No.22-7236

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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REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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

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RESPONSE TO STATE'S REASONS FOR DENYING THE WRIT

The State accuses Mr. Gaskin of seeking to "deprive his victims of justice" by seeking certiorari. This fallacious accusation unfairly misrepresents Mr. Gaskin's plight and attempts to villainize him for exercising his rights under the United States Constitution. While the State complains that the questions presented in the petition either should have been asked, or were asked, long ago, it remains Mr. Gaskin's position that in situations where the Eighth Amendment prohibition against cruel and unusual punishment are at issue, no claim should ever be barred based on waiver, foreclosure, or any other procedural reason. When the State determines that it is appropriate to take a life, a procedural bar should not be an impediment to the one who seeks to defend his life.

ARGUMENT I

The State refutes Mr. Gaskin's first argument with the standard argument that trial counsel made a reasonable strategic decision to limit mitigation, and that the claims are barred and without merit.

The State claims that Mr. Gaskin's claim is an ineffective assistance of counsel claim in disguise and is therefore procedurally barred. In an attempt to deny Mr. Gaskin his rights under the Eighth and Fourteenth Amendments, the State misapprehends and twists Mr. Gaskin's argument.

Like the State, the FSC 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.

This is not an ineffective assistance of counsel claim. The ineffective assistance of counsel Mr. Gaskin suffered was one failure in the overarching failure of Florida's death penalty system to conduct the individualized narrowing of the class of individuals subjected to the death penalty. Certainly, counsel failed and had he not done so, Mr. Gaskin would not be petitioning this Court on these issues as one condemned to death. Mr. Gaskin raises this claim under the Eighth Amendment

because the lack of consideration of his mitigation is contrary to the prohibitions against the arbitrary and capricious punishment, and his sentence of death is excessive based on well-established constitutional principles. It is indeed cruel and unusual under the exact meaning of those terms. It is cruel because he will die at the hands of the state when his mitigation diminishes his culpability. It is unusual because the decision to execute him was made with none of the reliability that is required under evolving standards of decency.

"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 *Stanford v. Kentucky*[1] and *Roper v. Simmons*,[2] defendants continued to appeal their convictions regarding juvenile offenders who were sentenced to death for crimes committed before they turned eighteen, arguing that it was cruel and unusual punishment to execute juvenile offenders. In the years between *Penry v. Lynaugh*[3] and *Atkins v. Virginia*,[4] capital defendants appealed their convictions and filed postconviction motions based on the premise that despite the ruling in *Penry*, it is unconstitutionally cruel and unusual punishment to execute the

[1] 492 U.S. 361 (1989) (holding that the decision whether to subject defendants under 18 years of age to capital punishment must be made locally and could not be categorically pronounced as cruel and unusual).
[2] 543 U.S. 551 (2005) (holding that standards of decency had evolved so that executing minors is cruel and unusual punishment).
[3] 492 U.S. 302 (1989) (rejecting the claim that the Eighth Amendment bars death sentences for the intellectually disabled).
[4] 536 U.S. 304 (2002) (holding that evolving standards of decency placed a substantive restriction on the execution of the intellectually disabled).

mentally retarded.[5] These defendants were denied by various courts based on *Stanford* and *Penry*; that is, until *Roper* and *Atkins* were decided, and now it is the national consensus and the law of the land that it *is* cruel and unusual punishment to execute those who were juveniles at the time they committed a capital crime as well as the intellectually disabled.

"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 all the available mitigation, even if it contained detrimental information, two more votes would have guaranteed that Mr. Gaskin died a natural death in prison, rather than be subject to execution by the State.

Evolving standards of decency insist that an individual's mitigation must be considered to ensure that he indeed belongs to the class of persons subject to the death penalty. 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.

While the State and the FSC relied on the other aggravating factors present in this case, this ignores the fact that the vote was a mere 8-4 with no real mitigation

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

presented, and with an unconstitutional instruction in the WEAC aggravating factor. The FSC 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.

Further, the State argues that this claim is barred by the law of the case doctrine. First, there is no law of the case in *this* Court because *this* Court never ruled on the claims presented here. To the extent that Mr. Gaskin has filed previous certiorari petitions, a denial of certiorari is not considered a ruling on the merits. The State knows this well-established legal principle yet ignores it in an attempt to dissuade this Court from exercising its well-established jurisdiction. Under the State's distorted view of the law of the case, there would be no judicial review of any lower court decisions because lower courts would be given the right to preclude review under the law of the case. Moreover, no party could ever seek review in a higher court under additional facts or based on changes in the law or the society in which we live.

Any state ground was not independent and adequate. The State has ignored Mr. Gaskin's argument that his execution would be a manifest injustice, which can and has overcome collateral estoppel and *res judicata* as well as the law of the case. The FSC has 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." *State v. McBride,* 848 So. 2d 287, 291-92 (Fla. 2003), (internal citations omitted).

Further, 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.

ARGUMENT II

The State refutes Mr. Gaskin's second argument saying that he has failed to demonstrate why this Court should recede from *Spaziano v. Florida*,[6] that this claim is procedurally barred, and any holding would not retroactively affect Mr. Gaskin.

This Court has the Power to Adjudicate This Claim

The State misapprehends the ability of this Court to adjudicate claims that the lower courts have held are procedurally barred. However, while the Florida Supreme Court claims its decision in this case rests on *res judicata*, this is mistaken. Rather, the decision rests not only on the FSC's misinterpretation of their own precedent, but the FSC's decision to ignore the national consensus, the evolving standards of decency, as well as Florida law as it currently stands.

This case presents an important question about capital jury sentencing – whether the execution of a person who was sentenced to death by a non-unanimous jury violates the Eighth Amendment prohibition against cruel and unusual punishment. Both the evolving standards of decency and the original understanding

[6] 468 U.S. 447 (1984).

that a unanimous jury verdict was required before a defendant could be executed support a finding that a death sentence based on anything less than unanimity is a violation of the Eighth Amendment. It is counterintuitive and incongruent to hold that while the unanimous vote of twelve jurors is required to convict a person of first-degree murder, it is not necessary to condemn that same person to death.

The State Mistakenly Claims the Right to a Unanimous Jury Sentence Only Arises Under the Sixth Amendment, not the Eighth.

It is interesting to note that the State does not dispute the overwhelming national consensus in favor of unanimous capital jury sentencing and the original public understanding that executions could only be carried out upon a unanimous jury verdict. Instead, the State raises a novel Sixth Amendment preemption argument and posits that the Eighth Amendment does not apply to trials as the sole reason not to revisit *Spaziano*. (BIO at 13-15) ("Gaskin's claim has nothing to do with his punishment being cruel or unusual"). These arguments do not justify denying certiorari review, and, in any event, are incorrect.

The State's novel Sixth Amendment preemption argument has long been rejected by this Court. The State implies that because the Sixth Amendment contains the right to a jury, no other constitutional protection can safeguard a defendant's rights with respect to juries. This has never been the case. The Sixth Amendment requires that juries be unanimous to convict a defendant of a serious crime,[7] while the Due Process Clause of Fifth and Fourteenth Amendments requires that the jury's

[7] *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

determination to convict be beyond a reasonable doubt.[8] The Eight Amendment requires heightened reliability in the determination that death is an appropriate sentence, and if an error is left uncorrected, the fundamental fairness of sentencing is affected. *See Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985).

Further, Mr. Gaskin's claim is premised on both the Sixth Amendment right to a jury, but also on the evolving standards of decency under the Eighth Amendment. This argument relates to the national consensus that began with *Furman v. Georgia*[9] and has gained momentum in the wake of *Hurst v. Florida*.[10]

The FSC unreasonably discounted that the jury makes numerous findings of fact, without which an individual cannot be sentenced to death. Mr. Gaskin's jury made no factual determinations regarding whether Mr. Gaskin belonged to the class of individuals subject to death. Again, the FSC 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 FSC failed in its duty to fully adjudicate them.

Hurst should apply to all defendants who were sentenced to death by non-unanimous juries.

The State claims that Mr. Gaskin failed to address the question of retroactivity of any decision holding that the Eighth Amendment requires jury sentencing, however this is incorrect. In his motion for postconviction relief, Mr. Gaskin claimed that his death sentences and execution violated the Sixth, Eighth, and Fourteenth

[8] *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1983).
[9] 408 U.S. 238 (1972).
[10] 577 U.S. 92 (2016).

Amendments because he was sentenced to death by a non-unanimous jury and that the FSC had acted arbitrarily and capriciously when it set a cut-off date for *Hurst* relief. Mr. Gaskin unequivocally asserted that based on *Hurst*, he was denied his right to a jury determination, proof beyond a reasonable doubt, and unanimity under the Sixth and Fourteenth Amendments. He further asserted that because 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.

When Mr. Gaskin sought relief from his non-unanimous jury death recommendation after *Hurst*, the FSC found that Mr. Gaskin was not entitled to relief, holding held *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)).[11] Since then, the FSC has adhered to that fundamentally flawed and arbitrarily drawn retroactivity line. *See Wright v. State*, 312 So. 3d 59, 60 (Fla. 2021). But for this unconstitutionally capricious decision, Mr. Gaskin would have received relief under *Hurst* and would not now be subject to this death warrant.

The FSC'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

[11] Senior Justice Perry dissented in part, stating, "I dissent because *Hurst v. Florida* does apply retroactively to Gaskin's case." *Gaskin*, 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." *Gaskin*, at 401. Justice Pariente further pointed out that Mr. Gaskin had raised the unconstitutionality of non-unanimous death verdicts during trial. *Id.*, at 403.

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. Mr. Gaskin has argued that while the June 4, 2002, decision date of *Ring* may have seemed to be a reasonable breaking point to the FSC, 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).

Florida's partial retroactivity also 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 here by the FSC 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. 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.

Less than ten years ago the FSC 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).[12] The FSC quoted *U.S. v. Lopez*, saying "'both the defendant and society

[12] "[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 sentence of death, the jury . . . must unanimously recommend a sentence of death." *Perry*, at 640.

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

Now, the court that once said "[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," *Id*., is now 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).

Regardless of the FSC's holdings in *Poole* and *Dillbeck*, Florida law currently requires a jury to make findings regarding the claimed 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 is reflective of the national consensus on that issue. To deprive Mr. Gaskin of that right based merely on one date shows precisely how arbitrary and capricious the death penalty is in Florida.

ARGUMENT III

This was not simply a reassertion of an old *Espinosa*[13] claim. Beyond the nuances of *Espinosa*, this is a claim that calls into question the ability of the Florida courts to serve as the primary decider of constitutional violations.

[13] *Espinosa v. Florida*, 505 U.S. 1079 (1992).

While the State seems to argue that it is the number of objections to an arbitrarily applied aggravator that would allow for this Court to consider this claim, the State's argument is disingenuous at best. Regardless of how many mentions the WEAC aggravator received in Mr. Gaskin's pretrial motion objecting to the aggravators, it was nonetheless objected to, as pointed out in the State's brief in opposition: "trial counsel wrote, 'the vague wording of (5)(i) and (h) [the subsection establishing the HAC aggravator] and ***their*** arbitrary application allows for ***their*** application in all murders.'" BIO at 21 (emphasis supplied). A "bare mention" notwithstanding, this Court clearly recognized that the objection was preserved when it remanded this matter to the FSC to consider Mr. Gaskin's *Espinoza* claim.

On remand, the FSC found the issue was not preserved, and even if it had been, the error was harmless as it related to Mr. Gaskin's death sentence for the murder of Georgette Sturmfels. *Gaskin v. State*, 615 So. 2d 679, 680 (Fla. 1993). However, the FSC ignored the impact that the instruction had on the jury because under Florida's then (unconstitutional) death penalty system, the role of the jury was merely to provide a majority recommendation to the judge, who would then make the final decision.

In the post-warrant litigation, the FSC again had the opportunity to correct the *Espinoza* error but failed to consider the important perspective of a jury, even under Florida's unconstitutional system at the time of Mr. Gaskin's trial. Mr. Gaskin received his death recommendation from a jury that heard essentially no mitigation yet was instructed that a very serious aggravating factor needed to be weighed on the

scale towards a death recommendation. The WEAC instruction provided no guidance for its application and would properly be seen as applying to every murder. Yet despite the obvious *Espinosa* error, and the misleading of the jury, the death recommendation was a mere eight-to-four. Under these circumstances, the error could not be harmless, under any standard and certainly not beyond a reasonable doubt.

ARGUMENT IV

The State refutes Mr. Gaskin's fourth argument stating that this Court lacks jurisdiction to review the FSC's judgment because the rejection of Mr. Gaskin's claims were based on well-settled state law grounds and rules of procedure, and that Mr. Gaskin was afforded all of his rights under the United States Constitution because the FSC has recognized its responsibility as the highest court in Florida to do justice and enforce those rights.

However, the State is mistaken in this assertion. While the FSC may have that duty, whether it has fulfilled that duty in this case is not certain.

Mr. Gaskin's post-warrant litigation raised a number of manifest injustices that are fully argued above. The FSC chose not to remedy these, although they could have done so. The law of the case, *res judicata* and collateral estoppel were overcome by the manifest injustices, yet there was no relief for Mr. Gaskin. *See State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). Moreover, the FSC has routinely decided that *stare decisis* only applies in certain situations. *See State v. Poole*, 297 So. 3d 487, 491 (Fla.

2020);[14] *Bush v. State*, 295 So. 3d 179, 201 (Fla. 2020);[15] *Phillips v. State*, 299 So. 3d 1013, 1022 (Fla. 2020);[16] *Lawrence v. State*, 308 So. 3d 544, 549 (Fla. 2020).[17] In each of these decisions, the FSC reduced the constitutional protections afforded to criminal defendants and especially death row prisoners.

The FSC completely abandoned its duty to remedy serious constitutional error in ruling on this case as it did, and these claims are worthy of this Court's exercise of jurisdiction to remedy this failure. In Mr. Gaskin's case he was a mere two votes from life, thus it is beyond belief that the lack of mitigation and the *Espinoza* error had no effect. 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.

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. The last man to be

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[14] In *Poole*, a five-member FSC rejected the majority opinion that had been entered four years earlier in *Hurst v. State*, ruling that *Hurst* was decided in error and was based on a fundamental reading of this Court's ruling in *Hurst v. Florida*. The FSC ruled that the Sixth Amendment only requires that the jury's decision that a defendant is *eligible* for the death penalty must be unanimous, and found that this Court had not definitively ruled that the death sentencing decision itself must be unanimous.
[15] In *Bush*, the FSC overturned Florida's century-old circumstantial evidence standard.
[16] In *Phillips*, the FSC overturned its own precedent and limited enforcement of *Hall v. Florida*, calling *Hall* an "evolutionary refinement" of law, rather than a development of fundamental significance, thus allowing for partial rather than full retroactivity in applying *Hall*.
[17] In *Lawrence*, the FSC abandoned proportionality review after decades of performing such reviews, often *sua sponte*.

executed by Florida also received an eight-to-four jury recommendation. This is all occurring while 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 as regards to 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.

While finality may have its place, it should not come at the expense of justice. The Florida courts like this Court were faced with numerous injustices in Mr. Gaskin's case and failed to do so. In fact, after this Court remanded Mr. Gaskin's case in 1991 to vacate two adjudications for felony murder, it took the Florida courts until 2014 to adhere to that mandate. The Florida Supreme Court had jurisdiction under the Florida Constitution and chose not to use this jurisdiction to remedy the failure to narrow Mr. Gaskin's case and to allow an individualized determination of whether he should be subject to death. This Court has both specific constitutional authority and the inherent authority to do justice in an individual case. Mr. Gaskin asks this Court to do so now.

CONCLUSION

The petition for writ of certiorari should be granted.

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