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In the Supreme Court of Florida

CASE NO. SC19-1264

GARY RAY BOWLES, *Petitioner*,

v.

MARK S. INCH,
Secretary, Florida Department of Corrections, *Respondent*.

EXECUTION SCHEDULED FOR
THURSDAY, AUGUST 22, 2019 @ 6:00 p.m.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

On July 26, 2019, Bowles, represented by Capital Collateral Regional Counsel - North, filed a petition for writ of habeas corpus in this Court in this capital case with an active warrant. The state habeas petition raises one claim asserting that capital punishment itself violates the Eighth Amendment's prohibition on cruel and unusual punishment. For the reasons discussed below, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief.

ISSUE I

WHETHER FLORIDA'S DEATH PENALTY STATUTE, SECTION 941.121, FLORIDA STATUTES, VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT?

Bowles asserts that Florida's death penalty statute, section 941.121, violates the Eighth Amendment's prohibition on cruel and unusual punishment. But the United States Supreme Court has repeatedly held otherwise. This Court is bound, both as a matter of federal and state law, by the United States Supreme Court's precedent to reject this Eighth Amendment challenge to capital punishment.

Standard of review

The standard of review for a constitutional challenge to a statute is *de novo* because the issue presents a pure question of law. *Davis v. State*, 142 So.3d 867, 871 (Fla. 2014) (conducting a *de novo* review of an Eighth Amendment issue). There is a strong presumption that a statute is constitutionally valid, and all reasonable doubts about the statute's validity must be resolved in favor of

constitutionality. *DuFresne v. State*, 826 So.2d 272, 274 (Fla. 2002) (citing cases); *United States v. Ruggiero*, 791 F.3d 1281, 1284 (11th Cir. 2015) ("We review *de novo* challenges to a statute's constitutionality, applying a strong presumption of validity.").

Merits

Bowles claims the death penalty itself violates the Eighth Amendment. The problem with this claim, of course, is that the United States Supreme Court has repeatedly, for more than four decades, held otherwise. *Glossip v. Gross*, 135 S.Ct. 2726, 2732-33 (2015) (recognizing that because "***it is settled that capital punishment is constitutional***, it necessarily follows that there must be a constitutional means of carrying it out" citing *Baze v. Rees*, 553 U.S. 35, 47 (2008) (emphasis added); *Baze v. Rees*, 553 U.S. 35, 47 (2008) ("We begin with the principle, settled by *Gregg*, that ***capital punishment is constitutional***" and observing it "necessarily follows that there must be a means of carrying it out.") (emphasis added but citation omitted); *McCleskey v. Kemp*, 481 U.S. 279, 299-319 (1987) (rejecting an Eighth Amendment as-applied challenge to the death penalty based on a study and observing the "Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment" and that "the Constitution does not place totally unrealistic conditions" on the use of capital punishment); *Gregg v. Georgia*, 428 U.S. 153

(1976) (holding the punishment of death for the crime of murder did not violate the Eighth Amendment); *Gregg*, 428 U.S. at 207 (White, J., concurring). The Eighth Amendment does not prohibit the death penalty under controlling United States Supreme Court precedent.

The High Court has repeatedly instructed lower courts to follow their existing precedent because only the High Court itself may overrule its own precedents. *Tenet v. Doe*, 544 U.S. 1, 11 (2005) (stating that courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions" quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *United States v. Hatter*, 532 U.S. 557, 567 (2001) (explaining that it is the United States Supreme Court's "prerogative alone to overrule one of its precedents" citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). This Court is bound by *Glossip*, *Baze*, *McCleskey*, and *Gregg* as a matter of federal law.

Additionally, this Court is bound by *Glossip*, *Baze*, *McCleskey*, and *Gregg* as a matter of state law. This Court is required, under the state constitution, to interpret the state constitution's prohibition against cruel and unusual punishment in conformity with United States Supreme Court precedent. Art. I, § 17, Fla. Const. ("The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution"); *Correll v. State*, 184 So.3d 478,

489 (Fla. 2015) ("this Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court" citing *Valle v. State*, 70 So.3d 530, 538-39 (Fla. 2011)). As Chief Justice Canady has explained, under the conformity clause, "the courts of Florida are precluded from determining that a sentence is cruel and unusual if a decision of the United States Supreme Court makes clear that the sentence does not violate the Eighth Amendment of the federal constitution" and a sentence may be invalidated "by a Florida court only if a decision of the United States Supreme Court requires invalidation of the sentence as cruel and unusual." *Yacob v. State*, 136 So. 3d 539, 558 (Fla. 2014) (Canady, J., dissenting). Under the conformity clause, this Court is bound by *Glossip*, *Baze*, *McCleskey*, and *Gregg* as a matter of Florida law.

Furthermore, this Court would have to overrule its own precedent holding that Florida's new death penalty statute, Chapter 2017-1, Laws of Florida, that was enacted in the wake of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), is constitutional. *Evans v. State*, 213 So. 3d 856, 859 (Fla. 2017) (denying two petitions for writs of prohibition and holding that Chapter 2016–13, Laws of Florida, can be applied to pending prosecutions because "most of the provisions of the Act" are constitutional); *Lambrix v. State*, 227 So.3d 112, 113 (Fla. 2017) (rejecting a substantive right argument based on the enactment of Chapter 2017-1, Laws of Florida, citing *Hitchcock v. State*, 226

So.3d 216 (Fla. 2017), and *Asay v. State*, 224 So.3d 695 (Fla. 2017)), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017).

Bowles seeks to have this Court, based on the unproven assertions supported mainly by newspaper articles and websites, overrule numerous cases from this Court as well as numerous cases from the United States Supreme Court. Under both federal and Florida law, capital punishment does not violate the Eighth Amendment. This Court should decline to do so.

The Eighth Amendment and "exonerations"

Based on information from the Death Penalty Information Center, which advocates abolishing the death penalty, Bowles asserts that since 1973, 29 "innocent people" on the Florida's death row have been "exonerated." Pet. at 4 & n.3. But, as the United States Supreme Court has observed, the accuracy of the guilt-phase determinations in a capital case, is "simply irrelevant" to the question of the constitutionality of a state's capital ***sentencing*** system. *Kansas v. Marsh*, 548 U.S. 163, 180 (2006) (emphasis in original). According to the United States Supreme Court, one may not challenge the constitutionality of a sentencing statute based on allegations regarding wrongful convictions because one concerns the guilt phase and the conviction, while the other concerns the penalty phase and the sentence.

Alternatively, the allegations regarding exonerations are not accurate. In claiming more than two dozen exonerations in Florida, opposing counsel has

confused legal error with innocence. An appellate court remanding for a new trial or finding insufficient evidence to support the conviction is ***not*** an exoneration. As Justice Scalia has noted, the mischaracterizations of reversible error as being the equivalent of actual innocence or amounting to an exoneration are "endemic in abolitionist rhetoric." *Marsh*, 548 U.S. at 196 (Scalia, J., concurring). Justice Scalia explained that, as a consequence of the sensitivity of courts to the due-process rights of capital defendants, almost two-thirds of all death sentences are overturned but "virtually none" of these reversals are attributable to the defendant's "actual innocence." *Id.* at 198. He explained that most reversals are based on legal errors "that have little or nothing to do with guilt." *Id.*

Commenting on DNA testing, Justice Scalia noted that "in every case of an executed defendant of which I am aware, that technology has ***confirmed*** guilt." *Marsh*, 548 U.S. at 188 (Scalia, J., concurring) (emphasis in original). Justice Scalia discussed several actual cases including the case of Roger Coleman. *Id.* Coleman, was, in Justice Scalia's words, the "poster-child for the abolitionist lobby." *Id.* Coleman was convicted of the rape and murder of his sister-in-law. After his execution, a DNA test ordered by the Governor of Virginia proved that Coleman was guilty. *Id.* at 189. Justice Scalia also pointed to the cases of Rick McGinn and Derek Barnabei, who were often pointed to as wrongfully convicted capital defendants, whose "guilt was also confirmed by DNA tests." *Id.* In Justice Scalia's words, there was not a "single verifiable case" of an innocent person being executed but "it is easy as pie" to identify plainly guilty murderers who have been

set free. *Id.* at 199. Justice Scalia noted that the dissent in *Marsh* could not point to "a single case—not one—in which it is clear that a person was executed for a crime he did not commit." *Id.* at 188.

Justice Scalia also discussed the Florida case of James Adams who was executed in 1984 and who is often given as an example of an innocent man who was executed. *Marsh*, 548 U.S. at 191-92 (Scalia, J., concurring). Justice Scalia detailed some of the most incriminating evidence against Adams including his having the victim's eyeglasses and jewelry in his car as well as Adams' clothing and cash being stained with the victim's blood type which was not his blood type. Justice Scalia then pointed out that the critics of the death penalty never mention any of this highly incriminating evidence against Adams in their claims of his innocence. These types of claims of innocence provoked Justice Scalia to label such claims of innocence as inaccurate, careless, and unworthy of credence. *Id.* at 191.

Justice Scalia also disputed the reliability of information from the Death Penalty Information Center, which is the source of opposing counsel's allegations regarding Florida's death row exonerations. Pet. at 4, n.3, n.4 & n.5. Justice Scalia noted that the Center's list of exonerees contains many "dubious candidates" including the Florida case of Delbert Tibbs. *Marsh*, 548 U.S. at 196-97 (Scalia, J., concurring) (discussing the Death Penalty Information Center's list and its defects). On remand from a reversal, the State Attorney "felt compelled to drop the charges" against Tibbs due to the victim/witness' condition, not based on a

belief that Tibbs was innocent. *Id.* at 197. In Justice Scalia's opinion, Tibbs "was never an innocent man wrongfully accused." Rather, Tibbs "was guilty." *Id.*

And, as Justice Scalia pointed out, reversals of erroneous convictions on appeal, or in federal habeas proceedings, or in executive clemency demonstrate "not the failure of the system but its success." *Marsh*, 548 U.S. at 193 (Scalia, J., concurring). Justice Scalia noted the general ".027% error rate for American verdicts" in all criminal cases and explained that, given the increased review afforded capital cases, the possibility that an innocent person would be executed has been reduced to "an insignificant minimum." *Id.* at 198-99.

Additionally, Bowles is the worst possible capital defendant to make this type of attack on the constitutionality of Florida's death penalty statute because there is no doubt as to his guilt. Bowles confessed to the murder and entered a guilty plea. *Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998) (noting Bowles "gave both oral and written confessions regarding Hinton's murder"); *Bowles v. State*, 804 So.2d 1173, 1175 (Fla. 2001) (noting "Bowles pled guilty to premeditated first-degree murder"). Furthermore, he entered guilty pleas in the prior Volusia County murder and in the prior Nassau County murder which were used as aggravating factors in this case. Bowles does not, and cannot have, a valid claim of innocence.

But again, regardless of wrongful convictions in other cases, the death penalty remains constitutional under the majority opinion in *Kansas v. Marsh*, which rejected just this type of challenge to the death penalty. *Marsh*, 548 U.S.

at 180.

Deterrence and retribution

Opposing counsel asserts that there is "no meaningful evidence that the death penalty deters" murder. Pet. at 11. There is indeed meaningful evidence of the death penalty's deterrence effect. *Baze v. Rees*, 553 U.S. 35, 89 (2008) (Scalia, J., concurring) (noting the "significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one" citing Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 706 & n.9 (2005), as "listing the approximately half a dozen studies supporting this conclusion"). Justice Scalia noted that if these studies were "even roughly correct," then "a refusal to impose capital punishment will effectively condemn numerous innocent people to death." *Id.* at 90.

These multiple regression studies employed a form of data, called "panel data," that uses all information from a set of units (states or counties) and follows that data over an extended period of time. H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & Econ. 453, 474 (2003) (using panel data on all death sentences handed out in the United States between 1977 and 1997 and finding that each "additional execution decreases homicides by about five, and each additional commutation increases homicides by the same amount, while one additional removal from death row generates one additional homicide."). A leading

study used county-level panel data from 3054 U.S. counties between 1977 and 1996. Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344 (2003) (finding that the murder rate is significantly reduced by both death sentences and executions and explaining that the most striking finding was that on average, each execution results in eighteen fewer murders); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Stud. 283, 318 (2004) (concluding that each execution results in, on average, three fewer murders and the death penalty's deterrence effect extends to crimes of passion and murders by intimates). These studies of panel data, however, noted that for the death penalty to have a deterrent effect, actual executions must occur. So, the problem is that delays in executions undermine the deterrent effect of capital punishment, not that capital punishment lacks a deterrent effect.

And, regardless of deterrence, as Justice Scalia has observed, the death penalty is constitutional based on retribution. *Baze*, 553 U.S. at 90 (Scalia, J., concurring). Retribution is a valid societal goal in punishment including the idea that it is sometimes the only punishment that "fits" the particular crime, including such crimes as being a serial killer like Bowles. Immanuel Kant, *Metaphysics of Morals*, 105. Contrary to opposing counsel's argument, retribution does not depend solely on the victim's immediate family's feelings.

Capital punishment is both a deterrent and justifiable retribution.

The Eighth Amendment and evolving standards of decency

Opposing counsel also claims capital punishment violates the Eighth Amendment because it is contrary to the "evolving standards of decency that mark the progress of a maturing society." Pet. at 6. She asserts that there is a "clear and consistent national trend against capital punishment," relying mainly on three states abolishing the death penalty in the last four years. Pet. at 5-6 & n.8 (citing Delaware in 2016; Washington in 2018; and New Hampshire in 2019).

But, as of 2019, 29 states and the federal government still have the death penalty. So, more than half of the states in this country still have capital punishment. The evolving standards of decency standard certainly does not require that States in the majority adopt the view of States in the minority. Furthermore, the trend is not all in one direction. The federal government recently announced it intends to resume executions. Office of Public Affairs, Press Release, U.S. Dept. of Justice, *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse* (July 25, 2019). Florida's death penalty statute does not offend the evolving standards of decency.

Moreover, basing the evolving standards of decency on mere trends undermines the States' independent sovereignty, which is at its highest when the issue concerns a State's police powers and the criminal law. *United States v. Morrison*, 529 U.S. 598, 618 (2000) (noting police power was denied to the National Government and reposed in the States by the Founders); *United States v. Lopez*, 514 U.S. 549, 561, n.3 (1995) ("Under our federal system, the States

possess primary authority for defining and enforcing the criminal law" citing cases). Florida should not be required to do what other states have done based merely on trends in those other states. Florida should not be bound by the laws enacted by the legislature of Delaware, Washington, or New Hampshire because the citizens of Florida had no vote in electing those state legislatures. Such a standard also undermines the states' ability to function as laboratories which is one of the reasons often given for federalism. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country'" quoting Justice Brandeis' dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)). The Eighth Amendment was not designed to undermine the Tenth Amendment.

And, as Justice Alito has noted, while the philosophical basis for the evolving standards of decency test was "problematic from the start," at least, when it is based on "tallying of the positions taken by state legislatures," it is objective. *Miller v. Alabama*, 567 U.S. 460, 510-11 (2012) (Alito, J., dissenting). Using state legislatures as the measure, because the majority of states in this country have capital punishment, capital punishment does not violate the Eighth Amendment's evolving standards of decency test.

Capital punishment does not violate the Eighth Amendment and therefore, the state habeas petition should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished via the e-portal to **KARIN LEE MOORE**, Capital Collateral Regional Counsel-North, 1004 Desota Park Dr., Tallahassee, FL 32301-4555; phone: 850-487-0922; email: karen.moore@ccrc-north.org; **ELIZABETH SPIAGGI**, Capital Collateral Regional Counsel-North, 1004 Desota Park Dr., Tallahassee, FL 32301-4555; phone: 850-487-0922; email: Elizabeth.Spiaggi@ccrc-north.org; **TERRI BACKHUS**, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: terri_backhus@fd.org; **KIMBERLY L. SHARKEY**, Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: kimberly_sharkey@fd.org this 31st day of July, 2019.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12 point font.

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