

20-7615
CAPITAL CASE

CASE No: _____

Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

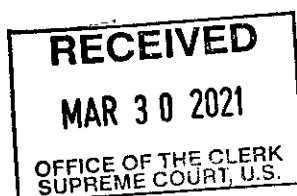
DUANE E. OWEN, PETITIONER

VS.

State of Florida, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI



DUANE E. OWEN # 101660
UNION CORRECTIONAL INSTITUTION
P.O. Box 1000
RAIFORD, FLA. 32083
- PRO SE -

Capital Case

Question Presented

Whether Petitioner was denied equal protection under the Fourteenth Amendment to the United States Constitution when the Florida Supreme Court declined to apply an established rule of law regarding a new penalty phase proceeding retroactively even though it had done so in similarly situated cases?

List of Parties

All parties appear in the caption on the cover page.

List of Related Cases

State v. OWEN, case no. 84-4014 CF A02, Circuit Court of the Fifteenth Judicial Circuit, In and For, Palm Beach County, Florida. Judgment of conviction entered October 18, 1985. Judgment of sentence entered March, 13, 1986.

Owen v. State, case no. SC 60-68550, Supreme Court of Florida. Judgment entered March 1, 1990; rehearing denied, May 2, 1990. Owen v. State, 560 So.2d.207 (Fla. 1990).

Florida v. OWEN, case no. 90-231, Supreme Court of the United States. Judgment entered October 1, 1990. Florida v. OWEN, 498 U.S. 855 (1990).

State v. OWEN, case no. 94-2885, Fourth District Court of Appeals. Judgment entered April 19, 1995; rehearing denied May 18, 1995. State v. OWEN, 654 So.2d.200 (Fla. 4th DCA 1995).

State v. OWEN, case no. 85,781, Supreme Court of Florida. Judgment entered October 18, 1995. State v. OWEN, 662 So.2d.933 (Fla. 1995)

State v. OWEN, case no. 85,781, Supreme Court of Florida

Judgment entered May 8, 1997; rehearing denied July 7, 1997.

State v. OWEN, 696 So.2d. 715 (Fla. 1997)

State v. OWEN, case no. 94-2885, Fourth District Court of Appeals.

Judgment entered August 20, 1997.

State v. OWEN, 697 So.2d. 1309 (Fla. 4th DCA 1997)

OWEN v. Florida, case no. 97-6237, Supreme Court of the United States.

Judgment entered December 1, 1997.

OWEN v. Florida, 522 U.S. 1002 (1997)

State v. OWEN, case no. 84-4014 CF A02, Circuit Court of the Fifteenth Judicial Circuit, In and For, Palm Beach County, Florida. Judgment of conviction entered on January 29, 1999. Judgment of sentence entered March 23, 1999.

OWEN v. State, case no. SC 95,526, Supreme Court of Florida

Judgment entered October 23, 2003; Rehearing denied December 19, 2003.

OWEN v. State, 862 So.2d. 687 (Fla. 2003).

OWEN v. Florida, case no. 03-9345, Supreme Court of the United States.

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OWEN v. Florida, 543 U.S. 986 (2004)

State v. OWEN, case no. 84-4014 CFA02, Circuit Court of the Fifteenth
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Judgment entered September 21, 2006.

OWEN v. State, case no. SC 06-2104, Supreme Court of Florida
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OWEN v. State, 986 So.2d. 534 (Fla. 2008)

OWEN v. McNeil, case no. SC 07-650, Supreme Court of Florida
Judgment entered May 8, 2008; Rehearing denied, July 10, 2008
OWEN v. State, 986 So.2d. 534 (Fla. 2008)

OWEN v. McNeil, case no. 08-civ-80876, United States District Court, S.D.
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Judgment entered November 30, 2010; Rehearing denied, July 7, 2011.
OWEN v. McNeil, 2010 WL 4942668 (S.D. Fla. 2010)

OWEN v. Fla. D.O.C., case no. 11-13592, United States Court of Appeals,
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OWEN v. CREWS, case no. 12-8439, Supreme Court of the United States.
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Owen v. State, case no. 84-4014 CF A02, Circuit Court of the Fifteenth
Judicial Circuit, In and For, Palm Beach County, Florida.

Judgment entered May 8, 2018

Owen v. State, case no. SC 18-910, Supreme Court of Florida

Judgment entered June 25, 2020

Owen v. State, 304 So.3d. 239 (Fla. 2020), reh'g denied, 45 Fla. L. Weekly
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(C.A.) (quoting Lord Mansfield in John Wilkes' case, Rex v. Wilkes,

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Introduction

Petitioner is presenting this petition for writ of certiorari in propria persona and respectfully request this Honorable Court to hold this pro-se pleading to a less stringent standard than those formal pleadings drafted by attorneys, and to liberally construe this pleading when determining whether the Florida Supreme Court's judgment in this case ran afoul of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Petitioner is aware that a petition for writ of certiorari is not a matter of right, but of judicial discretion and that it will be granted only for compelling reasons. Those compelling reasons exist in this case.

The Florida Supreme Court's judgment in this case irrationally excluded Petitioner from a designated class and denied Petitioner a new penalty phase proceeding retroactively even though it had accorded a resentencing to all other members of this class. The arbitrary consequences of this action is particularly grotesque since every member of this class have an opportunity for a life sentence - 31 members of this class have already been sentenced to life imprisonment - whereas, Petitioner has lost this benefit.

This inequality will result in irreparable injury, i.e., the execution of Petitioner and warrants the exercise of this Court's judicial discretion.

Adequate relief cannot be obtained in any other form or any other court.

Opinions and Orders Below

The opinion of the Florida Supreme Court is contained in the Appendix, Appendix B and is reported at Owen v. State, 304 So.3d. 239 (Fla. 2020), reh'g denied, 45 Fla. L. Weekly S 287 (Fla. Nov. 5, 2020).

The order of the Florida Supreme Court denying rehearing is contained in the Appendix, Appendix C.

The order of the Circuit Court denying the rule 3.851 motion is contained in the Appendix, Appendix A.

Jurisdiction

The Florida Supreme Court's opinion was entered on June 25, 2020. Petitioner filed a timely motion for rehearing. The Florida Supreme Court denied the motion for rehearing but issued a corrected opinion on November 5, 2020.

An extension of time to file the petition for writ of certiorari was granted by order of this Court dated March 19, 2020 extending the time for seeking certiorari to 150 days.

This Court has jurisdiction to review it under 28 U.S.C. § 1257.

Constitutional Provisions

The Sixth Amendment provides: 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 defense.

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

In Hurst v. Florida, 136 S.Ct. 616 (2016), this Court held that Florida's capital sentencing scheme was unconstitutional since it failed to require the jury to make critical findings necessary to impose the death sentence.

"The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."

Id. 136 S.Ct. at 619.

On remand, the Florida Supreme Court is considering what impact Hurst v. Florida had under both the United States and Florida Constitutions held:

"Before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proved beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating factors, and unanimously recommend a sentence of death."

Hurst v. State, 202 So.3d.40, 57 (Fla.2016). In assessing harmless

error, the Florida Supreme Court stated:

"... we cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was sufficiently substantial to call for a life sentence. Nor can we say beyond a reasonable doubt there is no possibility that the Hurst v. Florida error in this case contributed to the sentence. We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review. Thus, the error in Hurst's sentencing has not been shown to be harmless beyond a reasonable doubt."

Id. 202 So.3d. at 69.

In considering whether Hurst was to be applied retroactive, the Florida Supreme Court determined in Mosley v. State, 209 So.3d. 1248 (Fla. 2016) that:

"Defendants who were sentenced to death under Florida's former unconstitutional capital sentencing scheme after Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d. 556 (2002) should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring

to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by Ring should not be penalized for the United States Supreme Court's delay in explicitly making this determination. Consideration of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to distinguishable cases."

Id. 209 So.3d. at 1283.

In contrast, the Florida Supreme Court held in Asay v. State, 210 So.3d. 1 (Fla. 2016) that Hurst "does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in Ring." Id.

Petitioner's conviction and sentence of death became final on November 15, 2004 when this Court denied certiorari review of Owen v. State, 862 So.2d. 687 (Fla. 2003).⁽¹⁾ SEE Owen v. Florida, 543 U.S. 986 (2004)

Petitioner timely filed a Rule 3.851 motion in the circuit court on January 6, 2017 relying on the established rule of law set forth in Hurst and Mosley. The circuit court issued an order on May 9, 2018. SEE Appendix A. Within this order, the circuit court initially found that: "It is clear in this case that the Defendant's death sentence

(1) Petitioner was sentenced to death after the jury recommended this sentence by a vote of ten-to-two. Id. Owen, 862 So.2d. at 690.

was unconstitutional under Hurst v. Florida and Hurst v. State. " Id.

Appendix A, pg. 6. The circuit court in considering the harmless

error analysis stated:

"The Defendant points out that the Florida Supreme Court has NEVER found a Hurst error to be harmless in a case where the verdict was not unanimous. The court accepts the Defendant's assertion that the Supreme Court has yet to find harmless error in any case where the verdict was not unanimous. This appears to be an accurate representation of the history of the post-Hurst decisions by the Florida Supreme Court. However, the court rejects the notion that a Hurst sentencing error can NEVER be harmless if the original penalty phase verdict is less than unanimous."

Id. Appendix A, pg. 8. The circuit court concluded its order by finding that the state met its burden that the Hurst error was harmless beyond a reasonable doubt and denied relief. Id.

Petitioner filed an appeal to the Florida Supreme Court asserting that the circuit court's harmless error analysis was incompatible with the clear authority of the post-Mosley precedent and that the state cannot show that the Hurst error was harmless beyond a reasonable doubt, especially in light of the jury's recommendation of death by a vote of ten-to-two, and the significant mitigation introduced during the penalty phase proceeding. Petitioner further argued that the circuit court's failure to apply Hurst relief when all similarly situated members

of the Masley class were granted a new penalty phase proceeding violated the Sixth Amendment right to a jury trial, the Fourteenth Amendment right to due process and equal protection of the laws, and other constitutional objections. Id. OWEN v. State, No. SC 18-810, Initial brief, pg. 18-19.

The Florida Supreme Court issued an opinion on June 25, 2020. See Appendix A. Instead of determining whether the circuit court erred in its harmless error analysis as set forth in Hurst and post-Masley precedent or assess the relationship the significant mitigation introduced at the 1999 penalty phase proceeding had towards the Hurst v. Florida error ⁽²⁾, the Florida Supreme Court merely applied McKinney v. Arizona, 140 S.Ct. 702 (2020) and State v. Poole, 297 So.3d 487 (Fla. 2020) in affirming the circuit court's order. Id.

Petitioner filed a motion for rehearing assenting all of the federal constitutional violations which occurred in state court. Petitioner advances the Sixth and Fourteenth Amendment violations within this petition.

This certiorari petition is timely filed. SEE Jurisdictional Statement.

(2) In the 1999 sentencing order, the circuit court judge found the existence of three statutory mitigating circumstances and sixteen non-statutory mitigations. SEE OWEN, 862 So.2d at 690. Noteworthy is the observation by the judge regarding mitigation: "The fact that the Defendant Duane Owen, had one of the more horrific childhoods that this court has seen or heard of is uncontested in the evidence. It is truly a shame that anyone should be put on this earth to endure a childhood like Duane Owen's." (ROA pg. 004051)

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment to the United States Constitution guarantees that the Government must treat a person or class of persons the same as it treats other persons or classes in like circumstances. Black's Law Dictionary, 11th ed. (2019).

The relevant question presented in this case is whether the Florida Supreme Court's decision declining to apply an established rule of law regarding a new penalty phase proceeding retroactively to Petitioner even though it had done so in similarly situated cases becomes arbitrary and offends the equal protection clause.

Although the Florida Supreme Court has the right to make a ruling retroactive, prospective, or permit limited retroactivity, SEE, E.G., Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971); Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969), once it has established a rule it must apply it with an even hand. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

"Broad judicial review is necessary to preserve the most basic principle of jurisprudence that 'we must act alike in all cases of like nature.'" Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982), citing *Ward v. James*, [1966] 1 Q.B. 273, 294 (C.A.) (quoting Lord Mansfield in John Wilkes case, *Rex v. Wilkes*, 98 Eng. Rep. 327, 335 (1770)).

"The same thought was expressed by Judge Cardozo: 'It will not do to decide the same question one way between

one set of litigants and the opposite way between another."

B. Cordozo, *The Nature of the Judicial Process* 33 (1921).

The Florida Supreme Court made its choice to apply Hurst v. Florida partially retroactive and in the process, created two separate classes of death row inmates. This established rule of law made Hurst applicable to all capital defendants whose conviction and sentence became final after June 24, 2002. See Mosley v. State, 209 So.3d. 1248 (Fla. 2016). In contrast, the Florida Supreme Court held that Hurst did not apply retroactive to capital defendants whose conviction and sentence became final before June 24, 2002. See Asny v. State, 210 So.3d. 1 (Fla. 2016).

There is nothing irrational about the Florida Supreme Court's decision to separate death row into separate classes, but it is irrational to exclude Petitioner from the Mosley class. Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d. 344 (1977).

Petitioner's conviction and sentence of death became final after June 24, 2002 and falls under the ambit of the harmless error analysis set out in Hurst and the retroactive application set forth in Mosley. Relying on this established rule of law, Petitioner invoked his conferred rights under Hurst and Mosley by filing a rule 3.851 motion in the circuit court. Before the circuit court ruled on the motion, the harmless error analysis set out by the Florida Supreme Court was clearly established.

The Florida Supreme Court held that any capital defendant who received less than a unanimous jury recommendation for death would benefit from Hurst v. Florida :

"... we cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was sufficiently substantial to call for a life sentence. Nor can we say beyond a reasonable doubt there is no possibility that the Hurst v. Florida error in this case contributed to the sentence. We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review. Thus, the error in Hurst's sentencing has not been shown to be harmless beyond a reasonable doubt."

Id. Hurst v. State, 202 So.2d.40, 69 (Fla. 2016). Accord. Franklin v. State, 41 F.L.W. 5573 (Nov. 23, 2016) (Hurst error since the jury's recommendation of death was non-unanimous and had not been shown to be harmless beyond a reasonable doubt. Court rejects the state's contention that prior conviction for other violent felonies insulates death sentence from Hurst). The only members of the Mosley class which did not benefit from the established rule of law in Hurst were those capital defendants who waived a penalty phase jury, Mullens v. State, 197 So.3d.16 (Fla. 2016), or received an unanimous jury recommendation for death. Knight v. State, 225 So.3d.661 (Fla. 2017).

Since this legal landscape of Hurst was clearly established, over 150 members of the Mosley class were granted a new penalty phase

proceeding with the exception of PETITIONER. PETITIONER lost his opportunity for Hurst relief because his case found its way into the hands of an ERRANT judge, while others similarly situated had their cases decided by judges who followed the law. Clearly, this arbitrary way to administer justice should not be tolerated.

However, the Florida Supreme Court compounded this error by tacitly affirming the circuit court's order denying Hurst relief. The Florida Supreme Court did not even consider whether the circuit court's harmless error analysis was inconsistent with the well-established rule of law set out in Hurst and post-Hurst related cases, but instead rejected PETITIONER'S Hurst claim solely on the decisions in McKinney v. Arizona, 140 S.Ct. 702 (2020) and State v. Poole, 297 So.3d. 487 (Fla. 2020). SEE Appendix B.

Applying Poole's new rule that any jury guilt-phase finding of facts that were coincidental with a statutory aggravator precludes Hurst relief, the Florida Supreme Court found that this minimalistic test "is easily met in OWEN'S case because unanimous jury findings did support two of the aggravators in OWEN'S case (prison violent felony and in the course of a burglary)." Id. Appendix B, pg. 7. Excluding PETITIONER from the Mosley class and applying a rule not otherwise applied to those similarly situated class members most certainly violates the equal protection clause. The Florida Supreme Court went on to state:

"The foundation underpinning Hurst v. State was an ERRONEOUS reading of Hurst v. Florida as imposing a constitutional requirement for unanimous jury

findings on sentencing factors beyond the existence of at least one aggravating circumstance. McKinney confirms that our prior decision in Hurst v. State was erroneously grounded on a fundamental misunderstanding of Hurst v. Florida, as we held in Poole.

Id. Appendix B, pg. 6, fn. 2.

Clearly, the Florida Supreme Court has the right to recede from Hurst, but not at the expense of Petitioner. Even if Hurst was decided exclusively on erroneous federal grounds, the state would still have to apply its erroneous reading evenhandedly. If one person receives the benefit of a state court interpretation of federal law, so should the second. To deprive Petitioner of a new penalty phase proceeding which was accorded to over 150 members of the Mosley class — even if this benefit was granted on a "fundamental misunderstanding" of Hurst v. Florida — the Florida Supreme Court must still apply this interpretation of federal law evenhandedly. Such disparate treatment runs afoul of the equal protection clause.

This Court has stated:

"The equal protection clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. Plyler v. Doe, 457

U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed. 2d. 786 (1982)."

See City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

Furthermore, this Court has held: Our cases have recognized successful equal protection claims brought by a "class of one", where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See Sioux City Bridge Co. v. Dakota Co., 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed. 2d. 688 (1989). In so doing, we have explained that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Id. Sioux City Bridge Co., 260 U.S. at 445.

Petitioner has been intentionally treated differently from other similarly situated members of the Mosley class and the Florida Supreme Court has provided no rational basis for treating Petitioner differently.

The comment by Judge Learned Hand on the unfairness of extending a statute of limitation after it has run has even greater force if applied to Petitioner's case. To rephrase:

"The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For

the state of Florida to assure Petitioner that he is a member of a designated class of similarly situated death row inmates who will receive a new penalty phase proceeding and thereafter, to withdraw its assurance, seems to most of us unfair and dishonest."

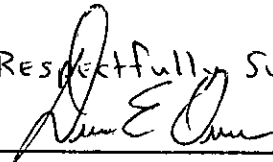
SEE Falter v. United States, 23 F.2d. 420, 425-426 (CA 2 1928) cited in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 C.Ed.2d. 344 (1977).

AN ANSWER to this question WARRANTS CERTIORARI REVIEW by this Honorable Court.

Conclusion

The petition for writ of certiorari should be granted:

Respectfully Submitted,



DUANE E. OWEN # 101660

Union Correctional Institution

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- PRO SE -

Capital Case

CASE No.

In the Supreme Court of the United States

Duane E. Owen, Petitioner

vs.

State of Florida, Respondent

ON Petition for Writ of CERTIORARI
to the Supreme Court of Florida

Appendix

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- PRO SE -

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Appendix A : The order of the Circuit Court denying the rule 3.851 motion issued May 8, 2018

Appendix B : The opinion of the Florida Supreme Court affirming the order of the Circuit Court issued June 25, 2020.

Appendix C : Order denying rehearing dated November 5, 2020.

