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Supreme Court of Florida

No. SC18-810

DUANE EUGENE OWEN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

June 25, 2020
CORRECTED OPINION

PER CURIAM.

Duane Eugene Owen appeals an order of the circuit court denying his successive motion to vacate his sentence of death under Florida Rule of Criminal Procedure 3.851, relying on *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017), *receded from by State v. Poole*, 45 Fla. L. Weekly S41 (Fla. Jan. 23, 2020), *clarified*, 45 Fla. L. Weekly S121 (Fla. Apr. 2, 2020); and this Court's *Hurst*-related precedent regarding death sentences that became final after June 24, 2002. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. Applying *McKinney v. Arizona*, 140

S. Ct. 702, 707-09 (2020), and *State v. Poole*, 45 Fla. L. Weekly S41, we affirm Owen's sentence of death.

BACKGROUND

In 1984, Owen forcibly entered a home in which fourteen-year-old Karen Slattery was babysitting two young children, stabbed Slattery to death, and sexually assaulted her. *Owen v. State* (*Owen II*), 862 So. 2d 687, 700 (Fla. 2003), *cert. denied*, 543 U.S. 986 (2004).[1] Owen was sentenced to death after his jury recommended this sentence by a vote of ten to two. *Id.* at 690.

Owen has also been convicted of the first-degree murder of another victim, Georgianna Worden, who was murdered approximately two months after Slattery in a scenario "substantially similar to [that] of the Slattery murder." *Id.* at 691-92; *Owen v. State* (*Owen I*), 560 So. 2d 207, 209 (Fla. 1990). Owen was sentenced to death for Worden's murder following his jury's ten-to-two recommendation for death. *See Owen v. State*, 596 So. 2d 985, 987 (Fla. 1992), *cert. denied*, 506 U.S. 921 (1992). With respect to this murder, too, Owen has sought relief under *Hurst v. Florida* and *Hurst v. State*. *Owen v. State*, 247 So. 3d 394, 395 (Fla. 2018). However, we have already held that Owen is not entitled to *Hurst* relief from his

1. For the sexual offense, Owen was not convicted of sexual battery, but attempted sexual battery. *Owen II*, 862 So. 2d at 690. Although there was clear evidence of a sexual assault, it was not clear whether it occurred before or after Slattery's death. *Id.* at 699.

sentence for the Worden murder because that sentence became final before June 24, 2002, the cut-off date for such relief that was established in *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). *See Owen*, 247 So. 3d at 395.

Even though Owen murdered Slattery before he murdered Worden, his death sentence for the murder of Slattery is in a different posture with respect to our *Hurst*-related precedent. The reason for this difference is that Owen's original conviction and sentence of death for Slattery's murder were reversed and remanded for a new trial, *see Owen I*, 560 So. 2d at 212, which delayed the finality date of his conviction and sentence for that murder. Although Owen was convicted of the Slattery murder again and given the same sentence, the new conviction and sentence for Slattery's murder did not become final until after June 24, 2002, more than a decade after Owen's conviction and sentence of death for Worden's murder became final. *See Owen II*, 862 So. 2d at 700, *cert. denied*, 543 U.S. 986 (2004).

With respect to the Slattery murder and the resulting sentence, which is at issue in this case, Owen, whose DNA was found in semen recovered from Slattery's body, confessed to his crimes. *Id.* at 702. More specifically, Owen admitted the following facts:

> Owen admitted to cutting a screen out of a window to gain access to the home where Slattery was babysitting. The first time he entered

> the home, he heard noises and observed Slattery fixing the hair of one of her charges. Owen left the home but subsequently returned. Initially, when he returned, he had his socks on his hands, but immediately upon entering the house, he searched a closet in the home and found gloves, which he placed on his hands, returning his socks to his feet. He also retrieved a hammer from the same closet.
>
> 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 [in that house] 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."

Id. at 700.

Along with first-degree murder, Owen was convicted of attempted sexual battery and burglary at his retrial. *Id.* at 690. After this Court affirmed Owen's convictions and sentence of death on direct appeal, *id.*, and the United States Supreme Court denied certiorari, *Owen v. Florida*, 543 U.S. 986 (2004), this Court affirmed the denial of Owen's initial postconviction motion and denied his petition for writ of habeas corpus. *Owen v. State* (*Owen III*), 986 So. 2d 534, 541 (Fla.

2008). The federal district court subsequently denied Owen's federal habeas petition, the Eleventh Circuit Court of Appeals affirmed, and the Supreme Court denied certiorari. *See Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181, 1183 (11th Cir. 2012), *cert. denied*, 569 U.S. 960 (2013). In the successive postconviction motion at issue in this appeal, Owen sought relief from his death sentence pursuant to the Supreme Court's decision in *Hurst v. Florida* and this Court's decision on remand in *Hurst v. State*. The circuit court denied relief, and Owen seeks reversal of that ruling.

ANALYSIS

In *Hurst v. Florida*, the Supreme Court found Florida's capital sentencing scheme unconstitutional because it "required the judge alone to find the existence of an aggravating circumstance." 136 S. Ct. at 624. In so holding, the Supreme Court overruled its prior precedent upholding Florida's capital sentencing scheme "to the extent [that precedent] allow[ed] a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty." *Id.* Then, in *Hurst v. State*, this Court held the following:

> [B]efore 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 proven 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.

202 So. 3d at 57. We have since receded from this holding, "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Poole*, 45 Fla. L. Weekly at S48. The Supreme Court's recent decision in *McKinney* confirms that we correctly interpreted *Hurst v. Florida* in *Poole* and supports our decision to recede from the additional requirements imposed by *Hurst v. State*.[2] *McKinney*, 140 S. Ct. at 7073 ("Under *Ring* [*v. Arizona*, 536 U.S. 584 (2002),] and *Hurst* [*v. Florida*], a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

Beyond the requirement that a jury unanimously find the existence of an aggravating circumstance beyond a reasonable doubt, as explained in *Poole*, the

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2. 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. *See Hurst v. State*, 202 So. 3d at 44 ("[W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury."). *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*.

holding of *Hurst v. State* is not supported by state or federal constitutional law or the statutory law that was in effect before its issuance. *Poole*, 45 Fla. L. Weekly at S43-48; *accord McKinney*, 140 S. Ct. at 707-8. In contrast, the requirement that a jury, not the judge, find the existence of an aggravating circumstance is mandated by the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. at 624, as a Sixth Amendment requirement. *McKinney*, 140 S. Ct. at 707; *Poole*, 45 Fla. L. Weekly at S44-47.

The Sixth Amendment test required by *Hurst v. Florida*, 136 S. Ct. at 624, and applied in *Poole*, 45 Fla. L. Weekly at S47-S48, 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*, 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. 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.

CONCLUSION

Because Owen's jury found that he committed first-degree murder and because jury findings establish the existence of two statutory aggravators, he is eligible for the death penalty under the law in effect at the time of his crime, and there is no constitutional infirmity in his sentence under *Hurst v. Florida* or the portion of the *Hurst v. State* holding that remains after our decision in *Poole*. Accordingly, we affirm the order of the circuit court upholding the death sentence imposed in this case.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, and COURIEL, JJ., concur.
LABARGA, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Palm Beach County,
Glenn D. Kelley, Judge - Case No 501984CF004014AXXXMB

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3. The trial court relied on additional prior violent felonies, against two additional victims, to establish this aggravator as well. However, for the purpose of our decision today, it is sufficient to note the Worden murder and sexual battery.

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for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Celia A. Terenzio, Assistant Attorney General, Palm Beach, Florida,

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Appendix C

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Supreme Court of Florida

THURSDAY, NOVEMBER 5, 2020

CASE NO.: SC18-810
Lower Tribunal No(s).:
501984CF004014AXXXMB

DUANE EUGENE OWEN vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, and COURIEL, JJ., concur.
LABARGA, J., recused.
GROSSHANS, J., did not participate.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

DAVID DIXON HENDRY
ARTHUR I. JACOBS
JAMES L. DRISCOLL JR.
CELIA TERENZIO
HON. SHARON REPAK BOCK, CLERK
HON. GLENN DAVID KELLEY, JUDGE

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

v.

DUANE OWEN,
Defendant.
_____/

CRIMINAL DIVISION: W
CASE NO.: 1984CF004014AXXXMB

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

THIS CAUSE came before the Court on Defendant Duane Owen's ("Defendant") "Successive Motion to Vacate Judgment of Conviction and Sentence" (DE #306) ("Motion"), filed pursuant to Florida Rule of Criminal Procedure 3.851 on January 6, 2017. The State filed its Amended Response to Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence[1] (DE #326) ("State's Response") on May 26, 2017, and the Court held a hearing at which the parties presented arguments on July 18, 2017. On September 28, 2017, Defendant filed his supplemental Briefing in Support of Vacating Death Sentences (DE #353) ("Supplemental Briefing"), and the State filed its Supplemental Response to Successive Motion to Vacate Sentence (DE #354) ("Supplemental Response"). The Court then held a final hearing on the issues presented on December 11, 2017. After conducting a thorough review of the court file and record in this case, the Court has carefully examined and considered Defendant's Motion and Supplemental Briefing, the State's Response and Supplemental Response, all arguments presented at the July 18

[1] The State filed its original Response to Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence on May 25, 2017 (DE #325), but filed an Amended Response the following day. The Court considers the State's Amended Response to Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence to be superseding.

and December 11, 2017 hearings, all supplemental authority filed by the parties,[2] and all applicable law.

FACTUAL AND PROCEDURAL HISTORY

Defendant was charged with first degree murder, sexual battery, and burglary relating to the March 24, 1984 murder of Karen Slattery. Defendant forcibly entered a Delray Beach home where the victim was babysitting, stabbed and then sexually assaulted the victim. Defendant was arrested in May 1984 after he was identified as a burglary suspect. Defendant was questioned regarding the May 29, 1984 murder of Georgianna Worden in Boca Raton (case no. 1984-CF-004000-AXXX-MB) when, during the course of several interrogations, Defendant confessed to the instant crimes and several other crimes, including the Georgianna Worden murder. At trial for the charges in the instant case, the State presented Defendant's confession and corroborating evidence, including a bloody footprint found at the scene. The jury returned guilty verdicts on the charges and recommended death; the judge followed the jury's recommendation and imposed a death sentence.

Defendant appealed his convictions and sentence, and on March 1, 1990, the Florida Supreme Court reversed the convictions and remanded for a new trial after finding that Defendant's confession was obtained in violation of *Miranda v. Arizona*.[3] *Owen v. State*, 560 So. 2d 207, 212 (Fla. 1990). Before Defendant's retrial, the State moved for reconsideration in light

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[2] The State's supplemental authority, filed June 29, 2017 (DE #334), included *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017). Defendant's first supplemental authority, filed December 4, 2017 (DE #367), included penalty phase verdict forms from the following three cases: (1) *State v. Bannister*, No. 2011CF003085 (Fla. 5th Cir. Ct. Nov. 11, 2017); (2) *State v. Matos*, No. 2014-CF-005586-AXWS (Fla. 6th Cir. Ct. Nov. 21, 2017); and (3) *State v. Wells*, No. 2011-CF-000498-B (Fla. 8th Cir. Ct. Oct. 4, 2017). Defendant's second supplemental authority, filed December 21, 2017 (DE #373), included *Ellerbee v. State*, 42 Fla. L. Weekly S973a (Fla. Dec. 21, 2017), and *LeBron v. State*, 42 Fla. L. Weekly S986a (Fla. Dec. 21, 2017).

[3] 384 U.S. 436 (1966).

of the United States Supreme Court's decision in *Davis v. United States*, 512 U.S. 452 (1994), which held that "neither *Miranda* nor its progeny require police officers to stop interrogation when a suspect in custody, who has made a knowing and voluntary waiver of his *Miranda* rights, thereafter makes an equivocal or ambiguous request for counsel." *State v. Owen*, 696 So. 2d 715, 717 (Fla. 1997) (describing the holding in *Davis*). The Florida Supreme Court ultimately ruled that while Defendant's responses were equivocal and *Davis* applied to Defendant's interrogation, the previous decision reversing Defendant's convictions was final and his prior convictions could not be retroactively reinstated. *Id.* at 720.

Defendant was re-tried in 1999 and was again convicted of first degree murder, as well as attempted sexual battery with a deadly weapon or force likely to cause serious personal injury and burglary of a dwelling while armed. Following the penalty phase, the jury recommended death by a vote of ten-to-two. The trial judge followed the jury's recommendation and imposed a death sentence, finding the existence of four aggravating circumstances: (1) the defendant had been previously convicted of another capital offense or of 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). The trial court 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. *Id.* The trial court also considered sixteen non-statutory mitigating factors.[4] *Id.* at 690–91. The Florida Supreme Court affirmed Defendant's convictions and sentence on October 23, 2003. *Id.* at 704. The United States Supreme Court then denied Defendant's petition for writ of *certiorari* on November 15, 2004. *Owen v. Florida*, 543 U.S. 986 (2004).

Defendant filed his initial motion for post-conviction relief pursuant to rule 3.851 on November 1, 2005, raising eight claims that included numerous sub-issues. An amended motion was filed May 18, 2006, and following an evidentiary hearing on August 11, 2006, the trial court denied the motion by written Order of September 22, 2006. Defendant appealed the trial court's denial and petitioned the Florida Supreme Court for a writ of *habeas corpus*. *Owen v. State*, 986 So. 2d 534 (Fla. 2008). On May 8, 2008, the Florida Supreme Court affirmed the denial of post-

[4] As related by the Florida Supreme Court, "The sixteen non-statutory mitigating factors were: (1) the defendant was raised by alcoholic parents (some weight); (2) the defendant was raised in an environment of sexual and physical violence (some weight); (3) the defendant was a victim of physical and sexual violence (some weight); (4) the defendant was abandoned by the deaths of his parents and abandoned by other family members (some weight); (5) the defendant has a mental disturbance and his ability to conform his conduct to the requirements of law was impaired (some weight) (6) the defendant was cooperative in court and not disruptive during court proceedings (little weight); (7) the defendant has made a good adjustment to incarceration and will be a good prisoner (little weight); (8) the offense for which the defendant was to be sentenced happened fifteen years ago (little weight); (9) the defendant will never be released from prison if given life sentences without parole (minimal weight); (10) the defendant cooperated with law enforcement (little weight); (11) the defendant obtained a high school equivalency diploma (little weight); (12) the defendant received a general discharge under honorable conditions from the United States Army (little weight); (13) the defendant saved a life in his youth (little weight); (14) the defendant suffered from organic brain damage (some weight); (15) the defendant lived in an abusive orphanage (some weight); and (16) any other circumstances of the offense (some weight). As to this final nonstatutory mitigating factor, the trial court considered the fact that Owen did not harm the two young children that Karen Slattery was babysitting at the time of her murder, nor did he harm Georgianna Worden's two young children who were present in her home at the time of her murder." *Owen v. State*, 862 So. 2d at 690–91, n.3.

conviction relief and denied Defendant's petition for writ of *habeas corpus*. *Id.* at 560. Following these state proceedings, on August 7, 2008, Defendant filed a federal *habeas corpus* petition in the United States District Court for the Southern District of Florida, which was denied on November 30, 2010. *Owen v. Florida Dep't of Corrections*, 686 F.3d 1181, 1191 (11th Cir. 2012). On July 11, 2012, the Eleventh Circuit affirmed the denial of Defendant's federal *habeas* petition. *Id.* at 1202. The United States Supreme Court then denied Defendant's subsequent petition for writ of *certiorari* on April 29, 2013. *Owen v. Crews*, 569 U.S. 960 (2013).

On January 6, 2017, Defendant filed the instant Successive Motion to Vacate Judgment of Conviction and Sentence. In the Motion, Defendant requests that the Court vacate his death sentence, arguing that it is unconstitutional based on the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's subsequent decision on the remand of that case, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). A case management conference was held on July 18, 2017, at which counsel presented arguments to the Court. At the conclusion of the hearing, the Court provided counsel an opportunity to file supplemental briefing on the retroactivity of the *Hurst* decisions, and whether any *Hurst* error that may have occurred in this case could be considered harmless. Both Defendant and the State filed supplemental briefings on September 28, 2017. A final hearing on these issues was held on December 11, 2017.

LEGAL ANALYSIS AND RULING

In *Hurst v. Florida*, the Supreme Court held that Florida's capital sentencing scheme was unconstitutional to the extent that it failed to require the jury to make all factual findings necessary to impose a sentence of death. In so doing, the Supreme Court rejected Florida's use of an advisory verdict by the jury as "not enough." *Hurst v. Florida*, 136 S.Ct. at 619. The Supreme Court did not decide whether this sentencing error was subject to a harmless error analysis.

On remand, the Florida Supreme Court decided *Hurst v. State*. In *Hurst v. State*, the Florida Supreme Court held, *inter alia*, that all findings necessary for the imposition of a sentence of death in a capital case must be found unanimously by the jury.[5] Specifically, the jury must make a finding as to each aggravating factor that has been proven beyond a reasonable doubt, must find that the aggravating factors are sufficient, and must find that the aggravating factors outweigh the mitigating circumstances. *Hurst v. State*, 202 So. 3d at 44.

Significantly, the Florida Supreme Court also addressed whether the sentencing error in *Hurst v. Florida* was subject to harmless error review. The Court concluded that the sentencing error was not a structural error and was, therefore, "not incapable of harmless error review." *Hurst v. State*, 202 So. 3d at 66-67.

It is clear in this case that the Defendant's death sentence was unconstitutional under *Hurst v. Florida* and *Hurst v. State*. However, not all death sentences are subject to review under *Hurst*. In *Asay v. State*, 210 So.3d 1 (Fla. 2016), the Florida Supreme Court held that *Hurst* does not apply retroactively to capital defendants whose sentences were final before *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* was decided on June 24, 2002. The Defendant's death sentence for the murder of Karen Slattery was not final on June 24, 2002. Therefore, in this case, the Defendant is entitled to review of his sentence of death in light of *Hurst*.[6]

The Defendant raises the following grounds for vacating his death sentence:

1. Based on *Hurst* his sentence is unconstitutional because he was denied a jury trial;

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[5] A unanimous verdict was not specifically required by the Supreme Court in *Hurst v. Florida*. The unanimity requirement was added by the Florida Supreme Court based on the right to trial by jury guaranteed by the Florida Constitution. *Hurst v. State*, 202 So. 3d at 53-54.

[6] The Defendant was also sentenced to death for the murder of Georgianna Worden. *State v. Duane Eugene Owen*, Case No. 1984CF004000AMB. The Defendant's sentence in the Worden case became final before *Ring* and this Court has already denied the Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence in that case.

2. In light of *Hurst* his sentence violates the Eighth Amendment and is arbitrary and capricious;
3. The fact-finding necessary to support his sentence was not proven beyond a reasonable doubt as required by *Hurst*;
4. In light of *Hurst* his sentence was obtained in violation of the Florida Constitution; and
5. The denial of his post-convictions claims must be reheard and determined under a constitutional framework.

The starting point of this Court's analysis in considering the Defendant's request to set aside his death sentence must be the harmless error test enunciated by the Florida Supreme Court in *Hurst v. State*.[7]

A sentencing error is harmless "only if there is no reasonable possibility that the error contributed to the sentence." In the context of *Hurst*, this means that the burden is on the State to "prove beyond a reasonable doubt that the jury's failure to unanimously find all facts necessary for imposition of the death penalty did not contribute to the death sentence." *Hurst v. State*, 202 So. 3d at 68. The Florida Supreme Court emphasized that "[t]he focus is on the effect of the error on the trier of fact." *Id.*

Ground One

The first error alleged by the Defendant is the sentencing error found by the Supreme Court in *Hurst v. Florida* and by the Florida Supreme Court in *Hurst v. State*, the denial of a right to a

[7] The Court acknowledges that the Defendant does not concede the application of the harmless error test to each of the assigned errors. For example, the Defendant asserts that his Eighth Amendment challenge is not subject to harmless error review. As will be discussed below, the Court disagrees.

jury trial. This is a Sixth Amendment argument. The Defendant was denied the right to have a jury unanimously decide all facts necessary for the imposition his sentence of death.

As an initial matter, the Court must consider the Defendant's argument that the sentencing error cannot, under any circumstances, be harmless because the penalty phase jury verdict was not unanimous. In this case, the verdict was ten-to-two for death. The Defendant points out that the Florida Supreme Court has never found a *Hurst* error to be harmless in a case were 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 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.

First, the Florida Supreme Court has never held that a sentencing error could not be harmless unless there was a unanimous verdict. Second, to blindly determine harmless error based on the initial numerical vote of a jury that was not instructed that they needed to reach a unanimous verdict would make a harmless error analysis meaningless. Indeed, there would be no analysis. The Court does not believe that the Florida Supreme Court intended such a result. Certainly, the Florida Supreme Court expects, and demands, in cases involving the most serious and heinous crimes against our citizenry that harmless error does not simply rise or fall on the numerical vote of a jury who was not instructed as to the need for unanimity.

This does not mean that the lack of unanimity should not be a significant factor in determining harmless error. However, any meaningful review must also consider whether a rational jury instructed as to unanimity would find beyond a reasonable doubt the existence of

sufficient aggravators, that those aggravators outweighed any mitigating circumstances, and that an appropriately instructed jury would unanimously recommend a death sentence.

In this case, there were four aggravators to be considered. The aggravating circumstances were:

(1) The defendant had been previously convicted of another capital offense or of a felony involving the use of violence to some person. § 921.141(6)(b);

(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. § 921.141(6)(d);

(3) The crime for which the defendant was to be sentenced was especially heinous, atrocious, or cruel ("HAC"). § 921.141(6)(h); 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"). § 921.141(6)(i).

While the Court's role is not to review the sufficiency of the evidence relating to these aggravating circumstances, in assessing the effect of the sentencing error on the trier of fact the evidence relating to each aggravator must be considered. Notably, the first two aggravators have already been found by a jury beyond a reasonable doubt.

The first statutory aggravator is a prior conviction for another capital offense or felony involving violence to some person. This aggravator is undisputed. At the time of the trial in this case, the Defendant had already been convicted of a capital offense for the brutal murder of Georgianna Worden. *State v. Duane Eugene Owen*, Case No. 1984CF004000AMB. The Worden case involved facts similar to this case. In the Worden case, the Defendant entered the home of

Ms. Worden. Upon gaining entry to the home, the Defendant bludgeoned Ms. Worden to death with a hammer and sexually assaulted her.[8] A unanimous jury in the Worden case found beyond a reasonable doubt that the Defendant was guilty of first degree murder, sexual battery and burglary.

While Defendant's previous conviction for a capital offense – i.e. the murder of Georgianna Worden - is the most significant and horrific felony involving violence to another person, the Defendant had also been convicted of other violent felonies. These felonies included 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.

The second statutory aggravator has also been found by a unanimous jury. The jury in this case found that the Defendant committed the crime of burglary when he entered the residence where he ultimately raped and murdered Karen Slattery. This aggravator, therefore, cannot be disputed.

The third and fourth statutory aggravators were not found unanimously by a jury. However, the evidence supporting these aggravators was significant and overwhelming. Both aggravators were addressed and discussed in this case by the Florida Supreme Court on direct appeal.[9]

The third aggravator, HAC, applies to murders that "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Owen v. State*, 862 So. 2d 687, 698-99 (Fla. 2003)

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[8] While not relevant to the harmless error analysis in this case, the jury recommended a sentence of death in the Worden case.

[9] This Court has independently reviewed the record evidence in this case. However, the Court cannot improve on the Florida Supreme Court's own observations and conclusions concerning HAC and CCP in this case.

(quoting *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998) and *Shere v. State*, 579 So. 2d 86, 95 (Fla. 1991)). This aggravator focuses on "the means and manner in which death is inflicted." *Owen, id.* at 699.

While this Court is not tasked with weighing the evidence of HAC, the Court must determine based on the record whether a properly instructed jury would find beyond a reasonable doubt the existence of HAC in the killing of Karen Slattery. There is no doubt that a rational jury would so find.

As detailed by the Florida Supreme Court, and as confirmed by this Court's independent review of the record, "Owen's killing of Karen Slattery unquestionably satisfies the requirement of HAC." *Owen, id* at 699-700. The Florida Supreme Court explained the record evidence of HAC as follows:

> Here, the medical examiner testified that Slattery suffered eighteen stab wounds—eight to her upper back, four cutting wounds to the front of her throat, and six stab wounds to her neck. Five of the wounds penetrated her lungs, causing them to collapse, making it impossible for Slattery to breath or speak. She would have experienced "air hunger"—the feeling of needing to breathe but not being able to do so. The doctor estimated that Slattery lost nearly her entire blood volume. The result of severe blood loss is shock, an involuntary and uncontrollable condition that causes high anxiety and terror. The doctor explained that pain is a result of the nerve receptors in the skin being injured, and that people can experience a substantial amount of pain without suffering a lethal injury.
>
> Although Slattery did not appear to have any defensive wounds, seven of the stab wounds were lethal and could have produced death. While the medical examiner could not determine which wounds were inflicted first, he believed they were all inflicted in rapid succession, and all while Slattery was alive. The doctor opined that Slattery would have been capable of feeling pain as long as she was conscious, which he estimated would have been for between twenty seconds and two minutes, depending upon which wound was inflicted first. He testified that one minute was a reasonable estimate for how long Slattery remained conscious, as twenty seconds was too short, but two minutes would have been a "little long." During that time she would have felt pain, experiencing the additional stab wounds, would have felt terror and shock, would have been aware of her impending doom, would have become weaker as a result of blood loss, and would have been unable to cry out. Finally, according to the medical examiner, although she may have been dead prior to the occurrence, Slattery was sexually assaulted, and semen was found on both her internal and external genitalia.

> In addition to the evidence presented by the medical examiner, the testimony of Owen's own mental health expert supports the finding of HAC. Dr. Frederick Berlin testified that Owen believed that by having sex with a woman he could obtain her bodily fluids, and that this would assist him in his transformation from a male to a female. Owen believed that if he had sex with a woman who was near death, his penis would act as a hose, and her soul would enter his body and they would "become one." Importantly, Owen believed that the more frightened the victim was, the better. This express need to cause his victim extreme fear clearly evinces an utter indifference to his victim's torture

Owen, id at 699. Based on the facts of this case, a properly instructed rational jury would find unanimously that the murder of Karen Slattery was heinous, atrocious and cruel.

The fourth aggravator was CCP. The Florida Supreme Court has established a four-part test to determine whether the CCP aggravator is justified. The test requires: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) the defendant must have had no pretense of moral or legal justification. *Owen, id.* at 862; *Evans v. State,* 800 So.2d 182, 192 (Fla.2001).

The Florida Supreme Court again detailed the record evidence supporting CCP in this case stating:

> Clearly, as with the Worden murder, the murder of Karen Slattery satisfies the requirements of CCP. The fact that Owen stalked Slattery by entering the house, observing her, leaving, and then returning after the children were asleep demonstrates that this murder was the "product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Evans,* 800 So.2d at 192 (quoting *Jackson v. State,* 648 So.2d 85, 89 (Fla.1994)). Further, Owen unquestionably had "a careful plan or prearranged design to commit murder," *id.,* as evidenced by the fact that he removed his clothing prior to entering the house, wore socks and then gloves on his hands, confronted the fourteen-year-old girl with a hammer in one hand and a knife in the other, and, by his own admission, did not hesitate before stabbing Slattery eighteen times.
>
> The third element of CCP, heightened premeditation, is also supported by competent and substantial evidence. We have previously found the heightened premeditation required to

> sustain this aggravator to exist where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder. *See Alston v. State,* 723 So.2d 148, 162 (Fla.1998); *Jackson v. State,* 704 So.2d 500, 505 (Fla.1997). When Owen first entered the home and saw the fourteen-year-old babysitter styling the hair of one of her charges, he had the opportunity to leave the home and not commit the murder. While he did exit the home at that time, he did not decide against killing Slattery. Instead, he returned a short time later, armed himself, confronted the young girl, and stabbed her eighteen times. Owen clearly entered the home the second time having already planned to commit murder. Heightened premeditation is supported under these facts.
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> Finally, the appellant unquestionably had no pretense of moral or legal justification. Notably, Owen never even suggested to the officers who questioned him, and to whom he confessed, in 1984 that a mental illness caused him to kill. He did not attempt to justify his actions, as he does in the after-the-fact manner he advances today, by explaining to the officers that he needed a woman's bodily fluids to assist in his transformation from a male to a female.

Owen, id. at 701. As with HAC, a properly instructed rational jury would find beyond a reasonable doubt that the brutal murder of Karen Slattery was cold, calculated and premeditated.

Evidence of the aggravating factors in this case was overwhelming. Two of the aggravators were established by a unanimous jury beyond a reasonable doubt. Based on a review of the record evidence in this case, the Court concludes that a properly instructed jury would have found unanimously HAC and CCP beyond a reasonable doubt.

The Court next needs to consider the issue of sufficiency. Sufficiency is a consideration of the nature and weight of the aggravating factors without regard to any possible mitigating circumstances. The Court concludes that the any rationale jury properly instructed would unanimously find that the aggravating factors here were sufficient to support a sentence of death.

The aggravators in this case are the most serious aggravators in the statutory sentencing scheme. The Defendant had previously been convicted of a capital felony, the brutal murder of Georgianna Worden, and of other violent felonies. HAC and CCP were both present. There is

no doubt that a properly instructed jury in considering these aggravators would have unanimously found the aggravators to be sufficient to impose a sentence of death.

The Court must now consider whether a rationale jury properly instructed would find that the aggravators outweighed the mitigating circumstances. During the penalty phase, three statutory mitigating factors were presented along with sixteen non-statutory mitigating factors.

The statutory mitigating factors were: (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.

Evidence of mental illness was presented at trial; however, the nature and extent of the Defendant's illness was vigorously challenged by the State. The jury, during the guilt phase, rejected the Defendant's insanity defense. During the penalty phase, the Defendant's experts relied heavily on Defendant's delusional belief that he was a woman. This belief was the lynchpin of the mental health opinions expressed by Dr. Berlin and Dr. Sultan.

The Defendant's mental health experts testified that, at the time of the offense, the Defendant suffered from an extreme mental or emotional disturbance. Specifically, the experts opined that the Defendant met "most" of the criteria for a delusional disorder and met the criteria for schizophrenia. Significantly, the defense experts premised their opinions on the Defendant's own questionable self-reporting of his delusions.

This self-reported delusion was never raised until 12 years after the murder of Karen Slattery. As noted by the Florida Supreme Court "Owen never even suggested to the officers who questioned him, and to whom he confessed, in 1984 that a mental illness caused him to kill. He

did not attempt to justify his actions, as he does in the after-the-fact manner he advances today, by explaining to the officers that he needed a woman's bodily fluids to assist in his transformation from a male to a female." *Owen, id.* at 701.[10] Nevertheless, while vigorously contested, there was some evidence to support this statutory mitigating circumstance.

There was little evidence in the record to support a finding that he did not appreciate the criminality of his conduct. To commit the crime, the Defendant wore socks over his hands to avoid detection. He showered after the murder, was careful not to take property from the home that could place him at the scene of the crime and he fled the scene. There is evidence to support a conclusion that he could not conform his conduct to the requirements of the law. He was, indeed, a repeat offender.[11]

There were 16 non-statutory mitigating circumstances presented during the penalty phase of the trial. Most of these mitigating factors do not require discussion. The most significant non-statutory mitigating circumstance was the Defendant's childhood and youth.

The evidence establishes that the Defendant was exposed to a horrific childhood. His parents were alcoholics. He witnessed his mother being abused and raped. The Defendant was physically and sexually abused. His mother passed away when the Defendant was a child and his father committed suicide. The Defendant was sent to the VFW National Home where the sexual and physical abuse continued. There can be no disputing that the Defendant's childhood, formative years and youth impacted him a profound way. As observed by the original trial court

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[10] The Supreme Court went on to state "Owen's claim that his mental illness must negate the CCP aggravator is unpersuasive." *Owen, id.* at 701.

[11] The third statutory mitigating circumstances requires no discussion. It is undisputed that the Defendant was young, 23, at the time of the murder.

"is it any wonder the Defendant is, and has been, mentally sick?" Clearly, the evidence of this non-statutory mitigating circumstance was established at trial.

The ultimate issue left to be decided is whether the State has met its burden to "prove beyond a reasonable doubt that the jury's failure to unanimously find all facts necessary for imposition of the death penalty did not contribute to the death sentence." *Hurst v. State*, 202 So. 3d at 68. In post-*Hurst* cases where harmless error has been found, the Supreme Court has considered: 1) whether the aggravators were overwhelming and uncontroverted; 2) whether the defendant challenged the aggravators; 3) whether the mitigation was comparatively weak and challenged by the State; and 4) the numerical vote of the jury during the penalty phase. *See, e.g. King v. State*, 211 So. 3d 866, 892-93 (Fla. 2017).

The record evidence in this case overwhelmingly establishes that the statutory aggravators outweigh the mitigating circumstances. Two aggravators are uncontested and were found by a jury beyond a reasonable doubt. The mitigating circumstances were, by comparison, relatively weak and were vigorously contested by the State. Nevertheless, a jury hearing this evidence rendered a less than unanimous verdict recommending the imposition of the death penalty. The question is whether, without a unanimous verdict, the State has met its burden of establishing harmless error beyond a reasonable doubt? This Court readily concludes that the State has met its burden.

While the lack of a unanimous verdict poses a hurdle to finding harmless error, the Court must consider whether a rationale jury instructed on the need for a unanimous verdict to return a sentence of death would reach such a verdict in this case. In this case, the jury was instructed that its verdict was advisory only. The jury was further instructed that if a majority of the jury voted for the death penalty the verdict was a recommendation of death.

Properly instructed, the jury would have been told that: 1) at least one aggravating factor must be found unanimously; 2) the jury must find unanimously that the aggravating factor or factors found by the jury are sufficient to impose the death penalty; and 3) the jury must unanimously find that the aggravating factors outweigh the mitigating circumstances. The jury would also have been instructed that, regardless of the jury's findings, no juror is compelled to vote for death.

The difficulty in determining the impact of the error on the trier of fact as compelled by *Hurst v. State* is, of course, the need to speculate about why two jurors did not vote for death. However, every harmless error analysis requires a degree of speculation and an assessment of the unknown. This is why courts are required to look at the totality of the evidence to determine the impact of the error on the trier of fact.

The record evidence in this case can only support one conclusion. If the jury had been instructed on the need for a unanimous verdict the jury would unanimously find: 1) four aggravating factors including HAC and CCP; 2) the aggravating factors were sufficient to impose the death penalty; 3) the aggravating factors outweigh the mitigating circumstances; and 4) death was the appropriate penalty.

Ground Two

The Defendant next raises an Eighth Amendment challenge his death sentence. While the Defendant asserts that his sentence is "arbitrary and capricious" this argument is nothing more than a restatement and repackaging of the *Hurst* jury trial issue.[12] The Defendant asserts that because his right to jury trial was denied his sentence was violative of the Eighth Amendment.

[12] As will be discussed, all of the remaining grounds for vacatur of the Defendant's death sentence are all based on *Hurst*.

The Defendant also asserts that an Eighth Amendment violation is not subject to harmless error review.

The Defendant is correct that a sentence of death without a unanimous jury verdict is violative of the Eighth Amendment. This was the holding of the Florida Supreme Court in *Hurst v. State*. *Hurst v. State*, 202 So. 3d at 59-60. However, it is equally clear that a *Hurst* Eighth Amendment violation is subject to a harmless error analysis. *See, e.g. Philmore v. State*, 234 So. 3d 567, 568 (Fla. 2018)(defendant's Eighth Amendment violation under *Hurst* harmless beyond a reasonable doubt).

The Court has already addressed whether the *Hurst* error in this case under the Sixth Amendment was harmless beyond a reasonable doubt. The same analysis applies to the Defendant's Eighth Amendment *Hurst* claim. For the reasons already expressed, the Court concludes that the State has met its burden to demonstrate that the Eighth Amendment *Hurst* error in this case is harmless beyond a reasonable doubt.

Grounds Three Four and Five

The Defendant asserts three additional grounds to vacate his sentence of death. The Defendant asserts as additional grounds: (1) The fact-finding necessary to support his sentence was not proven beyond a reasonable doubt as required by *Hurst*; (2) In light of *Hurst* his sentence was obtained in violation of the Florida Constitution; and (3) The denial of his post-convictions claims must be reheard and determined under a constitutional framework.

All of these grounds are nothing more than a repackaging of the original *Hurst* error. They are each based on the right to a jury trial under the Sixth Amendment and pursuant to article I, section 22 of the Florida Constitution. No additional analysis of these claims is required. Each is subject to the same *Hurst* harmless error review previously discussed and as to each additionally

asserted ground the State has met its burden to demonstrate that the error is harmless beyond a reasonable doubt.

For the foregoing reasons, it is hereby,

ORDERED AND ADJUDGED that Defendant Duane Owen's Successive Motion to Vacate Judgment of Conviction and Sentence is **DENIED.**

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida this _9th_ day of May, 2018.

JUDGE GLENN D. KELLEY
CIRCUIT COURT JUDGE

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Appendix B