CRIMINAL PROCEDURE — RETROACTIVITY — FLORIDA SUPREME COURT DENIES RETROACTIVE APPLICATION OF *HURST V. FLORIDA* TO PRE-*RING* CASES. — *Asay v. State*, 210 So. 3d 1 (Fla. 2016) (per curiam).

The balance between finality and fairness in retroactive application of changes in the law is a "thorny"[1] issue that has particular significance in the area of capital punishment, where retroactivity is not a question "of guilt or innocence but, rather, of life or death."[2] To address this issue, the U.S. Supreme Court has articulated, and many states have adopted, the *Teague v. Lane*[3] retroactivity standard. But states may adopt retroactivity standards that are "more generous" than the federal test,[4] and Florida has retained its *Witt v. State*[5] test on this basis. Recently, in *Asay v. State*,[6] the Florida Supreme Court (Court) applied *Witt* and held that the U.S. Supreme Court's ruling that Florida must commit capital-sentencing factfinding to a jury[7] does not apply retroactively to a certain class of cases.[8] However, the *Witt* test is "malleable," "nebulous,"[9] and hindered by its indeterminacy, belying its characterization as supporting "expansive retroactivity."[10] Therefore, Florida should consider aligning with federal practice and adopting the more determinate *Teague* retroactivity standard.

On July 17, 1989, Mark Asay, acting with racial motivation, shot and killed two men.[11] A jury found Asay guilty of two counts of first-degree murder,[12] and the penalty-phase jury voted nine to three to recommend death.[13] The trial court adhered to the jury's recommen-

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1 Witt v. State, 387 So. 2d 922, 924 (Fla. 1980) (per curiam).

2 Asay v. State, 210 So. 3d 1, 33 (Fla. 2016) (Pariente, J., concurring in part and dissenting in part); *see also* Matthew R. Doherty, Note, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty Collateral Review Cases*, 39 VAL. U. L. REV. 445, 471–73 (2004).

3 489 U.S. 288 (1989).

4 Jason M. Zarrow & William H. Milliken, *Retroactivity, the Due Process Clause, and the Federal Question in* Montgomery v. Louisiana, 68 STAN. L. REV. ONLINE 42, 43 (2015); *see also* Danforth v. Minnesota, 552 U.S. 264 (2008).

5 387 So. 2d 922.

6 210 So. 3d 1.

7 Hurst v. Florida, 136 S. Ct. 616, 619 (2016).

8 *Asay*, 210 So. 3d at 22. The class consists of those cases decided before *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury must find all the facts required to impose the death penalty upon a defendant, *id.* at 609.

9 Johnson v. State, 904 So. 2d 400, 415 (Fla. 2005) (Cantero, J., concurring).

10 *Id.* at 409 (majority opinion) (per curiam).

11 Asay v. State, 580 So. 2d 610, 610–12 (Fla. 1991) (per curiam). Testimony indicated that Asay had swastika and white supremacist tattoos and that he used racially derogatory language when referring to the murders. *See id.* at 612.

12 *Id.* at 611–12.

13 *Asay*, 210 So. 3d at 7. Until *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), jury unanimity was not required to recommend capital punishment.

dations and sentenced Asay to death for each conviction.[14] Thereafter, Asay's case wound through the Florida and federal court systems for nearly thirty years.[15]

The current case arises from Asay's second successive postconviction motion, filed on January 27, 2016.[16] The Florida circuit court summarily denied Asay's claims and his motion for a stay of execution, and Asay appealed to the Court, stating four claims[17] and filing a petition for a writ of habeas corpus.[18]

The Court affirmed and denied Asay's habeas petition.[19] In a per curiam opinion, the Court held that *Hurst v. Florida*[20] has no retroactive application to cases that were final when the U.S. Supreme Court decided *Ring v. Arizona*[21] in 2002.[22] In reaching this conclusion, the Court first addressed its decision in *Johnson v. State*,[23] which held that *Ring*, the case from which *Hurst* derived, does not apply retroactively.[24] Finding the *Johnson* Court to have improperly relied on reasoning derivative of the *Teague* test, which departs entirely from the criteria in Florida's *Witt* test, the Court determined that *Johnson*'s ret-

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[14] *Asay*, 580 So. 2d at 612.

[15] *See Asay*, 580 So. 2d 610; Asay v. Florida, 502 U.S. 895 (1991); Asay v. State, 769 So. 2d 974 (Fla. 2000) (per curiam); Asay v. Moore, 828 So. 2d 985 (Fla. 2002) (per curiam); Asay v. State, 892 So. 2d 1011 (Fla. 2004) (unpublished table decision); McNeil v. Asay, 558 U.S. 1007 (2009); Asay v. Sec'y, Fla. Dep't of Corr., No. 3:05-cv-147-J-32, 2014 WL 1463990 (M.D. Fla. Apr. 14, 2014); *see also Asay*, 210 So. 3d at 7–10.

[16] *Asay*, 210 So. 3d at 10.

[17] *Id.* The four claims were:

> (1) Asay's death sentence is unconstitutional under [*Hurst*] because a judge, rather than a jury, made certain findings to make Asay eligible for a sentence of death; (2) the circuit court erred in denying an evidentiary hearing as to Asay's newly discovered evidence, *Brady*, and *Strickland* claims; (3) Asay was denied due process when the circuit court considered extra record material and conducted an ex parte hearing with the State; and (4) Asay was denied due process, equal protection, and his right to effective collateral representation under *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988), when his death warrant was signed while no registry counsel was in place and had not been in place for over a decade.

Id.

[18] *Id.* Asay's petition first raised the same issue as his third claim. *Id.* The petition also contended that Asay was entitled to relief under Florida law, which mandates that "at least ten jurors agree with the recommendation of death before a sentence of death can be imposed." *Id.* at 10–11 (citing Act of Mar. 7, 2016, ch. 2016-13, 2016 Fla. Laws 231, *invalidated by* Perry v. State, 210 So. 3d 630 (Fla. 2016) (per curiam)).

[19] *Id.* at 29.

[20] 136 S. Ct. 616 (2016).

[21] 536 U.S. 584 (2002).

[22] *Asay*, 210 So. 3d at 11. The Court also denied Asay relief on his *Brady*/*Strickland*, *id.* at 22–25, extra record material and ex parte hearing, *id.* at 25–27, and *Spalding* claims, *id.* at 27–29. In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (per curiam), the Court held that *Hurst* applies retroactively to defendants whose sentences became final after *Ring*, *id.* at 1276, a question left open in *Asay*.

[23] 904 So. 2d 400 (Fla. 2005) (per curiam).

[24] *Asay*, 210 So. 3d at 15.

roactivity analysis is no longer binding and that it must analyze the retroactivity of *Hurst* without recourse to that precedent.[25] Under *Witt*, which established an intricate analytical framework that attempts to balance the needs for finality and individualized justice,[26] the Court does not retroactively apply a change in the law "unless the change: (a) emanates from [the] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance."[27] The third prong can be satisfied in one of two ways[28]: a change can either remove the state's regulatory power over certain conduct or ability to inflict certain penalties, or, alternatively, meet a magnitude threshold under the test established by the U.S. Supreme Court in *Stovall v. Denno*[29] and *Linkletter v. Walker*.[30] The *Stovall*/*Linkletter* test, in turn, incorporates three factors: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule."[31]

The Court quickly determined that *Hurst* satisfies the first two requirements under *Witt*.[32] Turning then to the *Stovall*/*Linkletter* test to evaluate *Witt*'s third prong, the Court first addressed the purpose to be served by the new rule, finding that protecting the right to a jury weighed in favor of retroactivity.[33] The Court next analyzed the second and "most important factor": reliance on the old rule.[34] Reviewing the evolution of Florida's capital punishment procedures, the Court found that it had — until *Ring* — significantly relied on the U.S. Supreme Court's decisions indicating the constitutionality of Florida's death penalty system.[35] Therefore, the second factor weighed "heavily" against reconsidering pre-*Ring* cases in light of *Hurst*.[36]

The third and final factor that the Court analyzed was "the effect of applying the new rule on the administration of justice."[37] Framing its discussion as whether retroactive application would "burden [Florida's] judicial machinery . . . beyond any tolerable limit," the Court focused on judicial economy and accuracy.[38] It explained that

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[25] *Id.* at 15–16.
[26] Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (per curiam).
[27] *Id.* at 931 (emphasis omitted).
[28] *Id.* at 929.
[29] 388 U.S. 293 (1967).
[30] 381 U.S. 618 (1965).
[31] *Witt*, 387 So. 2d at 926 (citing *Stovall*, 388 U.S. at 297; *Linkletter*, 381 U.S. 618).
[32] *Asay*, 210 So. 3d at 17.
[33] *Id.* at 17–18.
[34] *Id.* at 18.
[35] *Id.* at 19–20.
[36] *Id.* at 20.
[37] *Id.*
[38] *Id.* (quoting Ferguson v. State, 789 So. 2d 306, 312 (Fla. 2001)).

roughly forty-five percent of defendants currently on death row have sentences that were final pre-*Ring* and noted the substantial time gap between the occurrence of the crimes and a potential resentencing.[39] Because reopening these defendants' cases would immensely burden the courts — requiring gathering evidence and witnesses decades after conviction, without improving "the accuracy or reliability of penalty phase proceedings"[40] — the Court determined that this factor also "heavily" weighed against pre-*Ring* retroactivity.[41] Consequently, the Court concluded that *Hurst* did not apply retroactively to death sentences that became final before the issuance of *Ring* and therefore denied Asay relief.[42]

Asay generated five nonmajority opinions, two of which addressed the advisability of retaining the *Witt* test.[43] Justice Polston concurred, writing separately to advocate for abandoning the *Witt* test in favor of the federal *Teague* analysis.[44] Justice Lewis concurred in the result but disagreed with the Court's broader reasoning.[45] In his view, the correct retroactivity test would focus on claim preservation.[46] Therefore, the Court should hear the constitutional claims of defendants who had "preserved challenges to the lack of jury factfinding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal" before *Ring*.[47]

As *Asay* exemplifies, the *Witt* test is eminently complicated, "malleable," and "nebulous,"[48] requiring analysis of a multifactor and multilayer standard that strains the limits of judicial capacity and fosters numerous opportunities for operational disagreements.[49] Therefore, the Florida Supreme Court should consider abandoning the *Witt*

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[39] *Id.* at 20–21.

[40] *Id.* at 21 (quoting Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005) (per curiam)).

[41] *Id.* at 22.

[42] *See id.*

[43] The three remaining opinions addressed different concerns. Chief Justice Labarga concurred to specify that *Asay* does not apply to "defendants whose death sentences were imposed based upon . . . a judicial override." *Id.* at 29 (Labarga, C.J., concurring). Justice Pariente concurred in part and dissented in part, concluding that fairness outweighed finality here under a *Witt* analysis, thereby leading to full *Hurst* retroactivity. *Id.* at 33 (Pariente, J., concurring in part and dissenting in part). Justice Perry dissented, contending first that "retroactivity is a binary," *id.* at 37 (Perry, J., dissenting), and second that fairness justifies the burden resentencing pre-*Ring* capital defendants would place on the judiciary, *id.* at 37–41.

[44] *Id.* at 29–30 (Polston, J., concurring). Justice Polston cited to Justice Cantero's concurring opinion in *Johnson*, 904 So. 2d at 413 (Cantero, J., concurring), but did not offer further arguments for his view.

[45] *Asay*, 210 So. 3d at 30 (Lewis, J., concurring).

[46] *Id.* at 30–31.

[47] *Id.* at 30.

[48] *Johnson*, 904 So. 2d at 415 (Cantero, J., concurring).

[49] *See Asay*, 210 So. 3d 1 (including a majority opinion and two separate opinions by two individual justices disagreeing on the correct application of *Witt*).

test to align with current federal practice and adopt the *Teague* standard, which presumes that retroactivity does not apply unless a new rule of constitutional law removes the government's power to prohibit certain conduct or announces a "watershed"[50] rule of criminal procedure.[51] The Court has claimed and reaffirmed, without detailed analysis and without offering any other justification for its continued use of *Witt*, that *Witt* "provides more expansive retroactivity standards than those adopted in *Teague*."[52] However, in practice, *Witt* has not fulfilled this assertion of expansiveness and has been hindered by its indeterminacy. Conversely, adopting the *Teague* standard would promote determinacy by allowing Florida to benefit from federal and state explications of the standard and allow for easier implementation due to its rigidity and more demanding requirements. Finally, while commentators have criticized the retroactivity rules set forth in *Teague* and proposed a number of alternatives,[53] the lack of consensus counsels in favor of Florida adopting the determinate *Teague* standard now and developing it incrementally to fit the needs of the state.

While the Court has claimed that *Witt* enables more expansive retroactivity than does *Teague*, *Witt* fails to achieve that objective — belying the one rationale the Court has offered for keeping it. Compared with *Teague*, whose watershed exception applies only to fundamental liberties,[54] *Witt* incorporates the less restrictive factors of purpose, reliance, and effect on the administration of justice.[55] But *Witt* does not necessarily enable greater retroactivity in practice,[56] and indeed, at times does so less than *Teague* — a point exemplified by *Asay*. The *Asay* Court concluded that under *Witt*, *Hurst* does "not apply retroac-

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[50] Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion).

[51] *See id.* at 307.

[52] *Johnson*, 904 So. 2d at 409; *see also Asay*, 210 So. 3d at 15.

[53] *See, e.g.*, Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 43 (2009); Eric Schab, Commentary, *Departing from* Teague*:* Miller v. Alabama*'s Invitation to the States to Experiment with New Retroactivity Standards*, 12 OHIO ST. J. CRIM. L. 213, 227 (2014).

[54] *See* Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (describing the freedoms that "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge," *id.* at 324, as those "implicit in the concept of ordered liberty," *id.* at 325).

[55] *Johnson*, 904 So. 2d at 409 (citing Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) (per curiam)).

[56] *Compare* Falcon v. State, 162 So. 3d 954, 956 (Fla. 2015) (determining that *Miller v. Alabama*, 567 U.S. 460 (2012), applies retroactively under *Witt*), *with* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (determining that *Miller* applies retroactively under *Teague*); Hernandez v. State, 124 So. 3d 757, 759 (Fla. 2012) (per curiam) (concluding that *Padilla v. Kentucky*, 559 U.S. 356 (2010), does not apply retroactively under *Witt*), *with* Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013) (concluding that *Padilla* does not apply retroactively under *Teague*); Chandler v. Crosby, 916 So. 2d 728, 731 (Fla. 2005) (per curiam) (holding that *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply retroactively under *Witt*), *with* Whorton v. Bockting, 549 U.S. 406, 409 (2007) (holding that *Crawford* does not apply retroactively under *Teague*).

tively to cases that were final when *Ring* was decided."[57] Conversely, the Delaware Supreme Court, applying *Teague* and relying on its watershed rule of criminal procedure exception to nonretroactivity,[58] found that its decision interpreting *Hurst* to invalidate the Delaware death penalty statute "must be applied retroactively."[59] Therefore, *Teague* is not inevitably narrower than *Witt*, despite the statements of the Court claiming otherwise.[60]

Moreover, the "redundant, incomplete, and unclear" nature of multiprong tests[61] like *Witt* renders *Witt* indeterminate. The test is based on the *Stovall*/*Linkletter* standard that courts and scholars have criticized[62] as "unfair and inconsistent,"[63] focusing on the multifactor test's unpredictability[64] and lack of guidance concerning how to resolve tensions among its criteria.[65] A plurality of the U.S. Supreme Court implicitly adopted these criticisms in renouncing *Stovall*/*Linkletter* in favor of *Teague*.[66] Though *Witt* is not an exact copy of *Stovall*/*Linkletter*, it only exacerbates the problem by incorporating another level of multifactor analysis.

Compared to the three-stage multifactor balancing test mandated by *Witt*, *Teague*'s rigid requirements are much more determinate. *Teague* states "that new rules of constitutional law should . . . not apply retroactively to post-conviction cases unless (1) they place conduct beyond the power of the government to proscribe, or (2) they announce a 'watershed' rule of criminal procedure that is 'implicit in the concept of ordered liberty.'"[67] While applying these exceptions to specific fact patterns still requires careful examination, *Teague* and its progeny establish guidelines for what types of constitutional rulings fall into each

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[57] *Asay*, 210 So. 3d at 11.

[58] Powell v. State, 153 A.3d 69, 74–75 (Del. 2016) (per curiam).

[59] *Id.* at 76.

[60] While Florida has continued to reaffirm its interpretation of the *Witt* test as "expansive," *Johnson*, 904 So. 2d at 409; *Asay*, 210 So. 3d at 15, and has refused to abandon it, the state has never explicitly stated a goal of "more retroactivity" that adopting *Teague* would frustrate.

[61] Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986) (Posner, J.).

[62] Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558 (1975).

[63] Schab, *supra* note 53, at 231.

[64] *See* Desist v. United States, 394 U.S. 244, 256–58 (1969) (Harlan, J., dissenting) (noting the "doctrinal confusion" that resulted from *Linkletter*, *id.* at 258); Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 452 (1993).

[65] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1742 (1991).

[66] Teague v. Lane, 489 U.S. 288, 302–03 (1989) (plurality opinion).

[67] Johnson v. State, 904 So. 2d 400, 408 (Fla. 2005) (per curiam) (quoting *Teague*, 489 U.S. at 311 (plurality opinion)).

category.[68] Clear precedent establishing the boundaries of the *Teague* standard will aid the administration of justice in Florida, thereby significantly diminishing the intracourt disagreements engendered by the *Witt* test.

Adopting *Teague* would further alleviate *Witt*'s indeterminacy concerns. Even though states are not constitutionally bound to implement *Teague* when reviewing their own criminal convictions,[69] twenty-eight "state supreme courts, as well as the District of Columbia, have adopted the *Teague* standard *at least* to cases stemming from a federal constitutional right," with the "vast majority" of those jurisdictions having adopted *Teague* for "all questions of retroactivity."[70] Thus, by adopting *Teague*, the standard that the majority of states and the U.S. Supreme Court itself apply, Florida would benefit from the courts' explanations of the standard. Defendants would be better able to craft their challenges and predict the Court's legal reasoning if they could analyze federal and state precedents implementing the same standard as Florida.[71]

However, *Teague* itself has "prompted scathing criticism" from scholars[72] who have charged that differentiating between substantive and procedural changes in law is impossible[73] and that *Teague*'s exceptions are too narrow.[74] Nevertheless, these criticisms should not deter Florida from updating its retroactivity analysis. For all its shortcomings, *Teague* replaced a standard that the U.S. Supreme Court abandoned long ago as inconsistent and unfair.[75] While federal law has continued to evolve and refine its retroactivity standard, responding to

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[68] *See, e.g.*, Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (holding that the U.S. Supreme Court's invalidation of mandatory life sentences without parole for juvenile offenders was a substantive rule of constitutional law that applied retroactively); *Teague*, 489 U.S. at 313 (plurality opinion) (holding that watershed rules of criminal procedure are "those new procedures without which the likelihood of an accurate conviction is seriously diminished").

[69] Danforth v. Minnesota, 552 U.S. 264, 282 (2008) (holding that states, in this context, have the authority to fashion their own remedies for constitutional violations that would be "deemed 'nonretroactive' under *Teague*").

[70] Windom v. State, 886 So. 2d 915, 943 & n.28 (Fla. 2004) (Cantero, J., specially concurring).

[71] *Cf., e.g.*, Richardson v. N.C. Dep't of Corr., 478 S.E.2d 501, 505 (N.C. 1996) (applying federal equal protection law to interpret the state constitution's equal protection clause). While the greater body of precedent implementing the *Teague* standard may beneficially illuminate its contours as compared to *Witt*, courts have sometimes disagreed about the correct application of *Teague*. *Compare, e.g.*, State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013) (holding that *Miller v. Alabama*, 567 U.S. 460 (2012), applies retroactively under *Teague*), *with* Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013) (holding that *Miller* does not apply retroactively under *Teague*), *overruled by* Jackson v. State, 883 N.W.2d 272, 279 (Minn. 2016).

[72] Lasch, *supra* note 53, at 27.

[73] Doherty, *supra* note 2, at 481; *see also* Schab, *supra* note 53, at 230; *The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 307, 382–85 (2016).

[74] Fallon & Meltzer, *supra* note 65, at 1817; *see also* Lasch, *supra* note 53, at 28.

[75] *See* Teague v. Lane, 489 U.S. 288, 302–03 (1989) (plurality opinion).

criticism[76] and to changing social mores,[77] Florida's retroactivity analysis has not changed, becoming ever more disconnected from federal standards.[78] Furthermore, scholars have not reached a consensus regarding the best alternative to *Teague*,[79] and the U.S. Supreme Court has shown no signs of abandoning the doctrine.[80] Therefore, rather than wait for a new theory of retroactivity to develop, Florida should adopt the *Teague* standard now and incrementally develop it to fit the needs of the state.[81]

Fundamental notions of justice require courts to balance "finality of decisions" against "fairness and uniformity in individual cases."[82] As *Asay* demonstrates, the indeterminacy of Florida's *Witt* test obstructs this goal. The test requires courts to undertake a complicated multifactor analysis infused with malleability and foments implementation disagreements. Conversely, adopting the prevailing federal *Teague* standard would remedy these difficulties, providing for greater determinacy without necessarily diminishing the retroactive effect given to new constitutional rules. In recognition of the deficiencies of *Witt*, Florida should revise its retroactivity standards and adopt *Teague*.

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[76] *See* Beytagh, *supra* note 62, at 1558.

[77] *See, e.g.*, Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (determining the retroactivity of *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a mandatory sentence of life without parole for a juvenile offender was a cruel and unusual punishment under the Eighth Amendment).

[78] *See* Windom v. State, 886 So. 2d 915, 944 (Fla. 2004) (Cantero, J., specially concurring) (noting that, at the time, Florida had not "addressed *Teague* in the fourteen years since it was decided").

[79] *Cf., e.g.*, Lasch, *supra* note 53, at 43 (advocating for full retroactivity of all new constitutional rules); Schab, *supra* note 53, at 231 (describing a "line of cases" model of retroactivity); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203 (1998); Note, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1644 (2005) (arguing that, under *Teague*, courts should place more emphasis on whether a rule increases the probability of a correct conviction).

[80] *See Montgomery*, 136 S. Ct. 718 (applying *Teague* to determine retroactivity).

[81] Incremental change accords with the Blackstonian view that would "tend to restrain a court from adopting new law that is neither reflective of current community standards nor adequately foreshadowed by prior judicial developments." Paul J. Mishkin, *The Supreme Court, 1964 Term — Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 70 (1965).

[82] Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (per curiam).