Filing # 174023342 E-Filed 05/25/2023 05:01:51 PM

ACTIVE WARRANT SC2023-0732
EXECUTION SCHEDULED FOR JUNE 15, 2023, AT 6:00 P.M.

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2023-0732

DUANE EUGENE OWEN
APPELLANT

VS.

STATE OF FLORIDA
APPELLEE.

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Duane Eugene Owen, Defendant below, will be referred to as "Owen" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate records will be:

> **Direct Appeal** - "ROA" in case number 1960-68549; *Owen v. State*, 596 So. 2d 985 (Fla. 1992), *cert. denied, Owen v. Florida*, 506 U.S. 921 (1992);
>
> **Postconviction Relief Appeal** - "1PCR-R" for the record and "1PCR-T" for the transcripts case No. SC1960-92144; *Owen v. State*, 773 So. 2d 510 (Fla. 2000), *cert. denied, Owen v. Florida*, 532 U.S. 964 (2001);
>
> **Second Postconviction Relief Appeal** - "2PCR'" for case number SC01–2146 (postconviction) and case number SC2001–2476 (state habeas); *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003);
>
> **Third Postconviction Relief Appeal** - "3PCR" in case number SC2018–382; *Owen v. State*, 247 So. 3d 394 (Fla. 2018), *cert. denied, Owen v. Florida*, 139 S. Ct. 1171 (2019);
>
> **Fourth Postconviction Relief Appeal** - instant appeal - "4PCR" the instant appeal during active Death Warrant, case number SC2023-0732
>
> **Direct Appeal Record - (ROA-KS) in case number SC1960-95526** (in this Court's possession) from *Owen v. State*, 862 So. 2d 687 (Fla. 2003) (affirming Owen's conviction and sentence for first-degree murder, "attempted sexual battery with a deadly weapon … and burglary of a dwelling while armed" of 14-year old female).

Supplemental records will be identified with an "S" followed by the appropriate page number(s). Owen's initial brief will be notated as "IB."

STATEMENT OF THE CASE

Owen is under an active death warrant based on the affirmance of his 1986 conviction and sentence for the burglary, sexual assault, and first-degree murder of a Boca Raton mother, GW,[1] whose body was discovered by her children on May 29, 1984. *Owen v. State*, 596 So. 2d 985 (Fla. 1992), *cert. denied*, *Owen v. Florida*, 506 U.S. 921 (1992). He has litigated three motions for postconviction relief and their related appeals. *Owen v. State*, 773 So. 2d 510 (Fla. 2000) (finding Owen's waiver of postconviction claims/evidentiary hearing was valid), *cert. denied, Owen v. Florida*, 532 U.S. 964 (2001); *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003) (finding summary denial of successive challenge to waiver of original postconviction claims was proper); and *Owen v. State*, 247 So. 3d 394 (Fla. 2018) (rejecting claim based on *Hurst v. Florida*, 572 U.S. 92 (2016), *cert. denied, Owen v. Florida*, 139 S. Ct. 1171 (2019). Also, Owen unsuccessfully pursued habeas relief in state and federal court. *See Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003) (denying relief of habeas petition challenging

[1] The victim's initials are being used because a sexual assault was involved. Owen was also convicted of the 1984 murder of KS, attempted sexual battery with a deadly weapon or force likely to cause serious personal injury, and burglary of a dwelling while armed. *See Owen v. State*, 862 So. 2d 687 (Fla. 2003), *cert. denied*, *Owen v. Florida*, 543 U.S. 986 (2004).

appellate counsel's effectiveness); *Owen v. Sec'y for Dept. of Corr.*, 568 F.3d 894 (11th Cir. 2009) (concluding the state court properly rejected challenge to Owen's waiver of his original postconviction claims), *cert. denied*, 558 U.S. 1151 (2010). Owen now appeals the summary denial of his fourth attempt to obtain postconviction relief.

STATEMENT OF THE FACTS

The trial evidence showed that on May 28, 1984, before retiring for the evening, Stephanie Worden ("Stephanie") and her sister Kyra, said good night to their mother, GW, who was in her bedroom, sitting up in bed reading a book. GW's bedroom door, as normal, was open (ROA 3460-61). The next morning, Stephanie found her mother's door locked shut, dirt on the kitchen floor, and the kitchen window broken. After unlocking the bedroom door, Stephanie saw GW with a pillow over her head and blood in the bedroom (ROA 2803, 3462-65, 3469).

In response to Stephanie's telephone call, John Eddinger ("Eddinger"), a schoolmate's father and Boca Raton Fire Department Lieutenant, met a very frightened Stephanie who took him to her mother's room (ROA 2807-08). Eddinger noticed GW nude, lying on the bed spread-eagle, with a pillow over her head. He removed the children from the house, called 911, and awaited the first responders

(ROA 2808-10). When the paramedics arrived, GW was determined to be deceased (ROA 2811-12).

The police observed that GW was nude with a pair of underpants around her knee, a nightgown on the floor, and her head covered by a pillow and a pair of shorts. She had been traumatically beaten. A book, with Owen's fingerprint in it, was adjacent to GW's right shoulder and an old hammer with a bent nail and blood which appeared to have been wiped off was in the middle of the room. An extremely wet terrycloth garment was on the floor at the foot of the bed along with a large puddle of blood and brain matter, but GW's body was relatively free of any blood. Sneaker shoe prints in blood and mud were visible on the bed sheet in a crisscrossed pattern, as if someone had walked around on the end of the bed. A kitchen knife was found in a cabinet in the room (ROA 2822-24, 2832-33, 2834, 2922-24, 3237-38, 3249, 3259-60, 3471-73, 3500-01, 3503-3504). An extensive amount of blood splatter was observed on the wall behind and to the right of GW's bed (ROA 2832, 2920-22). A purse was on top of the dresser, with jewelry next to it. The door leading out of the master bathroom to the porch was partially open. The master bathroom was clean in comparison to the rest of the house (ROA 2834-35).

A search of the house revealed slits to the porch screening, the removal of a screen to the kitchen window and the top pane of the window smashed and bottom pane pushed all the way up (ROA 2826 2829, 2839, 3173-74, 3180-84). An exploration of the exterior of GW's home revealed shoe sole impressions on the concrete slab immediately in front of the screen door; on the edge of the torn screen; on the patio surface leading to the door; along the patio; in front of and beneath the kitchen window; and on the carpet just below the windowsill (ROA 3186-87). All the shoe impressions were similar in pattern to the ones found on the bed sheet (ROA 2922, 3187).

The wooded area of the vacant lot across the street from GW's home was searched on May 30, 1984. There, the police found a pair of grey nylon jogging shorts,[2] a pair of white tube athletic-type socks with gold and green rim around the top, and a pink washcloth with red roses design on it. This washcloth matched a washcloth found in GW's master bathroom and a towel taken from the dryer in the garage (ROA 2942, 3144, 3246-47). The tube socks matched those found in Owen's apartment (ROA 3020-3027).

[2] Mitchell Owen ("Mitchell"), Owen's brother, testified that on May 28, 1984, he saw Owen wearing "silky" grey jogging shorts, and a pair of knee-high tube socks with two or three rings on the top (ROA 2976).

Doctor James A. Benz, the medical examiner who performed the autopsy on GW, testified that the cause of death was cranial cerebral injury, which consisted of fractures of the skull and injuries to the brain. The autopsy revealed injuries to GW's head, neck, and vagina (ROA 3042-3044). The head injuries were "quite extensive," with large lacerations on the forehead. The "[u]nderlying bones "were extensively fractured" so one could "observe the brain tissue which tended to just exude out of the head through these large wounds." The left eye was "torn and collapsed." Dr. Benz observed "wounds on the right side of [GW's] head" near the ear and back of the jaw. "There were fractures of the skull involving the frontal bones, the temporal area, and the cheek bone was fractured." The injuries were caused by a blunt object of "fairly significant weight," suggesting a hammer. Bone fragments were driven into the brain and the jaw was fractured (ROA 3044-3048). Dr. Benz opined GW eventually lost consciousness from the blows, but none would have caused an instantaneous loss of consciousness; GW "did not die immediately" (ROA 3069-70). Dr. Benz found GW's hyoid bone was completely broken on the right side, and there was an incomplete fracture on the left side indicating a compressive force in the neck area. The doctor explained there was little hemorrhaging

associated with these injuries, either because the perpetrator was wearing gloves/socks on his hands or GW was still alive, but in the agonal phase of dying (ROA 3069-74).

GW also suffered vaginal injuries. Her vagina had been penetrated by a penis proven by the semen. Owen could not be eliminated as a possible contributor of that semen (ROA 3410-3415, 3447). Dr. Benz also found two large lacerations to GW's vagina which were consistent with penetration with a blunt object, such as a hammer handle (ROA 3077, 3086, 3402, 3405). Subsequent testing of the hammer handle found near her body revealed "epithelial cells" which are characteristic of vaginal secretions and consistent with the hammer having been inserted in GW's vagina (ROA 3422-23). Given the small amount of hemorrhaging in the surrounding tissue, Dr. Benz posited GW may have been near death, but still alive, when these injuries occurred (ROA 3084-85, 3092).

Sergeant Kevin McCoy ("McCoy") testified that he first met Duane Owen on the afternoon of May 30, 1984, and he was advised of his *Miranda*[3] rights (ROA 3263, 3298). While initially denying responsibility for the murder of GW, following several weeks of interrogation, Owen

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966),

"confessed to committing numerous crimes, including the present murder [of GW] and a similar murder in Delray Beach in March 1984." *Owen*, 596 So. 2d at 987. During the June 21, 1984, police interview, Owen was advised of his *Miranda* rights twice and an edited version of the tape was played for the jury (ROA 3553, 3565-66). A transcript of the edited June 21, 1984, tape appears at ROA 3582-3638.

Owen began his confession by telling the police where he threw away his sneakers, explaining that he could not keep them after leaving an impression on GW's bed sheets (ROA 3596-3599). Owen reported he drove his bike to the neighborhood, and left it hidden "near the ditch in the field" south, across the street from the house (ROA 3600). Then, he "walked around [the house], checked it out and started pulling on a few things. Because the windows were pretty locked up, he went around the back and slit the screen to the patio (ROA 3604). He recounted his extensive unsuccessful attempts to gain entry into the house through locked doors/windows, cutting of the patio screen, and his eventual successful entry through the kitchen window, and how he walked through the house (ROA 3605-13; SROA Tape Transcript 996). Owen stated he shut the door to the room where the girls were sleeping, then obtained a hammer from one of the kitchen drawers. He

described how he could not see into the kid's room from the outside because they had one side blocked up with [wood] (ROA 3610-13).

Owen said he then "snuck" into the victim's room and took her purse and stuff from the dresser to a different room to check it out, but finding no money, returned the purse to where he had found it. Owen said he saw a jar with money, and a ring and watch next to the purse (R 3614-16). Continuing, he described turning off the lamp on the dresser so if GW woke up, she could not see him (ROA 3618). Owen confessed, "I just figured I'd just go up there and rape her;" "I figured, hell, once she gets up, I was going to say, just tap her on the shoulder, and say, there's other guys in the other room that got your daughters that way she wouldn't scream." "Instead, I figured, well, hell, maybe I'll just hit her once, and then that way she'll get knocked out. So, I did." But then I just heard her scream" (ROA 3618-19). However, GW got out of bed and dove at him, so he pushed her off him, and she fell down (R 3621). He hit her more than once to put her out (ROA 3620-21).

"[W]hen she was just lying there," Owen laid down the hammer, returned GW to the bed, turned the light back on, and covered her head with a pillow and shorts (ROA 3622-25). Next, he "got a towel or something like that" and "was just wiping it down" (SROA Tape

Transcript 1018) and removed the pair of socks, drenched in blood, from his hands (ROA 3626). Owen admitted his socks had blue, green and yellow bands and "that's the only kind of socks" he had. "And that's probably how I touched that stupid book that was laying on the bed." He threw his socks in the shower and rinsed them, "wiped off the scene a little bit," and laid the cloth down somewhere (ROA 3627-28). After he "raped" GW, Owen took a shower, wrapped his socks and shorts in a washcloth, left through the side door, retrieved his bike from the wooded area, put on the pants and shirt he had there, got on his bike, and "threw the shit over." Owen "went up the road a little way and pulled between the two buildings and put [his] tennis shoes in [the dumpster]" (ROA 3632-34).[4]

Following the denial of a judgment of acquittal, (ROA 3673-3697), the defense rested, with Owen averring he did not wish to testify (R 3703-3705, 3715). The jury returned guilty verdicts on the charged counts, and Owen was adjudicated guilty (ROA 3976-3977, 3983-84).

During the penalty phase, Dr. Benz reaffirmed GW was alive during each of the five distinct blows she received to her head and was alive for a period of time after those blows were inflicted. Dr. Benz

[4] The transcripts of the unedited version of the tapes can be found at SROA 993-1027.

stated GW would have lived at least three to four minutes and could have survived for up to 30-60 minutes after suffering the strikes to her head. He explained that each blow was very painful, especially the one that collapsed and crushed GW's eyeball, and that loss of consciousness was not instantaneous even after all five blows were inflicted (ROA 4040-42). Also, GW's neck injury was very painful, but would not have caused her to lose consciousness immediately; it merely impaired her ability to breathe, causing her to feel air hunger, which is the apprehension that she could not breathe, and fearing she would die. Also, it would have impaired her ability to cry out (ROA 4043-44). Finally, the two vaginal lacerations were very painful. The lack of defensive wounds does not mean GW was unconscious (ROA 4045).

The certified copies of the indictment and Owen's conviction for the murder of KS and the attempted first-degree murder of MM were introduced (ROA 4060-62, 4071-4073). The State presented Helen Manley ("Helen") and MM.[5] Helen, MM's mother, testified that MM lived with her and MM's father on the day of the attack. Upon hearing a noise, Helen went to MM's room, found it locked, and MM not responding (ROA 4135-4137). Upon gaining access to the room, Helen found MM bloody

[5] MM's initials are being used because a sexual assault was involved.

and naked on the floor. Her right ear was torn and her head bruised; the left side of her head was very bloody. MM was hospitalized for over five weeks, suffering from brain damage. MM continues to have weakness to her right side, as well as speech and memory problems (ROA 4137-40).

MM testified that at the time of the attack, she was 19-years old, living with her parents. On February 9, 1984, her boyfriend was visiting and left around 12:30 a.m. through the sliding glass door in the bedroom. MM went to sleep wearing sweatpants, but awoke with blood in her hair, and unable to see out of her eye. She continues to have difficulty with her speech, and right hand (ROA 4142-4144).[6]

Delray Beach Police Officer Rick Lincoln, recounted Owen's confession to gaining entry to MM's property through a sliding glass door, after watching her boyfriend leave home, and to MM's rape. Before entering, Owen armed himself with a large wrench from a tow truck. When he entered, MM was sleeping. Owen locked her door, hit her on the head with the wrench, removed her clothes and raped her (ROA 4148-4149).

In mitigation, the defense called Mitchell Owen, defendant's brother. He testified about Owen's childhood and background, noting Owen was a happy child with no childhood issues until they lost their mother to cancer

[6] Owen stipulated to the facts of MM's injuries and the medical treatment she required rather than having the doctor testify (ROA 4149-4152).

when they were kids and their father started to drink heavily, and eventually committed suicide. The boys ended up in foster care. Mitchell fled the foster home, but Owen stayed. Eventually, Owen left and attended college (ROA 4153-4163).

Dr. J. Patrick Peterson, a court appointed clinical psychologist, who evaluated Owen and assisted the defense in trial preparation testified Owen could form intent, but at some point during the commission of the crime, lost that ability. While Owen was initially aware of what he was doing and intending to assault GW, but not kill her, Owen lost connection with reality; after the initial blow(s), something snapped and Owen lost that ability for the remainder of the attack. Dr. Peterson opined that the premeditated "portion of the incident was limited to the intrusion, and the assault, and the only violence that he intended was to be sufficient enough to subdue and perhaps incapacitate this victim, but at some point that initial physical contact perhaps triggered . . . like you see a shark feeding frenzy triggered by the blood feeding the water, and activity outside the rational control, and different from everything that he initially intended." (ROA 4166, 4169-4170, 4228-4229).

It was Dr. Peterson's opinion that Owen harbored severe distortional distress; a fake personality disorder, and episodic mental breakdowns

(ROA 4170-71). While Dr. Peterson felt Owen lost his ability to form intent "after the initial blow," Owen did not meet the criteria for "legally insane" (ROA 4175, 4178-79). Owen was very single-minded, with no regard for the feelings of others or the consequences of his actions. He also suffers from a severe personality disorder that is very episodic; Owen becomes unable to rationally control his actions due to his many incidences of abandonment/loss as a child (ROA 4171-72). His stepbrother died in Vietnam when Owen was nine years old; his mother died of cancer when he was ten years old; his father committed suicide a year later; and after his aunt and uncle refused to take in Owen and Mitchell, the boys were placed in foster care, experiencing rough conditions. This resulted in Owen being driven by a need to dominate and control females (ROA 4173).

Dr. Peterson found Owen had very low self-esteem/poor self-image and overcompensates by engaging in these activities. Owen enjoys creating the risk of being caught, Owen only intends to commit burglaries and assaults but after "landing the first blow" he loses control and the ability to form a homicidal intent (ROA 4173-75). Initially, Owen was a prowler, stalker, and peeping tom who enjoyed the "thrill" of getting away with it. Over time, his pattern of behavior has deteriorated leading up to these crimes. Owen, an Army veteran, maintains a fetish for the military

(ROA 4175-77). Dr. Peterson opined that at the time of these crimes, Owen was under the influence of an extreme emotional disturbance and could not conform his behavior to the requirements of the law. However, Owen was legally sane at the time of these crimes (R 4177-79).

On cross-examination Dr. Peterson recognized Owen: (1) had a good awareness and knowledge of the legal system; (2) was of average to high average intelligence; (3) suffered no mental disorder; and (4) was legally sane during the murder (ROA 4192-96). Dr. Peterson concluded that Owen knew what he was doing when prowling around the house; entering the home; procuring a hammer; and that hitting GW with the hammer would hurt or kill her. Owen knew right from wrong and understood the consequences of his actions (ROA 4196-4198, 4217-4219). Nonetheless, Dr. Peterson felt that after the first or second blow, Owen lost control; and control with reality was regained only after the aggressive part of the crime was over, and he cleaned the area (ROA 4199-4200, 4218-4219). Owen admitted to Dr. Peterson that he committed the crimes. Dr. Peterson confirmed Owen is a manipulator and thrill seeker who enjoys doing illegal activities and getting away with them. Owen's pattern of actions has escalated (ROA 4201-4207). Owen believes he is smarter than the police and enjoys the attention,

gamesmanship with the police. (ROA 4209). His criminal actions were of his own choosing, including at least the first blow with the hammer to the sleeping GW after which he lost control (ROA 4218-4219).

Owen then waived his right to testify at the penalty phase (ROA 4242-4245). The jury returned a ten to two advisory sentence of death (ROA 4356-57). The trial court found four aggravating factors: (1) Owen was previously convicted of another felony or felony involving the use of threat or threat of violence to another person; (2) crime was committed while Owen was engaged in a felony (burglary or sexual battery); (3) the crime was especially wicked, evil, atrocious or cruel ("HAC"); (4) cold, calculated, and premeditated ("CCP") (ROA 4951-4953). The trial court detailed all of Owen's offered mitigation, but found the aggravation clearly and convincingly outweighed any mitigation, and agreed with the jury in sentencing Owen to death for the murder of GW (ROA 4953-55).

Direct Appeal

Although represented by counsel, Owen was permitted to file a *pro se* brief. Together he raised 13 claims all of which were rejected.[7] On

[7] Through counsel and based on his *pro se* pleading, Owen raised: (1) "his convictions for murder and sexual battery were improper because the victim was dead prior to sexual union"; (2) "police lacked sufficient grounds for stopping and arresting him;" (3) "his statements to police were obtained through psychological coercion:" (4) the jury was "death qualified" and

October 13, 1992, the United States Supreme Court denied certiorari. *Owen v. Florida*, 506 U.S. 921 (1992).

Original Postconviction Litigation

Between 1986 and 1997, Owen litigated his original postconviction challenge amending his motion four times. The trial court granted an evidentiary hearing on five claims: (1) guilt phase counsel rendered ineffective assistance by failing to provide mental health experts with information necessary to conduct an accurate competency exam; (2) guilt phase counsel was ineffective for failing to mount an insanity or other defense and failing to call any witnesses; (3) attorneys Don Kohl ("Kohl") and Barry Krischer, ("Krischer") failed to disclose to Owen various conflicts of interest; (4) penalty phase counsel was ineffective for failing to investigate and present statutory and non-statutory mitigating evidence and by presenting only one (minor) witness; (5) trial counsel was

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"conviction prone;" (5) "his Fifth amendment rights were violated when police failed to act on his request to speak with an assistant state attorney concerning charges that were to be filed against him" (*pro se* brief); (6) "his due process rights were violated when police failed to videotape every occasion when he was interviewed by police" (*pro se* brief); (7) "his confession to [GW's] murder was obtained in violation of his Sixth Amendment right to counsel" (*pro se* brief); (8) error for judge to hear "victim impact" testimony; (9) Florida capital sentencing scheme is unconstitutional; (10) error to use the KS murder conviction as a prior violent felony; (11) error to find the aggravator during the course of a felony/sexual battery and burglary; (12) error to find HAC; (13) error to find CCP. *See Owen*, 596 So. 2d at 987-90, and fn. 9

ineffective in failing to raise various issues. The trial court provided Owen the opportunity to perfect several additional claims following the review of over 4000 pages of material given to him by the prosecutors in the KS murder trial in case number 84-4014. Those claims included potential: (1) juror misconduct; (2) newly discovered evidence; (3) *Brady v. Maryland*, 373 U.S. 83 (1963) claim; (4) *Johnson v. Mississippi*, 486 U.S. 578 (1988) claim; and (5) any information found in Krischer's file (1PCR-R 710-14, 717-719, 772-73, 1515-1516). *Owen*, 773 So. 2d at 512 n. 4.

At the start of the evidentiary hearing, Owen expressed a concern that because the retrial in the 84-4014 case was pending, he did not want to divulge any privileged information concerning that case, therefore, he asked for either an indefinite continuance of the postconviction proceedings or that the privileged communications from the 84-4014 case be protected. The trial court granted the later request and ordered Owen to proceed with the evidentiary hearing. After calling only one witness, Barry Krischer former counsel in the KS trial/case number 84-4014, Owen refused to proceed any further with the evidentiary hearing, alleging that his right to maintain the attorney client privilege in the 84-4014 case was "at risk." The court sought clarification from Owen as to when he would be ready to resume the evidentiary hearing in the GW murder case number

84-4000. Owen's postconviction counsel, referencing case 84-4014 stated, "[w]hen his conviction is final, when his petition has been denied and he no longer has any relationship with his trial attorney" (1PCR-T 861). Following extensive argument, including the state's concern counsel's answer was vague and offered no insight to assist the judge, the court ordered Owen to proceed or the court was prepared to deny the motion. Following a colloquy with Owen and his refusal to proceed, the trial court denied the postconviction motion. *Owen*, 773 So. 2d at 513.

Original Postconviction Appeal

On appeal, Owen asserted: (1) the trial court erred in finding his refusal to proceed was a valid waiver; the summary denial was improper; (2) the trial court should have conducted a *Faretta v. California*, 422 US 806 (1975) hearing when Owen opted not to proceed with the evidentiary hearing; and (3) the trial court erred in summarily denying the remaining sixteen postconviction claims.[8] Of import here, this Court affirmed the trial

[8] (3) trial counsel was ineffective and suffered a conflict of interest; (4) HAC instruction improper under *Espinosa v. Florida*, 505 U.S. 1079 (1992); (5) "during the course of a felony" instruction was improper; (6) "avoid arrest" instruction was improper; (7) "prior violent felony" instruction was improper; (8) CCP instruction was improper; (9) details of prior violent felonies were improperly admitted in penalty phase; (10) Kirscher was ineffective during suppression hearing; (11) penalty phase instructions shifted burden of proof to Owen; (12) penalty phase jury was improperly instructed concerning its role violating *Caldwell v. Mississippi*, 472 U.S. 320 (1985);

court's denial of relief and found that Owen had waived his ineffectiveness claims and conflict of interest claims for the GW case. *Owen*, 773 So. 2d at 514-15. Certiorari was denied. *Owen v. Florida*, 532 U.S. 964 (2001).

First Successive Postconviction Motion

On June 29, 2001, Owen filed a *pro se* successive motion for postconviction relief. In the first three issues, Owen repackaged his claims challenging his waiver of the evidentiary hearing on his initial collateral motion. Under the guise of three claims of ineffective assistance of ***postconviction*** counsel, Owen claimed counsel should not have advised him to waive the evidentiary hearing (2PCR 2-36). *See Owen*, 854 So. 2d at 187 n. 4. In his fourth claim, Owen alleged a *Brady* claim as the State withheld exculpatory evidence consisting of the "steno notes" of his therapist, Linda Burkholder.[9] Following the state's response, the trial court summarily denied the motion finding it to be successive, untimely, and an abuse of process (2PCR 248).

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(13) prosecutor made inflammatory closing argument remarks; (14) jurors should have been polled; (15) error to deny change of venue; (16) Florida's capital sentencing statute is unconstitutional; (17) video of the crime scene was unduly prejudicial; (18) cumulative errors deprived Owen of a fair trial.

[9] In 1983, Owen was receiving therapy from Ms. Burkholder, and she took notes of the sessions. Those notes, Owen claimed were in the state's possession and never turned over to him (2PRC 19-19, 35-36).

Appeal of Successive Postconviction Motion

On appeal, Owen was represented by counsel.[10] Of import here, Owen asserted it was error to deny him an evidentiary hearing on his claim that postconviction counsel rendered ineffective assistance and suffered under a conflict of interest as it pertained to his decision to waive the original postconviction claims.[11] *See Owen*, 854 So. 2d at 187, fn. 4. This Court affirmed. *Id*. at 188; upheld the summary denial of his *Brady* claim finding it insufficiently pled. *Id*.; and rejected the need for attachment of record to the summary denial order because the motion was denied as successive and insufficiently pled. *Id*

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[10] Capital Collateral Counsel - Middle ("CCRC-M") was the successor agency to Capital Collateral Representative which had represented Owen during the original postconviction case until CCRC-M took over.

[11] In his successive postconviction appeal, Owen asserted:

> . . . (3) whether the trial court erred by finding that Owen's claim of actual innocence was procedurally barred; (4) whether the trial court erred in summarily denying Owen's claim that the State withheld evidence in violation of *Brady…*; and (5) whether the trial court's order denying Owen's *pro se* postconviction motion was inadequate because it did not contain record attachments or specify what information contained in the court file was considered by the trial court in reaching its decision.

Owen v. Crosby, 854 So. 2d 182, 188, fn. 4 (Fla. 2003).

State Habeas Petition

In his related state habeas petition, Owen raised seven claims of ineffective assistance of appellate counsel and challenged the constitutionality of Florida's death penalty statute.[12] All relief was denied. *Owen*, 854 So. 2d at 188-194, n.7; 10, and 14.

Federal Habeas Corpus Petition and Appeal

On December 15, 2003, Owen filed a federal habeas petition raising 19 claims. *Owen v. Crosby*, 2007 WL 9719051 (S.D. Fla. September 6,

[12] In his state habeas petition, Owen claimed appellate counsel was ineffective for failing to raise and argue: (1) "Owen was denied a fair trial because of the admission into evidence of statements he made during plea negotiations with the State;" (2) "the venire from which the jury was selected in Owen's trial was unconstitutional because it excluded African Americans;" (3) "trial court should have declared a mistrial or struck Officer Kevin McCoy's improper statement;" (4) "Owen was denied due process of law because the trial judge was biased toward the State and should have recused himself;" (5) "court's denial of Owen's jury instruction on the difference between sexual battery and vaginal penetration of a deceased individual killed prior to any sexual contact;" (6) "sufficiency of the State's evidence used to prove the aggravators and failed to argue that the trial court did not properly consider all of the mitigation in favor of Owen;" (7) Owen's sentence on the noncapital cases is illegal because his offenses predated the effective date of the sentencing guidelines used; (8) "controlling authority on the issue of whether Owen's confession was involuntary;" (9) whether Florida's capital sentencing statute as applied is unconstitutional; (10) whether Owen's Eighth Amendment right against cruel and unusual punishment will be violated because he may be incompetent at the time of execution; and (11) "this Court erred by not appointing conflict-free counsel for Owen's direct appeal." *See Owen*, 854 So. 2d at 188.

2007). The federal district court denied Owen habeas relief in a very detailed order at *Owen*, 2007 WL 9719051 at *12-20.

Owen appealed to the United States Circuit Court for the Eleventh Circuit and raised fourteen claims.[13] The denial of federal habeas relief was affirmed. Of import here, the federal circuit court upheld the state courts' determination that Owen waived his opportunity to litigate any of the claims for which he was granted an evidentiary hearing in his initial postconviction motion. *Owen*, 568 F.3d at 908-912. After its extensive findings and analysis, that court recapped its conclusions as follows:

> In sum, Owen refused to avail himself of the opportunity to present at least some evidence at the [GW] 3.850 evidentiary hearing. Instead, he took the position, even after obtaining an order from the 3.850 court protecting privileged information, that the mere existence of the attorney-client privilege in the [KS] case absolved him of any need to try and prove anything at the Worden 3.850 hearing. Owen did not present any evidence about the [GW] case or show how the [KS] privilege prevented him from presenting any evidence. The state courts' finding of waiver is supported by evidence and constitutes an independent and adequate state procedural ground that precludes federal review.FN18 We are left with nothing but speculation and conjecture as to whether cause and prejudice

[13] (1) five ineffective-trial-counsel claims that the state collateral court found procedurally barred because Owen refused to proceed at evidentiary hearing; (2) one ineffective-appellate-counsel claim that the state collateral court found procedurally barred as it was insufficiently pled; (3) three ineffective counsel claims that the state collateral court found procedurally barred as they were raised and litigated on state direct appeal; and (4) five claims that the district court denied on the merits. *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 899 (11th Cir. 2009).

exist.FN19 That is not enough to excuse Owen's procedural default.

> FN18 The record belies Owen's argument that Owen's waiver of his 3.850 claims was invalid because he did not fully understand the consequences of his decision not to proceed at the evidentiary hearing. The 3.850 court directly addressed Owen at the hearing and informed him that if he did not proceed with the hearing, the court would deny Owen's 3.850 motion and that if the denial was upheld on appeal, "that's the end of the case, 84-4000 [GW case], insofar as any appellate rights." Owen answered that he did not understand the legal procedure, but stated, "I understand what the Court has just said." On this basis, the Florida Supreme Court found that "collateral counsel and Owen jointly made the strategic decision to end the evidentiary hearing." *Owen* [ ], 773 So.2d at 515. This finding is reasonable and amply supported by the record.
>
> FN19 Indeed, Owen was re-tried for [KS's] murder in 1999, was convicted, and had his conviction affirmed by the Florida Supreme Court on direct appeal in 2003. The United States Supreme Court denied Owen's certiorari petition in 2004. Yet, despite the passage of five years since Owen's direct appeal from the [KS] retrial concluded, he still has not come forward with any specific evidence in support of his [GW] claims that the attorney-client privilege in the [KS] case prevented him from presenting at the 3.850 evidentiary hearing.

Owen v. Sec'y for Dept. of Corr., 568 F.3d 894, 912 (11th Cir. 2009).

THIRD MOTION FOR POSTCONVICTION RELIEF

In his third postconviction challenge filed in January 2017, Owen

alleged entitlement to a new sentencing phase based on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Hurst v. Florida*, 572 U.S. 92 (2016) (3PCR 17-50). The trial court summarily denied relief finding the claim procedurally barred as "*Hurst, supra*, was not entitled to retroactive application under *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) (3PCR 202-04). Owen appealed and this Court affirmed the summary denial. *Owen v. State*, 247 So.3d 394 (Fla. 2018), *cert. denied, Owen v. Florida*, 139 S. Ct. 1171 (2019).

FOURTH POSTCONVICTION MOTION

On May 9, 2023, the Governor signed Owen's death warrant and the following day, this Court issued a scheduling order which directed that all proceedings in the state trial court be completed by May 19, 2023. The parties litigated public records issues on May 16, 2023, and the next day, Owen filed a successive postconviction motion pursuant to Rule 3.851 F. R. Crim. P. raising two issues: (1) Owen was denied due process when the postconviction court failed to stay Owen's evidentiary hearing or conduct a proper inquiry before allowing Owen to waive his constitutional rights, and as a result no jury or court ever considered all of the compelling and weighty mitigation in this case; and (2) newly discovered evidence regarding Owen's brain damage, declining mental condition, and

competency (4PCR 311-44). The State responded (4PCR 1012-30) and a Case Management Hearing was held.

On May 19, 2023, the trial court summarily denied Owen's first claim which raised a due process violation arising from the waiver of his original postconviction evidentiary hearing. The claim was found "procedurally barred and untimely" as the issue had been raised and rejected on appeal and it had been more than 20 years since Owen first became aware of the issue. (4PCR 2078-80). The second claim was also denied. The court found Claim Two "procedurally barred as the issues therein were previously raised and waived by the Defendant. Further, this Court also finds Defendant's claims of newly discovered evidence of brain damage, competency and mental health to be untimely as the record conclusively shows these issues were known to defense counsel more than 20 years ago" (4PCR 2080-83). Owen appealed.

SUMMARY OF THE ARGUMENT

Issue I - The trial court properly concluded that Owen's attempt to relitigate his 1997 waiver of his evidentiary hearing and postconviction claims was procedurally barred and untimely where no newly discovered evidence was offered to overcome those bars and this Court had rejected these challenges previously. *See Owen*, 854 So. 2d at 187; *Owen*, 773 So. 2d at 515.

Issue II - The postconviction court correctly rejected Owen's claim of alleged newly discovered evidence regarding brain damage and competency. First, the claim is procedurally barred because it was raised in the initial motion for postconviction relief. Second, to the extent it was never raised previously, it is untimely as it was known for approximately the previous 25 years.

Owen's allegation that he has a declining mental condition which bars his execution is not yet ripe for review. Owen states in the Initial Brief he intends to seek relief pursuant to Fla. R. Crim. Pro. 3.811 should the Governor decide that Owen is sane to be executed. Consequently, Owen is not entitled to relief on this claim.

ARGUMENT

ISSUE I

THE SUMMARY DENIAL OF OWEN'S SUCCESSIVE POSTCONVICTION MOTION RECHALLENGING HIS 1997 WAIVER OF HIS ORIGINAL POSTCONVICTION LITIGATION WAS PROPER AS THE CLAIM IS PROCEDURALLY BARRED AND UNTIMELY (restated)

In seeking review of the summary denial of his latest postconviction challenge to his 1997 decision to waive the evidentiary hearing and postconviction claims, Owen essentially seeks rehearing of this Court's decisions in, *Owen*, 854 So. 2d at 187; *Owen*, 773 So. 2d at 515 rejecting challenges to that waiver (IB 24-25). Owen also suggests manifest error will result if he does not obtain relief (IB 29). This Court should decline to revisit its prior decisions and find that the trial court correctly found the instant challenge untimely, procedurally barred, and meritless based of those prior reviews. Moreover, Owen has received a constitutional review of his conviction and sentence and the denial of relief here does not establish manifest injustice. A review of the record supports that ruling and this Court should affirm.

Standard of Review

In *Hunter v. State*, 29 So.3d 256, 261-62 (Fla. 2008) this Court recognized: "Rule 3.851(f)(5)(B) permits the denial of a successive

postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *See also, Long v. State*, 183 So. 3d 342, 344–45 (Fla. 2016). This Court reviews the summary denial of a post-warrant 3.851 motion *de novo*. *See Dillbeck v. State*, 357 So. 3d 94, 98 (Fla. 2023); *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009). It is proper for a postconviction court to summarily deny postconviction claims that are untimely, not retroactive, procedurally barred, not cognizable, or meritless as a matter of law. *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020) (affirming summary denial of an untimely claim); *Bogle v. State*, 288 So. 3d 1065, 1069 (Fla. 2019) (affirming summary denial of a successive postconviction claim on non-retroactivity grounds); *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021) (holding a court may summarily deny a procedurally barred claim); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (holding the circuit court properly summarily denied relief on purely legal claims); *Owen v. Crosby*, 854 So. 2d at 188 (explaining Owen failed to establish his successive motion was predicated on newly discovered evidence; therefore, he could not overcome the procedural bar attached to his motion).

Trial Court's Ruling

In the proceedings below, Owen presented a third attempt to

overcome the finding made by this Court 23-years ago, that his previous waiver, jointly made with his postconviction counsel in 1997, was constitutionally sound. Finding that the claim had been raised previously and rejected, the postconviction court, here, found the claim to be procedurally barred and to the extent not previously raised, untimely (4PCR 2079-80). In conclusion the postconviction court noted the following:

> Finally, this Court feels compelled to briefly note the history of this [sic] postconviction matter. Defendant has raised these issues or those of similar ilk multiple times and they have been rejected in state and federal court each and every time. *Owen v. State*, 773 So. 2d 510 (Fla. 2000) *cert denied, Owen v. Florida*, 532 U.S. 964 (2001); *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003); *Owen v. Sec'y for Dept. of Corr*. 568 F.3d 894 (11th Cir. 2009), *cert. denied, Owen v. Florida*, 558 U.S. 1151 (2010).

(4PCR 2082-83)

Merits

As detailed below, the procedural history of this claim warranted summary denial of relief. *See Gaskin v. State*, ___So. 3d ___ 2023 WL 2799414 *3 (Fla. April 6, 2023) (upholding summary denial of successive postconviction motion during active warrant as issue regarding ineffectiveness of trial counsel was previously litigated and even though information was not previously considered by his expert it does not overcome the procedural bar); *Dillbeck*, 357 So. 3d at 99-100 (Fla. 2023)

(rejecting claim during an active warrant that "reasonable efforts" satisfies the due diligence requirement; simply because a potential witness is not mentioned by name in police reports, diligent counsel would investigate further); *Rodgers v. State*, 288 So. 3d 1038, 1039-1040 (Fla. 2019) (rejecting claim of newly discovered evidence simply because symptoms previously known, but repackaged with a new diagnosis is not newly discovered evidence); *Asay v. State*, 210 So. 3d 1, 23 (Fla. 2016) (stating that merely "obtaining a new expert to review the same records does not create newly discovered evidence" and explaining that obtaining a new expert to review the same report does not "convert" the old report or the expert's new report into newly discovered evidence (citing *Howell v. State*, 145 So. 3d 774, 775 (Fla. 2013))); *Marek v. Singletary*, 626 So. 2d 160 (Fla. 1993) (precluding review of issue raised in a successive collateral motion as same was previously raised and rejected in first motion for postconviction relief); *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995) (finding it inappropriate to use a different argument to relitigate issue previously raised and rejected on appeal).

At the commencement of his 1997 evidentiary hearing, Owen requested a stay of those proceedings premised on *Simmons v. United States*, 390 U.S. 377 (1968). Owen alleged he was unfairly being forced to

choose between his right to a postconviction challenge in this case involving the murder of GW, and his right to protect the attorney-client privilege in the pending re-trial case for the murder of KS. This Court rejected his claims on the merits. *See Owen*, 773 So. 2d at 515 (finding Owen's waiver of his scheduled evidentiary hearing was valid as Owen failed to proceed in good faith).

Owen further argued on appeal that the postconviction court erred in not conducting a *Farretta* hearing to ensure that he knew the consequences of his refusal to go forward. This Court likewise rejected that claim *Id.* at 515 (finding Owen "freely chose to be represented by counsel", he "registered no objection to counsel's performance" and "Owen jointly, with counsel" made the strategic choice to end the proceedings.) (emphasis in the original).

In a successive postconviction motion, Owen again attempted to invalidate his previous waiver. He argued that his collateral counsel was operating under a conflict of interest and, therefore, the advice to not proceed with the evidentiary hearing was faulty and the result of ineffective assistance of postconviction counsel.[14] This Court found the repackaged

[14] In addition to the procedural bar, Owen's claim is legally without merit. *See Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005) (explaining under Florida law, there is no constitutional right to effective collateral counsel);

claim procedurally barred and upheld the trial court's summary denial. *Owen*, 854 So. 2d at 188.

Now, on the eve of his execution, Owen presented a third state challenge to the validity of his previous waiver, this time, one predicated on the prior postconviction court's error in refusing to stay the proceedings until after the re-trial of his other capital case, first-degree murder of KS in case number 84-4014. (4PCR 311-37). Also, he argued below, and again here, that he has never been properly advised of the consequences of his actions at the time of his waiver in 1997. (4PCR 321-26) In summarily denying relief, the lower court found the latest postconviction relief motion to be procedurally barred, as it was raised and rejected previously (4PCR 2079-80).[15] The postconviction court's summary denial must be upheld.

Barwick v. State, __So. 3d __, 2023 WL 3151079 (Fla. April 28, 2023) (reaffirming during active death warrant, that a claim of ineffective assistance of postconviction counsel does not provide a valid basis for relief).

[15] In 1997, the postconviction court warned Owen of the consequences of his waiver. On appeal, that waiver was found valid by this Court. *Owen*, 773 So. 2d at 515. When his second challenge to the waiver was summarily denied in 2001, this Court explained that in order to overcome the procedural bar Owen must present newly discovered evidence, but he failed to do so there. *Owen*, 854 So. 2d at 187 (rejecting Owen's attempt to relitigate the validity of his prior waiver as he presents no new fact to overcome the procedural bar). Regardless of these prior warnings, Owen again has failed to present any new evidence in support of his latest challenge to the 1997 waiver.

Marek, 626 So. 2d at 160 (repackaging claim denied previously in postconviction proceeding is barred; *Gaskin*, 2023 WL 2799414 at *3-4 (upholding summary denial of successive postconviction motion during active warrant as issue regarding ineffectiveness of counsel was previously litigated and even though information was not previously considered by his expert it does not overcome the procedural bar).

In further support of his claim that the postconviction court unreasonably denied his motion to stay the proceedings in 1997, Owen now claims that the stay requested for the GW postconviction proceedings, was to be for a limited time, i.e., until the re-trial in the KS case had been completed (IB 22-23). That is utterly false, as Owen refused to advise the court as to when the stay could be lifted. Instructive is the following exchange:

> COURT: I will try, and I will try to make it clearer when I ask it the second time. Is there a point in time in your perception of it that it will; ever come to pass that there may be a waiver of the attorney/client insofar as a 3.850 is concerned?
>
> COUNSEL: Specifically, in this case, if we didn't have [KS].
>
> COURT: I didn't ask you if we didn't have; we do. At what point in time would it ever occur that the attorney/client privilege would be waived?
>
> COUNSEL: I think once [KS] is disposed of Mr. Owen won't have that conflict.

> COURT: What do you mean disposed of, he goes to the electric chair?
>
> COUNSEL: No, when his conviction is final, when his petition has been denied and he no longer has any relationship with his trial attorneys.

(1PCR-T 860-861).

Counsel's vague answer offered no assistance in the court's determination of whether to grant the stay or reaffirm that the attorney-client privilege in the KS case remained sacrosanct pursuant to a protective order. Based on counsel's response, Owen clearly was seeking an ***indefinite stay and one over which he had complete control*** when or if ever it would be lifted.[16] Based on Owen's position, the court ordered Owen to move forward with the hearing while ensuring that the protective order was still in place. To be clear, Owen never asked for a limited stay of the postconviction proceedings only until the re-trial was completed. His attempt to portray the court's decision as unreasonable must fail. The record demonstrates that Owen requested an indefinite stay or a protective order regarding the attorney-client privilege in the 84-4014 case. The trial court reaffirmed the ***imposition of the protective order*** and ordered Owen to proceed. The fact Owen chose not to litigate his postconviction

[16] Such as a situation might arise where Owen never waives his attorney-client privilege - where he does not file a rule 3.851 in the KS case, and does not challenge Krischer's effectiveness directly.

claims is not an "error" that can be attributed to the lower court.

In summary, Owen has not overcome the factual findings made by this Court and reaffirmed by the Eleventh Circuit Court of Appeals, that he never proceeded in good faith when given the opportunity to present his claims. *Owen*, 773 So. 2d at 514; Owen, 568 F.3d at 905. The hearing transcripts from the 1997 postconviction proceedings make it abundantly clear Owen never intended to make a good faith to effort to move forward with his claims. The strategy was to present Krischer alone to demonstrate that "the privilege was not waived" and to rest on that strategy in hopes of obtaining a stay from this Court in the subsequent appeal (1PCR-T 807, 813, 857-859). In the instant proceedings Owen has failed to present any newly discovered evidence to refute the previous appellate findings. The postconviction court's summary denial entered here must be upheld. *See Owen*, 854 So. 2d at 187-88 (rejecting Owen's attempt to relitigate the validity of his prior waiver as he presents no new fact to overcome the procedural bar); *Gaskin*, 2023 WL 2799414 at *3-4 (affirming summary denial of successive claim that was procedurally barred having been raised and rejected previously).

The postconviction court also found in the alternative, that even if this claim had not been previously addressed, the facts upon which it is

predicated have been known to Owen since at least 1997 (4PCR 2079-80). Appended to the court's order is Owen's December 8, 1997, Fourth Amended Motion to Vacate Judgments of Conviction and Sentence (4PCR 2085-2286) wherein Owen presented at least five claims solely devoted to the facts he alleges in these proceedings. In 1997, Owen was granted an evidentiary hearing on five claims in which he asserted trial counsel, Craig Boudreau and Don Kohl, rendered ineffective assistance of counsel in the guilt and penalty phases of the trial. These claims entailed: (1) failing to present a myriad of Owen's alleged mental health conditions (outlined below); (2) failing to bring before the jury multiple mental health diagnoses to support a claim of incompetence to proceed to trial; (3) failing to present an insanity defense; (4) failing to offer additional areas of mitigation; and (5) that counsel was operating under a conflict of interest and failed to interview both expert and lay witnesses. (1PCR-R 1399-1463) The array of mental health and mitigation issues known 25 years ago include: (1) evidence of insanity and the inability to form specific intent; (2) psychosis; (3) his delusional and motivational belief that the crimes he committed would turn him into a female; (4) his attention deficit disorder; (5) organic brain damage in the frontal lobe; (6) gender identity issues; (7) the possibility Owen possesses an extra chromosome resulting in the ideation

that he was a woman; (8) his criminal pattern was escalating; (9) his juvenile delinquency could be attached to his organic brain damage; (10) his admissions to law enforcement and Dr. Peterson that he was a transsexual and enjoyed wearing women's clothes; (11) that he believed he was a woman and was uncomfortable as a man; (12) he possesses a bizarre sexual interest; (13) he enjoys exposing himself; (14) Owen was sexually and physically abused at an orphanage; (15) his parents were severe alcoholics; (16) his mother had multiple bad marriages; (17) he suffered neglect and abuse from his parents; (18) both parents died when he was young; and (19) the overall issue of abandonment as the result of his parents' deaths. Owen also alleged trial counsel failed to obtain medical records, school records, and records from the orphanage where Owen and his brother lived, in support of the specific factual claims. (1PCR-R 1399-1463; 4PCR 326-37).

The lower court properly determined that because the evidence had been known to Owen for almost a quarter century it did not qualify as newly discovered evidence. Relief was denied properly. *See Marek v. Singletary*, 626 So. 2d 160 (Fla. 1993) (precluding review of issue raised in a successive collateral motion as same was previously raised and rejected in first motion for postconviction relief); *Gaskin*, 2023 WL 2799414 at *3-4

(refusing during an active death warrant, to address issue previously litigated in prior postconviction proceedings); *Dillbeck*, 357 So. 3d at 99-100, (refusing to address claim during active death warrant because defendant failed to satisfy due diligence requirement); *Harvey*, 656 So. 2d at 1256 (finding it inappropriate to use a different argument to relitigate issue previously raised and rejected on appeal); *Zeigler v. State*, 632 So. 2d 48, 51 (Fla. 1993) (same); *Preston v. State*, 564 So. 2d 120, 123 (Fla. 1990) (same).

Finally, Owen claims that if the jury in this case had been presented with this evidence outlined in his instant motion, an "insanity defense would have been likely," and at the very least, "he would not have received a sentence of death." Without an evidentiary hearing and consideration of this evidence in this case, manifest injustice will result (IB 30-50). The complete and utter fallacy of this assertion is exposed fully by the fact that this identical evidence was presented to his jury in the re-trial proceedings in the KS case, with the result of a guilty verdict on all charges and a death recommendation. Owen received his second death sentence. There the trial court found:

> 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 sixteen non-statutory mitigating factors.

Owen v. State, 862 So. 2d 687, 690, 697-702 (Fla. 2003).

Owen's rendition of his penalty phase presentation in this brief, for obvious reasons, does not include the extent to which the doctors' opinions in the KS re-trial were challenged and discredited. For instance, the existence of Owen's disorder was premised exclusively on his ***self-report*** that he suffers from a delusional belief that he is a woman.[17] This suggested delusion motivates Owen to capture the "female essence" of his victims, which can only occur during sex with them while they are

[17] In fact, it was Owen who wrote to Dr. Berlin, rather than his then-current expert, Dr. Sultan, or his lawyer. He told Dr. Berlin he had a court case, and was interested in gender identity disorders after he read the doctor's article on sexual disorders (ROA-KS 5337).

"unconscious" or near death. This alleged delusion formed the basis of his doctors' opinions that he suffers from schizophrenia, and therefore, was insane at the time of the murder (ROA-KS 5346, 5426, 5383, 5352, 5979-5982, 5985-5987, 5514, 5997, 5592, 6000). The jury at the re-trial for the murder of KS, rejected unanimously this guilt phase defense.

Defense experts, Dr. Berlin and Dr. Sultan, stated that Owen was consumed with becoming a woman (ROA-KS 6637, 6675, 6547 6564, 6656, 6559, 6562, 6564). They relied almost exclusively on Owen's self-reported delusion in support of their opinions, conceding that if the delusion were fabricated by Owen, there was no basis to opine that he had any psychosis (ROA-KS 5350, 5368). Both doctors admitted that Owen's delusion was not directly corroborated by any other testing, and they acknowledged that he never told the police during his detailed and protracted statements involving all his crimes, that he suffered from this delusional disorder (ROA-KS 6661, 6553). His doctors found the delusion existed because of Owen's history of sexual activity at a young age with males and females; that as a teenager in the 1970s he liked to wear his hair long; his pattern was to commit sexual assaults after his victims were incapacitated; and from "1994-1999" Owen was consistent in his description of his delusion (ROA-KS 5494, 5350, 5562).

The bias of Owen's doctors was palpable. For instance, both were intractable in their opinions that Owen was telling them the truth but lied during police confessions. In fact, the doctors admitted believing everything Owen told them that supported the "delusion" they "found" and disbelieved anything Owen may have said that contradicted it. Also, Doctors Berlin and Sultan discounted the idea that Owen could have an anti-social personality disorder and not a delusion. The basis given for rejection of anti-social personality disorder was that Owen did not steal anything from his victims during the crimes and he was not a rapist because he did not have sex with them until they were unconscious.

Dr. Sultan steadfastly refused to let the objective facts get in the way of her defense friendly opinion that Owen suffers from this delusion. Although psychologist Dr. Barry Crown, another defense expert, unequivocally stated that Owen knew right from wrong, Dr. Sultan, in complete disagreement with Dr. Crown, testified that Owen could not appreciate the criminality of his actions. Even so, she was unable to explain away Owen's deliberate plan and pre-planned actions done to evade apprehension.[18] Remarkably, Dr. Sultan testified that Owen never

[18] *See Owen*, 862 So.2d at 700 (finding CCP based on changing clothes, blocking door to children's room, socks on his hand, taking shower after

intended to hurt KS[19] in spite of her being in great pain after being stabbed eighteen times and drowning in her own blood. Dr. Sultan also testified that Owen worshipped women, even though he had been convicted of extremely violent and depraved atrocities against six females ranging in age from fourteen to thirty-eight. All his female victims were home, and vulnerable as most were sleeping when Owen viciously attacked them.

Owen's final expert, Dr. Crown, testified that Owen has organic brain damage, which impairs his ability to stay focused, causes him to be compulsive, and causes undue stress in certain situations (ROA-KS 6502, 6520). Consequently, Dr. Crown found Owen was under extreme mental and emotional disturbance at the time of the killing even without speaking to Owen or viewing any of his video-taped police confessions (ROA-KS

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rape/murder, changing the clocks in his apartment, and purposely asking his roommate the time for the purpose of providing an alibi).

[19] Owen explained to his re-trial doctors that he was required to instill as much fear as possible in his victims to successfully capture their "female" essence. This notable facet of the delusion to which, Dr. Sultan opines exists, completely belies Dr. Sultan's other opinion that Owen never intended to hurt KS. In sentencing Owen to death for KS's murder, the trial court found "***Defendant desired to inflict pain and fear*** on [KS] 'to increase the flow of her female bodily fluids which he needed for himself.'" *Owen*, 862 So. 2d at 698 (emphasis supplied). Further undermining Dr. Sultan's suggestion that Owen did not intend to hurt his victims is Dr. Eisenstein's May 16, 2023, report. In it, Dr. Eisenstein stated that Owen admitted he "had to have intercourse with [his victims] the moment they expired. (4PCR 788-91). Clearly, if Owen knows he needs to kill his victims, he knows he is inflicting pain as he bludgeons GW and stabs KS.

6502). Based on his review of the records, Dr. Crown admitted Owen understood the nature and consequences of his actions and was responsible for his behavior (ROA-KS 6525). The doctor conceded that Owen had the ability to plan and did plan and premeditate the murder; he covered up his actions; and concocted an alibi (ROA-KS 6522-6523).

Owen's mental health experts were further challenged through the rebuttal testimony of the State's mental health experts, Dr. Waddell, a psychologist, and Dr. Cheshire, a psychiatrist (ROA-KS 5678-5888, 6724-6796). Both opined that Owen was not and had never been schizophrenic; Owen was sane at the time of the murder. The State's experts found Owen's claim of delusion to be fabricated and concocted simply as a defense for trial[20] (ROA-KS 5834, 5850-5851). The facts of Owen's confessions show he knew what he was doing; he intended to rape and kill KS; he knew that his behavior was wrong; and he took steps to avoid detection. Owen is a sociopath and has an anti-social personality (ROA - KS 5717-5719, 5834-5837).

The basis for Dr. Waddell's rejection of Owen's alleged delusion was very explicit. He explained to the jury that schizophrenia is a very serious

[20] Although unknown to the KS jury, but relevant for this Court, Owen never presented this defense of a delusional belief system at either phase of his first trial for the murder of KS; nor at his trial for the murder of GW.

and devastating illness and Owen did not exhibit any collateral symptoms nor demonstrate any serious emotional maladjustments in his videotaped confession. Dr. Waddell noted that in the 14 years since the murder there were no reports or indications from any mental health professional that Owen exhibited any psychotic behavior/disorder. In fact, Owen had never been treated for schizophrenia. Significantly for Dr. Waddell, it took Owen over 12 years to disclose this "delusion."[21] In his many years of practice, Dr. Waddell had never seen a diagnosis of schizophrenia with the only evidence of the psychosis being ***the self-reported gender dysphoria, i.e., delusion that he is a woman***. However, that finding would be rejected today. (ROA-KS 5707-21, 6737). The State asserts that such a position as Dr. Sultan took in 1998, would likewise be discredited today. Moreover, the delusion itself did not fit into any recognized symptom associated with schizophrenia. The standardized testing done by the doctor did not support a finding of a psychotic disorder; and without question, Owen has a significant motive to fabricate this malady. However, the testing and evaluations support the conclusion that Owen was and is mean, hates

[21] Dr. Sultan explained that Owen never revealed this to the police at the time of his arrest because he was embarrassed. Dr. Waddell dismissed that explanation because Owen had no trouble admitting to police that he was a "peeping tom" and a flasher who liked to wear women's clothes (ROA-KS 5709).

women, and has an anti-social personality. Although Owen has a gender identity disorder and is not mentally healthy, in Dr. Waddell's opinion, those maladies did not diminish Owen's culpability (ROA-KS 5707-5721, 6737).

Dr. Waddell explained that the video-taped confessions were significant because they exposed the fallacy of Owen's alleged schizophrenia. Owen was able to report in detail his behaviors, which were obviously calculated to avoid detection[22] both before and after the murder. The quality of his thinking did not exhibit any disorganization, nor did he show any signs of any major mental illness during this confession which was given less than three months after the KS murder (ROA-KS 5719).

Similarly, Dr. Cheshire concluded that Owen has an anti-social personality and that Owen's life is about dominating and at times being dominated. Significant here, Owen, needs to demean women. Dr. Cheshire found Owen's confession to be critical in his evaluation and explained that Owen was trying to dominate the police when he "chastised" them and "criticized" their investigation. This was evident when Owen laughed and thought at times the situation was funny. Dr. Cheshire found Owen was callous, with no compassion or empathy for KS (ROA-KS 5842).

[22] Such actions include Owen's waiting until his victim retired, removal of his clothes before entry into the house, covering his hands with socks, and cleaning up afterwards.

Dr. Sultan, the only defense expert who attempted to place Owen's troubled childhood into a mitigation context, opined that Owen's troubled past hampered his ability to stay focused. It made him impulsive, and unable to discern right from wrong because no one ever taught him that his adolescent behavior was unacceptable (ROA-KS 6638, 6640). The deficiency in this opinion is exposed by the fact that all of his experts, including Dr. Sultan, admitted that Owen went to great lengths to cover-up his acts including concocting an alibi (ROA-KS 6522-6523, 6681, 65548, 6576-6579).

Owen obtained his constitutionally required reviews and cannot now complain about his decision to waive the presentation of the above mental health information in his original postconviction case involving the GW murder. The qualitative nature of Owen's evidence from the KS retrial is lacking in credibility and substance. Moreover, his description of this identical evidence as "compelling" enough to overcome the procedural bar and untimeliness of his instant successive postconviction litigation is belied by the fact that this same evidence was considered by another jury and resulted in a conviction of first-degree murder and sentence of death. *See Owen*, 862 So. 2d at 697-702. Notably, on appeal, this Court was unimpressed with Owen's belated presentation of this "mental illness"

theory, noting that Owen never "even suggested" during his police questioning that he had a theory to justify his actions. *Owen,* 862 So.2d at 701. As such, the State asserts that Owen has failed to overcome the procedural and time bars, much less to show manifest injustice arising from his now-regretted decision to waive the original postconviction claims. The summary denial was warranted and the trial court's ruling should be affirmed. *Gaskin*, 2023 WL 2799414 at *3-4 (affirming summary denial of successive claim that was procedurally barred having been raised and rejected previously); *Dillbeck*, 357 So. 3d at 99-100 (Fla. 2023) (rejecting claim during an active warrant that "reasonable efforts" satisfies the due diligence requirement; simply because a potential witness is not mentioned by name in police reports, diligent counsel would investigate further).

ISSUE II

WHETHER THE POSTCONVICTION COURT'S SUMMARY DENIAL BASED ON FINDING THAT OWEN'S CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING OWEN'S BRAIN DAMAGE, DECLINING MENTAL CONDITION, AND COMPETENCY ARE EITHER TIME BARRED, WITHOUT MERIT, OR NOT COGNIZABLE WAS PROPER?

Premised primarily on a May 16, 2023, report submitted by Dr. Eisenstein, Owen alleges: (1) his mental condition is declining; (2) he has brain damage; (3) there has been development of better or more sensitive

MRI and PET scan testing to which Owen should be allowed access to prove newly discovered evidence; and (4) he is incompetent and insane to be executed necessitating a stay of execution under Fla. Stat. § 922.07(1), Fla. Stat. (IB 51-61) The trial court rejected those suggestions as either time barred or meritless. This Court should affirm.

Standard of Review

In *Hunter*, 29 So.3d at 261-62, this Court recognized: "Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief" and that review of summary denials of successive motions are reviewed *de novo*. *Gaskin v. State*, 48 Fla. L. Weekly S57 (Fla. Apr. 6, 2023); *Dillbeck*, 357 So. 3d at 98; *Long*, 183 So. 3d at 344–45; *Pardo v. State*, 108 So. 3d 558, 561 (Fla. 2012); *Owen*, 854 So. 2d at 188 (explaining Owen failed to establish his successive motion was predicated on newly discovered evidence; thus, he could not overcome the procedural bar attached to his motion).

Trial Court's Ruling

In denying Claim Two of the motion, the trial court pointed to Owen's 200-page December 1997 fourth amended postconviction relief motion where Owen had requested a CAT scan be conducted and that Owen had

doctors to discuss his "brain damage," "diminished capacity," and "insanity." Noting that incompetency was a theme in the December 1997 motion (4PCR 2080-81). Given that prior pleading, the trial court found Claim Two procedurally barred as Owen knew of these matters for more than 20 years (4PCR 2081). The trial court also found that Owen had not met the two-part test of *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) as the mental health issue was not newly discovered and would not lead to a different sentence (4PCR 2081).

With respect to the incompetency allegation, the trial court pointed to the orders on Owen's three ancillary motions[23] and found: "The Court does not find a judicial determination of incompetency to be required at this juncture. Further, the Court does not have jurisdiction to stay the execution of the Defendant." (4ROA 2072-77, 2082, 2287-89)

MERITS

The pith of Owen's claim below was premised on his alleged organic brain damage, schizophrenia, and a more pronounced delusion of gender dysphoria. He claimed these conditions made him incompetent to proceed in postconviction litigation and barred his execution due to insanity. In

[23] (1) "Motion for Determination of Competency Pursuant to Florida Rule of Criminal Procedure 3.851(g)"; (2) "Defendant's Motion for MRI and Pet Scan"; and (3) "Motion for Stay of Execution." (4PCR 2072-77, 2287-89)

denying this claim (4PCR 2078-2286) and the three ancillary motions in support of it (4PCR 2072-77, 2287-89), the postconviction court found the factual premise for the claims were raised previously in Owen's initial motion for postconviction relief (4PCR 2078-80) The court explained:

> Here it is crystal clear that counsel and Defendant were not only able to discover this mental-affliction evidence by the exercise of due diligence, they claimed to have discovered it more than a quarter-century ago. Although Defendant argues that this should be considered as newly discovered because of the evolution of technology, the Court is not persuaded.

(4PCR 2081). As demonstrated in Issue I, because Owen was aware of all this information for well over 25 years, re-litigation of claims premised on "new information and testing" is barred. The record supports these findings. (1PCR-T 759, 1975; 4PCR 1012-30, 2085-2286).

Moreover, the fact that the Governor has signed his death warrant does not relieve Owen of the consequences of the procedural bars attached to all his claims. *See Dilbeck v. State*, 357 So. 3d 94 (Fla. 2023) (affirming the summary denial of claim of brain damage related to fetal alcohol as facts were known well before the eve of execution). *Ferguson v. State*, 101 So. 3d 362, 367 (Fla. 2012) is instructive and dispositive. There, this Court affirmed the postconviction court's denial of a motion to determine competency to proceed under an active death warrant explaining:

> The circuit court correctly noted that, pursuant to this Court's discussion in Carter and to rule 3.851(g), a competency evaluation is not necessary if "all collateral relief issues ... involve only matters of record and claims that do not require the prisoner's input...." Fla. R. Crim. P. 3.851(g)(1). Such claims "shall proceed in collateral proceedings notwithstanding the prisoner's incompetency." Id. Accordingly, because we find that each of Ferguson's claims was untimely and that the circuit court properly denied them, we also find that the circuit court properly denied Ferguson's motion for competency determination.

Ferguson, 101 So. 3d at 367; *See also* Rule 3.851(d)(2); *Jones v. State*, 709 So. 2d 512, 521 (Fla.1998) (defining newly discovered evidence test).

By definition, Owen being aware of mental health issues for 25 years is not "newly discovered" under *Jones*. Consequently, he is not entitled to pursue repackaged claims to seek further testing to "discover new evidence." *See Rodgers*, 288 So. 3d at 1039-1040 (rejecting claim of newly discovered evidence simply because symptoms previously known but repackaged with a new diagnosis is not newly discovered evidence); *Asay*, 210 So. 3d at 23; (stating that merely "obtaining a new expert to review the same records does not create newly discovered evidence" and explaining that obtaining a new expert to review the same report does not "convert" the old report or the expert's new report into newly discovered evidence (*citing Howell v. State*, 145 So. 3d 774, 775 (Fla. 2013))); *Davis v. State*,

742 So. 2d 233, 236 (Fla. 1999)[24] (rejecting assertion that advancements in medical technology support a newly discovered evidence claim); *Barwick v. State*, SC2023-0531, 2023 WL 3151079, at *6 (Fla. Apr. 28, 2023) (recognizing Florida Supreme Court "has routinely held that resolutions, consensus opinions, articles, research, and the like, do not constitute newly discovered evidence."); *Sireci v. State*, 773 So. 2d 34, 43 (Fla. 2000) (finding request for additional DNA testing sought "to provide better identification" of evidence found was not newly discovered evidence).

Likewise, the postconviction court also determined that Owen failed

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[24] In *Davis v. State*, 742 So. 2d 233, 237 (Fla. 1999), this Court stated:

> We agree with the circuit court that Davis's PET-scan claim is procedurally barred. As the circuit court ruled, this claim is procedurally barred as an abuse of process in that Davis could have and should have raised it in his postconviction motion which was filed on April 15, 1998. *See Zeigler v. State*, 632 So. 2d 48 (Fla. 1993). Davis argues that raising the claim in the April 15, 1998, motion would have been impossible because the motion (his third postconviction motion) was filed a year prior to our decision in *Hoskins* in which we ordered a resentencing based on the failure of a trial judge to authorize a PET scan, and thus, Davis could not have discovered the evidence prior to May 13, 1999. However, we find Davis's postconviction claim to be distinguishable from Hoskins, in which the request for a PET scan was made prior to Hoskins' trial. Moreover, PET scans appear in cases reported as early as 1992. *Hose v. Chicago Northwestern Transp. Co*., 70 F.3d 968 (8th Cir. 1995); *People v. Weinstein*, 156 Misc.2d 34, 591 N.Y.S.2d 715 (N.Y.Sup.Ct.1992).

(footnote omitted)

to establish that a competency determination was required pursuant to Fla. R. Crim. Pro. 3.851(g) as there are no "factual matters at issue requiring the Defendant's input" (4PCR 2072-74, 2081). That determination was also correct. *Ferguson*, 101 So. 3d at 367.

The lower court also denied the request for a stay of execution, finding no substantial grounds upon which relief might be granted, because all his claims and requests for relief are untimely, procedurally barred, and without merit (4PCR 2080-84). That ruling must be upheld as well. *Davis v. State*, 142 So. 2d 867, 873 (Fla. 2014); *Dillbeck v. State*, 357 So. 3d 103 (Fla. 2023); *Barwick v. State*, No. SC2023-0531, 2023 WL 3151079 at 4 (Fla. April 28).

As his last justification for a stay of execution, Owen alleged that because he was pursuing a claim of insanity which would bar his execution, a stay is appropriate at this time (IB 58-59). However, as noted by the lower court, the claim is governed by the executive branch; Fla. Stat. §922.07(1) and Fla. R of Crim. P. 3.811 and 3.812.

Because the claims are successive, untimely, previously waived and without merit, Owen was not entitled, and in fact was properly denied the opportunity to resurrect these 25-year old claims. This Court should affirm the denial of postconviction relief.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May 2023, I electronically filed the foregoing with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Lisa M. Fusaro, Assistant CCRC, at

Fusaro@ccmr.state.fl.us; and support@ccmr.state.fl.us; Morgan P. Laurienzo, Assistant CCR, at laurienzo@ccmr.state.fl.us; and warrant@flcourts.org.

CERTIFICATE OF FONT AND PAGE LIMIT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in the foregoing is 14-point Arial, in compliance with Fla. R. App. P. 9.045(b) and pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief does not exceed 75 pages in length.

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