CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DUANE EUGENE OWEN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Hurst v. Florida* this Court struck down Florida's longstanding capital-sentencing procedures because they authorized a judge, rather than a jury, to make the factual findings that were necessary for a death sentence. On remand, the Florida Supreme Court held that a death verdict could not be rendered without unanimous jury findings of at least one aggravating circumstance and that the sum of aggravation is sufficient to outweigh any mitigating circumstances and to warrant death.

The Florida Supreme Court then held that it would apply both the federal and state jury-trial rights retroactively to inmates whose death sentences had not become final as of June 24, 2002 (the date of *Ring v. Arizona*, precursor of *Hurst*) but that it would deny relief to inmates whose death sentences were final on that date.

Mr. Owen presents the following question:

Whether the Fourteenth Amendment's guarantee of Equal Protection and the Eighth Amendment's prohibition of capricious capital sentencing impose limits upon a state court's power to declare unconventional rules of retroactivity, and whether those limits were transgressed here.

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Duane Eugene Owen respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. The opinion of the Circuit Court in and for Palm Beach County denying that motion is unreported. It is reproduced in Appendix A. The Florida Supreme Court affirmed on June 26, 2018 in *Owen v. State*, 247 So. 3d 394 (Fla. 2018), an opinion reproduced in Appendix B.

JURISDICTION

The Florida Supreme Court's final judgment was entered on June 26, 2018. Mr. Owen sought an extension of time for the filing of this petition. (Application 18A186). The Honorable Justice Clarence Thomas extended the filing date until November 23, 2018. This Court has jurisdiction to review the final judgment and case under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

> process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, Section 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Case and Procedural History

On July 11, 1984, the State charged Mr. Owen by indictment with first degree murder, sexual battery and burglary of a dwelling. The case was prosecuted by the Palm Beach County State Attorney’s Office and tried in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

Mr. Owen pled not guilty and went to trial in February of 1986. A jury found Mr. Owen guilty of all counts. After a penalty phase, the jury recommended death by a less than unanimous vote of ten to two. (Vol. XVIV R. 4357). Mr. Owen appealed his judgment

and conviction. The Florida Supreme Court affirmed. *Owen v. State*, 596 So. 2d 985 (Fla. 1992). This Court denied certiorari. *Owen v. Florida*, 506 U.S. 921 (1992).

Mr. Owen, through counsel, filed a third amendment to his Rule 3.850 Motion. The postconviction court held a hearing on December 8, 1997. *Owen v. State*, 773 So. 2d 510, 513 (Fla. 2000). (Prior postconviction counsel also filed a fourth amended postconviction motion on that date). The postconviction court denied relief. Mr. Owen appealed. The Florida Supreme Court affirmed the denial of postconviction relief. *Id*. at 515. Mr. Owen filed a Petition for Writ of Certiorari in this 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 and Mr. Owen was appointed counsel for his pro se appeal. The Florida Supreme 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).

After Mr. Owen's case was final in the state courts he sought federal relief. Mr. Owen filed a Petition under 28 U.S.C. § 2254

for Writ of Habeas Corpus by a Person in State Custody. The district court denied relief which was affirmed on appeal to the United States Circuit Court of Appeals. *Owen v. Sec'y for Dep't of Corr.,* 568 F.3d 894 (11th Cir. 2009). This Court denied certiorari. *Owen v. McNeil*, 558 U.S. 1151 (2010).

Mr. Owen filed a successive motion in this case and his other case within one year from the date of *Hurst v. Florida*, 136 S. Ct. 616 (2016). The postconviction court denied relief. Mr. Owen appealed. The Florida Supreme Court denied briefing and affirmed the lower court's denial. *Owen v. State*, 247 So. 3d 394 (Fla. 2018). The 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).

2. The Florida Supreme Court's Decisions Following *Hurst V. Florida*.

The Florida Supreme Court has only allowed for limited retroactive application of this Court's decision in *Hurst v. Florida*, and its own decision in *Hurst v. State,* despite finding that under Florida's death penalty scheme unanimous jury verdicts

are required to meet the demands of the Florida Constitution and the Eighth Amendment. The Florida Supreme Court drew a line based on the date each individual case became final in relation to the date this Court issued *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Ring*, this 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), this 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). This 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 the Florida Supreme Court applied this Court's decision in *Hurst* to Florida's death penalty system and held,

> that [this] 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 at 44. The court 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 and that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding:

> [T]he the 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.

Hurst v. State, 202 So. 3d 40, 59–60 (Fla. 2016). The court cited to Eighth Amendment concerns 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. (Emphasis in original). "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 the Florida Supreme 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*, a 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 Florida 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 Stovall14 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.

Lastly, 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.

The Florida Supreme 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 the court had previously relied upon this Court's precedent and the breadth of the Court's prior reliance).

Lastly, the majority considered the "Effect on the Administration of Justice." The majority recognized that the Florida Supreme 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 apply "*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.

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT'S DENIAL OF RETROACTIVE APPLICATION OF *HURST V. FLORIDA* AND RETROACTIVE APPLICATION OF THE CASES THAT FOLLOWED WAS UNCONSTITUTIONAL AND LEFT BEHIND CASES IN WHICH DEATH IS LESS JUSTIFIED AND LESS RELIABLE.

The Florida Supreme Court's denial of retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), on the ground that his 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* 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).

This case arises at the intersection of two principles that have become central fixtures of the Court's 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." I*d*. 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).

The second principle, originating in *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in *Teague v. Lane*, 489 U.S. 288 (1989), recognizes the pragmatic necessity for the Court 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 Court has 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 the Florida Supreme 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, one needs only consider the ways in which Florida's pre-*Ring* condemned inmates do and do not differ from their post-*Ring* peers:

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 this Court stretching back a third of a century.[1]

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

[1] 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).

(A) Inmates 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.

(B) Inmates 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. "This 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).

(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.[2] Thus, we can be sure

[2] See, *e.g.*, BRANDON L. GARRETT, END OF ITS ROPE 79-80 and figure 4.1 (Harvard University Press 2017); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2016: YEAR END REPORT 2 – 5 (2016); Death Penalty Information Center, *Facts About the Death Penalty* (updated July 28, 2017), p. 3, *available at https://deathpenaltyinfo.org/documents/FactSheet.pdf.*

A significant factor in the decreasing willingness of juries to impose death sentences has been the development of a professional corps of capital mitigation specialists – experts focused and trained specifically to assist in the penalty phase of capital trials. This subspecialty has burgeoned as a unique field of expertise since the turn of the century. See, *e.g.*, Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23 (2005); Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, 3:3 INDIGENT DEFENSE 1 (National Legal Aid and Defender Association, July/August 1999 *available at* https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/why-mit-specs.authcheckdam.pdf; Jeffrey Toobin, *Annals of the Law: The Mitigator*, THE NEW YORKER, May 9, 2011, pp. 32-39. It is fair to say that capital sentencing trials conducted since 2000, when this Court put the legal community on notice regarding the vital importance of developing mitigating evidence (see *Williams v. Taylor*, 529 U.S. 362 (2000)), have been far more likely to present a full picture of relevant sentencing information than pre-*Williams* trials. The explicit requirement that a mitigation specialist be included in capital defense teams was added to the ABA Guidelines in 2003. See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision), Guidelines 4.(A)(1) and 10.4(C)(2)(a), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003); and see *id.* at 959-960. Since that time, the collection and presentation of mitigating evidence in capital cases has been increasingly professionalized. See, *e.g.*, *Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008).

Another significant factor appears to be that public support for the death penalty is waning. *Compare* Alan Judd, "Poll: Most Favor New Execution Method" *Gainesville Sun*, February 18, 1998,

that a significant number of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by 2018 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,

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p. 1 ("Asked whether convicted murderers should be put to death or sentenced to life in prison, 68 percent chose execution. Twenty-four percent preferred life prison terms, while 8 percent offered no opinion.") *with* Craig Haney, "Column: Floridians prefer life without parole over capital punishment for murderers," *Tampa Bay Times*, Tuesday, August 16, 2016, 3:46 p.m., *available at http://www.tampabay.com/opinion/columns/column-floridians-prefer-life-without-parole-over-capital-punishment-for/2289719* (In "a recent poll of a representative group of nearly 500 jury-eligible Floridians. . . . when respondents are asked to choose between the two legally available options — the death penalty and life in prison without parole — Floridians clearly favor, by a strong majority (57.7 percent to 43.3 percent), life imprisonment without parole over death. The overall preference was true across racial groups, genders, educational levels and religious affiliation.") Although direct comparison of these 1998 and 2016 poll results is not possible because the 1998 report does not specify either the precise nature of the population sampled or the exact form of the question asked, the general trend suggested by the two polls is consistent with the evolution of popular opinion regarding the death penalty reflected in national polling and other indicia. See Death Penalty – Gallup Historical Trends – Gallup.com, *available at* http://www.gallup.com/poll/1606/death-penalty.aspx (between 1985 and 2001, the median percentage of the population favoring death was 54.5 %; the median percentage of the population favoring LWOP was 36 %; between 2006 and 2014, the median percentage favoring death was 49%; the median percentage favoring LWOP was 46 %); *Glossip v. Gross*, 135 S. Ct. 2726, 2772-2775 (2015) (Justice Breyer, joined by Justice Ginsburg, dissenting), citing, *e.g.*, Reid Wilson, "Support for Death Penalty Still High, But Down," *Washington Post*, GovBeat, June 5, 2014, online at www. washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down.

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.

(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.[3] Doubts that

[3] See EXECUTIVE OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) (REPORT OF THE PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY [September 2016], *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf), supplemented by a January 16, 2017 Addendum, *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf); COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf; ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (2015); Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 HASTINGS L. J. 1001 (2008); Paul C. Giannelli, *Wrongful Convictions and Forensic Science The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013); Simon A. Cole *Response: Forensic Science Reform: Out of the Laboratory and into the Crime Scene*, 91 TEX. L. REV. SEE ALSO 123 (2013); Michael Shermer, *Can We Trust Crime Forensics?*, SCIENTIFIC AMERICAN,

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.

September 1, 2015, *available at* http://www.scientificamerican.com/article/can-we-trust-crime-forensics/; *2016 Flawed Forensics and Innocence Symposium*, 119 W. VA. L. REV. 519 (2016); Alex Kozinski, *Rejecting Voodoo Science in the Courtroom*, WALL STREET JOURNAL, September 19, 2016, *available at* https://www.wsj.com/articles/rejecting-voodoo-science-in-the-courtroom-1474328199. And see, illustratively, *William Dillon, available at https://www.innocenceproject.org/cases/william-dillon/.*

And even if a prosecutor does opt to seek a penalty retrial[4] 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 the Florida Supreme 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 grant certiorari and consider whether it rises to a degree of capriciousness and inequality that violates the Eighth Amendment and Equal Protection respectively.

The State may never impose or carry out cruel and unusual punishment. *Hurst* and the Florida Supreme Court's decision in *Hurst v. State* have exposed the inherent and overt unconstitutionality of Florida's previous death penalty system. Mr. Owen's death sentence stands now as a product of chance, not law. It is

[4] But see the preceding point (C).

arbitrary, capricious, and contrary to evolving standards of decency. The Florida Supreme Court's denial of retroactive application of *Hurst* and *Hurst v. State* that result from a retroactivity split based on the date that *Ring* was issued violates the Eighth Amendment.

If the retroactivity split based on *Ring* stands, Florida no longer has narrowed the death penalty to the most aggravated and least mitigated cases. The *Ring* split has left individuals with a death sentence because a court never found sufficient constitutional error to grant a post-*Ring* resentencing or because their case became final before *Ring*. There is nothing about the crime or the individual that maintains the pre-*Ring* defendants' condemned status. The *Ring*-split retroactivity is arbitrary and capricious because there is no meaningful distinction based on the culpability or severity of offense, rather, it is based on the mere date *Ring* was issued. Those fortunate enough to obtain a new penalty phase before a jury will have fuller and greater consideration of their mitigation.

Mr. Owen's case shows how leaving behind the pre-*Ring* cases is also contrary to evolving standards of decency because those fortunate to obtain a retrial will have a jury that will consider all available mitigation under a constitutional standard that favors the defendant. With the evolving standards of decency, society and trial counsel's understanding of mitigation have

evolved. Since Mr. Owen's first trial, society has gained an understanding of how the brain develops, the effects of trauma during development, the infirmities of youth and neuropsychological impulsivity. This 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*, the Florida Supreme 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 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.

Denying retroactive application of *Hurst* and *Hurst v. State* based on the date of *Ring* has rendered Mr. Owen's death sentence arbitrary and capricious and beyond evolving standards of decency in violation of the Eighth and Fourteenth Amendments to the United States Constitution. There is no meaningful difference between Mr. Owen's case and those cases that fall on the winning side of the

Ring continuum.

Mr. Owen and his pre-*Ring* cohorts remaining death sentences suffer from an additional infirmity and unreliability that *Hurst* has brought to light - - *Caldwell* error. This Court has held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328–329 (1985). The advisory panel's role in Mr. Owen's case was unconstitutionally diminished in violation of the Eighth Amendment to the United States Constitution further rendering his death sentence arbitrary and capricious and unreliable.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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