

IN THE SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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## PRELIMINARY STATEMENT

This reply brief is directed to Issues One, Three, Five, and Six. Zieler will rely on his initial brief with regard to Issues Two and Four.

The state's answer brief is referred to herein as SB. All emphasis is supplied unless the contrary is indicated.

### ISSUE ONE [INEFFECTIVE ASSISTANCE/FUNDAMENTAL ERROR]

#### A. STEIGER

If Zieler, through undersigned counsel, is right that Steiger v. State, 328 So.3d 926 (Fla. 2021) leaves the door open just a crack to permit ineffective assistance of counsel rising to the level of fundamental error to be remedied on direct appeal, then he maintains his position that the combination of egregious mistakes on the part of his trial attorneys which deprived him of his one opportunity to be tried under the jury unanimity statute (and therefore deprived him of his only realistic chance to avoid a death

sentence) rises to that level. If, on the other hand, the state is right that Steiger absolutely closes and locks that door (SB28), then Zieler will accept the state's invitation to raise his IAC claim by means of a postconviction motion under Fla.R.Crim.P. 3.851 (SB29). See, e.g., Robards v. State, 112 So.3d 1256, 1266-67 (Fla. 2013). If necessary, an evidentiary hearing would shed light on whether these defense attorneys were or were not aware of the impending 8-4 amendment; whether they had any conceivable or actual strategic reason for their actions which caused Zieler to be tried under the 8-4 law; and whether their actions fell beneath the range of professionally acceptable performance in light of the heightened standards required of attorneys in capital cases.

B. THE 8-4 AMENDMENT WAS READILY FORESEEABLE

The state, citing Nelms v. State, 596 So.2d 441, 442 (Fla. 1992) and other case law from various jurisdictions, relies on the generally true proposition that a defense lawyer is not ineffective for failing to anticipate a change in the law, especially with regard to

pending legislation (SB30-32). The state asserts that “[r]easonable counsel would have acted on the law as it stood, not on ‘legislative fortune-telling’ about how it might change in the months ahead” (SB31). The state points out that “[t]housands of bills are filed in each legislative session”; 1828 of them in 2023 alone (SB32 and n.5).

However, the 8-4 amendment was no garden-variety legislative bill; it was a looming sea change impacting capital trials in Florida to the nth degree, designed to make it much easier for the prosecution to obtain a death sentence for any defendant tried under the new scheme. The amendment was a highly publicized and politicized response to the (itself highly publicized) Parkland school mass shooting, and the emotions generated by the fact that its perpetrator, Nikolas Cruz, “got off” with a life sentence because three jurors voted for life. Florida’s Governor Ron DeSantis, a nationally famous political figure, was an outspoken proponent of abolishing the jury unanimity requirement, and the amendment

received statewide and even national media coverage.<sup>1</sup> While it might still have escaped the attention of an average citizen or even a lawyer who does not practice in this highly specialized area, it is inconceivable, or should be, that any death-qualified Florida trial attorney - - especially one who accepts court appointments to defend indigent capital clients and who has such a trial pending - - would be unaware of it, or would not be seriously concerned about its potential impact on his client. See Fla.R.Crim.P. 3.112 (minimum standards governing criminal trial attorneys generally are insufficient for capital cases; “[c]ounsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case”).

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<sup>1</sup> See, e.g., Lizette Alvarez, Florida Moves to Revive a Reckless Approach to the Death Penalty, Washington Post, February 20, 2023 [[washingtonpost.com/opinions/2023/02/20/reckless-florida-death-penalty-legislation/](https://www.washingtonpost.com/opinions/2023/02/20/reckless-florida-death-penalty-legislation/)]; Dan Sullivan, DeSantis Pushes New Florida Death Penalty Standards as Execution Looms, Tampa Bay Times, February 21, 2023 [<https://www.tampabay.com/news/Florida/2023/02/21/execution-looms-florida-leaders-renew-interest-death-penalty/>].

State v. Victorino, 372 So.3d 772 (Fla. 5<sup>th</sup> DCA 2023) is a case which was wrongly decided on the merits of the ex post facto issue,<sup>2</sup> and one which the Fifth District Court of Appeal never had subject-matter jurisdiction to decide in the first place<sup>3</sup> - - but it does illustrate the importance which competent attorneys for the defense and for the state placed on the timing of a capital trial in view of the application or non-application of the 8-4 amendment. Victorino's lawyers acknowledged that by March 2023 all parties were aware of the bills then pending in the Florida legislature, and they were following its progress. 372 So.3d at 778. During jury selection on April 17, three days before the 8-4 amendment became effective, even several jurors indicated they were aware of the impending change. Id., at 729. Victorino's attorneys took the extraordinary approach of not conducting any voir dire examination of the prospective jurors "because they wanted to select a jury to try the

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<sup>2</sup> Undersigned counsel has not raised the ex post facto issue in this appeal solely because the charged crimes took place in 1990. See p. 18-21, infra.

<sup>3</sup> See Hunter v. State, SC23-1446, order dated February 9, 2024, p.5 n.1.

case as soon as possible – before the new law took effect.” Id., at 779. As the Fifth DCA put it “In sum, the record shows that the change to section 921.141 was entirely foreseeable to all parties. The record suggests that both sides were cognizant of the impact the new law could have on this proceeding, and tailored their litigation strategies – including the scope and even the existence of voir dire – to maximize the chance that their preferred version of the statute would apply.” Id., at 779.

In Zieler’s case, in stark contrast, his lawyers were either not cognizant of the existence of the looming 8-4 amendment, or not cognizant of its devastating impact on Zieler’s chances of avoiding a death sentence. Here, unlike Victorino, the much more favorable version of Florida’ death penalty law was going to apply, until his lawyers’ blunders squandered his last best chance. [Even though Zieler’s actual jury - - selected and instructed under the 8-4 amendment - - returned a nonunanimous (10-2) verdict, the state speculates that due to the nature of the murders any hypothetical jury selected and instructed under the unanimity statute would have unanimously voted for death (SB 19,33, 38-39). The state

cannot know this. If anything, the nature of these murders, from the perspective of any capable and zealous defense attorney, highlights the overwhelming importance of needing to persuade only one juror - - not five jurors - - to spare his client's life.

To see this coming, the lawyers didn't need to be clairvoyant, just competent. More so even than in United States v. Abney, 812 F.3d 1079, 1082-83, 1087-93 (D.C.Cir.2016), the impending changes to Florida's death penalty law were highly publicized and thoroughly foreseeable, and they pertained directly to Zieler's lawyers' supposed area of expertise. In Abney, the change in law would have benefited the defendant, and counsel's failure to request a continuance under the circumstances of the case was deficient performance. In Zieler's case the change in law greatly disadvantaged capital defendants (and was designed to achieve that result), but Zieler got in under the wire, and would have been tried under the unanimity statute but for his lawyers' series of inexcusable blunders.

Zieler's attorneys were of course well aware throughout years of trial preparation that this was a 1990 cold case. A pretrial plea

offer was discussed in the context of parole being available after 25 years (R2154-55, 2652-54). And a mere two weeks before jury selection began, defense counsel argued (and the prosecutor agreed) that the child victim aggravating factor could not be used because:

[t]he problem we have in potential application of that in this particular case is because this is a 1990 case, that aggravating factor was not enacted by the legislature until '95 or '97. So it was not even in effect at the time the homicide was committed.

(R4316)

During the three days of individual voir dire from February 27 – March 1, 2023, when somehow two defense lawyers, three prosecutors, and the judge “all forgot this was a 1990 case” (T3859), defense counsel Shirley repeatedly indicated his awareness that there used to be parole eligibility for capital life sentences, and now there isn't. “They used to have parole here in the state of Florida. That's gone, so . . . if you recommend life the person is never coming out again” (T2818-19). “[Y]ou understand that if . . . somebody is sentenced to life nowadays, that means life? They don't ever get out. . . . We used to have a parole system, but that's gone now” (T3105). “We don't have a parole anymore, so life is life.

When they go in, they don't come out again. You understand that?

. . . It wasn't always that way, but it is now, all right?" (T3197).

"[T]he state of Florida did away with parole many years ago. Since we don't have parole, do you understand that if somebody is sentenced to life, they're going to serve each and every day of the rest of their life behind bars?" (T3764). "[S]ince they've done away with parole . . . life means life" (T3775).<sup>4</sup>

When, on the fourth day of jury selection, someone finally realized what they'd done, there were mea culpas all around, but the harmful impact was on the taxpayers and, more importantly, on Zieler. Nevertheless, the defense attorneys still had avenues to preserve their client's opportunity to be tried under the unanimity statute. They squandered them. The prosecutor proposed two options - - either reinstruct the jury on the correct law and allow further voir dire examination, or "scrap the jury and start over" - - and that the choice should be "whichever . . . the Defense wants" (T3863-64). Defense counsel chose the option which deprived Zieler

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<sup>4</sup> More statements by Mr. Shirley to the effect that there is no parole "anymore" are at T3162, 3179, 3214, 3300, 3511, 3534, 3556, 3566, 3609, 3666, 3673, 3690, 3701, 3717, 3734, 3749.

of the unanimity requirement. The state brought up the 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). Defense counsel balked because he thought that would leave insufficient time to review the jury questionnaires (T3871). Nothing on the record indicates that defense counsel considered the 8-4 amendment, or advised Zieler that a continuance could have a devastating impact on his prospects of avoiding a death sentence.

Counsel's appalling performance can be addressed now, or later by means of a postconviction motion, but either way it cannot go unremedied.

### C. THE STATE'S "INVITED ERROR" ARGUMENTS ARE MERITLESS

The state's argument on appeal that Zieler waived or invited counsel's deficient performance by agreeing to strike the jury panel (SB18, 32-33 n.6, 36) is meritless absent evidence that Zieler had any knowledge or understanding of the consequences of striking the jury panel. The state wrongly claims that it is too much to expect

two death-qualified attorneys with an imminent capital trial to anticipate the 8-4 amendment, but the fact is that they were either unaware or it or didn't recognize its impact. Either way, they could not have properly advised their client of its importance, and it is too much to expect Zieler - - with his very limited education and his lack of access to information - - to have figured it out on his own. As far as he knew he was simply agreeing to a continuance.

Also, the state appears to be contending that the original monumental "screw-up" (T3861) which set the entire chain of events in motion - - notwithstanding everyone's agreement that they had just realized it on the fourth day of voir dire, and even though the defense lawyers, the prosecutors, and (somewhat reluctantly) the trial judge acknowledged responsibility for the mishap (T3859-63) - - was actually something very different. With zero evidence, the state insinuates that defense counsel was employing a deliberate (and profoundly unethical) strategy, with the deliberate intention to mislead the jurors into thinking parole was unavailable (SB36 - "Counsel believed it worked to his advantage to do so, since a jury unworried that Zieler could be paroled (and reoffend) would

be less inclined to recommend death. The error was therefore invited”). (SB 18 - “Zieler wanted<sup>5</sup> the jury instructed on ineligibility for parole, since his lawyers thought it would make the jury less likely to recommend death”). How the lawyers thought they would get away with this, or how they bamboozled the trial court and the prosecutors to tell the jurors the same thing, is never explained by the state.

If the state’s insinuation were supported by the record, then we would be talking not only about deficient performance, but nefarious misconduct as well. But it is neither supported by the record, nor by common sense, nor by the stunned comments made by the defense lawyers, the prosecutors, and the judge when they realized what had happened. There is no “invited error” here, only disastrous error.

**D. NOBODY EVER SUGGESTED A ONE-MONTH GAP BETWEEN THE FIRST PHASE AND THE PENALTY PHASE.**

In a misleading footnote, the state says this:

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<sup>5</sup> Emphasis in state’s brief.

Zieler also cannot know that, had the guilt phase continued as planned in February and March, his penalty phase would have been completed before SB 450 took effect on April 20, 2023. Counsel admitted in February that mitigation efforts were ongoing and that a month might be needed between a guilty verdict and the start of the penalty phase. Tr. 2636-41 (explaining that it would take time to conduct additional expert testing of Zieler). So Zieler might have found himself in “8-4 land” one way or another. Init. Br. 39

(SB 33-34, n.6).

That is a misreading of the record; nobody ever suggested a one month gap between the (potential) guilty verdict and the start of the penalty phase. Instead, the record shows that all parties expected the entire trial - - from the beginning of the first phase to the conclusion of the penalty phase - - to take, at most, four weeks. Defense counsel said to the judge “[C]an we just at least give [the jurors] an idea that this could go three weeks?” The judge said “Of course”, and asked counsel “Do you intend that to be both the guilt and potential penalty phases?” Defense counsel said “Yeah”, and that he didn’t expect a lengthy penalty phase (T2638). The prosecutor was optimistic that “if we get the jury selected this week and maybe even get openings done on Friday and we have four days

of trial this week, I think we can finish the guilt phase by next Friday at the latest” (T2639). [Next Friday would be March 10]. However, due to the need to depose mitigation witnesses he wasn’t sure if they would “be ready to jump into [the penalty phase] that third week”, and defense counsel agreed: “Maybe you . . . want to stretch it out to three and a half to four weeks, just so [the prospective jurors] have a better idea of what their commitment is going to be” (T2639-40; see 2641). Accordingly, at the outset of jury selection on February 27, the trial judge informed the initial group assembled for individual voir dire, “[W]e’re looking for a panel of 12 jurors and 4 alternates, which will be a total of 16 individuals who can serve for three to four weeks” (T2699), and “to give you an idea about your schedule . . . It may be that we can seat a jury in two or three days, but we are giving ourselves the whole week. If we can get a jury by Thursday of this week, the trial will begin this week. We have reserved week three, March 13<sup>th</sup>, just in case we need it for issues concerning the possible penalty” (T2701). The same information was given by the trial court to the groups of

potential jurors assembled for individual voir dire on February 28 and March 1 (T3051-53, 3463-66).

So, contrary to the state's conjecture on appeal that a month-long gap between the guilt and penalty phases might have occurred, the record shows that what was actually contemplated was - - at most - - a one-week gap, resulting potentially in a four-week trial, which would have ended no later than March 24<sup>th</sup>.

#### E. ONE PROSPECTIVE JUROR'S COMMENT

The state suggests that defense counsel's actions which cost Zieler his opportunity to be tried under the unanimity statute could not have amounted to deficient performance because - - immediately before the "much bigger problem" (as defense counsel put it, T3859) was revealed - - there was an allegation that a single juror, one who had apparently already been excused for unrelated reasons, had made an improper comment (SB18, 30). The full context is as follows.

A prospective juror, Ms. Greer, notified the clerk of an inappropriate remark made by another juror (T3849-51). Upon inquiry by the trial judge, Ms. Greer stated that on Tuesday her group of ten jurors were seated in the jury room. Four of them were just kind of talking back and forth about the long wait, while the other six were within earshot. When a juror said that it was a serious case and it takes time, another juror said (inaccurately as well as improperly) “It’s hard to say alleged when they find the body of a child in his basement.” Ms. Greer did not know the name of the juror who made this remark; “It was a young kid, and he had a jacket about this color and he had tan pants, and that’s about it.” Asked if he was wearing that today or on Tuesday, Ms. Greer said she didn’t think he was here today (T3851-54).

The judge was able to identify by juror number the ten jurors who were in Ms. Greer’s group; five of them had already been excused and five had gone forward (T3856). The prosecutor observed that there could be additional inquiry of those five, but “[t]here’s another issue that we’re speaking about with regard to the jury that is completely unrelated” (T3857). Defense counsel moved

to strike the entire remaining panel and start over (T3857). The judge said he would consider striking the five prospective jurors who were in the group with Ms. Greer, but “Why do you think all 60 have been tainted?” (T3858). Defense counsel said he was worried that it went beyond the five, but he admitted “I don’t have any evidence to support that” (T3858). The judge replied “I think your worry is not something I can act on”, but that he would consider “a more salient argument” that the five jurors should be excused (T3858-59).

Under these facts, the only juror who was automatically removable was the one who made the comment. (And he very likely had already been excused or released for unrelated reasons). As to the five remaining jurors who had heard the comment, it was a discretionary call for the judge to excuse them as a precautionary measure, or else he could have inquired of each of them and determined whether or not they would be influenced by having heard the comment. If all or any of those five jurors said they would not be influenced, the judge - - if he found them credible - - could have kept them in the pool of potential jurors. See, e.g.,

Street v. State, 636 So.2d 1297, 1301-02 (Fla. 1994); Scull v. State, 533 So.2d 1137, 1141 (Fla. 1988); Craig v. State, 766 So.2d 257 (Fla. 4<sup>th</sup> DCA 2000).

In short, nothing about the one prospective juror's improper comment remotely justified counsel's malfeasance in depriving Zieler of his valuable last-chance opportunity to be tried by a jury which could not return a death verdict without unanimous agreement of all twelve jurors.

F. THE STATE CONFLATES INEFFECTIVE ASSISTANCE  
AND EX POST FACTO

The state correctly points out in its brief that in 1990, when these homicides occurred, the required jury vote to recommend a death sentence was 7-5, which is even more onerous for capital defendants than the current 8-4 (SB 8, 17, 26 n.2). That is exactly the reason undersigned appellate counsel expressly waived the ex post facto claim which was argued below. As stated in Zieler's initial brief, p. 76 n. 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.

If Judge Angela Cowden adheres to the Highlands County jury's 9-3 death recommendation in Zephen Xaver v. State, case no. 282019CF000113CFAXMX - - a case in which the homicides occurred on January 23, 2019 while the unanimity statute was in effect - - the undersigned expects that the ex post facto issue, thoroughly presented below, will be the first or one of the first to be brought to this Court on direct appeal. [Because the state, unlike the defense, can proceed via writ of certiorari in the intermediate appellate courts when it loses the ex post facto issue pretrial, the Fifth and Sixth DCAs have incorrectly rejected defense arguments

based on Collins and Peugh. See State v. Lobato, \_\_So.3d\_\_ (Fla. 6<sup>th</sup> DCA, May 31, 2024)[2024 WL 2789409]; State v. Victorino, supra, 372 So.3d at 777-80.<sup>6</sup> These decisions are wrong as a matter of constitutional law, (1) in applying an antiquated substantive vs. procedural litmus test in lieu of the current test which is whether an amendment or new law creates a substantial risk of a more severe sentence, and (2) in mischaracterizing the 8-4 amendment as “quintessentially procedural”.<sup>7</sup>

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<sup>6</sup> And in State v. Lyons, \_\_So.3d\_\_ (Fla. 2d DCA, August 9, 2024) [2024 WL 3733178], the Second DCA concluded that the trial judge departed from the essential requirements of law by failing to apply the “binding precedent” of Victorino.

<sup>7</sup> The line between procedural and substantive law is hazy, and procedure “is often used as a vehicle to achieve substantive ends.” Moore v. Harper, 600 U.S. 1, 31 (2023). That perfectly describes Florida’s 8-4 “reform”. [See Zieler’s initial brief, p. 133-35]. Even the Solicitor General’s office (same attorney) and the Attorney General’s office (different attorney) do not think the 8-4 amendment is “purely procedural”, because they recognize that if it were it would violate the Florida Constitution. See the state’s initial brief in Jackson v. State, #SC23-1205, p. 51-52, n.8 (filed on August 5, 2024). Far from being “quintessentially procedural”, the state asserts (and thus concedes) that “SB 450’s procedural provisions are ‘intimately related’” to the definition of substantive rights conferred by the death penalty statute.” State’s brief in Jackson, p. 51-52, n.8.

But there is no reason to go down that rabbit hole in this reply brief. Because no ex post facto claim is raised, the issue is not whether Zieler had a constitutional right not to be tried under the 8-4 statute (except to the extent that, as demonstrated in the facial unconstitutionality arguments made in Issues Five and Six, every capital defendant has a right not to be tried under the current Florida scheme because (5) it fails to meet the essential Furman<sup>8</sup> bedrock requirement of providing sufficient safeguards against arbitrariness and (6) the Eighth Amendment requires jury unanimity in capital sentencing). But here in Issue One, Zieler is not asserting that he had a constitutional right not to be tried under the 8-4 amendment; only that he had a constitutional right not to have his one opportunity to be tried under the unanimity statute blown out of the water by his appointed attorneys' blundering performance. Issue One is a one-of-a-kind Sixth Amendment ineffective assistance claim, which can be remedied now or later, but cannot be allowed to go unremedied.

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<sup>8</sup> Furman v. Georgia, 408 U.S. 238 (1972).

### ISSUE THREE [UNEXPLAINED MISSING HAIRS]

The state, ignoring the testimony at trial, says the hair evidence here “was neither missing nor unexplained” (SB49). On the contrary, it was both missing and unexplained. The state says there was no evidence that the four empty paper-folds ever contained hair (SB47)(emphasis in state’s brief). Also wrong. The larger envelope, when it was provisionally admitted into evidence, was labeled “Hairs from Mouth and Body” (T1832). Five smaller paper-fold envelopes were inside (T1832). When DNA analyst Boyer opened the sealed larger envelope in 2008 only one of the paper-folds - - V2-2 which was labeled “Hairs collected from the body of L.S.” - - contained any evidence at all (T1833-34). Although paper-fold V2-3 was labeled “Hair from mouth, L.S.”, when Boyer opened it it (like the other three paper-folds) was empty (T1833-34, 1850). Obviously, unless it was somehow mislabeled, V2-3 at one time prior to 2008 did contain hairs, and we don’t know what happened to them. That, under all of the relevant case law, is an indication of probable tampering, which was never rebutted or explained by the

state. [As discussed in Zieler’s initial brief, the fact that hairs can be consumed in testing does not equate to a showing that these hairs were consumed in prior testing, especially in the absence of evidence that these missing hairs were previously tested].<sup>9</sup>

The state’s reliance on Taylor v. State, 855 So.2d 1, 25-26 and n. 28 (Fla. 2003) is misplaced. In Taylor the only thing that was missing was a note which had been stapled to the outside of the bag which contained Taylor’s boxer shorts, and there was a loose staple on the seal of the bag. “While Taylor may have been able to show differences in the outside condition of the bag”, there was no indication - - in contrast with the instant case - - that the interior of the bag or the contents of the bag had been disturbed. The booking officer who collected Taylor’s clothing testified that he had stapled the note to the outside of the bag to inform the officers on duty that

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<sup>9</sup> Also, the state suggests that there is no reason to believe that someone planted hairs in the envelope in order to frame Zieler, since he was not even a suspect in 2008 (SB48). However, there is no obligation to show that evidence was planted, or why tampering may have occurred. The objecting party need only show an indication of probable tampering in order to shift the burden to the other party to provide a proper chain of custody or otherwise demonstrate that tampering did not occur.

an FDLE agent would be picking it up. He further testified that he stapled the bag shut and placed it in a locked cabinet under the booking desk, where it stayed for two weeks until it was picked up by the FDLE.

Here, on the other hand, even the prosecutors did not dispute - - at trial - - that there were missing hairs; they merely asserted, without supporting evidence, that those hairs must have been consumed in prior testing. They further stated that they didn't care about the empty paper-folds, and that the only one that mattered was the one which contained the four hairs which Michelle Boyer actually tested. Finally, contrary to Florida case law<sup>10</sup>, they argued that the missing hairs went only to weight and not admissibility, and "like I said previously, Your Honor, that's an argument he can make to the jury" (T1863-69).

Finally, the state obfuscates the issue by sometimes saying and sometimes hinting that trial counsel failed to preserve it by objecting only to the hairs and/or the paper-folds but not to the

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<sup>10</sup> See, e.g., Murray v. State, 838 So.2d 1073, 1082-83 (Fla. 2003); Armstrong v. State, 73 So.3d 155, 171 (Fla. 2011).

DNA comparison derived from the hairs. (See SB 13, 14, 19-20, 45, 50-51).

Once again the state is wrong, and their argument is frankly puzzling. Aside from the DNA comparison linking two hairs to Zieler, State Exhibit 110 had no relevance and no basis for admission into evidence. Prior to trial, Zieler's defense attorneys filed a motion in limine, in which they asserted:

1. Among the items seized for inspection and testing from the scene of the homicide were approximately 40 human hairs found in various locations around the apartment.
2. These items were purportedly placed in evidence bags and transported to the Cape Coral Police Department for testing and preservation as potential exhibits at trial.
3. Some of the envelopes that were submitted for inspection, processing and testing by either the Federal Bureau of Investigation or Florida Department of Law Enforcement did not contain any of the hairs.
4. The Defendant believes that the State only intends to admit two of these hairs with the suggestion that they have DNA similar to that of the Defendant.
5. Likewise, the Defendant believes that the other hairs, including blond hairs that were clutched in the hand of one of the victims belonged to other persons that had been in the apartment and were either lost or mishandled

by the investigating agency and not subject to DNA testing.

6. The Defendant asserts that his right to confront evidence against him [. . .] or present evidence of the presence of other individuals at the scene has been compromised because these other hairs have disappeared and believes the only way to cure this injustice is to limit the State's introduction of these hairs attributable to him.

(R1389)

At a pretrial hearing on May 4, 2023, defense counsel asked for an order prohibiting the state from not only introducing the exhibit, but also any "testimony regarding these two hairs" (T2199, 2201).

At trial, after the retired FDLE crime scene analyst Joel Cary identified Exhibit 110, the prosecutor returned it to the clerk, saying he would wait for the [pre-recorded] testimony of DNA analyst Michelle Boyer to introduce it (T1472). Later, near the outset of Ms. Boyer's testimony being played to the jury, the prosecutor moved to provisionally admit Exhibit 110; defense counsel said "[s]ubject to being connected", and brought up cross-

examination<sup>11</sup>; the prosecutor replied “That’s why I said provisionally”; and the judge said “With the caveat from the defense 110 is provisionally admitted” (T1832).

After that, Ms. Boyer testified concerning her testing of the hairs contained in V2-2, and the fact that the other four paper-folds, including V2-3 which was labeled as containing hairs from L.S., were empty (T1832-63). [In the course of making a hearsay objection<sup>12</sup> while Ms. Boyer’s testimony was being pre-recorded, defense counsel noted that “[t]here’s also some issues with, as you’ve already heard, missing hairs” (T1836)]. At the conclusion of Ms. Boyer’s recorded testimony before the jury, the prosecutor moved Exhibit 110 into evidence, and defense counsel immediately objected based on indication of tampering (T1863-64). The grounds for the objection, the factual basis, and the prosecutor’s counter-arguments were thoroughly presented (T1864-69), and the judge

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<sup>11</sup> The transcript is less than clear: “Subject to being connected (unintelligible). (Unintelligible) go through cross-examination now” (T1832).

<sup>12</sup> Which is not being raised in this appeal.

overruled it, expressly assuring defense counsel, “you’re objection is preserved” (T1870).

The purpose of the contemporaneous objection rule is to place the trial judge on notice that an error may have been committed and to provide him or her with an opportunity to correct it. See, e.g., Franqui v. State, 804 So.2d 1185, 1192 (Fla. 2001). The grounds argued on appeal must be the same as those presented at trial. See, e.g., Johnson v. State, 969 So.2d 938, 954 (Fla. 2007). As Judge Branning recognized, these requirements were met. The judge clearly understood the defense’s legal and factual arguments, and, especially in light of his assurance to counsel that the issue was preserved, further objection would have been an exercise in futility. See Wong v. State, 212 So.3d 351, 357 (Fla. 2017).

The state makes the incomprehensible comments that Exhibit 110 “was not the predicate for the State’s DNA evidence” (SB 14), and that while Zieler objected to that exhibit (which contained the hairs which were tested as well as - - at some point - - the hairs which were missing) he “never challenged the testimony proving that the hairs were a DNA match to Zieler” (SB19-20). First of all,

of course Exhibit 110 was the predicate for the DNA evidence pertaining to the hairs. Otherwise the exhibit (which now just contained empty paper-folds) was irrelevant to the case. Secondly, as early as his pretrial motions in limine, he clearly objected to testimony concerning the hairs, and the DNA evidence derived therefrom. And third, there was no independent basis to object to the subsequent testimony of Rachel Oefelein (who performed the DNA and statistical analysis, and who knew nothing about the condition of the exterior and interior envelopes in which the hairs she analyzed and the missing hairs were at one time stored), other than the probable tampering argument upon which the trial judge had already ruled.

The issue is preserved, prejudicial error occurred, and Zieler's convictions and death sentences should be reversed for a new trial.

ISSUE FIVE [FLORIDA'S CURRENT CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL ON ITS FACE]

To recapitulate his constitutional argument based on Furman v. Georgia, 408 U.S. 238 (1972) - - not the compartmentalized fragments which the state superficially addresses - - it is this:

Whatever safeguards this state may once have 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.

The failure of the current Florida scheme is holistic; as defined by the Oxford Dictionary as the concept "that parts of something

are interconnected and can be explained only by reference to the whole.” The state inaccurately asserts that “this Court has often held [that] the scheme as a whole appropriately channels sentencing discretion and prevents the arbitrary imposition of the death penalty” (SB 21). In fact, this Court, until now, has never had occasion to rule on a challenge to the constitutional validity of Florida’s current death penalty scheme, which only went into effect four months ago. Zieler’s case, along with that of Michael James Jackson (case No. SC23-1298), are among the first capital trials to be conducted under the new 8-4 amendment. Florida has made itself an extreme and solitary outlier among all death penalty jurisdictions, and Zieler’s and Jackson’s appeals will provide this Court with its first opportunity to rule that the current scheme as a whole provides insufficient safeguards against the arbitrary infliction of death, and thus violates the Eighth Amendment.

As Zieler’s undersigned counsel thought he made abundantly clear in his initial brief (p. 23, 74-77, 124), this is a facial constitutional challenge, not an as-applied challenge. As was pointed out in United States v. Cheever, 423 F.Supp.2d 1181, 1215

(D.Kans.2006), “Furman is the quintessential example” of a constitutionally deficient sentencing scheme, and it invalidated every death sentence in the nation which was imposed under systems found violative of the Eighth Amendment. See Joubert v. Hopkins, 75 F.3d 1232, 1242 (8<sup>th</sup> Cir. 1996)(Furman invalidated all death penalty schemes then in place); State v. Webb, 680 A.2d 147, 201 (Conn. 1996)(in 1972 the Supreme Court invalidated all death penalty statutes of the states and federal government because they violated the Eighth Amendment); State v. Ramseur, 524 A.2d 188, 217 (N.J. 1987)(Furman invalidated every death penalty statute in the nation); People v. Foster, 242 P.3d 105, 152 (Cal. 2010)(even defendants like Charles Manson and Sirhan Sirhan had their death sentences overturned as a result of Furman). In his initial brief at p.74-77 undersigned counsel pointed out that, in contrast to as-applied constitutional claims which must be preserved below, facial constitutional challenges can be raised for the first time on appeal. For that reason, and other reasons, no as-applied arguments have been raised in Zieler’s appeal; only a challenge to Florida’s current death penalty scheme as a whole, which:

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.)

[Initial Brief, p. 75]

The state, for obvious reasons, would prefer to deflect the focus away from Florida's constitutionally deficient death penalty law, and shift it instead to each individual case. The state suggests that since Zieler could not prevail in an as-applied challenge (which he did not make) or a claim that the death sentence is disproportionate in his own case (which under current Florida law he cannot make<sup>13</sup>, and would not have made in any event), therefore he cannot challenge the constitutionality of Florida's capital sentencing scheme as a whole (SB 21-22, 63-64). That is not how a facial constitutional claim works. Zieler's argument, just like Furman's

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<sup>13</sup> See, e.g., Johnson v. State, \_\_So.3d\_\_ (Fla. 2024)[2024 WL 3364657, p.12]; Cruz v. State, 320 So.3d 695, 723 (Fla. 2021).

fifty years ago, is precisely that there is no set of circumstances under which Florida's current capital sentencing scheme is constitutionally valid [See United States v. Rahimi, 144 S.Ct. 1889, 1898 (2024), cited by the state at SB 64].<sup>14</sup> And - - to reiterate - - this constitutional argument is not solely based on the absence of proportionality review; rather it is based on the absence (and the deliberate dismantling) of virtually all of the meaningful safeguards which Florida once had. It is the current system as a whole which violates the Eighth Amendment, whether the individual defendant is Joseph Zieler, Michael James Jackson, or anyone else the state may seek to execute under its provisions.

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<sup>14</sup> As-applied challenges are those which assert that a statute cannot constitutionally be applied to a particular individual or individuals. Zieler's ex post facto argument (made below, and waived by the undersigned on appeal because this is a 1990 case rather than one which occurred between 2017 and 2023 when the unanimity statute was in effect) would be an example of an as-applied challenge, as is Michael Jackson's "bill of attainder" claim. Other examples include arguments that the death penalty cannot constitutionally be applied to defendants with severe mental illness or those under age 21. In contrast, Zieler's facial constitutional challenge here asserts that Florida's entire scheme is so devoid of safeguards required by the Eighth Amendment that nobody can be sentenced to death under it.

While Furman invalidated every state and federal death penalty scheme that existed in 1972, the argument here is laser-focused on one state – Florida. That is because Florida has become not only an outlier but a backslider when it comes to providing safeguards against the arbitrary infliction of death. The state and Zieler are in agreement that there is “no one right way for a State to set up its capital sentencing scheme.” SB 61; Zieler’s initial brief, p. 119-120. Where we disagree is on whether there can be a wrong way, and whether Florida has now landed there. After Furman those jurisdictions that wished to reinstate capital punishment adopted an assortment of statutory schemes, and - - after false starts in a few states<sup>15</sup> - - developed systems which were found to provide sufficient safeguards to meet Furman’s requirements. Florida’s was among them. See Proffitt v. Florida, 428 U.S. 242 (1976). But in recent years Florida has been systematically eliminating its former safeguards, to the point where there is no longer a “meaningful

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<sup>15</sup> See, e.g., Lockett v. Ohio, 438 U.S. 586, 599-602 (1978)(noting that in split decisions the initial post-Furman statutes in Georgia, Florida, and Texas were upheld, while those in North Carolina and Louisiana were overturned).

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

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

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<sup>16</sup> Representing 27 states, the federal government, and the U.S. military.

<sup>17</sup> Ramos v. Louisiana, 590 U.S. 83 (2020).

constitution does not require that the ultimate sentencing decision be made by a jury [SB 69]. While it is true the McKinney (in dicta)<sup>18</sup> says that “States that leave the ultimate life-or-death decision to the judge may continue to do so” [589 U.S. at 145], it is critically important to recognize that Florida is not such a state. Florida uses, and has used since Furman, a hybrid system in which the jury and the judge are co-sentencers. See Espinosa v. Florida, 505 U.S. 1079 (1992); Snelgrove v. State, 921 So.2d 560, 571 (Fla. 2005); Johnson v. Singletary, 612 So.2d 575 (Fla. 1993). A jury’s life verdict is binding on the judge, while a jury’s death recommendation - - while not binding - - is accorded great weight in the ultimate life-or-death decision. McKinney, at most, addresses whether a jury - - after finding a single aggravator for eligibility purposes - - needs to be involved in the selection decision at all. McKinney does not discuss unanimity or nonunanimity, and does not purport to decide what constitutional requirements apply to

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<sup>18</sup> The issue decided in McKinney was whether a state appellate court may conduct a Clemons reweighing of aggravating and mitigating circumstances. 589 U.S. at 141-47, citing Clemons v. Mississippi, 94 U.S. 738 (1990).

jurors and jury verdicts in states like Florida (and 26 others, as well as the federal and military systems) where juries do have an important and often outcome-determinative role in the death selection decision. Therefore the state's argument in Issue Six that McKinney trumps Ramos (SB 69) doesn't hold water. But as to Issue Five, Zieler need not show that the Sixth and Eighth Amendments categorically require jury unanimity; he need only show that unanimity is a significant safeguard<sup>19</sup> whose abandonment in combination with the abandonment of many other safeguards,<sup>20</sup> renders the Florida scheme no longer capable of ensuring against the arbitrary infliction of death.

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

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<sup>19</sup> See Zieler's initial brief, p. 109-11.

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

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

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

<sup>22</sup> Compare Fla.Stat. §921.141(6) with Neb.Rev.St. §29-2523 and MCA 46-18-303.

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

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

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

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

aggravator exists - - of whether death is the appropriate penalty)<sup>24</sup> -  
- utterly fails to comport with the Eighth Amendment's standards.

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

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

As in the previous Point on Appeal, the state's argument that Ramos doesn't apply is based on the observation in McKinney that states which leave the life-or-death selection decision to the judge may continue to do so. But - - again - - there are only two states which allocate the selection decision to the judge: Nebraska (3-judge panel) and Montana. Florida, like the federal government, the U.S. military, and 24 sister states does not leave the life-or-death decision to the judge. Florida is a hybrid system in which the jury is the co-sentencer; if its verdict is for life imprisonment it is binding, and if it is for death it is accorded great weight. So the question is not about what Nebraska and Montana can do; it is whether jurisdictions like Florida (8-4) and Alabama (10-2) can avoid the generally applicable Sixth and Eighth Amendment jury unanimity principles recognized in Ramos. Florida and Alabama are to the death penalty what Louisiana and Oregon were to noncapital trials, and the answer is no.

The Sixth Amendment requires that jurors be impartial and the Eighth Amendment requires heightened reliability in the decision to impose the death penalty. Even when it was wrongly thought that the Louisiana and Oregon laws allowing nonunanimous (9-3 and 10-2 respectively) verdicts for noncapital convictions was permissible, even those states required unanimous verdicts to convict in cases where death was on the table as a potential punishment. The state will argue that Ramos applies only to guilt phases and not penalty phases, but that stands the “death is different” principle<sup>25</sup> on its head. To conclude that the Sixth and Eighth Amendments require jury unanimity in all cases except for the life-or-death decision would make death “different” all right; it would afford less protection and less reliability. In a state like Florida which has chosen to empanel juries which are assigned an important and frequently dispositive role in the death-selection decision, the constitutional guarantees which apply to juries cannot be dispensed with on the deeply flawed theory that a jury was not

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

hypothetically necessary in the first place. On that theory, could the seating of a biased juror be permissible (or, if error, harmless) since McKinney appears to allow a state legislature - - if it chooses - - to dispense with a jury entirely? Could the state employ a six-person jury, or nine, or four, to be the sentencer or co-sentencer? If so, could the death penalty be imposed after a 4-2, or 6-3, or 3-1 vote? Could Florida, if it kept the jury size at 12, provide that five death votes, or three, are sufficient? That may be a “parade of horrors”, but under the state’s McKinney logic what - - other than arbitrary line-drawing - - would prohibit it?

Given that Florida has chosen to employ a jury in the death-selection decision, Ramos, not McKinney, controls.

## CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse his conviction [Issue Three] and/or death sentence.

## CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Chief Deputy Solicitor General Jeffrey Paul DeSousa at [Jeffrey.desousa@myfloridalegal.com](mailto:Jeffrey.desousa@myfloridalegal.com) and Senior Assistant Attorney General Christina Pacheco at [Christina.pacheco@myfloridalegal.com](mailto:Christina.pacheco@myfloridalegal.com) and [Capapp@myfloridalegal.com](mailto:Capapp@myfloridalegal.com), on this 28th day of August, 2024.

## CERTIFICATION OF COMPLIANCE

I certify that this document contains 8,864 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).

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