CAPITAL CASE

DOCKET 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 FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

James L. Driscoll Jr.
Florida Bar No. 0078840
Law Office of the Capital Collateral Regional Counsel
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone No. (813) 558-1600 ext. 608
Fax No. (813) 558-1601
Attorney of Record for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

In *Hurst v. Florida* this Court struck down Florida's longstanding capital-sentencing procedures, overruling *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989), because it authorized a judge, rather than a jury, to make the factual findings that were necessary for a death sentence. On remand, the Florida Supreme Court held that a death verdict could not be rendered without unanimous jury findings of at least one aggravating circumstance and that the aggravation is sufficient to outweigh any mitigating circumstances and to warrant death.

The Florida Supreme Court then held that it would apply both the federal and state jury-trial rights retroactively to inmates whose death sentences had not become final as of June 24, 2002 (the date of *Ring v. Arizona*, precursor of *Hurst*) but that it would deny relief to inmates whose death sentences were final on that date. Mr. Gaskin presents the following questions:

1. Whether the Fourteenth Amendment's guarantee of Equal Protection and the Eighth Amendment's prohibition of capricious capital sentencing impose limits upon a state court's power to declare unconventional rules of retroactivity, and whether those limits were transgressed here.

2. Whether Mr. Gaskin's death sentence was unconstitutional as applied.

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PETITION FOR WRIT OF CERTIORARI

Louis B. Gaskin respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

OPINIONS AND ORDERS BELOW

The unreported order of the Circuit Court, in and for, Flagler County, Florida, denying Mr. Gaskin's second successive postconviction motion filed under Florida Rule of Criminal Procedure 3.851 appears at Appendix A.

The opinion of the Supreme Court of Florida following the appeal of the trial court's denial of Mr. Gaskin's postconviction motion filed January 10, 2017 appears at Appendix B and is reported as *Gaskin v. State*, 237 So.3d 928 (Fla. 2018)

The opinion of the Supreme Court of Florida following direct appeal of Petitioner's judgment and sentence of death appears at Appendix C to the petition and is reported at *Gaskin v. State*, 591 So.2d 917 (Fla. 1991).

The opinion of the Supreme Court of Florida following appeal after remand from this Court (*Gaskin v. Florida*, 505 U.S. 1216, 112 S.Ct. 3022, 120 L.Ed.2d 894 (1992)) appears at Appendix D to the petition and is reported at *Gaskin v. State*, 615 So.2d 679 (Fla. 1993).

The opinion of the Supreme Court of Florida following appeal of the denial of Petitioner's first successive postconviction motion appears at Appendix E to the petition and is reported at

Gaskin v. State, 218 So.3d 399, 400 (Fla. 2017), *reh'g denied,* No. SC15-1884, 2017 WL 2210388 (Fla. May 17, 2017) *cert denied Gaskin v. Florida,* 138 S.Ct. 471 (2017).

The unreported order of the Circuit Court of the Seventh Judicial Circuit denying Petitioner's First Successive Motion to Vacate Judgment of Conviction and Sentence appears at Appendix F.

The unreported Corrected Judgment and Sentence Vacating the Death Penalty Imposed in Counts II and IV of the Indictment and the Adjudication of Guilt in Said Counts appears at Appendix G.

JURISDICTION

The Florida Supreme Court's final judgment was entered on February 28, 2018. Mr. Gaskin did not seek rehearing. Mr. Gaskin filed a motion for a 60 day extension of time which the Honorable Justice Clarence Thomas granted, which extended the time for filing until July 28, 2018. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> 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

states:

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

The Fourteenth Amendment to the United States Constitution, Section 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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

1. Case History

Following trial, a jury found Mr. Gaskin guilty of two counts of first-degree murder in the death of Robert Sturmfels (premeditated and felony murder); two counts of first-degree murder in the death of Georgette Sturmfels (premeditated and first-degree murder); one count of armed robbery of the Sturmfels; one count of burglary of the Sturmfels' home; one count of attempted first-degree murder of Joseph Rector; one count of armed robbery of the Rectors; and one count of burglary of the Rector's home. The jury found Mr. Gaskin not guilty of attempted first-degree murder of Mary Rector. (Vol. VII R. 1285 1294).

Following the jury's guilty verdict, Mr. Gaskin did not have a jury for penalty phase, just an advisory panel. The State argued:

> First, that Louis Bernard Gaskin has previously been convicted of another capital felony or a felony involving the use or the threat of violence against another person.
>
> In this particular case, and, as is allowed under and the Law, the very acts which have brought him into this Courtroom are the acts evincing that previous violence.
>
> In other words, the fact that the violence and the murders and the burglaries and, the robberies are all occurring within the same set of circumstances does not disqualify them for consideration.
>
> If they did, Your Honor would not instruct you that it is appropriate for you to consider them as aggravation. I do not need to review with you the numerous charges. You have heard the evidence and delivered a verdict, really just a short time ago, but there is more than

> sufficient previous convictions, as, His Honor, had adjudicated guilt in this case on those nine verdicts of prior felonious assaults, crimes.

(Transcript of June 18, 1990 Penalty Phase).

The advisory panel recommended death, by a vote of eight to four based on each victim, not each capital offense. The trial court instructed the advisory panel on the aggravating factor that Mr. Gaskin "had been *previously convicted of another capital* offense or a felony involving the use or threat of violence to some person[.]" (Vol. VIII R.1297).

The advisory panel's recommendation was without any findings of fact, or anything approximating the constitutional requirements of *Hurst v. Florida,* 136 S.Ct. 616 (2016) and or the Florida Supreme Court's decision in *Hurst v. State,* 202 So.3d 40 (Fla. 2016). The court made the findings of fact that subjected Mr. Gaskin to the death penalty, and sentenced him to death for Counts I-IV and sentenced him to death on those counts. *See* (Vol. VIII R. 1303 referencing the judgments and sentences that followed, R. 1311-24).

The trial court based the death sentence for the murder of Robert Sturmfels on the felony murder and premeditated murder of Georgette Sturmfels and the other charges Mr. Gaskin was convicted. (Vol. VIII R. 1313). The trial court based the death sentence for the murder of Georgette Sturmfels on the felony murder and premeditated murder of Robert Sturmfels and the other charges Mr.

Gaskin was convicted. (Vol. VIII R. 1320).

Mr. Gaskin appealed to the Florida Supreme Court. The court vacated the two felony murder convictions, affirmed the other convictions and sentences, "including two [remaining] sentences of death" and remanded for proceedings consistent with the Court's opinion. *Gaskin v. State*, 591 So.2d 917, 922 (Fla. 1991), cert. granted, judgment vacated, 505 U.S. 1216, 112 S. Ct. 3022, 120 L. Ed. 2d 894 (1992). The Florida Supreme Court's mandate issued on January 6, 1991. No proceedings consistent with the Florida Supreme Court's opinion were held until 2014, well beyond 2002.

On June 29, 1992, this Court granted certiorari review, vacated the judgment, and remanded the case to the Florida Supreme Court for reconsideration in light of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). *Gaskin v. Florida*, 505 U.S. 1216, 112 S.Ct. 3022, 120 L.Ed.2d 894 (1992).

On remand, the Florida Supreme Court affirmed Mr. Gaskin's two sentences based on a finding that the vagueness challenge to the heinous, atrocious or cruel jury instruction (*Espinosa* error) was not properly preserved for appellate review. *Gaskin v. State*, 615 So.2d 679 (Fla. 1993). The court did not remand for the trial court to vacate the two felony murder convictions or resentencing. This Court denied certiorari. *Gaskin v. Florida*, 510 U.S. 925, 114 S.Ct. 328 (1993). At this time the Florida Supreme Court's order for remand should have resumed yet counsel continued to seek relief

in state and federal court and was denied relief.

On August 12, 2014, some 23 years after the mandate issued in *Gaskin v. State*, 591 So.2d 917 (Fla. 1991), the lower court vacated the felony murder adjudications as ordered by the Florida Supreme Court as the court had mandated earlier. (PC2. R. 56-57). Mr. Gaskin had no attorney to represent him at the time that the lower court issued the order. Mr. Gaskin filed a pro se motion for rehearing. The court granted the State's "Motion to Strike Unauthorized *Pro Se* Pleading, Defendant's Motion for Rehearing" on November 18, 2014.

Mr. Gaskin filed a pro se notice of appeal, appealing to the Fifth Circuit Court of Appeal for Florida. (PC2 R. 79-80). Following receipt of an order from the circuit court, the district court dismissed the appeal, according to the Clerk of the Fifth District Court of Appeals Case Docket.

On May 6, 2015, Mr. Gaskin filed his First Successive Motion to Vacate Judgement of Conviction and Sentence, alleging that the use of both premeditated murder and felony murder as aggravating circumstances amounted to improper doubling of aggravators by the advisory panel, sentencing judge, and the Florida Supreme Court. (PC2. 95-102). On August 6, 2015 the lower court denied the successive motion. (PC2. 133-135).

Mr. Gaskin appealed to the Florida Supreme Court. Mr. Gaskin filed his initial brief after certiorari was granted in *Hurst v.*

Florida but prior to the court issuing an appellate decision in Mr. Gaskin's case. The reply brief was filed on January 12, 2016, the same date that this Court issued *Hurst*. The Florida Supreme Court affirmed the lower court's denial and went on to deny relief based on *Hurst v. Florida* without briefing or oral argument. *Gaskin v. State*, 218 So. 3d 399 (Fla.), *reh'g denied*, No. SC15-1884, 2017 WL 2210388 (Fla. May 17, 2017), and *cert. denied sub nom. Gaskin v. Fla.*, 138 S. Ct. 471, 199 L. Ed. 2d 362 (2017).

Justice Lewis dissented without an opinion. *Id.* at 401. Justice Pariente dissented finding that, "Even without a finding a full retroactivity, under Justice Lewis's concurring in result opinion in *Asay*, *Hurst* would apply retroactively to Gaskin under *James v. State*, 615 So.2d 668 (Fla. 1993), because Gaskin asserted, presented, and preserved a challenge to the lack of jury factfinding in Florida's capital sentencing procedure." *Id.* at 402. Justice Pariente found that the error was not harmless. *Id.* at 403. Justice Perry dissented and would have found that *Hurst* was retroactive regardless of whether a sentence was final before *Ring*. *Id.* at 404-405.

Prior to the Florida Supreme Court's opinion, on January 10, 2017, Mr. Gaskin filed a successive postconviction motion based on *Hurst* and *Hurst v. State*. Once Mr. Gaskin had a properly filed motion that complied with any possible time limits, he filed a motion for the court to relinquish jurisdiction so that he could

exhaust his *Hurst* and related claims in the lower court. In the alternative, the motion asked for supplemental briefing. The Florida Supreme Court denied this motion as moot.

Mr. Gaskin's January 10, 2017 *Hurst* related postconviction motion was denied by the lower court. Mr. Gaskin appealed the denial to the Florida Supreme Court. On December 19, 2017, the Florida Supreme Court required Mr. Gaskin to "show cause [ ], why the trial court's order should not be affirmed in light of [the Florida Supreme] Court's decision *Hitchcock v. State*, SC17-445." The Florida Supreme Court denied Mr. Gaskin appellate briefing on the *Hurst* and *Hurst* related claims the lower court denied. On February 28, 2018, the Florida Supreme Court affirmed the lower court's denial of postconviction relief. *Gaskin v. State*, 237 So.3d 928 (Fla. 2018). **The court did not address Mr. Gaskin's argument that his case became final in 2014, not in 1993 when this Court denied certiorari, and relied on its prior decision in *Gaskin v. State*, 218 So.3d 399, 491 (2017).** *See Id.* at 929.

Justice Pariente concurred because the Florida Supreme Court's opinion in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017) had become final. Nevertheless, Justice Pariente "continue[d] to adhere to the views expressed in [Justice Pariente's] dissenting opinion in *Hitchcock*. *Id.* at 929.

2. The Florida Supreme Court's Decisions Following *Hurst V. Florida*.

The Florida Supreme Court has only allowed for limited retroactive application of this Court's decision in *Hurst v. Florida*, and its own decision in *Hurst v. State,* despite finding that under Florida's death penalty scheme unanimous jury verdicts are required to meet the demands of the Florida Constitution and the Eighth Amendment. The Florida Supreme Court drew a line based on the date each individual case became final in relation to the date this Court issued *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

In *Ring*, this Court held that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 2432. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court stated the crux of *Ring*, that:

> "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.

Hurst, 136 S.Ct. at 621. (Internal citations omitted). This Court applied *Ring* directly to Florida's death penalty system, overruled *Spaziano* and *Hildwin,* and found:

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require

> the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So.2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy *Hurst* could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased *Hurst's* authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at 621-22.

On remand, a majority of the Florida Supreme Court applied this Court's decision in *Hurst* to Florida's death penalty system and held,

> that [this] Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the

> aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst v. State, 202 So.3d at 44. The court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution and that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding:

> [T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these

> constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So.3d 40, 59-60 (Fla. 2016). The court cited to Eighth Amendment concerns finding that, "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. (Emphasis in original). "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence is required under the Eighth Amendment." *Id.* at 59.

In *Perry v. State*, 210 So.3d 630 (Fla. 2016) a majority of the Florida Supreme Court found Florida's first post-*Hurst* revision of the death penalty statute was unconstitutional and found:

> In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in *Hurst*. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. *Hurst,* 202 So.3d at 44-45. Those

> findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id.* at 53-54, 59-60.

Id. at 633.

When addressing the question of retroactivity of *Hurst v. Florida* and its own decision in *Hurst v. State*, a majority found that *Hurst v. Florida* applies retroactively to cases that became final after *Ring v. Arizona* but not before. In *Mosley v. State,* 209 So.3d 1248, 1275 (Fla. 2016), the majority found that *Hurst* and *Hurst v. State* applied retroactively to cases which became final after *Ring v. Arizona* was issued. The majority analyzed retroactivity under the fundamental fairness approach of *James v. State*, 615 So.2d 668 (Fla. 1993) and the approach of *Witt v. State*, 387 So.2d 922, 926 (Fla. 1980).

The majority found that *Mosley* was entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State* under the fundamental fairness approach of *James* "because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn . . .." *Id.* at 1275.

The majority also found *Hurst v. Florida and Hurst v. State* retroactive to Mr. Mosley's case under Florida's *Witt* standard. *Id.* at 1276. The *Witt* standard grants retroactive application of changes in the law if,

> ". . .the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So.2d at 931. Determining the retroactivity of a holding "requir[es] that [th[e] Florida Supreme] Court] resolve a conflict between two important goals of the criminal justice system—ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other—within the context of post-conviction relief from a sentence of death." *Id.* at 924-25. Put simply, balancing fairness versus finality is the essence of a *Witt* retroactivity analysis. *See id.* at 925.

Id. The majority decided that the first two prongs were met because *Hurst v. State* and *Hurst v. Florida* emanated from this Court and the Florida Supreme Court and were constitutional in nature. *Id.* The third prong required the majority to decide whether the change in the law was a development of fundamental significance. As the majority explained,

> To be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. We conclude that *Hurst v. Florida*, as interpreted by this Court in *Hurst*, falls within the category of cases that are of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" from Stovall14 and Linkletter, which we address below. *Id.*
>
> The three-fold test of *Stovall* and *Linkletter* requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. *Witt*, 387 So.2d at 926; *Johnson*, 904 So.2d at 408.

Id. at 1276-77.

The majority found the threefold test of *Stovall* and *Linkletter* was met. *Id.* at 1277. The majority declared that the purpose of the new rule announced in *Hurst v. Florida* is,

> to ensure that capital defendants' foundational right to a trial by jury—the only right protected in both the body of the United States Constitution and the Bill of Rights and then, independently, in the Florida Constitution—under article I, section 22, of the Florida Constitution and the Sixth Amendment to the United States Constitution—is preserved within Florida's capital sentencing scheme. *See Hurst*, 202 So.3d at 57.

Id. The majority concluded,

> Thus, because *Hurst v. Florida* held our capital sentencing statute unconstitutional under the Sixth Amendment to the United States Constitution, and Hurst further emphasized the critical importance of a unanimous verdict within Florida's independent constitutional right to trial by jury under article I, section 22, of the Florida Constitution, the purpose of these holdings weighs heavily in favor of retroactive application.

Id. at 1278. The majority found that, as far as post-*Ring* cases were concerned, "fairness strongly favors applying *Hurst* retroactively to" the time that *Ring* was issued. *Id.* at 1280. The majority found that, "From *Hurst* [v. State], it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State. Thus, this factor weighs in favor of granting retroactive relief to the point of the issuance of *Ring*. *Id.* at 1280.

Lastly, the majority found that the effect on the

administration of justice would not be so great as to deny retroactive application to the post-*Ring* cases. *Id.* at 1281. The majority considered that:

> Of course, any decision to give retroactive effect to a newly announced rule of law will have some impact on the administration of justice. That is not the inquiry. Rather, the inquiry is whether holding a decision retroactive would have the effect of burdening "the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt*, 387 So.2d at 929-30. By embracing this principle as an analytical lynchpin, together with the other two prongs of the three-part test, the Court was attempting to distinguish between "jurisprudential upheavals" and "evolutionary refinements," the former being those that justify retroactive application and the latter being those that do not.

Id. at 1281-82. The Court found that it did not so burden the administration of justice because,

> capital punishment "connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So.2d at 926. In this case, where the rule announced is of such fundamental importance, the interests of fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

Id. at 1282.

While this decision was correct, and fair, it was not based on anything about the nature of the crime or Mr. Mosley's mitigation. Certainly, relief was appropriate, but the majority's basing the decision on the finality date of Mr. Mosley's case had no relation to the actual wrongfulness of the constitutional

violations it remedied, the nature of Mr. Mosley's case or the actual functioning of Florida's death penalty scheme.

The Florida Supreme Court considered retroactivity of *Hurst v. Florida* for *pre-Ring* cases and came to an entirely different conclusion in *Asay v. State,* 210 So.3d 1, 15 (Fla. 2016). The majority found that *Hurst v. Florida* did not apply retroactively to allow relief for Mr. Asay under just the Sixth Amendment.

In *Asay*, the majority held:

> After weighing all three of the above factors, we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*. We limit our holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*. When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida. Accordingly, we deny Asay relief.

Id. at 22. The majority found that the first prong of the *Stovall/Linkletter* test, the "purpose of the new rule" weighed in Mr. Asay's favor. The majority discussed that the importance of the right to a jury trial under the United States and Florida Constitutions which "th[e Florida Supreme] Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life[ ]." *Id.* at 18. The majority found that the reliance on the old rule weighed "against retroactive application of *Hurst v. Florida*" to Mr. Asay's pre-*Ring* case. *Id.* at 19. The majority found this Court had previously

relied upon Supreme Court precedent and the breadth of the Court's prior reliance.

Lastly, the majority considered the "Effect on the Administration of Justice." The majority recognized that the Florida Supreme Court's prior analysis of the retroactivity of *Ring* under the first prong of *Witt* "was impacted by an incorrect understanding of the Sixth Amendment claim . . . ." The majority found that the Court's conclusion in *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005) that "to apply *Ring* retroactively in Florida would . . . 'would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings'" was correct. *Id.* at 22; *citing Johnson* at 412.

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT'S DENIAL OF RETROACTIVE APPLICATION OF *HURST V. FLORIDA* AND RETROACTIVE APPLICATION OF THE CASES THAT FOLLOWED PURSUANT TO SUCH PRECEDENT WAS UNCONSTITUTIONAL AND PREJUDICED GASKIN WHOSE SENTENCES OF DEATH ARE UNRELIABLE AND ARE BASED ON FACTS NOT FOUND BY THE JURY AND DID NOT BECOME FINAL UNTIL AFTER 2014.

The Florida Supreme Court's denial of retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), on the ground that Mr. Gaskin's death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016) was incorrect. Granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), violated

Mr. Gaskin' right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam))and *Johnson v. Mississippi*, 486 U.S. 578, 584-585, 587 (1988). Furthermore, the Florida Court's position is inaccurate as Mr. Gaskin's case became final in 2014. Denial of such relief violates *Hurst v. Florida*.

This case arises at the intersection of two principles that have become central fixtures of the Court's jurisprudence over the past four and a half decades:

The first principle, emanating from *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty" (*id.* at 428). This principle "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The Eighth Amendment's concern against capriciousness in capital cases refines the older, settled precept that Equal Protection of

the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The second principle, originating in *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in *Teague v. Lane*, 489 U.S. 288 (1989) recognizes the pragmatic necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance of various rules of non-retroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines.

The Court has struck a balance between the two principles by honoring the second even when its application results in the execution of an inmate whose death sentence became final before the date of an authoritative ruling establishing that the procedures used in his or her case were constitutionally defective. *E.g., Beard v. Banks*, 542 U.S. 406 (2004). If nothing more were involved here, that balance would be decisive. But the Florida Supreme Court's post-*Hurst* retroactivity rulings do involve more. They inaugurate a kind and degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence.

The particular application of non-retroactivity resulting from the Florida Supreme Court's *Mosley-Asay* divide involves a level of caprice that runs far beyond that tolerated by standard-fare *Linkletter* and *Teague* rulings. Mr. Gaskin's case is precisely the type of case in which relief makes the most sense is and the denial of relief irremediably perverse. Even more perverse is that Gaskin's case was remanded back to the trial court for proceeding consistent with the Florida Supreme Court opinion in 1991. As a direct result of such the Florida Supreme Court's denial of retroactive application of the *Hurst* cases and *Mosley*, the decision in Mr. Gaskin's case was unconstitutional, prejudicial, fundamentally unreliable and harmful. This Court should grant certiorari and consider whether Mr. Gaskin's case rises to a degree of capriciousness and inequality that violates the Eighth Amendment and Equal Protection respectively.

The Florida Supreme Court has only held this Court's decision in *Hurst v. Florida,* and its own decision in *Hurst v. State*, retroactive to cases that became final after *Ring v. Arizona*.

Following Mr. Gaskin's direct appeal of his judgment and sentence this Court granted certiorari and remanded the case to the Florida Supreme Court for reconsideration in light of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). *Gaskin v. Florida*, 505 U.S. 1216, 112 S.Ct. 3022, 120 L.Ed.2d 894 (1992). On remand, the Florida Supreme Court found that the

Espinosa issue was not preserved because the issue of unconstitutional vagueness as to the jury instruction struck down in *Espinosa* had not been preserved for review. *Gaskin v. State*, 615 So.2d 679, 680 (Fla. 1993). This certainly was a denial of relief, but what is important is that the Florida Supreme Court's opinion never reissued the judgment that this Court vacated by the certiorari grant. At this point the Florida Supreme Court's order to strike the felony murder convictions should have been followed yet counsel still sought postconviction relief.

Mr. Gaskin sought certiorari for the Florida Supreme Court's post-remand decision, which this Court denied. *Gaskin v. Florida*, 510 U.S. 925, 114 S. Ct. 328, 126 L. Ed. 2d 274 (1993). At this time the Florida Supreme Court order for remand should have resumed yet counsel continued seeking relief. All that the opinion denying certiorari stated was, "Petition for Writ of Certiorari to the Supreme Court of Florida denied." *Id.* This Court's decision said nothing about vacating or otherwise altering the Court's earlier decision vacating the "judgment."

Mr. Gaskin never had a judgment after this Court's certiorari grant vacating his judgment until the circuit court finally vacated his convictions and death sentences for the two felony murder convictions. It was only then that Mr. Gaskin's case became final.

The circuit court's 2014 order vacating of the felony murder convictions fundamentally altered the original judgment to the

extent that it is a new judgment. Because Mr. Gaskin's case only became final when the state circuit court issued the order vacating the two felony murder convictions, Mr. Gaskin's case became final for purpose of the Florida Supreme Court's retroactivity distinction between *Asay* and *Mosley* in 2014 and thus was final after *Ring*. This allowed Mr. Gaskin to raise the improper doubling of aggravating factors, as well as *Hurst* and *Hurst*-related claims. Nevertheless, simply relying on *Asay* the majority found:

> Finally, Gaskin argues that he is entitled to relief in light of *Hurst v. Florida*. Because Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under *Hurst v. Florida*. *See Asay v. State*, ---So.3d ----, ----, 2016 WL 7406538 at *13 (Fla. 2016) (holding that *Hurst* is not retroactive to cases that became final before the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). Accordingly, we affirm the circuit court's order summarily denying Gaskin's successive postconviction motion.

Gaskin, 218 So.2d at 401. The Florida Supreme Court affirmed the denial of Mr. Gaskin's fully pled postconviction motion raising the Hurst and Hurst-related claims, and which is at issue here, for the same incorrect reason. *Gaskin*, 237 So.3d at 928-29.

Apart from the arbitrary distinction based on *Ring v. Arizona*, as far as Mr. Gaskin is concerned, Mr. Gaskin was clearly entitled to relief based on his case only becoming final when the lower court vacated the two convictions. The Florida Supreme Court has applied its own arbitrary rule arbitrarily in Mr. Gaskin's case in violation of the Equal Protection Clause.

In *Armstrong v. State*, 211 So.3d 864 (Fla. 2017), the Florida Supreme Court granted relief in a case that was materially indistinguishable from Mr. Gaskin's case. Mr. Armstrong was convicted of first-degree murder and attempted murder and was sentenced to death based on an advisory panel recommendation of 9-3. *Armstrong v. State*, 642 So.2d 730 (Fla. 1994). After the direct appeal, a Massachusetts court vacated a conviction that was used as aggravating factor during his Florida capital trial. *Armstrong v. State*, 862 So.2d 705, 717 (Fla. 2003). The Florida Supreme Court found that "because of the invalidation of a prior felony conviction that was introduced at his penalty phase," it "necessitate[d] resentencing before a new jury." *Id.* at 715.

Mr. Armstrong's resentencing took place in 2007 and "the jury again recommended death by a vote of nine to three. Following a *Spencer* hearing, the trial court found the existence of three aggravators, one statutory mitigator, and four nonstatutory mitigators and imposed a sentence of death." *Armstrong v.* State, 73 So.3d 155, 160-61 (Fla. 2011). As *Hurst v. Florida* and *Hurst* v. State held, the judge finding the aggravators and that they outweighed the mitigators was unconstitutional. Mr. Armstrong again sought postconviction relief. When he was denied he appealed to the Florida Supreme Court. The Florida Supreme Court found that:

> Because Armstrong was condemned by a vote of nine to three, we find that Armstrong's sentence is a result of a *Hurst v. Florida*, ---U.S. ----, 136 S.Ct. 616, 193

> L.Ed.2d 504 (2016), error. We therefore must consider whether the error was harmless beyond a reasonable doubt. *See Hurst*, 202 So.3d at 67.
>
>> The harmless error test, as set forth in Chapman[v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.
>
> *Id.* at 68 (quoting *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986)).
>
> The jury in this case recommended death by a vote of nine to three. While the aggravators are such that no reasonable juror would not have found their existence,1 we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation. We can only determine that the jury did not unanimously recommend a sentence of death.
>
> Because we cannot make these determinations, we cannot say that there is no possibility that the error did not contribute to the sentence. We therefore determine that the error in Armstrong's sentencing was not harmless beyond a reasonable doubt. Accordingly, we reverse the postconviction court's order and remand for a new penalty phase. *See Hurst*, 202 So.3d at 69.

Armstrong, 211 So.3d at 865.

Mr. Gaskin was no less entitled to relief than Mr. Armstrong because the constitutional violation was the same and the facts of each case are materially indistinguishable. They were convicted for crimes that occurred in 1989 and 1990. Mr. Gaskin's case became final after the trial court struck the felony murder convictions even though the Florida Supreme Court failed to recognize this.

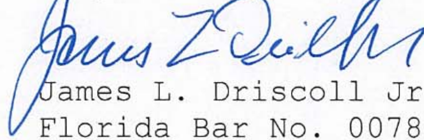
Mr. Gaskin's mere 8-4 death recommendation was partially attributable to an unconstitutional jury instruction on the Heinous, Atrocious and Cruel aggravating factor which the Florida Supreme Court refused a remedy because the issue was not preserved. Mr. Armstrong received a new penalty phase that placed him in a position to later receive *Hurst* relief because the jury considered a conviction later reversed. At Mr. Gaskin's trial the advisory jury was instructed with the improper Heinous, Atrocious and Cruel instruction and the two prior felony murder convictions but he was denied relief.

Whether or not Mr. Gaskin's case was final after *Ring* or before, and pursuant to the constitutional violations that he and Mr. Armstrong suffered were the same. Mr. Gaskin has been raising the issues that came to light in *Ring* before *Ring* was even issued, dating back to his trial. Mr. Gaskin was denied equal protection when compared to the cases in which relief was granted following *Hurst* and his remaining death sentence is arbitrary and capricious and grossly unfair. This Court should grant certiorari to decide whether the Florida ruling in this case violates Equal Protection and was arbitrary and capricious under the Eighth and Fourteenth Amendments.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,



James L. Driscoll Jr.,
Florida Bar No. 0078840
Office of the Capital Collateral
Regional Counsel
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone No. (813) 558-1600 ext. 608
Attorney of Record for Petitioner