**CAPITAL CASE**

**NO. 18-8683**

**IN THE SUPREME COURT OF THE UNITED STATES**

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**JAMES AREN DUCKETT,**

**Petitioner,**

**v.**

**STATE OF FLORIDA,**

**Respondent.**

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

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# PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION


MARY ELIZABETH WELLS*
Law Office of M.E. Wells
623 Grant Street, S.E.
Atlanta, Georgia 30312-3240
T: (404) 408-2180
mewells27@comcast.net
*Counsel of Record

BRITTNEY LACY
Capital Collateral Regional Counsel
1 E. Broward Blvd, Suite 444
Ft. Lauderdale, Florida 33301-1806
T: (954) 713-1284
lacyb@ccsr.state.fl.us

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## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's Brief in Opposition is a remarkable document. Even the broad license allowed an advocate to re-characterize its opponent's arguments or to hint that its opponent has made concessions where there were none is exceeded by reckless statements like "Petitioner admits that Florida's decision below rests on independent and adequate state grounds." (Page 12.) Even the wildest imaginable stretch of advocate's analogy is exceeded by positing that the issue of construction of the federal Fair Sentencing Act involved in *Dorsey v. United States,* 567 U.S. 260 (2012), has anything to do with "partial retroactivity." (Page 11.) And although Respondent certainly has got it right that "Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision below" (page 7), Respondent overlooks the reason for this: No state or federal court has ever invited constitutional challenge by drawing a retroactivity cutoff line that even remotely resembles the unreasoned and irrational cutoff line erected by *Asay* and *Mosely*.

The bald submission of the BIO, undergirding its entire argument, is that a state court's retroactivity rulings are – like no other feature of state law – entirely immune from regulation by the federal Constitution.[1] The implications of this proposition are boggling: If the Florida Supreme Court had arbitrarily chosen

[1] "This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*." (Page 8.)

Valentine's Day, 2000 as the cutoff date for retroactive *Hurst* relief, this Court would be powerless to review such a choice under ordinary Equal Protection and Eighth Amendment standards of fairness and rationality.

Please note that the present case can be distinguished from that extravagant hypothetical only because the cutoff date which the Florida Supreme Court did choose – June 24, 2002 – is the date when *Ring v. Arizona* was decided. But despite its intuitive appeal, this is a distinction without a difference. Historically, *Ring*'s decision date has no genuine bearing on Florida law or its federal constitutionality. On October 24, 2002, in *Bottoson v. Moore*, 833 So.2d 693, the Florida Supreme Court itself held that *Ring* did not apply to Florida's capital sentencing procedure.[2] Before and after *Bottoson*, Florida practice and the Florida courts' determination that it was constitutionally permissible remained exactly the same. Then, fourteen years later, the *Asay* and *Mosley* opinions abruptly declared that June 24, 2002 was a date of unique, critical importance because on that day Florida prosecutors and judges suddenly lost the reliance interest they had previously possessed in the State's unchanged pre-*Ring*/post-*Ring* sentencing practice.[3] This revisionist declaration defies both reality and rationality. Respondent's BIO makes no effort to defend it.

And, although the BIO was filed on May 3, it fails to advise this Court that the Florida Supreme Court itself is now having second thoughts about the *Asay*-

[2] *See also King v. Moore*, 831 So. 2d 143 (Fla. 2002).

[3] *See* Mr. Duckett's Petition for Certiorari, page 26, footnote 49 (continued), paragraph (3).

*Mosely* dividing line. On April 24, 2019, that court entered an order in *Owen v. State*, No. SC 18-810, providing that:

> "Following the parties' responses to this Court's June 25, 2018, order to show cause, the Court determines that full briefing would be helpful. Appellant's brief is to be filed on or before May 14, 2019; appellee's brief shall be filed twenty days after filing of appellant's brief; and appellant's reply brief shall be filed twenty days after filing of appellee's brief. The parties' briefs shall address, but are 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)."

Such a future recession might – if it involves the overruling of *Asay* and is itself announced retroactively – moot Mr. Duckett's present petition. Any other outcome in *Owen* would leave the Questions Presented by this petition unaffected. An overruling of *Mosley* or a prospective reconstruction of Florida retroactivity doctrine will not correct the past consequences of the *Asay* and *Mosley* decisions, under which 144 inmates in the *Mosley* cohort have already had their death sentences vacated[4] while 106 inmates in the *Asay* cohort have been denied that relief.[5] Even if Florida's onrushing death-penalty jurisprudence veers once again from one side of the legal highway to the other, that would hardly justify leaving Mr. Duckett and his *Asay*-cohort peers behind as roadkill. However much Respondent may wish to get Mr. Duckett's petition for certiorari denied and done

[4] *See* Appendix A. While categorizing the cases in preparation for the present Reply, counsel discovered that Mr. Duckett's petition for certiorari contained a mathematical error. The figure given for the number of inmates who were entitled to relief under *Mosley* as of the date of the *Mosley* decision should be 151, not "152." This error appears (1) in line 9 of the second paragraph of footnote 49 as continued on page 26 (the paragraph designated "(3)"); (2) in the second line of text on page 27; and (3) in the last line of the second paragraph (the first complete paragraph) of text on page 27. Counsel apologize to the Court.

[5] *See* Appendix B.

with before the Florida Supreme Court undertakes another attempt to rationalize its rules of retroactivity – an attempt which will end up either admitting the indefensibility of the *Asay-Mosely* divide or proposing some newly discovered justification for it – this Court might well want to wait and learn the outcome of *Owen* before considering whether the time has come for certiorari review.

Another development postdating the filing of Mr. Duckett's cert. petition bears consideration as well. On April 23, 2019, Florida's Governor signed a death warrant for Bobby Joe Long. Mr. Long's execution has been scheduled for May 23. The Florida courts have refused to stay that execution pending *Owen,*[6] and it is not unlikely that a stay will be sought from this Court. That will precipitate a repeat of the harrying proceedings in *Lambrix* and *Hannon* recounted in Mr. Duckett's cert. petition at pages 17 - 21. This is in no one's best interest, least of all this Court's interest in deliberate consideration of the application of basic federal constitutional guarantees to aberrant state-law regimes.

A grant of certiorari in Mr. Duckett's case and a stay in Mr. Long's will provide the opportunity for such consideration before Florida proceeds to execute the remaining 123 inmates whose lives depend upon the issue common to both cases

[6] *Long v State*, Fla. Supreme Court, No. SC19-726, Order, May 10, 2019.

and to others yet to be filed.[7]

Respectfully submitted,

Mary Elizabeth Wells
Law Office of M.E. Wells
623 Grant Street SE
Atlanta, Georgia 30312-3146
T: (404) 408-2180
mewells27@comcast.net
Florida Bar No. 0866067

BRITTNEY LACY
Capital Collateral Regional Counsel
1 E. Broward Blvd, Suite 444
Ft. Lauderdale, FL 33301-1806
T: (954) 713-1284
lacyb@ccsr.state.fl.us
Florida Bar No. 116001

[7] The cert. petitions in *Reese* and *Thompson* mentioned on page 36 of Mr. Duckett's petition were filed on May 10, 2019.