

**IN THE SUPREME COURT OF FLORIDA
CASE NUMBER: SC2023-0415
Lower Tribunal Case: 1990-CF-0001**

EXECUTION SCHEDULED FOR APRIL 12, 2023, at 6:00P.M.

LOUIS B. GASKIN,
APPELLANT,

v.

STATE OF FLORIDA,
APPELLEE.

_____ /

**ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The State has filed its answer to Mr. Gaskin's initial brief, and this reply follows. The reply will address only the most salient points argued by the State. Mr. Gaskin relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

ARGUMENT IN REPLY

Mr. Gaskin will reply to the individual claims below. This section argues that the State's Answer Brief misinterpreted his arguments that were presented in his Initial Brief and in his habeas petition.

This court is aware that Mr. Gaskin is not only sentenced to death but is also set for a date certain for execution. Once the State has killed Mr. Gaskin, he will not have any recourse to the courts. No remedy can ever right the wrongs inflicted on Mr. Gaskin. This Court must understand its duty to review litigation for extreme malfunction after a death warrant is issued. Mr. Gaskin's attorneys would not fail to bring any such gross error to the Court for review. This Court set a schedule for this case, with an understanding that claims would be brought. The scheduling order did not contemplate the possibility that there would be no claims.

“[E]xecution is the most irremediable and unfathomable of penalties. . . death is different.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986), *citing Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). When post-warrant litigation calls upon this Court to halt an execution in circumstances where a death sentence was based on an extreme malfunction of the process, this Court can and should intervene. Mr. Gaskin has provided the pathway for this Court to do so.

Without judgment of the prior makeups of this Court, it is worth considering the history of those who were executed in this State. After the United States Supreme Court (“USSC”) passed on Florida’s death penalty scheme in *Proffitt v. Florida*, 428 U.S. 242 (1976) a number of cases found constitutional error in Florida law. Two cases in particular are worth considering. First, *Hitchcock v. Dugger*,¹ which involved Florida’s lack of instruction on non-statutory mitigation. Many death-sentenced individuals received relief, post-*Hitchcock*; however, all of those executed before the decision in *Hitchcock* were executed based on a penalty phase that did not allow for the

¹ 481 U.S. 393 (1987).

consideration of non-statutory mitigation. From the execution of John Arthur Spenklink (executed May 25, 1979) to the execution of Daniel Morris Thomas (executed April 15, 1986), barring any volunteers or jury waivers, Florida executed fourteen people based on the unconstitutional lack of jury instructions at issue in *Hitchcock*.

It is much worse when one considers the executions that took place prior to *Hurst v. Florida*,² which declared that Florida's death penalty scheme was unconstitutional. Of the 100 people executed in Florida since 1976, none of them received or waived a constitutional penalty phase. The juries in these cases were not instructed properly on the role the jury must play in determining whether a death sentence should be imposed and carried out. The nuances of *Poole v. Florida*,³ aside, none of these individuals had their death sentences determined under a constitutional procedure, especially when considered in comparison to the current procedure and evolving standards of decency.

Those who were executed have no recourse now that they have been executed in violation of the United States Constitution. Mr.

² 577 U.S. 92 (2016).

³ 297 So. 3d 487 (Fla. 2020).

Gaskin's post-warrant litigation seeks to halt the adding of his name to the list of individuals subjected to death in Florida in violation of the United States Constitution. To do this, he asks this Court to exercise its jurisdiction that is based in the Florida Constitution and demanded by the United States Constitution. This Court can provide no remedy to the executed, even when evolving standards of decency are finally recognized.

This Court has the authority to do justice in an individual case.

This Court has the responsibility as the highest court in Florida to do justice and enforce the rights under the United States Constitution. This Court has a number of ways it can do justice in this case. Then Chief Justice Anstead's special concurrence in *Baker v. State*, 878 So. 2d 1236 (Fla. 2004), joined by Justice Pariente and Justice Lewis, is instructive:

I write separately to sound a note of caution and reminder that in our attempts to efficiently regulate a system for addressing postconviction claims we must constantly keep in mind that we are dealing with the writ of habeas corpus, the Great Writ, which is expressly set out in Florida's Constitution. That writ is enshrined in our Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many centuries. This Court will, of course, remain alert to claims

of manifest injustice, as will all Florida courts. As we reaffirmed in *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999), “we will continue to be vigilant to ensure that no fundamental injustices occur.”

We must also be mindful of the concerns expressed by Justice Overton in *Harvard*:

Habeas corpus jurisdiction is basic to our legal heritage. It is so basic that the authors of our habeas corpus jurisdiction made it unique with regard to this Court because it states that habeas corpus jurisdiction may not only be exercised by the entire Court, but it may also be exercised by a single justice. It is the only jurisdictional provision that gives authority to an individual justice. The provision also takes particular care to address the problem of resolving substantial issues of fact, a concern of the majority, by allowing the Court or any justice to make the writ returnable to “any circuit judge.”

Id. at 1025 (Overton, Senior Justice, dissenting). With these concerns in mind, I concur with the basic premise of the majority opinion that postconviction claims that would ordinarily be subject to the strictures of rule 3.850 in the trial courts are not relieved of those strictures by filing the same claims in this Court.

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

Mr. Gaskin’s post-warrant litigation raised such manifest injustices; each of the manifest injustices are fully argued in the

initial brief and below. The law of the case, *res judicata*, and collateral estoppel have been overcome. *State v. Owen*, 696 So. 2d 715 (Fla. 1997); *State v. McBride*, 848 So. 2d 287 (Fla. 2003). Moreover, *stare decisis* has been routinely overturned by this Court in recent years. See *State v. Poole*, 297 So. 3d 487, 491 (Fla. 2020); *Bush v. State*, 295 So. 3d 179, 201 (Fla. 2020); *Phillips v. State*, 299 So. 3d 1013, 1022 (Fla. 2020); *Lawrence v. State*, 308 So. 3d 544, 549 (Fla. 2020).

This Court, as detailed above, has not yet fulfilled its responsibility to remedy these constitutional violations. It should do so now. Any recalcitrance in remedying violations of the United States Constitution creates another compelling reason for this Court to determine the issues.

Not addressing the claims Mr. Gaskin presents would raise the very concerns that the USSC recently addressed in *Cruz v. Arizona*.⁴ In *Cruz*, the opinion rested on the proposition that “[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal

⁴ 143 S. Ct. 650 (2023).

constitutional rights.” *Id.* at 658 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)). The dissent fully embraced that rule but argued that it was not violated in the circumstances at hand. *Id.* at 665. Certainly, as far as any *Hurst* related claim, the partial retroactivity addressed in the initial brief qualifies as novel. An application of a procedural bar would also be “novel” when it is considered that this Court has the jurisdiction to correct manifest injustice. Considering the stakes in this case, this must not stand.

This Court should exercise jurisdiction. Mr. Gaskin respectfully requests that this Court grant relief. Mr. Gaskin will briefly reply to each claim.

REPLY TO ISSUE I

This claim raises much more than simply the ineffectiveness of trial counsel. This claim is a fundamental Eighth Amendment claim that Mr. Gaskin’s death sentence was obtained without consideration of essential mitigation. The State’s brief misunderstands the issue Mr. Gaskin presents. This Court should not.

Mr. Gaskin was sentenced to death through a process that failed to conform to the minimum requirements for a death sentence. The penalty phase he received is hardly recognizable when compared

to what is required and regularly occurs in Florida; yet Florida seeks to execute him based on the unrecognizable proceedings from the past. This was apparent at the time of those proceedings, and it has come into sharp focus as he approaches execution three decades after his sentences were imposed. The jury was never presented with considerable mitigation that would have led a reasonable jury, even in 1989, to return a life recommendation.

Viewing the significant, profound, and available mitigating evidence through the lens of the recognized doctrine of evolving standards of decency renders Mr. Gaskin's death sentences unconstitutional.

Presentation of available mental health mitigation has been firmly established as an elementary component of effective representation in capital cases. Mr. Gaskin would not receive a sentence of death today because his extensive mitigation would place him outside of the class of individuals who may receive it, and it would be clear that both mental health statutory mitigators apply. This weighty mitigation would have made it clear that Mr. Gaskin is not the worst of the worst, and that this case is not the most aggravated and least mitigated. In other words, if Mr. Gaskin were

tried today, he would not receive a majority death recommendation.

The USSC has gradually made clear that the consideration of mitigation by the sentencer is at the heart of the constitutionality of the death penalty. This Court need only look to the USSC's body of relative case law to see the trajectory. In *Proffitt v. Florida*, the Court considered whether the imposition of the sentence of death for the crime of murder under the law of Florida violate[d] the Eighth and Fourteenth Amendments. 428 U.S. 242, 244 (1976). The USSC found that Florida's new death penalty law passed constitutional scrutiny because:

On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must *Inter alia*, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to

prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, see *Gregg v. Georgia*, 428 U.S., at 197, 96 S. Ct., at 2936, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

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

The USSC moved forward and developed even more principles to ensure that the death penalty was not exacted on those who did not meet the requirements of the Constitution. *Woodson v. North Carolina* required that a death penalty scheme “allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.” 428 U.S. 280, 303 (1976),. This did not occur in Mr. Gaskin’s case.

After *Woodson* came a litany of cases that required consideration of mitigation. In *Lockett v. Ohio* the USSC

“conclude[d] that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”

438 U.S. 586, 604 (1978). In *Eddings v. Oklahoma*, the USSC applied *Lockett*, stating that:

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

455 U.S. 104, 112 (1982). *See also Hitchcock v. Dugger*, 481 U.S. 393 (1987) (advisory jury must consider non-statutory mitigation). An obvious thread through these cases is that the USSC has long recognized the need for an individualized sentencing that properly considers *all* available mitigation. Mr. Gaskin was denied that kind of individualized sentencing in the trial court, and he was denied

again when this Court failed to consider his proffered mitigation from postconviction under contemporary standards of decency.

It is worth noting that the USSC further established the need for mitigation in a number of cases involving ineffective assistance of counsel claims; starting with *Strickland v. Washington*;⁵ and then *Wiggins v. Smith*;⁶ *Williams (Terry) v. Taylor*;⁷ *Sears v. Upton*;⁸ *Rompilla v. Beard*;⁹ *Porter v. McCollum*;¹⁰ and *Andrus v. Texas*,¹¹ that were all premised on the importance of mitigation in determining whether a death sentence may be constitutionally imposed.

The USSC has also found based on evolving standards of decency that it is per se unconstitutional to execute those who fall in certain classes. The USSC found in *Atkins v. Virginia*, 536 U.S. 304 (2002) that the execution of the intellectually disabled violated the Eighth Amendment based on evolving standards of decency. *Id.* at 321. Three years later, the USSC found the execution of those who

⁵ 466 U.S. 668 (1984).

⁶ 539 U.S. 510 (2003).

⁷ 529 U.S. 362 (2000).

⁸ 561 U.S. 945 (2010).

⁹ 545 U.S. 374 (2005).

¹⁰ 558 U.S. 30 (2009).

¹¹ 140 S. Ct. 1875 (2020).

committed their capital crime when under eighteen years of age violated the Constitution. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). These cases relied on the evolving standards of decency but, in essence, they are simply finding that the critical mitigation that results from age and intellectual disability are so important that individuals so afflicted cannot be executed. Mitigation matters. While Mr. Gaskin does not currently fall into a class of individuals that are categorically exempt from execution, he forms a class of one when his unconsidered mitigation and imminent execution are considered.

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

In particular, the State assumes that the negative information was irrefutable and admissible. The State argued:

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.

AB at 6-7. This assumes too much. A properly prepared defense expert could both explain the origins of a State expert ASPD diagnosis and then refute that inapt diagnosis. Mr. Gaskin grew into adulthood, deprived and traumatized. A comprehensive mental health evaluation would have been highly persuasive and rebutted the State's notion that Mr. Gaskin was simply antisocial.

Second, the State assumes that the prosecution would have been able to attack Mr. Gaskin in whatever manner, including direct assault on his character. The defense does not open the door to bad character evidence simply by presenting mitigation.

First and foremost, the State may only elicit evidence regarding certain categories of evidence as rebuttal to the specific presentation of the defense in penalty phase. This Court has recognized repeatedly that there are limits to the State's ability to attack an individual for the mere fact of presenting evidence. In *Hitchcock v. State*, this Court reversed a death sentence because there was evidence admitted "about alleged sexual attacks upon persons other than the victim ...". 673 So. 2d 859, 863 (Fla. 1996). There are numerous cases where

this Court has reversed a death sentence based on improper penalty phase argument or evidence.

There are limits to what may be presented in a death penalty case. In Mr. Gaskin's case, any sort of sexual issues he experienced were irrelevant to the murders, unfairly prejudicial and probative of nothing. The report of Dr. Rotstein was admitted into evidence by the State for many reasons, but mostly to prejudice the judge towards death. The substance of Dr. Rotstein's report would overwhelmingly not have been admissible in rebuttal to a properly prepared mental health expert presented by the defense. The fact that a State expert diagnosed a capital defendant with Antisocial Personality Disorder was hardly novel; it is often the case in death penalty trials. The notion that an ASPD diagnosis somehow precludes mitigation, it is an absurdity that this Court should not consider.

REPLY TO ISSUE II

If Mr. Gaskin had the good fortune to have a verdict that became final after *Ring v. Arizona*,¹² he would be in the class of individuals that received *Hurst* relief. Mr. Gaskin would either be awaiting new penalty phase proceedings, or he would have already received a life sentence after a full mitigation presentation. Instead, Mr. Gaskin finds himself with a date certain for his execution, not because his case is the most aggravated and least mitigated, but because of one date on the calendar. This is arbitrary, capricious, and excessive, thus violative of the Eighth Amendment and the guarantee of equal protection under the Fourteenth Amendment.

Following the execution of Donald Dillbeck, Mr. Gaskin is ensconced in a class of one. Mr. Gaskin is the only person with an active death warrant, and an imminent execution based on a non-unanimous death recommendation that lacked the necessary fact-findings required under *Hurst*. As far as a class of one, the USSC has stated:

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the

¹² 536 U.S. 584 (2002).

laws,” which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L. Ed. 2d 786 (1982).”

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

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

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

Mr. Gaskin’s imminent execution weighs on the equal protection scale as further disparity in treatment, not as

dissimilarity. The unequal treatment Mr. Gaskin will receive if he is actually executed should lead this Court to reconsider his arguments on arbitrariness, capriciousness, and equal protection. This issue was unavailable for litigation until Mr. Gaskin's warrant was signed. This Court can reach the manifest injustice in Mr. Gaskin's case. This Court should grant relief.

REPLY ON ARGUMENT III

The State addresses Mr. Gaskin's argument that his execution violates the Eighth Amendment due to his prolonged incarceration on Florida's death row by offering this Court multiple reasons to deny the claim, some of which were advanced before the circuit court and others which were not and are therefore defaulted. In referring to this claim, the State cites to Mr. Gaskin's initial brief and cites to page 61 of that brief. Mr. Gaskin's initial brief does not have a page 61, it appears that the State was referring to the initial brief in Donald Dillbeck's appeal. Regardless, Mr. Gaskin submits that he should not be placed on a historical list of those individuals who were executed in violation of the Constitution, based on the cruel and unusual nature of having him serve what amounts to a life sentence, followed by death. This is especially true when it is considered that Mr. Gaskin

was denied many of the protections that the United States Constitution requires.

The State first argues that Mr. Gaskin’s claim has no basis or support in the law. AB at 21. However, the State misunderstands this claim. While certiorari review was denied in *Lackey v. Texas*,¹³ Justices Stevens and Breyer recognized that Lackey had raised a novel and important question as to whether his lengthy time on death row—17 years—was cruel and unusual thereby violating the Eighth Amendment. *Lackey*, at 1045.

Lackey’s claim stemmed from philosophical justifications for the death penalty recognized in *Gregg v. Georgia*: retribution and deterrence. 428 U.S. 153, 183 (1976) (“[t]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering”). Moreover, Justice Stevens commented:

It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner’s claim. Moreover, after such an extended time, the acceptable

¹³ 514 U.S. 1045 (1995).

state interest in retribution has arguably been satisfied by the severe punishment already inflicted.

Lackey, 514 U.S. at 1045. Justice Stevens noted that the Court had previously recognized “when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.” 514 U.S. at 1045 (quoting *In re Medley*, 134 U.S. 160 (1890)). Thus, the Court in *In re Medley* recognized the type of super-added punishment of lengthy delays that Justice Gorsuch discussed in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

Since *Lackey*, condemned inmates have challenged the prolonged length and/or delay awaiting execution. Indeed, the State cites to numerous opinions which have addressed the merits of such a claim. AB at 26. Mr. Gaskin’s *Lackey* claim is grounded in the *In re Medley — Gregg — Lackey — Bucklew* line of opinions. Mr. Gaskin’s argument focused upon the length of time he has spent on death row, a decade of which he was eligible for a death warrant.

The State argues generalities in urging this Court to affirm the denial of relief. The State asserts that any delay is wholly attributable

to Mr. Gaskin, never acknowledging the indisputable fact that his appeals and clemency had been completed for a decade or that the lengthy delay awaiting execution was historically considered cruel and unusual. AB at 28. As was pointed out at the *Huff*¹⁴ hearing, the page on this Court’s website regarding Timely Justice Act notifications labels the tabs that relate to death row inmates whose initial state and federal postconviction processes are complete as “Warrant Ready.” Thus, unlike in *Porter v. Singletary*, Mr. Gaskin “has proffered” “evidence to establish that delays in his case have been attributable to negligence or deliberate action of the state.” 49 F.3d 1483, 1485 (11th Cir. 1995).¹⁵

The State also raises arguments for the first time, including that Mr. Gaskin waived his claim due to the federal litigation in *Davis et al. v. Dixon*, 3:17-cv-820 (M.D. Fla.)¹⁶, and that Florida’s conformity

¹⁴ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

¹⁵ In *Lackey*, Justice Stevens contemplated the notion that delay could be attributed to defendants: “There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner’s case.” 514 U.S. at 1045. Here, there can be no doubt that, at a minimum, the past decade of delay was caused by the State’s “negligence or deliberate [in]action.” *Id.*

¹⁶ The only reference to *Davis* in the State’s Response to Mr. Gaskin’s Rule 3.851 motion related to the argument that Mr. Gaskin had not been housed in “solitary confinement”:

clause precludes consideration of Mr. Gaskin's claim. These arguments are defaulted. They were not raised in the response to Mr. Gaskin's Rule 3.851 motion; they were also not included as bases for denying the claim in the order denying relief. *See Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993) (the contemporaneous objection rule applies not just to criminal defendants, but to the State as well); *see also State v. Fleming*, 61 So. 3d 399, 401 n.3 (Fla. 2011) (noting that the State did not preserve an argument because it failed to make it in the district court); *Bryant v. State*, 901 So. 2d 810, 822 (Fla. 2005) (holding "In order to preserve an issue for appeal, the issue 'must be presented to the lower court and the specific legal argument or grounds to be argued on appeal must be part of the presentation,'" quoting *Archer v. State*, 613 So. 3d 446, 448 (Fla. 1993)).

Lastly, it is not accurate to refer to the conditions on Florida's death row as "solitary confinement." Florida's confinement practices do not amount to the solitary confinement that could be considered cruel and unusual under the Eighth Amendment.

PCR 504. The issue of whether Mr. Gaskin's housing constituted "solitary confinement" is entirely distinct from the current waiver argument and not at all relevant to Mr. Gaskin's argument concerning the length of time he has spent awaiting execution.

However, if the State's arguments were not defaulted, they are meritless. As to whether Mr. Gaskin waived his claim based upon the recent settlement agreement on the conditions of his confinement, in that litigation, Mr. Gaskin was seeking to have the conditions of his confinement changed due to the fact that they violated the Eighth Amendment. Here, Mr. Gaskin argues that his execution violates the Eighth Amendment due to the length of time he has been incarcerated. The two are entirely different claims with different remedies. Further, nothing in the settlement agreement in *Davis* releases or prohibits making in other cases the arguments made in *Davis*, nor does it bar relitigation of issues relevant to *Davis*. The settlement simply released the claim itself (i.e., the claim to change Mr. Gaskin's conditions of confinement because they constituted cruel and unusual punishment, in violation of the Eighth Amendment).

While the State makes much of the delay being caused by Mr. Gaskin seeking a remedy for what amounts to an unconstitutional death sentence, and notes that Mr. Gaskin has had zealous representation, this has not always been the case. The performance of trial counsel, if judged under today's standards would fail

miserably. Mr. Gaskin was further impacted by the lack of transcripts of all the proceedings. He received none of what the Constitution requires for a death sentence. Of course, he raised claims. He never volunteered for death and maintains that this Court should grant relief.

CONCLUSION

This Court should grant relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the above has been furnished to opposing counsel by filing with the e-portal, and by e-mail which will serve a copy of this brief on all counsel of record: Assistant State Attorney Rosemary Calhoun, at CalhounR@sao7.org and PaughN@sao7.org; Assistant Attorney General Patrick Bobek at Patrick.Bobek@myfloridalegal.com and capapp@myfloridalegal.com; Assistant Attorney General Doris Meacham, at Doris.Meacham@myfloridalegal.com, and the Florida Supreme Court, at warrant@flcourts.org, on this 31st day of March, 2023.

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CERTIFICATE OF COMPLIANCE

We hereby certify that the Initial Brief has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief is not subject to word count, and instead complies with the page limit as it does not exceed 25 pages.

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