IN THE SUPREME COURT OF FLORIDA

DUANE EUGENE OWEN,

Appellant,

CASE NO. SC18-382

v.

STATE OF FLORIDA,

Appellee.
_____/

STATE'S REPLY TO MARCH 12, 2018 ORDER TO SHOW CAUSE

COMES NOW, APPELLEE, the State of Florida, by and through the undersigned counsel, and files its reply to Appellant's Response to the March 12, 2018 Order to Show Cause and asserts that this Court should affirm the denial of Appellant's successive postconviction motion in accordance with *Asay v. State*, 210 So.3d 1 (Fla. 2016) (herein *Asay I)* ; *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); *Asay v. State, 224 So.3d 695 (Fla. 2017)* (herein *Asay II)*; and *Lambrix v. State*, 227 So.3d 112 (Fla.), *cert. denied*, 138 S.Ct. 312 (2017) and therefore states:

STATEMENT OF THE CASE AND FACTS

The capital sentence under attack in this successive motion for postconviction relief stems from Duane Owen's conviction and sentence of death for the horrific and brutal murder, of G.W. *Owen v. State*, 596 So. 2d 985 (Fla. 1992). Owen's case became final on October 13, 1992, with the denial of

certiorari. Owen v. Florida 506 U.S. 338 (1992). Owen filed a postconviction relief motion challenging his death sentence based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (herein *Hurst I)* and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (herein *Hurst II*). The trial court summarily denied the motion pursuant to *Hitchcock, supra* and *Asay v. State, 224 So.3d 695 (Fla. 2017).* This appeal followed.

Owen was tried and convicted for the first degree murder of G.W.; burglary with a weapon; and sexual battery. Following the penalty phase presentation, and in support of that sentence the trial court found the four following aggravators: "the defendant was previously convicted of another capital felony or felony involving the use of threat or violence to another person"; "the crime was committed while the defendant was engaged in a burglary and a sexual battery"; "the crime for which he is sentenced was especially wicked, evil, atrocious and cruel"; "the crime was committed in a cold, calculated, and premediated manner". (ROA 4951-4954). Owen was sentenced to death on March 13, 1986. (ROA 4954). This Court, on January 23, 1992 affirmed the convictions and death sentence, and rehearing was denied on April 1, 1992. *Owen, supra*. Owen has filed two prior motions since his 1992 direct appeal. *See Owen v. State*, 773 So. 2d 510 (Fla. 1994) and *Owen v. State*, 854 So.2d 182, 276 (Fla. 2004).

Thereafter, Owen filed a federal habeas petition which was denied and that

ruling was affirmed on May 18, 2009. *Owen v, Florida DOC* 568 F.3d 894 (11th Cir. 2009). Therein, Owen raised fourteen claims which the Eleventh Circuit Court of Appeals described as follows:

> In this capital case, Duane E. Owen appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus challenging his convictions for the murder and sexual battery of Georgianna Worden and his death sentence on the murder conviction. The certificate of appealability ("COA") encompasses fourteen claims that fall into four categories: (1) five ineffective-trial-counsel claims that the state collateral court found procedurally barred because Owen refused to proceed at his evidentiary hearing; (2) one ineffective-appellate-counsel claim that the state collateral court found procedurally barred because it was insufficiently pled and proven; (3) three other ineffective counsel claims that the state collateral court found procedurally barred because they were raised and litigated on state direct appeal; and (4) five claims that the district court denied on the merits.1 After review and oral argument, we conclude the district court properly found the first category of claims procedurally barred from federal habeas review but erred in concluding the next two categories of claims were procedurally barred from federal habeas review. Nonetheless, we conclude that all of Owen's claims not procedurally barred lack merit. Thus, we affirm the denial of Owen's § 2254 petition.

Owen, supra 568 F.3d at 899. No other litigation ensued since 2009 until the filing of the successive motion pursuant to *Hurst II.*

ARGUMENT

HITCHCOCK WAS NOT WRONGLY DECIDED AND DENIAL OF RETROACTIVE APPLICATION OF *HURST* IS NOT UNCONSTITUTIONAL (restated)

Appellant suggests he cannot be bound by *Hitchcock, supra* on due process and equal protection grounds as he has a substantive right to an individualized appellate process to challenge the retroactive application of *Hurst II* and therefore this appellate process is constitutionally flawed. He seeks an "individualized appellate" process here because allegedly the defendant in *Hitchcock* did not raise the same claims he presents and *Asay*, 210 So.3d at 1 did not address *Hurst II* retroactivity, thus, *Hitchcock* is not binding on him. Contrary to his suggestion, the settled precedent of *Hitchcock*; *Asay*, 210 So.3d at 22; *Lambrix*, 227 So.3d 116-17; and their progeny address the constitutional challenges Appellant raises here and support the denial of relief.

Moreover, the appellate review employed in this case is long-standing, proper and does not violate either due process or equal protection. Indeed, the United States Supreme Court employs a somewhat similar procedure when dealing with numerous cases involving the same issue. It decides the lead case, and then it vacates and remands the other cases to the lower courts in light of the new decision in the lead case. This procedure is referred to as "grant, vacate, and remand" or "GVR" for short. *Lawrence v. Chater,* 516 U.S. 163, 166 (1996) (noting "the ['grant, vacate, and remand'] order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices"); *Wellons v. Hall*, 558 U.S. 220, 225 (2010). There is no basis for this

Court to amend its procedure here. Moreover, reliance on precedent is the backbone of jurisprudence.

As for the merits, i.e., Owen's claim that *Hurst II* should be retroactive to his 1992 conviction and sentence, this Court has determined *Hurst I* and *Hurst II* are not retroactive to cases in a similar posture to the instant case. On December 22, 2016, this Court issued *Asay*, 210 So.3d at 22 and *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016). In *Mosley*, this Court stated: "we have now held in *Asay v. State*, [210 So.3d 1, (Fla. 2016)], that *Hurst v. State*, 202 So.3d 40 (Fla. 2016)} does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*." As such, Owen's argument that *Asay* did not settle the retroactivity question for cases final before *Ring* is not supported by this Court's precedent. Hence, *Hitchcock, supra* and *Lambrix, supra* foreclose the challenges raised here as Owen's case was final in October of 1992. *See Asay, supra* at 22;[1] *Hitchcock, supra* at 217 (stating "[w]e have consistently applied our decision in *Asay V*, [210 So.3d at 22], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to

[1] Also, in *Asay*, 210 So.3d at 15-16 this Court discussed the appropriate test for determining retroactivity of *Hurst II* and applied the *Witt v. State*, 387 So.2d 922 (Fla. 1980) analysis "which provides more expansive retroactivity standards than those adopted in *Teague [v. Lane*], 489 U.S. 288 (1989)," which enumerates the federal retroactivity standards. Id. (emphasis in original), *quoting Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005). *See also Danforth v. Minnesota*, 522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader that *Teague*). As recognized in *Hitchcock*, after *Asay*, 210 So.3d at 1, this Court has adhered staunchly to its ruling.

defendants whose death sentences were final when the Supreme Court decided *Ring*").

Moreover, *Ring* is not retroactive under *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), thus, further undercutting Owen's claim that he is being deprived of a substantive right. The United States Supreme Court determined *Ring* was a procedural rule and did not create a substantive constitutional change in the law as it only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Schriro*, 542 U.S. at 353. *Ring* did not alter the "range of conduct or the class of persons that the law punishes." *Id*. *Ring* "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Id*. at 358. Because *Hurst I* is an expansion of *Ring* to Florida, *Hurst I* like *Ring* did not create a substantive rule and is not retroactive under federal law. The *Ring* decision date is the bright-line cutoff point for retroactivity of a *Hurst* claim. Thus far, this Court has refused to extend *Hurst I* and *Hurst II* to defendants based solely on the fact that their judgments were final prior to the decision in Ring.[2] *Hitchcock*, 226 So.3d at 217;

[2] This Court has reaffirmed *Hurst* is not retroactive to cases final before June 24, 2002 and affirmed the denial of the *Hurst* claim on that basis. *See Stein v. State*, SC17-1547, 2018 WL 636066, at *1 (Fla. Jan. 31, 2018); *Gordon v. State*, SC17-1133, 2018 WL 636418, at *1 (Fla. Jan. 31, 2018); *Whitton v. State*, SC17-1118, 2018 WL 635982, at *1 (Fla. Jan. 31, 2018); *Krawczuk v. State*, SC17-1142, 2018 WL 635983, at *1 (Fla. Jan. 31, 2018); *Sireci v. State*, SC17-1143, 2018 WL 635985, at *1 (Fla. Jan. 31, 2018); *Rodriguez v. State*, SC17-1268, 2018

see also Asay, 224 So.3d at 703 (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); *Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment,[3] due process, equal protection, and a substantive right based on new legislation). This Court should affirm the denial of relief. *See also*

WL 635986, at *1 (Fla. Jan. 31, 2018); *Consalvo v. State*, SC17-1309, 2018 WL 635988, at *1 (Fla. Jan. 31, 2018); *Sliney v. State*, SC17-1074, 2018 WL 636103, at *1 (Fla. Jan. 31, 2018); *Miller v. Jones*, SC17-1211, 2018 WL 636104, at *1 (Fla. Jan. 31, 2018); *Lamarca v. State*, SC17-1179, 2018 WL 618728, at *1 (Fla. Jan. 30, 2018); *Whitfield v. State*, SC17-1399, 2018 WL 615022, at *1 (Fla. Jan. 30, 2018); *Mendoza v. State*, SC17-1324, 2018 WL 618592, at *1 (Fla. Jan. 30, 2018); *Gudinas v. State*, SC17-919, 2018 WL 618595, at *1 (Fla. Jan. 30, 2018); *Sochor v. State*, SC17-1343, 2018 WL 618698, at *1 (Fla. Jan. 30, 2018); *Fotopoulos v. State*, SC17-971, 2018 WL 579814, at *1 (Fla. Jan. 29, 2018); *Marquard v. State*, SC17-862, 2018 WL 524794, at *1 (Fla. Jan. 24, 2018). *See also Asay*, 210 So.3d at 8, 22(sentence final in 1991); *Hitchcock*, 226 So.3d at 216; *Lambrix v. State*, 217 So.3d 977, 989 (Mar. 2017) (sentence final in 1986).

3. Owen's argument that defendants who did not receive a unanimous jury recommendation are not eligible to receive a death sentence and cannot be executed under the Eighth Amendment is flawed. In *Spaziano v. Florida*, the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 463–64, (1984) *overruled on other grounds by Hurst v. Florida*, 136 S. Ct. 616 (2016). In deciding *Hurst v. Florida*, the Supreme Court only analyzed the case on Sixth Amendment grounds. The Court did not address any possible Eighth Amendment violation. Hence, *Hurst v. Florida*, only overrules *Spaziano* to the extent it allows a sentencing judge to find an aggravator independent of a jury's fact-finding. *Hurst v. Florida*, 136 S. Ct. at 618. The Supreme Court has never held a unanimous jury recommendation is required under the Eighth Amendment.

While this Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision, it did not, and cannot, overrule the United State Supreme Court's surviving precedent in Spaziano. Additionally, Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and unusual punishments in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014) (noting under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). Given Florida's conformity clause and that there is no United States Supreme Court case holding the Eighth Amendment requires the jury's final recommendation be unanimous, Owen's reliance on the Eighth Amendment discussed in *Hurst v. State* is misplaced and does not support his claim for relief. No Eighth Amendment right was created, thus, there is no right to be applied retroactively.

Lambrix v. Sec'y, Fla. Dep't of Corr., __ F.3d __, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), *cert. denied*, *Lambrix v. Jones*, 2017 WL 4456332 (Oct. 5, 2017) (rejecting constitutional challenges, including eighth amendment claim, to Florida Supreme Court's decision to find *Hurst II* to be inapplicable to pre-*Ring* cases and finding that decision to be consistent with precedent from United States Supreme Court).

Owen also argues that he is being deprived of the substantive rights now afforded to other capital litigants pursuant to Florida's new death penalty statue. However, as already recognized by this Court, that argument is simply another challenge to the retroactivity of *Hurst II* and therefore does not afford Owen any relief. *See Asay, 224 So.3d at 703* (rejecting claim that Hurst and Chapter 2017-1, Laws of Florida should be applied retroactively to defendant whose case became final before June 24, 2002*)*; and *Lambrix v. supra*, *cert. denied*, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017).

Even if *Hurst* were applied to Owen, any error is harmless beyond a reasonable doubt for a variety of reasons. That analysis requires the state to prove beyond a reasonable doubt, that a rational jury, when instructed according to the requirements of *Hurst II*, *supra*, would have found unanimously all the facts necessary to impose the death sentence and would have recommended the death penalty unanimously. *Mosley, supra* (explaining "it must be clear beyond a

reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence."); *see also Galindez v. State*, 955 So. 2d 517, 523 (Fla. 2007) (explaining that the harmless error analysis for an *Apprendi* violation is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration when there was a failure to have the jury make the victim injury finding regarding penetration); *Neder v. United States*, 527 1, 18 (1999)(explaining that the harmless test for erroneous instruction to the jury is based on the rational jury).

Herein, Owen has two prior violent felony convictions, and therefore he was death eligible based on a recidivist aggravator, his prior violent felony convictions of first degree murder and attempted murder. While this Court has not reembraced *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) fully, *see King v. State*, 211 So.3d 866, 891 (Fla. 2017), the United States Supreme Court recognized the critical distinction of an enhanced sentence supported by a prior conviction in *Almendarez-Torres*, 523 U.S. 224; *Ring*, 536 U.S. at 598 n.4; *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013). *Hurst v. Florida* did not disturb this precedent. Also, while this Court declined to model its harmless error analysis after *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017) for a post-*Ring* case, *Pagan v. State*, 2018 WL 654450 (Fla. Feb. 1, 2018), the United States Supreme Court has confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-

phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, the Supreme Court reversed and reinstated the death sentence. *See also Waldrop v. Comm'r, Alabama Dep't of Corr.*, 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (explaining its rejection of a *Hurst* claim, Circuit Court of Appeals stated: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. See §13A-5-45(e).").

This Court has previously found in this case that *Ring* was satisfied where aggravating factors were established by prior violent felonies and contemporaneous felonies. *Owen*, 854 So. 2d at 192. 03. That finding is still good law as even after *Hurst I* and *Hurst II*, this Court has reaffirmed that analysis. In *King v. State*, 211 So.3d 891(Fla. Jan. 2017), this Court stated as follows:

> We also conclude that the finding that the murder was committed during the course of a sexual battery or kidnapping was not erroneous. The United States Supreme Court indicated in *Apprendi* and *Ring* that there was one narrow exception to the Sixth Amendment requirement that a jury must find any fact that increases the maximum sentence: the fact of a prior conviction, as established in

> *Almendarez–Torres. Ring*, 536 U.S. at 597 n.4; *Apprendi v. New Jersey*, 530 U.S. 466, 489–90 (2000). . . . On this matter, we find persuasive the reasoning of the Arizona Supreme Court, which concluded unless and until the United States Supreme Court expressly rules otherwise, *Almendarez–Torres* remains a valid, if narrow, exception to *Apprendi* and *Ring*. *See State v. Ring*, 65 P.3d 915, 938 (Ariz. 2003) ("We cannot ignore a Supreme Court decision interpreting federal law unless the Court expressly overrules or casts cognizable doubt on that decision."); see also *State v. Whitfield*, 107 S.W.3d 253, 262 & n.7 (Mo. 2003) (finding no error by judge finding the existence of prior convictions as aggravating circumstances). Therefore, the jury in this case was not required to find the existence of the aggravating circumstance that King committed the murder during the course of sexual battery because he had already been convicted of sexual battery at the time he was sentenced.

King, supra at 891 n. 7. Therefore, the existence of both the contemporaneous felonies of burglary and sexual battery in this case prove that a jury unanimously found Defendant guilty of the felonies that supported this aggravating circumstances. Additionally, Owen conceded the existence of this factor. (ROA 4318). Consequently, it is beyond all reasonable doubt that a rational jury would have found unanimously the existence of these factors. *See Hall v. State*, No. SC15-1662, 2017 WL 526509, at *23 (Fla. Feb. 9, 2017)(finding the egregious facts of the case supported the harmless error finding); *Kopsho v. State*, No. SC15-1256, 2017 WL 224727 (Fla. Jan. 19, 2017) (finding that no reasonable juror would not have found the under the sentence of imprisonment, prior violent felony,

during the course of aggravators); *Armstrong v. State,* 211 So.3d 864 (Fla. 2017) (finding that even though jury recommendation was not unanimous, no reasonable juror would not have found the existence of the aggravators factors.

The same rationale holds for the "prior violent felony" aggravator. In support of that factor, one of the weightiest aggravators in Florida, the jury was presented with evidence of Owen's conviction of attempted first degree murder and burglary while armed with a weapon against a seventeen-year old female asleep in her bed. The jury also heard from that victim as well. M.M. And again, Owen conceded the existence of this factor. (ROA 4072, 4141, 4318). Consequently, a rational juror if instructed according to *Hurst II*, would have found beyond a reasonable doubt the existence of this factor. *Kopsoh, supra.*

Regarding the remaining two aggravators, "HAC" and "CCP" the harmless error analysis includes additional considerations as certain principles have emerged from the Florida Supreme Court's nascent harmless error analysis for *Hurst II* errors. Again *King, supra at* 889-893. Therein, the Court identified certain considerations it takes into account regarding a harmless error determination. Those considerations include: whether the defendant challenged contested facts in support of the aggravators; whether the aggravators were overwhelming and uncontroverted factually; was the mitigation comparatively weak and challenged

by the state; and the actual numerical vote of the jury's recommendation. *King*, 211 So. 3d at 892-893.

The facts of this case, warrant a finding of harmless error beyond a reasonable doubt because a rational jury, if instructed that all of their findings in support of a death recommendation had to be found unanimously would have recommended that Owen be given the death penalty for the brutal bludgeoning murder of G.W. The evidence establishing HAC was overwhelming as recounted by this Court:

> Sufficient evidence also supports the court's finding that the murder was especially heinous, atrocious, or cruel. The sleeping victim was struck on the head and face with five hammer blows. She awoke screaming and struggling after the first blow and lived for a period of from several minutes to an hour. Her neck was constricted with sufficient force to break the bones therein. She was sexually assaulted and the walls of her vagina were torn by a foreign object, such as the hammer handle.

Owen, supra at 990. A rational jury would have found unanimously the existence of this factor. *King, supra*; *Hall, supra.* Although Owen claimed that the victim could have been rendered unconscious after the first of five blows, the evidence was uncontroverted that G.W. screamed, and, according to Owen himself in his confession, tried to fight him off. Consequently, unlike the facts of *Jackson v. State*, 213 So. 3d 754 (Fla. 2017) the facts herein were not highly contested and

there is no need to speculate whether a jury would have found unanimously and beyond a reasonable doubt the existence of this factor.

Likewise, with respect to the CCP aggravator, the evidence was also unassailed and uncontroverted. This Court found:

> The court's finding that the murder was committed in a cold, calculated, and premeditated manner was also adequately established. Owen selected the victim, removed his own outer garments to prevent them from being soiled by blood, placed socks on his hands, broke into the home, closed and blocked the door to the children's room, selected a hammer and knife from the kitchen, and bludgeoned the sleeping victim before strangling and sexually assaulting her.

Id. Owen's challenge to this factor was based solely on the "frenzied nature" of the attack. Whether the lethal blows were administered in a frenzied manner or not, does not negate the elements of CCP here as, there is no question that Owen planned this murder and brought a lethal weapon with him. Even Owen's mental health doctor conceded that Owen intended to burglarize the house, to rape G.W. and either incapacitate or kill G.W. from the inception of the attack. (ROA 4197-4199, 4200, 4202, 4204). A rational jury would have unanimously found the existence of this aggravating factor, beyond a reasonable doubt if it had been instructed to do so.

In conclusion, based on the unique facts and circumstances the state asserts that this record demonstrates beyond a reasonable doubt that a rational jury having been instructed pursuant to *Hurst II* would have unanimously found all four aggravators. The compelling, striking and un-assailed evidence in support of all the aggravators, along with the manner in which Owen challenged two aggravators and conceded the facts in support of the remaining two factors, without question establishes beyond a reasonable doubt, that a rational jury would have unanimously found the four aggravators if instructed in accordance with *Hurst II*.[4]

[4] This murder was by all accounts horrific and extremely violent. Owen bludgeoned to death G.W. while she lay in her bed, with her children in the next room. All of the aggravating factors in this case were factually uncontested and three of the four, including "HAC", "CCP; and "prior violent felony" are the weightiest in Florida's death penalty jurisprudence. The evidence in mitigation was either suspect in its evidentiary support and/or qualitative nature. For instance, the fact that Owen "needs to dominate" women and that he is basically antisocial is qualitatively weak mitigation. Dr. Peterson "drew" a graphic picture of Owen as a shark feasting on prey in bloody waters. The inescapable conclusion to any rational person being that Owen wants to mitigate his culpability for the "frenzied attack," but he alone created that bloody trigger. The mitigation nature of that circumstance is hard to grasp. *Sochor v. State,* 619 So. 2d 285, 293 (Fla. 1993) (rejecting finding of statutory mitigator based on evidence that defendant becomes violent with women when drinking as it is difficult to discern whether such conduct is mitigating). Additionally, Dr. Peterson's opinion regarding Owen's mental state was based on an incredible hypothesis regarding the most convenient timing of Owen's "break with reality." That coupled with Dr. Peterson admission that Owen is a liar, and a manipulator stretches the boundaries of believability regarding his alleged mental status beyond what a rational juror could reasonable consider mitigation. Based on all the above, it is clear beyond a reasonable doubt that a rational jury, when instructed based on the requirements of *Hurst II,* would have unanimously found all the aggravators and other factors necessary for a death sentence and would have unanimously recommended a sentence of death against Duane Owen. *Cf. Thomas v. State,* 456 So. 2d 454, 460 (Fla. 1984) (upholding override of jury recommendation of life where victim bludgeoned to death, the existence of HAC and CCP and two weak statutory mitigators); *Torres-Arboledo v. State,* 524 So. 2d 403 (Fla. 1988)(explaining override was proper were defense expert testimony was sole basis for mitigation that defendant was intelligent and possessed potential for rehabilitation).

Owen also makes a cursory attempt to justify application of *Hurst II* because of his previous waiver of an evidentiary in his first postconviction motion which he claims was the result of an alleged ineffective assistance of collateral counsel. (Response at 12-13). Owen is incorrect as it was Owen himself who approved of the waiver of the evidentiary hearing, along with his counsel during the postconviction proceedings. Furthermore, this Court made explicit factual findings that Owen refused to act in good faith at those proceedings. This Court found as follows:

> In the present proceeding, by filing ineffectiveness and conflict of interest claims against trial counsel in the Worden case, Owen waived the attorney-client privilege in that case. Although he subsequently invoked the privilege in the Slattery case, **he still was obligated to proceed in good faith in the present case to the extent that the privilege permitted. He did not do so.** In fact, at the hearing below, he made no effort to introduce substantive evidence concerning the Worden trial. Instead, he called as his only witness Barry Krischer, i.e., his former trial counsel in the Slattery case. Krischer knew virtually nothing about the Worden trial and his testimony was guaranteed to implicate the privilege, which expressly applied only to the Slattery case. Further, although the court below agreed to bar disclosure of privileged information, Owen made no effort to proffer any substantive evidence that would have been excluded by the privilege. *515 In short, **Owen made no showing of prejudice**. We find no abuse of discretion in the manner in which the court conducted the hearing.

Owen, 773 So. 2d at 514–15. (emphasis added). Owen challenged the state court rulings in his federal habeas petition. Therein the Eleventh Circuit Court of

Appeals affirmed ruling that this Court's findings were fully supported by the record for numerous reasons. *Owen, supra,* 568 F.3rd at 909-910. Consequently, the "equitable remedy" Owen seeks is not justified.

Next, Owen's reliance on *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and claim there can be no harmless error as his jury was misled because its role was advisory (R at 16) is meritless. First, any complaint about jury instructions at this point is untimely and procedurally barred. *Troy v. State*, 57 So. 3d 828, 838 (Fla. 2011). Second, in order to establish constitutional error under *Caldwell*, a defendant must show the comments or jury instructions "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). The jury was instructed properly on its role based upon then existing law. It is absurd to suggest the jury should have been instructed in accordance with a constitutional change in the law which occurred decades after sentencing. Third, the claim is based on pure speculation. There is nothing to support the proposition that the jury's responsibility in rendering the advisory sentence was diminished. Relief must be denied. *See Reynolds v. State,* (rejecting claim that "Hurst induced Caldwell" claims challenging then standard instructions entitle defendants to relief based on *Hurst*).

In summation and as noted previously, this Court has rejected the notion that the passage of Chapter 2017-1, Laws of Florida creates a substantive right to a

resentencing in a case final before June 24, 2002. The fact that the Legislature has enacted a new statute following the dictates of *Hurst*, does not give Owen a new substantive right. *See Asay*, 210 So.3d at 8, 22; *Hitchcock*; *Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation); and *Asay*, 224 So.3d at 703 (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"). *See also* Article X, section 9 of the Florida Constitution. Given the fact Owen's case was final before *Ring* and this Court has rejected previously all of his claims, the denial of postconviction relief should be affirmed as his case is a successive motion and must be summarily denied. *See Florida Rule of Criminal Procedure* 3.851 (e)(2).

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests this Honorable Court to affirm the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of April 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: James Drsicoll Esq., at driscoll@ccmr.state.fl.us; hendry@ccmr.state.fl.us.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Celia Terenzio
COUNSEL FOR APPELLEE