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IN THE SUPREME COURT OF FLORIDA

EXECUTION SCHEDULED FOR APRIL 12, 2023, at 6:00 p.m.

LOUIS BERNARD GASKIN
Appellant,

v. **CASE NO: SC23-415**
ACTIVE WARRANT CAPITAL CASE

STATE OF FLORIDA,
Appellee.
_____/

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

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PRELIMINARY STATEMENT

The record on appeal will be referred to as "2023 3rd Succ. PCR" followed by the appropriate page number. Appellant, Louis Bernard Gaskin, the defendant in the trial court, will be referred to as Appellant, the Defendant, or by his proper name. The "IB" refers to the initial brief, followed by the appropriate page number.

STATEMENT REGARDING ORAL ARGUMENT

This Court typically does not conduct oral argument in successive postconviction appeals and certainly should not do so in this case which raises issues that are variously not cognizable at all, untimely, procedurally barred, conclusively rebutted by the existing record, or meritless as a matter of law under controlling precedent.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Facts of the Crimes

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*.

Procedural history

This Court upheld Appellant's death sentences and convictions on direct appeal. *Gaskin v. State*, 591 So.2d 917 (1992). After remand

from the United States Supreme Court to reconsider his case in light of the United States Supreme Court decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), this Court again affirmed his death sentences. *Gaskin v. State*, 615 So.2d 679 (Fla. 1993). Since this Court's decision in 1993 Appellant has continued to file motions for postconviction relief. This 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]

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

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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).

2023, Gaskin filed a third 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. Regarding claim 1, the State asserted any claim related to mitigation Gaskin had already presented in postconviction litigation was procedurally barred by the law-of-the-case doctrine citing this Court's ruling in *Gaskin v. State*, 822 So.2d 1243, 1246 (Fla. 2002) which affirmed the denial of relief on this exact claim. The State also argued he was entitled to no relief even if the court decided to address the merits for the same reasons given by this Court in *Gaskin*, and that if he were trying to assert a mental illness exception,

[3] *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

such a claim was untimely. For claim 2, the State argued that this claim was procedurally barred because this Court had already rejected this claim twice in *Gaskin v. State*, 218 So.3d 399 (Fla. 2017), *cert denied*, 138 S.Ct. 471; *Gaskin v. State*, 237 So.3d 928 (Fla. 2018), *cert. denied*, 139 S.Ct. 327. Additionally, even if the court were to decide *Hurst v. State*, 202 So.3d 40 (Fla. 2016) should have been retroactive to Gaskin, this Court's later ruling in *State v. Poole*, 297 So.3d 487 (Fla. 2020) found that a jury need only unanimously find one aggravating factor for a defendant to be death-eligible, not give a unanimous recommendation. The jury's contemporaneous convictions for several other felonies in Gaskin's case unanimously establish two different aggravators without the need for additional findings. Regarding claims 3 and 4, the State asserted that both claims were meritless as a matter of law under this Court's controlling precedent. The State asserted that none of the four claims warranted an evidentiary hearing.

On March 20, 2023, the circuit court conducted a case management conference, commonly referred to as a *Huff*[4] hearing, at

[4] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

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.

This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I: The postconviction court properly summarily denied Gaskin's claim that his trial counsel failed to present mitigation that would have resulted in a life sentence. The court correctly pointed out that this claim was procedurally barred because it had already been rejected in both state and federal court, including by this Court. It was also untimely because all of the information Gaskin brought forth was already known to counsel as early as 1995, and in fact was the focus of the evidentiary hearing in 2000. Finally, any claim was meritless. While there was mitigation that trial counsel did not present, he did so as a matter of trial strategy. Any mental health mitigation would have opened the door to the jury hearing about his personality disorder, sociopathy, or psychopathy, which are typically not seen as mitigating, and to the jury learning about another murder

and attempted murder, in addition to Gaskin's various sexual deviancies. This Court has already found trial counsel made a reasonable strategic decision under *Strickland*,[5] and so this claim also fails on the merits.

ISSUE II: The postconviction court properly summarily dismissed this claim. It is procedurally barred because this Court has already considered and rejected his *Hurst* claim on two prior occasions. The postconviction court followed this Court's finding that Gaskin's case became final in 1993, and therefore *Hurst* did not apply retroactively. Gaskin advances several arguments as to why this Court's partial retroactivity opinion was wrongly decided, but all have been previously rejected by this Court. Finally, even if this Court were to overrule itself and find *Hurst* retroactive to Gaskin, this claim fails on the merits after this Court's ruling in *State v. Poole*. In *Poole* this Court recognized that the only constitutional requirement from a jury was the unanimous finding of at least one aggravating factor for a defendant to be death-eligible. While Gaskin's jury did not submit findings on aggravators the way juries do today, they did

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

unanimously find him guilty of two murders, attempted murder, and related robberies and felonies. These unanimous verdicts are the basis for two of the aggravating factors in Gaskin's case: prior violent felony conviction, and that the murders were committed in the course of a robbery or burglary. Even if Gaskin were to get retroactive application of *Hurst* and *Poole*, his death sentence passes constitutional muster.

ISSUE III: The postconviction court properly summarily denied this claim. Here Gaskin argues that his prolonged stay on death row renders his death sentence unconstitutional, what is commonly referred to as a "*Lackey*[6] claim". The postconviction court summarily denied this claim as there is binding precedent from both this Court and the Unites States Supreme Court finding there is no constitutional support for this claim. Moreover, Gaskin's lengthy stay is largely due to his multiple challenges to his sentence over the decades. While a prisoner is free to pursue appellate and postconviction remedies, he cannot then point to the delay caused by those challenges as a reason for relief.

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[6] *Lackey v. Texas*, 514 U.S. 1045 (1995).

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED GASKIN'S CLAIM THAT HIS TRIAL COUNSEL FAILED TO PRESENT MEANINGFUL MITIGATION, WHICH, AS IT HAD BEEN PREVIOUSLY RULED ON, WAS MERITLESS AND PROCEDURALLY BARRED

Gaskin raises a claim under the Eighth and Fourteenth Amendments that his trial counsel failed to present a large amount of mitigation that would have resulted in him receiving a life recommendation from the jury. 2023 3rd Succ. PCR 430-436. The circuit court held an evidentiary hearing on this exact issue, on this same mitigation, back in the year 2000. That court found the claim was meritless as counsel had made a strategic decision not to present mitigation that was sometimes itself aggravating, and opened the door to a multitude of negative information about Gaskin the jury would have heard. As such, in addition to being meritless, this claim is procedurally barred, as it has been presented and rejected previously by the circuit court and this Court. This Court properly denied this claim without a hearing.

Standard of review[7]

The standard of review of a summary denial of a successive postconviction motion is *de novo*. *Bogle v. State*, 322 So.3d 44, 46 (Fla. 2021) (stating this Court reviews the postconviction court's decision to summarily deny a successive postconviction motion *de novo* citing *Duckett v. State*, 231 So.3d 393, 398 (Fla. 2017)); *Sweet v. State*, 293 So.3d 448, 451 (Fla. 2020) (citing *Long v. State*, 183 So.3d 342, 344(Fla. 2016)), *cert. denied*, *Sweet v. Florida*, 141 S.Ct. 909 (2020).

The circuit court's ruling

The circuit court summarily denied this claim. 2023 3rd Succ. PCR 557-558. The court pointed out this claim has been rejected in the circuit court previously, this Court, and in both federal district court and the 11th Circuit Court of Appeals. Citing those rulings, the court found that the claim was procedurally barred and lacked merit.

Summary denial of postconviction claims

[7] Because the postconviction court summarily denied all four claims, the same standard of review governs all the claims. So, in the interest of brevity, the State will not repeat the same standard of review for each issue.

A postconviction court may summarily deny a postconviction claim that is conclusively rebutted by the existing record. Fla. R. Crim. P. 3.851(f)(5)(B). It is also proper for a postconviction court to summarily deny postconviction claims that are untimely, not retroactive, procedurally barred, not cognizable, or meritless as a matter of law under controlling precedent. *Mungin v. State*, 320 So.3d 624, 626 (Fla. 2020); *Rodgers v. State*, 288 So.3d 1038, 1039 (Fla. 2019) (affirming a summary denial of a successive postconviction claim as untimely), *cert. denied*, *Rodgers v. Florida*, 141 S.Ct. 398 (2020); *Bogle v. State*, 288 So.3d 1065, 1069 (Fla. 2019) (affirming the summary denial of a successive postconviction claim on non-retroactivity grounds), *cert. denied*, *Bogle v. Florida*, 141 S.Ct. 389 (2020); *Morris v. State*, 317 So.3d 1054, 1071 (Fla. 2021) (stating a court may summarily deny a postconviction claim that is procedurally barred citing *Matthews v. State*, 288 So.3d 1050, 1060 (Fla. 2019)); *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (noting that because the claims were purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief).

This claim and related arguments are procedurally barred, untimely, and meritless.

Procedurally barred

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, this 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).

Untimely

All the allegations in this claim were not only known to postconviction counsel back in 1995 but were the focus of the evidentiary hearing that was held over 20 years ago. Gaskin does not allege any new arguments other than a self-serving assertion that the evolving standards of decency would have resulted in a life sentence for him in front of a jury in 2023. To the extent he implies an exemption to execution due to mental illness, such a claim is untimely because the claim is not cognizable in a successive postconviction motion. *Carroll v. State*, 114 So.3d 883, 886 (Fla. 2013).

Merits

Even if this claim were not procedurally barred and untimely, as revealed from prior litigation, it 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 "psycho social 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 Department of Corrections 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.

Given the multitude of bad information the jury would have heard about Gaskin if his mental health experts testified, weighed against the little mitigation they may have been able to establish, this Court and the Florida Supreme Court both already determined that trial counsel made a reasonable strategic decision not to present that testimony. *Gaskin*, 822 So.2d at 1251. This claim was properly summarily denied.

ISSUE II

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED GASKIN'S CLAIM THAT HE WAS ENTITLED TO *HURST* RELIEF, WHICH WAS A CLAIM THAT WAS PROCEDURALLY BARRED, UNTIMELY, AND MERITLESS

Here, Gaskin claims that he is entitled to relief under *Hurst* because his jury only recommended death by a vote of 8-4, while *Hurst* requires a unanimous recommendation before a defendant can be sentenced to death. 2023 3rd Succ. PCR 436-444. He argues that this Court acted arbitrarily and capriciously in establishing only partial retroactively of *Hurst* to those cases that became final after the ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). This issue, like issue one, is procedurally barred by the law-of-the-case doctrine as the circuit court and this Court, both previously rejected it on two separate occasions, and subsequent developments in this Court's case law under *Poole* make the claim meritless even if this Court were to give *Hurst* full retroactivity.

The circuit court's ruling

The circuit court summarily denied this claim. 2023 3rd Succ. PCR 558. The court found that Gaskin's case became final in 1993, long before *Ring* was decided, meaning Gaskin was not entitled to

retroactive relief under *Hurst* due this Court's holding in *Asay v. State*, 210 So.3d 1 (Fla. 2016). The court also noted that Gaskin had previously raised this claim in both the circuit court and this Court, and was rejected each time, so this claim was also procedurally barred.

Procedurally barred

This successive postconviction claim is procedurally barred by the law-of-the-case doctrine. As noted above, the law-of-the-case doctrine bars reconsideration of those legal issues that were actually considered and decided in a former appeal. The circuit court and this Court have addressed this claim twice and found against Gaskin both times, holding that because his case was final before *Ring v. Arizona*, 536 U.S. 584 (2002) was decided, *Hurst* did not apply retroactively to him. *Gaskin*, 218 So.3d 399 (Fla. 2017), *cert denied*, 138 S.Ct. 471 (2017); *Gaskin*, 237 So.3d 928 (Fla. 2018), *cert. denied*, 139 S.Ct. 327 (2018). Gaskin does not make any new arguments that have not been rejected by this Court repeatedly and consistently. Additionally, any *Ring*-type arguments that the jury should have made specific findings about aggravators is an issue that should have been addressed on direct appeal, and thus is also procedurally barred.

Untimely

Any arguments that *Hurst* should have applied to Gaskin retroactively are also untimely as this Court issued its ruling years ago. Gaskin did in fact raise the issue previously in a timely manner, however, as has been pointed out, the issue was decided against him.

Merits

His claim also fails on the merits. Despite his arguments to the contrary, this Court has consistently held its decision requiring specific jury findings and unanimous death recommendations in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) does not apply to cases that were decided before *Ring*. *See, e.g.*, *Asay v. State*, 210 So.3d 1, 29-30 (Fla. 2016); *Mosley v. State*, 209 So.3d 1248 (Fla. 2016). Additionally, in *State v. Poole*, 297 So.3d 487, 504 (Fla. 2020), this Court held that a unanimous jury recommendation is not constitutionally-required and the jury need only find the existence of one aggravating factor for a defendant to be death-eligible. The United States Supreme Court has even said the unanimity Gaskin argues for is not required. *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.") The jury in Gaskin's case did unanimously find two aggravating factors—prior violent felony conviction and committed in the course of a robbery or burglary—when they unanimously voted to convict him of two murders, attempted murder, burglary, and robbery, so his sentence comports with the requirements in *Poole*. Any suggestion that his trial would have turned out differently if it were tried today, and the jury had been presented mitigation that multiple courts have said would have opened the door to a multitude of negative information about Gaskin, is purely speculative and irrelevant. It could just as easily be argued that a new jury, instructed that only a unanimous death recommendation would make Gaskin death-eligible, would come back with a 12-0 recommendation.[8] This claim was properly dismissed without a hearing.

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[8] In fact, many defendants have received a unanimous verdict after securing relief under *Hurst*. *See, e.g. Hojan v. State*, 307 So.3d 618 (Fla. 2020) (Defendant received a 9-3 death recommendation despite waiving mitigation at his initial sentencing phase. On remand after *Hurst* and presentation of substantial mitigation, Hojan received a 12-0 death recommendation); *Mosley v. State*, 349 So.3d 861 (Fla.

ISSUE III

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT SPENDING OVER THREE DECADES ON DEATH ROW VIOLATES THE EIGHTH AMENDMENT

Gaskin contends that his three decades on death row, in what he labels as "solitary confinement", violates the Eighth Amendment, and precludes his execution.[9] IB at 61. There is, however, no support in the law for such a claim. Neither the United States Supreme Court nor this Court has ever granted relief on a *Lackey* claim. This Court has stated that regardless of however prolonged, the sheer number of years spent on death row is not a violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Dillbeck v. State*, ---So.3d---, 2023 WL 2027567, at *6 (Fla. Feb. 16, 2023) (over 31 years); *Valle v. State*, 70 So.3d 530, 552 (Fla. 2011) (33 years); *see*

2022) (Mosley received a 12-0 death recommendation after being granted relief under *Hurst* for the 8-4 recommendation in his first trial); *McKenzie v. State*, 333 So.3d 1098 (Fla. 2022) (12-0 verdict in resentencing after initially receiving a 10-2 verdict).

[9] Such claims are often referred to as *Lackey* claims because they stem from a dissenting opinion from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995).

also Lambrix v. State, 217 So.3d 977, 988 (Fla. 2017) (over 31 years); *Long v. State*, 271 So.3d 938, 946 (Fla. 2019) (over 30 years).

Equipped with that legal precedent, the postconviction court properly summarily denied the *Lackey* claim as meritless as a matter of law noting that this Court has consistently rejected *Lackey* claims including most recently in *Long v. State,* 271 So.3d 938, 946 (Fla. 2019).[10] The lower court also noted that this Court has observed that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment." *Id. citing Booker v. State*, 969 So.2d 186, 200 (Fla. 2007), and *Knight v. State*, 746 So.2d 423, 437 (Fla. 1998). Lastly, the postconviction court acknowledged that the "appropriate remedy for a claim that prolonged solitary confinement violates the Eighth Amendment is to

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[10] A postconviction court may summarily deny a successive postconviction claim because it is not cognizable or is meritless as a matter of law. *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (stating that postconviction claims that are meritless as a matter of law under this Court's precedent may be summarily denied). The *Lackey* claim is both not cognizable under the state constitution and meritless as a matter of law under this Court's precedent. Therefore, the state postconviction court properly summarily denied this claim.

challenge the condition of the confinement, not to vacate a death sentence". *Id.*

Initially, the claim is untimely in this successive motion regarding the Supreme Court's denial of certiorari review in *Lackey v. Texas*, 514 U.S. 1045 (1995), a case involving an inmate on death row for 17 years. Since Justice Stevens' opinion in *Lackey* was issued in 1995, it does not constitute a new rule of constitutional law -- assuming for a moment a memorandum opinion constitutes new law. As Gaskin has been on death row for some thirty years, this claim clearly could have been asserted earlier with the exercise of due diligence as required by Rule 3.851. This claim is therefore untimely and procedurally barred. *See Hunter v. State*, 29 So.3d 256, 266 (Fla. 2008) ("In light of Hunter's failure to sufficiently allege his diligence and timeliness in pursuing this claim in accordance with the requirements of rule 3.851, we find that the circuit court correctly denied this claim."); *see also Gardner v. State*, 234 P. 3d 1115, 1143-44 (Utah 2010) (finding *Lackey* claim untimely, noting that "we have no doubt that any harm that Mr. Gardner alleges is endured uniquely by death-row inmates surely would have become apparent to him during his first fourteen years of incarceration.").

Also, the "solitary confinement" aspect of the claim is waived. Gaskin, as a member of the class, recently entered into a settlement agreement regarding the conditions of confinement on Florida's death row with the Department of Corrections. *See Davis v. Dixon*, 3:17-cv-820 (M.D. Fla April 27, 2022) (Doc. # 148-1— settlement agreement); (definition section of agreement defining "Death Row Inmates" as referring "to all current and future inmates (regardless of gender) imprisoned on Death Row in the State of Florida"); (Doc. # 148-1 at ¶ 63 of the agreement defining the class).[11] As part of that settlement, Gaskin was "barred and precluded from prosecuting any claims, causes of action or requests" regarding the prior conditions on death row that were asserted in the federal civil litigation. (Doc. # 148- 1 at ¶ 78 release provision of the agreement).[12] Gaskin waived any claim

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[11] This Court may take judicial notice of federal district court records. § 90.202, Fla. Stat. (2022) (providing "a court may take judicial notice of the following matters" including "Official actions of the legislative, executive, and judicial departments of the United States and of any state, territory, or jurisdiction of the United States" and "(6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.")

[12] The release provision of the settlement provides:

> All claims asserted in the Amended Complaint shall be finally and fully settled and released, subject to the terms

based on the prior conditions on death row amounting to "solitary confinement" and may not rely on those conditions as part of his *Lackey* claim.

As for the merits, a *Lackey* claim is not a recognized legal claim in federal or Florida courts. As Justice Thomas has observed, there simply is no constitutional support for a *Lackey* claim. *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Thomas, J., concurring in the denial of certiorari); *see also Thompson v. Sec'y for Dep't of Corr.*, 517 F.3d 1279, 1283-84 (11th Cir. 2008) (noting "the total absence of Supreme Court precedent that a prolonged stay on death row violates the Eighth Amendment"). Indeed, no court has ever recognized such a claim, much less granted the relief of reducing a death sentence to a life sentence based on the number of years spent on death row.

> and conditions of this Agreement, which the Parties enter into freely, voluntarily, knowingly, and with the advice of counsel. Plaintiffs and class members hereby release Defendants in their official capacities from, and are barred and precluded from prosecuting any claims, causes of action or requests that have been asserted in this litigation, provided that in no event shall this release be deemed to release or otherwise affect in any way any claim regarding any act, incident, or event that occurs after the termination of the Court's retained jurisdiction.

The federal appellate courts routinely deny *Lackey* claims. *Thompson v. Sec'y for Dep't of Corr.*, 517 F.3d 1279, 1283-84 (11th Cir. 2008) (concluding that execution following 31 years spent on death row "is not in itself a constitutional violation" citing other circuit cases). Indeed, the federal circuits will not even entertain the issue on appeal. *Creech v. Richardson*, 59 F.4th 372, 393, (9th Cir. 2023) (denying a certificate of appealability on a *Lackey* claim and noting that "neither the Supreme Court nor the Ninth Circuit has ever held that the duration of a death row inmate's confinement prior to execution amounts to cruel and unusual punishment"); *Buntion v. Lumpkin*, 982 F.3d 945, 954-53 (5th Cir. 2020) (denying a certificate of appealability on a *Lackey* claim and observing that the Fifth Circuit, "like Justice Thomas" was "unaware of any support in the American constitutional tradition or in the Supreme Court's precedent" for such a claim). This Court has consistently rejected *Lackey*[13] claims including most recently in *Dillbeck v. State*, ---So.3d-

[13] *Long v. State*, 271 So.3d 938, 946 (Fla. 2019) (SC19-726). *Valle v. State,* 70 So.3d 530, 552 (Fla. 2011) (rejecting a *Lackey* claim in a case where the defendant was on death row for 33 years); *Gore v. State*, 91 So.3d 769, 780-81 (Fla. 2012) (rejecting a *Lackey* claim in a case where the defendant was on death row for over 28 years); *Ferguson v. State*, 101 So.3d 362, 366-67 (Fla. 2012) (rejecting a

--, 2023 WL2027567 (Fla. Feb. 16, 2023).[14] And this Court has rejected such claims in cases involving a similar number of years to the 31 years that Gaskin as spent on death row. *Valle*, 70 So.3d at 552; *Lambrix*, 217 So.3d at 988. Opposing counsel provides no

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Lackey claim in a case where the defendant was on death row for 30 years); *Muhammad v. State*, 132 So.3d 176, 206-07 (Fla. 2013) (rejecting a *Lackey* claim in a case where the defendant was on death row for over 30 years); *Correll v. State*, 184 So.3d 478, 486 (Fla. 2015) (rejecting a *Lackey* claim in a case where the defendant was on death row for 29 years); *Lambrix v. State*, 217 So.3d 977, 988 (Fla. 2017) (rejecting a *Lackey* claim in a case where the defendant was on death row for over 31 years); *Branch v. State*, 236 So.3d 981, 988 (Fla. 2018) (rejecting a *Lackey* claim in a case where the defendant was on death row for nearly 24 years), *cert. denied, Branch v. Florida*, 138 S.Ct. 1164 (2018); *Jimenez v. State*, 265 So.3d 462, 475 (Fla. 2018) (rejecting a *Lackey* claim in a case where the defendant was on death row for over 23 years), *cert. denied, Jimenez v. Florida*, 139 S.Ct. 659 (2018).

[14] Gaskin concedes that he is aware of this Court's decision in *Dillbeck v. State*, ---So.3d---, 2023 WL 2027567 (February 16, 2023), stating that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment." *Dillbeck* at *7, quoting *Booker v. State*, 969 So.2d 186, 200 (Fla. 2007). And further concedes that Dillbeck's arguments about conditions on death row did not persuade this Court that their precedent was "clearly erroneous." *Id.*, citing *State v. Poole*, 297 So.3d 487 507 (Fla. 2013). Gaskin also recognizes that his conditions were similar, if not identical, to Dillbeck's, up to and including the length of their stays on death row. (IB at 51).

reason for this Court to depart from its existing and long-standing precedent refusing to recognize *Lackey* claims.

In addition to being foreclosed by binding precedent, Gaskin's claim is disingenuous. Gaskin is seeking to have his death sentence reduced to life based on his own conduct. This Court has explained that capital defendants are not permitted to contend that their punishment has been unconstitutionally prolonged because the delay in carrying out the sentence which is, in large part, due to their "own actions" in challenging their convictions and sentences. *Lambrix*, 217 So.3d at 988; *Valle*, 70 So.3d at 552. Justice Thomas made the same point. He stated that there is no support in the American constitutional tradition or in the Court's precedent "for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring from the denial of certiorari).

While Gaskin has spent over 31 years[15] on death row, he has been litigating his convictions and sentence in both state and federal court for most of that time. In the time when Gaskin asserts there was no impediment to the issuance of his death warrant—i.e., from 2015 when his clemency proceedings concluded until 2023 when the Governor signed his death warrant—Gaskin continued to challenge his convictions and sentences. Even now, by filing his third successive motion for postconviction relief, he is only seeking to further delay or prohibit his execution. *See Valle v. State*, 70 So.3d 530, 552 (Fla. 2011) (Valle "cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction[s] and sentence."); *Carroll v. State*, 114 So.3d 883, 890 (Fla. 2013) ("Further, the length of time Carroll has spent on death row is due in large part to his postconviction motions and habeas petitions.") Gaskin has been engaging in collateral challenges to his death sentence since it became final in 1993 to avoid or delay his

[15] Many of these controlling Florida Supreme Court cases, such as *Valle, Lambrix, Muhammad*, and *Booker*, involve a similar number of years to the 33 years that Gaskin has spent on death row.

execution. Any complaint now that the process, which he has used to his advantage to delay his execution, took too long, is plainly frivolous.

Gaskin of course has the option of exercising his appellate rights but should not benefit from the delay required for him to do so. *See Porter v. Singletary*, 49 F.3d 1483, 1485 (11th Cir. 1995) (denying a *Lackey* claim where the petitioner did not establish that the delays in his execution were due to deliberate actions of the state). It is odd to argue that delays in the execution largely caused by litigation initiated by the capital defendant himself and his zealous attorneys should result in his death sentence being reduced to a life sentence due to the time all the litigation he filed took.[16] As one court observed, the standard practice at common law was that executions

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[16] When capital defendants refuse to challenge their conviction and sentence by waiving postconviction proceedings, their executions do not take decades. A good example of this is John Blackwelder, whose conviction and death sentence were affirmed by the Florida Supreme Court on direct appeal in July of 2003 and who then waived all other proceedings and was executed in May of 2004. *Blackwelder v. State*, 851 So.2d 650 (Fla. 2003). Blackwelder spent less than one year on death row after his sentence was affirmed by the Florida Supreme Court because he did not challenge that sentence other than in the mandatory direct appeal.

were carried out swiftly after sentencing, including sometimes at dawn the next day without any review of the trial. *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995). But these days, in contrast, the Ninth Circuit observed, courts provide death row inmates with ample opportunities to contest their trials and sentence to prevent errors. *McKenzie*, 57 F.3d at 1467. But the Ninth Circuit observed how odd it would be to "conclude that delays caused by satisfying the Eighth Amendment themselves violate it." *Id.* at 1467. The Eighth Amendment does not operate in that bizarre manner.

The United States Supreme Court has refused to employ equitable remedies when the party asking for relief was the one responsible for the delay. *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 255, 257 (2016) (affirming the denial of the Tribe's request for equitable tolling because equitable tolling is not available "when a litigant was responsible for its own delay"). Gaskin himself is the main source of the delay and therefore, he may not raise an Eighth Amendment claim seeking to reduce his sentence to life based largely on his own conduct.

Opposing counsel is attempting to obtain relief based on the historical view that solitary confinement, especially if it includes

sensory deprivation, may be cruel and unusual punishment without meeting the traditional definition of that term. But Florida's conformity clause prevents that avenue. Under the state constitution's conformity clause governing cruel and unusual punishment issues, a Florida court cannot expand the United States Supreme Court's definition of solitary confinement. Fla. Const. art. 1, § 17; *Lawrence v. State*, 308 So.3d 544 548 (Fla. 2020) (discussing the Florida's constitutional conformity clause regarding Eighth Amendment claims).

Furthermore, it is not accurate to refer to the conditions on Florida's death row as "solitary confinement." Under the state constitution's conformity clause governing cruel and unusual punishment issues, this Court may not expand the United States Supreme Court's traditional definition of solitary confinement. The conditions on Florida's death row did not at any time since 1990, when Gaskin arrived on death row, amount to "solitary" confinement that would be considered cruel and unusual under the traditional definition.

Traditionally, "solitary confinement" is defined by the United States Supreme Court as "complete isolation of the prisoner from all

human society" and confinement in a cell such that the prisoner has "no direct intercourse with or sight of any human being." *In re Medley*, 134 U.S. 160, 167-68 (1890). Florida's death row is not "solitary confinement" under that traditional definition. Brandon Vines, *Decency Comes Full Circle: The Constitutional Demand to End Permanent Solitary Confinement on Death Row*, 55 COLUM. J.L. & SOC. PROBS. 591, 620-02 & n.147 & n.148 (2022) (referring to Florida's death row as "non-Solitary" and stating that, by contrast, eleven states and the federal government have even more restrictive death rows than Florida's); *Davis v. Dixon*, 2022 WL 1267602, *3 (M.D. Fla. Apr. 28, 2022) (describing the conditions on Florida's death row currently after the settlement and, by implication, the previous conditions as well when referring to increasing access to materials for their tablets and increasing their access to telephones).

Gaskin improperly mixes a claim based on the years he spent on death row with a condition of confinement claim regarding "solitary confinement" on death row. Because Gaskin cannot meet the traditional definition of solitary confinement, any Eighth Amendment claim based on the conditions of his confinement on

death row necessarily fails, and he may not rely on it, even in part, as support for the *Lackey* claim.

Lastly, the appropriate vehicle for raising a condition of confinement complaint is a civil action seeking to change the conditions on death row. And the appropriate remedy, if the conditions on death row are determined to violate the Eighth Amendment, is to change those conditions, not to vacate a perfectly valid death sentence. A capital inmate having his sentence reduced to life as the remedy for substandard prison conditions is both a non-sequitur and an "over" solution. The remedy of reducing the death sentence to a life sentence does not solve the problems of the prison conditions and it vacates a perfectly valid and legal sentence for a reason that does not relate to the sentence. Moreover, as the postconviction court concluded, Gaskin has already received the only appropriate remedy for his condition of confinement challenge to Florida's death row. The state postconviction properly denied the *Lackey* claim without a hearing.

Gaskin fails to distinguish or reconcile the binding precedent which has consistently rejected this claim. The fact that his litigation has taken many years does not render his death sentence

unconstitutional or preclude the issuance of a death warrant. Accordingly, this Court should affirm the postconviction court's summary denial of the third successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the postconviction court's summary denial of the third successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished on March 30th, 2023, by e-portal to: Tracy Henry, Capital Collateral Regional Counsel – Middle, 12973 Temple Terrace, FL 33637, **henry@ccmr.state.fl.us**; Cortney Hackett, Capital Collateral Regional Counsel – Middle, 12973 Temple Terrace, FL 33637, **hackett@ccmr.state.fl.us;** Honorable Terence Perkins, Kim Hammond Justice Center, 1769 E. Moody Blvd., building.1, Bunnell, FL 32110 **sprice@circuit7.org**; Rosemary Calhoun, Assistant State Attorney, Office of the State Attorney, 251 N. Ridgewood Ave., Daytona Beach, FL 32114 **calhounr@sao7.org**; Jason Lewis, Assistant State Attorney, 1769 E. Moody Blvd., Building 1, 3rd Floor, Bunnell, FL 32110, **lewisj@sao7.org**; Florida Supreme Court, **warrant@flcourts.org; canovak@flcourts.org.**

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Answer Brief is 14-point Bookman Old Style, and word count is 7,015 in compliance with Fla. R. App. P. 9.210(a)(2)(C) and 9.045.

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