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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC18-810

DUANE EUGENE OWEN

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

ASHLEY B. MOODY
Attorney General
Tallahassee, FL

Celia A. Terenzio
Assistant Attorney General
Florida Bar No.: 0656879
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 268-5315
Facsimile (561) 837-5108
CapApp@MyFloridaLegal.com

Counsel for Appellee

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PRELIMINARY STATEMENT

Defendant below, will be referred to as "Owen" or "Appellant" and, State of Florida, will be referred to as "State" or "Appellee". Reference to the appellate records will be:

Direct Appeal - "ROA; and Postconviction Relief Appeal - "PCR". The initial brief will be notated as **"IB"**

ORAL ARGUMENT

Owen claims that oral argument is warranted simply because this is a capital case. The state asserts that is an insufficient basis to warrant oral argument. The issues have been briefed twice in the lower court and twice in this Court, and therefore a full opportunity to "air the issues" has been provided.

STATEMENT OF THE CASE AND FACTS[1]

The State does not object to Appellant's procedural history of this case. The relevant facts for purposes of the issues, specifically the harmless error analysis is contained in the State's previous response filed on July 16, 2018. A brief rendition of the guilt phase facts appears in the Court's opinion on direct appeal and are as follows:

Although not challenged by Owen, prior to determining whether the

[1] Appellant makes numerous references and argument about his capital sentence from his second case, *Owen v. State* 596 So. 2d 985 (Fla. 1992). That case is not under review in this appeal. This Court denied relief based on *Hurst v. Florida* 136 S.Ct. 616 (2016) on June 28, 2018. *See Owen v. State,* Case No. SC18-382.

> sentence of death is proportionate, this Court must examine the sufficiency of the evidence underlying the conviction. Here, the evidence clearly supports the finding of guilt. At trial, the State presented Owen's videotaped confession, as well as DNA evidence to establish Owen's guilt beyond any doubt. The medical examiner testified that semen was found on Slattery's external genitalia, as well as within her vagina. DNA experts testified that the semen most probably came from Owen, as only 1 out of 690 million Caucasian males would have the same DNA markers. The impressive DNA evidence and Owen's own confession to the murder provide sufficient proof to uphold the adjudication of guilt.

Owen v. State, 862 So. 2d 687, 702 (Fla. 2003).

SUMMARY OF THE ARGUMENT

Introduction: While Appellant's appeal of the denial of relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), was pending, on April 24, 2019, the Court directed the parties to address "whether this Court should recede from the retroactivity analysis in *Asay v. State*, 210 So.3d 1 (Fla. 2016); *Mosley v. State*, 209 So.3d 1248 (Fla. 2016); and *James v. State*, 615 So.2d 668 (Fla. 1993). Additionally, the Court permitted briefing on any other pertinent issue. In response, the State respectfully presents the following arguments.

ISSUE I. Stare decisis does not preclude this Court from receding from *Asay* and *Mosley* nor abrogating *James.* The decisions in *Asay* and *Mosley* were premised on ignoring long standing existing precedent without justification. Consequently, neither should be protected by stare decisis. Additionally, *James* does not command the protection of stare decisis, as its sole premise is in direct conflict with the

standard retroactivity analysis employed in Florida for decades.

ISSUE II. This Court should recede from *Asay* and *Mosley* as both decisions are the result of an improper application of the *Witt/Linkletter* factors. In receding from those decisions, the Court should reaffirm *Johnson v. State*, 904 So.2d 400 (Fla 2005), which held that *Ring v. Arizona* 536 U.S. 584 (2002), was not retroactive, and find that *Hurst v. Florida,* 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), are prospective only.

ISSUE III. This Court must abrogate *James,* as it violates the basic precepts of Florida's retroactivity analysis.

ISSUE IV. This Court must abrogate the *Witt/Linkletter* retroactivity test and replace it with the long-standing test of the United States Supreme Court in *Teague v. Lane,* 489 U.S. 288 (1989). Florida's policy considerations concerning the postconviction process and retroactivity of new rules is best served under *Teague.* Moreover, *Teague* is currently applied in 40 other states, the District of Columbia and the federal courts, and adopting it in Florida will serve the goal of consistency between and among the states - and between the state and federal courts - in applying decisions of the United States Supreme Court.

ISSUE V. This Court should affirm the trial court's finding of harmless error in this case and, in so doing, reaffirm that the harmless error test in Florida is an objective one based on the reasonable juror standard. As such, consideration of any

subjective factor related to the original jury and what effect any error had on that original jury is precluded. *See Neder v. United States*, 527 U.S. 1 (1999).

ARGUMENT

ISSUE I

THE DOCTRINE OF STARE DECISIS DOES NOT PRECLUDE THIS COURT FROM OVERRULING PRECEDENT THAT RESULTED FROM MISAPPLICATION OF OR IS IN DIRECT CONFLICT WITH LONG STANDING PRECEDENT

Owen spends time discussing why stare decisis should be adhered to, urging that "*Mosley* is settled law, and there is, thus, a strong presumption that *Hurst* should remain retroactive, at least as to post-*Ring* defendants." **(IB at 38).** Even applying the traditional state retroactivity test of *Witt*, this Court should recede from *Mosley* and hold that *Hurst v. Florida* and *Hurst v. State* are not retroactive.

Had the *Mosley* Court followed the doctrine of stare decisis, *Hurst v. Florida* and *Hurst v. State* would not have been found retroactive. Existing precedent from the Florida Supreme Court held that the right-to-jury-trial cases were not applied retroactively. The Court had routinely held that neither *Apprendi* nor its progeny, including its death penalty progeny, such as *Ring v. Arizona*, were retroactive under *Witt*. *See Hughes v. State*, 901 So.2d 837 (Fla. 2005) (holding *Apprendi* was not retroactive after performing an extensive *Witt* analysis); *Johnson v. State*, 904 So.2d 400 (Fla. 2005) (holding that *Ring* was not retroactive after performing an extensive *Witt* analysis); *State v. Johnson*, 122 So.3d 856 (Fla. 2013) (holding *Blakely v.*

Washington, 542 U.S. 296 (2004), was not retroactive after performing an extensive *Witt* analysis). The doctrine of stare decisis should not prevent this Court from receding from *Mosley*. *Cf. Okafor v. State,* 225 So.3d 768, 775-76 (Fla. 2017) (Lawson. J., concurring).

Detailed in Issue II is how the *Mosley* Court ignored long-standing, existing precedent in violation of stare decisis without cause.

Nor is the *Mosley* Court's reliance on *James v. State*, 615 So.2d 668 (Fla.1993), entitled to the protection of the doctrine of stare decisis. *Mosley*, 209 So.3d at 1274-75 (discussing the "fundamental fairness rationale" of *James*). *James* was an unwarranted deviation from the established state test for retroactivity of *Witt*. *James,* 615 So.2d at 671 (Grimes, J., dissenting) (explaining that *Espinosa v. Florida*, 505 U.S. 1079 (1992), was not retroactive under *Witt* and observing that the "public can have no confidence in the law if court proceedings which have become final are subject to being reopened each time an appellate court makes a new ruling."); *Mosley*, 209 So.3d at 1291 (Canady, J., dissenting) (advocating the abrogation of *James* altogether because it is irreconcilable with *Witt* as it gave "no consideration to the framework for retroactivity established in *Witt*.").

The doctrine of stare decisis is not "an inexorable command" and the doctrine is at its "weakest" when a constitutional decision is at issue because such a decision can only be altered by constitutional amendment. *Agostini v. Felton*, 521 U.S. 203,

235 (1997). While courts often list many considerations in the decision to overrule precedent, in many ways, it is reliance on the existing precedent that is the critical factor in any stare decisis analysis because that is the main basis for the entire doctrine of stare decisis in the first place. *Brown v. Nagelhout*, 84 So.3d 304, 309, 311 (Fla. 2012) (noting that "reliance interests are of particular relevance" in stare decisis analysis and then overruling precedent after determining that "no reliance interests" were implicated); *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (observing that stare decisis has special force when legislators or citizens have acted in reliance on a previous decision); *Randy J. Kozel, Stare Decisis as Judicial Doctrine*, 67 Wash & Lee L. Rev. 411, 414 (2010) (noting reliance interests are a critical part of stare decisis and advocating that reliance considerations rather than other considerations play the determinative role in whether to overrule precedent).

The doctrine of stare decisis is based on the recognition that even bad decisions can be valuable because parties may have made critical decisions based on that bad decision and overruling such decisions can cause great losses, especially in civil cases due to those reliance interests. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that adhering to precedent is usually the wise policy, because often "it is more important that the applicable rule of law be settled than it be settled right"). As the United States Supreme Court explained in *Payne* a capital case where the Court overruled its precedent, considerations in favor of stare decisis are "at their

acme in cases involving property and contract rights, where reliance interests are involved" but observing "the opposite is true" in cases "involving procedural and evidentiary rules" and then overruling precedent because no such reliance interests were at stake. *Payne,* 501 U.S. at 828. *See also United States v. Gaudin*, 515 U.S. 506, 521 (1995) (explaining the role of stare decisis is "reduced" when applied to procedural rules which do serve as guides to lawful behavior").

While reliance interests are often highest in the civil context, reliance interests can be at stake in the criminal context as well. Both the State and, on occasion, a criminal defendant can have justifiably relied on existing law as the basis for their conduct. *See e.g., Davis v. United States*, 564 U.S. 229 (2011) (holding, when the police conduct a search based on objectively reasonable reliance on existing precedent, the exclusionary rule does not apply). A criminal defendant may also have a reliance interest in existing substantive law. *Cf. Bouie v. City of Columbia,* 378 U.S. 347 (1964); *Rogers v. Tennessee*, 532 U.S. 451 (2001) (explaining that *Bouie* restricts retroactive application of judicial interpretations of criminal statutes to those interpretations that are unexpected and indefensible by reference to precedent). But one of the main limitations on a criminal defendant claiming reliance on existing law is that the reliance must be justifiable reliance. As Justice Scalia explained in a concurring opinion, which was critical to the holding of that decision, one of the main goals of stare decisis is "preserving justifiable

expectations," and that goal was "not much at risk" because those that relied on the existing precedent to tell the truth to Congress or the courts, instead of lying, "have no claim on our solicitude." *Hubbard v. United States*, 514 U.S. 695, 717 (1995) (Scalia, J., concurring).

Here, as in *Payne*, there is no such countervailing reliance interests at stake. Neither Owen nor any other capital defendant actually relied to their detriment on either *Mosley* or *Hurst*. Indeed, Owen did not rely on either *Apprendi* or *Ring* because neither of those cases had been decided at the time of this murder in 1984. The existing precedent at the time of this murder was *Spaziano v. Florida*, 468 U.S. 447 (1984), and subsequently *Hildwin v. Florida*, 490 U.S. 638 (1989), which were the cases partially overruled by the United States Supreme Court in *Hurst v. Florida*. *Hurst v. Florida*, 136 S.Ct. at 623 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part."). And, under either *Spaziano* and *Hildwin* or *Hurst*, Owen could still be sentenced to death for this murder. Not only do criminal defendants not rely on procedural cases, such as *Spaziano*, *Hildwin*, *Hurst*, or *Mosley*, when committing murder, they do not change their legal positions during trials, appeals, or postconviction proceedings in reliance on those types of decisions either. At a minimum, capital defendants cannot be thought to have relied on *Mosley* and related precedents where, as here, the judgement became final before those cases were decided and no new judgment has since been entered.

True stare decisis would mandate following the existing precedent of *Hughes, Johnsons,* and *State v. Johnson,* and would also mean that *Hurst v. Florida,* and *Hurst v. State,* were not retroactive either.

ISSUE II

MOSLEY AND *ASAY* MUST BE OVERRULED AS THEY ARE PREMISED ON A COMPLETE ALTERATION OF THE WITT/LINKLETTER TEST FOR RETROACTIVITY

Eleven years prior to *Mosley*, the Court, applying the *Witt*[2] test, found, in *Hughes v. State,* 901 So.2d 837, 840-846 (Fla. 2005), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was not to be applied retroactively in Florida. In so finding, the Court determined that none of the *Witt* factors favored retroactivity. *Hughes v. State,* 901 So.2d at 840-846 (Fla. 2005). On that same day, the Court found that *Ring v. Arizona,* 536 U.S. 584 (2002), would not be applied retroactively in Florida. The Court again found none of the three factors of *Witt* favored retroactivity, in *Johnson v. State*, 904 So.2d 400, 407. Eight years later in *State v. Johnson,* 122 So.3d 856 (Fla. 2013), the Court found the *Apprendi* based rule of *Blakely v. Washington,* 542 U.S. 296 (2004), redefining the definition of a statutory maximum sentence, should

[2]The three-prong test developed in *Stoval v. Denno* 388 U.S. 293 (1967) and *Linkletter v. Walker*, 318 U.S. 618 (1965), are: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule. *Witt*, 387 So. 2d at 926.

not be given retroactive application, as all three factors of *Witt* disfavored retroactive application. *State v. Johnson,* 122 So.3d at 866.

However, in 2016, the United States Supreme Court decided *Hurst v. Florida,* (*Hurst I)*, which held that Florida's death penalty procedures were unconstitutional to the extent those procedures failed to require a jury to find the fact of an aggravating circumstance. *Hurst* 136 S.Ct. at 619. The United States Supreme Court's decision was premised entirely upon *Ring*. *See Hurst* at 136 S.Ct. at 621-623. Months later the Florida Supreme Court found *Apprendi/Ring* claims were to be applied retroactively—in particular, that the *Hurst* decisions,[3] would be applied retroactively from June 22, 2002, the day *Ring* was decided. *Mosley,* 209 So.3d at 1283; *Asay,* 210 So.3d at 22.

The *Asay* majority acknowledged that based on its earlier finding in *Johnson* that *Ring* was not retroactive, a logical conclusion would be that *Hurst I* was also not retroactive as it too was derived from *Ring*. *Asay* 210 So.2d at 15. However, without providing any support beyond a conclusion that it was so, the *Asay* majority determined that its previous *Witt-Ring* analysis in *Johnson* was based on "an

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[3] The United States Supreme Court did not find in *Hurst v. Florida* that the application of *Hurst* was to be applied retroactively. That Court remanded the *Hurst* case to the Florida Supreme Court to assess whether the constitutional error in that case was harmless. Specifically, the United States Supreme Court found that because there was no evidence that the *Hurst* jury found a qualifying aggravator, such as a prior felony, the Florida Supreme Court on remand could assess whether the error was harmless based upon the record and evidence presented.

incorrect understanding of the Sixth Amendment claim." *Asay,* 210 So.3d at 21. The *Asay* majority did not explain its position in light of its prior precedents, but concluded that that "inadequacy" justified the Court's receding from *Johnson* and ignoring the Court's consistent non-retroactive application and interpretation of *Ring*. In its place, the Florida Supreme Court re-characterized what was clearly a procedural rule of who decides a capital sentence-- to now, one designed to protect the right to jury findings of other elements of the crime at sentencing. *Asay* at 210 So.3d at 16.

In *Asay,* the Court observed that the misconception in *Johnson* about the significance of the Sixth Amendment was the result of an improper reliance on *Schriro v. Summerlin*, 542 U.S. 348 (2004). Inexplicably, the Court reasoned that because *Schriro* was a federal case, its retroactivity analysis was based on *Teague*, which is narrower than *Witt* and, therefore utilizes different factors from Florida's *Witt* test. *Asay v. State*, 210 So.3d at 15. The Court's rationale was that *Johnson* failed to fully apply the holding of *Ring* because the Court was constrained by *Hildwin v. Florida*, 490 U.S. 638 (1989). *Id*. Based on these declared inadequacies, *Johnson,* could no longer be followed in light of *Hurst I.*

In fact, the claim raised in *Asay* that the Court relied on *Schriro,* was identical to the argument made by the lone dissent in *Johnson*, claiming:

> While I agree there is no doubt that *Ring* and *Apprendi* would not be retroactively applied under the federal standard, in Florida we long

> ago decided, based upon reasons of justice and fairness, to apply a very different standard to determine retroactivity.

Johnson, 904 So.2d at 417–18. (Anstead J., dissenting). The *Johnson* majority, however, explained its proper deference to *Schriro* to be:

> Deferring to the United States Supreme Court's assessment of its own decision in *Ring*, we conclude that the purpose of the new rule does not support retroactivity.[4]
>
> > [4] **We are not, as Justice Anstead suggests, relying on the federal standard for retroactivity**. Dissenting op. at 417–18, 419. We defer not to the federal standard, but rather to the Supreme Court's characterization of the purpose of *Ring*. **To the extent that the purpose of *Ring* is a factor in our own retroactivity test, a recent discussion of that purpose by the very Court that decided *Ring* is obviously worthy of our attention and deference.**

Johnson, 904 So.2d at 410 & n. 4 (Fla. 2005) (emphasis added). Notably, in a concurring opinion, Justice Lewis, although in disagreement with *Schriro's* interpretation of *Ring,* recognized the importance of following that interpretation of federal law from the Court in which the rule was created. *See Johnson*, 904 So.2d at 416–17 (Lewis J., concurring) explaining the import of the Supreme Court's interpretation of its own rule and finding:

> The United States Supreme Court is the ultimate arbiter of the federal constitution, and the decision in *Ring* is that Court's own Sixth Amendment interpretation and application as it extended the *Apprendi* principles into the capital context. If the United States Supreme Court has held and stated that *Apprendi* principles as applied in the capital context in *Ring* are not a "watershed rule of criminal procedure" but merely a "new procedural rule that does not apply retroactively," then

> I am precluded from determining that these decisions are of fundamental significance, significant magnitude or constitute a "jurisprudential upheaval" under Florida law.

See Hughes 901 So.2d at 849 (Lewis J., concurring) (affirming United States Supreme Court is final arbiter of the federal constitution and its decision regarding constitutional implications of *Ring* are binding); *Marshall v. Crosby,* 911 So.2d 1129, 1139 (Fla. 2005) (same); *See State v. Bolyea,* 520 So.2d 562 (Fl. 1988) (recognizing deference given to federal precedent interpreting federal law as persuasive authority). *See also Moore v. State,* 452 So. 2d 559 (1984) (finding because state evidentiary statute on hearsay was patterned after federal counterpart, it is proper for Florida courts to construe statute in accordance with federal decisions); *O'Malley v. St. Thomas University,* 599 So. 2d 999, (Fla. 3rd DCA 1992) (finding that because Florida's RICO statute is patterned after the federal RICO statute, it is appropriate to look to federal statute for guidance regarding interpretation and application of the law); *Bank of New York v. Calloway,* 157 So. 3d 1064 (Fla. 4th DCA 2015) (same).

Yet, despite this explicit acknowledgment of, and respect for, the United States Supreme Court's interpretation of its own rules, the *Asay* Court embraced the previously rejected and "misapprehended" logic and overturned the well-reasoned decision in *Johnson. Asay*, 210 So.3d at 15. Reversal is warranted.

The second rationale given in *Asay* to cast aside *Schriro,* and therefore, *Johnson's* analysis, is pointing to *Hildwin,*[4] and reasoning that because it had been overturned in *Hurst I,* the Court was now free to ignore *Schriro,* and dispose of *Johnson* altogether by creating its own interpretation of what *Ring* should mean. *Asay* 210 So.3d at 15-16. In complete contradiction of *Ring* and *Schriro,* the Court held that *Ring's* true purpose "was to protect the fundamental right to a jury in determining **each element of an offense.**" *Asay,* 210 So.3d at 16 (emphasis added). The *Asay* majority's new conclusion regarding *Ring's* purpose is certainly not based on any objective reading of *Ring, Schriro,* or *Hurst I* and, in fact, it is contrary to Florida law.

Hildwin held that under Florida law "…the Sixth Amendment does not require the specific findings authorizing the imposition of the sentence of death to be made by the jury." *Hildwin,* 490 U.S. 638, at 640 (1989). In *Hurst I,* the United States Supreme Court partially overruled its 1989 decision in *Hildwin* because it conflicted with *Ring's* requirement that any sentence imposed over the maximum sentence available following a conviction for first degree murder, requires a jury determination of those facts. *Ring,* at 536 U.S. at 609. While later in time, *Hurst I* is no more expansive than *Ring,* and it simply held that because in Florida, the

[4] It is noteworthy, that neither the majority, the three concurrences, nor the dissent in *Johnson* cited to *Hildwin* or offered how the *Hildwin* opinion constrained in any way the Court's retroactivity analysis.

maximum sentence available following a conviction for first degree murder is life without the possibility of parole, a judge alone cannot sentence a defendant to death. The United States Supreme Court concluded:

> Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst, 136 S.Ct. at 624. The United States Supreme Court could not have been any more explicit that *Ring* applies to sentencing factors only and has no application to elements of a crime explaining:

> A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. *See Bousley*, 523 U.S., at 620-621, 118 S.Ct. 1604. **But that is not what *Ring* did; the range of conduct punished by death in Arizona was the same before *Ring* as after.**

Schriro, 542 U.S. at 354 (emphasis added). And, no reasonable interpretation of *Ring* or *Hurst I* would support the *Asay* majority's conclusion that a Florida jury's findings required for a death sentence "are other elements of the crime." *Asay v. State,* 209 So.3d at 16.

Additionally, *Asay* cannot be reconciled with Florida law. *See Foster v. State,* 258 So.3d 1248 (Fla. 2018). Therein, Foster, relying on *Hurst I* and *Hurst v. State,* 202 So.3d 40 (Fla. 2016) (*Hurst II)*, claimed an entitlement to a jury finding of all the **elements** of the crime of **"capital first-degree murder."** *Foster,* 258 So.3d at

1251 (emphasis added). The Court rejected the suggestion that the crime of "capital first degree murder exists expressly" finding:

> Before we proceed, we note that under Florida law, there is no crime expressly termed "capital first-degree murder." Florida law prohibits first-degree murder, which is, by definition, a capital crime. This distinction, while subtle, is essential, because contrary to Foster's argument**, it is not the *Hurst* findings that establish first-degree murder as a capital crime for which the death penalty may be imposed. Rather, in Florida, first-degree murder is, by its very definition, a capital felony.**
>
> * * *
>
> These statutes and the rule of procedure illustrate that **the *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder.** Rather, they are findings required of a jury: (1) before the court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of *guilt for first-degree murder has occurred*. Thus, Foster's jury did find all of the elements necessary to convict him of the capital felony of first-degree murder—during the guilt phase.

Foster at 258 So.3d at 1252 (emphasis added). *See also Jackson v. State,* 213 So.3d 754, 783 (Fla. 2017) (finding "*Ring* and *Hurst v. Florida* simply state that the jury must find 'any fact on which the legislature conditions an increase in the maximum punishment'"). *Foster* and *Jackson* lay bare the fallacy of *Asay's* rationale.

In receding from *Johnson*, the Court relied in part on the premise that "death is different":

> Further, as is apparent, the ultimate decision of whether a defendant lives or dies rests on these factual findings, only strengthening the purpose of the new rule. Both this Court and the Supreme Court have recognized that "death is different." *See, e.g., Yacob v. State,* 136 So.3d 539, 546 (Fla. 2014) (quoting *Fitzpatrick v. State,* 527 So.2d 809, 811 (Fla. 1988)); *Ring*, 536 U.S. at 605, 122 S.Ct.

> 2428. Thus, in death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life, and the purpose of the new rule weighs in favor of applying *Hurst v. Florida* retroactively to *Asay.*

Asay, 210 So.3d at 17–18.

That rationale ignores completely the compelling interest in finality violating the principles of postconviction jurisprudence. In fact, this identical argument was criticized in *Witt* where the Court rejected a construct of postconviction review that compromised finality simply because the case under review was a capital case. The Court's prescient warning explained:

> To the extent we permit this rule to be used as a second procedure to balance individual applications of the death penalty our first being on direct review of the conviction and sentence the limited historical role for post-conviction proceedings becomes distended**. For the policy reasons which underpin the finality of decisions, and because the imposition of any death penalty would be averted by a different construction of our rule, we now declare our adherence to the limited role for post-conviction relief proceedings, even in death penalty cases.**

Witt, 387 So.2d at 927 (emphasis added).

Asay let stand *Johnson's* analysis regarding the remaining two *Witt* factors, that "reliance of the old rule" was done in good faith and the breadth of that reliance weighed heavily against retroactivity, and that the effect on the administration of justice would be overwhelming. *Asay,* 210 at 19-21. Thus, the Court found *Hurst I* would not be retroactive to Asay nor to any other death row defendant whose case

was final before the issuance of *Ring*. *Asay,* 210 So.3d at 22. However, the Court warned that:

> "We limit our holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*."

Id.

Asay should be reversed as it rejected completely the United States Supreme Court's interpretation of its own rule, substituting in its place an interpretation that is contrary to both federal and Florida law. *See Mosley*, 209 So.3d at 1286 (Canady J., concurring in part and dissenting) (criticizing the majority's failure to dismiss without explanation the well-reasoned precedent of *Johnson).*

In *Mosley,* the Court created a two-tiered classification of final cases splitting the single class of capital defendants whose cases were final when *Hurst I* was decided into one class consisting of defendants whose cases were final before *Ring,* and the other class consisting of defendants whose cases were final after *Ring*. *Mosley*, 209 So.3d at 1283. [5] In *Mosley,* this Court concluded that Mosley was entitled to the retroactive application of *Hurst I* pursuant to a *Witt* analysis and based on a fairness determination pursuant to *James v.* State, 615 So.2d 668 (Fla. 1993). *See Mosley* 209 So.3d at 1274-1276.

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[5] Mosley's case became final in 2009, *Mosley* 209 So.3d at 1254, and Asay's case became final in 1991. *See Asay*, 210 So.3d at 22.

As previously explained, the issue of whether *Hurst I* was to be retroactively applied was not decided on a blank slate. Eleven years earlier, the Court determined that neither *Apprendi* nor *Ring* were to be given retroactive application in Florida. *See Hughes* 901 So.2d at 840-847, and *Johnson,* 904 So.2d at 409-410. *State v. Johnson,* 122 So.3d at 864-866. *Blakely* was not retroactive. In fact, in all three cases, the Court determined that the new rule of *Apprendi* and its progeny, in *Ring and Blakely*, did not meet any of the three factors of *Witt*.

What had been settled law began to unravel in *Asay,* with the complete transformation of *Witt's* first factor regarding the "purpose of the new rule." Although that has been addressed extensively above, it bears repeating that *Mosley* continued to completely mischaracterize the effect of *Hurst I* in Florida. In addressing *Witt*, *Mosley,* quoting *Hurst v. State,* 202 So.3d 40 (Fla. 2016) (*Hurst II)* found:

> **The Supreme Court in Hurst [v. Florida] has now [also] made clear that the critical findings necessary for imposition of a sentence of death are the sole province of the jury. And because these findings occupy a position on par with elements of a greater offense**, we conclude that all these findings necessary for the imposition of a sentence of death must be made by the jury—as are all elements—unanimously. *Hurst*, 202 So.3d at 57 (footnotes omitted)

Mosley, 209 So.3d at 1277–78) (emphasis added). Neither *Ring, Schriro* nor *Hurst I* support the proposition that the United States Supreme Court considers the requisite jury findings for sentencing to be elements of an offense under the federal

Constitution. *See Schriro* (rejecting outright any attempt to describe *Ring* findings as elements of an offense); *Foster* at 258 So.3d at 1252, (rejecting characterization of *Ring* findings as elements of the crime of capital first degree murder). Regrettably, this gross mischaracterization of United States Supreme Court precedent remained the sole basis for the *Mosley* majority to find this *Witt* factor favored retroactivity. *Mosley,* 209 So.3d at 1277-1278. However, *Mosley* went further than *Asay* by altering completely, and without any legal or factual support, the analysis of the remaining two *Witt* factors of "reliance on the old rule" and "effect on the proper administration of justice."

Mosley changed entirely the focus of the second *Witt* factor of "reliance on the old rule" previously decided by the Court. In contradiction of *Johnson* and *Asay,* the majority stated that "good faith" reliance on the old rule is not a relevant consideration. *Mosley,* 209 So. 3d at 1280. Instead there is a "new calculus" that must be considered. The Court explained:

> **We now know after *Hurst v. Florida* that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*.** From *Hurst*, it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State. Thus, this factor weighs in favor of granting retroactive relief to the point of the issuance of *Ring*.

Mosley 209 So. 3d at 1281. (emphasis added). This "new calculus" is circular, renders meaningless the "reliance on the old rule" factor, and effectively destroys

the concept of finality so vital to precedent and the orderly administration of justice. The Court's analysis of *Hurst I* does not address "the extent of reliance on the old rule." Invariably any new rule will alter the "previous calculus" as that is inherent in any change. This specious alteration of *Witt's* second factor is incongruent with the traditional focus, which always has been the breadth of reliance on the old rule and whether that reliance has been in good faith. *Mosley* never explained how the "calculus of the constitutionality of the death penalty scheme" is in any way related to "reliance on the old rule." In truth, this "calculus" is simply a repeat of the first factor regarding "purpose of the new rule," and obviously was intended to "place a thumb on the scale" to favor finding *Hurst I,* retroactive under *Witt*. *Mosley,* 209 So.3d 1290 (Canady J., dissenting) (finding that statement that *Hurst I* changed the calculus of Florida's capital sentencing scheme is a "non sequitur" and renders this *Witt* factor meaningless.). *Compare Hernandez v. State,* 124 So.3d 757, 765 (Fla. 2012) (finding *Padillia* not retroactive in Florida relying in part on fact "our reliance on the old rule 'has been entirely in good faith,'" therefore satisfying the second factor of *Witt*).

Allowing this "new calculus" to stand would eviscerate any notion that cases that have become final are not subject to every new United States Supreme Court opinion. The Court's unexplained and unsupported application of the *Witt* factor renders any courts' precedents potentially unstable and unreliable.

Previously, when applying the final *Witt* factor of "effect on the administration of justice", the Court found that retroactive application of *Apprendi* or its progeny of *Ring* and *Blakely,* would have a tremendous negative effect on the administration of justice, straining resources, without a guarantee of a more accurate result on resentencing. *Hughes, supra,* 901 So.2d at 845-846; *Johnson, supra,* 904 So.2d at 411; *State v. Johnson, supra,* 122 So.3d at 865-866*; Asay, supra,* 210 So.2d at 20-21. But in complete contradiction, *Mosley* found the impact of resentencing in capital cases to be a less significant undertaking and not as taxing on the administration of justice compared to a retrial. In support of this new finding, *Mosley* relied on *Chandler v. Crosby,* 916 So.2d 728, 730 (2005) (finding retroactive application of *Crawford v. Washington* 541 U.S. 36 (2004), would require new trials in a multitude of cases which would have an unacceptable negative effect on the administration of justice).

The majority's reasoning for this contradictory finding rings hollow. Ironically, in *Chandler,* where the Court found the effect on the administration of justice disfavored retroactivity for *Crawford,* it relied on *Windom,* 886 So.2d at 952 (Cantero J., concurring) (finding that "the effect on the administration of justice" for capital resentencing proceedings including lost evidence and unavailable witnesses disfavored retroactivity of *Ring*). *Chandler,* 916 So.2d at 730. Obviously, before *Mosley,* the Court equated resentencing in capital cases to be as significant a drain

on resources as would a retrial.[6] However, without evidentiary support, the *Mosley* majority finds that no longer to be true. *Mosley,* 209 So.3d at 1282. *Mosley* ignores completely how in-depth capital sentencing proceedings are under Florida law. Juries must be empaneled to hear evidence from both parties. Most often that evidence will include lay and expert witnesses, the resurrection of stale physical evidence, and fading memories of witnesses who testified, in some cases, well over a decade ago. These undertakings, years after the fact, remain costly and a drain on resources, victims, and the system as a whole. Those objective realities have not become less taxing since the issue was addressed in *Johnson* eleven years earlier and re-addressed in *Asay* when this Court found these facts to weigh against retroactivity. *Mosley* offers no credible explanation for the diametrically opposite conclusion. [7]

Application of the *Witt* analysis in *Mosley* cannot be logically reconciled with *Johnson, Hughes, State v. Johnson,* nor, for that matter, a portion of *Asay. See Jeanty v. Warden, FCI-Miami,* 757 F.3d 1283, 1285 (11th Cir. 2014) (observing if *Apprendi's* rule is not retroactive, then neither is a decision applying its rule);

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[6] As the Court is aware, a resentencing necessitates the State to present almost its entire guilt phase evidence so that the jury hears about the crime and aggravators. As such, there is no appreciable difference in time, costs, or expenditures of judicial resources between a new trial and resentencing.

[7] The majority predicted that the number of cases effected would be lessened because the *Hurst I* error would be subject to a harmless error analysis. *Mosley,* 209 So.3d at 1282-1283. Although not acknowledged by the Court, harmless error has proven to be a fallacy because the requirements imposed on the State to prove harmlessness since *Hurst II* are difficult to meet.

Hughes v. United States, 770 F.3d 814, 818-819 (9th Cir. 2014) (same). In short, *Mosley* should be overruled for the reasons set out in then-Justice Canady's well-reasoned dissent. *See Mosley*, 209 So.3d at 1286 (Canady J., concurring in part and dissenting) (criticizing the majority's failure to dismiss without explanation the well-reasoned precedent of *Johnson).*

Owen alleges that *Asay* must be reversed because it precludes a particular class of defendants from receiving the benefit of *Hurst I*, "based on a date on the calendar" while ignoring completely the facts of any particular case. (**IB at 28**.) He adds that by denying *Hurst I* relief to any defendant whose case became final before the United States Supreme Court decided *Ring*, is arbitrary and capricious and violates Equal Protection Clause of the federal constitution. (**IB at 30).** Owen's argument is specious as a retroactivity analysis will always involve a date certain regarding if and when a new rule should be applied to a final case. *See Penry v. Lynaugh,* 492 U.S. 302, 304 (1989) (holding that finality concerns in retroactivity are applicable in the capital context.). What Owen is really advocating for is automatic retroactivity to all final capital cases, because "no date regarding a cutoff point for retroactivity" would be acceptable. *Witt* rejected this argument. *Witt*, 387 So. 2d at 927 (finding that automatic application of any new rule in postconviction "to balance individual applications of the death penalty" would avert imposition of the death penalty in all cases). Owen's arguments must be rejected.

The *Mosley* holding clearly created a conundrum demonstrating the unacceptable malleability between it and *Asay v. State*, 210 So.3d 1 (Fla. 2016), in its analysis applying *Witt*. Both cases were issued by the same court on the same day and both employed a *Witt* analysis. But one case — *Mosley* — holds that a violation of the right-to-a-jury-trial right is retroactive and the other case — *Asay* — holds that same right is not retroactive. This outcome reinforces Justice Cantero's concern about the *Witt* factors being too "vague and malleable" was quite justified in *Windom*, 886 So.2d at 942. Overruling *Mosley* would have the benefit of restoring consistency with *Hughes*, *Johnson*, and *State v. Johnson*, as well as with *Asay*.

ISSUE III

***JAMES* MUST BE REVERSED AS IT PROVIDES RETROACTIVITY OF NEW RULES BASED ENTIRELY ON A FACTOR WHICH HAS NO RELEVANCE TO FLORIDA'S RETROACTIVITY ANALYSIS**

The State asserts that *James* must be overruled as it violates every canon of the retroactivity analysis and the law in Florida and permits retroactive application of a new rule of law based solely on preservation of the issue on direct appeal. *James,* 615 So. 2d at 669. Also, it violates *Fla. R. Crim. Pro.* 3.851 (d)(2)(B).

While the denial of James' successive motion for postconviction relief was pending on appeal, the United States Supreme Court declared Florida's jury instruction on the "HAC" factor[8] to be unconstitutionally vague pursuant to

[8] *See Fla. Stat. §*921. 141 (6) (h).

Espinosa v. Florida, 505 U.S. 1079 (1992). *James,* 615 So. 2d at 669. Because James had preserved the issue on direct appeal,[9] the Court for the first time concluded, "it would not be fair to deprive him of the *Espinosa* ruling." *Id.* There was no mention of *Witt,* no mention of finality, and no mention of the fact that *Espinosa* had never been found previously to be retroactive in Florida. Instead, James received a new sentencing proceeding strictly based on preserving, ten years earlier, a non-meritorious issue. *See James*, 615 So.2d at 669-670 (Grimes J. *dissenting*) (finding James not entitled to benefit of *Espinosa,* as a properly conducted *Witt* analysis would prevent its application to final cases). Relying solely on *James,* this Court found that because Mosley preserved a non-meritorious *Ring* claim on direct appeal seven years earlier, fundamental fairness, dictated that he was entitled to retroactive application of *Hurst II. Mosley*, 209 So. 3d at 1274-1275. Equally vacuous as *James*, *Mosley* offered no legal reasoning regarding how Florida law supported the suspension of a retroactivity analysis.

James conflated the concept of preservation of issues on appeal and retroactivity in final cases which resulted in an aberration of *Witt* in every sense. *James* is antithetical to finality and fairness, nor can it be reconciled with any concept

[9] James unsuccessfully challenged this instruction at trial and on direct appeal. *James v. State,* 453 So. 2d 786, 790 (1984)

of ordered liberty. [10] S*ee Mosley,* 209 So. 3d at 1292 (Fla. 2016) (Canady J. *dissenting)* (finding *James* to be irreconcilable with *Witt* and not entitled to any weight). *See also State v. Glenn,* 558 So.2d 4, 6-7 (Fla. 1990) (explaining availability of a new rule in final cases requires a *Witt* retroactivity analysis in order to balance the competing interests of finality and fairness which is critical to the credibility of the criminal justice system); *Thompson v. State*, 887 So. 2d 1260, 1263 (Fla. 2004) (reaffirming retroactivity of new rule requires balancing of finality with fairness and uniformity under *Witt); McCuiston v. State,* 534 So. 2d 1144 (Fla. 1988) (recognizing *Witt* analysis is required before applying a new rule retroactively); *Ferguson v. State,* 789 So. 2d 306 (Fla. 2001) (same); *Coppola v. State,* 938 So. 2d 507, 510-11 (Fla. 2006) (rejecting idea that a new case should be considered "a newly discovered fact" for purposes of retroactive application in lieu of a *Witt* analysis); *Walton v. State,* 246 So. 3d 246 (Fla. 2017) (same).

James is also in violation of Rule 3.851 (d)(2)(B), as it permits defendants to ignore the time limitations of Rule 3.851 which preclude successive untimely motions based on new rules unless the new rule had been found retroactive previously. *Chandler,* 916 So. 2d at 732. (Wells J. concurring) (failing to adhere to the requirements of 3.851(d)(2)(B) has increased the number of untimely petitions

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[10] hu raised a *Ring* claim on direct appeal. *Owen v. State,* 862 So. 2d 687, 703-04 (Fla. 2003). However, in his motion for postconviction relief, Owen did not present an argument that he was entitled to relief based on *James.* (PCR 37-38).

seeking relief from new rules that have not been found to apply retroactively). Furthermore, in his concurrence, Justice Wells expressed concern regarding the ramifications of the Court's lack of enforcement of 3.851(d)(2)(B) as it severely undermines the credibility of the criminal justice system; is an affront to finality and stability of the law; and violates the very foundation of *Witt*. *Chandler,* 916 So.2d at 733. (Wells J. concurring)*; see also Johnson v. State,* 536 So. 2d 1009, 1011 (same).

Finally, *James* never explained how either fairness or finality were served by the rule it created. For example, pursuant to *James,* by the mere happenstance that one attorney may have objected to a settled point of law and another had not, *James* provides relief to the former while denying relief to the latter, regardless of whether there has been a determination of retroactivity. Fundamental fairness does not support a rule that encourages litigants to raise claims squarely foreclosed by controlling precedent.[11]

In *Griffith v. Kentucky,* 479 U.S. 314, 321(1987), the United States Supreme Court altered its focus and recognized as significant, the difference between cases that are final from those that are still pending on direct review at the time the new rule is announced and concluded that the retroactivity analysis requires appreciation

[11] The new rule to which James received the benefit, arose from *Espinosa v. Florida*, which was found not to be retroactive in *Lambrix v. Florida,* 520 U.S. 518 (1997).

of the difference between cases pending on appeal from those that are final at the time the new rule is announced. *See Teague,* 489 U.S. at 304. Therefore, pursuant to *Griffith,* all cases that were still pending on direct appeal at the time a new rule is announced, will get the benefit of that rule. *Griffith,* 479 U.S. at 328.

With regards to cases that are final, the United States Supreme Court found:

> We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated.

Teague, 489 U.S. at 316.

James is the antithesis of *Teague,* as *James* makes the retroactivity analysis turn on an issue unrelated to the principal considerations supporting retroactivity. *See Lambrix v. State,* 641 So. 2d 847, 848 (Fla. 1994) (failing to raise issue on appeal precludes receiving benefit of *Espinosa* in successive motion); *Walton v. State,* 847 So. 2d 438, 445 (Fla. 2003) (foreclosing benefit of *Espinosa* for failure of preserving issue at trial).[12] The qualifying factor under *James*, which is preservation of a non-meritorious issue, has no logical connection to retroactivity.

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[12] The rule of *James* is also contrary to *Jones v. Barnes,* 463 U.S. 745, 753 (1983) (reminding that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal... as the most effective form of appellate advocacy). Instead *James* encourages the raising of all non-meritorious claims, simply to "preserve" it for a later date.

Owen acknowledges that the premise for relief under *James* is simply the "luck of a forward-thinking lawyer" who would not be stymied by a page limitation in making the "appropriate arguments;" (**IB at 41**). This is not a valid rationale for the continued viability of *James. See Mosley,* 209 So. 3d at 1291) (Canady L. dissenting) (finding *James* illogical as its notion of fundamental fairness is premised on "punishing" defendants whose lawyers did not have sufficient foresight to preserve an issue that had no merit).

Next, Owen candidly admits that the true reason to save *James,* is because "any decision that allows for more people to receive relief from unconstitutional death sentences is manifestly good…." (**IB at 43**). That predictable endorsement provides no logical or legal basis to reaffirm *James.* Instead, it illustrates that *James,* is void of reasoning regarding retroactivity, and its sole purpose is to interfere with implementation of *Fla. Stat.* § 921.141. *See Witt*, 387 So. 2d at 921 (permitting collateral proceedings to be used as second appeals to balance individual cases subverts imposition of the death penalty.

ISSUE IV

TEAGUE v. LANE SHOULD REPLACE THE *WITT/LINKLETTER* TEST FOR ANY RETROACTIVITY ANALYSIS OF NEW RULES EMANATING FROM BOTH THE UNITED STATES SUPREME COURT AND THIS COURT

Replacing the *Witt/Linkletter* test of retroactivity with *Teague,* goes well beyond death penalty jurisprudence. Although the vehicle for this requested change is based on capital cases, application of *Teague,* will solidify decisional law in Florida for all criminal issues. Other decisions of Florida courts involving issues other than those that are unique to capital cases are not immune from the legal maneuvering exposed here. For instance, *Padillia v. Kentucky* 559 U.S. 356 (2010) was found not to be retroactive in Florida. *See Hernandez v. State,* 124 So. 3d 757 (Fla. 2012) (finding under *Witt/Linkletter* all three factors disfavor applying *Padillia* retroactively in Florida).[13] Yet that decision was ignored completely in *Castano v. State*, 119 So. 3d 1208 (Fla. 2012) (explaining that *Hernandez* should not be followed where defendant's postconviction claim was pending when *Padillia* was decided).

The application of the *Witt* factors which then formed the basis for both *Mosley* and *Asay,* would be justification alone for this Court to reconsider the continued viability of *Witt.* However, and more importantly, the underpinnings of *Teague* are identical to the policy reasons that informed Florida's collateral review process decades ago. This argument is neither novel nor new, as members of this Court have been advocating for this change for years. The legal gymnastics that

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[13] The following year the United States Supreme Court found *Padillia* not to be retroactive under *Teague*. See *Chaidez v. United States,* 568 U.S. 342 (2013).

resulted in *Mosley* and *Asay,* make clear that it is now time to abrogate the *Witt/Linkletter* factors and adopt *Teague.* *See Johnson* 904 So. 2d at 413 (Cantero J. concurring) (explaining, "[t]he primary problem with the *Linkletter* factors was their malleability'); *See Windom v. State,* 886 So. 2d 915, 941-952 (Fla. 2004) (Cantero J. concurring) (advocating for adoption of *Teague* as comparable to stated goals of *Witt* and abrogating *Linkletter*); *see also Windom*, 886 So. 2d at 932 (Wells J. concurring) (finding that adopting *Teague* in Florida would serve the proper administration of justice in Florida's collateral proceedings); *see also Windom*, 886 So. 2d at 932 (Bell J. concurring); *Monlyn v. State*, 894 So. 2d 832 (Fla. 2004) (Cantero J. concurring) (reaffirming that *Teague* should be the standard in Florida for retroactivity analysis of United States Supreme Court cases); *Asay,* 210 So. 3d 1, 30 (Polston J. concurring) (advocating *Teague* for retroactivity analysis). Moreover, the arguments against *Teague's* application in Florida[14] are not supported by law and must now be rejected.

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[14] *See Hughes*, 901 So. 2d at 856, n. 20 (Anstead J. dissenting) (rejecting adoption of *Teague* in Florida as it leads to harsh and unfair results and its analysis is too narrow*);* *see also Hughes*, 901 at 853 (Pariente J. dissenting) (finding purpose of *Witt* different than *Teague* whose purpose is to limit federal review of state court judgments); *Figarola v. State*, 841 So. 2d 576, 576-577 n. 1 (Fla. 4th DCA 2003) (finding that refusal to adopt *Teague* may be because Florida's policy considerations for state post-conviction relief are different).

In short, the rationale given for rejecting *Teague* is that its foundation is premised on the narrow federal habeas review standard for state convictions, and because it allegedly is irrelevant to Florida's policy considerations regarding collateral review. These criticisms are wholly unfounded and contrary to Florida and federal law. A review of Florida's collateral process and the retroactivity analysis illustrate that *Teague* is consistent with Florida's policy considerations regarding postconviction review, and in fact Florida's postconviction procedures are identical to the federal system and possess the same purposes and goals.

Florida's rule, created in response to *Gideon v. Wainwright*, 372 U.S. 335 (1963), was modeled after its federal counterpart 28 U.S.C.A. §2255. The rule's purpose was limited to a challenge of criminal convictions on grounds cognizable under habeas corpus. *See Roy v. Wainwright,* 151 So. 2d 825, 828 (Fla. 163) (finding justifications for federal postconviction statute §2255 are equally appropriate in justifying Florida's postconviction rule); *see State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408-409 (Fla. 1998) (reaffirming postconviction rule in Florida is identical to federal counterpart intended to protect fundamental or organic rights traditionally available under habeas corpus); s*ee Baker v. State,* 878 So. 2d 1236, 1239 (Fla. 2004) (explaining postconviction review was intended to protect the right to test legality of judgements traditionally left for habeas corpus along with protecting the institutional needs of court system); *State v. Bolyea,* 520 So. 2d 562,

563 (Fla. 1988) (same); *McCrae v. State,* 437 So. 2d 1388, 1390 (Fla. 1983) (finding that collateral review is limited and is not cognizable to review trial errors as a substitute of a second appeal); c*f. Archer v. State,* 166 So.2d 163, 164 (Fla. 2nd DCA 1964) (noting this Court's recognition that because Florida's postconviction rule is "adopted almost verbatim" from federal collateral rule, decisions of federal courts should be used as a guide for the proper application of state postconviction rule).

Well before *Witt,* this Court had applied the *Stovall/Linkletter* factors in determining retroactive application of United States Supreme Court precedent in non-capital cases. Influenced completely by the United States Supreme Court's decisions on retroactivity, this Court, explained:

> For various reasons all of these new standards as announced in such landmarks as *Escobedo, Miranda, Griffin, Gilbert, Wade and Mapp* were held to be prospective only. The common thread running through them is that a refusal to apply them retroactively does not severely endanger the truth-finding process; that the probability of having convicted the innocent is remote; and that employment of theretofore existing standards is a reasonably reliable device for arriving at the truth, despite announced improvements available under the new standards.

State v. Steinhauer, 216 So. 2d 214, 219 (Fla. 1968); *Brewer v. State,* 264 So. 2d 833 (Fla. 1972) (applying use of the *Stovall* test in Florida for determining retroactivity of new law in final cases). In *Witt* this Court decided that those same policy reasons,

including the need for finality,[15] would apply in collateral review of capital cases as well. *Witt 387* So. 2d. at 924.

In determining the proper balance between finality of decisions, a basic requirement for an effective criminal justice system, and uniformity and fairness[16] in individual cases, this Court recognized two basic premises that informed its decision. First, collateral review of final cases was no more a superior method to ensuring a just conviction than was a contemporaneous direct appellate review; and second, applying a new rule of law to a final case in postconviction does not make that latter process any more accurate than the former. *Witt* 387 at 924–25. Therefore, retroactive application of a new rule would occur only if that new rule was a significant, fundamental and constitutional change that if not applied would cast doubt on the veracity or integrity of the original proceeding. *Witt,* 387 So. 2d at 929-31(explaining that the types of new rules that would require retroactive application fall into two categories; changes in law that would preclude the state from regulating

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[15] *Witt* was concerned that constant collateral review of capital cases would enlarge the postconviction process to the breaking point, resulting in no finality in death cases and adding little confidence in the trial/sentencing process. *Witt,* 387 So. 2d at 927.

[16] This Court noted that absolute uniformity and fairness would require retroactive application of all relevant new rules. *Witt,* So. 2d 387 at 927. However, as noted above, perfect uniformity and fairness are not required where application of the new rule would add little to the truth finding or protection against conviction of the innocent.

certain conduct or imposing certain punishment and changes, such as *Gideon,* that are of such magnitude as defined by the three-part test of *Stovall/Linkletter*).

Notably, these policy limitations were based exclusively on numerous decisions from the United States Supreme Court regarding retroactive application of new law in federal collateral proceedings including *United States v. Addonizio,* 442 U.S. 178, 184 & n.11 (1979) (holding that an error requiring reversal of a conviction on direct appeal does not necessarily support a reversal on collateral review of the same issue, therefore, such collateral attacks are justifiably limited to protect against severely undermining confidence and impairing the administration of justice); s*ee also Witt 387* at 924- 925 n. 2; *Roy,* 151 So. 2d at 828 (explaining federal precedent and authority are a guide to the proper application and interpretation of Florida's postconviction process).

In comparison, the federal retroactive/prospective analysis starts with *Griffith* and ends with *Teague.* Adopting the dissenting opinions of Justice Harlan in *Mackey v. United States,* 401 U.S. 667 (1971) and *Desist v. United States,* 394 U.S. 244 (1969), the United States Supreme Court abandoned the *Stovall/Linkletter* test because of the confusion and unpredictability it caused. *See Griffith, 479 U.S.* at 322; *see also Griffith,* 479 U.S. at *329* (Justice Powell, concurring) (advocating for all new rules to be applied retroactively on direct appeal as it is an important step to end confusion generated by application of *Linkletter).* Additionally, the United States

Supreme Court found that because of the disparate treatment that resulted from its application, the *Linkletter* test was unprincipled and inequitable. *Griffith,* 479 U.S. at 322. Consequently, the United States Supreme Court determined that based on "basic norms of constitutional adjudication" all new rules or changes in the law from the Court, would apply retroactively to all cases, federal and state, that are not final at the time the new rule was decided, *Griffith,* 479 U.S. at 32.[17]

Two years later, the United States Supreme Court gave the final death knell to the *Linkletter* test in *Teague*. Therein, the United States Supreme Court determined that new rules would not be retroactive to final cases unless the new rule met one of two exceptions to non-retroactivity.[18] Again, informed by Justice Harlan's dissent in *Mackey,* the United States Supreme Court noted that the *Linkletter* test was fundamentally flawed because of its "inability to account for the nature and function of collateral review." *Teague,* 489 U.S. at 305. Instead of focusing on the purpose of the new rule, as in *Linkletter,* the focus must be on **the purpose of the proceedings** in which the defendant is challenging his conviction

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[17] This Court adopted *Griffith v. Kentucky* 479 U.S. 314 (1987) in Florida as its own test because it was consistent with many of its decisions applying its new rules to cases pending on direct review. See *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (recognizing *Griffith* as the law in Florida).

[18]The first exception, which is identical to *Witt,* 387 So. 2d a 929, involves whether the new rule places certain conduct beyond the control of the state and the second exception is reserved for those "watershed" rules that "are implicit in the concept of ordered liberty" without which the accuracy and fundamental fairness of the trial is seriously diminished. *Teague* 489 U.S. at 307.

and seeking the benefit of the new law. *Teague,* 489 U.S. at 306. When reviewed in that context where the doctrine of finality is paramount, and therefore it logically flows that such review would be limited. *Id.* *Teague's* alteration of the context is identical to analysis applied in *Witt,* where this Court in assessing the relative effectiveness of the trial and direct appeals process to that of the collateral process, found the collateral process to be no more effective in securing justice. *Witt,* 387 So. 2d at 924-925.

Teague and *Witt* are identical insofar as, as both contain an exception against non -retroactivity where the accuracy and fairness of the trial is at issue. *See Witt,* 387 So. 2d at 925, 927; *Teague,* 489 U.S. at 306 313; *see Steinhauer*, 216 So. 2d at 219 (finding new rule must be applied retroactively where failing to do so would severely diminish confidence and cast serious doubt on the result of the former trial.); *Chandler v. Crosby,* 916 So. 2d 728, 733 (Fla. 2005) (Wells J. concurring) (recognizing *Witt* is premised on finality which is consistent with both *Teague* and the 1996 federal law regarding successive habeas petitions by state prisoners pursuant to 28 U.S.C. §2244(b)(2)). Consequently, because both tests are identical in purpose and policy, the arguments that *Teague* is too restrictive and irrelevant to

Florida's interests are unpersuasive. *Hughes,* 901 So. 2d at 837 and 853 (Anstead J. & Pariente J. dissenting).[19]

As explained above, the state's postconviction framework was modeled completely after its federal counterpart, §2255 and federal habeas corpus.[20] The state asserts that there is absolutely no supportable or reasonable justification to cling to a rule that is outdated, has been rejected completely by the United States Supreme Court and does not efficiently further the goals of Florida's criminal justice system.

The *Witt* standard was never intended to be "more expansive" than its federal counterpart. In fact, the genesis of the retroactivity analysis and history of the collateral process in Florida does not suggest otherwise. The fact that *Witt* has been characterized as "being more expansive than *Teague,*" *see Johnson,* 904 So. 2d at

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[19] In Justice Anstead's criticism of *Teague,* he claimed that *Schriro v. Summerlin* was not deserving of deference because it was based on the restrictive standard of *Teague,* and therefore, this Court must conduct an independent consideration under *Witt. Hughes* 901 So. 2d at 856 n. 20 (Anstead J. dissenting). However, that argument is unpersuasive as *Schriro* was predicated on the previous finding that *Duncan v. Louisiana,* 391 U.S. 145 (1968) (holding the right to a jury trial applies to the states through the Fourteenth Amendment) was not retroactive. Importantly, that retroactivity decision was made under the pre-*Teague* analysis of *Linkletter*. *See DeStefano v. Woods,* 392 U.S. 631 (1968). Consequently, the "restrictive nature" of *Teague,* was "not the culprit" in finding *Ring* to be prospective only as under either *Teague* or *Linkletter, Schriro's* outcome was preordained. Also, the fact that *Schriro* was based on the *Linkletter* analysis, lends further support for the state's position that *Asay* and *Mosley* were decided wrongly in part or in whole.

[20] The United States Supreme Court has applied *Teague* in a federal postconviction challenge. *Welch v. United States,* 136 S. Ct. 1257, 1264 (2016) (explaining that it was going under assumption of the parties that *Teague* applied to federal collateral challenges of federal convictions).

409, does not support the idea that this Court had always intended that result. The flaws in *Linkletter/Stoval,* allowed for inconsistencies resulting in an unpredictable *Witt* analysis. *Linkletter* was adopted in Florida because that was the available test[21] employed by the federal courts, and Florida's collateral review procedures mirrored that of the federal government. As explained above, the policy considerations of the state's system, informed by the federal system, was based on finality, which by its nature, limited the availability of postconviction relief. *Witt* 387 So. 2d at 925. (adopting federal system's scope of collateral review); *Mitchell v. Moore,* 786 So. 2d 521, 529 (Fla. 2001) (explaining that under *Witt,* because of a strong concern for finality, the Court rarely finds a decision to be retroactive). Regardless of any debate about the wisdom and the extent, to which *Witt* has strayed from its original foundation, there can be no debate that *Mosley's* and *Asay*'s alteration of *Witt* has proven *Witt's* lack of efficacy and predictability, and how greatly the outcome in *Mosley* compromised the administration of justice with no discernable benefit. *Cf. Johnson,* 904 So. 2d at 413 (Cantero J. concurring) (finding "[t]he problem with the *Linkletter* factors was their malleability.").

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[21] The *Stovall/Linkletter* test adopted in *Steinhauer* was not done as an alternative to *Teague,* as *Teague* was not decided until 21 years later.

The remaining significant reason to adopt *Teague* in Florida is best presented by Justice Cantero in his thorough and extensive analysis of *Witt* and *Teague* in *Windom.* He opined as follows:

> We should now adopt *Teague* in cases considering the retroactivity of decisions of the United States Supreme Court. We should not apply a different standard for determining the retroactivity of United States Supreme Court decisions than that Court itself applies. Consistency among the states-and between the state and federal courts-in applying decisions of the United States Supreme Court demands that, to the extent possible, standards for retroactivity be uniform. Otherwise, the retroactivity of a decision of the Supreme Court will depend on the jurisdiction in which the defendant was prosecuted. Although such a result is sometimes unavoidable, we should attempt as much as possible to limit such lack of uniformity.

Windom 886 So. 2d at 944 (Cantero J. concurring). In 2004, there were 28 states as well as the District of Columbia who adopted *Teague* regarding decisions from the United States Supreme Court. *Windom,* 886 So. 2d at 943. Additionally, a great majority of those states also adopted a *Teague* analysis for all questions of retroactivity. *Id.* Significantly, at present 40 states adopted *Teague,* and most of them apply *Teague* for all retroactivity decisions.[22] The Arizona Supreme Court explained its justification for adopting *Teague* for all its retroactivity decisions as follows:

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[22] *Oprisko v. D.O.C.* 293 Va. 87, 795 S.E. 2d 739 (2017); *Bush v. State*, 92 So. 3d 121 (Ala. 2009); *Matter of Colbert*, 186 Wash. 614, 380 P.3d 504 (2016); *People v. Tate,* 2015 Co 42, 352 P.3d 959 (2018); *Alford v. State*, 287 Ga.105, 695 S.E. 1 (2010); *State v. Gomes*, 107 Hawaii 308, 113 P.3d 184 (2005); *Gutierrez-Medina v State*, 157 Idaho 34, 333 P. 3d 849 (2014); *Stevens v. State*, 924 N.W. 876 (Iowa 2018) ; *Drach v. Bruce*, 281 Kan. 1058, 136 P. 3d 390 (2006); *State v. Lotter*, 266 Neb. 245, 664 N.W. 892 (2003); *Thiersaint v. Commissioner of Correction*, 316

> However, here, as in *State v. Hurley*, 154 Ariz. 124, 131, 741 P.2d 257, 264 (1987), we believe such diversity would be mischievous and a disservice to principles of federalism. The law regarding retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity rules, depending on whether the substantive decision is grounded on state or federal constitutional principles—especially when many decisions are grounded on both. Given the supremacy of the United States Supreme Court on federal issues and its current explication of the law, we think public policy presently requires that we adopt and apply the federal retroactivity analysis to decisions of state constitutional law.

State v. Slemmer, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991); *see also Edwards v. People,* 129 P3d. 977 (Colo. 2006) (adopting federal retroactivity of *Teague*, as it satisfies state postconviction goal of finality and prevention of injustice); *State ex. Rel. Taylor v. Whitley,* 606 So. 2d 129, 1296 (La. 1992) (recognizing *Linkletter* test

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Conn. 89, 111 V.3d 829 (2015); *State v. Gaitan,* 209 N.J. 339, 37 A. 3d 1089 (2012); *State v. Guice*, 141 N.C. App. 177, 541 S.E. 474 (2000) *Morel v. State,* 2108 N.D. 141, 912 N.W.2d 299 (2018); *Page v. Palmeteer*, 336 Or. 379, 84 P.3d 133 (2004); *Commonwealth v. Stahley*, 2018 PA Super 346, 210 A.3d 200 (2018); *Pierce v. Wall*, 941 A.2d 189 (R.I. 2008); *Lucero v. State,* 414 S.C. 238, 777 S. E2d 409 (2015). *Siers v. Weber*, 2014 S.D. 51, 851 N.W. 2d 731 (2014); *Ex Parte De Los Reyes*, 392 S.W. 3d 675 (Tex. 2013); *Winward v. State*, 792 Ut 61, 355 P. 3d. 1022 (2015); *State v. White*, 2007 VT 113, 944 A.2d 203 (2007); *Dominguez v. State*, 2015-NMSC-014, 348 P. 3d 183 (2015); *State v. Lagundoye,* 268 Wisc. 77, 674 N.W. 526 (2004); *In Re New Hampshire*, 166 N.H. 65, 103 A.3d 227 (2014); *State v. Tate*, I 130 So. 3d 829 (La. 2013); *Jones v. State,* 122 So. 3d 698 (Miss. 2013); *State v. Slemmer*, 170 Ariz. 174, 823 P.2d 41 (1991); *Powell v. State*, 153 A. 3d 69, (Del. 2016); *People v. Flowers*, 138 Ill. 218, 561 N.E. 674 (1990); *Membres v. State*, 889 N.E. 265 (Ind. 2008); *White v. Commonwealth*, 500 S.W. 208 (Kentucky 2016); *Carmichael v. State*, 2007 Me. 86, 927 A.2d 1172 (2007); *Commonwealth v. Sylvain*, 466 Mass. 422, 995 N.E. 760 (2013); *Beach v. State*, 379 Mont. 74, 348 P.3d 629 (2015); *State v. Mares*, 2014 Wy 126, 335 P. 3d 487 (2014); *People v. Smith,* 28 N.Y. 3d 191, 66 N.E. 641 (2016); *State v. Bishop*, 2104-Ohio-173, 7 N.E. 605 (2014); *Baxter v. State*, 2010 Ok 20, 238 P.3d 934 (2010) .

as vague leading to inconsistent results and *Teague* promotes finality which makes it equally applicable in state proceedings as it is to federal proceedings); *Rhodes v. State,* 149 Idaho 130 (Idaho 2010) (adopting *Teague* as it is simpler, more predictable, and advances the important interest of finality of judgements).

Of special note is *Danforth v. State,* 761 N.W. 493 (Minn. 2009), where on remand from the United States Supreme Court in *Danforth v. Minnesota,* 552 U.S. 264 (2008), the Minnesota Supreme Court decided to retain *Teague* as the most appropriate retroactivity analysis available because it provided a bright line rule, and it protected the finality of convictions. Moreover, it protected limited judicial resources from being further expanded as well as protecting the criminal justice system from being burdened with reviewing final cases that have been previously found to be error free. *Danforth,* 761 N.W. 2d at 499. Most notable is that in support of its decision to retain *Teague,* the Court quoted from *Witt,* and this Court's policy reasoning regarding finality. *See Danforth*, 761 N.W. 2d at 498-499, *quoting Witt,* 387 So. 2d at 925.

The Court is not reticent in embracing federal law in a variety of contexts when it served to advance or protect the interests of Florida and the integrity of the criminal process. As noted previously, the Court adopted the retroactivity test of *Griffith* for new state court rules. *See Smith* 598 So. 2d at 1066 (Fla. 1992) (recognizing rule of *Griffith* was consistent with many of its own decisions applying

its new rules to cases pending on direct review). Other examples of adopting federal precedent are; *Galindez* v. State, 955 So. 2d 517, 521 (Fla. 2007) (overruling its own prior precedent that *Apprendi* error was not subject to harmless error after United States Supreme Court determined otherwise); *Hurst II,* 202 So. 3d 40 (Fla. 2016) (recognizing harmless error analysis discussed in *Neder v. United States,* 527 U.S. 1 (1999) when element of offense is erroneously omitted from jury's consideration); *Haag v. State,* 591 So. 2d 614 (Fla. 1992) (adopting "mailbox rule" of United States Supreme Court to address timeliness problems of *pro se* habeas petitioners as consistent with policy considerations under Florida Constitution and rule 3.850). Ironically, in Owen's case, this Court adopted the rule announced in *Davis v. United States,* 512 U.S. 452 (1994) which requires the requests for counsel must be unequivocal before law enforcement is required to cease interrogation. *State v. Owen,* 696 So. 2d 715, 719 (Fla. 1997) (recognizing that although the Court has the authority to apply state law regarding equivocal requests for counsel, it found federal precedent interpreting the Fifth Amendment to be persuasive).

Also instructive is that the Citizens of Florida have twice amended the state constitution mandating Florida courts to follow the United Supreme Court in matters involving interpretation of the federal constitution regarding the Fourth Amendment and the Eight Amendments. *Correll v. State,* 184 So.3d 478, 489 (Fla. 2015) ("[T]his 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."); s*ee Bamberg v. State,* 953 So.2d 649 (Fla. 2d DCA 2007) (explaining this court is "bound, on search and seizure issues, to follow the opinions of the United States Supreme Court regardless of whether the claim of an illegal arrest or search is predicated upon the provisions of the Florida or United States Constitutions.").

In conclusion, the adoption of *Teague* for all retroactivity determinations would further Florida's goals and policy considerations in collateral review proceedings. *Asay* and *Mosley* provide justification to make that change in the instant case.

ISSUE V

THE TRIAL COURT CORRECTLY CONCLUDED THAT ANY *HURST* ERROR IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Owen alleges that he is constitutionally entitled to a finding that the *Hurst I* error in his case was not harmless. And, to uphold the trial court's findings that the error was harmless beyond a reasonable doubt, would violate his constitutional protection against ex post facto punishment**. (IB at 19)**. Owen does not cite to any authority for this proposition, because there is none. Owen is not constitutionally entitled to any particular outcome in this case. Simply because in other cases where

the previous vote for death was not unanimous, the *Hurst I* error was found to be harmful, does not require the same finding for Owen.

In *Hurst II,* the Court explained that the harmless error test required the State to prove beyond a reasonable doubt, that no rational jury would decide to impose a life sentence based on the mitigation presented. The Court warned that speculation as to why the vote was not unanimous or why members of the actual jury voted a certain way was precluded. *Hurst II* 202 So. 3d at 69. Owen was entitled to the reasonable juror standard for the harmless error analysis. That is what he received, and under no interpretation of the law, is he entitled to a particular result from that analysis. (PCR 364-382).

Owen also claims that from those defendants who received resentencing hearings pursuant to *Hurst I*, approximately a third of them, received life sentences. He then makes the quantum leap that the number of life sentences obtained under the new procedures is significant and proves that the new procedures "enhance the accuracy of the underlying proceeding." (**IB at 27.**) Owen's claim is merely an assumption and he provided no facts to support that. In fact, the opposite is true, many of these cases include sentencing hearings conducted over a decade ago, therefore as recognized in *Johnson,* 904 So. 2d at 411:

> We fear that any new penalty phase proceedings would actually be less complete and therefore less (not more) accurate than the proceedings they would replace.

Id. Owen's claims are unpersuasive. For the remainder of the harmless error, the State will rely on the argument made previously in the response filed on July 16, 2018.

CONCLUSION

WHEREFORE, the State respectfully requests that, at a minimum, this Court affirm the trial court's order finding that any *Hurst* error be found harmless beyond a reasonable doubt, codifying the reasonable jury standard of *Neder*. Additionally, based on this Court's supplemental order of April 24, 2109, the State respectfully requests that *Mosley* and *James* be overruled and *Asay* be modified to reinstate "the purpose of the new rule" found in *Johnson* and adopt the retroactivity test of *Teague* as the sole test for determining retroactivity of new rules in final cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2019, I filed the foregoing with the Clerk of the Court by using the E-Portal Filing System and sending a notice of electronic filing to the following: James Driscoll, driscoll@ccmr.state.fl.us.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

__/S/ Celia Terenzio______
CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 0656879
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 268-5315
Facsimile: (561) 837-5108
CapApp@MyFloridaLegal.com
Secondary e-mail:
Celia.Terenzio@MyFloridaLegal.com
COUNSEL FOR APPELLEE