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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.

REPLY BRIEF FOR WRIT OF HABEAS CORPUS

EXECUTION SCHEDULED FOR
AUGUST 22, 2019 at 6:00 P.M.

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PRELIMINARY STATEMENT

The State has filed its response to Mr. Bowles's petition for writ of habeas corpus, and this reply follows. This reply will address only the most salient points argued by the State. Mr. Bowles relies upon his petition in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

CITATIONS TO THE RECORD

Citations to the Record on Appeal compiled in Mr. Bowles's second direct appeal, *see Bowles v.* State, 804 So. 2d 1173 (Fla. 2001), will be in the format "R. at [page]. Citations to the Record on Appeal compiled in Mr. Bowles's appeal from the denial of his initial postconviction motion, *see Bowles v. State*, 979 So. 2d 182 (Fla. 2008), will be "PCR. [Volume Number] at [page]." Citations to the Record on Appeal compiled for this petition will be "PCR-ID. at [page]." Citations to the State's Response to Mr. Bowles's Petition for Habeas Corpus will be "Response at [page]."

REPLY TO ISSUE 1

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE EIGHTH AMENDMENT'S AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT.

The State correctly posits that Mr. Bowles is asking this Court to declare Florida's death penalty unconstitutional under the Eighth Amendment of the United States Constitution and Article 1, § 17 of the Florida Constitution. The request is not made lightly, but Florida is an outlier in the application of the death penalty in this country and is bucking national trends that mark the progress of a maturing society. Mr. Bowles's case particularly is emblematic of the wielding of this most severe sanction in an unacceptably arbitrary manner.

The State has argued that a majority of states still have the death penalty, but that is misleading. Response at 12. Mr. Bowles would not be eligible for execution in twenty-five states and the District of Columbia if he were convicted

today of capital murder in those states.[1] Since 2007, nine states have abolished the death penalty and four other states have moratoria imposed by their governors.[2]

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[1] The states with the death penalty are Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Four of these states, California, Colorado, Oregon, and Pennsylvania, have gubernatorial moratoria in place.

States without the death penalty are Alaska, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. *See* Death Penalty Information Center (DPIC), *States with and without the Death Penalty – 2019*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

[2] Those states are Connecticut (2012), Delaware (2016), Illinois (2011), Maryland (2013), New Hampshire (2019), New Jersey (2007), New Mexico (2009), New York (2007), and Washington (2018). *Id.* States with gubernatorial moratoria are California (2019), Colorado (2013), Oregon (2011) and Pennsylvania (2015). *Id.* On July 16, 2019, Philadelphia District Attorney Larry Krasner announced that his office is asking the Pennsylvania Supreme Court to declare the death penalty unconstitutional and cited to an internal study of death penalty cases in his office over a forty year period that revealed that seventy-two percent of the 166 death sentences were overturned. *See* Julie Shaw, *DA Krasner wants Pa. Supreme Court to Strike Down State's Death Penalty and Declare It Unconstitutional,* Philadelphia Inquirer (July 16, 2019), *available at* https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-death-penalty-response-state-supreme-court-jermont-cox-20190716.html

In 2018, thirty-six states did not impose new death sentences and only eight states conducted executions.[3] In 2018, Florida counties imposed seven new death sentences[4] and executed two people.[5] Only California with 740 prisoners[6] has a larger death row population than Florida, but California has not executed an inmate since 2006.[7] Florida currently has a death row population of 343[8] and last executed a prisoner on May 23, 2019.[9]

Against that backdrop, Florida has earned disturbing distinctions as the state that leads the nation in death row exonerations (twenty-nine with two in the last

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[3] *See* DPIC, *The Death Penalty in 2018: Year End Report, available at* https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2018-year-end-report.

[4] *See* DPIC n. 3, *supra*.

[5] *See* DPIC, *Executions in 2018, available at* https://deathpenaltyinfo.org/executions/2018.

[6] *See* DPIC, *Death Row Prisoners by State, available at* https://deathpenaltyinfo.org/death-row/overview.

[7] *See* DPIC, *State and Federal Information: California, available at* https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california. California has executed only thirteen people since 1976.

[8] *See* Fla. Dep't. of Corr., *Death Row Roster, available at* http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx.

[9] *See* Fla. Dep't. of Corr., *Execution List: 1976-Present, available at* http://www.dc.state.fl.us/ci/execlist.html.

year)[10] and the state with the most missed federal habeas corpus filing deadlines (thirty-four).[11]

1. Exonerations

Florida leads the nation with twenty-nine death row exonerations.[12] The State has objected to the use of the term "exoneration" and cites to Justice Scalia's concurring opinion in *Kansas v. Marsh*, 548 U. S. 163, 198 (2006), for the proposition that "exonerations" do not equal "innocence." Response at 6-8. The State has argued that the defense has confused "legal error with innocence" in claiming that twenty-nine men have been exonerated from Florida's death row. Response at 6-7. Regardless of the term used, twenty-nine men who faced

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[10] *See* DPIC, *Innocence Database*, *available at* https://deathpenaltyinfo.org/policy-issues/innocence-database. Of the 166 exonerations, Florida has twenty-nine, which accounts for more than seventeen percent of all exonerations in this country.

[11] *See Lugo v. Sec'y, Dep't. of Corr.*, 750 F. 3d 1198, 1216-1218 (11th Cir. 2014) (Martin, J., concurring) (explaining that at least thirty-four death row inmates in Florida have missed their one-year filing deadlines under the Anti-Terrorism and Effective Death Penalty Act of 1996.) At least three Florida death row inmates, Juan Chavez, Paul Howell, and Chadwick Banks, have been executed after their postconviction lawyers missed their federal habeas corpus filing deadlines. *See Lugo*, 750 F. 3d. at 1216; and Ken Armstrong, *The Marshall Project, Death by Deadline, Part One* 8 (2014). The Marshall Project report tallied thirty-seven missed filing deadlines in federal habeas proceedings for Florida death row prisoners. The number of missed filing deadlines also calls into question the competence of counsel appointed to represent death row inmates in state and federal postconviction and habeas proceedings.

[12] *See* DPIC, n. 10, *supra.*

execution have been released from Florida's death row. The "legal errors" were substantial enough to warrant remands. Whether all were actually innocent is not certain, but all either had their capital crime dismissed by courts or prosecutors or were found not guilty at a new trial of the crime for which they were originally sentenced to death.[13]

Apparently, the State contests the innocence of all those exonerated from Florida's death row and opposes the release of even those defendants who are actually innocent. Indeed, at the case management conference held below on Mr. Bowles intellectual disability claim, the State argued to the circuit court, "The State's position is that actually innocent people should not be set free." PCR-ID at 1327. The State ignores the gross injustices, some of which were leveled by prosecutors, or legal errors that led to death sentences for defendants who were later acquitted at new trials or whose cases were dismissed by the state or judges upon remand.

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[13] In a 2011 report entitled *Truly Innocent? A Review of 23 Case Histories of Inmates Released from Florida's Death Row Since 1973 (Truly Innocent?)*, the Florida Commission on Capital Cases examined twenty-three case histories of inmates released from Florida's death row from 1973 through 2011 in response to negative publicity that Florida led the nation in death row releases. *Id*. at 7. The Commission, which was defunded for the fiscal year 2011-2012, disputed the innocence of all but four of the twenty-three death row prisoners who were released. *Id*. However, none of the remaining nineteen released defendants were returned to death row. *Id.*

Moreover, the Florida Commission on Capital Cases found in a 2011 report that of the twenty-three men released from Florida's death row from 1973 through 2011, two (Freddie Lee Pitts and Wilbert Lee) were pardoned by Governor Askew and the Cabinet because of "substantial doubt as to their guilt," one (Frank Lee Smith) died before DNA results excluded him as the source of semen in a capital sexual battery case, and a fourth man (James Richardson) was not retried by the State "due to the newly discovered evidence and the suspicion of another perpetrator."[14] According to the report, the remaining nineteen death row men who were released from death row were not innocent, but not one of them was returned to death row to face execution for their original capital crime.[15] The State dismissed the capital charges for eight of the remaining defendants, six were acquitted at their new trials, and six were remanded by this Court for entry of a judgments of acquittal.[16] And since the 2011 report by the Commission, this Court has reversed at least two other convictions and death sentences.

In 2014, in *Dausch v. State,* 141 So. 3d 513, 518-19 (Fla. 2014), this Court reversed the first-degree murder conviction and death sentence of Carl Dausch and remanded his case to the circuit court with directions for entry of a judgment of

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[14] *See Truly Innocent?,* n. 13, *supra.*

[15] *Id.* at 7.

[16] *Id. at 9.*

acquittal because the State failed to prove the identity of the perpetrator in this circumstantial evidence case. DNA evidence and latent fingerprints from items collected from the scene did not establish that Dausch murdered the victim, only that he was in the victim's car at some time. *Id.* at 518-519. In fact, DNA testing on semen found on bedsheets used to bind the victim's hands and feet excluded Dausch and fingerprints on the victim's wallet were not Dausch's. *Id.* at 518.

And in *Aguirre-Jarquin v. State*, 202 So. 3d 785, 794-94 (Fla. 2016), this Court reversed the circuit court's denial of a new trial based on a postconviction newly discovered evidence claim. At the evidentiary hearing on the claim, Aquirre-Jarquin presented DNA evidence on previously untested items of evidence that excluded the Defendant and included the victim's daughter. *Id.* at 791-92. The defense also presented evidence that the daughter had confessed to her mother's murder to four different witnesses on five different occasions. *Id.* at 792. On remand, the state dismissed all charges against Mr. Aguirre-Jarquin.[17]

The danger of executing an innocent person is real. Even if not actually proven innocent, when errors occur of such magnitude that innocence remains a possibility, courts and prosecutors alike are hesitant to call for the gravest

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[17] Charles King, *Prosecutors Drop Case against Clemente Aguirre-Jarquin*, Orlando Sentinel (Nov. 5, 2018), *available at* https://www.orlandosentinel.com/news/breaking-news/109577133-132.html.

punishment. *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."); *Herrera v. Collins*, 506 U.S. 390, 431 (1993) (Blackmun, J., Stevens, J. and Souter, J., dissenting in part) ("I think it is crystal clear that the execution of an innocent person is 'at odds with contemporary standards of fairness and decency.'") (quoting Spaziano v. Florida, 468 U.S. 447, 465 (1984)). If the execution of an innocent person has not already happened, it is only a matter of time before it does. In fact that fear, along with the costs associated with the death penalty, are commonly cited as driving forces behind abolition in the states that have recently abolished the death penalty.

2. Deterrence

The State has cited to several studies that indicate that capital punishment saves lives by deterring new murders. Response at 10-11. In 1978, two years after the Supreme Court decision in *Gregg v. Georgia*, 408 U. S. 238 (1976), ended the four-year moratorium on capital punishment after the Court's plurality decision in *Furman v. Georgia*, 408 U. S. 238 (1972),[18] the National Research Council (NRC),

[18] In *Furman*, Justices Brennan and Marshall declared the death penalty unconstitutional *per se* for different reasons in separate opinions, Justices Douglas, Stewart and White, declared the death penalty unconstitutional as applied for different reasons and in separate opinions, , and Chief Justice Burger and Justices

the research arm of the National Academy of Sciences (NAS), examined existing studies on the deterrent effect, if any, of capital punishment, and determined that "available studies provide no useful evidence on the deterrent effect of capital punishment."[19]

In 2014, the NRC's Committee on Deterrence and the Death Penalty came to the same conclusion after studying existing research and commissioning more studies on the issue.[20] Existing and new studies ran the gamut from finding some deterrent effect that saved lives, to finding capital punishment actually increased murders, to finding no evidence that capital punishment had any deterrent effect.[21] The NRC concluded that research gathered to date "on the effect of the capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates." The

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Powell and Rehnquist filed separate dissenting opinions finding the death penalty constitutional. There was no majority decision.

[19] Nat'l Research Council (NRC), Nat'l Academy of Sciences, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, NRC at 9 (1978). The National Academy of Sciences (NAS) was established by Congress in 1863 to "advise the federal government on scientific and technical matters." *See* NAS, *Mission*, *available at* http://www.nasonline.org/about-nas/mission/. The NAS formed the National Research Center in 1916 "to associate the broad community of science and technology with the Academy's purposes of furthering knowledge and advising the federal government." *Id.*

[20] NRC, *Deterrence and the Death Penalty*, at 1 (2012).

[21] *Id.*

NRC recommended that these contradictory studies not be used to "inform deliberations" about the effect, if any, of capital punishment on homicide.[22]

All studies cited by the State predate the 2012 NRC report and should not be used to support the existence of any deterrent effect of the death penalty on homicides. If there is no sound basis in science that capital punishment deters new murders, then there is no reasonable basis in law for using deterrence to support the continued use of the death penalty.

3. Retribution

The State has argued that retribution is a valid sentencing purpose. The only alternative sentence under Florida law for a conviction for first-degree murder is a life sentence with no possibility of parole. If this Court ruled Florida's death penalty unconstitutional, then Mr. Bowles and every other death row inmate on Florida's death row would die in prison, just not at the hands of the State.

The State has argued that what other states do should not control what Florida does. The fact that nine states have abolished the death penalty in the past twelve years is compelling and signifies a new standard of decency, one which this state should adopt.

[22] NRC, n. 15 at 2.

The State has argued that the majority of states, twenty-nine, still have capital punishment, but four of those states (California, Colorado, Oregon and Pennsylvania) have moratoria on executions. Nine states have abolished the death penalty since 2007, which indicates a significant trend away from capital punishment. The State has argued that the federal government's very recent decision to resume executions indicates that the trend is not in one direction. Response at 12. That argument is misleading. The decision to resume federal executions was made by the executive branch with the stroke of a pen. The nine states that have repealed the death penalty did so by legislation, the true measure of the will of the people.

4. The Death Penalty Is Arbitrary and Capricious as Applied to Mr. Bowles

Not only does Florida's death penalty violate the Eighth Amendment's evolving standards of decency principle, it is arbitrary and capricious as applied to Mr. Bowles in two ways.

First, Mr. Bowles was arbitrarily denied relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 18 So. 3d 975 (Fla. 2016), and *Asay v. Florida*, 201 So. 3d 1 (Fla. 2016). Mr. Bowles pleaded guilty to first-degree murder in Duval County, Florida in 1996. *See Bowles v. State*, 716 So. 2d 769, 770 (Fla. 1998).

Pursuant to Florida's pre-*Hurst*[23] sentencing scheme, the judge imposed a death sentence. *Id*. On appeal, the Florida Supreme Court found that Mr. Bowles's death sentence was unreliable because the trial court erred in allowing the State to introduce prejudicial evidence, and vacated Mr. Bowles's death sentence and remanded for a new sentencing. *Id.* at 773. Following a second penalty phase proceeding, the state court again imposed the death sentence, which was affirmed by the Florida Supreme Court on direct appeal in 1999. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), *cert denied*, *Bowles v. Florida*, 536 U.S. 930 (2002).

On the same day that Mr. Bowles's direct appeal was affirmed in this Court, in a separate decision, this Court affirmed the unrelated death sentence of James Card. *Card v. State*, 803 So. 2d 613 (Fla. 2001). Both prisoners petitioned for a writ of certiorari in the United States Supreme Court. The Supreme Court denied Mr. Bowles's and Mr. Card's certiorari petitions in orders issued 10 days apart. Because Florida's *Hurst*-related retroactivity rule applies a bright line cutoff for retroactive relief not at the date of *Hurst*, but at the date of the opinion in *Ring v. Arizona*, 536 U.S. 584 (2002), those are the sole facts—that Mr. Bowles' death sentence became final on June 17, 2002, *Ring* was issued on June 24, 2002, and Mr. Card's became final on June 28, 2002—that led this Court to hold, more than fifteen years later, that Mr. Bowles must remain on Florida's death row while Mr. Card's death sentence

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[23] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

should be vacated under *Hurst*, 136 S. Ct. 616, and his case remanded for a new sentencing proceeding. *See Bowles v. State*, 235 So. 2d 292 (Fla. 2018), *cert denied*, 139 S. Ct. 157 (Mem.) (2018).

Secondly, while the death penalty has become extraordinarily rare, when it is imposed it is done so freakishly and wantonly, rendering it constitutionally unreliable under the Eighth Amendment. Alarmingly, fifty-seven percent of the few death sentences imposed in 2018 came from merely four states, including Florida.[24] Even more troubling, Duval County, the county where Mr. Bowles was sentenced, "is among the two percent of counties in the United States responsible for a majority of all inmates on death row."[25] Roughly twenty-five percent of Florida's death sentences come from Duval County, even though it only holds about five percent of the state's population.[26] Bernie De La Rionda, the assistant state attorney who prosecuted Mr. Bowles, has put more people on death row than just about any other prosecutor in Florida, putting ten people on death row since 2008.[27] This is

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[24] *Id.*

[25] Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DPIC (Oct. 2013), *available at* https://files.deathpenaltyinfo.org/documents/pdf/TwoPercentReport.f1560295690.pdf.

[26] *See, e.g.*, Robert J. Smith, *America's Deadliest Prosecutors*, Slate (May 14, 2015), https://slate.com/news-and-politics/2015/05/americas-deadliest-prosecutors-death-penalty-sentences-in-louisiana-florida-oklahoma.html

[27] *See, e.g.*, *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, Fair Punishment Project (June 2016),

particularly disturbing in light of the national trend moving away from capital punishment describe above. It is clear that whether a death sentence is imposed depends not on the crime or societal mores, but rather on the specific state, county, and prosecutor where an individual is sentenced—the height of an arbitrary and capricious system.

CONCLUSION AND RELIEF SOUGHT

Based on the evolving standards of decency counsel for Mr. Bowles respectfully urges this court to commute his death sentence into a life sentence.

Respectfully submitted,

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available at http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf; *see also* Robert J. Smith, *America's Deadliest Prosecutors*, Slate (May 14, 2015), *available at* https://slate.com/news-and-politics/2015/05/americas-deadliest-prosecutors-death-penalty-sentences-in-louisiana-florida-oklahoma.html.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this petition complies with the font and formatting requirements of Fla. R. App. 9.210(a)(2). A Times New Roman 14 font was used.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Terri Backhus, Chief, Capital Habeas Unit, Federal Public Defender for the Northern District of Florida (terri_backhus@fd.org); Bernie de la Rionda (bdelarionda2@gmail.com); Assistant State Attorney Sheila Ann Loizos (sloizos@coj.net); Assistant Attorney General Jennifer A. Donahue (jennifer.donahue@myfloridalegal.com), Assistant Attorney General Charmaine Millsaps (Charmaine.millsaps@myfloridalegal.com), (capapp@myfloridalegal.com), the Circuit Court of the Fourth Judicial Circuit (pfields@coj.net), and the Florida Supreme Court (warrant@flcourts.org) this 6th day of August, 2019.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi