DOCKET NO. 18-9366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MICHAEL T. RIVERA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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APPENDIX A

In the Supreme Court of Florida

GROVER B. REED,

Appellant,

v.

CASE NO.: SC19-714
CAPITAL CASE

STATE OF FLORIDA,

Appellee.

_____/

STATE'S REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

On May 7, 2019, this Court issued an order to Appellant to show cause "why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017)." Under this Court's current caselaw of *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017), and *Hitchcock*, Reed is not entitled to any *Hurst* relief because his sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. Reed's death sentence was final in 1990, which was over a decade before *Ring v. Arizona* was decided in 2002. This Court, however, should reconsider its precedent regarding the proper test for retroactivity and adopt the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). But regardless of which test for retroactivity is used,

Reed is not entitled to any *Hurst* relief. The trial court properly summarily denied the successive postconviction motion and this Court should affirm.

Merits

Under this Court's current precedent of *Asay* and *Hitchcock*, *Hurst* is not retroactively applicable to Reed because his death sentence became final in 1990, which was over a decade before *Ring v. Arizona* was decided. *Reed v. Florida*, 498 U.S. 882 (1990); *see also Reed v. State*, 259 So.3d 718, 719 (Fla. 2018) ("His sentence of death became final in 1990"). Reed is not entitled to any *Hurst* relief under this Court's current precedent. But this Court should recede from its current precedent of *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), and hold that neither *Hurst v. Florida* nor *Hurst v. State* apply retroactively to any case that was final before 2016 when *Hurst v. Florida* and *Hurst v. State* were decided.

Adopting *Teague*

For all the reasons given by Justice Cantero in his concurring opinion in *Windom v. State*, 886 So.2d 915 (Fla. 2004), this Court should adopt the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989), in place of the "now-outmoded" state test of *Witt v. State*, 387 So.2d 922 (Fla. 1980). *Windom*, 886 So.2d at 942-50 (Fla. 2004) (Cantero, J., concurring) (advocating that Florida courts adopt *Teague*). This Court should do as many other state supreme courts have done and adopt *Teague* as the test for retroactivity in

Florida. *Windom*, 886 So.2d at 943, n.28 & n.29 (Cantero, J., concurring) (listing the numerous state supreme courts that have adopted *Teague* as the state test for retroactivity, in whole, or in part, and noting only six state supreme courts have not adopted *Teague*). Additional state supreme courts have adopted *Teague* since Justice Cantero wrote his concurring opinion in 2004.[1] This Court should adopt *Teague* as the state test for retroactivity in place of *Witt*, as the vast majority of other states have done.

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[1] *See, e.g., Thiersaint v. Comm'r of Corr.*, 111 A.3d 829, 840, 810 & n.11 (Conn. 2015) (adopting *Teague* formally as the state test for retroactivity in the wake of the United States Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), clarifying that states may have more liberal tests for retroactivity and noting that thirty-three other states and the District of Columbia likewise apply *Teague* in deciding state law claims); *Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009) (adopting *Teague* as the state test of retroactivity on remand from the United States Supreme Court's decision in *Danforth* based on finality concerns). Justice Cantero listed the other state supreme courts that had not adopted *Teague* at the time of his opinion as being Alabama, Alaska, Michigan, Missouri, South Dakota, Utah, Wyoming, and also stated that Tennessee did not follow *Teague* as to state law decisions. *Windom*, 886 So.2d at 943, n.29. Since then, three of those states have adopted *Teague*. The Alabama Supreme Court has since adopted *Teague*. *Ex parte Williams*, 183 So.3d 220, 224 & n.2 (Ala. 2015) (stating that Alabama has adopted *Teague* citing *Ex parte Harris*, 947 So.2d 1139, 1143-47 (Ala. 2005), and rejecting an argument based on *Danforth* that the state should adopt a more liberal state retroactivity test), *cert. granted, judgment vacated on other grounds*, *Williams v. Alabama*, 136 S.Ct. 1365 (2016). Wyoming now follows *Teague* for federal law cases. *State v. Mares*, 335 P.3d 487, 501-04 (Wyo. 2014). Tennessee now follows *Teague* including in state law cases. *Bush v. State*, 428 S.W.3d 1, 19-20 (Tenn. 2014) (noting that the Tennessee legislature by enacting the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-122, had abrogated the prior state test for retroactivity and had adopted *Teague* for all types of cases). The trend of state courts adopting *Teague* has continued even in the wake of *Danforth*.

In addition to the reasons given by Justice Cantero for adopting *Teague*, there is a historical reason for doing so as well. *Teague* is the logical companion case of *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Griffith* created the concept of automatic pipeline retroactivity under which a defendant automatically receives benefit of any change in the law, even if the change in the law occurred months after his trial was completed, provided his case is pending on appeal. Before *Griffith*, courts performed the same retroactivity analysis on cases that were pending on direct appeal as those cases that were decades old and in postconviction without any consideration of finality.[2] *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966) (holding the same three *Stovall*/*Linkletter* factors applied to both convictions pending on direct appeal and to final convictions). But once the United States Supreme Court adopted broad and automatic pipeline retroactivity for all cases pending on appeal in *Griffith*, it made logical sense to narrow the cases that received benefit of retroactivity in postconviction by adopting *Teague* a couple of years later. What many commentators misunderstand about the

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[2] *Griffith*, 479 U.S. at 320-21 (explaining the history of retroactivity and the prior tests for retroactivity citing *Stovall v. Denno*, 388 U.S. 293 (1967) (using three factors to determine retroactivity); *Linkletter v. Walker*, 381 U.S. 618 (1965) (using three factors to determine retroactivity). The three retroactivity factors used in both *Stovall* and *Linkletter* are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Griffith*, 479 U.S. at 321. Those three factors are the same three factors used by the state test for retroactivity of *Witt*. *Mosley*, 209 So.3d at 1277 (explaining that Florida's test for retroactivity, *Witt*, uses the three factors from the older federal tests of *Stovall* and *Linkletter* citing *Witt*, 387 So.2d at 926).

creation of the narrower test of *Teague* in the postconviction context was that it was a direct result of adopting a much broader and automatic test of retroactivity for all cases on direct appeal in *Griffith*. *Johnson* was dramatically broadened into *Griffith* while *Stovall* and *Linkletter* were narrowed into *Teague*. Furthermore, the combination of *Griffith* and *Teague* give finality its proper due while *Stovall* and *Linkletter* did not.[3] Because this Court follows *Griffith,* as it is constitutionally required to do by *Griffith* itself, it should also adopt the companion case of *Teague*. *Griffith*, 479 U.S. at 328 (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); *Smith v. State*, 598 So.2d 1063, 1065 (Fla. 1992) (discussing the history of the pipeline concept and *Griffith*). Because *Griffith* and *Teague* are a logical complementary pair of cases, this Court should follow *Teague*.

Furthermore, the fundamental flaw of *Witt* is that like *Stovall* and *Linkletter*, it does not give finality its paramount place in retroactivity analysis.

Opposing counsel is certainly correct to point out the critical role the distinction between substantive versus procedural plays in any proper

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[3] *Griffith*, 479 U.S. at 321-22 (explaining that the Court in *United States v. Johnson*, 457 U.S. 537 (1982), drew a distinction for purposes of retroactivity for the first time based on finality following the logic of Justice Harlan's dissent in *Desist v. United States*, 394 U.S. 244, 256 (1969), and concurring opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971)).

retroactivity analysis. Response at 14-17. Because crimes in Florida are defined by statute, it is actually statutory interpretation decisions, not constitutional decisions, that are most critical to retroactivity analysis. That is because statutes are the basis for substantive criminal law, while, by contrast, most constitutional decisions are procedural. But *Witt* does not account for the distinction between substantive and procedural or the importance of statutory interpretation decisions. Indeed, *Witt* limits retroactivity analysis to decisions that are "constitutional in nature," thereby excluding statutory interpretation decisions from its ambit. *Witt*, 387 So.2d at 931; *Hughes v. State*, 901 So. 2d 837, 840 (Fla. 2005) (explaining under *Witt*, a change of law would not be deemed retroactive unless the change "is constitutional in nature"). It is statutory construction cases that raise the specter of legal innocence as well as *ex post facto* and notice concerns. *Bousley v. United States*, 523 U.S. 614, 620 (1998) (applying a decision involving statutory construction of the federal use-of-a-firearm statute retroactively and explaining that decisions involving substantive federal criminal statutes necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (due process concerns raised by statutory construction of a trespass statute); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (noting the due process notice concerns of statutory retroactivity). It was the use of the *Witt* test for retroactivity that raised such concerns in the United States Supreme Court in *Bunkley v. Florida*, 538 U.S. 835 (2003), which was a statutory interpretation case.

But all this is simply another reason to recede from *Witt,* which does not make such distinctions, and to adopt *Teague*, which does.

For all these reasons, this Court should adopt *Teague*.

Teague **and the** ***Hurst*** **decisions**

Under *Teague*, *Hurst v. Florida* is not retroactive. The United States Supreme Court has held that *Ring v. Arizona*, 536 U.S. 584 (2002), was not retroactive using *Teague* in *Schriro v. Summerlin*, 542 U.S. 348 (2004). Both the Eleventh Circuit and the Ninth Circuit have held that *Hurst v. Florida* is not retroactive under *Teague*. *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165, n.2 (11th Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *cert. denied*, *Lambrix v. Jones*, 138 S.Ct. 217 (2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim because *Hurst v. Florida* did not apply retroactively). No federal appellate court has held to the contrary.

While there are differences between the holding of the United States Supreme Court in *Hurst v. Florida* and the holding of this Court in *Hurst v. State*, *Hurst v. State* is not retroactive under *Teague* either. The United States Supreme Court in *Hurst v. Florida*, in effect, held that the finding of an aggravating factor was an element that must be found by the jury. In contrast, this Court in *Hurst v. State* mandated additional jury findings, such as sufficiency of the aggravators,

mitigation, and weighing, as well as requiring unanimity of those findings and of the jury's final recommendation. But those additional aspects of *Hurst v. State* are not retroactive under *Teague* either.

The case of *Ivan V. v. City of New York*, 407 U.S. 203 (1972), which requires retroactive application of the beyond a reasonable doubt standard of proof, does not apply because Florida has required the aggravators to be proven at the beyond a reasonable doubt standard for decades.[4] If a rule of law is not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. So, no retroactivity analysis is required at all. And neither *Hurst v. Florida* nor *Hurst v. State* are standard of proof cases anyway. The issue in both *Hurst* cases was who decides — the judge versus the jury — not the standard of proof. And the new unanimity requirement established by this Court in *Hurst v. State* is not

[4] *Williams v. State*, 37 So.3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286 (Fla. 2004)); *Diaz v. State*, 132 So.3d 93, 117 (Fla. 2013) (explaining that mitigating factors be established by the greater weight of the evidence citing *Mansfield v. State*, 758 So.2d 636, 646 (Fla. 2000)); *cf. Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable doubt").

equivalent to a standard of proof. They are two very different concepts. *Ivan V.* is simply not at issue.

While this Court in *Hurst v. State* mandated the jury make additional findings, such as sufficiency of the aggravators, mitigators, and weighing, that does not turn those additional jury findings into elements. Under both Florida statutes and Florida caselaw, the additional findings are not elements. According to Florida's new death penalty statute, aggravating factors are the only elements in Florida and it is a jury's finding of "at least one aggravating factor" that makes the defendant eligible for death. § 921.141(2)(b)(1), Fla. Stat. (2018) (stating that if the jury does "not unanimously find at least one aggravating factor, the defendant is ***ineligible*** for a sentence of death") (emphasis added); § 921.141(2)(b)(2), Fla. Stat. (2018) (stating if the jury "unanimously finds at least one aggravating factor, the defendant is ***eligible*** for a sentence of death . . .") (emphasis added). Under the text of Florida's death penalty statute, the only "element" of capital murder is the finding of one aggravating factor. The additional jury findings are "other determinations" that require "subjective judgment," not an eligibility fact which is limited to "the existence of an aggravating circumstance." *Hurst*, 202 So.3d at 81-82 (Canady, J., dissenting). Contrary to opposing counsel's assertion, the legislature explicitly agrees with Justice Canady's view of aggravating factors and eligibility and expressed that agreement in two different subsections of Florida's new death penalty statute. Response at 13-14; § 921.141(2)(b)(1), Fla. Stat. (2018); § 921.141(2)(b)(2), Fla. Stat. (2018).

Additionally, this Court recently directly held that the additional jury findings required by *Hurst v. State* are not elements. *Foster v. State*, 258 So.3d 1248, 1251-53 (Fla. 2018) (holding the additional jury findings required "are not elements of the capital felony of first-degree murder"). None of the additional jury findings required by *Hurst v. State* are elements; rather, they are selection factors. *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (contrasting eligibility factors with the selection decision). So, *Ivan V.* has no application to any retroactivity determination in any Florida capital case. Neither *Hurst v. Florida* nor *Hurst v. State* are retroactive under *Teague*.[5]

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[5] This Court in *Hurst v. State* also imposed a requirement of unanimity for those additional findings and the jury's recommendation of death. The issue of unanimity is currently pending in the United States Supreme Court in an non-capital case. *Ramos v. Louisiana*, 139 S.Ct. 1318 (2019) (granting the petition for writ of certiorari in a second-degree murder case to review Louisiana law which permits nonunanimous verdicts when ten out of twelve jurors vote to convict) (No. 18-5924). It seems unlikely that the Court will overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), which permitted nonunanimous verdicts in twelve-person juries, in light of *Williams v. Florida*, 399 U.S. 78 (1970), which permits six-person juries. *Gonzalez v. State*, 982 So.2d 77, 78 (Fla. 2d DCA 2008) (noting that Connecticut, as well as Florida, permits six-person juries for life felonies and that Indiana and Massachusetts permit six-person juries for less serious felonies). Nonunanimous verdicts from ten of twelve-person juries are more difficult to obtain for the prosecution than unanimous verdicts from six-person juries. Four more persons have to vote to convict in Louisiana than in Florida.

But, even if the United States Supreme Court overrules *Apodaca* in *Ramos* and requires unanimous verdicts from twelve-person juries, that holding is not likely to be retroactive. *Cf. Whorton v. Bockting*, 549 U.S. 406, 409 (2007) (holding that *Crawford v. Washington*, 541 U.S. 36 (2004), regarding Confrontation Clause rights, was not retroactive under *Teague* and observing that it is unlikely that there is any watershed rule of criminal procedure that has not yet emerged, as required by *Teague*). The unanimity requirement of *Hurst v. State* is not retroactive either.

Under *Teague*, *Hurst v. Florida* does not apply to any sentence that was final before January 12, 2016, when the United States Supreme Court decided that case. And, under *Teague*, *Hurst v. State*, does not apply to any sentence that was final before November 3, 2016, when the Florida Supreme Court issued its mandate in that case. Reed's death sentence was final in 1990 which was over two decades before *Hurst v. Florida* and *Hurst v. State* were decided in 2016. Under *Teague*, neither decision applies to Reed.

Stare decisis

The doctrine of stare decisis should not prevent this Court from receding from *Mosley*. *Cf. Okafor v. State*, 225 So.3d 768, 775-76 (Fla. 2017) (Lawson, J., concurring). If the *Mosley* Court had followed the doctrine of stare decisis, then *Hurst v. State* would not have been found to be retroactive. The *Mosley* Court ignored existing precedent in violation of stare decisis. This Court's existing precedent was that right-to-jury-trial cases were not applied retroactively. This Court had routinely held that neither *Apprendi* nor its progeny, including its death penalty progeny, such as *Ring v. Arizona*, were retroactive under *Witt*. *Hughes v. State*, 901 So.2d 837 (Fla. 2005) (holding *Apprendi* was not retroactive after performing an extensive *Witt* analysis); *Johnson v. State*, 904 So.2d 400 (Fla. 2005) (holding that *Ring v. Arizona* was not retroactive after performing an extensive *Witt* analysis); *State v. Johnson*, 122 So.3d 856 (Fla. 2013) (holding *Blakely v. Washington*, 542 U.S. 296 (2004), was not retroactive after performing an

extensive *Witt* analysis). In *Johnson*, this Court did a full-blown *Witt* analysis that consisted of over 20 paragraphs that discussed each of the *Witt* factors at length and then concluded that *Ring* was not retroactive. *Johnson*, 904 So.2d at 405, 407 ("we hold that *Ring* does not apply retroactively in Florida to defendants whose convictions already were final when that decision was rendered" and "we now hold that *Ring* does not apply retroactively in Florida"). So, in three decisions involving *Apprendi* — *Hughes*, *Johnson,* and *State v. Johnson* — this Court held that *Apprendi* was not retroactive but then, in *Mosley*, this Court held that *Apprendi* was retroactive.

The *Johnson* Court's main reasoning for holding *Ring* was not retroactive was that jury factfinding, as opposed to judicial factfinding, did not seriously increase accuracy. This Court agreed with the United States Supreme Court's observation that "reasonable minds continue to disagree over whether juries are better factfinders" than judges are and therefore, it cannot be said "that judicial factfinding ***seriously*** diminishes accuracy." *Johnson v. State*, 904 So.2d at 410 (emphasis in original). The *Johnson* Court also explained that if *Ring* were applied retroactively, it would result in new penalty phases that would have to be conducted "decades" after the murder which would be "extremely difficult" and which would be less accurate than the prior penalty phase. *Id.* at 411. New penalty phases held years after the crime decrease reliability. But all of that logic applies equally to both *Hurst v. Florida* and *Hurst v. State*. The *Mosley* Court

should have followed *Johnson* and held that *Hurst v. State* was not retroactive under *Witt*.

Furthermore, as a matter of logic, if the seminal case is not retroactive, then neither is its progeny. *Jeanty v. Warden, FCI–Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if *Apprendi*'s rule is not retroactive on collateral review, then neither is a decision applying its rule" citing cases). It is inconsistent to hold *Apprendi* itself is not retroactive, as this Court did in *Hughes*, but then hold its progeny, *Hurst*, is retroactive, as this Court did in *Mosley*. *Mosley* conflicts with *Hughes*, *Johnson,* and *State v. Johnson*, as well as with basic logic.

True stare decisis would mandate following the existing precedent of *Hughes*, *Johnson,* and *State v. Johnson* and would mean that *Hurst* was not retroactive either. While the *Mosley* Court referred to *Johnson* and acknowledged it had held that *Ring* did not apply retroactively, it brushed *Johnson* aside saying it was based on a misunderstanding of *Ring*'s application to Florida at that time. *Mosley*, 209 So.3d at 1276. Justice Canady noted in his dissent that the detailed reasoning of *Johnson* was rejected by the *Mosley* majority "without any discussion of that reasoning" and observed that this "is not the way any court should treat a carefully reasoned precedent." *Mosley*, 209 So.3d at 1286 (Canady, J., dissenting). As the dissent in *Mosley* noted, the conclusion that *Hurst* is not retroactive should "ineluctably" follow from *Johnson*. *Id*. at 1285 (Canady, J., dissenting). The *Mosley* dissent also noted that the outcome in *Johnson* followed inevitably from the Court's earlier decision in *Hughes*. *Id*. at 1285-86. Justice

Canady also noted that the existing precedent of *Hughes* which had held *Apprendi* was not retroactive because it merely "shifted certain fact-finding from judge to jury" but did not "impugn the very integrity of the fact-finding process or present the clear danger of convicting the innocent," applied with equal force to any retroactivity analysis of *Hurst*. *Id*. at 1286 (Canady, J., dissenting).

Additionally, *Mosley* is in tension with *Asay v. State*, 210 So.3d 1 (Fla. 2016). Both cases were issued by the same court on the same day and both employed a *Witt* analysis. But one case - *Mosley* - holds that a violation of the right-to-a-jury-trial right is retroactive and the other case - *Asay* - holds that same right is not retroactive. This outcome shows that Justice Cantero's concern about the *Witt* factors being "vague and malleable" was quite justified. *Windom*, 886 So.2d at 942. It is *Witt* that is the source of much of the "instability" in the law that opposing counsel complains about. Overruling *Mosley* would have the benefit of restoring consistency with *Hughes*, *Johnson,* and *State v. Johnson*, as well as with *Asay*.

As Justice Canady noted in his dissent, the *Mosley* Court had not treated this Court's precedent with the respect that it was due under the doctrine of stare decisis, so that doctrine certainly should not prevent this Court from overruling *Mosley*. Decisions that do not respect the doctrine of stare decisis, such as

Mosley, should not be entitled to its protections. Indeed, true respect for the doctrine of stare decisis would mandate overruling *Mosley*.[6]

The doctrine of stare decisis is not is "an inexorable command" and the doctrine is at its "weakest" when a constitutional decision is at issue because such a decision can only be altered by constitutional amendment. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). While courts often list many considerations in the decision

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

Furthermore, while the *Mosley* Court invoked *James*, it did not actually follow *James*' "preservation approach" to retroactivity. Instead, the *Mosley* Court created a new approach to retroactivity of partial retroactivity. The *Mosley* Court adopted an "atonement approach" to retroactivity seeking to atone for the Florida legislature's "inaction" in not revising the state's death penalty statute in the wake of *Ring v. Arizona* and the United States Supreme Court's "delay" in overruling *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989). *See Mosley*, 209 So.3d at 1274, 1280 & 1283. But even the "atonement approach" does not really account for the holding in *Mosley* because the *Mosley* Court held that *Hurst v. State,* as well as *Hurst v. Florida,* was retroactive. The *Mosley* majority granted retroactive benefit not just of *Hurst v. Florida* but retroactive benefit of its own decision of *Hurst v. State* as well. The Florida Supreme Court' s expansion of the findings required in *Hurst v. State*, as opposed to the United States Supreme Court's limited holding in *Hurst v. Florida* regarding an aggravating factor, has no atonement aspect to it. There is no possible atonement justification for applying *Hurst v. State* retroactively.

But the main problem with the "atonement approach" to retroactivity, aside from its incoherence, is that it ignores the importance of finality in any proper retroactivity analysis.

to overrule precedent, in many ways, it is reliance on the existing precedent that is the critical factor in any stare decisis analysis because that is the main basis for the entire doctrine of stare decisis in the first place. *Brown v. Nagelhout*, 84 So.3d 304, 309, 311 (Fla. 2012) (noting that "reliance interests are of particular relevance" in stare decisis analysis and then overruling precedent after determining that "no reliance interests" were implicated); *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (observing that stare decisis has special force when legislators or citizens have acted in reliance on a previous decision); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash & Lee L. Rev. 411, 414 (2010) (noting reliance interests are a critical part of stare decisis and advocating that reliance considerations rather than other considerations play the determinative role in whether to overrule precedent).[7] The doctrine of stare decisis is based on the recognition that even bad decisions can be valuable because numerous actors may have made critical decisions based on that bad decision and overruling such

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[7] This Court's stare decisis jurisprudence does on occasion put the overriding emphasis on reliance but it does not do so consistently. *Compare Brown v. Nagelhout*, 84 So.3d 304, 309, 311 (Fla. 2012) (listing many considerations but noting that "reliance interests are of particular relevance" in stare decisis analysis and then overruling precedent after determining that "no reliance interests" were implicated), *with N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 637-38 (Fla. 2003) (listing many considerations of unworkable, reliance, disruption, and dramatic change in the premises but incorrectly stating that stare decisis is at its "zenith" when dealing with a "divisive societal controversy" and refusing to overrule precedent). Stare decisis is not at its "zenith" when dealing with a "divisive societal controversy"; actually, it is at its nadir when dealing with such controversies. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling, unanimously, the "separate but equal" doctrine established in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

decisions can cause great losses, especially in civil cases due to those reliance interests. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that adhering to precedent is usually the wise policy, because often "it is more important that the applicable rule of law be settled than it be settled right"). As the United States Supreme Court explained in *Payne*, a capital case where the Court overruled its precedent, considerations in favor of stare decisis are "at their acme in cases involving property and contract rights, where reliance interests are involved" but observing "the opposite is true" in cases "involving procedural and evidentiary rules" and then overruling precedent because no such reliance interests were at stake. *Id.* at 828. *See also United States v. Gaudin*, 515 U.S. 506, 521 (1995) (explaining the role of stare decisis is "reduced" when applied to procedural rules

which do not serve as "guides to lawful behavior").[8] *Hurst* is not a guide to lawful behavior; it is a guide to trial procedures only.

Here, as in *Payne*, there is no such countervailing reliance interests at stake. Neither Reed nor any other capital defendant actually relied to their determent on either *Mosley* or *Hurst*. Indeed, Reed did not rely on either *Apprendi* or *Ring v. Arizona* because neither of those cases had been decided at the time of this murder in 1986. The existing precedent at the time of this murder was *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), which were the cases overruled by the United States Supreme Court in *Hurst v. Florida*. *Hurst v. Florida*, 136 S.Ct. at 623 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part."). And, under either *Spaziano* and *Hildwin* or *Hurst*, Reed could still be sentenced to death for this murder. Not only do

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[8] While reliance interests are often highest in the civil context, reliance interests can be at stake in the criminal context as well. Both the State and, on occasion, a criminal defendant can have justifiably relied on existing law as the basis for their conduct. *See, e.g., Davis v. United States*, 564 U.S. 229 (2011) (holding, when the police conduct a search based on objectively reasonable reliance on existing precedent, the exclusionary rule does not apply). A criminal defendant may also have a reliance interest in existing substantive law. *Cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Rogers v. Tennessee*, 532 U.S. 451 (2001) (explaining that *Bouie* restricts retroactive application of judicial interpretations of criminal statutes to those interpretations that are unexpected and indefensible by reference to precedent). But one of the main limitations on a criminal defendant claiming reliance on existing law is that the reliance must be justifiable reliance. As Justice Scalia explained in a concurring opinion, which was critical to the holding of that decision, one of the main goals of stare decisis is "preserving justifiable expectations," and that goal was "not much at risk" because those that relied on the existing precedent to tell the truth to Congress or the courts, instead of lying, "have no claim on our solicitude." *Hubbard v. United States*, 514 U.S. 695, 717 (1995) (Scalia, J., concurring).

criminal defendants not rely on procedural cases, such as *Spaziano*, *Hildwin*, *Hurst*, or *Mosley*, when committing murder, they do not change their legal positions during trials, appeals, or postconvictions proceedings in reliance on those types of decisions either. Neither *Ring* nor *Hurst* serve as "guides to lawful behavior." While capital defendants, who were granted *Hurst* relief due to *Mosley*, in cases where a new judgment and sentence of life has been entered, arguably have a reliance interest, under the reasoning of *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108-09 (2003), which provides that when a court enters findings sufficient to establish a "legal entitlement to the life sentence," double jeopardy bars any retrial of the appropriateness of the death penalty, capital defendants in the remaining cases, where no new judgment and sentence has been entered, do not. The true core of the doctrine of stare decisis, justifiable reliance, does not apply to those remaining capital defendants and the *Mosley* decision. Because there are no reliance interests at stake in the remaining cases, stare decisis is not a valid basis for refusing to recede from *Mosley*.

Opposing counsel's reliance on *Bunkley v. Florida*, 538 U.S. 835 (2003), and *Fiore v. White*, 531 U.S. 225 (2001), is misplaced. Response at 16-17. This Court recently considered and rejected these same arguments in *Zakrzewski v. State*, 254 So.3d 324 (Fla. 2018) (SC18-646). Opposing counsel made the same arguments based on *Bunkley* and *Fiore* in *Zakrzewski* that he does in this case. See *Zakrzewski v. State*, SC18-646, Response at 11-14, 19, 22-23; Reply to reply at 5, 7, 9-13. And the United States Supreme Court recently denied review of

these same arguments as well. *Zakrzewski v. Florida*, 2019 WL 2078132 (May 13, 2019) (No. 18-8090). Moreover, *Bunkley* is not determinative because the United States Supreme Court ultimately denied review of *Bunkley* after remanding to this Court. *Bunkley v. State*, 882 So.2d 890 (Fla. 2004), *cert. denied*, *Bunkley v. Florida*, 543 U.S. 1079 (2005). All *Bunkley* really establishes anyway is that *Witt* is a poor test for retroactivity.

This Court should adopt *Teague* in place of *Witt* and recede from *Mosley* in the remaining cases that are pending on appeal in this Court. § 43.44, Fla. Stat. (2018); *In re Amendments to Fla. Rules of Judicial Admin. & Fla. Rules of Appellate Procedure*, 125 So.3d 743 (Fla. 2013). Under either a *Teague* analysis or a *Witt* analysis, this Court should recede from *Mosley* and hold that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively. But, regardless of whether this Court adopts *Teague* or recedes from *Mosley*, Reed is still not entitled to any *Hurst* relief under *Asay* and *Hitchcock*.

Accordingly, this Court should affirm the trial court's summary denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S REPLY TO RESPONSE TO ORDER TO SHOW CAUSE has been furnished by electronic mail via e-portal to Martin J. McClain of McClain & McDermott, P.O. Box 101386, Ft. Lauderdale, FL 33310-1386; phone: (305) 984-8344; email: martymcclain@comcast.net this 4th day of June, 2019.

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