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

REPLY BRIEF OF THE APPELLANT

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REPLY TO STATE'S ANSWER BRIEF

At issue in this case is the right to a jury trial - - the greatest protection against the tyranny of the State that we have as citizens. Fundamental dignity requires that, before life or liberty may be taken by the State, the critical fact-finding decisions must be made by members of the community manifesting the power that remains with the citizens.

The *Teague*[1] standard does not take into account this Court's historical and constitutional role in protecting the rights of individuals under the Florida and United States Constitutions. This Court is the closest to the actual functioning of the death penalty in Florida and therefore best able to guard the rights of the individual against the misuse of the power of the State. The *Witt*[2] and *James*[3] standard fully allows this Court the greatest ability to carry out this function and should not be abandoned.

Any decision overruling *Mosley*[4] and denying Mr. Owen *Hurst*[5]-based relief on a theory of non-retroactivity at this point in time, after *Mosley* has been established Florida law since 2016 and has been consistently applied to give relief to other indistinguishable members of the class of death-sentenced inmates

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[1] *Teague v. Lane*, 489 U.S. 288 (1989)
[2] *Witt v. State*, 387 So. 2d 922 (Fla. 1980)
[3] James v. State, 615 So. 2d 668 (Fla. 1993)
[4] *Mosley v. State*,209 So. 3d 1248 (Fla. 2016)
[5] *Hurst v. Florida*,136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)

that includes Mr. Owen, would violate Mr. Owen's federal constitutional rights to Equal Protection of the Laws under the Fourteenth Amendment (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)), and against the arbitrary and capricious application of Florida's death-sentencing process (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992)(per curiam); *Johnson v. Mississippi*, 486 U.S. 578, 584-585, 587 (1988); *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008),and also would violate Mr. Owen's federal Article I, § 10 immunity against *ex post facto* punishment.

I. *STARE DECISIS* SHOULD BE FOLLOWED UNLESS IT IS NECESSARY TO OVERCOME A SIGNIFICANT INJUSTICE AND REMEDY A SERIOUS CONSTITUTIONAL VIOLATION.

The State has invited this Court to engage in the most egregious judicial activism in the history of Florida. If this Court accepts the State's invitation, the ability of individuals to seek a remedy for state and federal constitutional violations will be hindered for generations. The inability to obtain redress for constitutional violations is a horrible legacy to pass on. This Court should avoid judicial activism, maintain *stare decisis* and apply Florida's consistent and workable retroactivity framework. Arduous retroactivity should not provide safe harbor for the State's constitutional violations.

The State's answer fails to mention the other people who rely

on this Court maintaining *stare decisis*. The citizens have the right to rely on the death penalty being imposed or maintained under a constitutional system in a fair and non-arbitrary manner. Each pre-*Hurst* condemned individual was denied that. This Court should never reverse *stare decisis* when the result would be to take away the availability of a remedy for constitutional violations that cause unfairness and unreliability. It should never maintain *stare decisis* when the prior law would compel such unfairness and unreliability. The citizens are relying on that.

"The presumption in favor of *stare decisis* is strong," *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 638 (Fla. 2003), and the State offers no compelling reason for this Court to take the extraordinary step of overturning its precedent. For one, the State entirely disregards one of the three factors that this Court considers in deciding whether to overrule precedent: 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 State does not contend that anything about the "factual premises" underlying *Mosley* have shifted so as to undermine its retroactivity ruling. As Mr. Owen has explained, IB 39-40, just the opposite is true. Whatever limited burden *Mosley* imposed on the justice system in 2016, that burden has almost completely dissipated because nearly all defendants sentenced to death by a judge after *Ring v.*

Arizona, 536 U.S. 584 (2002), have already initiated challenges to their unconstitutional sentences—many of them successfully.

The State instead focuses solely on reliance interests, deeming reliance "the critical factor," AB 6, despite that it is but one of three factors that this Court considers in deciding whether to overrule its precedent, *see, e.g. N. Fla. Women's Health*, 866 So. 2d at 638; *Strand v. Escambia Cty.*, 992 So. 2d 150, 159 (Fla. 2008). The State, moreover, trivializes the reliance and fairness interests at stake here by focusing only on whether defendants relied on *Mosley* and *Hurst* at the time of their offenses, convictions, and sentences, which of course occurred before *Mosley* and *Hurst*. (AB 8). The State offers no basis for its cramped understanding of reliance. In assessing reliance, this Court does not ask merely whether a decision shaped peoples' behavior; it asks the broader question of whether "the rule of law announced in the decision [can] be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law." *N. Fla. Women's Health*, 866 So. 2d at 637. By the State's logic, a decision establishing a new constitutional right would never be entitled to precedential effect because many people took action prior to the decision. That is not how precedent works.

Rather, the relevant reliance interests here are those that have accrued *as a result of Hurst* and *Mosley*—namely, defendants'

interests in challenging their unconstitutional death sentences. Scores of capital defendants have, under *Hurst* and *Mosley*, spent countless time and energy challenging their unconstitutional death sentences, as is their absolute right under those cases. The State also misses a key aspect of the "injustice" and "disruption" that would follow a retreat from *Mosley*: that retrenchment here would cause *independent constitutional harm*. Again, the State has not disputed that retroactive elimination of Mr. Owen's right to challenge his death sentence under *Hurst* (let alone the rights of other defendants to do the same) violates the Due Process Clause of the Fourteenth Amendment, and the *Ex Post Facto* Clause. (IB 45-47). That alone demands reaffirming *Mosley*.

What remains is the State's assertion that *Mosley* should be overruled because it did not *itself* correctly apply rules of *stare decisis*. But this is a mere rehashing of the State's argument that *Mosley* is wrong. *Mosley* did not overrule precedent, but instead applied well-established retroactivity analysis, too narrowly, to a recent decision of the United States Supreme Court and held that the decision was retroactive. The State's disagreement with how *Mosley* resolved the issue does not allow circumvention of the foundational principle of *stare decisis.* This Court has declined to "forsake the doctrine of *stare decisis* and recede from [its] own controlling precedent when the only change in this area has been in the membership of this Court." *N. Fla. Women's Health*, 866

So. 2d at 638. It must do the same here.

II. THE STATE FAILED TO RESPOND TO TWO IMPORTANT ARGUMENTS WHICH RENDERS THIS CASE AN INAPPROPRIATE CASE FOR RECONSIDERING RETROACTIVITY.

Both of the State's failures to fully respond make this case a bad vehicle for eliminating *Hurst*-retroactivity.

First, the *Ex Post Facto* Clause bars the State from eliminating *Hurst*-retroactivity because doing so is equivalent to reviving or reinstating a punishment that the State has already discharged. *See* IB 46-48. Mr. Owen devoted three pages to this argument in his opening brief, and the argument decisively precludes the State from eliminating *Hurst*-retroactivity as a matter of federal constitutional law. The State does not address this argument *in any fashion* in its answer brief.

Second, *Hurst* must be retroactively applied to *all* pre-*Hurst* cases in Florida because *Hurst* announced a "watershed procedural rule" under *Teague. See* IB 26-27. That is because one-in-three individuals who have been resentenced under the post-*Hurst* framework have received a sentence of life in prison rather than death. *See* IB 27. As Mr. Owen noted in his opening brief, "[a]ny procedural rule that protects at least 33 percent of the individuals who receive it from an incorrect sentence of death" plainly meets the *Teague* standard for a "watershed procedural rule." *Id.* Moreover, because *Hurst* is *already* retroactive as a matter of *federal* retroactivity law, the Court has no occasion to

decide whether to eliminate *Hurst*-retroactivity in this case or whether to change Florida's law of retroactivity. Like the *ex post facto* argument, the State does not address this argument *at all* in its answer brief.

Indeed, under ordinary waiver rules, the Government's complete failure to address these two dispositive arguments waives them. *See State v. Wells*, 539 So. 2d 464, 468 n.4 (Fla. 1989) ("[T]he state effectively has waived this argument by failing to raise it below or in this appeal."); *see also United States v. Jones,* 565 U.S. 400, 413 (2012) (Government "forfeited" argument); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.); *Simmons v. State*, 934 So.2d 1100, 1117 n.14 (Fla. 2006); *Braddy v. State*, 219 So. 3d 803, 825 (Fla. 2017); *Coolen v. State*, 696 So.2d 738, 742 n.2 (Fla. 1997); Philip J. Padovano, Florida Appellate Practice § 16:10 (2018 ed.) ("Arguments not presented in the briefs are waived.").

The State's failures make this case an impossible vehicle in which to eliminate *Hurst* retroactivity. It would be deeply unfair to allow the State to rescue itself from its failure to address at oral argument because—again—it would leave the issue inadequately addressed and force Mr. Owen to guess the arguments the State might make without providing Mr. Owen adequate opportunity to reply. Deciding these issues in this case adverse to Mr. Owen would be deeply unfair and improvident.

III. BOTH *MOSLEY* AND *ASAY* APPLIED THE CORRECT AND WELL ACCEPTED *WITT* STANDARD EVEN THOUGH IN ASAY THERE WAS NO MATERIAL DIFFERENCE AND SHOULD HAVE LED TO THE SAME RESULT AS *MOSLEY*.

The State asks this Court to overrule *Mosley* and *Asay*[6] based on a theory that those cases were not correctly decided under *Witt* based on cases that considered the retroactivity of *Ring* and *Apprendi*. None of those cases finding non-retroactivity of *Apprendi* and *Ring* considered the retroactivity under the unique holdings of *Hurst* and *Hurst v. State;* this did not occur until *Mosley* and *Asay*.

The State misapprehends Florida's death penalty system and the application of *Hurst* to it. "In capital cases in Florida, the[] 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." *Hurst v. State*, 202 So. 3d at 44. This is more than simply a question of who makes the fact-findings as in *Ring* or *Apprendi*. The earlier retroactivity decisions failed to consider that the *Hurst* elements have been the same since the death penalty was reenacted in Florida. As this Court stated *in Victorino v. State,* 241 So. 3d 48 (Fla. 2018):

> Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating

[6] *Asay v. State*, 210 So. 3d 1 (Fla. 2016)

> factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, see § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable.

Id. at 50. Florida is a weighing state. Whether the aggravating circumstances outweigh the mitigating circumstances is a critical fact-finding decision that must be made by a jury. This Court's earlier *Ring*-retroactivity cases fail to account for the extent of this fact-finding which involved more than at issue in *Ring*.

The State went on to dismiss the need for reliability in favor of finality, criticizing this Court for its concern that "death is different." (AB at 16). This is most shocking because the State can only have a finality interest in a death sentence that was reliably obtained. The resentencings discussed in Mr. Owen's brief (IB 26-27) show that what previously produced a death sentence would not necessarily do so now. As such, allowing the older death sentences, with less developed mitigation, and without the full reliability the current death penalty system demands, creates a reliability gap that this Court should address with full retroactivity. If nothing else, it shows why the retroactivity of *Mosley* cases should stand because it will at least ensure reliability in those cases.

The State argues that complying with the Constitution, as required by *Mosley*, "the effect on the administration" is too

great. *See* (AB 22-23). To make this argument the State vastly exaggerates what is involved in retrying a penalty phase and ignores what has taken place since *Mosley*. While there may be experts involved, those experts are constitutionally mandated. Some cases will involve important mitigation that may not have been originally presented and may be extensive. Other cases, as this Court has affirmed, will have a much more limited presentation. Contrary to the State's concern for the calling of lay witnesses and "the resurrection of stale evidence" (AB 23) it would be a rare case which delved into the detail of a guilt phase. Moreover, the State ignores that in a penalty phase retrial, the convicted are prohibited under Florida law from arguing lingering doubt, thus limiting the State's need for extensive evidence.

Since *Mosley*, the State has not had any trouble obtaining a death sentence in some cases, even if it has not been successful in all of the cases. *See* IB 26-27. In many more cases the State has used its discretion to not seek a death sentence. This is a proper use of discretion by the State to exclude individuals from death row and the concomitant fiscal and societal costs of the overinclusion of cases that would probably never lead to an execution. It also ensures that the death penalty is limited to the worst of the worst. Rather than burden the system, retroactivity ensures efficiency and reliability.

IV. WHILE THE *JAMES* STANDARD WOULD LEAVE BEHIND CASES WITH SIGNIFICANT *HURST* ERROR THIS COURT SHOULD NOT ABANDON IT.

The State's position that this Court should abandon the *James* standard would allow violations of the Constitution to go unremedied. There is no "valid rationale" for doing away with a rule that provides greater fairness. While *James* was inadequate, standing alone, to provide a remedy to *Hurst* error and the ensuing constitutional violations that resulted from the *Ring*-based retroactivity split, *James* still can serve a valid purpose.

James allows Florida and this Court to ensure that the death penalty is imposed consistently to all who have properly raised an issue and have fallen outside the limited time frame of a pipeline case. Importantly, *James* also allows retroactive application of state law changes that were properly raised on direct appeal.

Mr. Owen properly raised a *Ring* claim after *Ring* became final. Like in *Mosley*, because Mr. Owen had a non-unanimous death penalty recommendation, he is entitled to relief in Owen II, based on *James and Witt*. Whether *Mosley* applied became the fundamental question for relief to be granted but *James* answers that Mr. Owen is entitled to relief as well. This Court should not recede from *James*, even though it was inadequate to remedy the violations of rights that were occasioned by the *Ring* retroactivity split.

V. *TEAGUE* IS INADEQUATE TO PROTECT THE RIGHTS OF INDIVIDUALS IN FLORIDA AND REMEDY VIOLATIONS OF THE UNITED STATES AND FLORIDA CONSTITUTIONS, EVEN THOUGH *HURST* MEETS THE *TEAGUE* STANDARD.

Both *Hurst* cases meet the standard for retroactivity under *Teague* because they announced watershed procedural rules. (IB 26-

27). *Teague*, however, is insufficient to safeguard the rights of the citizens of Florida. This Court should not recede from *Witt*. In *State v. Horwitz*, 191 So. 3d 429 (Fla. 2016) this Court stated,

> Unless the Florida Constitution specifies otherwise, this Court, as the ultimate arbiter of the meaning and extent of the safeguards and fundamental rights provided by the Florida Constitution, may interpret those rights as providing greater protections than those in the United States Constitution. Put simply, the United States Constitution generally sets the "floor"—not the "ceiling"—of personal rights and freedoms that must be afforded to a defendant by Florida law. As we explained in *Kelly,* "we have the duty to *independently* examine and determine questions of state law so long as we do not run afoul of federal constitutional protections or the provisions of the Florida Constitution that require us to apply federal law in state-law contexts."

Id. at 438. (Internal citations omitted). In addition to being the sole authority for the protection of the rights under the Florida Constitution, this Court holds the first and foremost authority to review violations of the United States Constitution. Federal habeas corpus is limited in its scope and requires full exhaustion of a claim so that the state courts have the first and almost exclusive review. The United States Supreme Court has found that:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. [citations omitted] Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U.S., at 251, 6 S.Ct., at 740. Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which

> "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr v. Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950). See *Duckworth v. Serrano*, 454 U.S. 1, 3, 102 S.Ct. 18, 19, 70 L.Ed.2d 1 (1981) (*per curiam*) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

Rose v. Lundy, 455 U.S. 509, 518(1982). And also that,

> A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues.

Id. at 518–19. This Court should maintain the well-established *Witt* and *James* standards because they are needed to protect the rights guaranteed in both the state and federal Constitutions. This Court's role of safeguarding the rights guaranteed in those documents is too critical to follow a lesser standard.

VI. THE LOWER COURT'S DECISION FINDING THE VIOLATION OF MR. OWEN'S CONSTITUTIONAL RIGHTS WAS HARMLESS DESPITE A 10-2 RECOMMENDATION WAS INCORRECT AND A FURTHER VIOLATION OF MR. OWEN'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State is incorrect - - Mr. Owen has a right to a particular result which is both fair and constitutional. He is entitled to the same result as achieved in materially indistinguishable cases. In both of Mr. Owen's cases the error was not harmless beyond a

reasonable doubt. In Owen II, Mr. Owen has the absolute right to be treated the same as the individuals in the large number of non-unanimous cases whose cases became final after *Ring.*

It is pure speculation that the error in Mr. Owen's case was harmless, especially when analyzed under Florida's current constitutional system. In both of Mr. Owen's cases, the State was unable to convince an advisory panel to unanimously recommend a death sentence and only were able to obtain 10-2 recommendations. The State had every conceivable advantage yet still could not obtain a unanimous death recommendation in either case.

Any decision denying Mr. Owen *Hurst*-based relief based on a purported finding of harmless error at this point in time would likewise violate Mr. Owen's federal constitutional rights to Equal Protection of the Laws under the Fourteenth Amendment and against the arbitrary and capricious application of Florida's death-sentencing process. Mr. Owen's case, at least as far as Owen II, is a post-*Ring* non-unanimous case. Mr. Owen's case is not just similarly situated to the number of individuals that received relief, it is exactly the same.

The State fails to account for the fact that while proceeding under a diminished role, two jurors voted for life in each case. The State fails to point out any reason that these life voters were not reasonable. These decision makers are entitled to respect that the State's brief fails to pay. Under Florida's current death

penalty system, the jury's death verdict must be unanimous. In Mr. Owen's cases neither panel recommendation was unanimous, thus showing beyond all argument that the error was not harmless.

A retrial today comes with the added reliability of a unanimous yet deliberative and collaborative verdict. It also comes with far better understanding of mitigation by the jurors and by defense attorneys. The Bar and society simply have gained greater understanding of mitigation. The failure to obtain a death sentence under Florida's current constitutional scheme in other cases shows that the State cannot show that in nonunanimous cases, such as Mr. Owen's, the error is harmless. Certainly these jurors were not unreasonable as the State would have this Court believe the life voters in Mr. Owen's case were.

The State's brief overlooks that these former death cases now fall outside the class of the most aggravated and least mitigated for which a death sentence may be imposed. These cases received life sentences because the attorneys have greater understanding of mitigation that has resulted from scientific advances in the understanding of the brain and the effects of trauma and mental illness. If a case would not produce a death sentence today under contemporary standards and legal proceedings, it is not a constitutional death sentence. Mr. Owen has two such cases.

CONCLUSION

This Court should reverse.

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 24th day of June 2019.

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I HEREBY certify that a true copy of the foregoing Reply 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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