No._____

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS B. GASKIN,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY, APRIL 12, 2023, AT 6:00 PM

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QUESTIONS PRESENTED -- CAPITAL CASE-DEATH WARRANT

Mr. Gaskin was sentenced to death thirty-three years ago. After that, he petitioned every court that would hear his claims, and some that would not. Mr. Gaskin's execution raises the fundamental issue of whether his execution, if it takes place, violates the US Constitution because the process malfunctioned so completely that his execution would be an intolerable injustice. Accordingly, Mr. Gaskin raises the following issues:

1. Whether evolving standards of decency have rendered Mr. Gaskin's death violative of the Eighth Amendment's prohibition of cruel and unusual punishment and is excessive when the mitigation that was developed post-trial is considered in deciding whether Mr. Gaskin's case falls into the category of cases which are the most aggravated and least mitigated?

2. Whether Mr. Gaskin was further denied his rights not only under the Eighth Amendment, but was also denied the Sixth Amendment's guarantee of a jury trial and unanimity, as well as the Fourteenth Amendment's right to equal protection, when the state courts failed to remedy the constitutional inadequacy of Mr. Gaskin's trial and treated Mr. Gaskin differently from other similarly situated individuals?

3. Whether Mr. Gaskin was denied his rights under *Espinosa v. Florida* and again when the Florida Supreme Court denied habeas relief?

4. Whether the Florida courts' application of their procedural rules and legal decisions unique to this case can allow the execution to take place that would be a profound and manifest injustice?

LIST OF PARTIES

All parties appear in the caption on the cover page.

LIST OF RELATED CASES

Trial

Circuit Court of Flagler County, Seventh Judicial Circuit, Florida
State of Florida v. Louis B. Gaskin,1990-CF-000001; 1990-CF-07 (consolidated).

Judgment entered: Guilty as charged June 15, 1990, on two counts of felony murder and two counts of premeditated murder. Death recommendation, June 18, 1990. Death sentence imposed by court June 19, 1990.

Direct Appeal
Florida Supreme Court
Gaskin v. State, 591 So. 2d 917 (Fla. 1991) Case Number SC60-76326
Judgment entered: Opinion December 5, 1991; Mandate January 6, 1992. Sentence vacated for one adjudication for each murder.

Certiorari
United States Supreme Court
Gaskin v. State of Florida, 505 U.S. 1216 (1992); Case Number 91-7634
Judgment entered: June 29, 1992; rehearing denied September 4, 1992. Judgment vacated and remanded to the Florida Supreme Court.

Appeal after remand to the Florida Supreme Court
Florida Supreme Court
Gaskin v. State, 615 So. 2d 679 (Fla. 1993); Case Number SC60-76326
Judgment entered: March 18, 1993; Mandate April 19, 1993. Affirmed.

Certiorari
United States Supreme Court
Gaskin v. State of Florida, 510 U.S. 925 (1993); Case Number 93-5788
Judgment entered: October 12, 1992; Denied.

Postconviction Motion
Circuit Court in and for Volusia County, Seventh Judicial Circuit, Florida.
Gaskin v. State of Florida, Case Number 90-001; VOLUSIA CASE NO. 95-34327-CFAES
Judgment entered: Order denying Motion for Postconviction Relief and Amended Motion filed on January 17, 1997 (unpublished)

Appeal of denial of postconviction motion
Florida Supreme Court
Gaskin v. State, 737 So. 2d 509 (Fla. 1999) Case Number SC60-90119
Judgment entered: July 1, 1999, rehearing denied August 30, 1999, Mandate September 29, 1999. Remanded for an evidentiary hearing on Claims II. V, and XVII

Postconviction following remand
Circuit Court in and for Volusia County, Seventh Judicial Circuit, Florida. (This was a transfer between counties in the same circuit. This refers to the postconviction for the first entry above).
Louis B. Gaskin v. State of Florida, Case Number 90-001, 90 07; VOLUSIA CASE NO. 95-34327-CFAES
Judgment entered: August 23, 2000. Denied.

Appeal from the denial of postconviction after remand
Florida Supreme Court
Gaskin v. State, 822 So. 2d 1243 (2002); Case Number SC00-2025 -
Judgment entered: Opinion June 13, 2002, affirmed; Mandate July 15, 2002.

Interlocutory appeal
Florida Supreme Court
Gaskin, et al v. State, 798 So. 2d 721 (Fla. 2001)
Case Number: SC01-982
Judgment entered October 18, 2001; Mandate October 24, 2001

Federal habeas petition
United States District Court, Middle District of Florida
Gaskin v. McDonough, Case No. 3:03-cv-547-J-20 (unpublished)
Judgment entered: March 23, 2006

Appeal from the denial of federal habeas petition
United States Court of Appeals, Eleventh Circuit
Gaskin v. Sec'y, Dept. of Corr., 494 F.3d 997 (11th Cir. 2007); Case Number 06-12351
Judgment entered: August 3, 2007, opinion, affirmed. USCA Judgment September 10, 2007.

Appeal
Florida Fifth District Court of Appeal
Gaskin v. State Case Number 5D14-4474
Judgment entered February 10, 2015
Unreported

Postconviction motion
Circuit Court of Flagler County, Seventh Judicial Circuit, Florida

Louis B. Gaskin v. State of Florida, Case Number 90-001, 90 07; VOLUSIA CASE NO. 95-34327-CFAES
Judgment entered: Order denying first successive Motion to Vacate Judgment of Conviction and Sentence. August 6, 2015. (Unpublished)

Appeal from the denial of postconviction after remand
Florida Supreme Court
Gaskin v. State, 218 So. 3d 399 (Fla. 2017); Case Number SC15-1884
Judgment entered: Opinion January 19, 2017, affirmed; Motion for rehearing denied May 17, 2017; Mandate June 9, 2017.

Certiorari
United States Supreme Court
Louis B. Gaskin v. State of Florida, 138 S. Ct 471 (2017); Case Number No. 17–5669.
Judgment entered: November 27, 2017; *cert denied.*

Postconviction motion
Circuit Court of Flagler County, Seventh Judicial Circuit, Florida
Louis B. Gaskin v. State of Florida, Case Number 90-001, 90 07; Volusia Case No. 95-34327-CFAES
Judgment entered: October 12, 2017, Order denying second successive Motion to Vacate Judgment of Conviction and Sentence.

Appeal from the denial of postconviction
Florida Supreme Court
Gaskin v. State, 237 So. 3d 928 (Fla. 2017); Case Number SC17–2190
Judgment entered: Opinion February 28, 2018, affirmed; Mandate March 16, 2018

Certiorari
United States Supreme Court
Louis B. Gaskin v. State of Florida, 139 S. Ct 327 (2018); Case Number No. 18-5415.
Judgment entered: October 9, 2018. Denied.

Pro Se All Writs Petition
Florida Supreme Court
Gaskin v. State, 2020 WL 57987 (Fla. 2020); Case Number 19-1097
Judgment entered: Struck January 6, 2020. Rehearing denied February 26, 2020.

Pro Se All Writs Petition
Florida Supreme Court
Gaskin v. State, 2020 WL2467112 (Fla. 2020); Case Number SC-653
Judgment entered: Struck May 13, 2020.

Postconviction motion
Circuit Court of Flagler County, Seventh Judicial Circuit, Florida
Louis B. Gaskin v. State of Florida, Case Number 90-001, 90 07; Volusia Case N0. 95-34327-CFAES
Judgment entered: March 20, 2023, Order denying Third Successive Motion to Vacate Judgment of Conviction and Sentence

Appeal from the denial of postconviction
Florida Supreme Court
Gaskin v. State, ---So. 3d --- (Fla. 2023); Case Number: SC23-415
Judgment entered: April 6, 2023, Affirmed.

State Habeas Petition
Florida Supreme Court
Gaskin v. Dixon, Case Number SC23-440
Judgment entered: April 6, 2023, Denied.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order denying the Third Successive Motion for Postconviction Relief appears at Appendix A.

The opinion of the Florida Supreme Court appears at Appendix B to the petition and is unreported at this time.[1]

The opinion of the Florida Supreme Court affirming judgment and sentence appears at Appendix D to the petition on direct appeal is reported at *Gaskin v. State*, 591 So. 2d 917 (Fla. 1991).

The opinion of the Florida Supreme Court after remand appears at Appendix F and is reported at *Gaskin v. State*, 615 So. 2d 679 (Fla. 1993).

JURISDICTION

The Florida Supreme Court decided the case on April 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. §1257. Mr. Gaskin fully exhausted the federal claims at issue in the Florida courts by filing his Third Successive Motion for Postconviction Relief, appealing the same to the Florida Supreme Court, and by filing a Petition for Writ of Habeas Corpus in the Florida Supreme Court.

[1] Citations to non-appendix material from the record below are as follows: references to the direct appeal record of Mr. Gaskin's trial are designated as T/[page number]; references to the record of Mr. Gaskin's postconviction proceedings are designated as PC/[page number].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

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: 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 the death penalty 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. Relevant here, Mr. Gaskin raised:

> **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 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 this Court that was granted on June 29, 1992, for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). The Florida Supreme Court's ruling was vacated, and the case was remanded. *Gaskin v. Florida*, 505 U.S. 1216 (1992). On remand, the Florida Supreme Court found that Mr. Gaskin did not object to the vagueness of the wicked, evil, atrocious, or cruel aggravating circumstance (WEAC) 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. Florida*, 510 U.S. 925 (1993).

Mr. Gaskin filed his first motion for postconviction relief in state court on March 23, 1995. Relief was denied on January 17, 1997, without an evidentiary hearing. The Florida Supreme Court remanded for an evidentiary hearing on ineffective assistance of counsel during the penalty phase claims 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. The postconviction court denied relief. Mr. Gaskin appealed the denial to the Florida Supreme Court, which 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 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. Sec'y, Dep't of Corr.*, 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, and appealed to the Florida Supreme Court, which affirmed the denial. *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017). This Court 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 the Florida Supreme Court, which

ordered Mr. Gaskin to show cause as to 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 the Florida Supreme 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. The Florida Supreme Court denied relief on February 28, 2018. This Court denied Mr. Gaskin's petition for writ of certiorari. *Gaskin v. Florida*, 139 S. Ct 327 (2017). Mr. Gaskin filed *pro se* motions that are not at issue here.

On March 13, 2023, the Governor of Florida issued a death warrant for Mr. Gaskin. 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*[2] hearing on March 20, 2023, denied an evidentiary hearing on each claim, and summarily denied each claim on the same date.

Mr. Gaskin appealed to the Florida Supreme Court and filed a state petition for writ of habeas corpus there as well. The Florida Supreme Court ruled on both pleadings on April 6, 2023.

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[2] *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).

After Mr. Gaskin was convicted, only two witnesses were called in penalty phase. His cousin Janet 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.

His aunt Virginia 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-grandparents. T/977. She confirmed that the great-grandparents were strict, and Mr. Gaskin was generally confined to the family property. T/978. Mr. Gaskin was ordinary, "until he got grown." T/978-79. According to his aunt, Mr. Gaskin was an average student, not an aggressive boy. T/979. Everyone liked him, and there was nothing in his background that would indicate a propensity for violence. T/980. This was the extent of her testimony.

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

In postconviction, Dr. Harry Krop testified at the evidentiary hearing; he had been retained but did not testify at trial. Defense counsel had provided the doctor with police reports and a polygraph report, but Dr. Krop believed he needed more information to address questions regarding Mr. Gaskin's sanity and possible mitigation, and requested additional information from trial counsel, but received none. PC/295-96.

Dr. Krop initially believed Mr. Gaskin had a profile that suggested possible schizophrenia. 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. PC/299. 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. 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. Trial counsel never followed up on this recommendation.

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 testified at the postconviction evidentiary hearing. PC/412. Dr. Toomer received 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.

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. 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.

Janet Smith testified again 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.

REASONS FOR GRANTING THE PETITION

ARGUMENT I

THIS COURT SHOULD GRANT CERTIORARI BECAUSE MR. GASKIN'S CASE IS NOT ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED WHEN HIS MITIGATION IS CONSIDERED UNDER EVOLVING STANDARDS OF DECENCY AND THE STANDARDS THAT WERE EXTANT AT THE TIME OF THE TRIAL.

Mr. Gaskin's death sentence was obtained without the jury considering important mitigation that would have led to a life recommendation from the penalty phase jury that non-unanimously recommended Mr. Gaskin's death sentence by a non-unanimous recommendation of 8-4. He has raised this repeatedly following the imposition of his death sentence in all manner and form. He did so once again following the recent signing of a death warrant. The Florida courts refused relief.

This Court should not.

Mr. Gaskin was sentenced to death through a process that failed to conform to the minimum requirements for a death sentence. The penalty phase he received hardly is recognizable when compared to what is required and regularly takes place in Florida. Yet Florida seeks to execute him based on the unrecognizable proceedings from the past. 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.[3]

[3] 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.

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.

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.

Consideration of mitigation by the sentencer is at the heart of the constitutionality of the death penalty. This Court need only look to its own case law to see the trajectory. In *Proffitt v. Florida*, 428 U.S. 242 (1976), this Court considered

whether the imposition of the sentence of death for the crime of murder under the law of Florida violate[d] the Eighth and Fourteenth Amendments. *Id*. at 244. This Court found that Florida's new death penalty law passed constitutional scrutiny because:

> On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must Inter alia, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, see *Gregg v. Georgia*, 428 U.S., at 197, 96 S.Ct., at 2936, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

Proffitt at 251–52. Because the trial judge and the recommending jury were denied the mitigation that was extant in Mr. Gaskin's case, the recommending jury and the trial court never focused on the unique circumstances of Mr. Gaskin. His deprivation, mental illness, and trauma he suffered was never heard, thus falling to meet the bare requirements of *Proffitt*.

Woodson v. North Carolina, 428 U.S. 280 (1976), required that a death penalty scheme "allow the particularized consideration of relevant aspects of the character

and record of each convicted defendant before the imposition upon him of a sentence of death." *Id*. at 303. This did not happen in Mr. Gaskin's case.

The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982) this Court applied *Lockett*, stating that,

> the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg v. Georgia, supra*, at 197, 96 S. Ct., at 2936, the rule in *Lockett* recognizes that "justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 S. Ct. 59, 60, 82 L. Ed. 43 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

Id. at 112. *See also Hitchcock v. Dugger*, 481 U.S. 393 (1987) (advisory jury must consider non-statutory mitigation). An obvious thread through these cases is that this Court has long recognized the need for an individualized sentencing that properly considers all mitigation. Mr. Gaskin was denied this at the time of trial, and he was denied again when the Florida Supreme Court failed to consider his proffered mitigation from postconviction under contemporary standards of decency.

This Court further established the need for mitigation in a number of

ineffective assistance of counsel claims, all premised on the importance of mitigation in determining whether a death sentence may be constitutionally imposed. [4]

The above line of cases, show evolving standards of decency that insist upon consideration of a group or an individual's mitigation. The lack of consideration of Mr. Gaskin's mitigation, at trial and now, shows that his execution violates his rights under the Eighth Amendment because his case has never been narrowed to the most aggravated and least mitigated.

ARGUMENT II

THE EXECUTION OF A DEFENDANT WHO WAS NOT SENTENCED TO DEATH BY A UNANIMOUS JURY VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Gaskin's death sentences were contrary to *Hurst v. Florida*, 577 U.S. 92 (2016), and Florida Statutes, § 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 death 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.

In finding that Florida's death sentencing scheme was unconstitutional, this Court stated "the Sixth Amendment requires a jury, not a judge, to find each fact

[4] *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000); *Sears v. Upton*, 561 U.S. 945 (2010); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009).

necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst,* 577 U.S. at 94. Prior to *Hurst*, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. *Id*.

After *Hurst*, the Florida legislature adopted a new capital sentencing statute that remains in effect, which requires the sentencing jury to make the same findings as to whether aggravation exists, whether it is sufficient, whether it outweighs the mitigation, and whether the defendant should be sentenced to death, but these decisions must now be unanimous, and the failure to return a unanimous death verdict is binding on the sentencing judge. § 921.141, Fla. Stat. (2022).

After the Florida Supreme Court extended *Hurst* and held it partially retroactive, Mr. Gaskin raised successive postconviction claims that his death sentence violated the Sixth, Eighth, and Fourteenth Amendments. Despite two certiorari petitions, a detailed rehearing petition after *Hurst*, a fully pleaded *Hurst* motion, and appeal to the Florida Supreme Court, Mr. Gaskin remains sentenced to death and now faces an imminent execution if this Court denies him the writ.

Mr. Gaskin was diligent in raising these issues in the state courts and in this Court. He now argues in this petition, that whatever arbitrariness, caprice, and unequal treatment he pleaded earlier has increased exponentially with the signing of his death warrant. Mr. Gaskin, without consideration of his unique remand, was in a larger class of post-*Asay*[5] cohort who were excluded as a large class of post-*Ring*[6]

[5] *Asay v. State*, 210 So. 3d 1 (Fla. 2016).
[6] *Ring v. Arizona*, 536 U.S. 584 (2002).

petitioners.

Following the execution of Donald Dillbeck on February 23, 2023, Mr. Gaskin became ensconced in a class of one. He is the only person who has a death warrant and faces imminent execution based on a nonunanimous death recommendation with none of the fact-findings required under *Hurst* being made by a jury. Regarding the status of a class of one, this Court has stated:

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe,* 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)."

City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). And also:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989). In so doing, we have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge Co.*, supra, at 445, 43 S. Ct. 190 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S. Ct. 495, 62 L. Ed. 1154 (1918)).

Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). *See also Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006) (requiring an "extremely high degree of similarity" between the plaintiff and those similarly situated).

Mr. Gaskin's imminent execution weighs on the equal protection scale as further disparity in treatment, not as dissimilarity. The unequal treatment Mr.

Gaskin will receive if he is executed should lead this Court to reconsider his arguments on arbitrariness, capriciousness, and equal protection.

Although this Court has noted that the decision by a jury to sentence a defendant to death maintains the "link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect the evolving standards of decency that mark the progress of a maturing society," *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968), this Court's jurisprudence still permits a judge or non-unanimous jury to sentence a defendant to death. This Court should grant certiorari to determine whether Mr. Gaskin is in the class of offenders culpable enough to face execution in light of the fact that, when faced with this question, four jurors determined he was not.

This Court has looked to two alternative tests when determining whether a death-penalty procedure passes muster under the Eighth Amendment: (1) "the evolving standards of decency of that mark the progress of a maturing society," *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (internal quotation omitted), and (2) whether the modern procedure would have violated the general public understanding at the time of the founding, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019).

Under both tests, Mr. Gaskin's execution would violate the Eighth Amendment. First, in light of the evolving standards of decency—including (1) the consensus in statutes, sentencing, and executions in favor of unanimous jury death sentences and (2) this Court's recognition that a jury vote must be unanimous to convict a defendant of a "serious offense" — Mr. Gaskin is not in the class of offenders

culpable enough to deserve a sentence of death, as found by the four jurors who recommended that his life be spared. Second, allowing a defendant to be executed despite a non-unanimous jury vote violates the common understanding at the time of the founding that sentences of death must be based upon a unanimous jury. Mr. Gaskin's case offers this Court the opportunity to address capital jury sentencing and ensure that it conforms with both the evolving standards of decency and original public understanding.

There is an Overwhelming National Consensus in Favor of Unanimous Capital Jury Sentencing

Death penalty procedures that have been found to have been repudiated by the "evolving standards of decency that mark the progress of a maturing society" violate the Eighth Amendment. *Atkins* at 312. Under this inquiry, this Court has traditionally reviewed the current understanding and administration of the procedure in question. When the procedure used by a state is out of touch with the contemporary consensus, the procedure fails this test and has been rendered unconstitutional.

Since *Hurst*, only four states have executed a defendant who was sentenced after the jury was not unanimous during this time — Alabama, Florida, Missouri, and Nebraska — not including defendants who waived a jury. The practice is thus "truly unusual." *Atkins*, at 316 (calling the practice of executing the intellectually disabled "truly unusual" after noting that among the states that regularly execute and had no prohibition against the practice, only five states had actually executed a defendant with an IQ less than 70 since other states began prohibiting the practice).

In fact, because only five states carried out such executions, this Court declared in *Atkins* there was a "national consensus" against executing the intellectually disabled. *Id*. In that regard there is a stronger consensus here.

This Court's Decision in *Ramos* Also Contributes to the Societal Consensus Against Non-unanimous Juries

Also relevant to the consensus is this Court's recent decision recognizing that a unanimous jury vote is required to convict a defendant of a "serious offense" under the Sixth Amendment. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).[7] As this Court noted, a unanimous jury has been required to convict a defendant of a serious offense essentially uniformly throughout common law and currently in all but two states. *Id*. at 1394-97. The right to a jury is "fundamental to the American scheme of justice." *Id*. at 1397.

This Court's recent recognition that a unanimous jury is required to convict a defendant of a serious crime — i.e., that a unanimous jury vote is required to subject a defendant to the mere possibility of facing more than six months in prison — is clearly relevant to the current standards of decency. If it is unacceptable to subject a defendant to the possibility of facing over six months in prison based on a less-than unanimous jury vote, clearly society has now recognized it is unacceptable to subject him to execution when one or more jurors — let alone four — have determined that the prosecution has not proven the defendant is worthy of the ultimate punishment. This Court should grant certiorari review to consider the discrepancy between the

[7] "Serious offenses" are defined as those with a minimum potential punishment of more than six months in prison. See *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

recognition of the unanimous jury right in *Ramos* and this Court's outdated precedents allowing capital non-unanimous jury or judge sentencing.

It was Widely Understood that a Unanimous Jury Vote was Required to Execute a Defendant at the Time of the Founding

Capital sentencing was understood to require a unanimous jury verdict at the time of the Founding. "[T]he Constitution's guarantees cannot mean less today than they did the day they were adopted." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019). In addition to the evolving standards of decency, this Court has also looked to the original understanding as an additional guide to the proper scope of the Eighth Amendment. *See, e.g.*, *Beck v. Alabama*, 447 U.S. 625, 635 (1980); *Woodson*, 428 U.S. at 289. This is because, at the Founding, the Constitution permitted the death penalty only "so long as proper procedures [were] followed." *Bucklew*, 139 S. Ct. at 1122.

At common law, the determination of whether a defendant should be sentenced to death belonged to the jury. It was understood that "no man should be called to answer to the king for any capital crime, unless . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals."[8] By the time the Bill of Rights was adopted, the jury's right to determine whether a defendant should face the death penalty "was unquestioned."[9]

Given the number of crimes that mandated capital punishment, the

[8] Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, 271 (2017) (quoting 4 William Blackstone, Commentaries on the Law of England 343 (4th ed., Oxford, Clarendon Press 1770)).

[9] Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 10-11 (1989).

determination of whether to find the defendant guilty and whether to spare his life was frequently the same. In such cases, it was widely understood that the jury had nullification power if the jury believed a death sentence would be too harsh. See *Woodson*, 428 U.S. at 289–290. Although "under this capital punishment scheme, there was no bifurcation between guilt and sentencing," "common law juries necessarily engaged in 'de facto sentencing' when deciding whether the defendant was guilty as well as the degree of guilt."[10]

Fundamental to the jury's determination that a defendant should be sentenced to death were the corresponding protections that the jury's verdict should be unanimous and beyond a reasonable doubt. *See Hoeffel*, *supra*, at 275-79 (noting the creation of the beyond a reasonable doubt standard was based on the "morality of punishment" in capital cases, rather than fact finding); *Ramos*, 140 S. Ct. at 1395-97 (cataloging the centuries long history of jury unanimity when defendants were charged with "serious" crimes). This was compared to less serious crimes for which judges could determine sentences and were not bound to make findings beyond a reasonable doubt.[11] This Court should grant certiorari to re-examine capital jury sentencing in light of the original public understanding.

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[10] Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 Mich. L. R. 1499, 1523-25 ("the question of 'appropriate punishment' was not only at issue in those unified proceedings but was often the principal issue faced by the jury").

[11] See John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967 (2005) ("judges exercised sentencing discretion in choosing among [non-capital] punishments and in fixing terms of imprisonment, and . . . they exercised that discretion in sentencing proceedings that lacked the formality of jury trials").

This Court should Reconsider What Remains of *Spaziano* and *Harris*

This case presents this Court with the opportunity to revisit *Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984) and, by extension, *Harris v. Alabama*, 513 U.S. 504 (1995). The Florida Supreme Court has recently used *Spaziano* to deny relief on this very question, stating that this Court

> "rejected th[e] exact argument . . . that the Eighth Amendment requires a unanimous jury recommendation of death" in *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). *Poole*, 297 So. 3d at 504. To the extent that our prior decision rejecting Dillbeck's Eighth Amendment challenges to his death sentence does not foreclose relief, *Spaziano* is still good law and requires denying Dillbeck's claim.

Dillbeck v. State, ___ So. 3d __, 2023 WL 2027567 *7.

Spaziano has already been overruled in part by this Court. *Hurst*, 577 U.S. at 101. In light of the evolving standards of decency and the original public understanding regarding unanimous capital jury sentencing, *Spaziano's* already crumbling foundation cannot bear the weight the Florida Supreme Court has placed upon it.

Spaziano and *Harris* are the subject of "grave concern" over capital judge sentencing, and Justices of this Court have called for the Court to revisit these precedents allowing a judge, rather than a unanimous jury, to sentence a defendant to death. *Woodward v. Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of certiorari); *see also Reynolds v. Florida*, 139 S. Ct. 27 (2018) (Breyer, J., respecting the denial of certiorari). And in *Ring*, where the question was not before the Court, Justices debated this exact issue. *Compare Ring v. Arizona*, 536 U.S. 584, 610-13 (2002) (Scalia, J., concurring) with *id.* at 613-20 (Breyer, J., concurring in

judgment).

The calls to revisit these holdings are not without reason. The *Spaziano* decision is almost four decades old, and key premises underlying the judge versus jury sentencing portion of the opinion have eroded over time. Once such premise that has eroded is reliability. In *Spaziano*, this Court rejected the petitioner's argument that juries would be more reliable in determining which cases truly warrant the death penalty compared to a judge. 468 U.S. at 461; *see also Proffitt*, 428 U.S. at 252 ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").

Evidence has accumulated over time casting doubt on this assumption. For example, a study of death-row exonerations across three states that permitted a judge to sentence a defendant to death over the non-unanimous vote of a jury — Alabama, Delaware, and Florida — found that "[i]n 28 of the 30 cases for which the jury vote is known . . . at least one juror had voted for life."[12]

This case provides the Court with the overdue opportunity to revisit the precedents that permit the execution of a condemned man despite four jurors voting to spare his life.

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[12] *Death Penalty Information Center, DPIC Analysis: Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions* (March 13, 2020) (noting that the 1974 jury vote could not be found for one exoneration and the other involved the waiver of a sentencing jury). Available at: https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighten-risk-of-wrongful-convictions

This Case is a Proper Vehicle to Decide the Question

This case presents an excellent opportunity for this Court to decide the question because this Court's jurisdiction to hear the case is not affected by an independent or adequate state law ground. The Florida Supreme Court's rejection of Mr. Gaskin's Eighth Amendment challenge to his death sentence, including for lack of juror unanimity as to the recommended sentence, the decision below does not rest on that fact.

Evolving standards of decency prevent Mr. Gaskin's execution under the Eighth Amendment because he was denied a unanimous death recommendation. Mr. Gaskin's date finality on direct appeal has no relationship to the nature of his crime or his character and to whether he belongs to the class of defendants who are subject to the death penalty. Mr. Gaskin's case was also not narrowed to the most aggravated and least mitigated because of the failure of the jury to hear and the courts to consider his mitigation. Mr. Gaskin's case was arbitrarily narrowed by caprice. 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).

Evolving standards of decency, or any standards of decency for that matter, cannot allow Mr. Gaskin to be executed based on nothing more than a perverse lottery. His execution would be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J. concurring). This Court should grant the writ.

ARGUMENT III

Mr. Gaskin raised a state habeas petition filed in the Florida Supreme Court, involving that court's denial of relief based on Mr. Gaskin's claim argued under this Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). Following direct appeal, Mr. Gaskin petitioned this Court for a writ of certiorari. Mr. Gaskin raised one issue:

> Whether adequate guidance is provided by instructing a sentencing jury that it consider as an aggravating circumstance whether the crime was committed in an especially wicked, evil, atrocious, or cruel manner.

This Court granted the certiorari petition and remanded to the Florida Supreme Court "for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 [ ] (1992)." *Id.*

On remand, Mr. Gaskin argued:

> The jury instructions at Gaskin's penalty phase were unconstitutionally vague. This issue was preserved by the filing of a pretrial motion. Even if counsel failed to adequately preserve the issue, *Espinosa* and *Sochor* represent a change in Florida law which must now be applied to Mr. Gaskin's claims. The State cannot meet the onerous burden of proving the constitutional error harmless beyond a reasonable doubt.

Remand Brief/4. On remand, Mr. Gaskin argued under a line of Florida cases that argued Mr. Gaskin truly did raise the *Espinosa* issue in his pretrial motion. To the extent that trial counsel was not perfect in preservation of the issue, it was more than explainable by the futility of raising such issues in the wake of the Florida Supreme Court's rulings. Nevertheless, the Florida Supreme Court gave two reasons for the denial:

> 1. [A]lthough Gaskin argued at trial against the instruction for the "cold, calculated and premeditated" aggravating circumstance,3 he 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 for this circumstance. Thus, the issue of unconstitutional vagueness as to the jury instruction struck down in *Espinosa* has not been preserved for review. *See, e.g., Ragsdale v. State,* 609 So. 2d 10 (Fla.1992).
>
> 2. In addition, were we to address the issue, the reading of the insufficient heinous, atrocious, or cruel aggravating circumstance instruction as it relates to the sentence for the murder of Georgette Sturmfels would be harmless error beyond a reasonable doubt, because the reading of this vague instruction could not have affected the jury's recommendation of death in this case. Therefore, for the reasons stated here and in our earlier decision, we again affirm the two death sentences.

Gaskin v. State, 615 So. 2d 679, 680 (Fla. 1993) (footnote omitted). It was beyond dispute that the jury instruction was found unconstitutional in *Espinosa* was the same jury instruction that Mr. Gaskin's jury received. However, it was far worse because Mr. Gaskin's jury was instructed on the same aggravating factors for both murders even though the jury was told to return separate recommendations for each victim. The trial court later found that as a matter of law the WEAC aggravating factor only applied to one of the victims. T/1026, 1033. The court instructed in part, that:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence . . . Four, the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

T/999. The State did not admit in penalty phase closing argument that the WEAC aggravating factor was not proven for one of the victims. Rather, the State argued:

> Another statutory, lawful consideration is that **these murders** were carried out in an especially heinous or especially heinous, atrocious or cruel; heinous, **or** atrocious **or** cruel.

> Mercifully, Robert died quickly.
>
> First, he thought he was having a heart attack as his wife rushed to him, stood up and realized with the second shot that he is being shot and they both turn to flee and with that she was struck through the cheek into the nose.

T/990. (Emphasis added). With no jury instruction to clarify, the State's argument did nothing to inform the jury that they should not consider the WEAC aggravating factor for Mr. Sturmfels. The State argued in the plural. There was no definition given to the jury for what wicked, evil, atrocious, or cruel meant in relation to the murders, and as such the jury had no guidance on this aggravator. *See* current Fla. Stat. § 921.141(6)(h) (2022); *see also* corresponding Florida Standard Jury Instructions in Criminal Cases 7.11., para. 8.[13] There was nothing to prevent the jurors from considering the vague WEAC aggravating factor when they were voting on whether Mr. Gaskin should serve life in prison or be executed by the state. There was nothing to prevent this unconstitutional factor from being the deciding factor in choosing death.

This error was not harmless. While it is unconstitutionally cruel and unusual to execute Mr. Gaskin based on a non-unanimous jury recommendation, this is made even more egregious because the jurors' limited function in their eight-to-four recommendation was infected by the *Espinosa* violation.

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[13] The First-Degree Murder was especially heinous, atrocious, or cruel. "Heinous" means extremely wicked or shockingly evil.
"Atrocious" means outrageously wicked and vile.
"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to (decedent).

This Court has held that "'the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.'" *Lee v. Kemna*, 534 U.S. 362, 378 (2002) (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)).

Mr. Gaskin preserved an *Espinosa* issue in greater detail than anyone was required to under the Florida Supreme Court's decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). The Florida Supreme Court never required preservation of a *Ring* claim to prevail on a *Hurst* claim. While there was some dicta on the standard of retroactivity under the theory in *James v. State*, 615 So. 2d 668 (Fla. 1993), this was never a factor in determining who would get relief and who would not. Until *Poole v. Florida*, 297 So. 3d 487 (Fla. 2020), the courts in Florida simply asked whether the jury was less than unanimous and had the case become final after *Ring*. This was based on Florida law's standards for retroactivity as well as the importance of this Court's decision in *Hurst*. The Florida Supreme Court treated Mr. Gaskin disparately on *Hurst* as it had done based on *Espinosa*. Those individuals were never required to show a preserved *Ring* claim to avail themselves of the benefits of *Hurst*, as was the case with post-*Hitchcock* petitioners. Mr. Gaskin preserved an *Espinosa* issue, even though he was not required to have previously raised one.

In the case of *Espinosa*, Mr. Gaskin invoked on remand that the Florida Supreme Court recognized in that the significance of *Hitchcock v. Dugger*, *supra*, also

a landmark case of this Court, stating "that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default." *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987). *Espinosa* was as clear in its rejection of the standard jury instruction and the notion that the judge's sentencing based on the jury's non-unanimous recommendation insulated the jury instructions regarding aggravating factors from compliance with Eighth Amendment jurisprudence.

The Florida Supreme Court has held that the change brought by *Hitchcock* was so significant that the failure to previously raise a timely challenge to the jury instruction would not preclude consideration of a *Hitchcock* claim in postconviction proceedings. *Delap v. Dugger*, 513 So. 2d 659, 662 (Fla. 1987) (The fact that Delap's request for a proper instruction was late is not significant to our decision because in *Hitchcock* the impropriety of the instruction was not even raised at the trial.) Again, the instruction rejected in *Hitchcock* was, as it is here, a standard jury instruction repeatedly approved by the Florida Supreme Court. *See Demps v. State*, 395 So. 2d 501, 505 (Fla. 1981). The approach in *Delap* is also warranted here, where attorneys in reliance on the Florida Supreme Court's jurisprudence which conclusively, albeit erroneously, settled the issue adversely to the client, chose to forego arguments which appeared to be meritless in favor of issues with a greater chance of success. The Florida Supreme Court should have treated *Espinosa*'s reversal of its jurisprudence as a substantial change in law.

The contrast between the Florida Supreme Court's treatment of *Hurst* and *Hitchcock* compared to *Espinosa* is striking and unconstitutional. The Florida Supreme Court always had the power to remedy errors such as those found in Mr. Gaskin's case. It was clear at the time of the FSC's decision on the *Espinosa* claim that, "Fundamental fairness" may override the State's interest in finality. *Moreland v. State*, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* Accordingly, the Florida Supreme Court held in *Witt* that "only major constitutional changes of law" as determined by either the Florida Supreme Court or the United States Supreme Court are cognizable in postconviction proceedings. *Id*. at 929-30. Here, the decisions at issue have emanated from this Court. As such, *Espinosa* qualified under *Witt* to be such a major constitutional change in law. In *Witt*, the Florida Supreme Court cited *Gideon v. Wainwright*[14] as an example of a change in law which defeated any procedural default. As a result of *Gideon*, it was necessary "to allow prisoners the opportunity and a forum to challenge those prior convictions which might be affected by *Gideon*'s law change." *Witt*, 387 So. 2d at 927. The rights at issue in *Espinosa* and presented here are no less important than those

[14] 372 U.S. 335 (1963).

in *Gideon*. Mr. Gaskin's raising of an *Espinosa* claim was fundamentally the same as the approach of the post-*Ring* petitioners to *Hurst*.

Lastly, the Florida Supreme Court found that Mr. Gaskin never preserved an *Espinosa* claim when it appears the charge conference that took place before the Jury Instructions was never transcribed. The appellate record for Mr. Gaskin's direct appeal was eight volumes and a one volume supplemental record. Mr. Gaskin's attorney argued and preserved the objection to the WEAC instruction at a pretrial motion hearing.

> At the close of evidence, the following exchange took place:
>
> Whereupon, the Jury went to the Jury Room at 1:52 o'clock p.m.
>
> **The Court:** Do we have anything further that needs to be brought to my attention as to the proposed instructions?
> **Mr. Cass:** If it please, Your Honor, yes we do have some instructions to look at. I have not had time, I don't think Mr. Tanner has had the time to look at them.
> **The Court:** They are normally considerably more brief than the earlier instructions. Do you have those with you?
> **Mr. Tanner:** Your honor, they are prepared. May I step down the hall?
> **The Court:** Would you please.
> **Mr. Cass:** Before Mr. Tanner goes, if you don't mind, I would like to renew my motion for directed judgment and
> for mistrial on the same grounds and the same reasons as I previously stated.
> **The Court**: Thank you. I am going to deny the motion. Anything further?
> **Mr. Tanner:** No, your, honor. Thank you.
> **The Court:** Let's see if we can get those instructions and then each of you can review them and we will proceed.
> **Mr. Tanner:** Yes. Your Honor. May I speak with Mr. Cass for just a moment about something?
> **The Court:** You may. **Mr. Tanner:** May we approach the Bench?
> **The Court:** You may.
>
> Whereupon a Conference was held at the Bench. {Not transcribed]

> **The Court:** We will take about a ten minute recess, perhaps fifteen, and reassemble when we have that paper work.
>
> Whereupon, the Court recessed at 1:50 o'clock p.m.
> Whereupon, the Court resumed at 2:45 o'clock p.m.
> Whereupon, the Jury returned to the Courtroom at 2:45 o'clock p.m.

T/985-86. The State rests. T/964. The defense rests. T/984

The above excerpt shows that a charge conference had yet to take place where trial counsel could have objected and offered an alternative jury instruction. The trial court proceeded to closing arguments. The trial court immediately instructed the jury on the penalty phase instructions. There appears to be no transcript of the charge conference. This begs the question of how the Florida Supreme Court was able to determine that the issue was not preserved when the very point at which trial counsel would have objected was not recorded.

The Florida Supreme Court found that Mr. Gaskin did not object to the jury instruction, nor did he request a special jury instruction for this circumstance. It is possible that he could have done so but the charge conference was not transcribed, but there is no way to know what occurred. Mr. Gaskin brought this to the court's attention. On direct appeal, Mr. Gaskin argued that:

> LOUIS GASKIN'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION HAVE BEEN VIOLATED BY THE FACT THAT A MULTITUDE OF PROCEEDINGS THROUGHOUT THE TRIAL WERE NOT REPORTED BY THE COURT STENOGRAPHER.

Initial Brief/49. Indeed, his due process rights were violated. Appellate counsel was correct, and Mr. Gaskin would suffer serious constitutional violations when he was

denied *Espinosa* relief, in part, because he had no record of whether his trial counsel objected or not.

The error was not harmless as indeed, the WEAC aggravating factor did not apply to one murder as a matter of law and was rather specious for the other. Mr. Gaskin was sentenced to death based on a vague aggravator that ultimately tipped the scales from 6-6 to 8-4. This should not stand.

ARGUMENT IV

APPLYING TO ALL OF THE FORGOING CLAIMS THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FLORIDA SUPREME COURT HAS FORSAKEN ITS ROLE AS THE PRIMARY FORUM FOR LITIGATING CONSTITUTIONAL CLAIMS.

In theory the Florida Supreme Court has recognized its responsibility as the highest court in Florida to do justice and enforce the rights under the United States Constitution. Accordingly, Mr. Gaskin urged such relief be granted by the Florida Supreme Court in his post-warrant direct appeal and state habeas petition. No relief came. The Florida Supreme Court had a number of ways it could have done justice in this case. Then Chief Justice Anstead's special concurrence in *Baker v. State,* 878 So. 2d 1236 (Fla. 2004), joined by Justice Pariente and Justice Lewis, is instructive:

> I write separately to sound a note of caution and reminder that in our attempts to efficiently regulate a system for addressing postconviction claims we must constantly keep in mind that we are dealing with the writ of habeas corpus, the Great Writ, which is expressly set out in Florida's Constitution. That writ is enshrined in our Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many centuries. This Court will, of course, remain alert to claims of manifest injustice, as will all Florida courts. As we reaffirmed in *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999), "we will

> continue to be vigilant to ensure that no fundamental injustices occur."
>
> We must also be mindful of the concerns expressed by Justice Overton in *Harvard*:
>
> > Habeas corpus jurisdiction is basic to our legal heritage. It is so basic that the authors of our habeas corpus jurisdiction made it unique with regard to this Court because it states that habeas corpus jurisdiction may not only be exercised by the entire Court, but it may also be exercised by a single justice. It is the only jurisdictional provision that gives authority to an individual justice. The provision also takes particular care to address the problem of resolving substantial issues of fact, a concern of the majority, by allowing the Court or any justice to make the writ returnable to "any circuit judge."
>
> *Id*. at 1025 (Overton, Senior Justice, dissenting). With these concerns in mind, I concur with the basic premise of the majority opinion that postconviction claims that would ordinarily be subject to the strictures of rule 3.850 in the trial courts are not relieved of those strictures by filing the same claims in this Court.

Baker, 878 So. 2d at 1246. The Florida Supreme Court always has jurisdiction to remedy errors that amount to a manifest injustice; it is in the Florida Constitution.

Mr. Gaskin's post-warrant litigation raised such manifest injustices that are fully argued above. The Florida Supreme Court chose not to remedy these, although they could have done so. The law of the case, *res judicata* and collateral estoppel were overcome yet there was no relief for Mr. Gaskin. *See State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). Moreover, *stare decisis* is routinely overcome in the Florida State courts. *See State v. Poole*, 297 So. 3d 487, 491 (Fla. 2020).; *Bush v. State*, 295 So. 3d 179, 201 (Fla. 2020); *Phillips v. State*, 299 So. 3d 1013, 1022 (Fla. 2020); *Lawrence v. State*, 308 So. 3d 544, 549 (Fla. 2020).

The Florida Supreme Court's recalcitrance in remedying violations of the

United States Constitution creates another compelling reason for this Court granting certiorari. The Florida Supreme Court has not fulfilled its responsibility to remedy these constitutional violations when the court clearly could do so.

Mr. Gaskin appealed to the Florida Supreme Court and filed a state petition for writ of habeas corpus there as well. The Florida Supreme Court ruled on both pleadings on April 6, 2023. The court referred to the argument that is contained below in Argument I as "Mitigating Circumstances." *Gaskin v. State*, *Gaskin v. Dixon,* Case No. SC2023-0415; SC2023-0440 (Appendix B)(hereinafter Op. page#). Op/10. The court essentially treated this as a successive ineffective assistance of counsel claim and never engaged with Mr. Gaskin's Eighth Amendment arguments. The extent of the court's engagement on the larger issues was: "Gaskin concedes in his initial brief that this issue is procedurally barred but argues that constitutional infirmities afflict his case are sufficient to overcome a procedural bar. However, we reject this argument and conclude that Gaskin's constitutional arguments are insufficient to overcome the procedural bar" The court never considered whether evolving standards of decency prohibited Mr. Gaskin's execution. As argued below, Mr. Gaskin's claim raised significant arguments that his execution is unconstitutional because he falls outside the class of individuals which may be subject to death.

Next, the Florida Supreme Court considered what it titled "*Hurst*." Op./14. The court relied on its prior case law and failed to fully engage with Mr. Gaskin's unique and discrete arguments. The Florida Supreme Court's decision rested on its prior decisions which were wrongfully decided at the time and wrongfully applied in Mr.

Gaskin's opinion. Most notably, the court never addressed Mr. Gaskin's argument that he was further denied equal protection because he was placed in "a class of one" with the signing of a warrant. The court unreasonably discounted that the jury makes numerous findings of fact, without which an individual cannot be sentenced to death. The court's reliance on *Poole* was significantly misplaced and violates the ex post facto clause. Mr. Gaskin, without a jury making factual determinations to limit the class of individuals subject to death, under the Florida Supreme Court's view, had no process that legitimately narrows the class of individuals subjected to death to the most aggravated and least mitigated. Again, the court failed to engage in the evolving standards of decency at the heart of the argument. Mr. Gaskin raised significant constitutional issues that were unique to him. The Florida Supreme Court failed in its duty to fully adjudicate them.

Finally, the Florida Supreme Court denied habeas relief. Op/20. The court failed to reconsider whether the error concerning the unconstitutional jury instruction was harmless for the murder of Georgette Sturmfels, despite the court's erroneous finding on appeal. The court then proceeded to find that it was harmless for the murder of Robert Sturmfels. While the court referenced "the no reasonable possibility that the error contributed to the death sentence" for Mr. Sturmfels (Op/20; citing *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986), this was an application of this Court's standard under *Chapman v. California*, 386 U.S. 18, 24 (1967).

Finding the error harmless for both murders was a complete abandonment of the Florida Supreme Court's duty to remedy serious constitutional error and worthy

of this Court's exercise of jurisdiction to remedy it. While the court relied on the other aggravating factors present in this case, it ignores the fact that the vote was a mere 8-4 with no real mitigation presented, and with an improper instruction on the WEAC aggravating factor. The court failed to recognize that the very reason this Court found the WEAC aggravating factor unconstitutional was because it was vague and created a substantial risk that an individual could be executed without sufficient individual consideration of whether death should be imposed. In Mr. Gaskin's case he was a mere two votes from life, thus it is beyond belief that it had no effect. This is so under the death penalty scheme Mr. Gaskin was sentenced to death that allowed a death sentence with no real mitigation being presented. It is a certainty when this is considered under contemporary standards of decency as seen in Florida's current death penalty system which requires detailed fact finding by a jury and a unanimous vote.

Additionally, this case raises the very concerns that this Court recently addressed. On February 22, 2023, this Court decided *Cruz v. Arizona*, 143 S. Ct. 650 (2023) favorably to Mr. Cruz, a death-sentenced prisoner from Arizona. The opinion rested on the proposition that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 658 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)). The dissent fully embraced that rule but argued that it was not violated in the circumstances at hand. *Id.* at 665. The procedural requirements that the Florida

Supreme Court has rested its decisions on were not merely "novel" they were contradicted by its own law. Considering the stakes in this case this must not stand.

Like the Florida Supreme Court, this Court may exercise jurisdiction. Mr. Gaskin respectfully requests that this Court grant the Writ.

CONCLUSION

The petition for writ of certiorari should be granted.

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