IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,549

**DUANE EUGENE OWEN,**

Appellant

vs.

**STATE OF FLORIDA,**

Appellee.

MAY 3 1990

Deputy Clerk

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# SUPPLEMENTAL BRIEF OF APPELLEE

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# TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF CITATIONS | ii |
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF THE CASE AND FACTS | 2 |
| SUMMARY OF ARGUMENT | 3 |
| ISSUE | |
| THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY SENTENCING APPELLANT TO DEATH | 4 |
| ARGUMENT | 4 |
| CONCLUSION | 9 |
| CERTIFICATE OF SERVICE | 9 |

TABLE OF CITATIONS


| CASES | PAGES |
|---|---|
| Buenoano v. State, 15 FLW S196, 197 (Fla. April 5, 1990) | 7 |
| Bundy v. State, 538 So.2d 445, 447 (Fla. 1989) | 6 |
| Clemons v. Mississippi, 4 FLW Fed. S224, 225 (March 28, 1990) | 7 |
| Daugherty v. State, 533 So.2d 287, 288-289 (Fla. 1988) | 6 |
| Duest v. State, 15 FLW S41, 42 (Fla. January 18, 1990) | 6 |
| Elledge v. State, 346 So.2d 998, 1002-1004 (Fla. 1977) | 6 |
| Eutsey v. State, 541 So.2d 1143, 1145-1146 (Fla. 1989) | 6 |
| Hill v. State, 515 So.2d 176, 179 (Fla. 1987), cert. denied, 485 U.S. 993 (1988) | 6 |
| Holland v. State, 466 So.2d 207 (Fla. 1985) | 5 |
| Johnson v. Mississippi, 486 U.S. ___, 100 L.Ed.2d 575 (1988) | 3,4,6,7 |
| Miranda v. Arizona, 384 U.S. 436 (1966) | 4 |
| Owen v. State, 15 FLW S107 (March 1, 1990) | 3,4,7 |
| Owen v. State, Case No. 4-86-0732 (Fla. 4th DCA February 1, 1989) | 5 |
| Richardson v. Johnson, 864 F.2d 1536, 1540-1542 (11th Cir. 1989), cert. denied, ___U.S.___, 104 L.Ed.2d 1037 (1989) | 6 |

Williams v. State,
110 So.2d 654, 663 (Fla. 1959),
cert. denied, 361 U.S. 847 (1959) 5

STATUTES PAGES

Section 921.121(5)(b), Fla. Stat. 4,5,6

Section 921.141(5)(d), Fla. Stat. 6

Section 921.141(5)(h), Fla. Stat. 6

Section 921.141(5)(i), Fla. Stat. 6

## PRELIMINARY STATEMENT

Appellant, Duane Owen, the capital criminal defendant below, will be referred to as "appellant." Appellee, the State of Florida, the prosecuting authority below, will be referred to as "the State."

References to the thirty-two volume record on appeal will be designated "(R: )."

All emphasis will be supplied by the State.

## STATEMENT OF THE CASE AND FACTS

The State rejects the "statement of the case and facts" plus the factual assertions contained in the argument portion of the "Supplemental Brief of Appellant" filed pursuant to this Honorable Court's order of April 17, 1990 as cursory and incomplete. The State accordingly adopts the "statement of the case and facts" found at pages 2-22 of its "Answer Brief of Appellee" served on June 24, 1988, and will augment same with the information contained in the argument portion of this brief which is necessary to resolve the narrow legal issue supplementarily presented upon appeal.

## SUMMARY OF ARGUMENT

The trial judge did not reversibly violate Johnson v. Mississippi, infra, in sentencing appellant to death for the first degree murder of Georgianna Worden, despite this Court's subsequent reversal of appellant's capital adjudication and sentence for the murder of Karen Slattery in Owen v. State, infra, because the jury would have recommended and the judge imposed the same sentence in the instant case given that the aggravating factor for which the Slattery homicide was employed was proved independently by appellant's brutal attempted first degree murder of Marilee Manley; that three other aggravating factors and no mitigating factors were also proved and found; and that appellant has far from escaped the possibility of a reimposition of a death sentence for the Slattery homicide.

# ISSUE

THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY SENTENCING APPELLANT TO DEATH

# ARGUMENT

Appellant now essentially alleges that this Honorable Court's 5 to 2 reversal of his capital adjudication and sentence for murdering Karen Slattery in Owen v. State, 15 FLW S107 (March 1, 1990) (hereinafter "Owen I"), on grounds that his voluntary confession therein was nonetheless admitted in violation of Miranda v. Arizona, 384 U.S. 436 (1966), compels an automatic reversal of his capital sentence for murdering Georgianna Worden in the instant cases (hereinafter "Owen II") under Johnson v. Mississippi, 486 U.S. ___, 100 L.Ed.2d 575 (1988). Appellant tenders this argument because evidence of the factually very similar Slattery homicide was admitted for his jurors' consideration at his sentencing proceeding for the Worden homicide (R 4058-4060, 4072-4073, 4096-4111, 4122-4134), at which they recommended a capital sentence by a 10 to 2 vote (R 4356-4357, 4941), and was relied upon by Palm Beach County Circuit Judge Richard Burk to constitute one component of the aggravating factor that the Worden killing was committed by one "previously convicted of another capital felony or of a felony involving the use or threat of violence to another person" under section 921.121(5)(b), Fla. Stat. (R 4558-4565, 4951-4954).

In Johnson v. Mississippi, our Supreme Court vacated a relatively weakly justified Mississippi capital sentence wherein a prosecutorially-stressed parallel aggravating factor based solely upon evidence of a subsequently voided and perhaps unreliable New York conviction for a violent sexual offense was used in conjunction with only two other aggravating factors to offset valid mitigating criteria. The State strenuously disagrees that Johnson v. Mississippi compels a resentencing here, for three reasons.

First, evidence of the Slattery homicide was not the exclusive predicate for a finding that appellant fit the criteria of section 921.121(5)(b); the jury also received and the judge also credited extensive evidence that appellant had met this aggravating factor through his affirmed adjudications for the brutal attempted first degree murder of Marilee Manley and the burglarization of her dwelling with a dangerous weapon (R 4071-4072, 4135-4152, 4558-4565), Owen v. State, Case No. 4-86-0732 (Fla. 4th DCA February 1, 1989) (hereinafter "Owen III"). Since this aggravating factor was proved by compelling evidence totally independent of the Slattery homicide, and reliable evidence of appellant's commission of this similar homicide could have been properly admitted at appellant's trial and hence sentencing proceeding below for other purposes even if appellant had not been convicted for this crime, see Williams v. State, 110 So.2d 654, 663 (Fla. 1959), cert. denied, 361 U.S. 847 (1959) and Holland v. State, 466 So.2d 207 (Fla. 1985), the State sees no error, let alone reversible error, in the admission of the

evidence pertaining to Ms. Slattery. Compare Richardson v. Johnson, 864 F.2d 1536, 1540-1542 (11th Cir. 1989), cert. denied, ___U.S.___, 104 L.Ed.2d 1037 (1989); cf. Duest v. State, 15 FLW S41, 42 (Fla. January 18, 1990); Daugherty v. State, 533 So.2d 287, 288-289 (Fla. 1988). It is unnecessary to go further.

Second, assuming arguendo that the aggravating factor of section 921.141(5)(b) was not independently supported, the fact remains that the death sentence imposed in Owen II was also supported by three sancrosanct independent aggravating factors, and was not offset by any mitigating factors. As explained in much greater detail at pages 92-108 of its "Answer Brief of Appellee," the unmitigated Worden murder was committed by appellant during the perpetration of a burglary and a rape or attempted rape, thus fulfilling the aggravating criteria of section 921.141(5)(d), Fla. Stat.; was especially heinous, atrocious, or cruel, thus fulfilling the aggravating criteria of section 921.141(5)(h), Fla. Stat.; and was cold, calculated, and premeditated, thus fulfilling the aggravating criteria of section 921.141(5)(i), Fla. Stat. (R 4951-4954). Thus, any error in permitting the aggravating circumstance codified as section 921.141(5)(b) to be considered below would be harmless, see Bundy v. State, 538 So.2d 445, 447 (Fla. 1989); cf. Eutsey v. State, 541 So.2d 1143, 1145-1146 (Fla. 1989); compare generally Hill v. State, 515 So.2d 176, 179 (Fla. 1987), cert. denied, 485 U.S. 993 (1988) and Elledge v. State, 346 So.2d 998, 1002-1004 (Fla. 1977), collectively establishing that a remand for resentencing is not necessary every time this Court strikes one of several

aggravating circumstances, if mitigating evidence is either not present or is not compelling. As our Supreme Court recently confirmed, "the federal constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless error review." Clemons v. Mississippi, 4 FLW Fed. S224, 225 (March 28, 1990).

Third, the State would note that its motion for rehearing in Owen I remains pending before this Court, and that it will definitely seek certiorari review of that decision in the United States Supreme Court should its motion for rehearing fail. Since the State still has two options for reinstatement of appellant's capital adjudication and sentence for the Slattery homicide, the success of either of which would render appellant's claim of a Johnson v. Mississippi violation in Owen II indisputably moot; and since even if Owen I does become final in its present form the State may well retry appellant for the Slattery homicide and achieve the same result as before, thus rendering any technical Johnson v. Mississippi violation indisputably harmless, the State would submit that if this Court is unpersuaded by both of the foregoing arguments it should simply defer ruling on appellant's Johnson v. Mississippi claim and grant appellant no relief on same unless all three of the State's potential avenues for holding him capitally culpable for the Slattery homicide fail. Cf. Buenoano v. State, 15 FLW S196, 197 (Fla. April 5, 1990).

The State will close by urging this Court to speak the obvious: that this violent career criminal appellant's coldly premeditated murder of Georgianna Worden while sexually defiling her was so cruel (See "Answer Brief of Appellee," pages 2-32, 92-107) that no rational jury or trial judge would have spared his life for this crime even if they had never heard of Karen Slattery.

## CONCLUSION

WHEREFORE appellee, the State of Florida, respectfully submits that this Honorable Court must AFFIRM the dispositions under appeal.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Supplemental Brief of Appellee" has been furnished by United States mail to CRAIG A. BOUDREAU, ESQUIRE, P.O. Box 1269, West Palm Beach, Florida 33402 this 2nd day of May, 1990.

John Tied.

Of Counsel

JT:lek