the death penalty even without mandatory proportionality review, it is neither controlling in Florida nor is it factually and legally on point.

For years after the adoption of the conformity clause, this Court continued to conduct proportionality review - - whether or not raised by the capital defendant on appeal[30] - - in order to limit imposition of the death penalty to the most aggravated and least mitigated first degree murders, as the legislature intended and as the Eighth Amendment requires. Then, in 2014, Justices Canady and Polston announced their conclusion that proportionality review is prohibited in this state by the (then twelve years old) conformity clause, coupled with the (then thirty years old) Pulley v. Harris decision. Yacob v. State, 136 So.3d 539,557-63 (Fla. 2014)(Canady J., joined by Polston, C.J., concurring in part and dissenting in part). Based on that legal analysis, Justices Canady and Polston

[30] See, e.g., Kaczmar v. State, 104 So.3d 990,1007 (Fla. 2012)

would have refused to set aside Yacob's death sentence, even though they agreed with the plurality and concurring Justices that death was a disproportionate punishment "under this Court's comparative proportionality jurisprudence" in Yacob's case [136 So.3d at 557 and 562].

The plurality opinion in Yacob and the concurring opinion of Justice Labarga each emphasized that proportionality review arises from a variety of sources in Florida and federal law - - not solely from the prohibition against cruel and unusual punishment - - and (with the plurality citing Furman, Proffitt, Gregg, and Dixon) it is essential to guard against the arbitrary imposition of the death penalty. 136 So.3d at 546-550,552-57. The plurality opinion specifically points out another fatal flaw in the dissent's conformity clause analysis, i.e., its implicit assumption that what the U.S. Supreme Court said about California's 1977 capital sentencing scheme necessarily applies to Florida's very different scheme. 136 So.3d at 549 n.2.

Six days after the Yacob opinions were issued, another capital defendant who was challenging the proportionality of his death sentence, Humberto Delgado, filed motions to disqualify Justices

Canady and Polston on the ground that they would decline to engage in the Court's mandatory proportionality review. The two Justices denied the motions for disqualification. In 2015, Delgado's death sentence was reduced to life imprisonment on proportionality grounds, largely based on compelling mental health mitigation. Delgado v. State, 162 So.3d 971,982-83 (Fla. 2015). Once again, Justices Canady and Polston agreed with the majority's conclusion that Delgado's death sentence "cannot withstand scrutiny under this Court's comparative proportionality jurisprudence." Justice Canady wrote:

> [In Yacob] I expressed the view that the exercise of proportionality review by this Court is inconsistent with the conformity clause of article 1, section 17, of the Florida Constitution. My view on the subject was however, expressly rejected by the Court majority. Until the State presents an argument justifying receding from our precedent on the subject that was clearly established in Yacob, I will follow that precedent. Accordingly, I agree with the decision to overturn the sentence of death imposed in this case.

Delgado, 162 So.3d at 983 (Canady, J. concurring).

Thus, by dint of fortunate timing, Michael Yacob (whose crime was a single aggravator "robbery gone bad", with a spur-of-the-moment shooting precipitated by the store clerk's sudden movement) and Humberto Delgado (who suffered from a serious,

longstanding, and well-documented mental illness, and where the shooting of the police officer also occurred on the spur of the moment after Delgado was tasered) were spared the death penalty because it was proportionally unwarranted. [If their cases were on appeal now their death sentences would presumably be upheld, on the flawed theory that the Court's hands are tied by the conformity clause, since Yacob and five decades of sound precedent have been overturned by Lawrence, infra].

In January 2019, Justices Lewis, Quince, and Pariente, having reached the mandatory retirement age of seventy (since changed to seventy-five) retired from the Court.

On October 29, 2020 in Lawrence this Court receded from Yacob and adopted the position advocated by Justices Canady and Polston in their dissent in that case. Justice Labarga, who had written a strong concurring opinion in Yacob, now found himself the lone dissenter in Lawrence. Characterizing the majority decision as its "most consequential step yet in dismantling the reasonable safeguards" in Florida's capital sentencing system, Justice Labarga sought to place the majority's recent (i.e., since the changes in membership beginning in January 2019) decisions in context:

I cannot overstate how quickly and consequentially the majority's decisions have impacted death penalty law in Florida. On January 23, 2020, this Court decided State v. Poole, 297 So.3d 487 (Fla. 2020). As I noted in my dissent in Poole, despite the clearly defined historical basis for requiring unanimous jury verdicts in Florida, this Court receded from the requirement that juries must unanimously recommend that a defendant be sentenced to death. Poole, 297 So.3d at 513 (Labarga, J. dissenting). After 2016, only the state of Alabama permitted a nonunanimous (10-2) jury recommendation. [Footnote omitted]. Poole paved the way for Florida to return to an absolute outlier status of being one of the only two states that does not require unanimity.

On May 14, 2020, this Court decided Bush v. State, 295 So.3d 179 (Fla. 2020). In that case, this Court uprooted the long applied heightened standard of review in cases that are wholly based on circumstantial evidence. Under the heightened standard "[e]vidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict." Davis v. State, 90 So.2d 629,631-32 (Fla. 1956). This standard, applied for more than one hundred years, served as an important check on circumstantial evidence cases. As I noted in my dissent in Bush, while circumstantial evidence is a vital evidentiary tool in meeting the State's burden of proof, "circumstantial evidence is inherently different from direct evidence in a manner that warrants heightened consideration on appellate review." Bush, 295 So.3d at 216 (Fla. 2020)(Labarga, J., concurring in part and dissenting in part). "The solemn duty imposed upon this Court in reviewing death cases more than justifies the stringent review that has historically been applied in cases based solely on circumstantial evidence." Id. at 217.

On May 21, 2020, this Court decided Phillips v. State, 299 So.3d 1013 (Fla. 2020). In Phillips, this Court receded from Walls v. State, 213 So.3d 340 (Fla. 2016) (holding that Hall v. Florida, 572 U.S. 701, 134 S.Ct 1986, 188 L.Ed.2d 1007 (2014), is to be retroactively applied). The United States Supreme Court's decision in Hall held that Florida law, which barred individuals with an IQ score above 70 from demonstrating that they were intellectually disabled, "creates an unacceptable risk that persons with intellectual disability will be executed, and this is unconstitutional." Id. at 704, 134 S.Ct 1986. The Supreme Court concluded: "This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Id. at 723, 134 S.Ct 1986. In Walls, this Court held that Hall is to be retroactively applied. The majority's recent decision in Phillips subsequently receded from Walls.

As expressed in my dissent in Phillips, in light of the majority's decision to recede from Walls, "an individual with significant deficits in adaptive functioning, and who under a holistic consideration of the three criteria for intellectual disability could be found intellectually disabled, is completely barred from proving such because of the timing of his legal process. This arbitrary result undermines the prohibition of executing the intellectually disabled." Phillips, 299 So.3d at 1025 (Labarga, J. dissenting).

In each of these cases, I dissented, and I lamented the erosion of our death penalty jurisprudence. Now today, the majority jettisons a nearly fifty-year-old pillar of our mandatory review in direct appeal cases. As a result, no longer is this Court required to review death sentences for proportionality. I could not dissent more strongly to this decision, one that severely undermines the reliability

> of this Court's decisions on direct appeal, and more broadly, Florida's death penalty jurisprudence.

Lawrence v. State, 308 So.3d at 553-54 (Labarga, J. dissenting).

## F. NO PROPORTIONALITY REVIEW AND NO MEANINGFUL NARROWING OF DEATH ELIGIBILITY (0 FOR 2)

In Pulley v. Harris, 465 U.S. at 879-80, the Supreme Court did not address Florida's system, and did not hold that proportionality review is never required by the Eighth Amendment. The Supreme Court simply said, "Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without proportionality review, the 1977 California statute is not of that sort".

First of all, we do know that there can be capital sentencing systems lacking sufficient safeguards against arbitrariness, because all of the various states' pre-Furman systems were of that sort. So the first question is whether Florida's system - - especially as construed by this Court since 2019, and now in the absence of appellate review designed to ensure that the death penalty is narrowed to only the most aggravated and least mitigated of first-degree murders - - is of that sort. [And the second, even more

momentous, question which will be addressed in Parts I and J and Issue VI, infra, is whether Florida's elimination of the unanimous jury requirement and its replacement with death imposed upon an 8-4 vote - - by far the lowest bar in the nation and deliberately so - - makes this state's capital sentencing scheme as a whole "of that sort"].

Under the 1977 California scheme, a conviction of first-degree murder resulted in a sentence of life imprisonment, unless the state alleged one or more "special circumstances" in the charging document. There were, at the time, only seven of these special circumstances, and they were tried, along with the issues of guilt or innocence, at the initial phase of the trial. Only if the jury found the defendant guilty of first degree murder and found beyond a reasonable doubt the existence of one or more special circumstances would the trial then proceed to a second phase to in which the jury would determine by a unanimous vote whether

death or life imprisonment was the appropriate penalty.[31] In the second phase, additional evidence could be presented, and the jury was given a list of additional factors it could consider. Pulley v. Harris, 465 U.S. at 880. California's 1977 system, the Supreme Court concluded, was sufficient to limit the death sentence "to a small sub-class of capital-eligible cases." 465 U.S at 831.

Is Florida's system sufficient, without jury unanimity and at least some form of proportionality review, to limit imposition of the death penalty to a small sub-class of first degree murder defendants? Is single-aggravator death-eligibility enough? In 1972, when Florida's post-Furman death penalty law was enacted, there were eight statutory aggravating factors. State v. Dixon, 283 So.2d at 5-6. That number has since doubled to sixteen. §921.141 (6)(a through p). It is not only the sheer number of aggravators but also their overbreadth which undermines the safeguards required by Furman against arbitrary imposition of the death penalty. As

[31] The 1977 California death penalty statute at issue in Pulley required jury unanimity on the life-or-death decision, as did the 1978 version, as does the current California law up to and including the present. See Cal. Penal Code §190.4; People v. Robert Alton Harris, 623 P.2d 240, 255 and n.9 (Cal. 1981) [the defendant in Pulley v. Harris]; People v. Charles, 349 P.3d 990, 1008 (Cal. 2015).

discussed in Sharon, The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes, 46 Harv.C.R.-C.L. L.Rev. 223, 232-33 (Winter, 2011):

> Aggravating factors frequently fail to perform this constitutionally required function designated for them by Furman and its progeny. Rather than confining death eligibility to the worst offenders, most state death penalty statutes list a litany of aggravating factors that apply to nearly every first-degree murder and are motivated more by political exigency than careful efforts to identify those who are most culpable.
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> . . . . . .
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> In their efforts to draft death penalty statutes that complied with Furman, most state legislatures adopted the Model Penal Code's guided discretion model, which specified eight aggravating factors and required the jury to find at least one such factor before a defendant could be death eligible. However, since the initial drafting of post-Furman statutes, aggravating factors "have been added to capital statutes . . . like Christmas tree ornaments", rendering more and more offenders eligible for the death penalty.

Professors Carol and Jordan Steiker, in Courting Death: The Supreme Court and Capital Punishment, 160-62 (2016), noted (in the context of Arizona's system) that the enumeration of plentiful and broad aggravating factors in combination with that state's Supreme Court's minimalist policing, subverted Furman's requirement of adequate safeguards against arbitrary imposition of

the death penalty. See also Shatz, The American Death Penalty: Past, Present, and Future, 53 Tulsa L.Rev. 349, 355-56 (2018).

Florida's current system of sixteen aggravators is very different from the 1977 California system which was upheld in Pulley v. Harris. Until the Lawrence decision jettisoned five decades of sound precedent, and dispensed with meaningful review of whether the death penalty is appropriate under the totality of circumstances of the particular case, it is possible that this Court's proportionality review may have saved the continued viability of Florida's system. See Jones v. State, 705 So.2d 1364, 1366 (Fla. 1998). But now that this Court has abandoned proportionality review in favor of minimalist policing (or no policing) based on a flawed conformity clause analysis and on a now 40 year old U.S. Supreme Court decision which addressed a very dissimilar state capital sentencing scheme, whatever meaningful safeguards Florida may once have had in order to comply with Furman have been eviscerated. And the even more recent elimination of jury unanimity as the last straw (if one more straw were needed).

## G. ONE OF THE CORE PURPOSES OF PROPORTIONALITY REVIEW IS TO PREVENT DISCRIMINATION

The core purposes of proportionality review include minimizing the risk of arbitrariness and ameliorating the danger that racial prejudice - - whether based on the race of the defendant or that of the victim[s] - - will infect the capital sentencing decision. In the early post-Furman case of State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), and later in Offord v. State, 959 So.2d 187, 188 (Fla. 2007), this Court said:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

(emphasis in Offord opinion).

See Turner v. Murray, 476 U.S. 28, 35 (1986)("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence"); Robinson v. State, 520 So.2d 1, 7-8 (Fla. 1988)("Racial prejudice has no place in our system of justice and has long been condemned by this Court" and "the risk that the factor of race may

enter the criminal justice process has required . . . increasing attention", especially in "the context of a capital sentencing proceeding"); State v. Benn, 845 P.2d 289, 317 (Wash. 1993)(proportionality review addresses two systemic problems: random arbitrariness and death sentences based on race); Ronk v. State, 172 So.3d 1112, 1147 (Miss.2015)(state's sentencing scheme includes numerous safeguards to ensure that the death penalty is not imposed arbitrarily or in a discriminatory manner); State v. Cooper, 731 A.2d 1000, 1007-08 (N.J. 1999)(one of the objectives of proportionality review is to ensure that death penalty decisions are free from discrimination based on race, gender, socioeconomic status, or other impermissible factors).

The federal Second Circuit Court of Appeals has recognized that under Pulley v. Harris "comparative proportionality review may be constitutionally required only when a capital sentencing system lacks. . . adequate checks on arbitrariness." United States v. Aquart, 912 F.3d 1, 52 (2d Cir. 2016). The federal death penalty statute however, in addition to requiring jury unanimity, contains yet another important provision which Florida's lacks:

> The FDPA further channels a capital jury's discretion to impose the death penalty by prohibiting it from

> considering race, color, religious beliefs, national origin, or sex in its sentencing decision and, indeed, requiring each juror to sign a certificate that such factors did not inform his or her sentencing decision. See 18 U.S.C. §3593(f).

Aquart, 912 F.3d at 52

See, e.g., United States v. Runyon, 707 F.3d 475, 497 (4th Cir. 2013); United States v. Taveras, 583 F.Supp.2d 327, 329 (E.D.N.Y. 2008); United States v. Haynes, 269 F.Supp.2d 970, 976-77 (W.D.Tex.2003) ". . . [T]he FDPA explicitly provides that a jury may not consider information regarding the defendant for the kind of inadmissible purposes that were at the heart of the [Supreme] Court's concerns in Furman." United States v. Frank, 8 F.Supp.2d 253, 265 (S.D.N.Y. 1998).

18 U.S.C. §3593(f) provides as follows:

> **Special precaution to ensure against discrimination**. -- In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious

> beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

Florida's death penalty statute contains no equivalent provision[32].

## H. ONE-AGGRAVATOR ELIGIBILITY IN FLORIDA IS A WEAK SAFEGUARD AT BEST, AND WITHOUT PROPORTIONALITY REVIEW OR JURY UNANIMITY IT IS NO SAFEGUARD AT ALL.

The state is likely to claim that the current requirement that the jury must unanimously find a single aggravator to render a defendant death-eligible is enough of a safeguard. The state will be

[32] While Florida has no explicit statutory protection against the various forms of discrimination, there is a very generic standard jury instruction that "Your decision should not be influenced by feelings of racial or ethnic bias". However, that advice pales in comparison with the emphasis conveyed to the jurors by the federal statute and jury instruction. The Florida instruction says nothing about religious or gender discrimination, nor does it make it clear that it applies to the victim[s] as well as the defendant. The Florida instruction does not direct the jurors that they cannot recommend a death sentence unless each of them conclude that they would have made the same recommendation no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim might be. Nor does the Florida instruction require that each juror take individual responsibility by returning a signed certificate that he or she has complied with the non-discrimination directive.

wrong. One aggravator does not limit the death penalty to a small sub-class; on the contrary, nearly everyone charged with or convicted of first-degree murder has at least one; and many of the statutory aggravators will be indisputable, making death-eligibility a foregone conclusion.[33]

Practically every defendant convicted in the first phase of felony murder - - which typically involves a less culpable level of intent than premeditated murder[34] - - will be death-eligible before the penalty phase even begins. And even for those few felony-murder defendants who are not separately charged with the underlying offense, the jury's penalty finding of the felony-murder aggravator - - (having already found him guilty of felony-murder after being instructed on the underlying felony) will always be a no-brainer. And while the state might demur by pointing out that there

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[33] Retired Circuit Judge O.H. Eaton, one of Florida's most experienced trial judges in death penalty cases, speaking before a Senate Criminal Justice Committee workshop, said it would be hard to imagine a Florida first degree murder case without at least one aggravator. Judge Eaton was engaging in slight hyperbole; you can imagine such a case and if you look hard enough you can find some. But they are few and far between

[34] See Blanco v. State, 706 So.2d 7, 13 (Fla. 1997)(Anstead, J., specially concurring); State v. Frazier, 164 P.3d 1, 3 (N.M. 2007).

are a handful of crimes enumerated in the felony murder statute which are not contained in the aggravating factor, all of the common ones are in both - - robbery, burglary, sexual battery, kidnapping, arson, aggravated child abuse - - and even a few less common like aircraft piracy and bombthrowing. And even some of the few underlying felonies which are not listed in the felony-murder aggravator will virtually always give rise to a <u>different</u> indisputable aggravator. [For example, escape, while not enumerated in §921.141(d), is instead addressed in section (e) (committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody). Similarly, aggravated fleeing to elude will, as a practical matter, always involve avoiding arrest and/or disrupt[ing] or hinder[ing] the lawful exercise of any governmental function or the enforcement of laws" (subsection (g)). Drug trafficking offenders under Fla.Stat. §893.1359(1) have their own separate death penalty statute to proceed under.[35] Carjacking and home invasion robbery are - - by definition - - robbery as well as burglary, and resisting an officer with violence to his or her person will activate the "victim was a law enforcement officer"

[35] Fla.Stat. §921.142.

aggravator (except in the rare situation where a non-law-enforcement-officer is killed while the defendant is doing violence to a law enforcement officer who is not killed). Aggravated abuse of an elderly person is covered by the "vulnerable due to advanced age or disability" aggravator, and terrorist acts will typically involve "great risk of death to many persons" (unless the terrorist act is a targeted assassination, which would likely trigger the "victim was a public official") aggravator.

The point is that, while the state may or may not be able to conjure a few unlikely scenarios where a defendant convicted of felony murder might just conceivably not start with out with an automatic aggravator making him or her death-eligible, the overwhelming majority of defendants convicted of felony-murder (with or without an additional finding of premeditation) are death eligible from the get-go. That is not a small sub-class, and there is no genuine narrowing.

This Court has identified at least three aggravating factors as being among the most serious and weighty in the Florida scheme - - HAC, CCP, and prior conviction of a violent felony. See, e.g. Craft v. State, 312 So.3d 45, 56 (Fla. 2020); Bush v. State, 295 So.3d 179,

215 (Fla. 2019). That may certainly be true in the weighing (i.e., selection) process, but as far as eligibility is concerned the vast majority of those Florida first-degree murder defendants who do not start off death-eligible based on felony-murder will have at least one of the other three, so, again, there is no meaningful narrowing of death-eligibility as required by the Eighth Amendment.

HAC (especially heinous, atrocious, or cruel) ordinarily applies to almost any method of homicide other than gunshot, and even gunshot murders will be considered HAC if the victim was in fear of his or her impending death prior to the shooting. Allred v. State, 55 So.3d 1267, 1280 (Fla. 2010). This Court "[has] held that the victim's perception of imminent death need only last seconds for [the HAC] aggravator to apply." Allred, at 1280. See also Buzia v. State, 926 So.2d 1203, 1214 (Fla. 2006)(beating homicide; victim was awake and aware during at least part of the ordeal, so "[w]hether this state of consciousness lasted minutes or seconds" he was acutely aware of his impending death). So the HAC aggravator can apply to virtually any murder unless death is near-instantaneous and the victim didn't see it coming. Accordingly, it

applies when the victim is stabbed[36], strangled[37], suffocated[38], drowned[39], or beaten to death.[40]

CCP (cold, calculated, and premeditated) applies to planned or calculated murders ("heightened premeditation"). It requires more time for reflection than does simple premeditation (where the requisite intent can be formed a moment before the act)[41] , but even for the CCP aggravator there is no "bright-line rule for how much reflection suffices." Miller v. State, 379 So.3d 1109, 1125 (Fla. 2024); Colley v. State, 310 So.3d 2, 13-14 (Fla. 2020). See, for example, Lynch v. State, 841 So.2d 362, 373 (Fla. 2003) (regardless of what Lynch's intentions may have been before adult victim's

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[36] See, e.g., Cox v. State, 819 So.2d 705, 719 (Fla. 2002)(single stab wound); Rogers v. State, 783 So.2d 980, 994 (Fla. 2001)(multiple stab wounds).

[37] See, e.g., McWatters v. State, 36 So.3d 613, 643 (Fla. 2010); Frances v. State, 970 So.2d 806, 815-16 (Fla. 2007).

[38] See Stephens v. State, 975 So.2d 405, 411, 423 (Fla. 2007).

[39] See Walker v. State, 707 So.2d 300, 315 (Fla. 1997).

[40] See, e.g., Buzia v. State, supra, 926 So.2d at 1211-14, Colina v. State, 634 So.2d 1077, 1081-82 (Fla. 1994).

[41] See, e.g., Gordon v. State, 350 So.3d 25, 36 (Fla. 2022); Oliver v. State, 214 So.3d 606, 618 (Fla. 2017).

arrival, he had 5 to 7 minutes in which he could have left the scene and not inflicted the fatal gunshot). And "prior violent felony" is also a very broad category, which can apply to contemporaneous and even later-committed crimes.[42] (If, for example, a defendant has only a twenty-year old strongarm robbery (with no physical injury) conviction, that may reduce the weight of that aggravator in the selection decision - - and it used to reduce the weight of that aggravator in this Court's proportionality review[43], - - but the relative weakness of the aggravator helps not at all in the "existence of one aggravator" eligibility determination).

It is a safe assumption, then, that the vast majority of first-degree murders qualify for at least one of these four aggravators - - felony murder, HAC, CCP, or prior violent felony. If, as may have been the case before Hurst and the ensuing "one aggravator

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[42] See, e.g., Pham v. State, 70 So.3d 485, 495 (Fla. 2011); Hess v. State, 794 So.2d 1249, 1266 (Fla. 2001); Urbin v. State, 714 So.2d 411, 418 (Fla. 1998).

[43] See Delgado v. State, 162 So.3d 971, 982 (Fla. 2015); Scott v. State, 66 So.3d 923, 938-39 (Fla. 2011); Hess v. State, supra. 794 So.2d at 1266; Johnson v. State, 720 So.2d 232, 238 (Fla. 1998), in each of which the prior violent felony aggravator existed but did not warrant significant weight under the circumstances, and Jorgenson v. State, 714 So.2d 423, 428 (Fla. 1998)(facts of prior crime, and 20-year gap between prior crime and charged crime).

eligibility" statute, it was still required that the co-sentencers find that the aggravators in combination were sufficient to make a defendant eligible for the death penalty, that might not be as much of a constitutional problem. But now that all the jury has to do is find the existence of one aggravator to make a defendant death-eligible, it certainly is one. But to make matters worse, while at least certain aggravators such as HAC and CCP are subject to evaluation of the facts and circumstances of the case, many of Florida's aggravators such as felony murder (after a first-phase conviction of felony murder and/or the underlying felony) and prior or contemporaneous conviction of a violent felony are rarely subject to dispute. Many of the enumerated factors are "defendant status aggravators" (defendant was under prison sentence, community control, or felony probation; defendant was previously adjudicated as a sexual predator; as well as prior violent felony), or "victim status aggravators" (victim was a law enforcement officer, or a public official, or a person under age 12, or an elderly or disabled person), or both (defendant was subject to a domestic violence

injunction obtained by the victim or close family member). That being said, there is nothing inherently unconstitutional about including such "auto ags" in a death penalty statute, and allowing them to be considered and weighed against the mitigating factors in the selection stage. But they serve no meaningful narrowing function in the death-eligibility determination. If virtually every first-degree murder defendant starts off right from the gate with at least one aggravating factor, and if jury unanimity is required only as to that single aggravator (even if it's a status aggravator), then the aggravating factors cannot do the constitutionally necessary function of genuinely limiting death-eligibility, and the inevitable result is an impermissible level of arbitrariness.

And without conceding the point, perhaps a state with a broad proliferation of aggravators could still save its capital sentencing scheme from constitutional invalidity, if it provided for jury unanimity at the selection stage and proportionality review on appeal. For example, when Florida had both of those protections, this Court's practice was to affirm death sentences based on a single aggravating factor only when there was "either nothing or very little in mitigation." Songer v. State, 544 So.2d 1010, 1011

(Fla. 1989); see, e.g., Ballard v. State, 66 So.3d 912, 920 (Fla. 2011); Jones v. State, 705 So.2d 1364, 1366 (Fla. 1998); Besaraba v. State, 656 So.2d. 441, 446-47 (Fla. 1995); Thompson v. State, 647 So.2d 824, 827-28 (Fla. 1994); DeAngelo v. State, 616 So.2d 440, 443-44 (Fla. 1993). As stated in Jones, "To rule otherwise . . . would put Florida's entire capital sentencing scheme at risk." Now in stark contrast, a finding of a single aggravator - - regardless of weight - - results in death-eligibility, and this Court after Lawrence refuses to look any further into the question of whether the death penalty is appropriate or deserved under all of the circumstances of the case or the defendant's life history. Like Yacob and Delgado, Ballard, Jones, Besaraba, Thompson, DeAngelo, and many others would be put to death under current Florida law.

Narrowing, jury unanimity, and proportionality review can be viewed as interlocking safeguards which form the foundation of a constitutionally permissible capital sentencing scheme, and arguably the absence of one can be compensated for by the others

(as suggested by Pulley v. Harris).[44] But absence of two, coupled with aggravating factors so numerous, broad, and frequently automatic that nearly everyone convicted of first-degree murder is death-eligible, is a recipe for an unconstitutional system.

Florida, which had and took seriously proportionality review for nearly half a century, and which required jury unanimity for six years prior to Parkland and the 2023 8-4 amendment, now has neither. And it is the only jurisdiction out of 27 states, the federal system, and the U.S. military which has neither. (Most have both).

## I. NO JURY UNANIMITY AND EXTREME OUTLIER (0 FOR 3)

By design, Florida now has the lowest bar in the nation both as to jury unanimity specifically, and as to safeguards - - individually and especially in combination - - against arbitrary infliction of the death penalty.

With regard to this Point on Appeal, which addresses the constitutional invalidity of Florida's newly enacted capital

[44] For purposes of this safeguards argument, Zieler will assume without conceding that two out of three might suffice. However, he maintains his position asserted in Issue VI that jury unanimity is - - independently - - a constitutional necessity.

sentencing law as a whole, undersigned counsel would reiterate that his argument is in no way dependent on the separate question of whether the Sixth and/or Eighth Amendments always require unanimity under any capital sentencing scheme.[45] Rather, the question here is whether unanimity is required under this capital sentencing scheme, which provides neither proportionality review nor jury unanimity, and in which death eligibility is not narrowed to a small sub-class of persons convicted of first-degree murder. From the standpoint of safeguards against arbitrary death decisions, Florida's current scheme is now the worst in the nation, and nobody else - - not even Alabama - - comes close.

This Court has noted that "[m]any courts and scholars have recognized the value of unanimous verdicts." State v. Steele, 921 So.2d 538, 549 (Fla. 2005). In the context of death penalty determinations the Steele Court quoted State v. Daniels, 542 A.2d 306, 315 (Conn. 1988):

> [W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether

[45] That issue is addressed in Issue VI, infra.

> the death penalty is appropriate", Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 2720,97 L.Ed.2d 56 (1987), convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

See also McKoy v. North Carolina, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring)("Jury unanimity, it is true, is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community"); United States v. Scalzitti, 578 F.2d 507, 512 (3rd Cir.1978)("Unlike the 'historical accident' of jury size, unanimity relates directly [to] the deliberative function of the jury. Unanimity serves to effectuate the purpose of the jury system by promoting the full expression of the views of all members of the jury and by ensuring that those views are taken into account as fully and fairly as possible in reaching a verdict").

The Scalzitti court's perception of the importance of jury unanimity as a safeguard is even more compelling today than in

1978. The Third Circuit cites the dissenting opinions of Justices Stewart and Marshall in Apodaca v. Oregon, 406 U.S. 404 (1972). Apodaca had upheld the constitutionality of a provision of the Oregon state constitution allowing conviction in noncapital criminal trials by a 10-2 jury vote, just as Johnson v. Louisiana, 406 U.S. 356 (1972) had upheld the constitutionality of Louisiana laws allowing conviction in noncapital criminal trials by a 9-3 jury vote.[46] However, both Apodaca and Johnson were overturned by the United State Supreme Court in 2020 in Ramos v. Louisiana, 590 U.S. ___, 140 S.Ct. 1390 (2020)[47]. Justice Gorsuch took note of the extreme outlier status of those two jurisdictions. "In 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction. But not in Louisiana". 140 S.Ct. at 1394. [See Burch v. Louisiana, 441 U.S. 130, 138 (1979)(the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between

[46] Shortly after Johnson, the Louisiana majority verdict provisions were amended in 1974 to require 10-2 instead of 9-3. See State v. Hankton, 122 So.3d 1028 (La.App.2013).

[47] Justice Gorsuch delivered the opinion of the Court in Ramos as to Parts I, II-A, III, and IV-B-1, and the plurality opinion as to Parts II-B, IV-A, IV-B-2, and V.

those jury practices that are constitutionally permissible and those that are not")].

In 2024, there are 27 states[48] which have the death penalty, plus the federal government and the U.S. military. Both the Federal Death Penalty Act [FDPA] and the military justice system require a unanimous determination (by the jury or by the twelve service-member court-martial panel respectively) that death is the appropriate punishment. 18 U.S.C. §3593(e); RCM 1006 (d)(4)(A); see, e.g., United States v. Roof, 10 F.4th 314, 358 n.26 (4th Cir. 2021); Loving v. Hart, 47 M.J. 438, 442 (1998); United States v. Simoy, 50 M.J. 1 (1998). [The military courts of criminal appeals also conduct proportionality review in death penalty cases].[49] The only state jurisdictions which allow a death sentence to be imposed on the basis of a nonunanimous jury vote are Alabama (10-2) and now Florida (8-4). And even Alabama requires a significantly higher

[48] Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming.

[49] See United States v. Curtis, 32 M.J. 252, 270 (1991); United States v. Witt, 73 M.J. 738, 824 (2014).

percentage of the jury (83 and a third) to agree on a death verdict than what is deemed sufficient under Florida's new scheme (66 and two thirds). But an even more crucial difference is this: Alabama has at least retained the safeguard of proportionality review on appeal [see Ala. Code §13A-5-53(b)(3); Petric v. State, 157 So.3d 176, 250 (Ala.Crim.App. 2013)], while Florida, by contrast, has seen fit in recent years to abandon both jury unanimity and proportionality. If this were a race to lower the bar, Florida wins.

Moreover, in the large majority (17 states, federal government, U.S. military) of the jurisdictions which require a unanimous jury vote to impose a death sentence, there is no "hung jury" option. The state's failure to convince all twelve jurors results in a sentence of life imprisonment. Five states (Alabama[50], Arizona, California, Kentucky, and Nevada) allow one or more penalty retrials in the event of a deadlocked jury, but - - except in Alabama - - there is no possibility of a death sentence without a unanimous jury verdict in the retrial. There are four states (Indiana, Missouri, Montana, and

[50] In Alabama, if fewer than 10 jurors vote for death and fewer than seven jurors vote for life, a penalty retrial may be held. Ala. Code §13A-5-46 (f) and (g).

Nebraska) which don't fit neatly into the unanimous/nonunanimous dichotomy. [Whether or not those states' capital sentencing schemes would pass constitutional muster is not at issue here, but none of them are as devoid of safeguards as Florida's]. In Indiana and Missouri if the jury deadlocks the trial judge determines the sentence.[51] In Montana the judge imposes sentence based on the jury's findings of aggravating factors.[52] In Nebraska the jury determines death-eligibility and then a panel of three judges determines the sentence.[53] The Nebraska three-judge panel cannot impose the death penalty except by unanimous vote. State v. Hochstein, 632 N.W.2d 273, 281-83 (Neb. 2001). Importantly, three of those four jurisdictions - - Missouri, Montana, and Nebraska - - require proportionality review by the state's highest court to ensure (as the Nebraska statute puts it) "that each case produces a result similar to that arrived at in other cases with

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[51] Ind.Code §35-50-2-9 (f); Holmes v. State, 820 N.E.2d 136, 137 (Ind. 2005); V.A.M.S. 565.030.4; State v. Shockley, 410 S.W.3d 179, 198-99 and n.11 (Mo. 2013).

[52] MCA 46-18-305.

[53] Neb.Rev.Stat. §29-2521; State v. Trail, 981 N.W.2d 269, 305 (Neb. 2022).

the same or similar circumstances."[54] The fourth state, Indiana, in light of the "ultimate gravity" of the death penalty, recognizes the need for "maximum compliance with the proportionality concerns" of its state constitution, and encourages appellate counsel to raise the issue of proportionality, but has stopped short of holding that it is constitutionally required in all cases. See Bivins v. State, 642 N.E.2d 928, 955 (Ind. 1994); Stevens v. State, 691 N.E.2d 412, 437-38 (Ind. 1997); In re Gardner, 713 N.E.2d 346, 347-48 (Ind. App. 1999). In Wilkes v. State, 917 N.E.2d 675, 693 (Ind. 2009), the Indiana Supreme Court wrote: "We cannot say that the death sentences in this case are inappropriate. The nature of the offense is a triple murder of a mother and her two children. The murders . . . were committed in a particularly gruesome manner. We have upheld death sentences in similar cases" [citing two previous decisions for comparison purposes]. Indiana's approach is therefore plainly different from Florida's recent conclusion - - based

[54] V.A.M.S. 565.035.3(3); State v. Wood, 580 S.W.3d 566, 590 (Mo. 2019); MCA 46-18-310(1)(c); State v. Gollehon, 864 P.2d 249, 267-68 (Mont. 1993); Neb. Rev. Stat. §29-2521.01(5); State v. Trail, 981 N.W.2d 269, 311-13 (Neb. 2022); State. v. Garcia, 994 N.W.2d 610, 704-05 (Neb. 2023).

on a misreading of Pulley v. Harris - - that proportionality review in this state is impermissible.

## J. FLORIDA'S CAPITAL SENTENCING SCHEME HAS NOW BECOME "THAT SORT" OF SYSTEM ENVISIONED IN PULLEY V. HARRIS - - ONE SO LACKING IN MEANINGFUL SAFEGUARDS AGAINST ARBITRARY INFLICTION OF THE DEATH PENALTY THAT IT DOES NOT PASS CONSITUTTIONAL MUSTER

It is not only Florida's extreme outlier status which renders its current scheme unconstitutional. [Theoretically a state could be an outlier by adopting more safeguards or better safeguards]. But there is a floor below which a state's capital sentencing system cannot sink without violating the Eighth Amendment's protection against the arbitrary infliction of death. Justice Labarga saw where this was going when he dissented from the Court's abandonment of proportionality review in Lawrence:

> Today, the majority takes the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence - - a step that eliminates a fundamental component of this Court's mandatory review in direct appeal cases. . . . I cannot overstate how quickly and consequentially the majority's decisions have impacted death penalty law in Florida. On January 23, 2020, this Court decided State v. Poole 297 So.3d 487 (Fla. 2020). As I noted in my dissent in Poole, despite the clearly defined historical basis for requiring unanimous jury verdicts in Florida, this Court

> receded from the requirement that juries must unanimously recommend that a defendant be sentenced to death. Poole, 297 So.3d at 513 (Labarga, J., dissenting). After 2016, only the state of Alabama permitted a nonunanimous (10-2) jury recommendation [footnote omitted]. Poole paved the way for Florida to return to an absolute outlier status of being one of the only two states that does not require unanimity.

308 So.3d at 552-53 (Labarga, J., dissenting)

Poole paved the way, and three years later the Florida Legislature chose to travel down that paved road. As a result, Florida is now the only jurisdiction - - state, federal, or military - - in the Nation which provides neither the safeguard of jury unanimity at the selection stage nor the safeguard of proportionality review at the appeal stage. And the eligibility stage lacks meaningful safeguards as well, since the vast majority of individuals convicted of first-degree murder start off with at least one indisputable aggravating factor, and under the Florida system that's all it takes.

For nearly five decades this Court rigorously conducted proportionality review to ensure that the death penalty would not be inflicted in an arbitrary or discriminatory manner. So even though for most of those years Florida did not require jury unanimity, that system arguably met the bare minimum constitutional standards as

they were perceived before Ramos. Then, for a brief shining moment from 2016 with Hurst v. State, 202 So.3d 40 (Fla. 2016) until 2020 Florida required both proportionality review and jury unanimity. Proportionality was discarded in 2020 due to the Lawrence decision's misinterpretation of Pulley. At that point, maybe the unanimous jury requirement - - hanging on by its fingernails in light of Poole - - was enough to save it from constitutional invalidity (though undersigned counsel contends not). But, as Justice Labarga predicted, the Florida Legislature was not very far behind in discarding unanimity as well. What is left is a capital sentencing scheme so lacking in meaningful safeguards against arbitrary infliction of the death penalty, and so egregiously out of step with the near-uniform judgment of the nation[55] that it does not pass constitutional muster.

Forty years ago in Spaziano v. Florida, 468 U.S. 447, 464 (1984) - - more on that decision in the next Point on Appeal - - the United States Supreme Court reiterated that it was "unwilling to say that there is any one right way for a state to set up its capital

[55] Burch v. Louisiana, supra, 441 U.S. at 138.

sentencing scheme." But that doesn't mean there can't be a wrong way, and Florida has found it.

Immediately after its "no one right way" comment, the Spaziano Court said it was persuaded that "Florida has struck a reasonable balance between sensitivity to the individual and his circumstances, and ensuring that the [death] penalty is not imposed arbitrarily or discriminatorily." That reasonable balance is gone. A year before Spaziano, in Barclay v. Florida, 463 U.S. 939, 958-59, 973-74 (1983)(Stevens, J., joined by Powell, J., concurring in the judgment), Justice Stevens began by recognizing that "Death as a punishment is unique in its severity and irrevocability. Since Furman v. Georgia, this Court's decisions have made clear that States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations." 463 U.S. at 958-59. "Particular features of state sentencing schemes may be sufficiently inadequate, unreliable, or unfair that they violate the United States Constitution" 463 U.S. at 959. In rejecting Barclay's claim that (in 1983) the Florida Supreme Court "has abdicated its constitutionally-mandated responsibility to perform meaningful appellate review", Justice Stevens said this:

> More generally, the question is whether, in its regular practice, the Florida Supreme Court has become a rubber stamp for lower court death-penalty determinations. It has not. On 212 occasions since 1972 the Florida Supreme Court has reviewed death sentences; it has affirmed only 120 of them. The remainder have been set aside, with instructions either to hold a new sentencing proceeding or to impose a life sentence.

463 U.S. at 973.

See also Proffitt v. Florida, 428 U.S. 242, 253 (1976)(finding it significant that the Florida Supreme Court in the mid-1970s had not hesitated to vacate death sentences (8 of 21) when it determined that that sentence should not have been imposed), and Olsen v. State, 67 P.3d 536, 610 (Wyo. 2003)(recognizing that the United States Supreme Court "continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective").

In contrast, this Court - - in the five years since the mandatory retirement of Justices Lewis, Quince, and Pariente which preceded by a year or so the overruling of Yacob and jettisoning of

proportionality review in Lawrence - - has reviewed 36 death sentences on direct appeal and affirmed 33 of them[56]

Florida's recent elimination of both proportionality review and jury unanimity (among other things)[57] puts this state on an island.

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[56] Miller v. State, 379 So.3d 1109 (Fla. 2024); Loyd v. State, 379 So.3d 1080 (Fla. 2023); Bevel v. State, 376 So.3d 587 (Fla. 2023); Cruz v. State, 372 So.3d 1237 (Fla. 2023); Orme v. State, 361 So.3d 842 (Fla. 2023); Wells v. State, 364 So.3d 1005 (Fla. 2023); Sievers v. State, 355 So.3d 871 (Fla. 2022); Gordon v. State, 350 So.3d 25 (Fla. 2022); Fletcher v. State, 343 So.3d 55 (Fla. 2022); Ritchie v. State, 344 So.3d 369 (Fla. 2022); Joseph v. State, 336 So.3d 218 (Fla. 2022); McKenzie v. State, 333 So.3d 1098 (Fla. 2022); Bell v. State, 336 So.3d 211 (Fla. 2022); Noetzel v. State, 328 So.3d 933 (Fla. 2021); Alcegaire v. State, 326 So.3d 656 (Fla. 2021); Davidson v. State, 323 So.3d 1241 (Fla. 2021); Bargo v. State, 331 So.3d 653 (Fla. 2021); Allen v. State, 322 So.3d 589 (Fla. 2021); Deviney v. State, 322 So.3d 653 (Fla. 2021); Smith v. State, 320 So.3d 20 (Fla. 2021); Woodbury v. State, 320 So.3d 631 (Fla. 2021); Hojan v. State, 307 So.3d 618 (Fla. 2020); Colley v. State, 310 So.3d 2 (Fla. 2020); Craft v. State, 312 So.3d 45 (Fla. 2020); Lawrence v. State, 308 So.3d 544 (Fla. 2020); Craven v. State, 310 So.3d 891 (Fla. 2020); Santiago-Gonzalez v. State, 301 So.3d 157 (Fla. 2020); Bush v. State, 295 So.3d 179 (Fla. 2020); Smiley v. State, 295 So.3d 156 (Fla. 2020); Bright v. State, 299 So.3d 985 (Fla. 2020); Doty v. State, 313 So.3d 573 (Fla. 2020); Newberry v. State, 288 So.3d 1040 (Fla. 2019); Rogers v. State, 285 So.3d 872 (Fla. 2019).

The three reversals are Figueroa-Sanabria v. State, 366 So.3d 1035 (Fla. 2023)(new penalty trial); Mosley v. State, 349 So.3d 861 (Fla. 2022)(new Spencer hearing); and Cruz v. State, 320 So.3d 695 (Fla. 2021)(resentencing by trial judge only). In one appeal, Avsenew v. State, 334 So.3d 590, 592 (Fla. 2022), this Court did not address any death penalty issues, as they were moot in light of reversal of the conviction for a new trial.

[57] See Justice Labarga's Lawrence dissent.

At the time Spaziano was decided Florida was performing proportionality review, and at the time Harris v. Alabama, 513 U.S. 504 (1995) was decided Alabama was doing the same. (Alabama still is). In Harris - - a decision which, like Spaziano, may no longer be viable[58] - - the U.S. Supreme Court, in upholding Alabama's law, said "Alabama's capital sentencing scheme is much like that of Florida. . . . In Florida, as in Alabama, the reviewing courts must independently weigh aggravating and mitigating circumstances to determine the proportionality of the death sentence. . . and must decide whether the penalty is excessive or disproportionate compared to similar cases". 513 U.S. at 508-09. Because Spaziano and Harris approved capital sentencing schemes which prominently featured proportionality review, Florida's recent abandonment of such review undercuts the rationale of those cases (even apart from the impact of Ramos v. Louisiana discussed in the next Point on Appeal.).

Florida's current capital sentencing law, as amended effective April 20, 2023, under which Joseph Zieler was sentenced to death,

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[58] See Issue VI, infra.

lacks adequate safeguards at all stages of the proceedings - - death-eligibility, death-selection, and appeal. Such a scheme is constitutionally invalid on its face, for essentially the same reasons the pre-Furman death penalty schemes were invalid. Death sentences imposed under Florida's current system, including Zieler's, cannot constitutionally be carried out.

ISSUE VI

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

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

that exact same argument in Spaziano." Spaziano and Harris v. Alabama, 513 U.S. 504 (1995) upheld, in the context of the former Florida system and the former Alabama system respectively, provisions which allowed the trial judge to override a jury's life recommendation and impose a death sentence instead.[59] Both Spaziano and Harris are heavily premised on the majority's oft-repeated characterization of the jury's role at the time as "advisory". Unanimity is not discussed in either opinion, and there is no mention of the then-leading cases on nonunanimous juries, Apodaca v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972), as would be expected if unanimity was at issue in Spaziano and/or Harris. Rather, the essential holding of those cases - - now overruled at least in significant part by Hurst v. Florida, 577 U.S. 92, 102 (2016) - - was that the Sixth Amendment is not violated when the death penalty is imposed by a judge rather than a jury, and the Eighth Amendment is not necessarily violated

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

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

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

In her 2013 opinion (joined in part by Justice Breyer) dissenting from denial of certiorari in Woodward v. Alabama, 134 S.Ct 405 (2013), Justice Sotomayor expressed the view that the rationale of Harris (and by extension Spaziano) had been undermined by more recent decisions of the Court, and should be reconsidered. Three years later, Hurst v. Florida partially overruled Spaziano "to the extent that [it allows] a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that

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

is necessary for imposition of the death penalty." Then came Hurst v. State followed by State v. Poole. As previously mentioned, the Poole Court's rejection of Poole's (and Hurst v. State's) Sixth Amendment position was based in large part on Spaziano [297 So.3d at 504], and its rejection of Poole's and the Hurst Court's Eighth Amendment analysis was based entirely on Spaziano and Harris [297 So.3d at 504].

However any remnant of constitutional viability Spaziano (and therefore Poole) might have retained on the issue of jury unanimity after Hurst v. Florida was put to pasture by the United States Supreme Court's decision in Ramos, issued three months after Poole, which abrogated its 1972 decisions in Apodaca and Johnson. Oregon and Louisiana were the only two states which allowed criminal convictions based on nonunanimous jury verdicts[61], and, as the Nebraska Supreme Court emphasized in State v. Hochstein, 632 N.W.2d 273, 282 (Neb. 2001), even Oregon and Louisiana had express provisions that nonunanimous verdicts were impermissible in capital cases. This capital case exception "reflects the under-

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

standing that such cases are qualitatively different and require an added measure of reliability." 632 N.W.2d at 282.

In Ramos, Justice Gorsuch recounts the Jim Crow-era history of racial bias which motivated Louisiana to dispense with jury unanimity, and the history of racial, ethnic, and religious bigotry (and the rise of the Ku Klux Klan in that state) which motivated the adoption of Oregon's nonunanimity provision in the 1930s. These laws were purposely crafted in order to dilute the influence of minorities on Louisiana and Oregon juries. 140 S.Ct at 1393, 1401 and n.44.

See, e.g., Raoul G. Cantero and Robert M. Kline, Death is Different: The Need for Jury Unanimity in Death Penalty Cases, 22 St. Thomas L.Rev. 4, 31-32 (2009) ("The unanimity requirement also gives meaning to each juror's vote, thereby preventing a simple majority of the jury from ignoring an individual juror's voice when imposing a death sentence against a fellow citizen. Put another way, courts that allow a non-unanimous jury to render a verdict empower superficial, narrow, and prejudiced arguments that appeal only to certain groups"); Jennifer Eisenberg, Ramos, Race, and Juror Unanimity In Capital Sentencing, 55 Loyola L.A.L.Rev. 1085,

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

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

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

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

A discussed in the last Point on Appeal, the federal death penalty law [FDPA] - - like nearly every American jurisdiction in which death is a possible punishment - - requires a unanimous jury

verdict on whether the aggravating factors sufficiently outweigh the mitigating factors as to justify a sentence of death. However, federal Circuit Courts of Appeal, like this Court, have rejected defendants' arguments that this weighing process is governed by the "beyond a reasonable doubt" standard.[62] The Sixth Circuit in United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013) highlighted the significant difference between a jury's finding of fact (amenable to and subject to the reasonable doubt standard) and its weighing of aggravating and mitigating circumstances, which involves a "complex moral judgment"[63] which is not amenable to a reasonable doubt standard:

> [Factual] findings - - that a particular statement might influence its recipient, or that the defendant acted with a particular state of mind, or possessed a particular quantity of drugs, or was himself the triggerman, rather than just an accomplice - - are different in kind from the "outweighs" determination required by §3593(e). Apprendi findings are binary - - whether a particular fact existed or not. Section 3593(e), in contrast, requires the jury to "consider" whether one type of "factor" "sufficiently outweigh[s]" another so as to "justify" a

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

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

> particular sentence. These terms - - consider, justify, outweigh – reflect a process of assigning weights to competing interests, and then determining based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral - - for the root of "justify" is "just." What §3593(e) requires, therefore, is not a finding of fact but a moral judgment.

This Court recently in Loyd v. State, 379 So.3d 1080, 1096 (Fla. 2023)(quoting Justice Thomas' concurring opinion in Glossip v. Gross, 576 U.S. 863, 902-03 (2015)) stated that trials before a local jury "ensure that capital defendants are given the option to be sentenced by a jury of their peers who, collectively, are better situated to make the moral judgment between life and death than are the products of [empirical studies].[64] It is especially noteworthy that Justice Thomas meant "the moral judgment between life and death"; not a mere finding of fact that, say, a particular defendant had a prior robbery conviction or a particular victim was a law enforcement officer. As expressed in Jones v. United States, 527 U.S. 373, 382 (1999), ". . . [W]e have long been of the view that '[t]he very object of the jury system is to secure unanimity by a com-

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

parison of views, and by arguments among the jurors themselves' [Citation and footnote omitted]. We have further recognized that in a capital sentencing proceeding the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.' "

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

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

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

punishment from unanimous to a supermajority of eight out of twelve.

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

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

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

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

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

> "The victims of the most evil crimes and their families deserve to see criminals punished to the full extent of the law," said **Senator Blaise Ingoglia**. "One rogue juror should not be the sole arbiter of justice. Thank you to the Parkland families, Governor DeSantis, and Representative Jacques for ensuring this doesn't happen again."
>
> "Florida will no longer allow a small handful of activist jurors to derail the full administration of justice when individuals are found guilty beyond a reasonable doubt and meet the qualifications for the death penalty," said **Representative Bernie Jacques**.[65]

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

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

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

> "[It is]the almost invariable assumption of the law that jurors follow their instructions." Richardson v. Marsh, 481 U.S. 200, 206, 107.S.Ct. 1702, 1707, 95 L.Ed.2d 176 (1987). "[W]e presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." Francis v. Franklin, 471 U.S. 307, 324, n.9, 105 S.Ct. 1965, 1976, n.9. 85 L.Ed.2d 344 (1985).

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

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

As previously discussed, this Court held in Hurst v. State in 2016 that jury unanimity is constitutionally required, and then it reversed its field in Poole in January 2020 and concluded that it is not. Zieler submits that, especially in light of the United States

Supreme Court's April 2020 decision in Ramos, Hurst v. State had it right. And Hurst v. State was manifestly right in anticipatorily rejecting the Florida Governor's and Legislature's purported "rogue juror" - - or more accurately "four rogue jurors" - - rationale:

> We also note that there is no valid basis for concern that such requirement will allow a single juror with a fixed objection to the death penalty to impede the proper conduct of the penalty phase process. Although a prospective juror who voices only general objections to the death penalty cannot be excluded from the jury on that basis, Guardado v. State, 176 So.3d 886, 898 (Fla. 2015) (citing Witherspoon, 391 U.S. at 522, 88 S.Ct 1770), a prospective juror may be found unqualified to serve if he or she expresses an unyielding conviction and rigidity toward the death penalty. Conde v. State, 860 So.2d 930, 939 (Fla.2003). This Court has made clear that, although a juror's initial response to questioning about the death penalty alone will not automatically provide good cause to remove that juror, a juror's "[p]ersistent equivocation or vacillation. . . on whether he or she can set aside biases or misgivings concerning the death penalty in a capital penalty phase supplies the reasonable doubt as to the juror's impartiality which justifies dismissal." Johnson v. State, 969 So.2d 938, 947-48 (Fla.2007). This is in accord with the United States Supreme Court's holding in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d. 841 (1985), that a prospective juror may be excused for cause when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id at 433, 105 S.Ct. 844 (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct.2521, 65 L.Ed.2d 581 (1980)).
>
> Furthermore, it is presumed that jurors will, in good faith, follow the law as it is explained to them. See

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

202 So.3d at 62-63.

The phantom "rogue juror" bogeyman is not a constitutionally valid rationale for dispensing with unanimity, and every other state and federal jurisdiction - - save Florida and Alabama - - which has the death penalty is able to function without lowering the bar to 8-4 or 10-2. Moreover, in Florida imposition of the death penalty is never required by law [see Smith v. State, 866 So.2d 51, 67

(Fla.2004)], and Florida jurors are specifically instructed "Regardless of the results of each juror's individual weighing process - - even if you conclude that [a] [the] sufficient aggravator[s] outweigh[s] the mitigator[s] – the law neither compels nor requires you to recommend that the defendant should be sentenced to death."[66] Therefore, it is impossible for a Florida juror to violate his or her oath or the judge's instructions by voting for life over death. The only way the "rogue juror" scenario could theoretically occur is if a prospective juror who would never consider voting for a death sentence were to lie under oath on voir dire, and then somehow get past the state's ten peremptory challenges. [Apparently the legislature was comfortable that five rogue jurors would not be able to pull this off in order to block a death verdict]. Florida's Legislature, spurred on by its Governor, hastily overreacted to a high-profile verdict it didn't like, and in so doing enacted a one-of-a-kind capital sentencing scheme [see also Issue V, supra] which, especially after Ramos, is constitutionally invalid on its face.

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

## CONCLUSION

Based on the foregoing, appellant respectfully requests that this Court reverse his conviction [Issue III] and/or death sentence.

## CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Assistant Attorney General Christina Pacheco at Christina.pacheco@myfloridalegal.com and capapp@myfloridalegal.com, on this 30th day of April, 2024.

## CERTIFICATION OF COMPLIANCE

I certify that this document contains 28,026 words (excluding the portions exempted by Fla.R.App.P. 9.045(e)). I also hereby certify that this document was generated by computer using Microsoft Word with Bookman Old Style 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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