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IN THE SUPREME COURT OF FLORIDA
CASE NUMBER: SC2023-0415
Lower Tribunal Case: 1990-CF-0001

EXECUTION SCHEDULED FOR April 12, 2023, at 6:00P.M.

LOUIS B. GASKIN,
APPELLANT,
v.

STATE OF FLORIDA,
APPELLEE.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Gaskin respectfully requests oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action will determine whether Mr. Gaskin lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Gaskin.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, in this case are from the transcript and of the form T/[page number]. References to the record on postconviction appeal are of the form PC/[page number]. References to the current, post-warrant record on appeal are in the form W/[page number]. Generally, Louis B. Gaskin is referred to as Mr. Gaskin throughout this brief.

STATEMENT OF THE CASE AND FACTS

I. Procedural History

Mr. Gaskin was convicted at a jury trial of the first-degree premeditated murders and first-degree felony murders of Robert and Georgette Sturmfels, the attempted first-degree murder of Joseph Rector, two counts of armed robbery with a firearm and two counts of burglary of a dwelling with a firearm. For the non-capital offenses, Mr. Gaskin received the following sentences to be run consecutively: thirty years for both counts of armed robbery; natural life for both counts of burglary of a dwelling with a firearm; natural life for attempted first-degree murder of Joseph Rector. For the capital offenses, the jury recommended death by an eight to four vote on each count. The trial judge sentenced Mr. Gaskin to death on June 19, 1990.

Mr. Gaskin appealed his judgment and sentences, raising the following issues:

> **Point I:** The Trial Court Erred by Denying Appellant's Motion for a Change of Venue Where Pre-Trial Publicity Precluded the Selection of a Fair and Impartial Jury.
> **Point II:** The Murder of Georgette Sturmfels was not Heinous, Atrocious and Cruel.

Point III: The Trial Court Improperly Rejected a Finding That Gaskin's Capacity To Appreciate the Criminality of his Conduct or to Conform his Conduct to the Requirements of Law was Substantially Impaired, Thereby Violating his Constitutional Rights Under the Eighth and Fourteenth Amendments.

Point IV: Louis Gaskin's Constitutional Rights to Due Process and Equal Protection Have Been Violated by the Fact That a Multitude of Proceedings Were Not Reported by the Court Stenographer.

Point V: In Contravention of Appellant's Rights Under the State and Federal Constitutions, the Trial Court Erred in Admitting Several Items of Irrelevant Evidence.

Point VI: Gaskin's Four Adjudications for Four Counts of First-Degree Murder Where Only Two People Were Killed Violate Double Jeopardy.

Point VII: The Record Fails to Reflect Gaskin's Presence at a Critical Portion of His Trial.

Point VIII: The Trial Court's Comment on the Evidence Resulted In Fundamental Error.

Point IX: The Jury Should not Have Been Instructed on the Meaning of Reasonable Doubt, not That They Must Convict Absent Such a Doubt.

Point X: Section 921.141, Florida Statutes (1987) is Unconstitutional on its Face and as Applied.

The judgment and sentences were affirmed, and the case was remanded in part to vacate two adjudications for felony murder. *Gaskin v. State*, 591 So.2d 917 (Fla. 1991). Mr. Gaskin filed a Petition for Writ of Certiorari in the United States Supreme Court ("USSC") that was granted on June 29, 1992, for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). This Court's ruling was

vacated, and the case was remanded. *Gaskin v. Florida*, 505 U.S. 1216 (1992). On remand, this Court found that Mr. Gaskin did not object to the vagueness of the especially heinous, atrocious, or cruel aggravating circumstance instruction at trial, nor did he request a special instruction, and upheld its previous ruling. *Gaskin v. State*, 615 So. 2d 679, 680 (Fla. 1993). Mr. Gaskin filed a Petition for a Writ of Certiorari that was denied on October 12, 1993. *Gaskin v. State*, 510 U.S. 925 (1993).

Mr. Gaskin filed his first motion for postconviction relief in state court pursuant to Fla. R. Crim. P. 3.850 on March 23, 1995. The following claims were raised:

> **Claim I:** Mr. Gaskin is Being Denied His Right to Effective Representation by the Lack of Funding to Fully Investigate and Prepare his Post Conviction Pleadings in Violation of his Sixth, Eighth and Fourteenth Amendment Rights Under the United States Constitution and in Violation of *Spalding v. Dugger*.
> **Claim II**: Counsel for Mr. Gaskin has not Received Records From State Agencies and Other Sources. Counsel is Unable to Properly (1) Investigate This Case; and (2) Prepare This Motion and Otherwise Litigate Mr. Gaskin's Claims. This Claim Arises Pursuant to Chapter 119 of the Florida Statutes and the Eighth and Fourteenth Amendments.
> **Claim III:** Mr. Gaskin was Denied the Effective Assistance of Counsel at Penalty Phase, in Violation of the Sixth, Eighth, and Fourteenth Amendments. Trial Counsel was

Rendered Ineffective by the Trial Court's and State's Actions. Trial Counsel Failed to Adequately Investigate and Prepare Additional Mitigating Evidence and Failed to Adequately Challenge the State's Case. Counsel Failed to Adequately Object to Eighth Amendment Error. Counsel's Performance was Deficient, and as a Result, The Death Sentence is Unreliable.

Claim IV: The Outcome of Mr. Gaskin's Guilt/Innocence and Sentencing Phases was Materially Unreliable due to the Withholding of Exculpatory or Impeachment Material, Newly Discovered Evidence, Improper Rulings and Conduct of the Trial Court, Improper State Conduct, Ineffective Assistance of Counsel and/or all of the Foregoing, in Violation of Mr. Gaskin's Rights Under the Sixth, Eighth, and Fourteenth Amendments.

Claim V: Mr. Gaskin was Denied the Effective Assistance of Counsel Pretrial and at the Guilt/Innocence Phase of his Trial, in Violation of the Sixth, Eighth, and Fourteenth Amendments. Counsel Failed to Adequately Investigate and Prepare Mr. Gaskin's Case in Challenge to the State's Case, and Failed to Zealously Advocate on Behalf of his Client and a Full Adversarial Testing did not Occur. The Court and State Rendered Counsel Ineffective. Counsel's Performance was Deficient, and as a Result, Mr. Gaskin's Convictions and Death Sentence are Unreliable.

Claim VI: The Jury was Improperly Instructed on the Cold, Calculated, and Premeditated Aggravating Factor, in Violation of *Espinosa v. Florida., Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger*, and the Eighth and Fourteenth Amendments.

Claim VII: Inaccurate Comments of Both the Prosecutor and the Trial Court Greatly Diminished the Jury's Sense of Responsibility in Deciding Whether Mr. Gaskin Should Live or Die in Violation of the Eighth and Fourteenth Amendment to the United States Constitution.

Claim VIII: The Introduction of Nonstatutory Aggravating Factors and the State's Argument Regarding Nonstatutory Aggravating Factors Rendered Mr. Gaskin's Death Sentence Fundamentally Unfair and Unreliable, in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim IX: The Prosecutors' Misconduct During the Course of Mr. Gaskin's Case Renders Mr. Gaskin's Conviction and Death Sentence Fundamentally Unfair and Unreliable in Violation of the Sixth, Eighth, and Fourteenth Amendments. The State Encouraged and Presented Misleading Evidence and Improper Argument to the Jury. Counsel was Ineffective for not Objecting.

Claim X: Mr. Gaskin was Denied his Constitutional Right to a Fair and Impartial Jury When the Trial Court Refused to Change Venue Despite Repeated Requests by Defense Counsel. A Fair and Impartial Jury Could not be had in Flagler County due to Persuasive and Prejudicial Pretrial Publicity.

Claim XI: Newly Discovered Evidence Shows Mr. Gaskin's Capital Conviction and Sentence are Constitutionally Unreliable in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim XII: Florida's Capital Sentencing Statute is Unconstitutional on its Face and as Applied in This Case Because it Fails to Prevent the Arbitrary and Capricious Imposition of the Death Penalty. It Also Violates the Constitutional Guarantees of Due Process and Prohibiting Cruel and Unusual Punishment.

Claim XIII: Mr. Gaskin did not Receive Effective Assistance of Appellate Counsel.

Claim XIV: Aggravating Circumstances Were Overbroadly and Vaguely Argued by Counsel for the State, in Violation of *Espinosa v. Florida, Stringer v. Black, Sochor v. Florida,*

Maynard v. Cartwright, Hitchcock v. Dugger, and the Eighth and Fourteenth Amendments.

Claim XV: Juror Misconduct Occurred in the Guilt and Penalty Phases of Mr. Gaskin's Trial in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Corresponding Provisions of the Florida Constitution.

Claim XVI: The Rules Prohibiting Mr. Gaskin's Lawyers From Interviewing Jurors to Determine if Constitutional Error was Present Violates Equal Protection Principles, the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Corresponding Provisions of the Florida Constitution.

Claim XVII: Mr. Gaskin was Denied his Rights Under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the Corresponding Provisions of the Florida Constitution, as a Result of Systematic Discrimination in the Selection of his Jury, Including the Lack of a Fair Cross-Section of his Peers.

Claim XVIII: Mr. Gaskin was Denied the Effective Assistance of Counsel During Critical Stages of his Capital Proceedings in That Counsel Failed to Provide the Mental Health Experts With Available Information Which the Experts Needed to Make an Accurate Competency Determination, in Violation of Mr. Gaskin's Rights Under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Claim XIX: The Mental Health Experts who Evaluated Mr. Gaskin Regarding his Competence to Stand Trial did not Render Adequate Mental Health Assistance as Required by *Ake v. Oklahoma*, in Violation of Mr. Gaskin's Rights Under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Claim XX: The Introduction of Several Items of Irrelevant Evidence Over Defense Counsel's Objections Rendered Mr. Gaskin's Conviction and Resulting Death Sentence Fundamentally Unfair and Unreliable in Violation of the Sixth, Eighth and Fourteenth Amendments.

Claim XXI: Mr. Gaskin was Denied a Proper Direct Appeal From his Judgment of Conviction and a Proper Appeal From his Sentence of Death in Violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Art. 5, Sec. 3(B)(L) of the Florida Constitution and Florida Statutes Annotated, Sec. 921.141(4), due to Omissions in the Record.

Claim XXII: Mr. Gaskin's Trial Court Proceedings Were Fraught With Procedural and Substantive Errors, Which Cannot be Harmless When Viewed as a Whole Since the Combination of Errors Deprived him of the Fundamentally Fair Trial Guaranteed Under the Sixth, Eighth, and Fourteenth Amendments.

Claim XXIII: Mr. Gaskin's Death Sentence Rests Upon an Unconstitutional Automatic Aggravating Circumstance, and Instruction in Violation of *Stringer v. Black, Maynard v. Cartwright, Lowenfield v. Phelps, Hitchcock v. Dugger*, and the Eighth Amendment. Counsel's Failure to Object was Ineffective Assistance of Counsel. Thus, Mr. Gaskin was Denied his Rights Under the Sixth, Eighth, and Fourteenth Amendments.

Claim XXIV: The Prosecutors' Misconduct During the Closing Argument of Mr. Gaskin's Penalty Phase Rendered Mr. Gaskin's Death Sentence Fundamentally Unfair and Unreliable in Violation of the Sixth, Eighth, and Fourteenth Amendments. The State Presented Misleading and Improper Argument to the Jury. Counsel was Ineffective for not Objecting.

Claim XXV: Mr. Gaskin's Sentence of Death Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments Because the Penalty Phase Jury Instructions Shifted the Burden to Mr. Gaskin to Prove That Death was Inappropriate and Because the Sentencing Judge Himself Employed This Improper Standard in Sentencing Mr. Gaskin To Death. Failure to Object Rendered Defense Counsel's Representation Ineffective.

Claim XXVI: The Introduction of Nonstatutory Aggravating Factors and the State's Argument Regarding Nonstatutory Aggravating Factors Rendered Mr. Gaskin's Death Sentence Fundamentally Unfair and Unreliable, in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The postconviction court denied relief on January 17, 1997, without conducting an evidentiary hearing. Mr. Gaskin appealed to this Court, and raised the following issues:

Argument I: The Trial Court Erred in Denying Summarily Mr. Gaskin's Amended Motion to Vacate on the Grounds That the Claims Were Procedurally Barred. The Court Mistreated the Amended Motion as a Successive Motion
Argument II: The Lower Court Erred in Denying Mr. Gaskin's Amended Motion on Lack of Sufficiency
Argument III: Trial Counsel's Failure to Present Mental Health Mitigation
Argument IV: Trial Counsel's Failure to Challenge State's Case
Argument V: The Lower Court Erred in Summarily Denying Mr. Gaskin's Ineffective Assistance of Counsel Pretrial and at the Guilt/Innocence Phase Claim on the Grounds That it was Procedurally Barred as a Successive Motion
Argument VI: The Jury was Improperly Instructed on the Cold, Calculated, and Premeditated Aggravating Factor
Argument VII: The *Caldwell v. Mississippi* Claim
Argument VIII: The Nonstatutory Aggravator Claim
Argument IX: Mr. Gaskin was Denied a Fair and Impartial Jury When the Trial Court Refused to Change Venue
Argument X: Florida's Capital Sentencing Statute is Unconstitutional on its Face and as Applied in This Case

Argument XI: Mr. Gaskin was Denied a Proper Direct Appeal due to Omissions in the Record. Mr. Gaskin did not Receive Effective Assistance of Appellate Counsel
Argument XII: The Vague and Overbroad Aggravators Claim
Argument XIII: The Juror Misconduct Claim
Argument XIV: The Inability to Interview Jurors Claim
Argument XV: The Discriminatory Jury Selection Claim
Argument XVI: The *Ake v. Oklahoma* Claim
Argument XVII: The Irrelevant Evidence Claim
Argument XVIII: The Cumulative Error Claim
Argument XIX: The Automatic Aggravator Claim
Argument XX: The Prosecutorial Misconduct Claim
Argument XXI: The *Mullaney v. Wilber* Claim

This Court remanded the case for an evidentiary hearing on the claims of ineffective assistance of counsel during the penalty phase and based upon an alleged conflict of interest arising from trial counsel's status as a deputy sheriff. The Court affirmed the denial of relief in all other respects. *Gaskin v. State*, 737 So. 2d 509 (Fla.1999).

The postconviction court held an evidentiary hearing on April 13 and 14, 2000; testimony and evidence were presented on claims III, V, and XVIII. The postconviction court denied relief on the remanded claims. Mr. Gaskin appealed the denial to this Court, raising the following issues:

Argument I: The Lower Court's Ruling Following the Post-Conviction Evidentiary Hearing Was Erroneous

A. Ineffective Assistance of Counsel at the Penalty Phase

1. Trial Counsel's Failure to Adequately Investigate and Prepare Important Mitigation Evidence

B. Failure to Provide Experts With Sufficient Background Information

C. Trial Counsel's Failure to Argue in This Closing Argument the Weighing Process That the Jury Should Apply to Mitigating and Aggravating Circumstances

This Court denied relief. *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002).

Mr. Gaskin filed a Petition for Writ of Habeas Corpus and Memorandum of Law in Support of Habeas Corpus in the Middle District of Florida on July 11, 2003, which was denied on March 23, 2006. The Eleventh Circuit Court of Appeals affirmed the district court's denial of relief. *Gaskin v. Secretary Department of Corrections*, 494 F.3d 997 (11th Cir. 2007).

Mr. Gaskin filed a First Successive Motion to Vacate Judgment of Conviction and Sentence on May 6, 2015, raising one issue:

The Corrected Judgment and Sentence Vacating the Death Penalty Imposed in Counts II and IV of Indictment and the Adjudication of Guilt in Said Counts Established That the Death Sentences Given on Counts I and III of the Indictment Were the Result of Unconstitutional Doubling of the Aggravating Circumstance of Prior Violent Felonies.

The motion was denied on August 6, 2015. The denial was appealed to this Court, which affirmed the denial. *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017). The USSC denied Mr. Gaskin's petition for writ of certiorari. *Gaskin v. Florida*, 138 S. Ct. 471 (2017).

Mr. Gaskin filed a Second Successive Motion to Vacate Judgment of Convictions and Sentences on January 10, 2017, raising one claim with numerous subparts:

> In Light of *Hurst*, *Ring*, and *Apprendi*, Mr. Gaskin's Death Sentences Violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, the Corresponding Provisions of the Florida Constitution and Article I, Section 15 and 16 of the Florida Constitution.

The claim was denied and appealed to this Court, which ordered Mr. Gaskin to show cause why the trial court's order should not be affirmed in light of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Mr. Gaskin responded to the order, requesting oral argument and full briefing of the issues and stating that the vacating of the felony murder convictions in 2014 - twenty-three years after this Court mandated that it be done - fundamentally altered the original judgment to the extent that it was a new judgment, thus putting Mr. Gaskin in the post-*Ring* cohort that was entitled to *Hurst* relief, and

further stating that *Hitchcock* was wrongly decided. This Court denied relief on February 28, 2018. The USSC denied Mr. Gaskin's petition for writ of certiorari. *Gaskin v. Florida*, 139 S. Ct 327 (2017).

Mr. Gaskin filed a *pro se* Successive Motion to Vacate Judgment of Convictions and Sentences in the Circuit Court on October 10, 2018, raising the following issues:

> **I.** Pursuant to the Florida Supreme Court Mandate Issued in *Gaskin v. State*, 591 So. 2d 917 (Fla. 1991) Subsequent Collateral Relief and Federal Courts Lacked of Subject Matter Jurisdiction to Entertain any Filing Until After Compliance on August 14, 2014. Denying the Defendants Protected Sixth, Eighth, Fourteenth Amendment Rights to the United Constitution and Corresponding Florida Constitution.
>
> **II.** The Egregious Delay of Over Twenty-Three (23) Year Between the Florida Supreme Courts Mandate Remanding the Defendants Case Back to the Seventh Judicial Circuit on February 18, 1991, and its Occurrence on August 14, 2014 violated the Defendant's Due Process Rights and Denied him Equal Protection Under the Law, Severely Prejudicing the Defendant and Creating a Miscarriage of Justice.
>
> **III.** The Defendant is Entitled to Have His Sentence(s) of Death Vacated, and Pursuant the Precedent Established in Hurst v. Florida, 136 S. Ct. 616 (201) Because his Sentence(s) were not final until after August 14, 2014, Pursuant to a Remand to the Trial Court on Direct Appeal in *Gaskin v. State*, 591 So. 2d 917 (Fla. 1991) in the Interest of Justice and Equal Protection Under the Law.

This motion was stricken, and in the order, this Court ruled that any future *pro se* pleadings filed by the Defendant while he was represented by counsel would be stricken as well. Mr. Gaskin filed a *pro se* Petition to Invoke All Writs Jurisdiction in this Court on July 1, 2019; this petition raised the issue that no Florida court could entertain or determine any appellate matter until the court of original jurisdiction, namely the Seventh Judicial Circuit, complied with this Court's mandate in *Gaskin v. State*, 591 So. 2d 917 (Fla. 1991), which did not occur until August 14, 2014, and alleging that because his corrected resentencing took place after the date of the opinion in *Ring*, he was entitled to Hurst relief. The State and Mr. Gaskin's counsel litigated whether Mr. Gaskin was entitled to represent himself in this proceeding. This Court dismissed the petition on January 6, 2020, because he was not seeking to discharge counsel. Mr. Gaskin filed a *pro se* motion for rehearing, which was denied without opinion on February 26, 2020.

On March 13, 2023, the Governor issued a death warrant. The warden set the execution for April 12, 2023. Mr. Gaskin filed his Third Successive Motion to Vacate Judgment of Conviction and Death Sentence After Warrant Signed on March 18, 2023. The State

responded on March 19, 2023. The trial court held a *Huff*[1] hearing on March 20, 2023, denied an evidentiary hearing on each claim, and summarily denied each claim on the same date. This appeal follows.

II. Relevant Facts From the Trial

After Mr. Gaskin was convicted at trial, trial counsel called two witnesses in penalty phase: his cousin Janet Morris, and his aunt Virginia Brown. Ms. Morris testified that she and Mr. Gaskin lived with their great-grandparents, played, and went to school together. T/972. She testified that people liked Mr. Gaskin and that he had no problems, that he worked at a mill after school, and that she was shocked when she learned of his charges. T/972-73. On cross-examination, she testified that they were treated well by their great-grandparents, who were very strict. T/975. This was the extent of her testimony.

Ms. Brown testified that she had known Mr. Gaskin all his life, that he had lived with her for a time, but mainly lived with his great-

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993) (in death penalty postconviction case, judge must allow attorneys opportunity to appear before court and be heard on initial motion to vacate, set aside, or correct sentence, for purpose of determining whether evidentiary hearing is required and to hear legal argument relating to motion).

grandparents. T/977. She confirmed that the great-grandparents were strict, testifying that Mr. Gaskin was generally confined to the family property. T/978. Mr. Gaskin was an ordinary kid, "until he got grown." T/978-79. According to his aunt, Mr. Gaskin was an average student, not an aggressive boy. T/979. Mr. Gaskin spent some time in the Job Corps. T/979. Everyone liked him, and there was nothing in his background that would indicate a propensity for violence. T/980. On cross-examination, Ms. Brown admitted that she was aware of his prior burglaries, his interest in ninja books and sexually explicit materials. T/982. This was the extent of her testimony.

III. The Trial Court's Sentencing Order

The sentencing order considered each statutory aggravator and mitigator regarding the murder of Robert and Georgette Sturmfels, addressing whether each applied to Mr. Gaskin. Regarding the statutory mitigators, the judge found that the murders were committed while Mr. Gaskin was under the influence of extreme mental or emotional disturbance; the court went on to find that Mr. Gaskin's capacity was not impaired, but that the expert testimony combined with the other facts of the crime supported a lack of impairment. T/1316, 1323. Regarding the statutory mitigator that

the capacity of the defendant's ability to appreciate the criminality of his conduct to or to conform his conduct to the requirements of law substantially impaired, the judge found that Mr. Gaskin was capable of appreciating the criminality of his conduct or to conforming his conduct to the requirements of law, and the mitigator did not apply. T/1317, 1324.

The lone nonstatutory mitigator requested by defense counsel was that Mr. Gaskin was the product of an abused or deprived childhood; the trial court found this mitigator. T/1317, 1324.

The court did not assign weight to any of the aggravators or mitigators, but found that the aggravators outweighed the mitigators, and further found that any single aggravator outweighed the mitigators and supported the imposition of the death penalty. T/1317, 1324.

IV. Relevant Facts From Prior Postconviction Proceedings

In postconviction, Dr. Harry Krop testified at the evidentiary hearing. Trial counsel hired Dr. Krop to assist in Mr. Gaskin's penalty phase but never called him to testify. Dr. Krop first examined Mr. Gaskin on March 13, 1990, and administered some personality testing. PC/294. Defense counsel had provided the doctor with police

reports and a polygraph report, but Dr. Krop believed he needed more information in order to address questions regarding Mr. Gaskin's sanity and possible mitigation. PC/295. Dr. Krop requested additional information but received nothing further from trial counsel. PC/296.

Upon initial examination, based on the Minnesota Multiphasic Personality Inventory ("MMPI"), Mr. Gaskin had a profile that suggested possible schizophrenia; his interview also suggested sexual deviance. PC/297. Mr. Gaskin described his thought processes, "his varied personalities, things he hears inside his head," and based on those representations, Dr. Krop could not rule out schizophrenia at that time. PC/299. The doctor found that Mr. Gaskin was not completely isolated, but was often alone, and his great-grandmother kept him secluded and confined. PC/301. Prior to trial, Dr. Krop performed additional testing, after which he determined he could not diagnose schizophrenia; instead, the testing indicated a severe personality disorder was more likely, either schizoid or schizotypal. PC/304-05.

In postconviction, counsel provided Dr. Krop with the records and information he felt he needed prior to trial but had not received,

including school records, transcripts of interviews, deposition transcripts, and a report that had been produced by the State's expert prior to trial. PC/301, 305-06.

Dr. Krop found Mr. Gaskin to be a seriously disturbed individual, believing that "the nature of the acts themselves speak for themselves as far as how disturbed Mr. Gaskin was." PC/309. At the time of trial, he would have diagnosed Mr. Gaskin with a mixed personality disorder with schizoid and antisocial features and would have testified to that diagnosis. PC/311. When asked about Mr. Gaskin's more deviant behaviors, Dr. Krop stated that those who engage in deviant behavior at an early age, as Mr. Gaskin did, had likely been abused themselves. However, Mr. Gaskin did not report any history of sexual abuse, nor did the rest of his family. PC/313.

Prior to trial, Dr. Krop learned that Mr. Gaskin experienced at least one head injury in childhood, this led him to suggest to trial counsel that a neuropsychological evaluation would be helpful. PC/314-15. However, trial counsel never followed up on this recommendation.

During postconviction, when Dr. Krop was able to review school records, he learned that Mr. Gaskin had been diagnosed with a

learning disability, and his examinations of Mr. Gaskin prior to the postconviction evidentiary hearing supported that diagnosis. PC/316. Had he testified at trial, Dr. Krop would have spoken about Mr. Gaskin's learning disabilities and the effect they had on his mental health; the doctor believed that Mr. Gaskin dropped out of school prematurely due to his inability to achieve. PC/317.

Based on interviews, in particular with Mr. Gaskin, Dr. Krop did not see that Mr. Gaskin's upbringing was dysfunctional or abusive but acknowledged that he did not have enough information to link the later behavior to earlier trauma. PC/318-19. He further acknowledged that in certain cases a dysfunctional upbringing would not be seen as such by those who were participating in or subject to such conditions. PC/319.

Dr. Krop stated that Mr. Gaskin's "sexual deviancy, particularly at the age that he started engaging in sexually deviant behavior compared to thousands of sex offenders that I've worked with, it's very, very severe." PC/321.

In postconviction, Dr. Krop testified that if he had all of the information at trial that he had in postconviction, he would have testified that Mr. Gaskin was one of the more seriously disturbed

individuals he had ever encountered, and that he could provide a diagnosis of a mixed personality disorder. PC/323.

Dr. Jethro Toomer also testified at the postconviction evidentiary hearing. PC/412. Dr. Toomer received information that Dr. Krop had not received prior to trial, including school records, information provided by family members, as well as reports and testimony given by Dr. Krop and Dr. Rotstein, the psychologist retained by the State at trial. PC/415. Dr. Toomer also performed a clinical evaluation of Mr. Gaskin, including psychological testing. PC/415. Using all the information available to him, Dr. Toomer determined that Mr. Gaskin suffered from a schizophrenia-paranoid type mental illness. PC/416. The totality of the data suggested numerous possible diagnoses including borderline personality disorder, or schizotypal personality disorder. PC416-17. Dr. Toomer also indicated that Mr. Gaskin had some neurological impairment, or a neurocognitive disorder. PC/417.

Mr. Gaskin scored high on the MMPI measure for schizophrenia. PC/417. According to Dr. Toomer, any indication of sexually deviant behavior would be a result of his dysfunctional upbringing. PC/419. Based on a pervasive and long-term pattern of

instability in terms of mood, effect and behavior, Mr. Gaskin had been impacted adversely regarding his ability to function adequately in terms of thought and behavior. PC/419.

According to Dr. Toomer, Mr. Gaskin is:

> [A]n individual who because of these predispositional factors and the developmental dysfunction, basically has been paralyzed in terms of being able to develop normally and appropriately, which comes from having a background of stability, predictability, and safety. And because of the lack of this atmosphere or climate of predictability and safety, you have an individual whose overall development and behavior represents deficits and impulse control diffidence in tolerance for anxiety, a lack of supplementary capacity and an inability to control impulse delayed gratification. . . . And as well as an overall general inadequacy in terms of ego functioning, in terms of higher order thought, in terms of projecting consequences, in terms of weighing alternatives.

PC/423-24. Dr. Toomer found that Mr. Gaskin's mental illness established the statutory mental health mitigator that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and that this was not only applicable at the time of the offense but had been applicable to Mr. Gaskin for a good part of his life. PC/424-25.

Regarding a diagnosis, Dr. Toomer testified that Mr. Gaskin "vacillated along [a] continuum for a good part of his life." PC/427.

Mr. Gaskin's mental illness would manifest different ways at different points; sometimes his behavior would be more aligned with schizotypal personality disorder, and other times more like schizophrenia. PC/427.

Andre Williams, Mr. Gaskin's brother, testified at the postconviction evidentiary hearing that he was unaware he had a brother until he was thirteen years old, and Mr. Gaskin was seventeen. PC/523. He and Mr. Gaskin lived with their great grandparents and were essentially raised by them; he testified that his great grandparents were illiterate. PC/524.

Janet Smith, Mr. Gaskin's cousin, testified at penalty phase and in postconviction. She also lived with their great grandparents beginning from when she was about eleven years old. PC/527. She described the discipline in the house as being very, very strict and confirmed that the great grandparents could not read. PC/528. Ms. Smith went to the same school that Mr. Gaskin attended and testified that Mr. Gaskin was bullied because "we were kind of on the poor side and we didn't get new clothes like everybody else and that even in his teen years, he was sucking his thumb." PC/529. She also described that Mr. Gaskin "would go off by himself and even

sometimes rock, you know just sit somewhere and constantly rock." PC/529. Ms. Smith described an incident where Mr. Gaskin fell off his bicycle and suffered a head injury. PC/530.

SUMMARY OF ARGUMENT

I. Mr. Gaskin was sentenced to death by a jury that was never presented with profound and important mitigating evidence. Evolving standards of decency prohibit Mr. Gaskin's death sentences because the jury never considered the extensive mitigating evidence regarding his abusive childhood and mental illness. This profound and significant mitigation would have outweighed the aggravation, thus putting Mr. Gaskin outside the class of individuals who are subject to the death penalty, violating the Eighth and Fourteenth Amendments. The USSC has produced a body of cases that require previously discounted mitigation to be considered and, in some cases, act as a bar to execution. Mr. Gaskin's death worthiness should be considered in light of this.

II. Mr. Gaskin's death sentences are contrary to *Hurst v. Florida*, 577 U.S. 92 (2016) and are in violation of Fla. Stat., § 921.141. He was denied his right to a jury determination, proof

beyond a reasonable doubt, and unanimity under the Sixth and Fourteenth Amendments. As a result of Florida's failure to remedy these violations, Mr. Gaskin's sentences violate the Eighth Amendment's bar against excessive, arbitrary, and capricious punishment and equal protection under the Fourteenth Amendment. Further, Florida's partial *Hurst* retroactivity violates the Equal Protection Clause of the Fourteenth Amendment. The current Florida law requiring a unanimous death sentence jury recommendation is reflective of the evolving standards of decency and the national consensus on this issue.

III. Under the Eighth Amendment, Mr. Gaskin's prolonged incarceration precludes his execution.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Mr. Gaskin's motion and in this appeal as true to the extent that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction

court's decision whether to grant an evidentiary hearing is likewise subject to de novo review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT

I. The Circuit Court Erred in Ruling That Mr. Gaskin's Death Sentences and Execution are not in Violation of Evolving Standards of Decency and the Eighth and Fourteenth Amendments Because the Jury was Never Presented with Profoundly Meaningful Mitigation Which Would Have Resulted in a Majority Life Recommendation.

Mr. Gaskin was sentenced to death through a process that failed to conform to the minimum requirements for a death sentence. This was apparent at the time of those proceedings, and it has come into sharp focus as he approaches an execution many years after his sentences were imposed. The jury was never presented with considerable mitigation that would have led a reasonable jury, even in 1989, to return a life recommendation. Viewing the significant, profound, and available mitigating evidence through the lens of the recognized doctrine of evolving standards of decency renders Mr. Gaskin's death sentences unconstitutional.

During penalty phase, Mr. Gaskin's trial attorney called only two witnesses who gave brief testimony regarding Mr. Gaskin, saying

he was generally well-liked and an average student. Even with this bare-bones mitigation, four jurors voted to sentence Mr. Gaskin to life. T/1301-02. After penalty phase, the State presented a report to the judge from their mental health expert, which stated that Mr. Gaskin suffered from schizotypal personality disorder and suffered from delusions in which he saw himself as a ninja; this doctor also determined that Mr. Gaskin qualified for the statutory mitigator that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.[2] Florida Statues, section 921.141(7)(f). The trial judge chose to ignore this finding when ruling on the mitigation in this case. T/1316, 1324.

In postconviction, one mental health expert testified that Mr. Gaskin suffered from a severe personality disorder and was one of the most seriously disturbed individuals he had ever encountered. PC/323. A second mental health expert testified that Mr. Gaskin's mental health moved along a continuum from schizotypal personality disorder to full-blown schizophrenia. PC/427.

[2] At the sentencing hearing held on June 19, 1990, the State Attorney entered the report of a mental examination of Mr. Gaskin performed by Dr. Rotstein into evidence. T/1017.

Mr. Gaskin was sentenced to death by a jury that was never presented with profound, compelling mitigating evidence. Notably, four jurors voted for life even without hearing the weighty mitigation regarding Mr. Gaskin's abusive childhood and significant mental health disorders.

Presentation of available mental health mitigation has been firmly established as an elementary component of effective representation in capital cases. Mr. Gaskin would not receive a sentence of death today because his extensive mitigation would place him outside of the class of individuals who may receive it and it would be clear that both mental health statutory mitigators apply. This weighty mitigation would have made it clear that Mr. Gaskin is not the worst of the worst, and that this case is not the most aggravated and least mitigated. In other words, if Mr. Gaskin were tried today, he would not receive a majority death recommendation.

The USSC established:

> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the

> evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100–101, 78 S. Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560–61 (2005).

Evolving standards of decency prohibit Mr. Gaskin's death sentences because the jury never considered the extensive mitigating evidence about his abusive childhood and mental illness. This profound and significant mitigation would have outweighed the aggravation, thus firmly establishing that Mr. Gaskin is outside the class of individuals who are subject to the death penalty, in violation of the Eighth and Fourteenth Amendments.

Beyond the case at bar, there is a growing consensus that the death penalty should be prohibited for the seriously mentally ill. As of this date, 23 states have abolished the death penalty altogether, including Virginia, which did so in 2021. Of the states that retain the death penalty, two (Ohio and Kentucky) have passed legislation outlawing the execution of seriously mentally ill defendants.[3] One of the mental illnesses defined as sufficiently serious to preclude a

[3] OH ST § 2929.02; KRS § 532.140.

defendant from the death penalty is schizophrenia, meaning that if Mr. Gaskin had been convicted of these crimes in Ohio or Kentucky, he would now have the opportunity to contest the legality of his death sentences and would likely prevail on such a claim. This highlights the arbitrary and capricious nature of the death penalty in Florida.

The movement towards excluding the mentally ill from execution establishes that society's standards of decency are evolving to recognize the mitigating nature of mental illness. Scientific understanding has also grown exponentially. Mr. Gaskin did not receive a unanimous recommendation for death. If he were to be tried today, he certainly would not receive a unanimous death verdict now. The entire body of death penalty jurisprudence, under the passage of time since Mr. Gaskin's death sentences, has recognized the importance of the investigation and presentation of available mental health mitigation. To allow a death sentence to stand with the paltry and incomplete mitigation presented at Mr. Gaskin's trial is an affront to decency.

With the evolving standards of decency, society's and attorneys' understanding of mitigation have also evolved. Since Mr. Gaskin's trial, society has gained an understanding of how the brain develops,

the effects of trauma during development, the infirmities of youth and neuropsychological impulsivity. The USSC has produced a body of cases that require previously discounted mitigation to be considered and in some cases act as a bar to execution. Mr. Gaskin's death worthiness should be considered in light of this.

The Eighth Amendment prohibits cruel and unusual punishment; cases such as *Ford*, *Atkins,* and *Roper* make it clear that it is cruel and unusual punishment to carry out a death sentence on an individual who lacks the capacity to appreciate the criminality of his conduct and understand the possible outcome of their actions.[4] This inability is highly mitigating and was in this case improperly balanced against the aggravation. Given the final nature of the death

[4] *Ford v. Wainwright*, 477 U.S. 399 (1986) (Eighth Amendment prohibits state from inflicting the penalty of death upon a prisoner who is insane); *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of mentally retarded criminal is unconstitutionally cruel and unusual punishment, abrogating *Penry v. Lynaugh*, 492 U.S. 302 (1989)); *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth and Fourteenth Amendments forbid imposition of death penalty on offenders who were under the age of 18 when their crimes were committed, abrogating *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

penalty there should be no point at which Eighth Amendment considerations are foreclosed.[5]

The circuit court held that this claim was previously denied, and that the denial was upheld by this Court, as well as the federal district court, and the Eleventh Circuit Court of Appeals,[6] and is therefore procedurally barred. The circuit court also held that the claim is meritless, based on this Court's opinion following Mr. Gaskin's initial postconviction motion.

"The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall v. Florida*, 571 U.S. 701, 708 (2014) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)). In the years between the USSC's decision in *Penry* and their decision in *Atkins*, capital defendants appealed their convictions and filed postconviction motions based on the premise that despite the ruling

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[5] "[E]xecution is the most irremediable and unfathomable of penalties. . . death is different." *Ford*, supra at 411, citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

[6] *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002); *Gaskin v. McDonough*, 3:03-cv-547-J-20 (M.D. Fla. 2003); *Gaskin v. Sec'y, Dept. of Corr.*, 494 F.3d 997 (11th Cir. 2007).

in *Penry*, it is unconstitutionally cruel and unusual punishment to execute the mentally retarded.[7] These defendants were denied by various courts based on *Penry*; that is, until *Atkins* was decided, and now it is the national consensus and the law of the land that it *is* cruel and unusual punishment to execute the intellectually disabled.

In the years between *Stanford* and *Roper*, defendants were also appealing their convictions with regard to juvenile offenders who were sentenced to death. "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force." *Hall*, 571 U.S. at 708. In this case, four jurors who knew nothing about Mr. Gaskin nevertheless determined that he was not a member of the class of people who are subject to the death penalty. Had the jury heard the rest of the available mitigation, even if it contained detrimental information, two more votes would have guaranteed that

[7] Evolving standards of decency have dictated the usage of the term "intellectually disabled" instead of the previously used term "mentally retarded."

Mr. Gaskin died a natural death in prison, rather than be subject to execution.

In addition, this Court has found that manifest injustice can overcome collateral estoppel and *res judicata* as well as the law of the case. In *State v. McBride*, 848 So. 2d 287 (Fla. 2003), this Court acknowledged the clear principle, "that res judicata will not be invoked where it would defeat the ends of justice. . . . We hold that collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice." *Id.* at 291-92 (internal citations omitted). The law of the case does not prevent relief when it is necessary "to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). There can be no more exceptional circumstance than the state taking a life. It would be a manifest injustice if a man as damaged as Mr. Gaskin were to be executed given that his case is not one of the most aggravated and least mitigated.

II. The Circuit Court Erred in Ruling That Mr. Gaskin's Death Sentences and Execution are not in Violation of the Sixth, Eighth, and Fourteenth Amendments Because his Jury Failed to Make Findings Regarding the Aggravators and Mitigators and was not Unanimous in Recommending Death.

Mr. Gaskin's death sentences are contrary to *Hurst v. Florida*, 577 U.S. 92 (2016), and are in violation of Florida Statutes, section 921.141. Mr. Gaskin was denied his right to a jury determination, proof of the aggravators beyond a reasonable doubt, and unanimity as to the aggravators and a death sentence, all of which he is entitled to under the Sixth and Fourteenth Amendments. As a result of Florida's failure to remedy these violations, Mr. Gaskin's sentences violate the Eighth Amendment's bar against excessive, arbitrary, and capricious punishment as well as violate his right to equal protection under the Fourteenth Amendment.

The trial judge sentenced Mr. Gaskin to death based on an eight-to-four jury recommendation. The jury that voted whether he should serve life in prison or be executed by the State never made any determination regarding the aggravators and mitigators in this case. Worse yet, the trial judge unilaterally made those determinations and in making those determinations failed to assign weight to any specific aggravator or mitigator.

Mr. Gaskin had lived on Florida's death row for more than half his life due to that non-unanimous jury recommendation when the USSC issued its opinion in *Hurst*, *supra*, declaring Florida's death penalty system unconstitutional. Mr. Gaskin filed a successive postconviction motion to vacate his death sentences based on *Hurst*, claiming that his death sentences were obtained under the exact death penalty scheme that *Hurst* found unconstitutional.

The successive motion asserted, *inter alia*, that the jury who determined Mr. Gaskin's fate was misled and its role was unconstitutionally diminished because the jury was instructed that although the court was required to give great weight to its recommendation, the jury's recommendation was merely advisory. The motion further alleged that because the jury finding regarding the imposition of the death penalty was not unanimous, Mr. Gaskin's sentences were also unconstitutional based on this Court's ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which held that a unanimous jury verdict was required for a death sentence to be

constitutionally valid.[8] The postconviction court summarily denied the *Hurst* claims, and Mr. Gaskin appealed.

This Court found that Mr. Gaskin was not entitled to relief, holding *Hurst* was not retroactive to cases that became final prior to the USSC's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). *Gaskin v. State*, 218 So. 3d 399, 401 (Fla. 2017) (citing *Asay v. State*, 210 So. 3d 1, 29-30 (Fla. 2016)).[9] Since denying Mr. Gaskin *Hurst* relief, this Court has adhered to that fundamentally flawed and arbitrarily

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[8] "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment. Although the United States Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases, the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different." *Hurst*, 202 So. 3d at 59-60 (internal citations omitted).

[9] Senior Justice Perry dissented in part, stating, "I dissent because *Hurst v. Florida* does apply retroactively to Gaskin's case." *Gaskin*, 218 So. 3d at 404. Justice Pariente also dissented in part, stating that "fundamental fairness concerns emanating from the constitutional rights at stake require us to hold *Hurst* fully retroactive to all death sentences imposed under Florida's prior, unconstitutional capital sentencing scheme." *Id.* at 401. Justice Pariente further pointed out that Mr. Gaskin had raised the unconstitutionality of non-unanimous death verdicts during trial. *Id.* at 403.

drawn retroactivity line. *See Wright v. State*, 312 So. 3d 59, 60 (Fla. 2021); *Dillbeck v. State*, 2023 WL 2027567 at *7 (Fla. February 16, 2023). But for this unconstitutionally capricious decision, Mr. Gaskin would have received relief under *Hurst* and would not now be subject to this death warrant.

This Court's decisions in *Asay* and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), that Florida would only remedy *Hurst* violations in the cases of those inmates whose direct appeals concluded after June 24, 2002, arbitrarily and capriciously denied relief to 129 condemned inmates while granting relief to 151 others – despite all of those inmates' death sentences being infected by the identical constitutional error. While the June 24, 2002, decision date of *Ring* may have seemed to be a reasonable breaking point to this Court, it is anything but. The date of the conclusion of a defendant's direct appeal has no meaningful relationship to the reprehensibility of his crime or the depravity of his character and serves no purpose in what is supposed to be a narrowing function: death sentences are constitutionally required to be limited to the most aggravated and least mitigated of cases. Sorting on this basis rather than an arbitrary date avoids the capricious infliction of the death penalty, whereas the

current state of the law utterly fails to narrow the class of persons subject to the death penalty. A state death penalty rule, even if it is clear and easily administered, is unconstitutional unless it is calibrated to culpability and "ensure[s] consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

This partial retroactivity violates the Equal Protection Clause of the Fourteenth Amendment. Distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a bright line between those capital defendants who will receive the benefit of a constitutionally valid sentencing process and those who will not, the state's justification for the line must satisfy strict scrutiny. The line drawn by this Court cannot meet that standard. *See Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973).

Retroactivity doctrines curtailing the availability of postconviction relief means that some capital defendants will not benefit from favorable developments in the law because the system failed them too soon. The state interests supporting those nonretroactivity doctrines center upon conserving judicial resources by leaving undisturbed rulings that may have appeared correct when made. Further, more death row inmates received *Hurst* relief than were denied, which once again highlights just how capricious the *Ring* cutoff is. To meet even the most relaxed equal protection scrutiny, the retroactivity lines drawn by a state must have a rationally articulable connection to those objectives. *See Moreno*, 413 U.S. 528. There is no such connection in this case.

Further, if any discrimination was to occur between capital defendants whose unconstitutional penalty proceedings took place more recently than those whose cases were older, the older cases should be given more favorable treatment. First, inmates whose death sentences became final before June 24, 2002, have been on death row longer than their post-*Ring* counterparts. They have demonstrated over a longer period that they have adjusted to their environment and are continuing to live without endangering any

valid interest of the State. Second, inmates whose death sentences became final before June 24, 2002, have suffered on death row longer than their post-*Ring* counterparts.[10] "[T]he longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from denial of certiorari). Conversely, this Court imposed a rule of nonretroactivity that denies relief to a similarly situated, yet better adjusted, class of inmates solely because they have been on death row longer than the more favored group.

Inmates whose death sentences became final before June 24, 2002, are more likely than their post-*Ring* counterparts to have received their sentences under standards that would not produce a capital sentence under the conventions of decency prevailing today. Since *Ring* was decided, death sentences have been in steady decline

[10] *See* Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999); *Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from denial of certiorari).

and more states have abolished the death penalty.[11] The standards of decency continue to evolve away from the death penalty. A major factor in the declining imposition of the death penalty is the growing awareness of the importance of developing and presenting mitigation, such as the presence of mental illness, which did not happen in Mr. Gaskin's case. In the American Bar Association Death Penalty Representation Guidelines, a specific requirement now exists that capital defense teams include a mitigation specialist, resulting in the professionalization of the mitigation function.[12] In contrast to the minimal mitigation presented at Mr. Gaskin's trial, a trial twenty years later would have afforded him the expertise of a multi-disciplinary team to draw a compelling portrait of his life like the one

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[11] *See, e.g.*, Brandon L. Garrett, End of its Rope 79-80 & fig. 4.1 (Harvard Univ. Press 2017); Death Penalty Information Center, The Death Penalty in 2021: Year End Report (2021) ("2021 saw historic lows in executions and near historic lows in new death sentences."); Death Penalty Information Center, The Death Penalty in 2022: Year End Report (2022).

[12] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003 rev.), 31 Hofstra L. Rev. 913, 952, 959-60, 999-1000 (2003) (Guidelines 4(A)(1) & 10.4(C)(2)(a)); *Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008).

presented in postconviction. If Mr. Gaskin's trial had taken place twenty years later, he would have been entitled to a new sentencing proceeding because he would have been granted *Hurst* relief. If Mr. Gaskin's trial had taken place after 2017, he would have been sentenced to life without the possibility of parole. Because his trial took place when it did, he is now subject to a death warrant imposed by a jury that was not in agreement whether the death penalty should be imposed at all and who made no findings regarding the applicable aggravators or mitigators, as is now required by statute in death penalty sentencing procedures. Fla. Stat, § 921.141(2).

Notably, Mr. Gaskin's trial took place in 1989, in front of an all-white jury in Flagler County, Florida. The all-white jury voted on whether Mr. Gaskin, a black man accused of murdering two white people, should spend the rest of his life in prison and die a natural death, or whether he should be executed by the State of Florida; it took them a mere 40 minutes to come to a decision. Eight of those jurors voted for death by execution. The remaining four jurors voted for life, despite the fact that they knew nothing about whether there was any reason to *not* impose death other than his aunt and cousin saying he was well-liked. Four jurors voted for life even though they

had unanimously found Mr. Gaskin guilty of two murders. Four jurors voted for life despite the fact that Mr. Gaskin's trial counsel failed him at every turn, especially in the penalty phase where only two lay witnesses and no expert witnesses were presented. Those four jurors knew next to nothing about Mr. Gaskin. They knew nothing about the abuse and abandonment he suffered as a child; nothing about him being raised in squalor by his illiterate great-grandparents who forced him to eat off the floor and beat him mercilessly; nothing about his teenage mother who disappeared from his life for years at a time; nothing about the father he never knew. The jurors heard nothing about Mr. Gaskin being bullied in school, that he continued to suck his thumb well into his teen years, or that he would go off by himself and rock back and forth.

The four jurors who voted for life knew nothing about Mr. Gaskin's mental illnesses. They knew nothing about Dr. Krop's opinion that Mr. Gaskin was one of the most seriously disturbed people he had ever encountered, because trial counsel did not call Dr. Krop to testify. Worse yet, Mr. Gaskin's trial counsel failed to supply Dr. Krop with the necessary background material, so the jurors never even had the possibility of hearing Mr. Gaskin suffered

from a diagnosis of mixed personality disorder. The jurors heard nothing about weighty mitigation such as Mr. Gaskin's potential schizophrenia, neurological impairment, neurocognitive disorder, or severe head injuries because they were never explored by his trial attorney.[13]

Although the jury heard none of the compelling mitigation that was available at the time of trial, four jurors still understood the practically nonexistent mitigation case presented at trial well enough to recommend a life sentence. This is far from a constitutionally valid death verdict. With a full presentation of mitigation by competent counsel, it is highly unlikely that the State would have obtained a majority recommendation from the jury, let alone a 12-0 decision from a properly instructed jury. In fact, one of the jurors who voted for death at Mr. Gaskin's trial, has come forward saying that she regrets her decision. On March 15, after learning of the death

[13] Brain damage has been long held to be weighty mitigation. *See Hurst v. State*, 18 So. 3d 975, 1011 (Fla. 2009) (evidence of organic brain damage is "significant, relevant mental mitigation"); *see also United States v. Barrett*, 985 F.3d 1203, 1222 (10th Cir. 2021) ("evidence of mental impairments is exactly the sort of evidence that garners the most sympathy from jurors, and that is especially true of evidence of organic brain damage") (internal quotation omitted).

warrant, she told a reporter that she would not make the same decision today. "I don't think it's up to us to decide who's going to be --. At the time, I did believe that, but I don't. . . . I don't feel good about that. Like said [*sic*], I would never make that decision again." Flagler Live, *Janet Valentine, a Juror and Future Superintendent, Regrets Voting for Gaskin's Death. Prosecutor Does Not.*, FlaglerLive.com, March 15, 2023, www.flaglerlive.com/187509/valentine-tanner-gaskin.

Less than ten years ago this Court, following the USSC precedent set in *Hurst v. Florida*, held that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, *and unanimously recommend a sentence of death*." *Hurst v. State*, 202 So. 3d 40, 58 (Fla. 2016) (emphasis supplied); see also *Perry v. State*, 210 So. 3d 630 (Fla. 2020).[14] This Court quoted *U.S. v. Lopez*, saying

[14] "[W]e resolve any ambiguity in the Act consistent with our decision in *Hurs*t. Namely, to increase the penalty from a life sentence to a

"'both the defendant and society can place special confidence in a unanimous verdict.'" 581 F.2d 1338, 1341 (9th Cir. 1978).

Now, this Court, which once said in *Hurst,* "[i]n requiring unanimity . . . in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice," is saying that "the Eighth Amendment does not require a unanimous jury recommendation of death." *Dillbeck v. State*, 2023 WL 2027567 (Fla. February 16, 2023) at *7 (citing *Poole v. Florida*, 297 So. 3d 487 504 (Fla. 2020)). The change that four years has wrought has upended death penalty litigation in Florida.

Regardless of this Court's ruling in *Dillbeck*, Florida law currently requires a jury to make findings regarding evidence of mitigators, as well as make a unanimous finding regarding the applicable aggravators, and come to a unanimous verdict in order to impose a death sentence. Fla. Stat, § 921.141(2)(c). The current Florida law requiring a unanimous death sentence recommendation

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sentence of death, the jury . . . must unanimously recommend a sentence of death." *Perry*, 210 So. 3d at 640.

is reflective of the national consensus and the evolving standards of decency.

The imposition of the death penalty and the signing of the death warrant in this case is especially troubling given the eight-to-four jury recommendation. Four members of the jury, citizens of the State of Florida, believed that Mr. Gaskin should spend the rest of his life in prison and die a natural death, rather than being put to death by the state. There are other prisoners on death row who received fewer votes for life, or a unanimous vote, who are not under a death warrant. Donald Dillbeck, the last person to be executed by the state, also received an eight to four jury recommendation. This is all occurring at the same time that the State of Florida is poised to roll back the constitutionally required unanimous death verdict to an eight to four "supermajority," and return Florida to its outlier status in the number of jurors required to obtain a death sentence. This apparent trend in death warrants highlights exactly how arbitrary and capricious the imposition of the death penalty is in the State of Florida and renders Mr. Gaskin's death sentence and execution even more arbitrary, capricious, and excessive.

The circuit court held that this claim was previously denied in this Court's opinion following Mr. Gaskin's second successive postconviction motion and is therefore procedurally barred.[15] The circuit court also held that the claim is meritless, based on this Court's opinions in *Hurst v. State*[16] and *Asay v. State*,[17] that because Mr. Gaskin's judgment and sentence became final before the date *Ring v. Arizona*[18] was decided, he is not entitled to relief under *Hurst v. Florida.*[19]

As stated above, this Court has found that manifest injustice can overcome collateral estoppel, *res judicata*, and the law of the case. In *State v. McBride*, 848 So. 2d 287 (Fla. 2003), this Court acknowledged the clear principle, "that res judicata will not be invoked where it would defeat the ends of justice. . . . We hold that collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice." *Id.* at 291-92 (internal citations omitted). The law of the case does not prevent relief

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[15] *Gaskin v. State*, 237 So. 3d 928 (Fla. 2018), *cert. denied*, 139 S. Ct. 327.
[16] 202 So. 3d 40 (Fla. 2016)
[17] 210 So.3d 1 (Fla. 2016).
[18] 536 U.S. 584 (2002).
[19] 577 U.S. 92 (2016).

when it is necessary "to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). Again, the taking of a human life, no matter who's, is an exceptional circumstance, and in this case the taking of Mr. Gaskin's life would be a manifest injustice.

III. Executing Mr. Gaskin After Over Thirty Years in Solitary Confinement on Death Row Violates the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment.

Mr. Gaskin's execution would violate the Eighth Amendment prohibition against cruel and unusual punishment because of the unconstitutional superaddition of three decades of delay under unjustly harsh, prolonged solitary confinement, including the last ten years with no legal impediment to a death warrant. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

Mr. Gaskin was sentenced to death in 1990; his initial round of appeals and postconviction review ended upon the denial of federal habeas review seventeen years later. *Gaskin v. Sec'y, Dept. of Corr.*, 494 F.3d 997 (11th Cir. 2007). Clemency proceedings began in 2014, and upon information and belief, concluded in either that year or

2015. There remained no legal or customary impediment to the signing of a death warrant. In 2013, then-Governor Scott signed a legal directive that an execution date be set within thirty days of the certified completion of federal habeas review, absent a grant of clemency. *See* Fla. Stat. § 922.052(2). Since then, Florida has carried out 25 executions.

During Mr. Gaskin's thirty-three years on death row – until last year's class action settlement on confinement – he was housed "in solitary confinement under 'severely harsh long-term conditions.'" *Davis, et al. v. Inch*, 3:17-cv-820, ECF No. 72 at 29 (M.D. Fla. 2019) (quoting allegations in denying motion to dismiss). Pursuant to FDC Rule 33-601.830(1), Mr. Gaskin was deprived of "'basic human contact' in a confined space [to] 'languish alone in cramped, concrete, windowless cells, often for twenty-four hours a day, for years on end.'" *Id.* at 4 (noting the plausible allegations about conditions).

Mr. Gaskin's sentences were amplified with prolonged solitary confinement that of itself violates the original understanding of the prohibition against cruel and unusual punishments. Long term isolation is prototypical "unusual" punishment, unheard of when the Constitution was written, attempted but abandoned in the following

centuries, and resurrected only with this generation of prisoners. John F. Stinneford, *Experimental Punishments*, 95 Notre Dame L. Rev. 39, 65-66, 71-71 (2019), *see also Bucklew*, 139 S. Ct. at 1123. A punishment is cruel and unusual if it is incompatible with "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Mr. Gaskin is aware of this Court's decision in *Dillbeck v. State*, 2023 WL 2027567 (February 16, 2023), stating that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment." *Dillbeck* at *7 (quoting *Booker v. State*, 969 So. 2d 186, 200 (Fla. 2007)). This Court further stated that Mr. Dillbeck's arguments about conditions on death row did not persuade this Court that their precedent was "clearly erroneous." *Id.* (citing *State v. Poole*, 297 So. 3d 487 507 (Fla. 2013)). Mr. Gaskin recognizes that his conditions were similar, if not identical, to Mr. Dillbeck's, up to and including the length of their stays on death row, however, he asserted this claim to exhaust for further review.

The circuit court found that this claim is meritless because this Court has consistently rejected claims like this and because the proper remedy for such a claim is to challenge the conditions of confinement, not vacate a death sentence. Notwithstanding the fact that Florida's death row prisoners did challenge the conditions of their confinement, and prevailed, the conditions are no longer the issue here – execution after over thirty years of unconstitutional confinement is the issue. The circuit court further found that this claim is successive because Mr. Gaskin failed to provide good cause for failing to raise this argument in previous motions. On the contrary, the claim that Mr. Gaskin's imminent execution is unconstitutional because of his prolonged stay in solitary confinement did not become ripe until the death warrant was signed.

Regardless of prior rulings, this Court has found that manifest injustice can overcome collateral estoppel and *res judicata*. In *State v. McBride*, 848 So. 2d 287 (Fla. 2003), this Court acknowledged the clear principle "that res judicata will not be invoked where it would defeat the ends of justice. . . . We hold that collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice." *Id.* at 291-92 (internal citations omitted). There

can be no more extraordinary circumstance or unjust outcome than the execution of a man who has already spent more than half of his life in what amounts to solitary confinement, the last ten years of which he knew he was eligible for a death warrant, each day wondering if that was the day he would suffer the ultimate punishment.

While acceptance of lengthy stays in solitary confinement, and execution thereafter, may be the current state of the law in Florida, the standards of decency continue to evolve. While courts may not yet have ruled that protracted stays on death row are cruel and unusual punishment, that fact *is* being recognized within the courts. In 2015, Justice Kennedy stated in a concurrence that "the human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commenters." *Davis v. Ayala*, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring). Justice Kennedy pointed out that one hundred twenty-five years prior, the USSC "recognized that, even for prisoners sentenced to death, solitary confinement bears 'a further terror and peculiar mark of infamy.'" *Id.*

(quoting *In re Medley*, 134 U.S. 160, 170 (1890)).[20] As the public becomes more aware of the conditions of confinement, and the results of the research permeate the courts, the current state of the law in Florida will become a relic of a past, less compassionate time.

The needless, cruel subjugation to prolonged solitary confinement, superadded to the length of time Mr. Gaskin has spent on death row, including the ten years he was aware he was potentially subject to a death warrant, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The further addition of execution at the end of this lengthy period compounds the cruelty and wanton infliction of unnecessary pain.

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[20] ". . . consideration of these issues is needed. Of course, prison officials must have discretion to decide that in some instances, temporary solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near total isolation exact a terrible price." (citations omitted).

CONCLUSION

Based on his arguments, Mr. Gaskin respectfully requests that this Court remand his case for an evidentiary hearing, vacate his sentences of death, and/or grant a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the above has been furnished to opposing counsel by filing with the e-portal, and by e-mail which will serve a copy of this brief on all counsel of record: Assistant State Attorney Rosemary Calhoun, at CalhounR@sao7.org and PaughN@sao7.org; Assistant Attorney General Patrick Bobek at Patrick.Bobek@myfloridalegal.com and capapp@myfloridalegal.com; Assistant Attorney General Doris Meacham, at Doris.Meacham@myfloridalegal.com, and the Florida Supreme Court, at warrant@flcourts.org, on this 27th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

We hereby certify that the Initial Brief has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief is not subject to word count, and instead complies with the page limit as it does not exceed 75 pages.

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