

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-810

DUANE EUGENE OWEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action may determine whether Mr. Owen lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Owen.

PRELIMINARY STATEMENT REGARDING REFERENCES

The postconviction record on appeal of the denial of Mr. Owen's Successive Motion to Vacate Death Sentence is comprised of one volume, initially compiled by the clerk, successively paginated beginning with page one.

Mr. Owen has two death sentences. Following the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), Mr. Owen filed a Successive Motion under Florida Rule of Criminal Procedure 3.851 in both cases. Generally, Duane Owen is referred to as Mr. Owen throughout this brief. The Office of the Capital Collateral Regional Counsel - Middle Region, representing the Appellant, is shortened to "CCRC."

To the extent necessary to distinguish the two cases, Mr. Owen will refer to the case from lower case 84-4000, as Owen I, and refer to the case from lower case 84-4014, as Owen II (the instant case). Record citations from Owen I and Owen II are so

designated. Record citations to the prior postconviction record are designated as PCR. All other record citations are self-explanatory or explained herein.

STATEMENT OF THE CASE AND FACTS

1. Procedural History

Mr. Owen was sentenced to death in two cases, Owen I and II, without a jury trial at which the State proved, beyond a reasonable doubt, all of the elements necessary to subject him to death. Mr. Owen maintains that both death sentences are unconstitutional. While Owen II is the case before the Court, Mr. Owen discusses Owen I throughout as an example of why this Court should recede from *Asay*. A brief procedural history of each is offered as follows:

Owen I: In 1984, the State charged Mr. Owen by indictment with first-degree murder, sexual battery and burglary of a dwelling. (Owen I PCR 94-95). Mr. Owen pleaded not guilty and went to trial in February of 1986. A jury found Mr. Owen guilty of all counts. After a penalty phase, the advisory panel recommended death by a less than unanimous vote of ten to two. Mr. Owen appealed his judgment and conviction. This Court affirmed. *Owen v. State*, 596 So. 2d 985 (Fla. 1992). The United States Supreme Court denied certiorari. *Owen v. Florida*, 506 U.S. 921 (1992).

Mr. Owen filed a Rule 3.850 Motion and it was subsequently amended. (Owen I PCR. 1379-1546). The postconviction court held a hearing on December 8, 1997. *Owen v. State*, 773 So.2d 510, 513 (Fla. 2000). (Mr. Owen also filed a fourth amended postconviction motion on that date.) The postconviction court denied relief. Mr.

Owen appealed. This Court affirmed the denial of postconviction relief. *Id.* at 515. Mr. Owen filed a Petition for Writ of Certiorari in the United States Supreme Court which was denied. *Owen v. Florida*, 532 U.S. 964 (2001). Mr. Owen continued to seek relief in the state courts, through counsel and *pro se*.

Through counsel, Mr. Owen filed a state petition for writ of habeas corpus. Mr. Owen filed a Successive Pro-Se Motion for Post-Conviction Relief and/or Extraordinary Writ. The postconviction court denied the motion and Mr. Owen appealed. These cases were consolidated for oral argument. This Court affirmed the postconviction court's denial of relief and denied relief on the state habeas corpus petition. *Owen v. Crosby*, 854 So.2d 182 (Fla. 2003).

Mr. Owen sought federal habeas relief. The district court denied relief which was affirmed on appeal to the United States Circuit Court of Appeal. *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894 (11th Cir. 2009). The United States Supreme Court denied certiorari. *Owen v. McNeil*, 558 U.S. 1151 (2010).

Mr. Owen filed a motion in Owen I within one year from the date of *Hurst v. Florida*, 136 S. Ct. 616 (2016). The postconviction court denied relief. Mr. Owen appealed. This Court denied briefing and ordered Mr. Owen to show cause "why the trial court's order should not be affirmed in light of this Court's decision in

Hitchcock v. State, SC17-445." See *Owen v. State*, 247 So. 3d 394 (Fla. 2018). After Mr. Owen responded, this Court found that,

[a]fter reviewing Owen's response to the order to show cause, as well as the State's arguments in reply, we conclude that Owen is not entitled to relief. Owen was sentenced to death following a jury's recommendation for death by a vote of ten to two. *Owen v. State*, 596 So. 2d 985, 987 (Fla. 1992). His sentence of death became final in 1992. *Owen v. Florida*, 506 U.S. 921, 113 S. Ct. 338, 121 L.Ed.2d 255 (1992). Thus, *Hurst* does not apply retroactively to Owen's sentence of death. See *Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Owen's motion.

Id. at 395 (Fla. 2018). Mr. Owen petitioned for certiorari in the United States Supreme Court. The Court denied the petition. *Owen v. Florida*, 139 S. Ct. 1171 (2019).

Owen II: Mr. Owen was charged by indictment with first-degree murder, sexual battery and burglary. After a jury trial, Mr. Owen was convicted of first-degree murder, attempted sexual battery and burglary. The advisory panel returned a 10-2 recommendation for a death sentence. The trial court alone then made the findings of fact necessary to sentence Mr. Owen to death and did so.

Prior to Mr. Owen's first trial, counsel moved to suppress statements made by Mr. Owen while he was in custody. The trial court ruled against Mr. Owen and his statements were admitted into evidence. On direct appeal, this Court reversed Mr. Owen's conviction and sentence and remanded for retrial. *Owen v. State*, 560 So.2d 207 (Fla. 1990). This Court held that Mr. Owen's post-*Miranda* statements to law enforcement, "I'd rather not talk about

it," and "I don't want to talk about it, were at the least, an equivocal invocation of the *Miranda* right to terminate questioning, which could only be clarified." *Id.* at 211.

Before Mr. Owen was retried, the United States Supreme Court issued *Davis v. United States*, 512 U.S. 452 (1994), holding that an equivocal invocation of the right to an attorney during custodial interrogation did not require police to stop questioning a suspect. Based on *Davis*, the State filed a petition for a writ of certiorari in the Fourth District Court of Appeal of Florida on whether *Davis* applied to Mr. Owen's case. The district court certified a question to this Court of whether "the principles announced by the United States Supreme Court in *Davis* appl[ied] to the admissibility of confessions in Florida, in light of *Traylor*?" *State v. Owen*, 654 So. 2d 200, 202 (Fla. 4th DCA 1995). This Court found that *Davis* applied and overcame the law of the case but that Mr. Owen's conviction could not be reinstated because the time for rehearing had passed. *State v. Owen*, 696 So. 2d 715 (Fla. 1997). Mr. Owen was returned for trial "in the same position as any other defendant who has been charged with murder but who has not yet been tried." *Id.* at 720. The trial court again denied suppression which this Court affirmed on direct appeal following trial. *Owen v. State*, 862 So. 2d 687, 697 (Fla. 2003).

Mr. Owen filed a Notice of Intent to Rely on Insanity. (Owen II Vol. 17 R.3263-64). Mr. Owen pursued an insanity defense during

the guilt phase and called two mental health professionals, Dr. Fredrick Berlin (Owen II Vol. 55 R. 5389-5435), and Dr. Faye Sultan (Owen II Vol. 56 R. 5573-5661). Both found that Mr. Owen was insane at the time of the offense. Mr. Owen was convicted of first-degree murder, attempted sexual battery with a deadly weapon or force likely to cause serious personal injury, and armed burglary of a dwelling. (Owen II Vol. 60 R. 6113-14).

At the penalty phase, Mr. Owen recalled Dr. Berlin and Dr. Sultan as witnesses. (Owen II Vol. 63 R. 6546-6587, 6627-6692). Mr. Owen also called neuropsychologist Dr. Barry Crown as a witness. (Owen II Vol. 62 R. 6486-542). The advisory panel recommended a death sentence by a recommendation of 10-2. (Owen II Vol. 65 R. 6994). After a *Spencer* hearing the trial court imposed a death sentence making the finding of fact necessary to subject Mr. Owen to death. (Owen II Vol. 65 R. 7023).

On direct appeal following retrial, this Court affirmed the conviction and death sentence. *Owen v. State*, 862 So. 2d 687, 697 (Fla. 2003). Mr. Owen petitioned the United States Supreme Court for a Writ of Certiorari. The Court denied Mr. Owen's Petition. *Owen v. Florida*, 543 U.S. 986 (2004).

Mr. Owen sought postconviction relief by filing a Motion to Vacate Judgment of Conviction and Death Sentence. (Owen II Vol. I PCR. 75). Mr. Owen amended this motion. (Owen II Vol. II PCR. 315-391). The lower court denied relief (Owen II Vol. IV PCR. 684).

Mr. Owen appealed this decision to this Court and filed a State Petition for a Writ of Habeas Corpus. The Court affirmed the lower court and denied the petition with a revised opinion. *Owen v. State*, 986 So.2d 534 (Fla. 2008).

Mr. Owen sought habeas relief in federal court by filing a petition for writ of habeas corpus. The federal district court denied the writ. The Eleventh Circuit affirmed on appeal. *Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181 (11th Cir. 2012). The United States Supreme Court denied certiorari. *Owen v. Crews*, 569 U.S. 960 (2013).

Mr. Owen filed a motion within one year from the date of *Hurst v. Florida*, 136 S. Ct. 616 (2016) in this **post-Ring** case, Owen II, as well. The lower court denied relief in the instant case, finding the error harmless. Mr. Owen appealed. Mr. Owen filed a Motion for Order to Show Cause based on the strong case precedent finding no harmless error in post-*Ring* non-unanimous cases. This Court granted the motion and issued the order to show cause. The State filed a response and Mr. Owen responded.

On April 24, 2019, this Court ordered briefing from the parties "address[ing], but [] not limited to, 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)." Mr. Owen will avail himself of this opportunity in this brief and reply.

2. *Hurst v. Florida - Before and After*

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that in a non-capital case, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Court recognized that the principles supporting a jury trial,

extend[] down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...."

Id. at 477. (Citations omitted). Justice Scalia, in concurrence, added,

(Judges, it is sometimes necessary to remind ourselves, are part of the State - and an increasingly bureaucratic part of it, at that.). The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

Id. 498.

In *Ring*, the United States Supreme Court held that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature

conditions an increase in their maximum punishment." *Id.* at 589. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court stated the crux of *Ring*, that,

"the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.

Hurst, 136 S. Ct. at 621. (Internal citations omitted). In *Hurst* the United States Supreme Court applied *Ring* directly to Florida's death penalty system and found:

The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So. 2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

As with Timothy Ring, the maximum punishment Timothy *Hurst* could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased *Hurst's* authorized punishment based on

her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at 621-22.

On remand, a majority of this Court applied the United States Supreme Court's decision in *Hurst* to Florida's death penalty system and held,

that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016). The majority found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. Moreover, the majority found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require unanimous jury fact-finding:

[T]he foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. See *Gregg*, 428 U.S. at 199, 96 S. Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in *Gregg*." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Id. at 59-60. The majority cited to the Eighth Amendment finding that, "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended

verdict resulting in a death sentence is required under the Eighth Amendment." *Id.* at 59.

In *Perry v. State*, 210 So. 3d 630 (Fla. 2016) a majority of this Court found Florida's first post-*Hurst* revision of the death penalty statute was unconstitutional and found,

[i]n addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in *Hurst*. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. *Hurst*, 202 So. 3d at 44-45. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id.* at 53-54, 59-60.

Id. at 633.

When addressing the question of retroactivity of *Hurst v. Florida* and its own decision in *Hurst v. State*, the majority found that *Hurst v. Florida* applies retroactively to cases that became final after *Ring v. Arizona* but not before. In *Mosley v. State*, 209 So. 3d 1248, 1275 (Fla. 2016), the majority found that *Hurst* and *Hurst v. State* applied retroactively to cases which became final after *Ring v. Arizona* was issued. The majority analyzed retroactivity under the fundamental fairness approach of *James v.*

State, 615 So. 2d 668 (Fla. 1993) and the approach of *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980).

The majority found that *Mosley* was entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State* under the fundamental fairness approach of *James* "because *Mosley* raised a *Ring* claim at his first opportunity and was then rejected at every turn" *Id.* at 1275.

The majority also found *Hurst v. Florida* and *Hurst v. State* retroactive to Mr. *Mosley*'s case under Florida's *Witt* standard. *Id.* at 1276. The *Witt* standard grants retroactive application of changes in the law if,

" . . . the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So. 2d at 931. Determining the retroactivity of a holding "requir[es] that [th[e] Florida Supreme] Court] resolve a conflict between two important goals of the criminal justice system—ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other—within the context of post-conviction relief from a sentence of death." *Id.* at 924-25. Put simply, balancing fairness versus finality is the essence of a *Witt* retroactivity analysis. See *id.* at 925.

Id. The majority decided that the first two prongs were met because *Hurst v. State* and *Hurst v. Florida* emanated from this Court and the United States Supreme Court and were constitutional in nature.

Id. The third prong required the majority to decide whether the change in the law was a development of fundamental significance. As the majority explained,

[t]o be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. We conclude that *Hurst v. Florida*, as interpreted by this Court in *Hurst*, falls within the category of cases that are of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" from *Stovall* and *Linkletter*, which we address below. *Id.*

The three-fold test of *Stovall* and *Linkletter* requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. *Witt*, 387 So. 2d at 926; *Johnson*, 904 So. 2d at 408.

Id. at 1276-77.

The majority found the threefold test of *Stovall* and *Linkletter* was met. *Id.* at 1277. The majority declared that the purpose of the new rule announced in *Hurst v. Florida* was,

to ensure that capital defendants' foundational right to a trial by jury—the only right protected in both the body of the United States Constitution and the Bill of Rights and then, independently, in the Florida Constitution—under article I, section 22, of the Florida Constitution and the Sixth Amendment to the United States Constitution—is preserved within Florida's capital sentencing scheme. *See Hurst*, 202 So. 3d at 57.

Id. The majority concluded,

[t]hus, because *Hurst v. Florida* held our capital sentencing statute unconstitutional under the Sixth Amendment to the United States Constitution, and *Hurst* further emphasized the critical importance of a unanimous verdict within Florida's independent constitutional right to trial by jury under article I, section 22, of the Florida Constitution, the purpose of

these holdings weighs heavily in favor of retroactive application.

Id. at 1278. The majority found that, as far as post-*Ring* cases were concerned, "fairness strongly favors applying *Hurst* retroactively to" the time that *Ring* was issued. *Id.* at 1280. The majority found that, "[f]rom *Hurst* [v. State], 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*." *Id.* at 1280.

The majority found that the effect on the administration of justice would not be so great as to deny retroactive application to the post-*Ring* cases:

Of course, any decision to give retroactive effect to a newly announced rule of law will have some impact on the administration of justice. That is not the inquiry. Rather, the inquiry is whether holding a decision retroactive would have the effect of burdening "the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30. By embracing this principle as an analytical lynchpin, together with the other two prongs of the three-part test, the Court was attempting to distinguish between "jurisprudential upheavals" and "evolutionary refinements," the former being those that justify retroactive application and the latter being those that do not.

Id. at 1281-82. The Court found that it did not so burden the administration of justice because,

capital punishment "connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d

at 926. In this case, where the rule announced is of such fundamental importance, the interests of fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990).

Id. at 1282.

While this decision was correct, and fair, it was not based on anything about the nature of the crime or Mr. Mosley's mitigation. Certainly, relief was appropriate, but the majority's basing the decision on the finality date of Mr. Mosley's case had no relation to the actual wrongfulness of the constitutional violations it remedied, the nature of Mr. Mosley's case, or the actual functioning of Florida's death penalty scheme.

This Court considered retroactivity of *Hurst v. Florida* for *pre-Ring* cases and came to an entirely different conclusion in *Asay v. State*, 210 So. 3d 1, 15 (Fla. 2016). The majority found that *Hurst v. Florida* did not apply retroactively to allow relief for Mr. Asay under just the Sixth Amendment:

After weighing all three of the above factors, we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*. 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*. When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida. Accordingly, we deny Asay relief.

Id. at 22. The majority found that the first prong of the *Stovall/Linkletter* test, the "purpose of the new rule," weighed in Mr. Asay's favor. The majority discussed the importance of the right to a jury trial under the United States and Florida Constitutions which "th[e Florida Supreme] Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life[]." *Id.* at 18. The majority found that the reliance on the old rule weighed "against retroactive application of *Hurst v. Florida*" to Mr. Asay's pre-*Ring* case. *Id.* at 19. (The majority found that this Court had previously relied upon the United States Supreme Court's precedent and the breadth of the Court's prior reliance.)

The majority considered the "Effect on the Administration of Justice." The majority recognized that this Court's prior analysis of the retroactivity of *Ring* under the first prong of *Witt* "was impacted by an incorrect understanding of the Sixth Amendment claim" The majority found that the Court's conclusion in *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005) that applying "*Ring* retroactively in Florida . . . 'would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings'" was correct. *Id.* at 22; citing *Johnson* at 412. Like in *Mosely*, although to Mr. Asay's detriment, the majority's basing the decision on the finality date of Mr. Asay's case had no relation to the actual wrongfulness of

the constitutional violations it remedied, the nature of Mr. Asay's case, or the actual functioning of Florida's death penalty scheme.

SUMMARY OF THE ARGUMENT

Mr. Owen was denied his right to a jury trial on the facts that subjected him to the death penalty. Mr. Owen's death sentence in Owen I remains because of the calendar and this Court's use of it to deny relief to those whose cases became final before the United States Supreme Court issued *Ring*. Mr. Owen's death sentence in Owen II remains because the lower court ignored the non-unanimous advisory panel recommendation that showed that the State could not prove beyond a reasonable doubt that the error in Owen II was harmless. Denying Mr. Owen relief based on the date of *Ring* and an erroneous harmless error finding allows serious violations of the right to a jury trial to stand, violates equal protection and renders Mr. Owen's death sentence contrary to the Eighth and Fourteenth Amendments.

This Court should recede from *Asay* and expand *Mosley* and *James* to reach the cases that were left behind by this Court's decisions. Half a jury trial is a full denial of the right to a jury trial which is essential to a fair system of justice that respects the dignity of the individual. This Court's decisions applying *Hurst* and *Hurst v. State* retroactively only to the *post-Ring* cases have rendered the remaining death sentences unfair, unreliable and

unconstitutional under the Sixth, Eighth and Fourteenth Amendments.

Florida's death penalty system has been unconstitutional since the death penalty was reenacted after *Furman v. Georgia*. *Hurst v. Florida* and *Hurst v. State* have corrected some of the unconstitutionality but, based on the fracturing of retroactivity, the cases that remain are even further removed from rights guaranteed by the United States Constitution and the Florida Constitution. Mr. Owen's death sentences were unconstitutional when he received them and even more so if this Court allows them to stand.

This Court should recede from *Asay* and find that the error in *Owen I* and *II* was not harmless.

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), these claims are mixed questions of law and fact requiring de novo review.

ARGUMENT

I. THE STATE CANNOT SHOW THE ERROR IN MR. OWEN'S CASES WAS HARMLESS BECAUSE THE ADVISORY PANEL RECOMMENDED DEATH BY A VOTE OF 10-2 IN BOTH CASES, RESPECTIVELY, ESPECIALLY IN LIGHT OF MR. OWEN'S SIGNIFICANT MITIGATION.

To deny Mr. Owen the benefit of the rulings in *Hurst v. Florida*, *Hurst v. State*, *Mosley v. State* and *Abdool v. State*, 220 So.3d 1106 (Fla. 2017), when numerous other similarly situated

inmates and rationally indistinguishable classes of inmates have been given the benefit of those rulings would violate Mr. Owen's federal Sixth Amendment right to jury trial, his federal Fourteenth Amendment right to due process and equal protection of the laws, his federal Eighth and Fourteenth Amendment immunities against arbitrary and indecent execution of a death sentence, and his federal Article I, § 10 immunity against ex post facto punishment. "Because the jury in this case recommended death by a vote of ten to two, 'we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation.' *Kopsho [v. State]*, 209 So.3d [568] . . . 570 [(Fla. 2017)]. 'We can only determine that the jury did not unanimously recommend a sentence of death.' *Id.* Therefore, because we cannot say that there is no possibility that the error did not contribute to the sentence, the error in Abdool's sentencing was not harmless beyond a reasonable doubt." *Abdool*, 220 So.3d at 1116.

Even under Florida's previous death penalty scheme that heavily favored the State, two jurors in Owen I and two jurors in Owen II found that the State's aggravation did not overcome the significant mitigation Mr. Owen presented. Had Mr. Owen been tried under a constitutional system, he would have received life. Mr. Owen's tragic life, mental illness and organic brain damage defeats any attempt by the State to prove beyond a reasonable doubt that the error in Mr. Owen's cases was harmless. In part, the extensive

mitigation that applies to Mr. Owen shows the insufficiency of the *Asay* standard because that standard left behind death sentences obtained without a unanimous jury and despite significant mitigation in many cases. Such death sentences are not just unconstitutional, they are also unreliable.

Mr. Owen will use most of this brief to present arguments in light of this Court's order. Nevertheless, a brief discussion of Mr. Owen's mitigation would aid this Court in seeing that the error was not harmless and further elucidate the problems of partial retroactivity. He does not abandon any argument made on harmless error in the order to show cause procedure or argument concerning the constitutional violations made in his original motion.

Mr. Owen was denied a comprehensive mitigation presentation in Owen I. Trial counsel presented extensive mitigation during the retrial in Owen II. Mr. Owen then presented even more extensive mitigation during the postconviction evidentiary hearing in Owen II. The totality of the mitigation applies equally to both cases.

While the 10-2 advisory panel recommendations conclusively refute any State claim of harmlessness beyond a reasonable doubt, significant and weighty mitigation does exist and should be considered in determining whether this Court should recede from *Asay*. The State has yet to overcome Mr. Owen's significant mitigating factors with significant enough aggravating factors to

convince a unanimous jury, beyond a reasonable doubt, that death should be imposed in either case.

Mr. Owen's early life was one of chaos and deprivation. Both of Mr. Owen's parents were alcoholics and were frequently drunk during Mr. Owen's formative years. Mr. Owen was neglected. His mother died when he was still a child. Mr. Owen's father committed suicide leaving Mr. Owen without a parent or any relative to care for him. Mr. Owen began a downward spiral into sexual problems, mental illness, drugs and trouble with the law during his childhood which culminated with the two death sentences he received.

Mr. Owen, now an orphan, was then sent to the VFW National Home. While there, the abuse continued. After having started using drugs as a child living in his parent's house, he continued to use mind-altering substances up to the time of arrest. Mr. Owen later suffered a head injury when a car he was working on fell on his head.

Mr. Owen suffered cognitive impairment, developmental impairment, severe mental illness, and delusions, and was confronted with a compulsion to act which he could not control. Mr. Owen's ongoing self-medicating drug use also affected his ability to control his behavior and make decisions at the time of the offense. This all occurred before Mr. Owen's brain was fully developed at age 25.

Mr. Owen suffers from very serious mental illness and brain impairment. Two neuropsychologists have also found that Mr. Owen suffered frontal-lobe brain damage, the part of the brain used to regulate impulsivity. He has been diagnosed with a multitude of mental illnesses.

While Mr. Owen challenged trial counsel's effectiveness in his postconviction motion in Owen II, trial counsel presented extensive mitigation starting during Mr. Owen's guilt phase insanity defense and following through with a broader presentation in the penalty phase. This shows that Mr. Owen falls outside the narrow class of individuals whose cases are the most aggravated and least mitigated. While there were bad facts in Mr. Owen's case this is not unusual; there are bad facts in every murder case, including the small minority of cases which the State seeks death and the vast majority which it does not.

At trial, Mr. Owen called Dr. Frederick Berlin as witness in the guilt and penalty phase of Owen II. Dr. Berlin was the founder of the Johns Hopkins Sexual Disorder Clinic. Dr. Berlin found that Mr. Owen was insane at the time of offense with a reasonable degree of medical certainty. (Owen II Vol. 55 R. 5389). While the insanity defense failed, like it does in most cases, it did show significant mitigation that must be considered by the relevant sentencers in determining a death sentence.

Dr. Berlin was recalled as an expert witness during the penalty phase. Dr. Berlin found that Mr. Owen committed the crime while he was under the influence of extreme mental or emotional disturbance and that Mr. Owen was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law. (Owen II Vol. 63 R. 6563-6564). Dr. Berlin, both a medical doctor and a Ph.D. in psychology, testified that Mr. Owen had gender identity disorder, a paraphilic sexual disorder **and** schizophrenia. (Owen II Vol. 54 PCR. 5346). At penalty phase, Dr. Berlin found that Mr. Owen committed the crime while he was under the influence of extreme mental or emotional disturbance and that Mr. Owen was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law. (Owen II Vol. 63 R. 6563-6564).

Dr. Faye Sultan testified likewise. Dr. Sultan found that Mr. Owen was under the influence of extreme mental or emotional disturbance at the time of the crimes and that his ability to conform his conduct to the requirements of law was substantially impaired. (Owen II Vol. 63 R. 6655-6656).

Dr. Barry M. Crown testified at the penalty phase as a defense expert in neuropsychology. (Owen II Vol. 62 R. 6486-6490). Dr. Crown found that Mr. Owen had an age equivalent of 11 years, 5 months. (Owen II Vol. 62 R. 6494). Dr. Crown found that Mr. Owen suffered from organic brain damage which significantly impaired

his ability to process information, to reason, or to make judgments under the significant stress that he was under at the time of offense. (Owen II Vol. 62 R. 6501). The organic brain damage impacted Mr. Owen's ability to conform his requirements to the requirements of law. (Owen II Vol. 62 R. 6502). Dr. Crown also believed that Mr. Owen's brain damage was exacerbated by an injury that took place in 1982 when a car fell on his head, that there was perinatal injury to Mr. Owen's brain and that Mr. Owen exhibited signs of fetal alcohol syndrome. (Owen II Vol. 62 R. 6505).

The trial court in sentencing Mr. Owen to death found the two statutory mental mitigating factors:

1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The court gave this factor considerable weight because:

Clearly, the evidence shows that the defendant was and is mentally ill.[]

Being born to an alcoholic mother, watching one's hopelessly alcoholic parents brutalize each other, watching and hearing one's mother raped, having an alcoholic father abuse a half-brother by keeping him locked in the basement for years, being sexually abused from age nine and living on a steady diet of sexual and physical abuse from childhood through teen years, losing one's only two caretakers to cancer and suicide during one's formative years, and then spending teenage years in an equally abusive home or environment where adult role models are the chief abusers, is there any wonder that the defendant is and has been mentally sick?

It is true that some individuals can adjust adequately in their adulthood with much counseling, therapy and

some supportive help and live relatively normal lives. Duane Owen had no help, therapy or counseling and could never be expected to live a normal life. The very place he was sent for the purpose of protecting him and getting him such help made matters worse and irreversible.

(Owen II Vol. 65 R. 7012-13).

The court also found:

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. (The Court gave this factor some weight).

(Owen II Vol. 65 R. 7014).

The trial court found a great deal of non-statutory mitigation, importantly that Mr. Owen "suffered from organic brain damage: In 1981, [making Mr. Owen approximately 20 years of age] the defendant was injured when a car that had been jacked-up fell on his head. He may also be the product of fetal alcohol syndrome due the extensive use of alcohol by his mother as described [above in the sentencing order]." (Owen II Vol. 65 R. 7021). The court found some further non-statutory mitigation because of Mr. Owen's deprived background, alcoholic parents, his father's suicide and similar information concerning Mr. Owen's background.

Mr. Owen has the very type of mental issues, brain damage and traumatic background that would allow at least one juror to vote for life. In fact, at least one juror on the advisory panel in each case did as Mr. Owen received two life votes in each case. This shows that the error in Mr. Owen's cases was not harmless.

It also shows that *Asay* is insufficient to do justice because Mr. Owen remains sentenced to death in a case that certainly would not produce a death sentence under the law of today and modern understanding of mitigation. The same is true in *Owen I* as the mitigation presented in *Owen II* would be presented today even though like many of the older pre-*Ring* *Asay* cases no jury ever considered the full extent of Mr. Owen's mitigation in *Owen I*.

Moreover, as a matter of federal retroactivity law, *Hurst* must apply retroactively to all pre-*Hurst* cases because it announced a "watershed rule[] of criminal procedure." *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion). A constitutional procedural rule must be applied retroactively on collateral review if it "implicate[s] the fundamental fairness" of the proceeding. *Id.* at 312. That means that (1) "Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," and (2) "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (quotation marks and citations omitted); *Teague*, 489 U.S. 288, 313 (1989) (plurality opinion) (a rule is watershed where the likelihood of obtaining an accurate result is "seriously diminished" by failure to apply the rule).

Empirical evidence from post-*Hurst* resentencings proves that *Hurst* announced a watershed rule of criminal procedure. Of the

individuals sentenced to death by a judge pre-*Hurst* who were later resentenced by a jury post-*Hurst*, fully one third - 1 out of 3 - have been sentenced to life rather than death.¹ That figure does not account for the many defendants sentenced to death by a judge before *Hurst* but for whom, after *Hurst*, the State has since declined to pursue a death sentence. Any procedural rule that protects at least 33 percent of the individuals who receive it from an incorrect sentence of death "seriously" enhances the accuracy of the underlying proceeding. Because *Hurst* is a watershed procedural rule, it must be applied retroactively under *Teague* to all defendants sentenced in violation of *Hurst*.

Mr. Owen was sentenced to death under procedures that were unconstitutional, unreliable and not harmless. This Court should reverse the lower court's finding to the contrary.

II. THIS COURT SHOULD RECEDE FROM ASAY BECAUSE THIS COURT'S DECISION ALLOWED SERIOUS CONSTITUTIONAL VIOLATIONS TO STAND IN CASES THAT WERE THE FURTHEST FROM MEETING THE DEMANDS OF A CONSTITUTIONAL DEATH SENTENCE.

Mr. Owen's case is the model of what could go wrong, and did go wrong, after this Court's retroactivity-split decisions left those like Mr. Owen without relief for serious constitutional violation. Florida is a "justice for all state." This Court's decision in *Asay* violated this principle because it allowed death

¹ This figure was calculated based on information obtained from the Death Penalty Information Center as of April 2, 2019. Known retrials were reviewed and the results compared.

sentences to stand based on a date on the calendar, not anything about an individual's case, thus denying justice for all.

On a very basic level, *Asay* has been seen as an unfair decision by lawyers, jurists and lay people alike. One of the basic tenets of a fair-minded society is that people should be treated alike. Denying relief to the pre-*Ring* cases in *Asay* undermined confidence in Florida's death penalty system and the justice system as a whole. Indeed, many thought what difference does a date make when a death sentenced individual was denied a right as important and esteemed as the right to jury trial. Regardless of whether people support the death penalty, overwhelmingly the citizens of Florida support the right to a jury trial. Also, on a basic level, fair-minded individuals have also had difficulty in understanding why individuals with more severe facts and less mitigation received relief and, in many cases life sentences, when more mitigated and less culpable individuals remain condemned.

By example, one jurist, in scrupulously following this Court's decision in *Asay* and denying relief in a pre-*Ring* case expressed that,

[t]he undersigned judge has the utmost respect and admiration for the highest court of the state and is legally duty-bound to follow the law as specified in *Asay*. The undersigned judge, however, agrees with the dissenting opinions of Justice Pariente and Justice Perry in *Asay*, in that *Hurst* should be applied retroactively to all death sentences considering the finality of death and that "death is different." The retroactive application of *Hurst* to a certain date

results in an arbitrarily drawn line for death sentences which became final before and after June 24, 2002. Nonetheless, as an officer of the court, I must follow the law of the land.

Record on Appeal *Fotopoulos v. State*, Case Number: SC17-971 at 474. The Florida Senate also went on to pass a bill 33-3 that would have required retroactivity for all pre-*Ring* cases because the Senate found that this Court's decision in *Asay* resulted in a miscarriage of justice.² The bill passed the Senate by a vote of 33-3 before being indefinitely postponed and withdrawn from consideration.³

This Court should recede from *Asay* to restore confidence in Florida's death penalty system among the lower courts, attorneys and, most importantly, the citizens of this State that look to this Court to ensure fairness in the legal system when this Court is engaged in applying the Florida Constitution and United States Constitution.

The problems of partial retroactivity are apparent in *Owen I* and would be so if this Court affirmed the lower court in *Owen II*. This Court's denial of retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), on the ground that Mr. Owen's death sentence became final before June 24, 2002 under the decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), while granting retroactive *Hurst*

² See SB870 <https://flsenate.gov/Session/Bill/2018/00870>.

³ <https://flsenate.gov/Session/Bill/2018/00870>.

relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), violated Mr. Owen's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)) and *Johnson v. Mississippi*, 486 U.S. 578, 584-585, 587 (1988).

The pre-*Ring* *Asay* cases, like *Owen I*, arose at the intersection of two principles that have become central fixtures of death penalty jurisprudence over the past four and a half decades:

The first principle, emanating from *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia, supra*, is that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.* at 428. This principle "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The Eighth Amendment's concern against capriciousness in capital cases refines the older,

settled precept that Equal Protection of the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner* 316 U.S. at 541 (1942). Such was the case in both of Mr. Owen's cases as he remains under two death sentences while other individuals with similar cases, or even more severe cases, have received relief and even life sentences.

The second principle, seen in this Court's decisions in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *James v. State*, 615 So. 2d 668 (Fla. 1993) and although decided wrongly, *Asay*, recognizes the pragmatic necessity for courts to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance of various rules of non-retroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines.

The courts have struck a balance between the two principles by honoring the second even when its application results in the execution of an inmate whose death sentence became final before the date of an authoritative ruling establishing that the procedures used in his or her case were constitutionally defective. *E.g.*, *Beard v. Banks*, 542 U.S. 406 (2004). If nothing more were involved here, that balance would be decisive. But this Court's

post-*Hurst* retroactivity rulings do involve more. They inaugurate a kind and degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence.

To see why this is so, this Court should consider the ways in which Florida's pre-*Ring* condemned inmates denied relief under *Asay* do and do not differ from their post-*Ring* counterparts whom received relief based on *Mosley*:

What the two groups have in common is that both were sentenced to die under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial - a procedure finally invalidated in *Hurst* although it had been thought constitutionally unassailable under decisions of the United States Supreme Court stretching back a third of a century.⁴

The ways in which the two groups differ are more complex. Notably:

(A) Inmates, like Mr. Owen in *Owen I*, whose death sentences became final before June 24, 2002, have been on Death Row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State. Prison has deterred Mr. Owen from further violence. He

⁴ See *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Bottoson v. Florida*, 537 U.S. 1070 (2002) (denying certiorari to review *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002)).

has often served his fellow death row inmates when they have had difficulty in adapting to life on death row.

(B) Inmates, like Mr. Owen, whose death sentences became final before June 24, 2002, have undergone the suffering chronicled in, e.g., *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), and most recently by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts. The United States Supreme Court, "speaking of a period of *four weeks*, not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected.'" *Id.* at 470. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of certiorari). Mr. Owen has suffered under a death sentence that was obtained without a jury trial for an extended period of time in both of his cases. He has gone from young man to old man serving what amounts to a life sentence to be followed by death.

(C) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have been given those sentences under standards that would not produce

a capital sentence - or even a capital prosecution -under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. Thus, we can be sure that a significant number of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by 2019 standards. We cannot say which specific cases would or would not with certainty; but it is plain generically - and even more plain in cases where the jury was divided in its penalty recommendation, as it was (10-2) in Mr. Owen's case - that some inmates condemned to die before *Ring* would receive less than capital sentences today.

Especially seen in Owen II, Mr. Owen had extensive mitigation that would lead many jurors to find that a sentence of less than death was appropriate if Mr. Owen were to receive a constitutional jury trial today. Mr. Owen received a death sentence in 1986's Owen I from an advisory panel that lacked the understanding of mental illness, brain damage and the devastating effects of childhood trauma and sexual abuse that a contemporary jury would more readily understand. While the retrial penalty phase in Owen II took place later, there still has been significant time for a potential jury's and counsel's understanding to evolve and provide for a more reliable determination of whether death is appropriate in Mr. Owen's case.

With the evolving standards of decency, society and trial counsel's understanding of mitigation have evolved. Since Mr. Owen's trials, society has gained an understanding of how the brain develops, the effects of trauma during development, the infirmities of youth and neuropsychological impulsivity. The United States Supreme Court has provided a stream of cases that required previously discounted mitigation to be considered and in some cases act as a bar to execution.

By splitting retroactivity based on *Ring*, this Court has left the cases that are more likely to have mitigation under contemporary standards and understanding that was not presented at the earlier penalty phase. Beneficiaries of *Hurst* relief, and all post-*Hurst* cases, will have counsel that are versed in the latest science and understanding of mitigation that will present such mitigation to an actual jury. That jury will determine the existence of aggravating factors and whether those aggravating factors outweigh any mitigation beyond a reasonable doubt. Without a correction from this Court, Mr. Owen, and those still with death sentences, will not have had the best case for mitigation presented to a jury with today's advanced understanding of mitigation. The *Asay* retroactivity split has left behind those pre-*Ring* individuals with less aggravated and more mitigated cases than those who are fortunate enough to have received *Hurst* relief and may receive life sentences under a constitutional jury trial.

(D) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic fact-finding. The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence - flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth - that was accepted without question in pre-*Ring* capital trials. Doubts that would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Evidence which led to confident convictions and hence to unhesitating death sentences a couple of decades ago would have substantially less convincing power to prosecutors and juries today.

Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood of evidence loss over time. But the prosecution's case for death in a penalty trial seldom depends on the kinds of evidentiary detail that are required to achieve conviction at the guilt-stage trial; transcript material from the guilt-stage trial will remain available to the prosecutors in all cases in which they opt to seek a death sentence through a penalty retrial; it is a commonplace of capital sentencing practice everywhere that prosecutors often rest their case for death

entirely or almost entirely on their guilt-phase evidence, leaving the penalty trial as a *locus* primarily for defense mitigation. And even if a prosecutor does opt to seek a penalty retrial⁵ and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned the Court in *Linkletter* and *Teague*.

Taken together, considerations (A) through (D) make it plain that the particular application of non-retroactivity resulting from this Court's *Mosley-Asay* divide involves a level of caprice that runs far beyond that tolerated by standard-fare *Linkletter* or *Teague* rulings. Its denial of relief in precisely the class of cases in which relief makes the most sense is irremediably perverse. This Court should recede from *Asay* to correct the level of capriciousness and inequality that violates the Eighth Amendment and Equal Protection.

III. THIS COURT SHOULD NOT RECEDE FROM MOSLEY AND JAMES BECAUSE, WHILE INCOMPLETE, THOSE CASES ALLOWED FOR RELIEF FROM SERIOUS CONSTITUTIONAL VIOLATIONS IN A NUMBER OF CASES AND SHOULD PROVIDE RELIEF FOR THE FEW REMAINING POST-RING CASES WHICH HAVE YET TO BECOME FINAL IN POSTCONVICTION.

⁵ But see the preceding point (C).

A. This Court has the unique vantage point of reviewing the day-to-day operations of Florida's death penalty scheme in practice, throughout the state, and over extended periods. This Court has not just the experience of each Justice serving on the bench but the institutional knowledge that comes with this Court's history. This Court was best able to consider all of the implications of *Hurst* and *Hurst v. State* and ruled correctly in *Mosley* and *James*. This Court's *Witt* standard has been more than adequate over almost 40 years to determine retroactivity, and was applied correctly in *Mosley*, even if it was not in *Asay*.

Mosley is settled law, and there is thus a strong presumption that *Hurst* should remain retroactive at least as to post-*Ring* defendants. This Court has repeatedly stated that it is "committed to the doctrine of stare decisis" -- a "fundamental tenet of Anglo-American jurisprudence for centuries" that is "grounded on the need for stability in the law." *Strand v. Escambia Cty.*, 992 So.2d 150, 159 (Fla. 2008) (quoting *Tyson v. Mattair*, 8 Fla. 107 (1958)). "The presumption in favor of *stare decisis* is strong, and where" as here "the decision in issue was a watershed judgment resolving a deeply divisive societal controversy, the presumption in favor of *stare decisis* is at its zenith." *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 638 (Fla. 2003).

In deciding whether to take the extraordinary step of upending precedent, this Court traditionally asks three questions: (1) whether the precedent has "proved unworkable," (2) whether it "can be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law," and (3) whether the "factual premises underlying the decision [have] changed so drastically as to leave the decision's central holding utterly without legal justification." *Id.* at 637. The answers to those questions here bolster the strong presumption in favor of *stare decisis*. First, there is nothing unworkable about *Mosley's* rule: while incomplete, it is simple to administer because it applies to defendants based on the date their sentence became final. Second, overruling *Mosley* and declaring *Hurst* entirely non-retroactive would do serious injustice to the scores of capital defendants who have spent countless time and energy challenging their unconstitutional death sentences, as is their absolute right under *Hurst* and *Mosley*. *Hurst* has had a tremendous practical effect on defendants sentenced to death by judges. This Court has found that nearly every capital defendant with a non-unanimous advisory jury verdict was prejudiced by his judge-imposed death sentence. And a stunningly high number of these defendants have been resentenced to life imprisonment by juries. This Court's retreat from *Mosley* would send many of these defendants to their deaths

under a system that the U.S. Supreme Court and this Court have held irreconcilable with the Sixth Amendment.

Third, nothing about the “factual premises” underlying *Mosley* has in any way changed so as to undermine its retroactivity ruling. Quite the contrary, subsequent factual developments *further support Mosley*. *Mosley* reasoned that applying *Hurst* retroactively would not unduly burden the justice system; whatever limited burden existed in 2016 has almost completely dissipated because many defendants have successfully challenged their unconstitutional sentences. And there have been no doctrinal developments that have shown *Mosley’s* retroactivity analysis to be flawed. There is no reason to depart from the settled retroactivity ruling of *Mosley*, and there is every reason to reaffirm it.

B. This Court can correct the remaining unconstitutionality left behind based on *Asay* by extending what this was correct in finding in *Mosley*.

James

Expansion of *James* is unnecessary if *Mosley* is extended to the cases in which relief was denied because a case was final before *Ring*. This Court applied the *Witt* standard and the *James* standard in *Mosley*. Both allowed for relief for Mr. Mosley, although the strength of the retroactivity of *Witt* made the application of *James* unnecessary for relief in the post-*Ring* cases.

Mr. Owen certainly would not object to this Court extending or applying *James* in the instant case because he raised a clear direct appeal *Ring* claim in *Owen II*. *Owen*, 862 So. 2d at 703. This nevertheless would only be fair and correct the unconstitutionality in some of the *Asay* cases.

While the approach that would allow retroactivity to those fortunate enough to have raised a *Ring*-like issue before *Ring* on direct appeal would cure some injustice and unconstitutionality, it would not remove the unconstitutionality of the remaining death sentences. Additionally, while this would provide a remedy for those meeting the prior pleading requirements, these individuals would be limited to disparate groups, not based on the nature of any individual case. First, an individual may meet these requirements because that person had excellent and forward-thinking counsel. Such counsel would have to have gone well beyond the standards of effective appellate counsel that this Court requires. Not everyone is so fortunate.

Second, there are page limits on briefs. Somebody with the good fortune to have an appellate attorney with some grasp of the emerging issues that would give rise to *Ring*, may not have had the space to raise issues that did not lead to anybody receiving relief in Florida until 14 years after *Ring*. The lack of space in the hands of the excellent appellate advocate would possibly have arisen from the sheer number of issues that an exceptional attorney

would see as potentially more viable. Moreover, this Court does not grant relief for every violation of right based on deference to the lower court, harmless error and prejudice. An individual may have used all one hundred pages to raise claims that were important and were on the cusp of relief.

Also, an appellate attorney may have found it necessary for this Court's proportionality review, or simply whether the death penalty was appropriate, to detail the mitigation that effective counsel put forth at trial. An individual with extensive mitigation would likely have a case that fell outside the most aggravated and least mitigated of cases. Appellate counsel should not have had to decide between presenting a cutting edge claim that may produce fruit years later and fully presenting compelling mitigation to this Court.

Courts have repeatedly stated that experienced appellate counsel must winnow the claims presented on appeal. Winnowing a claim that would only lead to relief 14 years later in favor of fully raising claims that this Court would address would not resolve the current unconstitutionality of Florida's remaining death sentences. While it would be proper to grant such relief because it removes some people from the pool of the unconstitutionally sentenced, it would also arbitrarily leave behind those whose cases gave forth the most arguable claims of

constitutional violation or those whose attorneys failed to acquaint themselves with emerging issues in capital law.

Accordingly, while any decision that allows for more people to receive relief from unconstitutional death sentences is manifestly good, such would not be sufficient to overcome the equal protection and Eighth Amendment violations that were occasioned by this Court's partial retroactivity in *Asay*.

Mosley and Witt

The *Witt* standard applied in *Mosley* is essential to this Court fulfilling its role as the primary caretaker of the rights guaranteed by the United States and Florida Constitutions. When the United States Supreme Court issued *Hurst v. Florida*, it left its retroactive application and harmless error to this Court because this Court has the primary responsibility to remedy state and federal constitutional violations. The *Witt* standard as described by this Court in *Asay* was that,

Under *Witt*, a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id.* at 931. To be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or, alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall*¹⁶ and *Linkletter*." *Id.* at 929. The *Stovall/Linkletter* test requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that

retroactive application of the new rule would have on the administration of justice. *Id.* at 926; *Johnson*, 904 So. 2d at 408.

Asay, 210 So. 3d at 16-17 (footnote admitted).

The problem has never been with the *Witt* standard but with its specific application in *Asay* that excluded the older, more constitutionally infirm death sentences like in *Owen I*. Mr. *Asay* was denied retroactivity because of the second and third *Stovall-Linkletter* factors, prior reliance and the effect on the administration of justice.

As far as prior reliance is concerned, this Court came to the opposite conclusion in *Mosley* because of the judicial decisions following *Ring* that denied a remedy for the constitutional error that the United States Supreme Court corrected in *Hurst*. This does not account for the fact that the same error existed in the pre-*Ring* cases. This Court could have corrected the denial of a unanimous jury based on the Florida or the United States Constitution at any time. Appellate counsel have been raising the denial of a unanimous trial and the advisory panel from well before *Hurst* and *Ring*. This Court was no more constrained since *Ring* than it was before *Ring*, especially when this Court's application of the Florida Constitution in *Hurst v. State* is considered. Other states following *Ring* took corrective action, either through the courts or legislatively, that Florida could have taken.

On the third *Stovall/Linkletter* prong, in *Asay*, this Court's decision failed to consider that the Court's retroactivity split affected the administration of justice by injecting a level of arbitrary and capriciousness and equal protection denial into the entire death penalty system in Florida. Confidence in the fairness and constitutionality of the pre-*Ring* death sentences was placed in doubt.

The death penalty is reserved for the most aggravated and least mitigated of cases, not the oldest that had the least opportunity to show that such a case fell outside the limited class of cases for which death is even a possible punishment. Society, the condemned individual, and ultimately history, should be able to answer the question of why did the state execute the condemned individual with something more profound than "the calendar" or "just unlucky."

Allowing the pre-*Ring* cases to receive resentencings under a constitutional trial would actually aid the administration of justice because it would limit the death penalty to the most aggravated and least mitigated. Scant resources could be used to pursue actual death sentences in cases in which 12 citizens have determined to be the worst of the worst rather than the unluckiest of the unlucky. There may be fewer death sentences following this Court receding from *Asay*, but the citizens of this State will have the assurance that only a properly empaneled jury verdict can

render, that those who are executed fell in the narrow class of cases in which death is constitutionally permissible. The death penalty should result from a constitutional trial or not at all.

IV. THE UNITED STATES CONSTITUTION FORBIDS THIS COURT FROM RECEDING FROM MOSLEY AND JAMES.

The Due Process Clause of the Fourteenth Amendment independently bars the Court from retroactively eliminating Mr. Owen's right to challenge his death sentence as a *Ring/Hurst* violation. The Due Process Clause prohibits retroactive application of "a judicial enlargement of criminal liability." *See Marks v. United States*, 430 U.S. 188, 192 (1977) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964)). And a judicial decision is retroactive, and therefore violates the *Ex Post Facto* Clause, where "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994). The "antiretroactivity principle" embodied in these provisions "flatly prohibits retroactive application of penal legislation" not just to provide individuals with "fair warning," but also to "restrict[] governmental power by restraining arbitrary and potentially vindictive" government action. *Id.* at 266.

Courts have thus long recognized that ex post facto principles bar any attempt to revive or reinstate criminal charges for which the statute of limitations previously has run. The U.S. Supreme Court has explained that such attempts violate the prohibition on "manifestly unjust and oppressive retroactive effects" - "the government has refused 'to play by its own rules'" and, in turn, has "deprived the defendant of . . . fair warning." *Stogner v. California*, 539 U.S. 607, 610 (2003) (quotation marks omitted); see also *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928) (L. Hand, J.); *United States v. Roselli*, 1994 WL 4195, *2 (N.D.N.Y. 1994); *United States v. Fraidin*, 63 F. Supp. 271, 276 (D. Md. 1945); *Moore v. State*, 43 N.J. Law. 203 (1881); *State v. Sneed*, 25 Tex. Supp. 66 (1860); Henry Campbell Black, *Handbook of American Constitutional Law*, § 273, at 713 (3d ed. 1910) ("[A]n act condoned by the expiration of the statute of limitations is no longer a punishable offense."). As Judge Learned Hand likewise explained:

Certainly, it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest.

Falter, 23 F.2d at 425-26.

Retroactively eliminating Mr. Owen's right to overturn his unconstitutionally secured death sentence - *after* the State has

granted him the right to overturn it - is directly analogous to reinstating criminal charges for which the statute of limitations previously has run. At the time of Mr. Owen's charged offense, Florida law provided him with a means of challenging his sentence as based on subsequent constitutional rulings. See *Witt*, 387 So.2d 922 (1980). Mr. Owen has a vested right to challenge the constitutionality of his death sentence, and due process prohibits the Court from retroactively eliminating that right.

CONCLUSION AND RELIEF SOUGHT

Following *Furman v. Georgia*, 408 U.S. 238, 379, 92 S. Ct. 2726 (1972), Florida enacted a system, upheld by the courts, that prevented any of the decision makers from taking responsibility. For years, Florida told the advisory panel, incorrectly called a jury, that the weighing of aggravating factors was advisory and that the responsibility lies with the trial judge. The trial judge "gave great weight" to the "recommendation" of the sentencing panel limiting the responsibility of the trial judge. When reviewing the decisions of the trial court, the Florida Supreme Court, and the federal courts under AEDPA, gave great deference to each previous court. Florida ultimately had no decision maker with the ultimate responsibility for determining a death sentence. *Hurst* made clear that the responsibility clearly lies with a jury. The right to a jury trial predates the United States Constitution and is the mark of a civilized society. Mr. Owen was sentenced to death without a jury trial on the essential elements that purported to justify his death. Mr. Owen's death sentences violate the Sixth, Eighth and Fourteenth Amendments. This Court should not fail to grant a remedy based on partial retroactivity or on an erroneous harmless error finding.

Based on Mr. Owen's federal Fourteenth Amendment right to due process and equal protection of the laws, his federal Eighth and Fourteenth Amendment immunities against arbitrary and indecent

execution of a death sentence, and his federal Article I, § 10 immunity against ex post facto punishment Mr. Owen respectfully requests this Court reverse the lower court and also recede from *Asay*.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Initial Brief on, Celia Terenzio Assistant Attorney General, on this 14th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

I HEREBY certify that a true copy of the foregoing Initial Brief of the Appellant was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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