DOCKET NO. 20-7615

IN THE SUPREME COURT OF THE UNITED STATES

DUANE OWEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

ASHLEY MOODY
ATTORNEY GENERAL

CELIA TERENZIO*
Senior Assistant Attorney General
Florida Bar No. 0656879
*Counsel of Record

Office of the Attorney General
1515 N Flagler Dr Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 268-5315
Facsimile: (561) 281-5501
capapp@myfloridalegal.com
celia.terenzio@myfloridalegal.com
COUNSEL FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied because Petitioner's claim that he is entitled to the benefit of a state law case that was overruled by the Florida Supreme Court while his postconviction case was pending does not violate the equal protection clause of the Fourteenth Amendment?

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The decision of the Florida Supreme Court is reported at *Owen v. State*, 304 So. 3d 239 (Fla. 2020).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on June 25, 2020. *See Owen v. State*, 304 So. 3d 239 (Fla. 2020). Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE AND FACTS

Owen was charged with the 1984 first-degree murder of fourteen-year-old K.S. while she was babysitting two young children for a neighbor. His original conviction and sentence of death was overturned by the Florida Supreme Court in 1990 based on a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).[1] *See Owen*

[1] The Court found that once Owen made an equivocal request to remain silent, the police should have ceased all questioning. Therefore, the trial court erred in failing to suppress his confession *Owen v. State*, 560 So. 2d 207, 212 (Fla. 1990).

v. State, 560 So. 2d 207, 212 Following (Fla. 1990). Prior to his retrial, the State sought reconsideration by the Florida Supreme Court in light of the United States Supreme Court decision in *Davis v. United States*, 512 U.S. 452 (1994) which held that unless a defendant makes an unequivocal request, the officer is not required to cease questioning. The Florida Supreme Court determined that under *Davis* Owen's confession was indeed admissible, but because his conviction had already been reversed, re-trial was still required. Significantly, the State was permitted to admit the confession subject to any new arguments Owen may present at a new suppression hearing. *Owen v. State*, 696 So. 2d715, 717 (Fla. 1997).

Owen's retrial was held in 1999 and he was again convicted of the first-degree murder of K.S. and again sentenced to death. He was also convicted of burglary of a dwelling while armed and attempted sexual battery with a deadly weapon or force likely to cause serious personal injury. *Owen*, 862 So. 2d 687, 690 (Fla. 2003).

Evidence at the re-trial established that Owen entered the home by cutting a screen in a bedroom window. The victim was stabbed or cut a total of eighteen times, eight to her upper back, four cutting wounds to the front of her throat, and six stab wounds to her back. She was also sexually assaulted during the attack. At some point her body was dragged from the living room to the bedroom where she

was found by the owners of the home.

In his reinstated confession, Owen described his murderous actions as follows:

> According to Owen, he confronted Slattery near the phone as she was concluding a telephone conversation. He ordered her to return the phone to its cradle, and when she did not, he dropped his hammer, grabbed the phone from her hand, returned it to its base, and immediately began stabbing her. After Owen had stabbed Slattery, he checked on the children to ensure they had not awakened during the attack, and he then proceeded to lock the doors and turn off all the lights and the television. Owen then dragged Slattery by her feet into the bedroom, removed her clothes, and sexually assaulted her. He explained to the officer questioning him that he had only worn a pair of "short-shorts" into the house. After he sexually assaulted Slattery, Owen showered to wash the blood from his body, and then exited the house through a sliding glass door. He then returned to the home where he was staying and turned the clocks back to read 9:00 p.m. According to Owen, he did this to provide an alibi based on time. He admitted that after he turned the clocks back, he purposely asked his roommate the time. Owen bragged to the officers about his plan to turn back the clocks, explaining that he "had to be thinking."

Owen, 862 So. 2d at 700. He also detailed how he had entered the home previously that evening and saw K.S. combing the hair of one of the children. He left and came back later, finding her alone, concluding a phone call and killed her. *Owen, supra,* at 701. In addition to his very detailed videotaped confession, the State presented DNA evidence demonstrating that his semen was found inside the victim as well as on the outer portion of her body. *Id.* at 702.

Following the penalty phase the jury recommended death by a vote of 10-2.

The trial judge followed the recommendation and imposed death finding the existence of four aggravating factors:

> In support of the sentence of death, the trial court found that four aggravating circumstances existed to support the death sentence: (1) the defendant had been previously convicted of another capital offense or a felony involving the use of violence to some person; (2) the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary; (3) the crime for which the defendant was to be sentenced was especially heinous, atrocious, or cruel (HAC); and (4) the crime for which the defendant was to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification (CCP). In mitigation, the trial judge considered three statutory mitigating factors: (1) the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired; and (3) the age of the defendant at the time of the crime was twenty-three. The trial court also considered 691 sixteen non-statutory mitigating factors.

Owen, at 690–91.

Owen's initial motion for postconviction relief and writ of habeas corpus were denied by the Florida Supreme Court in 2004. *See Owen v. State*, 986 So. 2d 543, 541 (Fla. 2008). His subsequent federal habeas petition was denied, and that denial was affirmed on appeal by the Eleventh Circuit. *Owen v. Fla. Dep't of Corr.*, 686 F. 3d 1181, 1183 (11th Cir. 2012), *cert denied*, 569 US 960 (2013).

Owen then filed a successive motion for postconviction relief relying on

both this Court's opinion in *Hurst v. Florida*, 577 U.S. 92 (2016) and the Florida Supreme Court's 2019 interpretation of *Hurst* as detailed in *Hurst v. State,* 202 So. 3d 40 (2016). Because his direct appeal was not final prior to this Court's opinion in *Ring v. Arizona,* 536 U.S. 584 (2002), his *Hurst* claim was not procedurally barred. The trial court relying on *Hurst v. Florida* and *Hurst v. State,* found that any error in failing to instruct the jury under the requirements as set forth in *Hurst v. State,* was harmless error beyond a reasonable doubt. The trial court's denial of relief was upheld by the Florida Supreme Court in *Owen v. State,* 304 So. 3d 239 (2020). Owen has now filed a *pro se* motion for *certiorari* review in this Court.

REASON FOR DENYING THE WRIT

THE PETITION MUST BE DENIED AS PETITIONER HAS FAILED TO ESTABLISH A FEDERAL CONSTITUTIONAL RIGHT TO APPLICATION OF AN ERROENOUS STATE LAW CASE THAT WAS OVERRULED DURING THE PENDENCY OF HIS POSTCONVICTION APPEAL

Although currently represented by counsel, James Driscoll, Esq. of Capital Collateral Regional Office-Middle District of Florida, Owen brings this *pro se* petition before the Court. The pith of his claim is that under the Equal Protection Clause of the Fourteenth Amendment, he is entitled to the benefit of a state court decision that was overruled during the pendency of his postconviction appeal. He does not allege that his sentencing proceeding was unreliable or unfair. Instead, he

claims that because other capital defendants received a life sentence pursuant to *Hurst v. Florida,* 577 U.S. 92 (2016) (herein *Hurst I)* and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016) (herein *Hurst II*) he also was entitled to the benefit of *Hurst II* regardless of the fact that it was overruled by the Florida Supreme Court while his case was still pending. In other words, Owen claims that he is constitutionally entitled to the benefit of a state court decision that had been made in error just because others had received the benefit of that erroneous decision. Respondent asserts that because there is no federal constitutional right to such a "windfall" this petition must be denied.

Instructive is *Lockhart v. Fretwell,* 506 U.S. 364 (1993) where this Court rejected a Sixth Amendment claim of ineffective assistance of counsel in an identical procedural and substantive posture. During Fretwell's trial, counsel failed to make an objection that would have entitled him to relief if timely presented. Following his conviction and sentence of death, Fretwell claimed that pursuant to *Strickland v. Washington,* 466 U.S. 668 (1984) he received ineffective assistance of counsel pursuant to the Sixth Amendment because of counsel's failure to make a "*Collins* challenge" to one of the aggravating factors sought by the state. *Fretwell,* 306 U.S. at 366. However, during the pendency of his collateral proceedings, the legal basis for the "*Collins* challenge" was overruled by an appellate court.

Regardless, Fretwell continued his pursuit of the Sixth Amendment challenge claiming although the argument was no longer legally viable, he was still entitled to a finding of *Strickland* prejudice because "but for" counsel's error he would have obtained relief. *Id.*

In rejecting that argument, this Court stated that a defendant is not constitutionally entitled to the benefit of an erroneous decision under the guise of *Strickland*, "prejudice" explaining as follows:

> Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him. *See Cronic*, supra, 466 U.S., at 658, 104 S. Ct., at 2046.

Fretwell, 506 U.S. at 369–70.

This rationale should apply with equal force to Owen's Fourteenth Amendment claim because the underlying premise of his argument is also defective in the identical manner as that in *Fretwell.* There simply is no entitlement to resurrection and application of an erroneous decision.

A brief recount of the relevant procedural history will place this issue in proper context. Owen was convicted of first-degree murder and sentenced to death for brutal sexual battery and killing of fourteen-year-old K.S. *See Owen v. State*,

560 So. 2d 207 (Fla. 1990). (*Owen I*). However, his conviction and sentence were overturned based on a violation of *Miranda v. Arizona*, 384 U.S. 486 (1966). *Owen*, 560 So. 2d at 212.

He was again tried and convicted for the murder and sexual battery in 1999. By a vote of 10-2, the jury recommended death and the trial court imposed the death sentence finding the existence of four aggravating factors[2] which overwhelmingly justified a sentence of death in comparison to the mitigation offered. *Owen v. State*, 862 So. 2d 687 (Fla. 2003) (*Owen II*.)

In 2017, Owen filed a successive motion for postconviction relief relying on both this Court's opinion in *Hurst I* and the Florida Supreme Court's 2019 interpretation of *Hurst I* as detailed in *Hurst II*. Following supplemental pleadings and additional oral arguments, the trial court denied relief on May 8, 2018. Relevant herein is, that in conducting a harmless error analysis, the trial court initially noted that two of the aggravating factors[3] were established by a unanimous

[2] In support of the sentence of death, the trial court found that four aggravating circumstances existed to support the death sentence: (1) the defendant had been previously convicted of another capital offense or a felony involving the use of violence to some person; (2) the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary; (3) the crime for which the defendant was to be sentenced was especially heinous, atrocious, or cruel (HAC); and (4) the crime for which the defendant was to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification (CCP). *Owen v. State*, 862 So. 2d 687, 690 (Fla. 2003).

[3] Owen conceded the existence of the following two aggravating factors; "the defendant has been previously convicted of another capital offense or of a felony involving the use of violence to

jury beyond a reasonable doubt. (Petitioner's Appendix A at 9-10, 13). Additionally, the trial court found that the four aggravating factors overwhelmingly outweighed[4] the comparatively weak mitigation that was vigorously contested by the State. In conclusion, the trial court found that had the jury been properly instructed on the need for a unanimous verdict, it would have; unanimously found the existence of all four aggravators; the aggravators were sufficient to impose the death penalty, the aggravating factors outweighed the mitigation; and death was the appropriate penalty. (Pet. App. A at 17). Based on these findings the trial court denied Owen's Hurst *I* and *II* claim. He then appealed.

During the pendency of Owen's appeal, the Florida Supreme Court issued its

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some person." *Fla. Stat.* §921.141(6)(b), and "the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary." *Fla. Stat.* §921.141(6)(d). *Owen v. State,* 862 So. 2d 687, 702 (Fla. 2003). The evidence presented in support of 921.141(6)(b) included Owen's previous convictions for the murder, sexual battery and burglary involving G.W. *Owen v. State,* 596 So. 2d 9845 (Fla. 1992). Moreover, Owen had also been convicted of several other violent felonies involving several other victims, including attempted first-degree murder, burglary of a dwelling while armed with a dangerous weapon, sexual battery with a deadly weapon, and burglary of a dwelling with an assault or battery. *Owen v. State,* 862 So. 2d at 690. (Pet. App. A at 9-10).

Additionally, the jury unanimously convicted Owen of burglary of a dwelling while armed and attempted sexual battery with a deadly weapon or force likely to cause serious personal injury. Therefore those convictions were sufficient to support the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary." *Fla. Stat.* §921.141(6)(d). *Owen* 862 So. 2d at 702 (Fla. 2003).

[4] The trial court also found that based on the overwhelming evidence to establishing the aggravating factors of HAC and CCP, a properly instructed jury would have found the existence of these two aggravating as well. The strength of these of these two weighty aggravators along with the others against the mitigation was harmless error. (Pet. App. A at 16-17)

decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020) *cert denied* 141 S. Ct. 1051 (2021), wherein the Court overruled *Hurst II* and explained its rationale as follows:

> B. The Errors of *Hurst v. State*
>
> This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death.

Poole, 297 So. 3d. at 503.

Significantly and germane to this petition, the Florida Supreme Court further recognized that Florida's death penalty statute has not and does not run afoul of the Sixth Amendment nor of Florida's constitution. The Court explained:

> 2. State Law Errors
>
> For many decades, this Court considered Florida's post-*Furman* sentencing procedures to be facially consistent with our state constitution. Even after *Ring*, in cases where the aggravator consisted of a prior violent felony, we rejected claims that Florida's capital sentencing scheme violated the right to a jury trial under our state constitution. See, e.g., *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003).

Id., at 504–05.

Several weeks following *Poole*, this Court rendered its decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020) which essentially affirmed the Florida Supreme Court's decision in *Poole* and exposed the errors in *Hurst II*. Therein, this Court expressly reaffirmed that neither *Ring v. Arizona,* 536 U.S. 584 (2002) nor *Hurst I*

require jury weighing of sentencing factors nor jury sentencing. Instead, the Sixth Amendment only requires that a jury unanimously find the existence of a fact that makes a defendant eligible for a death sentence. *McKinney,* 140 S. Ct. at 707-708.

Several months later, now with the benefit of *McKinney*, the Florida Supreme Court, rendered its decision herein affirming the trial court's denial of relief finding:

> The Sixth Amendment test required by *Hurst v. Florida*, 577 U.S. at 102–03, 136 S. Ct. at 624, and applied in *Poole*, 45 Fla. L. Weekly at S47-S48, 292 So. 3d at ——, is easily met in Owen's case because unanimous jury findings did support two of the aggravators in Owen's case (prior violent felony and in the course of a burglary) and would preclude a finding of *Hurst v. Florida* error. *See Hurst v. Florida*, 577 U.S. at 103, 136 S. Ct. at 624 (finding that Florida's sentencing scheme violated the Sixth Amendment because it "required the judge alone to find the existence of an aggravating circumstance"); *Poole*, 45 Fla. L. Weekly at S48, 292 So. 3d at ——. Specifically, the prior-violent-felony aggravator was established by Owen's convictions, after a jury trial, of the first-degree murder and sexual battery of Worden. *Owen III*, 986 So. 2d at 553, 555; *Owen*, 596 So. 2d at 986-87 (Worden case).3 The "in the course of a burglary" aggravator was established by the jury's verdict of guilt as to that offense in this case. *Owen II*, 862 So. 2d at 690. In fact, Owen conceded the existence of both of these aggravators at sentencing. *Id*. at 702.

Owen v. State, 304 So. 3d 239, 242 (Fla. 2020) (*Owen III).*

In upholding the denial of relief on Owen's *Hurst I* and *II* claim, the Florida Supreme Court recognized that Owen received that to which he was constitutionally entitled during his sentencing hearing. A jury found him guilty of

first-degree murder and two of the four aggravator factors used to support his sentence of death were unanimously found by a jury. *Owen III*, 304 So. 3d at 242. The Court further noted that Owen conceded the existence of both factors. *Id.* at 242-243. Consequently, the Florida Supreme Court denied relief because there was no constitutional infirmity in Owen's sentence.

It is against this backdrop that Owen claims he is constitutionally entitled to application of *Hurst II*, although it has been overruled because it was determined to be an incorrect interpretation of constitutional law. Owen is wrong. *Fretwell, supra 506* U.S. at 366 (rejecting claim that a defendant is entitled to the benefit of a state law error); *Nix v. Whiteside,* 475 U.S. 157, 175 (1986) (finding as defective any analysis of a Sixth Amendment claim that is outcome determinative with no consideration for the reliability and fairness of the proceeding).

Finally, the cases upon which he relies are of no moment as they are completely distinguishable. In *Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia,* 488 U.S. 336 (1989) the petitioner sought application of an existing rule regarding a taxation formula for real property, instead of a more onerous formula that was used for assessing his property. This Court found the landowner was entitled to application of the same valid taxation formula that all other property owners receive. *Allegheny*, 488 U.S.

at 346. In contrast, Owen is not seeking application of a valid and still existing rule of law, instead he seeks to resurrect case law that was overruled because it was erroneous. Consequently *Allegheny,* does not support his position.

In *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985) petitioner, a facility for intellectually disabled people, was required to apply for a "special use permit" in its attempt to open a group home in an area already zoned for similar type structures that house multiple people, i.e., dormitories, lodging houses etc. No other group home structure was required to apply for the special permit. This Court found that imposition of that additional requirement to petitioner violated the equal protection clause as petitioner was treated differently than others similarly situated. In contrast, Owen has not been asked to do anything differently in his postconviction challenge. Based on the procedural posture of his case, he was entitled to and did receive a review on the merits of his *Hurst I* and *Hurst II* claims. Consequently, *Cleburne Living Center,* does not support petitioner's claim. Simply because he is dissatisfied with the results of that review, does not establish a basis for relief under the Fourteenth Amendment.

In conclusion, Owen has not alleged that his sentencing proceeding was unreliable; only that he should receive a windfall from the application of an erroneous and overruled case. Indeed, *McKinney* reaffirms that the Florida

Supreme Court correctly interpreted *Hurst I* in *Poole*, 297 So. 3d at 503 and therefore *Hurst II* was decided in error. *McKinney* also supports the Florida Supreme Court's conclusion that Owen received a fair and reliable sentencing hearing in accordance with the law that existed at the time of his crime. *Owen III* at 242-243. Because Owen has failed to present a valid constitutional claim, his request for review must be denied. *McKinney* (reaffirming *Hurst v. Florida* that the Sixth Amendment only requires that a jury make the requisite findings of death eligibility but jury weighing of aggravating and mitigators nor jury sentencing is constitutionally mandated); *Fretwell*, (explaining that defendants are not constitutionally entitled to the windfall that would follow with application of overruled/erroneous law).

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL
Tallahassee, Florida

/s/ Celia Terenzio
CELIA TERENZIO*
Senior Assistant Attorney General
Florida Bar No. 0656879
*Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
1515 N. Flagler Dr.; 9th Floor
West Palm Beach, FL 33401
Office: (561) 268-5315
Facsimile: (561) 837-5108
COUNSEL FOR RESPONDENT