DOCKET NO. 22-7236
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS BERNARD GASKIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Gaskin killed Robert and Georgette Sturmfels in their home. He shot at both the Sturmfels from outside their house as they sat in their living room. Robert was hit in the chest and died shortly after, but Georgette managed to find cover inside the home after being shot. Gaskin broke in and found her breathing and bleeding inside a hallway. He shot Georgette and Robert in the head and proceeded to steal items from the home. He then went to the home of Joseph and Mary Rector. After failing to lure them outside, he shot them, as well, as they sat inside their home. While Joseph was shot in the chest, he and Mary managed to grab their keys and escape to their car, where they were able to drive away from Gaskin. He stole items from their house, as well, and then left.

Florida Governor Ron DeSantis recently signed a death warrant for Gaskin and his execution is scheduled for April 12, 2023. Gaskin asked Florida's courts to stay his execution and vacate his sentence. The Florida Supreme Court rejected Gaskin's claims and refused to stay his execution on both procedural state law and substantive grounds. This Court should decline to exercise certiorari jurisdiction over the following questions presented:

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?

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The Florida Supreme Court's decision petitioned for review appears as *Gaskin v. State*, No.SC23-415, 2023 WL 2799414, at *1 (Fla. April 6, 2023).

CONSTITUTIONAL 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.

JURISDICTION

This Petition seeks review of a ruling from the Florida Supreme Court, and therefore any jurisdiction is conferred by 28 U.S.C. §1257.

STATEMENT OF THE CASE AND FACTS

Gaskin is currently under an active death warrant, with execution scheduled for April 12, 2023. The State provides the following relevant factual and procedural summary of prior proceedings and litigation under the instant warrant.

A. Trial and Prior Postconviction Proceedings

On December 20, 1989, Louis Gaskin murdered Robert and Georgette Sturmfels in their home. *Gaskin v. State*, 591 So.2d 917, 918 (Fla. 1991). He approached their isolated house at night and circled the house several times armed with a gun. *Id.* Spotting the two through a window, Gaskin shot the couple, alternating between the two. *Id.* Robert died quickly, but Georgette was able to crawl into another part of the house and Gaskin pursued running around the outside. *Id.* When he found her, he shot her again, and then shot both victims once more in the head after breaking into the home. *Id.* He then stole several items of value, including cash, jewelry, VCRs, and lamps. *Id.*

He then went to the home of Joseph and Mary Rector and attempted to do the same to them. He lured them outside and shot Joseph once before the pair were able to get to their car and drive to the hospital, Gaskin shooting at the car as they sped off. *Id.* He then burglarized their home. *Id.* He later went to the house of his girlfriend's cousin, Alfonso Golden, and dropped off several of the items saying they were Christmas presents. *Id.* He told Golden he had "jacked" the items and left the victims "stiff". *Id.* Golden learned of the murders on the news and went to the authorities, turning over the items which were identified as belonging to the Sturmfels. *Id.* Gaskin was arrested and confessed to the crimes, directing the police to additional evidence in a nearby canal. *Id.* During the investigation Gaskin gave a very detailed statement about the murders, saying:

> Aimed, aimed at him, pulled the trigger and he was shot. To his wife it appeared that he was having a heart attack and then he said, Oh, my

> God, what's happening and I shot him again and his wife realized what was going on. She proceeded to run. I shot her. He was still standing and he tried to run and I shot him again. He fell down. Didn't move anymore. It was like his wife got a little burst of energy from somewhere; proceeded to crawl out and shot her again. She still proceeded. She got into the hallway out of sight, so I went around to the other doors that faced the hallway. She was sitting there holding her head looking at the blood. I shot her again. She fell over. I went back around to the front; pulled the screen out; bust the window; opened it up; proceeded in and closed the window back , closed the blinds; checked them out and shot him again in the head at point-blank range. Went around to the lady. She was still groggily dying; shot her again in the head at point-blank range and then closed the blinds in the rest of the house.

Supp. Rec. 44-45.

The jury found Gaskin guilty of first-degree murder under premeditated and felony murder theories of both Robert and Georgette. They also found him guilty of armed robbery of the Sturmfels; burglary of the Sturmfels' home; attempted first-degree murder of Joseph Rector; armed robbery of the Rectors; and burglary of the Rector home.

Following a penalty phase, the jury recommended death by a vote of 8-4 for each murder. 591 So.2d at 919. The trial judge found three aggravators applied to both murders: 1) the murders were committed in a cold, calculated, and premeditated manner; 2) Gaskin had previously been convicted of another capital offense or of a felony involving the use or threat of violence based on his contemporaneous convictions; and 3) the murders were committed while the defendant was engaged in the commission of a robbery or a burglary. *Id.* The judge found a fourth aggravator for Georgette's murder, that it was especially wicked, evil, atrocious, or cruel. *Id.* In mitigation, the judge found that the murders were

committed while Gaskin was under the influence of extreme mental or emotional disturbance and that he had a deprived childhood. *Id.* The judge followed the jury's recommendation and sentenced Gaskin to death for each murder. *Id.*

The Florida Supreme Court upheld his convictions and death sentences on direct appeal. *Id.* After remand from this Court to reconsider his case in light of the decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), the Florida Supreme Court again affirmed his death sentences. *Gaskin v. State*, 615 So.2d 679 (Fla. 1993). Since that Court's decision in 1993, Gaskin has continued to file motions for postconviction relief. The Florida Supreme Court affirmed the denial of his initial motion, his first and second successive motions, and dismissed two pro se all writs petitions.[1]

Gaskin also pursued relief in federal court and filed a federal habeas petition in the federal district court on June 25, 2003. The district court denied relief on March 23, 2006, and the Eleventh Circuit Court of Appeals affirmed that denial on August 3, 2007.[2]

B. Litigation Under the Instant Warrant

The governor signed a death warrant for Gaskin on March 13, 2023. After the public records litigation, on Saturday, March 18, 2023, Gaskin filed a third

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[1] *See, Gaskin v. State*, 822 So.2d 1243 (Fla. 2002); *Gaskin v. State*, 218 So.3d 399 (Fla. 2017), *cert. denied*, 138 S.Ct. 471 (2017); *Gaskin v. State*, 237 So.3d 928 (Fla. 2018), *cert. denied*, 139 S.Ct. 327 (2018); *Gaskin v. State*, No. SC19-1097, 2020 WL 57987 (Fla. Jan 6, 2020); *Gaskin v. State*, No. SC20-653, 2020 WL 2467112 (Fla. May 13, 2020).

[2] See, *Gaskin v. McDonough*, 3:03-cv-547-J-20 (M.D. Fla. 2003); *Gaskin v. Sec'y, Dept. of Corr.*, 494 F.3d 997, 1000 (11th Cir. 2007).

successive postconviction motion in the circuit court raising four claims. 2023 3rd Succ. PCR 422-449. The four claims were: (1) his death sentence violated evolving standards of decency because the jury was never presented with meaningful mitigation; (2) he was entitled to relief under *Hurst* [3] due to a non-unanimous jury recommendation; (3) the lengthy delay between his clemency proceedings and the signing of a warrant entitled him to relief; and (4) his lengthy stay on death row entitled him to relief.

On March 19, 2023, the State filed its answer to the motion asserting that all four claims should be summarily denied. 2023 3rd Succ. PCR 484-507. On March 20, 2023, the circuit court conducted a case management conference, commonly referred to as a *Huff*[4] hearing, at which the court heard the arguments of counsel regarding whether any of the four claims required further factual development at an evidentiary hearing. That same day, the court entered an order summarily denying the third successive postconviction motion. 2023 3rd Succ. PCR 522-561.

Gaskin appealed the circuit court's denial of claims 1, 2, and 4 to the Florida Supreme Court while abandoning Claim 3. He also filed a habeas petition in the Florida Supreme Court alleging that the *Espinosa* error in his trial entitled him to relief. Finally, he moved to stay his execution. The State opposed the stay and habeas petition and argued that the court should affirm the denial of his third successive postconviction motion.

The Florida Supreme Court rejected all claims raised in both Gaskin's appeal

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[3] 577 U.S. 92 (2016)
[4] 622 So. 2d 982 (1993).

and habeas petition on procedural, state-law grounds and substantive, merits-based grounds. *Gaskin v. State*, No.SC23-415, 2023 WL 2799414, at *1 (Fla. April 6, 2023).

REASONS FOR DENYING THE WRIT

Gaskin seeks certiorari review in an attempt to deprive his victims of justice on the eve of his execution for heinous crimes committed decades ago. Every question he presents now should have been (or was) asked and answered long ago. Gaskin's long-belated certiorari questions are not entitled to any answer from this Court on that basis alone. *Cf. Bucklew v. Precythe*, 139 S.Ct. 1112, 1133-34 (2019) ("Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay.") This Court should deny certiorari and bring true finality to the victims, the State of Florida, and Louis Bernard Gaskin.

Gaskin raises four long-deferred questions for this Court to consider less than a week before his execution: 1) whether his trial counsel's mitigation presentation renders his death sentence invalid; 2) whether he was entitled to a unanimous death recommendation from the jury; 3) whether the *Espinosa* error in his case entitles him to relief; 4) whether the Florida courts' application of their procedural rules amounts to a manifest injustice.

The State will deal with each of Gaskin's dilatory questions presented in turn. But none warrants this Court's review. The bottom line is this case would be uncertworthy under normal circumstances, much less on the eve of an execution. The decision below properly stated and applied all governing federal principles, is

based primarily on state law grounds, does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or United States Court of Appeals, and does not conflict with any decision of this Court. Petitioner does not argue otherwise, and review should be denied on that basis alone. *See* Sup. Ct. R. 10, 14 (g)(i). This Court should refuse to grant certiorari.

ARGUMENT I

Petitioner's trial counsel made a reasonable strategic decision to limit his mitigation presentation, and Petitioner's mitigation claims are procedurally barred and without merit.

Petitioner argues under the Eighth and Fourteenth Amendments that his death sentence is unconstitutional because the judge and jury were not presented what he calls significant mitigation. While he styles his argument under those two amendments, the heart of his argument is in fact he was denied the effective assistance of counsel as required by the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984). The Florida Supreme Court recognized this and found that this claim was procedurally barred, as it had been raised and rejected previously, and that even if it weren't, the claim was meritless. 2023 WL 2799414 at *4.

This successive postconviction claim is procedurally barred by the law-of-the-case doctrine. The law-of-the-case doctrine bars reconsideration of those legal issues that were actually considered and decided in a former appeal. *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001). And the law-of-the-case doctrine, which is

designed to prevent relitigation of the same issues, applies to postconviction proceedings. *McManus v. State*, 177 So.3d 1046, 1047 (Fla. 1st DCA 2015) (citing *State v. McBride*, 848 So.2d 287, 290-91 (Fla. 2003)); *Zeigler v. State*, 116 So.3d 255, 258 (Fla. 2013). The law-of-the-case doctrine also applies regardless of whether a party employs different arguments when reraising the same claim. *Sireci v. State*, 773 So.2d 34, 40-41 (Fla. 2000) (finding claims procedurally barred and observing that even if a defendant uses a different argument to relitigate the same issue, the claim remains procedurally barred); *Mills v. State*, 684 So.2d 801, 805 (Fla. 1996) (concluding a claim was barred where it was merely a variation of another prior postconviction claim).

The circuit court, the Florida Supreme Court, the United States District Court, and the Eleventh Circuit Court of Appeals have all already rejected this exact claim. *Gaskin v. State*, 822 So.2d 1243, 1246 (Fla. 2002); *Gaskin v. McDonough*, 3:03-cv-547-J-20 (M.D. Fla. 2003); *Gaskin v. Sec'y, Dept. of Corr.*, 494 F.3d 997 (11th Cir. 2007).

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v.*

New York, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

Additionally, even if this Court found the procedural bar was not an adequate independent state ground, this case is not a good vehicle for the question presented because Gaskin's counsel did provide adequate assistance and his case is one of the most aggravated and least mitigated. This claim is meritless. While there was mental health information that could have been presented to the jury, the bad far outweighed the good. Trial counsel employed Dr. Krop to do an evaluation of Gaskin before trial, and the results were unhelpful to mitigation. Dr. Krop "testified at the evidentiary hearing that he expressly told counsel before trial that he would not be of much help to the defense because he would have to testify about Gaskin's extensive history of past criminal conduct, sexual deviancy, and lack of remorse." *Gaskin v. State*, 822 So.2d 1243, 1248 (Fla. 2002). Gaskin also misrepresents trial counsel's efforts, as the only information Dr. Krop had not received was school records, and they only would have made him determine Gaskin also suffered from attention deficit disorder in addition to the non-mitigating personality disorder Dr. Krop had already diagnosed. *Id.* at 1250.

Dr. Toomer's testimony and opinion were not as definitive or as strong as Gaskin presents, either. On cross at the evidentiary hearing, Toomer admitted he did a large proportion of his examinations in capital cases for the defense, and at the time of the hearing had been retained by CCRC about a hundred times. PCR

V4, 435. Toomer was aware of Gaskin's previous criminal conduct, including an unrelated murder and another attempted murder and robbery. PCR V4, 439. Although he said he was aware of no other criminal conduct, he did admit he knew Gaskin had forced himself upon others sexually, but he did not categorize that as criminal, but part of his "psychosocial history." PCR V4, 440. There were other indications of sexual deviancy including cross-dressing, bestiality, and pedophilia, and instances where Gaskin flushed animals down the toilet. PCR V4, 441-3.

Toomer did not believe an antisocial personality disorder was a correct diagnosis because it had not been diagnosed before Gaskin was 18. PCR V4, 445. However, when confronted with the Diagnostic and Statistical Manual of Mental Disorders (DSM) which says a diagnosis is not required before 18, just that certain conduct be observed before the age of 15, Toomer, a clinical psychologist, called the DSM simply a "cookbook" or "guide" and said, "it is not definitive." PCR V4, 446. Toomer agreed Gaskin exhibited several behaviors indicative of antisocial personality disorder before he was 15, including forced sex, truancy, animal cruelty, and theft, but still summarily rejected the diagnosis. PCR V4, 444; 486-7. Despite previously endorsing a schizophrenia diagnosis, Toomer admitted that Gaskin's lack of significant auditory or visual hallucinations made that diagnosis not apply. PCR V4, 461-3. He said then he would have to go with a schizotypal diagnosis, but admitted he could not recall reviewing anything in Gaskin's DOC file that would support that diagnosis or schizophrenia. PCR V4, 476. While Toomer agreed that Gaskin's conduct during the crimes showed deliberate behavior and planning, he

still argued that "mentally disturbed [people] engage in behavior that appears to be purposeful and planned." PCR V4, 480. The defense did not present any testimony related to organic brain damage.

Back in 2002, the Florida Supreme Court affirmed that defense counsel made a reasonable strategic decision based on all the information he had, and they affirmed that decision again in the opinion below: "It is apparent from the record that the witnesses who Gaskin alleges should have testified on his behalf were subject to being cross-examined about disturbing information about Gaskin, which would have defeated trial counsel's strategy." 2023 WL 2799414 at *4. Counsel's strategic decision to shield the jury from damaging information which would be revealed by mental health testimony--including the fact that Gaskin had committed a prior murder--is fully consistent with this Court's precedent. *See Wong v. Belmontes*, 558 U.S. 15, 28 (2009) (noting that evidence the defendant committed another murder is among the most powerful aggravating evidence "imaginable" which would have outweighed additional facts about the defendant's difficult childhood) (quoting the lower court). The Court should deny review.

ARGUMENT II

Petitioner has failed to demonstrate why this Court should recede from *Spaziano* and hold that the Eighth Amendment requires unanimous jury sentencing as this claim is procedurally barred, and any holding would not retroactively affect Gaskin.

Gaskin's second question presented asks this Court to recede from *Spaziano* and hold that the Eighth Amendment requires unanimous jury sentencing before a death sentence can be imposed or carried out. The Florida Supreme

Court rejected this claim based on a state-law re-litigation bar and, alternatively, held the Eighth Amendment does not require jury sentencing under *Spaziano v. Florida,* 468 U.S. 447, 457-65 (1984) (holding the Eighth Amendment did not prohibit judges from overriding a jury's life recommendation and imposing a capital sentence).

This Court should decline to exercise certiorari jurisdiction and answer this question for at least three reasons. First, the Florida Supreme Court's alternative holding that Gaskin was barred from relitigating this claim under state law deprives this Court of jurisdiction. Second, there is no reason to recede from *Spaziano* because the Sixth (not Eighth Amendment) is the provision that would confer the right to unanimous jury sentencing in capital cases if such a right existed, and this Court has confirmed no such right exists in the Sixth Amendment. Third, Gaskin has failed to address retroactivity and the answer to this question would not apply to him.

A. This Court Lacks Jurisdiction Over [the] Question Presented

The Florida Supreme Court's clear disposal of this case on state-law procedural grounds before alternatively reaching the merits deprives this Court of jurisdiction. *Michigan v.* long, 463 U.S. 1032, 1041 (1983). The Florida Supreme Court held Gaskin could not relitigate his Eighth Amendment claim in 2023 when the court previously rejected it. *Gaskin*, 2023 WL 2799414 at *5.

This Court has long held that Florida's re-litigation bar is an independent and adequate state-law ground depriving this Court of jurisdiction to review the underlying claim. *Durley v. Mayo*, 351 U.S. 277, 281, 283-285 (1956) (dismissing for lack of jurisdiction where the Florida Supreme Court's decision below "might have rested"[5] on res judicata). Since the Florida Supreme Court's decision rests clearly and explicitly on Florida's bar to relitigation of direct-appeal issues as an alternative holding independent of the merits, this Court lacks jurisdiction over this question presented. *Durley,* 351 U.S. at 285; *Michigan v. Long*, 463 U.S. at 1042 ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.").

B. There is No Reason to Recede from *Spaziano*

Even if this Court had jurisdiction, there is simply no reason to recede from *Spaziano* because the right to a unanimous jury recommendation of death (if it existed) would arise under the Sixth Amendment, not the Eighth.

Spaziano rejected any claim that the Eighth Amendment conferred a right to jury sentencing by holding a judge may override a jury's life recommendation and impose a capital sentence. *Spaziano,* 468 U.S. at 457-65.

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[5] The State recognizes that this Court's jurisdictional test has changed since *Durley*. *See Long*, 463 U.S. at 1042. But that makes no difference here since this Court need not guess whether the Florida Supreme Court relied on a re-litigation bar, the court below explicitly did so.

This holding flows quite naturally from the plain text of the Eighth Amendment, which (in relevant part) only confers a right against "cruel and unusual punishment." Amend. VIII, U.S. Const. Gaskin's claim has nothing to do with his punishment being cruel or unusual; he argues the correct procedures were not followed before imposing his punishment because there was no unanimous jury recommendation of death.

That type of claim properly arises under the Sixth (not Eighth) Amendment and should be analyzed as such. *See United States v. Lanier,* 520 U.S. 259 n.7 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision."). The Sixth Amendment specifically protects the right to a trial by jury and this Court has utilized that provision to protect the right of capital defendants to have juries decide parts of their cases where appropriate. *See Hurst v. Florida,* 577 U.S. 92, 101-02 (2016) (overruling *Spaziano*'s Sixth Amendment holding and determining the Sixth Amendment requires the jury to find an aggravating circumstance before a judge may impose death).

Gaskin's proposed certiorari question arises under the wrong constitutional amendment. There is no reason to recede from *Spaziano*'s Eighth Amendment holding when the right Gaskin seeks to vindicate would actually arise under the Sixth Amendment if it existed at all. That is reason enough to deny certiorari since Gaskin has not argued the Sixth Amendment

protects his unanimous jury recommendation claim and the Eighth Amendment clearly does not.

But it is also worth pointing out the Sixth Amendment does not require a unanimous jury decision to impose a death sentence. *McKinney v. Arizona,* 140 S. Ct. 702, 707-08 (2020) (In "a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range . . . States that leave the ultimate life-or-death decision to the judge may continue to do so."). This Court previously refused to grant certiorari on the Florida Supreme Court's refusal to grant Gaskin's retroactive relief under *Hurst. Gaskin v. Florida,* 138 S. Ct. 471 (2017); *Gaskin v. Florida*, 139 S.Ct. 327 (2018). Gaskin's attempt to repackage an already-rejected Sixth Amendment claim in Eighth Amendment clothing is unavailing and not worth this Court's review.

C. Gaskin has Failed to Address the Retroactivity of any Decision Holding the Eighth Amendment Requires Jury Sentencing and any Such Decision would not be Retroactive

Setting everything else aside, this question is not cert-worthy because Gaskin has failed to address retroactivity and this Court's retroactivity precedents clearly show the answer to the question Gaskin presents would not apply to him. Any decision from this Court extending the Eighth Amendment beyond its textual confines and conferring a right to unanimous jury sentencing

in capital eases would not be retroactive.

Whether a ruling from this Court answering the question presented applies to Gaskin's case requires this Court to determine retroactivity by analyzing three questions: (1) when did Gaskin's conviction become final? (2) is the rule this Court announces actually new when viewed from the legal landscape existing when the conviction became final? (3) does the new rule fall within a nonretroactivity exception? *See Beard v. Banks,* 542 U.S. 406, 411 (2004).

Gaskin has failed to discuss any of these questions, and that is reason enough to deny certiorari. *See N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145 (2009) (Kennedy, J., respecting denial of writ of cert.) (explaining that certiorari was properly denied because answering the question presented would have required the Court to answer "antecedent questions under state law and trademark-protection principles"); *McDonough v. Smith*, 139 S. Ct. 2149, 2161-62 (2019) (Thomas, J., dissenting) (arguing that the Court should have dismissed the writ of certiorari as improvidently granted because it assumed away key antecedent questions); *see also Caspari v. Bohlen,* 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must" determine retroactivity "before considering the merits of the claim."); *Graham v. Collins,* 506 U.S. 461, 477 (1993) (refusing to reach the merits when the petitioner asked for a new rule to be applied to his case on habeas review

because any decision would not have been retroactive).

But perhaps more importantly, this Court's retroactivity precedents clearly demonstrate Gaskin would receive no relief on his Eighth Amendment Claim. His conviction became final in 1993 and this Court's 1984 precedent in *Spaziano* clearly foreclosed any argument that the Eighth Amendment required unanimous jury sentencing. Any rule that the Eighth Amendment requires unanimous jury sentencing is indeed new to Gaskin's long-finalized conviction.

The final retroactivity question also indicates that any future holding that the Eighth Amendment requires unanimous jury sentencing before a death sentence can be imposed would not apply to Gaskin. The only nonretroactivity exception[6] applicable to Gaskin's question applies if this Court's new answer forbids punishment of certain conduct or prohibits a category of punishment on a class of defendants. *Edwards v. Vannoy,* 141 S.Ct. 1547, 1555-62 & n.3 (2021) (eliminating the watershed procedural rule exception to retroactivity and recognizing substantive rules are automatically retroactive). Holding that the Eighth Amendment requires unanimous jury sentencing does neither, and this Court has routinely refused to give retroactive effect to similar right-to-jury precedents. *See McKinney v. Arizona,* 140 S. Ct. 702, 708 (2020) (holding neither *Hurst* nor *Ring* were retroactive); *Edwards,* 141 S. Ct. at 1551

[6] This Court has recognized that this is not really an exception, but a substantive rule that does no need to go through a retroactivity analysis. *Beard*, 542 U.S. at 411 n.3.

(holding the right to a unanimous jury verdict to convict for a serious offense was not retroactive).

Retroactivity bars are designed to protect the State's interest in finality. *See Beard,* 542 U.S. at 413. Such bars are designed to ensure the State is not continually forced to marshal its resources to keep in prison defendants whose proceedings were constitutionally acceptable under the standards existing at the time. *Id.* These interests are particularly acute in a case like this one, where the State has been marshaling resources for over decades. *Id.* Retrial may not be available due to "lost evidence, faulty memory, or missing witnesses." *Edwards,* 141 S. Ct. at 1554 (cleaned up). And most importantly, any delay interposed by granting certiorari to answer this question would delay justice for the victims and State of Florida. In short, respect for the State's resources, the victims, and decades of finality also counsel against taking this case in light of the retroactivity question here. This Court should deny certiorari.

ARGUMENT III

Petitioner's claim related to *Espinosa* was properly rejected as procedurally barred and untimely under Florida state law and is otherwise meritless and not a basis for this Court's review

Petitioner claims that this Court's ruling in *Espinosa,* finding that Florida's previous jury instruction on the heinous, atrocious, and cruel aggravating factor, invalidates his death sentence.

This claim arises from *Espinosa v. Florida*, 505 U.S. 1079 (1992). In that

case, Henry Espinosa, a prisoner sentenced to death like Gaskin, challenged the WEAC aggravating factor jury instruction used by Florida for being unconstitutionally vague. *Id.* at 2927. This Court agreed, finding it unconstitutional and remanded Espinosa's case to this Court. *Id.* at 2928-9. However, that was not the end of the inquiry, as the Florida Supreme Court reviewed Espinosa's case again, applying this Court's decision. On remand, that Court found that Espinosa had not preserved the issue for appellate review, and even if he had, reading the instruction was harmless beyond a reasonable doubt because the jury would have found the presence of HAC even with a proper limiting instruction, and there were three other strong aggravators, including a contemporaneous murder. *Espinosa v. State*, 626 So.2d 165 (Fla. 1993). They again affirmed his death sentence and this Court denied review. *Espinosa v. Florida*, 511 U.S. 1152 (1994).

Gaskin's case followed an identical path. After his sentences were affirmed on direct appeal, he filed a writ of certiorari in this Court, which remanded the case in light of its decision in *Espinosa*. *Gaskin v. Florida*, 505 U.S. 1216 (1992). Just as in Espinosa's case, the Florida Supreme Court found Gaskin had not preserved an objection to the HAC instruction for appellate review, and that even had he done so, any error in the jury instruction was harmless beyond a reasonable doubt as it would not have affected the recommendation. *Gaskin v. State*, 615 So.2d 679 (Fla. 1993). In doing so, the court pointed to its decision in Gaskin's direct appeal upholding the HAC aggravator:

> The facts show that Mrs. Sturmfels knew her husband was being murdered, and that she must have contemplated her own death. She

> was shot at least twice before crawling down the hall where she watched blood pour from her wounds. She must have been in physical pain and mentally aware of her impending death as Gaskin first disabled her and then stalked her throughout the house.

Gaskin v. State, 591 So.2d 917, 920-1 (Fla. 1991). The court additionally held in that case that even if the aggravator had not been found, the trial court still would have imposed the death penalty as it did for the murder of Georgette's husband, who did not have the HAC aggravator. *Id.* at 921. It's important to note, as in Espinosa's case, there were other weighty aggravators: CCP, prior violent felony conviction, and that the murders occurred in the course of a robbery or burglary. This Court then denied certiorari review. *Gaskin v. Florida*, 510 U.S. 925 (1993).

As noted above, this claim was already raised and dismissed by the Florida Supreme Court back in 1993. Gaskin argued below, "This Court should have applied *Espinosa* retroactively" to him on remand; however, that is exactly what the Court did. State Hab. Pet. at 7. That court found that Gaskin failed to challenge the vagueness of the HAC jury instruction at trial, and even if he had, any error was harmless beyond a reasonable doubt. *Gaskin*, 591 So.2d at 920-1. They specifically applied this Court's *Espinosa* holding, they simply decided the issue against him. The Florida Supreme court has been consistent in applying this procedural bar to *Espinosa* claims that were not first raised in the trial court. *See, e.g., Evans v. State,* 946 So.2d 1, 16 (Fla. 2006); *Floyd v. State,* 808 So.2d 175, 187 (Fla. 2002) (finding that a claim of constitutional error under *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), was not preserved for postconviction review because it was not raised both at trial and on direct appeal); *Downs v. State,*

740 So.2d 506, 517 (Fla. 1999) (finding that claim of *Espinosa* error was procedurally barred on postconviction review where not raised at both trial and on direct appeal although *Espinosa* decided while direct appeal in pipeline).

Any challenges to the 1993 ruling about *Espinosa* not entitling Gaskin to relief should have been addressed by a motion for rehearing after his claims were dismissed on remand, or at the very least in his first postconviction motion in 1995 or in a habeas petition with his initial 3.850 appeal. Instead, Gaskin raises this new *Espinosa* claim 30 years after it was first rejected, and weeks before his pending execution. The Florida Supreme Court's determination that the claim was procedurally barred is an adequate and independent state law ground precluding this Court's review. *Michigan v. Long*, 463 U.S. at 1039-41.

Additionally, as the Florida Supreme Court pointed out in 1993, this claim is also procedurally barred because it was not raised in the trial court and thus was not preserved for appellate review. Gaskin claims trial counsel did raise the issue in a pretrial motion, but Gaskin misreads that objection. Attached to the state petition, the motion was a challenge only to Fla. Stat. 921.141 (5)(i), the cold, calculated, and premeditated aggravating factor (CCP) as "unconstitutionally vague, overbroad, arbitrary, and capricious". State Hab. Pet. Exh. 1 at 1. The motion spent 24 pages thoroughly challenging the CCP aggravator in particular, but the only reference to HAC was on page 23 when 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." *Id.* at 23. The

motion barely mentions the HAC aggravator and only complains about the vague wording of the statute and not the jury instruction at issue in *Espinosa*.

Despite Petitioner's arguments that this Court should overrule itself about a procedural bar and that the very reading of the HAC jury instruction renders his entire sentencing phase invalid, this issue has already been decided against him with regard to *Espinosa* claims. *Sochor v. Florida*, 504 U.S. 527 (1992) involved another death-sentenced inmate challenging the vagueness of the HAC jury instruction. The Florida Supreme Court had upheld Sochor's sentence on direct appeal, finding that trial counsel had failed to object to the instruction at trial and therefore the issue was not preserved for review. *Sochor v. State*, 580 So.2d 595, 602-3 (Fla. 1991). This Court granted certiorari review and remanded on other issues but held that Florida's finding that the HAC issue was not preserved for appeal was an independent and adequate state ground preventing this Court from review. *Sochor*, 504 U.S. at 533-4. Gaskin's attempts to compare *Espinosa* to a case like *Gideon v. Wainwright*, 372 U.S. 335 (1963), which can defeat procedural defaults has already been rejected by this Court.

This claim is also meritless because any error with the reading of the HAC instruction was harmless beyond a reasonable doubt. Gaskin argues otherwise in his petition, but as with the preservation issue, this claim has already been decided against him. Pointing to its reasoning from his direct appeal case, the Florida Supreme Court found that the HAC factor clearly applied to the death of Georgette Sturmfels. *Gaskin*, 591 So.2d at 920-1. In the opinion below the Florida Supreme

Court confirmed it was also harmless error in relation to the murder of Robert Sturmfels due to the existence of three weighty aggravating factors. 2023 WL 2799414 at *6. This Court has found that there is no error for a trial judge to weigh an impermissibly vague aggravating factor if the state supreme court had properly narrowly construed the statutory language in the past. *Sochor*, 504 U.S. at 535. This Court determined that the Florida Supreme Court had limited the use of the HAC factor only to "conscienceless or pitiless crime which is unnecessarily tortuous to the victim," and that finding gave Florida trial courts adequate guidance in applying the factor. *Id.* at 536. A review of Florida cases found that the court had been consistently applying the factor. *Id* at 536-7.

And that factor was properly found by the trial court and upheld on direct appeal. Georgette had just watched her husband die and had been shot twice before she managed to find cover inside her home. Gaskin then broke inside and found her, alive and bleeding, before summarily executing her with one shot to the head. The court correctly found, with its guidance and narrowing from prior cases, that HAC properly applied to the murder of Georgette, as it was conscienceless, pitiless, and unnecessarily tortuous. This claim is also without merit because the court held its application would not have changed the outcome because the jury recommended, and the trial court imposed, the death penalty for the murder of Robert Sturmfels, who did not have the HAC aggravator.

The correctness of the finding of harmlessness is a factual determination with no implications beyond the parties involved in this case, mandating the denial of

certiorari review. *See Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). Moreover, the sufficiency of the Florida Supreme Court's analysis is established by a review of that opinion.

There is no manifest injustice in this case. *Espinosa* error does not render Gaskin's trial fundamentally flawed. Even the eponymous Espinosa did not receive relief on remand for the same reasons as Gaskin. Accordingly, this claim does not merit review because all Gaskin's claims and arguments are procedurally barred, untimely, or meritless.

ARGUMENT IV

Applying all of the foregoing claims, this Court lacks jurisdiction to review the judgment below because the claims presented were rejected by the Florida Supreme Court based upon well-settled state law grounds and rules of procedure

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. Those rights were afforded to Gaskin throughout the many years he unsuccessfully challenged his convictions and sentences in state and federal court and during post-warrant litigation.

The Florida Supreme Court has also recognized that "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v.*

Thompson, 523 U.S. 538, 555 (1988). While it is a basic guarantee of the Florida Constitution that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost," art. I, § 13, Fla. Const., the Florida Supreme Court recognized in *Haag v. State,* 591 So.2d 614, 616 (Fla.1992), that "the right to habeas relief, like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." *Baker v. State*, 878 So. 2d 1236, 1241 (Fla. 2004). In his concurring opinion in *McCrae v. State,* 437 So.2d 1388 (Fla.1983), then Chief Justice Alderman suggested, in the interests of finality, that rule 3.850 be amended to provide further limitations on the ability of criminal defendants to obtain collateral postconviction relief under the rule:

> I believe . . . that we should impose a time limitation for filing 3.850 motions and should narrow the scope of grounds which may be alleged in successive petitions for relief. In order to give due weight to the finality and the presumption of legality of a final judgment and to restore the public's confidence in our criminal system of justice, we should amend rule 3.850 by adding a one-year statute of limitations on the filing of these motions. In my view, one year from the time the judgment becomes final, that is after the appellate process is concluded, is a sufficient and reasonable limitation period to place on the filing of these motions. This would include certiorari review to the United States Supreme Court if it is sought. There is no reason why a defendant, through the exercise of due diligence, cannot determine his basis for collateral attack during that period of time.
>
> Moreover, I do not believe that successive motions to vacate should be allowed where the grounds alleged in the successive petition were known or could have been known to the defendant at the time he filed his initial motion for relief. A defendant should not be allowed to file one 3.850 motion after another to prolong his inevitable execution, each time reserving one or more grounds for relief that could have been alleged in his initial motion. The movant should be required to plead in his motion that he did not know and could not have known the grounds for his present motion for relief.

Id. at 1391–92 (Alderman, C.J., concurring in result only). Nevertheless, Gaskin argues that evolving standards of decency are sufficient to overcome claims that were previously raised and considered, conclusively refuted by the record, and procedurally barred.

However, this Court recently reiterated that it "will not take up a question of federal law in a case 'if the decision of the state court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgement.'" *Cruz v. Arizona*, 143 S.Ct. 650, 658 (2023) (quoting *Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002)) (emphasis in original). The adequate and independent state grounds doctrine is the product of two fundamental features of this Court's jurisdiction. First, this Court is powerless to revise a state court's interpretation of its own law. *Murdock v. Memphis*, 20 Wall. 590, 636, 87 U.S. 590 (1875). Ordinarily, a violation of a state procedural rule that is "'firmly established and regularly followed' . . . will be adequate to foreclose review of a federal claim." *Cruz,* 143 S.Ct. 650 at 658 (2023); *Lee v. Kemna*, 534 U.S. 362, 376 (2002); *Walker v. Martin*, 562 U.S. 307, 316 (2011) (quoting *Beard v. Kindler,* 558 U.S. 53, at 60–61 (2009)); *see also Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (state procedural bar is "adequate" that has been "consistently or regularly applied") (quoting *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988)). The bar for finding inadequacy is extraordinarily high.

In this case, the Florida Supreme Court held that the circuit court did not err in summarily denying Gaskin's claims first and foremost because they were

procedurally barred. This Court lacks jurisdiction to review the judgment below because the claims presented were rejected by the Florida Supreme Court based upon well-settled state law grounds and rules of procedure. Article III empowers federal courts to render judgments, not advisory opinions. *Hayburn's Case*, 2 Dall. 409, 2 U.S. 408, 1 L.Ed. 436 (1792). So, if an independent state ground of decision is adequate to sustain the judgment, this Court lacks jurisdiction over the entire dispute. Anything said about alternative federal grounds would not affect the ultimate resolution of the case and would therefore be advisory. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). *Cruz v. Arizona*, 143 S. Ct. 650, 662 (2023).

Gaskin's claim that evolving standards of decency should have been considered by the Florida Supreme Court is inconsequential. Even if this Court were to consider that these procedural bars should have been relaxed to correct a manifest injustice, Gaskin has failed to allege any facts—nor can he—to justify the Florida Supreme Court invoking the extremely limited concept of manifest injustice to excuse a procedural bar and review the merits of his claims as fully argued above. *See, e.g., Cuffy v. State*, 190 So. 3d 86, 87 (Fla. 4th DCA 2015) (noting: "The term 'manifest injustice,' which has been acknowledged as an exception to procedural bars to postconviction claims in only the rarest and most exceptional of situations, now is abused widely by postconviction litigants"); *Hall v. State*, 94 So. 3d 655 (Fla. 1st DCA 2012); *Stephens v. State*, 974 So. 2d 455, 457 (Fla. 2d DCA 2008). The mere incantation of the words "manifest injustice" does not make it so.

There is little doubt that every defendant believes they will suffer a "manifest injustice" if their postconviction claim is deemed foreclosed by the passage of time. However, a defendant does not have an unlimited right to continue to litigate (and relitigate) the validity of their conviction, and such a limited right must be balanced against the State's competing and substantial interest in the finality of judgments in criminal cases, which in this case is carrying out Gaskin's death sentence. *Beiro v. State*, 289 So. 3d 511, 511–12 (Fla. Dist. Ct. App. 2019). This Court should deny review of this claim.

Conclusion

Based on the foregoing, Gaskin's certiorari petition should be denied.

Respectfully submitted,

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