No. SC2023-0732

EXECUTION SCHEDULED FOR JUNE 15, 2023 at 6:00 P.M.

IN THE

Supreme Court of Florida

DUANE EUGENE OWEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA
Lower Tribunal No. 501984CF004000AXXXMB

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

Owen respectfully requests oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action will determine whether Owen lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. *See Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017) (where this Court stayed Asay's execution after holding an oral argument). A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the ultimate penalty that the State seeks to impose on Owen.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial in this case are of the form T[volume]/[page].

References to the 92,144 postconviction record on appeal are of the form R[volume]/[page].

References to the 95,526 record of the direct appeal of the retrial in the 84-4014 circuit court case ("KS retrial") are of the form S/[page]. The relevant testimony has been reproduced in the Appendix to the Defendant's Fourth Successive Motion to Vacate

Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After Death Warrant Signed. *See* W/353-883.

References to the current, post-warrant record on appeal are in the form W/[page number].

The initials GW and KS are used when referring to the victim in each case referred to herein.

STATEMENT OF THE CASE AND FACTS

I. Procedural History

Owen was convicted at a jury trial of the first-degree murder and sexual battery of GW, and burglary. For the non-capital offenses, Owen received the following sentences to be run consecutively: sexual battery (natural life) and burglary (natural life). For the capital offense, the advisory jury recommended death by a ten to two vote. The trial judge sentenced Owen to death on March 13, 1986.

This Court described the aggravating factors as follows:

> The judge found four aggravating circumstances: The defendant had been previously convicted of a violent felony; the murder was committed during a burglary or sexual battery; the murder was especially heinous, atrocious, or cruel; and the murder was cold, calculated, and premeditated. *See* § 921.141(5), Fla. Stat. (1983).

Owen v. State, 596 So. 2d 985, 987 n. 1 (Fla. 1992).

This Court described the only mitigating factors considered by the trial judge as:

> Owen's mother died when he was very young; his alcoholic father committed suicide a year later; Owen and his brother were shuffled from one foster home to another until his brother finally ran away and left him; Owen was sexually and otherwise abused in the foster homes; Owen's mind "snapped" during the murder; he had enlisted twice in the army and aspired to be a policeman.

Id. at n. 2.

Owen raised the following claims on direct appeal:

> **Claim I:** The trial court erred by not granting appellant's motion for judgment of acquittal as to count II of the indictment.
> **Claim II:** The trial court erred in denying motion to suppress appellant's confession.
> **Claim III:** The trial court erred by allowing members of the victim's family to testify prior to pronouncement of sentence.
> **Claim IV:** The trial court erred by sentencing the appellant to death based on invalid aggravating circumstances.
> **Claim V:** The trial court erred in denying all death penalty motions of appellant.
> **Claim VI:** The trial court erred by denying the preclusion of death qualification of jurors and a bifurcated jury.

This Court affirmed Owen's judgment of conviction and sentence of death. *Owen v. State*, 596 So. 2d 985, 987 (Fla. 1992). Owen filed a Petition for a Writ of Certiorari to the United States Supreme Court that was denied on October 13, 1992. *Owen v. Florida*, 506 U.S. 921 (1992).

Owen filed his fourth motion for postconviction relief ("1997 PC Motion") in state court pursuant to Fla. R. Crim. P. 3.850 on December 8, 1997. The following claims were raised:

> **Claim I:** Access to the files and records pertaining to Mr. Owen's case in the possession of certain state agencies have been withheld in violation of chapter 119, Fla. Stat., the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment, and the corresponding provisions

of the Florida Constitution. Mr. Owen cannot prepare an adequate 3.850 motion until he has received public records materials and been afforded due time to review those materials and amend.

Claim II: Access to trial counsel's files on Mr. Owen has yet to be provided to collateral counsel. Collateral counsel is entitled to access to these files in that the files belong to the client and must be reviewed by collateral counsel in determining what claims for relief exist. Without access to these files, counsel cannot adequately investigate Mr. Owen's case and provide the effective assistance of counsel.

Claim III: Mr. Owen was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, when his sentencing jury and judge relied on materially inaccurate information in sentencing Mr. Owen to death.

Claim IV: Mr. Owen was deprived of his rights to due process under the Fourteenth Amendment to the United States Constitution as well as his rights under the Fifth, Sixth, and Eighth Amendments, because the state withheld evidence which was material and exculpatory in nature and/or presented misleading evidence.

Claim V: Mr. Owen was denied the effective assistance of counsel during pre-trial, trial and sentencing of his capital proceedings in that counsel failed to provide the mental health experts with available information which the experts needed to make an accurate competency determination, and the state withheld material exculpatory information needed to reach such a determination, in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Claim VI: Mr. Owen was denied effective assistance of counsel at the guilt innocence phase of his trial, counsel failed to adequately investigate and prepare the defense case and challenge to the state's case, and a full adversarial testing did not occur in violation of Mr. Owen's Rights under the Fifth, Sixth, Eighth, and Fourteenth

Amendments. As a result, Mr. Owen's convictions and death sentence are unreliable.

Claim VII: Trial counsels' undisclosed conflicts of interest in violation of the laws and Constitution of the State of Florida denied Mr. Owen the effective assistance of counsel guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim VIII: Mr. Owen was deprived of his right to a reliable adversarial testing and denied the effective assistance of counsel at the penalty phase of his capital trial, in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments and the corresponding provisions of the Florida Constitution.

Claim IX: Mr. Owen was deprived of his right to effective assistance of counsel in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments and the corresponding provisions of the Florida Constitution.

Claim X: Newly discovered evidence establishes that Mr. Owen's capital conviction and sentence are constitutionally unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim XI: Mr. Owen's jury was improperly instructed on the heinous, atrocious, and cruel aggravating factor, in violation of *Espinosa v. Florida, Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger,* and the Eighth and Fourteenth Amendments to the United States Constitution.

Claim XII: Mr. Owen's sentence was tainted by improper instructions on the felony-murder aggravating factor in violation of *Espinosa v. Florida, Stringer v. Black, Sochor v. Florida, Maynard v. Cartwright, Hitchcock v. Dugger,* and the Eighth and Fourteenth Amendments. No meaningful harmless error was performed.

Claim XIII: The avoiding arrest aggravating factor was improperly applied, and the jury received inadequate instructions, in violation of the Eighth and Fourteenth Amendments.

Claim XIV: The trial court over broadly and vaguely instructed Mr. Owen's jury on the previous conviction of a violent felony aggravating circumstance, in violation of *Espinosa v. Florida, Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger,* and the Eighth and Fourteenth Amendments.

Claim XV: The "cold, calculated" aggravating circumstance instruction failed to limit the jury's consideration and was not supported by the evidence in violation of the Eighth and Fourteenth Amendment to the United States Constitution.

Claim XVI: The Florida Supreme Court failed to conduct a meaningful and constitutionally adequate harmless error analysis of the effect of the improper presentation to, and consideration by, the jury of an unconstitutional prior conviction, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Claim XVII: Mr. Owen was denied his rights under the Sixth, Eighth, and Fourteenth Amendments when the trial court allowed the jury to hear evidence in detail of prior felonies of which Mr. Owen had been convicted.

Claim XVIII: Mr. Owen was denied the right to remain silent and the right to counsel at pretrial, trial and sentencing, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and subsequent admission of his purported statements at trial was erroneous.

Claim XIX: Mr. Owen was denied his right to a trial by a fair and impartial jury in violation of his Fifth, Sixth, and Fourteenth Amendment Rights, by improper prosecutorial conduct, and by the trial court's failure to adequately ensure that a fair and impartial jury was guaranteed to Mr. Owen.

Claim XX: Mr. Owen's death sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments because the

penalty phase jury instructions shifted the burden to Mr. Owen to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Owen to death. Failure to object or argue effectively rendered defense counsel's representation ineffective.

Claim XXI: Mr. Owen's sentencing jury was misled by comments and instructions which unconstitutionally and inaccurately diluted its sense of responsibility for sentencing in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Claim XXII: The prosecutor's inflammatory and improper comments and argument rendered Mr. Owen's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments.

Claim XXIII: The rules prohibiting Mr. Owen's lawyers from interviewing jurors to determine if cause exists to determine if relief is appropriate due to juror misconduct violates equal protection principles, the First, Sixth, Eight and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Claim XXIV: The sentencing court's refusal to find and consider various mitigating circumstances clearly set out in the record violated the Eighth Amendment and demonstrates that the jury's consideration was similarly constrained.

Claim XXV: The introduction of non-statutory aggravating factors and the state's argument upon non-statutory aggravating factors rendered Mr. Owen's death sentence fundamentally unfair and unreliable, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim XXVI: Mr. Owen was denied a proper direct appeal from his judgment of conviction and a proper appeal from his sentence of death in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, art. 5, sec. 3(b)(l) of the Florida Constitution

and Florida Statutes Annotated, sec. 921.141 (4), due to omissions in the record.

Claim XXVII: Mr. Owen was denied a fair trial by the trial court's refusal to grant a change of venue in light of the extensive and highly prejudicial pretrial media coverage of his case. As a result, Mr. Owen was deprived of his right to a fair and impartial jury at the guilt/innocence and sentencing phases of his trial, in violation of the Sixth, Eighth, and Fourteenth Amendments

Claim XXVIII: Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty, and for violating the constitutional guarantee prohibiting cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Claim XXIX: The introduction of prejudicial crime scene video tape rendered Mr. Owen's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments.

Claim XXX: Mr. Owen's right to due process was violated when the trial court instructed the jury on sexual battery.

Claim XXXI: Mr. Owen's trial was fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

The postconviction court denied relief on December 8, 1997, without conducting a full evidentiary hearing. R10/1862. Owen appealed to this Court, and raised the following issues:

Argument I: Mr. Owen was denied a full and fair evidentiary hearing in violation of his constitutional rights to due process.

Argument II: The trial court failed to conduct an adequate

Faretta inquiry to determine if Mr. Owen was knowingly, voluntarily and intelligently waiving his right to pursue postconviction relief.

Argument III: Mr. Owen was denied a full and fair hearing on the following issues.

- **A.** Mr. Owen was denied the effective assistance of counsel during pre-trial, trial and sentencing of his capital proceedings regarding failure to provide the mental health experts with available information.
- **B.** The adversarial testing at the guilt phase issue.
- **C.** The conflict of interest issue.
- **D.** The ineffective assistance of counsel at penalty phase issue.
- **E.** The ineffective assistance of counsel issue.

Argument IV: The *Espinosa v. Florida* issue.

Argument V: The improper felony-murder instruction issue.

Argument VI: The improper application of avoiding arrest aggravating factor.

Argument VII: The previous conviction of a violent felony aggravating circumstance issue.

Argument VIII: The improper "cold, calculated" aggravating circumstance instruction issue.

Argument IX: The improper evidence of prior felonies issue.

Argument X: The motion to suppress issue.

Argument XI: The burden shifting issue.

Argument XII: The *Caldwell v. Mississippi* issue.

Argument XIII: The inflammatory and improper comments issue.

Argument XIV: The interviewing jurors issue.

Argument XV: The change of venue issue.

Argument XVI: Florida's capital sentencing statute is unconstitutional.

Argument XVII: The unduly prejudicial crime scene video issue.

Argument XVIII: The fundamental error issue.

This Court affirmed the denial of all claims. *Owen v. State*, 773 So. 2d 510 (Fla. 2000). The United States Supreme Court denied review. *Owen v. Florida*, 532 U.S. 964 (2001).

Owen filed a *pro se* Successive Motion for Postconviction Relief in June 2001 and raised the following issues:

> **Claim I:** Capital Collateral Regional Counsel-Middle labored under a direct conflict of interest which precluded this firm from representing Defendant in the postconviction proceedings.
> **Claim II:** Capital Collateral Regional Counsel-Middle deprived Defendant of effective representation and due process during the postconviction proceedings.
> **Claim III:** A. Defendant's claim of innocence, B. Brady Violation.

Owen appealed and, after this Court appointed counsel, "affirm[ed] the trial court's order summarily denying postconviction relief." *Owen v. Crosby*, 854 So. 2d 182, 188 (Fla. 2003).

Owen filed a Petition for Writ of Habeas Corpus on September 25, 2001. The following claims were raised:

> **Claim I:** Appellate counsel was ineffective for failing to raise and argue on direct appeal that the petitioner was denied a fair trial because of the admission into evidence of the statements petitioner made during plea negotiations with the government.
> **Claim II:** Appellate counsel was ineffective for not raising and arguing that the venire from which the Jury was selected in Mr. Owen's trial was unconstitutional because the venire unconstitutionally excluded African Americans

from the venire from which Mr. Owen's trial Jury was selected.

Claim III: Appellate counsel was ineffective for failing to raise and argue on direct appeal that the trial court should have declared a mistrial or struck Sgt. McCoy's alleged improper statement that the "hurting would start all over again," and that the trial court should have granted Owen's motion for a mistrial.

Claim IV: Appellate counsel was ineffective for failing to raise and argue on direct appeal that Mr. Owen was denied due process of law because the trial court was biased towards the state and should have recused itself.

Claim V: Appellate counsel was ineffective for failing to raise and argue on direct appeal the trial court's denial of petitioner's jury instruction on the difference between sexual battery and vaginal penetration of a deceased individual killed prior to any sexual contact.

Claim VI: Appellate counsel ineffectively raised and argued the sufficiency of the State's evidence used to prove the aggravator's and by not raising and arguing that the trial court did not properly consider all of the mitigation in favor of Mr. Owen.

Claim VII: The trial court illegally sentenced Mr. Owen on the non-capital cases because sentencing guidelines were unconstitutional at the time Mr. Owen was sentenced.

Claim VIII: Appellate counsel was ineffective for failing to cite directly to controlling precedent and the record on appeal on the issue of whether Mr. Owen's confession was involuntary thus denying this court the opportunity for meaningful review of Mr. Owen's case on appellate review.

Claim IX: The Florida death sentencing statute as applied is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

Claim X: Mr. Owen's Eighth Amendment right against cruel and unusual punishment will be violated because Mr. Owen may be incompetent at the time of execution.

Claim XI: This court erred by not appointing conflict free appellate counsel or remanding the case to the trial court

> for a finding of fact on whether there was a conflict of interest between Mr. Owen and appellate counsel after Mr. Owen brought to this court's attention that there was a conflict of interest.

This Court denied Owen's Petition for Writ of Habeas Corpus. *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003).

Owen filed a Petition for Writ of Habeas Corpus in the Southern District of Florida on December 15, 2003. The following claims were raised:

> **Claim I:** Mr. Owen's trial counsel was ineffective for failing to file and argue several available meritorious federal constitutional challenges to the State of Florida's use of his statements to law enforcement officers following his arrest. The State Courts of Florida did not afford Mr. Owen a fair opportunity to present evidence to establish the ineffectiveness of his trial counsel for failing to suppress his statements.
> **Claim II:** The State courts of Florida erred in denying Mr. Owen's motion to suppress confession.
> **Claim III:** Mr. Owen was denied due process when the Florida Supreme Court allowed Mr. Owen's conviction for sexual battery to stand when the evidence failed to show Mr. Owen committed the offense in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.
> **Claim IV:** Trial Counsels' undisclosed conflicts of interest denied Mr. Owen the effective assistance of counsel guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
> **Claim V:** Mr. Owen was denied relief on properly pled Brady claim filed in his *pro se* motion which Mr. Owen discovered in 1999 while pending retrial in the [KS] case.
> **Claim VI:** Mr. Owen was denied the effective assistance of

counsel during pre-trial, trial and sentencing of his capital proceedings in that counsel failed to provide the mental health experts with available information which the experts needed to make an accurate competency determination, and the State withheld material exculpatory information needed to reach such a determination, in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Claim VII: Mr. Owen was denied effective assistance of counsel at the guilt/innocence phase of his trial, counsel failed to adequately investigate and prepare the defense case and challenge the State's case, and a full adversarial testing did not occur in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. As a result, Mr. Owen's convictions and death sentence are unreliable.

Claim VIII: Mr. Owen was deprived of his right to a reliable adversarial testing and denied the effective assistance of counsel at the penalty phase of his capital trial, in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments and corresponding provisions of the Florida Constitution.

Claim IX: Mr. Owen was deprived of his right to effective assistance of counsel in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments.

Claim X: The Florida Supreme Court denied Mr. Owen the right to effective and conflict free counsel by not appointing conflict free appellate counsel or remanding the case to the trial court for a finding of fact on whether there was a conflict of interest between Mr. Owen and appellate counsel after Mr. Owen brought to the Florida Supreme Court's attention that there was a conflict of interest with appellate counsel.

Claim XI: Appellate counsel was ineffective for failing to raise and argue on direct appeal that the trial court should

have declared a mistrial or struck Sgt. McCoy's improper statement that the "hurting would start all over again," and that the trial court should have granted Owen's motion for a mistrial.

Claim XII: Appellate counsel was ineffective for failing to raise and argue on direct appeal that the petitioner was denied a fair trial because of the admission into evidence of the statements Petitioner made during plea negotiations with the government.

Claim XIII: Appellate counsel was ineffective for failing to raise and argue on direct appeal that Mr. Owen was denied due process of law because the trial court was biased towards the state and should have recused itself.

Claim XIV: Appellate counsel was ineffective for failing to cite directly controlling precedent and the record on appeal on the issue of whether Mr. Owen's confession was involuntary thus denying this court the opportunity for meaningful review of Mr. Owen's case on appellate review.

Claim XV: Appellate counsel was ineffective because he ineffectively raised and argued the sufficiency of the state's evidence used to prove the aggravators against Mr. Owen and by not raising and arguing that the trial court did not properly consider all the mitigation in favor of Mr. Owen.

Claim XVI: Mr. Owen was denied due process and effective assistance of appellate counsel in his direct state appeal when the Florida Supreme Court allowed Mr. Owen's conviction for sexual battery to stand and denied the claim of ineffective assistance of appellate counsel for failure to raise the issue of the trial court's denial of a jury instruction distinguishing sexual battery on a live person and lesser offenses if the victim was deceased at the time of penetration.

Claim XVII: Florida's capital sentencing scheme was unconstitutional as applied, denying Mr. Owen his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim XVIII: The jury that recommended death for Mr. Owen was unconstitutionally instructed and improperly considered unconstitutional aggravators thus this court

should issue the writ.

The Southern District of Florida denied Owen's petition for writ of habeas corpus. *Owen v. Crosby*, 03-81152-CIV, 2007 WL 9719051, at *1-2 (S.D. Fla. Sept. 6, 2007). The Eleventh Circuit Court of Appeals affirmed the district court's denial of relief. *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 899 (11th Cir. 2009). The United States Supreme Court denied certiorari review. *Owen v. McNeil*, 558 U.S. 1151 (2010).

Owen filed a Third Successive Motion to Vacate Judgment of Conviction and Sentence on January 6, 2017. The following claims were raised:

> **Claim I:** Mr. Owen's death sentence should be vacated because it is unconstitutional based on *Hurst,* prior precedent and subsequent developments because Mr. Owen was denied his right to a jury trial on the facts that led to his death sentence.
> **Claim II:** This court should vacate Mr. Owen's death sentence because, in light of *Hurst* and subsequent cases, Mr. Owen's death sentence violates the eighth amendment because his death sentence was contrary to evolving standards of decency and is arbitrary and capricious.
> **Claim III:** This court should vacate Mr. Owen's death sentence because the fact-finding that subjected Mr. Owen to the death was not proven beyond a reasonable doubt.
> **Claim IV:** In light of *Hurst,* Mr. Owen's death sentence should be vacated because it was obtained in violation of the Florida constitution.
> **Claim V:** The court's denial of Mr. Owen's postconviction

> claims must be reheard and determined under a constitutional framework.

The trial court summarily denied relief, and this Court affirmed the summary denial of Owen's successive motion. *Owen v. State*, 247 So. 3d 394 (Fla. 2018).

On May 9, 2023, the Governor issued a death warrant for Owen. The Warden set the execution for June 15, 2023 at 6:00 P.M. On May 17, 2023, Owen filed his Fourth Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After Warrant Signed ("Successive Motion"). Concurrently, Owen also filed a Motion for Determination of Competency Pursuant to Florida Rule of Criminal Procedure 3.851(g), a Motion for MRI and PET Scan, and a Motion for Stay of Execution. The State responded to the Successive Motion on May 18, 2023, and responded to the other motions on May 17, 2023. The circuit court held a brief *Huff*[1] hearing on May 18, 2023 and denied

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993) (in death penalty postconviction case, judge must allow attorneys opportunity to appear before court and be heard on initial motion to vacate, set aside, or correct sentence, for purpose of determining whether evidentiary hearing is required and to hear legal argument relating to motion).

an evidentiary hearing on each claim. The circuit court summarily denied each Successive Motion claim in a written order on May 19, 2023. The other three motions were denied on May 18-19, 2023. This appeal follows.

II. Relevant Facts from the Trial

During the guilt phase of Owen's trial, trial counsel did not call a single witness to challenge the State's case.

After Owen was convicted, trial counsel called only two witnesses during the penalty phase: Mitchell Owen ("Mitchell"), Owen's older brother, and Dr. J. Patrick Peterson, a court appointed psychologist. All of Owen's mitigation was presented through these two witnesses.

Mitchell testified briefly to his and Owen's childhood, explaining that the boys' issues began when their mother died of cancer. T28/4156-57. About two years after losing their mother, the boys came home from school one day to find their father had committed suicide. T28/4158-60. After losing both parents and their aunt and uncle being unable to permanently care for the boys, they were sent to a foster home and eventually the VFW home. T28/4160-61. Mitchell testified that at the VFW home, the two of them stuck

together and began to misbehave, but that he would eventually leave the VFW home and Owen would stay. T28/4160-61. None of the compelling mitigation regarding the horrific atrocities of the VFW home was presented to the jury.

Dr. Peterson testified generally to Owen's mental capacity and that Owen suffers from a severe personality disorder that is very episodic, as he becomes unable to rationally control his actions. T28/4171-73. Dr. Peterson testified that this is the result of many incidences of abandonment and loss as a child. T28/4172. Notably, Dr. Peterson testified that Owen does not possess the intent to kill his victims, rather, he intends to commit burglaries and assaults but after "landing the first blow" he loses control and the ability to form a homicidal intent. T28/4175. Dr. Peterson explained that Owen's intent was only to subdue, "but at some point that initial physical contact perhaps triggered in the sense almost 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." T28/4169-70. During Dr. Peterson's testimony, the jury never learned that Owen was insane, psychotic, delusional, and lost touch with reality.

Further, Dr. Peterson did not have the type of background materials at that time that would have assisted him in making the appropriate diagnosis of Owen's condition. The only information Dr. Peterson possessed regarding the GW case was from a probable cause affidavit and his own conversations with Owen. Dr. Peterson never reviewed any police reports, witness statements, Owen's own statements to police, transcripts or the actual tapes of Owen's taped confessions to the police. T28/4188-90. Worse yet, Dr. Peterson admitted that the jury heard many more facts about the case than he did. T28/4191. However, the jury had no idea that Owen was psychotic and delusional, or that he had brain damage which rendered him incapable of forming the requisite intent to commit first-degree premeditated murder. What Owen's jury heard barely scratched the surface of what was actually going on in Owen's life or inside his mind at the time of the crime.

Likely due to the instant case being tried in 1986, the trial judge made very general findings within his four-page sentencing order. The trial judge did not assign weight to any of the aggravating or mitigating circumstances, but ultimately found the aggravating circumstances clearly and convincingly outweighed any mitigating

factors. T32/4951. Notably, although Dr. Peterson opined Owen was under the influence of an extreme emotional disturbance and could not conform his behavior to the requirements of the law at the time of the crime, the trial judge found no statutory mitigation in his order. T28/4177.

III. Relevant Facts from Prior Postconviction Proceedings

Owen was granted an evidentiary hearing on five claims in his 1997 PC Motion. R28/838. However, Owen was forced to choose between his constitutional rights as to whether to go forward with the evidentiary hearing in the instant case or waive attorney client privilege in the pending KS retrial. Without conducting a valid waiver colloquy to determine whether Owen's waiver was knowing, intelligent, and voluntary, the judge denied the 1997 PC Motion and claimed Owen chose not to proceed. R28/909-13. As a result, Owen unintentionally waived his claims, and there was never any factual development of Owen's mitigation claims in the GW case. *See infra* pp. 21-30.

SUMMARY OF ARGUMENT

ARGUMENT I: Due to the unique posture of both of Owen's cases at the time of his 1997 postconviction evidentiary hearing, he

was forced to choose between his constitutional rights. To allow a severely mentally ill, brain damaged individual to waive a constitutional right without ensuring that his waiver was knowing, intelligent, and voluntary constitutes manifest injustice. Accordingly, no jury or court ever heard Owen's compelling mitigation in the instant case, which has denied Owen due process.

ARGUMENT II: A neuropsychologist recently evaluated Owen and determined he is not competent to proceed in postconviction proceedings. In addition, the expert recommended neuroimaging to render a more definitive opinion as to the extent of Owen's brain damage, which Owen submits would also lead to newly discovered evidence. Although Owen submits that he should not have made it to this stage of the appeal as he is incompetent to proceed, Owen's declining mental condition, schizophrenia, and fixed delusions also place Owen outside of the class of individuals allowed to be executed because he lacks the sanity to be executed.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Owen's motion and in this appeal as true to the extent

that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision whether to grant an evidentiary hearing is likewise subject to de novo review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING OWEN'S CLAIM THAT HE WAS DENIED DUE PROCESS WHEN THE POSTCONVICTION COURT FAILED TO STAY HIS 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

a. The 1997 Postconviction Hearing

Owen's life has been plagued by misfortune and adversity as the system repeatedly failed him. Owen was granted an evidentiary hearing ("EH") on multiple claims in his 1997 PC Motion. Owen was also granted a retrial on another capital murder, the KS case. However, when the judge in the instant case wanted to hold the EH in December 1997, the KS retrial was still pending. The judge likely wanted to hold the EH at this juncture because of his imminent

retirement on January 31, 1998. R28/756. Due to the unfortunate posture of both cases, Owen was unjustly forced to choose whether to forgo his EH on his postconviction claims in this case, or risk information from the EH being used against him in the KS retrial. R28/775. Owen was deprived of due process and inappropriately forced to choose between his rights. *Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.") In addition,

> [t]he need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be deemed harmless.

Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987). Nevertheless, Owen was denied his right to an EH and denied due process.

Owen should never have been forced to decide whether to go forward with his EH. Regardless of the judge's impending retirement, he should have stayed the EH until the completion of the KS retrial to avoid the litany of potential issues that were already starting to arise just from calling the first witness. R28/801, 807-08. Worse yet,

the prosecutor on this case admitted that he was also prosecuting Owen in the retrial. R28/807.

Failing to stay the EH was improper due to the nature of these cases being inextricably intertwined. Notably, some of the original trial attorneys were either involved in both the GW and KS cases or had information that related to the KS case. R28/787-95. If the judge did not want to stay the EH until after the KS retrial, in the alternative, the judge could have summarily denied the 1997 PC Motion as if an EH was never granted, since an EH was never completed. Then Owen's claims could have at least been heard based on the factual allegations presented in the motion itself. This Court could have accepted the allegations presented in the 1997 PC Motion as true to the extent they were not conclusively refuted by the record. *Ventura*, 2 So. 3d at 197-98. Since this Court did not rule on the GW appeal until 2000, if this Court decided to remand for an EH, the KS retrial would have been complete at that point and Owen's rights would not have been violated.[2] However, the judge failed to stay the proceedings or summarily deny the 1997 PC Motion, which resulted

[2] The KS retrial was complete on March 23, 1999. *Owen v. State*, 862 So. 2d 687, 690 (Fla. 2003).

in Owen involuntarily waiving his postconviction proceedings related to those claims.

"'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and" "we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal citation omitted). Accordingly, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). The state has an obligation to assure that waivers are "knowing, intelligent, and voluntary." *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993).

The judge should have conducted a *Faretta*-type[3] inquiry of Owen to determine if he understood the consequences of waiving his postconviction EH, which in turn would result in having the claims in his 1997 PC Motion denied. *Id.* Upon appeal, instead of this Court remanding for the proper inquiry, Owen respectfully submits that the Court wrongly held "the principles underlying *Faretta* are applicable

[3] *Faretta v. California*, 422 U.S. 806, 832 (1975).

only when a defendant in a criminal case seeks to waive professional legal representation and proceed unrepresented." *Owen*, 773 So. 2d at 515. Worse yet, this holding appeared arbitrary in light of this Court remanding Durocher's case for an inquiry a few years prior but failing to remand Owen's case for the proper waiver inquiry to occur.

Owen submits that this Court's previous interpretation was erroneous and constitutes manifest injustice because the waiver of postconviction claims is akin to waiving postconviction proceedings, where a *Faretta/Durocher*-like inquiry is required. *See infra* pp. 48-51. In fact, this Court later stated "we have not required a full proffer of available mitigation evidence before a postconviction waiver of penalty phase claims. We require only that such waivers be 'knowing, intelligent, and voluntary.'" *Garcia v. State*, 949 So. 2d 980, 986 (Fla. 2006) (quoting *Durocher,* 623 So. 2d at 485). Notably, an identical situation occurred in *Gore v. State*, 24 So. 3d 1, 13-14 (Fla. 2009), *as revised on denial of reh'g* (Dec. 10, 2009). Gore waived the only postconviction claim that was granted an evidentiary hearing, and this Court again reiterated "we have held that a valid waiver of postconviction penalty phase claims must be 'knowing, intelligent, and voluntary."' *Id.* at 14. Owen received no such inquiry and no due

process.

Instead, this was the sole discussion that ensued at the 1997 postconviction hearing:

> COUNSEL: In light of the Court's ruling, and in light of Mr. Krischer's testimony today, and in light of the fact that ***Mr. Owen feels that his rights are being chipped away*** as the witness -- each witness who is going to come up will probably say the same thing, I don't feel that I could go forward anymore.
> ***I am not abandoning any claims. I am not waiving any claims. I do not feel that it is in Mr. Owen's best interest to go forward.***
>
> JUDGE: If you are telling me you are not planning to call any additional witnesses, I am prepared to enter an order denying Mr. Owen's 3.850 motion, Counselor; you realize that?
>
> COUNSEL: I understand that, Your Honor, I have to do --
>
> JUDGE: You discussed that with him?
>
> COUNSEL: I have to preserve Mr. Owen's rights. And I think, in light of this Court's rulings today, in light of Mr. Krischer and how he testified, yes, I understand that, Your Honor.
>
> JUDGE: You have discussed this with Mr. Owen?
>
> COUNSEL: Yes.
>
> JUDGE: Mr. Owen, you understand what she is telling me?
>
> OWEN: Yes; we had discussions.

JUDGE: You understand what she is telling me; she is planning not to pursue further your 3.850 motion at this time. If it is not pursued, it is my intention to enter an order dismissing that 3.850. That will be the end of it. And if the Florida Supreme Court upholds that, that's the end of the case, 84-4000, insofar as any appellate rights. You understand that?

OWEN: ***I am not an expert in the law*** but I have to rely upon what counsel stated.

JUDGE: I am asking you if you understand if I grant this motion to -- if I enter an order dismissing this 3.850 because of lack of proof and it goes to the Florida Supreme Court and they affirm that decision, that's the end of your 3.850 in regard to the [GW] case; you understand?

OWEN: Well, I understand what the Court has just said. ***I don't understand the procedure.***

PROSECUTOR: May I say for the record that you will be denying, not dismissing.

JUDGE: That's correct.

COUNSEL: The Court said dismissing the motion. Will you inquire of Mr. Owen?

JUDGE: What I am talking about is denying the motion, in effect, because there has been no proof produced as to these allegations.

COUNSEL: Your Honor, I would like the order to reflect that I feel I can't go forward because of the Court's ruling today.

JUDGE: You have made your record with regard to it. My order is going to simply say I am going -- calling upon you to proceed. If you choose not to proceed after having

> discussed those matters with Mr. Owen, it is my intent to enter an order, as I said, directed by the State. It will be denying motion for 3.850; you understand?
>
> COUNSEL: I understand that, Your Honor.

R28/909-13 (emphasis added). Counsel even requested that the judge inquire of Owen, but he did not ask any additional questions of Owen for the remainder of the hearing. R28/912.

From the minimal exchange that did occur, it was clear that Owen did not understand the consequences of his decision to allow counsel to stop calling witnesses at the EH or having his claims denied. Nonetheless, the judge failed to conduct a proper inquiry to ensure Owen understood the nature of the rights he was giving up. Owen was never asked point blank whether he was aware he was waiving his rights. The judge also neglected to confirm that Owen "was not under the influence of any medicines, drugs, or alcohol that affected his ability to enter the waiver and was not threatened, influenced, or bribed to enter the waiver." *Davis v. State*, 257 So. 3d 100, 105 (Fla. 2018). The court was also not privy to the evidence of Owen's brain damage and cognitive impairments which may have also affected the validity of his waiver.

Based on the limited inquiry that the judge did conduct; it was

plainly evident that Owen was unequivocal that he did not understand the circumstances. Owen did not knowingly, intelligently, and voluntarily waive his postconviction EH and the right to present evidence supporting his failure to receive the effective assistance of counsel he was guaranteed under *Strickland v. Washington*, 466 U.S. 668 (1984) and the Sixth Amendment to the United States Constitution.

This Court also previously noted, "although the court below agreed to bar disclosure of privileged information, Owen made no effort to proffer any substantive evidence that would have been excluded by the privilege." *Owen*, 773 So. 2d at 514. However, manifest injustice results from that flawed analysis. It is problematic to agree to bar disclosure of information when the prosecutor cross-examining witnesses at the EH is also prosecuting Owen's retrial. R28/807. It would be virtually impossible for the prosecutor's actions in the retrial to not be influenced by anything heard at the EH. This is especially concerning being that sometimes the prosecution and factfinders consider some mitigation evidence as presenting a "double-edged sword." *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

Due to Owen's counsel failing to go forward with the EH, Owen

involuntarily waived the most compelling portion of his postconviction proceedings. Counsel made explicitly clear at the EH: "I am not abandoning any claims. I am not waiving any claims. I do not feel that it is in Mr. Owen's best interest to go forward." R28/910. Unfortunately, unbeknownst to Owen, a waiver of all postconviction claims was the result.

It is also apparent that Owen did not understand the legal situation at hand because he did not know to correct the judge when at the end of the hearing, the judge announced his order on the record and stated "the defendant announcing his intention not to proceed further with the motion, the Court hereby denies the fourth amended Motion." R28/914. Conversely, if Owen had been properly informed of the rights he was relinquishing by failing to present evidence at the EH, Owen would have continued with the EH, put on mitigating evidence, and would not have waived his postconviction claims.

b. Examples of Mitigation Owen Could Have Presented if 1997 Evidentiary Hearing Was Not Waived Involuntarily

Among the most poignant mitigation that has never been heard regarding the GW case is the testimony of mental health experts and

neuropsychologists who were provided the proper documents and materials by counsel. If trial counsel had properly investigated and provided appropriate information to mental health experts, a sanity defense would have been likely in the GW case. At the very least, if trial counsel had not been ineffective in failing to investigate and present mental health testimony, Owen would not have received a sentence of death on the GW case. The below testimony and information from the KS retrial and EH are the next best evidence of what could have been presented at the GW trial since no EH was held.

On March 8, 1996, Dr. Fredrick Berlin completed a clinical examination of Owen and testified at the 1999 KS retrial during the guilt and penalty phases. S/4040. All information Dr. Berlin testified to was available for the instant case, whether it be at trial or during postconviction. Dr. Berlin first learned of Owen in 1994 after receiving a letter from him in the mail inquiring about gender identity disorder. S/4042. Dr. Berlin responded to Owen, requesting Owen have his attorney contact him; Dr. Berlin was hired by the defense shortly thereafter in 1995. S/4042. Before evaluating Owen, Dr. Berlin reviewed a multitude of materials including, VFW Orphanage

records, affidavits from Owen's neighbors as a young child, police reports, a psychological report by State expert Dr. Waddell, a probable cause affidavit, an affidavit regarding KS's death, jury instructions regarding insanity, and a video confession of Owen. S/4042-43.

Simply stated, Owen had a "a tragic and unfortunate family history." S/4054. Dr. Berlin concluded that Owen suffered from several psychiatric disorders, including gender identity disorder, paraphilic sexual disorder, and schizophrenia. S/4056. Regarding Owen's gender identity disorder, Owen began to believe he was a female from a very young age. S/4058. Owen became sexually active prior to his teen years around age nine or ten, and notably, at times, wanted to have sex with boys because he believed that, as a girl, he should be having sex with boys. S/4058. VFW records corroborate Owen's identity problems from a young age, as the records notate items such as Owen taking particular pride in his long hair. S/4059. As for paraphilic sexual disorder, Dr. Berlin noted Owen had exposed himself in public on several occasions, engaged in voyeuristic activities, and "described sticking or inserting the finger into the anus in a more conventional way." S/4060. Overall, Dr. Berlin

characterized Owen as an individual who was "very disturbed in the sexual arena." S/4060. The primary factor leading to Owen's third diagnosis, schizophrenia, was that Owen appeared "not in touch with reality, he appeared to be delusional"; Owen did not just feel he was a female, he believed himself to be a female. S/4062.

> Even more bizarre . . . was his notion that somehow by having intercourse with a woman, he could access fluids from this woman; that would make him more of a female; that if the woman were frightened there was even greater secretions . . . If she was unconscious, this would help even further.

S/4062. As Owen's delusions progressed, Owen

> believed that if he could have intercourse with a female at the time when she was close to death, that his penis would function as a hose through which her soul could enter him and they could become like one; that he could capture the soul of a woman and make him the woman he was supposed to be in this fashion.

S/4062-63. Remarkably, Owen's fixed, false beliefs appear to have been in him "over a sustained period of time, since early childhood, independent of any mood change." S/4064. Dr. Berlin testified that looking at Owen's bizarre pattern of behavior many years earlier, it was compatible with the idea of what Owen was trying to do. S/6564. Dr. Berlin noted during trial that in very rare cases schizophrenia

and severe gender identity disorder may coexist, as they do in Owen. S/4072.

During the KS incident, Owen did not believe he was killing KS, but rather capturing her soul; the facts are very different and bizarre compared to what one would ordinarily see when looking into evidence surrounding a rape. S/4075, 4078. Dr. Berlin believes within a reasonable degree of medical certainty that Owen was insane at the time of the offense. S/4093. Importantly, Dr. Berlin testified, when taken as a whole, there is more information out there to support than refute Owen's reason for the KS incident. S/4125. Dr. Berlin stated that while Owen knew he was stabbing KS with a knife and knew it could cause her death,

> [h]e believed that in order to capture her soul she had to be in the process of being unconscious or dying. He did not, in my judgment, believe she would actually die. He did not believe he was murdering her because he believed in that process he would have intercourse, her soul would merge with his, he would get the fluids, the soul that he needed.

S/4131, 4141. Notably, after learning in the paper that KS was only fourteen years old, Owen realized that perhaps the reason he had not become a woman was because KS was too young, and Owen needed to find an adult woman with more hormones, which led him to attack

GW. S/6548.

While assaulting GW, Owen placed articles over her face and mouth so that her soul could not escape through her mouth. S/6549-50. Further, Owen inserted his fingers into GW's vagina, which is one of the ways he would try to get fluid to become a woman in the past. S/6550. The children in the home remained unharmed and could have been used as hostages but were not. S/6551. When taken together, the above facts surrounding the GW incident support the notion that Owen was doing this for "bizarre and sick reasons." S/6549. The GW incident was the "sixth in a series of situations in which he had tried or intended to have sex with a woman who was unconscious or dying in order to fulfill his delusional needs." S/6554. Dr. Berlin testified during penalty phase of the KS retrial that he did not believe this can be explained as "simply a person of sound mind misbehaving, being evil and bad." S/6559. Dr. Berlin further testified, Owen is "someone who is mad rather than bad" and that that needs to be looked at with an understanding of how to deal with the ability to reason rationally. S/6559. During the KS penalty phase, Dr. Berlin classified Owen as "an extremely emotionally disturbed individual" and does not believe Owen was capable of walking away

from these acts. S/6563-64. Further, Dr. Berlin stated,

> I don't believe he was capable or is capable of standing back and reflecting and saying, this makes no sense, I shouldn't do this. This is really very crazy, very wrong. I don't think he has that ability. I believe today, as sad as it is, he could go out and do the same act because he can't think and choose. He would simply go and try to become who he believes in his sick mind he needs to be.

S/6577-78.

In addition, Dr. Faye Sultan conducted a comprehensive forensic evaluation of Owen, meeting with him on four separate occasions during 1994 and 1995. S/5496. Early on, Dr. Sultan recognized that, in addition to psychological issues, Owen had a neurological problem, and was functioning without all his necessary brain parts working in a connected way. S/5496-97.

Dr. Sultan administered the Minnesota Multiphasic Personality Inventory – 2 (MMPI-2), and the results revealed that while Owen acknowledges the possibility that there were things more seriously wrong about him, he did not want to discuss anything that might imply he was sick. S/5498-5502. Ultimately, due to the underreporting of symptoms, the MMPI-2 could not be used due to the validity pattern, because the scale profile revealed nothing about Owen. S/5504. The MMPI administered by Dr. Waddell, four years

later, was notably a much better version of the test, and while the scoring reflected Owen's life, it still underreported symptoms. S/5531-32, 5534.

With regard to the initial rapport, Owen began discussing almost immediately with Dr. Sultan, his need for help in getting medical assistance because he needed his genitals removed. S/5506. From the very beginning, Owen was open with Dr. Sultan about being a woman and realizing he was a woman when he was a child. S/5506. She also reviewed documents in support that included a petition for name change to a female name that Owen filed with the clerk of court. S/5509-12.

Notably, during the guilt phase of the KS retrial, Dr. Sultan testified: ***"Mr. Owen is very, very mentally ill, probably among the most mentally ill of all the people I've seen during my career."*** S/5513 (emphasis added). Dr. Sultan diagnosed Owen with delusional disorder to the extreme, a particular subset of schizophrenia, very severe gender identity disorder falling under dysthymia, and paraphilia so severe that it does not fall into any category available other than not otherwise specified. S/5513-14. Notably, Dr. Sultan opined that Owen suffered from these diagnoses

continuously, beginning at some point in his adolescence. S/5516.

Owen's case is characterized by a continuous series of events, beginning at birth, which are "so traumatic and so horribly perverted that he was guaranteed to wind up with some kind of psychological problems." S/5517. Growing up, Owen had no support system, no guidance, no structure that he began operating on impulses that were very primitive. S/6641. Owen grew up in a household where predatory behavior—whether for pleasure of beating, brutalizing, humiliating, or for sexual gratification—was an everyday event. S/5518. In the Owen household, both parents would continuously drink and in turn neglect basic needs of the children (food, clothing, and supervision). S/5520. The children of the Owen household were also subject to the regular, frequent, and loud screams, cries, pleading, and begging of Owen's mother being raped by Owen's father. S/5519-20. By the age of eight or nine, Owen and his brother began conducting sexual perversions of their own with friends in Owen's "playhouse" or "clubhouse," where those children would sexually brutalize one another. S/5520. It is in this clubhouse that Owen was anally raped by older boys on a routine basis and taught to administer enemas to himself, which he became seriously addicted

to and hurt himself with for many years. S/5520-21. These behaviors continued into Owen's years at the VFW home. S/5522. Records of an evaluation of Owen from the VFW home at age 16 report him becoming schizoid in his thinking, becoming unrealistic, having a lack of impulse control, being unsure of himself, and overall "as in some trouble." S/5523.

Dr. Sultan testified that given Owen's background, it was not particularly odd "that's the way in which he ultimately went crazy." S/5563. Given Owen's background, he was never able to truly function independently as an adult, and all his symptoms need to be interpreted in light of his head injury, where a car fell on his head and knocked him unconscious in the early 1980s. S/5525-26. Remarkably, Dr. Sultan testified that "[h]e's a very, very, very, sick man and not eager to be portrayed that way." S/5529.

> It's Mr. Owen's belief, probably from about age 13 or 14, that the reason he has not developed what he views as normal external male characteristics, body hair, a defined shape with broad shoulders, narrower waist and hips, is that he has had sexual contact with women when they have been frightened and that it is the transfer of their essence to him -- sometimes he calls it estrogen turning into a man that keeps him from fully turning into a man. And that, in fact, he needed to continue to have that sort of connection so that he could completely become a woman.

S/5536. When Owen and other boys were raping a frightened girl at the VFW home, Owen realized he was not growing underarm hair, and decided this was the path to move down; but Owen altered between believing this was a terrible way to think and wanting to see if he could make himself back into a male. S/5537. Notably, Dr. Sultan further testified:

> [i]n all the time I've known Mr. Owen, he has never been willing to acknowledge that the genitals that are attached to his body belong to him. He describes them as alien creatures, as those things. He talks about wanting desperately to mutilate himself, castrate himself. He continues to perform very painful procedures on himself as a way to emasculate himself. . . . Mr. Owen experimented for a period of time with squeezing his testicles with rubber bands or other devices to bind them to get them – to see if he can get them to wither away. He's offended by testicles because he believes they are the source of his masculine hormones. He wants them gone very badly. He's done some research. He calls it self-castration and described to me in some detail how he would perform that procedure.

S/5539-40. These fixed, delusional beliefs were so bizarre and so far-reaching that they impacted almost every aspect of Owen's life. S/5540. Taking women's underwear from their homes, wearing women's clothes and undergarments, dressing as a woman in social situations, frequenting adult bookstores and having sex with men as

a woman (using his anus as a substitute for a vagina), and mutilating himself in public, were all examples of bizarre behavior leading up to this offense and ultimately losing control. S/5540-41. Dr. Sultan summarized Owen's delusional system as having "rendered him unable to function in every area of his life," leaving him homeless, jobless, and friendless. S/5541.

Dr. Sultan's guilt phase testimony in the KS retrial addressed the possibility that one can live with a bizarre, fixed, delusion, and that unless someone specifically asks about it, the individual would have no other way to know. S/5553. Other criteria of schizophrenia need not be met when there is a significant, bizarre delusion or hallucination. S/5556. Over Dr. Sultan's five years working with Owen, his behavior remained entirely consistent. S/5562. With Owen's IQ in the mid-80s, "it would require a great deal of intelligence to be able to devise that kind of elaborate scheme." S/5562. Dr. Sultan further elaborated on this in penalty phase, testifying that intellectually, Owen functions as a young adolescent around eleven or twelve years old, and emotionally, his functioning is even lower. S/6657.

Over time, Owen became more desperate to rid himself of his

male genitalia and he found a correlation between frightening women and the inhibition of his body hair growth; he believed that escalating violence produced an increasingly powerful surge of female energy and hormones. S/5565. Notably, Owen is not proud of what he thinks, believes, and needs; this corroborates his lack of explanation for the crimes during his confession video. S/5566. Yet, Owen remained consumed and obsessed with his goal. S/5567. Dr. Sultan concluded that at the time of these crimes, Owen was indeed insane. S/5569.

On cross-examination during the guilt phase, Dr. Sultan testified that Owen does not perceive sexual battery in the typical sense of the term because his experience with being sexually assaulted and participating in assaulting others have distinctly altered Owen's understanding of what one would typically describe as rape. S/5648. During the penalty phase, Dr. Sultan testified, "there is nothing in my evaluation of Mr. Owen that would lead me to believe that he was motivated by the need to hurt another person, to torture another person, to make another person suffer." Rather, Owen "was obsessed with his delusion to the exclusion of the needs of anyone else." S/5650. For example, Owen knew he was inflicting

injuries upon KS and believed she was consenting to be merged with him. S/5653. Owen firmly believes that KS lives within him physically, spiritually, religiously, and psychologically. S/5661.

These delusions are fixed and are still present today, as shown by Dr. Hyman Eisenstein's report from his May 15, 2023 evaluation. W/788-91. Dr. Eisenstein stated that Owen still believes that GW and KS are a part of him and have been living inside of him all these years. Dr. Eisenstein's recent assessment is strikingly similar to all the others because Owen's delusions have remained consistent and unchanged over the years. It is a miscarriage of justice that Owen's trial counsel in the GW case was so ineffective that not only was an insanity defense not pursued, but none of this compelling evidence was presented to the jury at all. Not being able to present this testimony at a postconviction EH means no court ever heard any factual development of these claims in the GW case.

This is not a case where Owen obtained a mental health expert with a different or more favorable opinion in an attempt to render trial counsel deficient. *Carter v. State*, 175 So. 3d 761, 775 (Fla. 2015). For example, the two experts who testified for the State in the KS retrial, Dr. Thomas R. Waddell and Dr. McKinley Cheshire also

came up with similar results to Dr. Berlin and Dr. Sultan regarding gender identity disorder. Dr. Waddell concluded that Owen exhibits "several mental disorders," notably gender identity disorder and "depression of moderate intensity." S/5713, 5722. Specifically, Dr. Waddell stated that Owen is "uncomfortable seeing himself as a male and prefers to see himself as a female." S/5713. The attribution of gender identity disorder stemmed from Owen's express identifications, expressed interest in hormonal treatments, and history supporting those expressions through such instances as dressing as a woman. Dr. Cheshire diagnosed Owen with a Sexual Disorder Not Otherwise Specified and explained that encompasses various sexual attitudes, including such diagnoses as gender identity disorder. S/5874.

Multiple neuropsychologists have also confirmed that Owen suffers from a host of other issues related to his organic brain damage. No neuropsychological testimony or evidence of organic brain damage was presented to the jury in the GW trial and this weighty evidence should have at the very least, been put on at the EH.

Dr. Barry Crown conducted a neuropsychological exam on

Owen and testified to those results in the 1999 KS retrial. S/6490. Through research and decades of experience, Dr. Crown concluded that even the most skilled individuals would be unable to consistently fake the battery of tests that he administered on Owen. S/6490-91. After conducting those tests over the course of numerous hours, Dr. Crown determined that Owen suffered from organic brain damage, which he defined as actual physical damage that affects the functioning capacities of the brain. S/6490, 6501-03.

Dr. Crown found weighty statutory mitigation that should have also been presented in the instant case. He concluded that the organic brain damage he observed in Owen impacted his ability to conform his conduct to the requirements of the law. S/6501-02. Dr. Crown's conclusion was based on his evaluation that the organic brain damage Owen's suffered from caused significant impairments in his ability to process information, reason, make judgments, and control his impulsivity. S/6501. Remarkedly, Dr. Crown found Owen's abstract problem-solving abilities were equivalent to that of an 11-year-old and his auditory selective attention, meaning his ability to concentrate, fell within the 17th percentile. S/6494-97. He opined that the wide-ranging damage to Owen's brain likely resulted

from a combination of head injuries, to include a car falling on his head, and perinatal deficits. S/6503-04.

Dr. Henry Dee performed a neuropsychological evaluation and testing on Owen and testified in the 2006 postconviction EH for the KS case. W/849. All the information that he testified to was available for the instant case, whether it be at trial or during postconviction. In fact, Dr. Dee confirmed there his testimony corroborates Dr. Crown's opinion that Owen suffered from organic brain damage, impairments in judgment and mental functioning, memory problems, impulsivity, and disinhibition. W/864-65, 876-77. Dr. Dee testified regarding the existence of a large magnitude of difference between Owen's verbal and performance IQ which is reliable "presumptive evidence of cerebral damage or disease." W/852. Owen's performance on the Denman Neuropsychology Memory Scale battery yielded a strikingly low full scale memory quotient compared to the full-scale IQ which indicates brain damage. W/852. Notably, Dr. Dee ruled out malingering, and such tests further indicated that Owen exhibits cerebral damage that impaired his memory functioning and verbal abilities. W/853.

In the KS retrial, a case with arguably worse facts, Owen also

received a 10-2 jury recommendation. Nevertheless, back in 1986, Owen still received a 10-2 recommendation with ineffective counsel introducing a barebones presentation of merely two witnesses during his GW trial. As the mitigating circumstances actually present in the GW case are weightier, there is a reasonable probability that, but for trial counsel's deficiencies in investigating and presenting mitigation, Owen would have received a life sentence.

Owen's severe, lifelong mental illness[4] and psychosis were especially strong in the instant case because the experiment to become a woman in the KS incident had already failed. As a result of that failed experiment, the psychosis was stronger when encountering GW, and Owen was compelled to try again. A reasonable probability exists that if Owen's jury at the GW trial, who heard barely any mitigation and still made a 10-2 recommendation, heard the litany of mitigation uncovered in postconviction, Owen would have received a life sentence.

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[4] Owen submits that his severe mental illness should be a complete bar to execution under the Eighth and Fourteenth Amendments like in Ohio and Kentucky. *See* OH ST § 2929.02; KRS § 532.140. However, Owen recognizes that the Florida courts have not yet recognized this claim. *Simmons v. State*, 105 So. 3d 475, 511 (Fla. 2012).

c. Denying Owen Due Process and Failing to Decide Owen's Arguments on the Merits Results in a Manifest Injustice

The circuit court found that Owen's claim was "procedurally barred and untimely." W/2079. However, the court failed to address Owen's arguments that the claim must be considered under the proper lens of manifest injustice. Owen submits that any procedural or time bar is overcome because failing to hear Owen's compelling mitigation and decide his case on the merits results in manifest injustice.

"[C]ollateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice." *State v. McBride*, 848 So. 2d 287, 292 (Fla. 2003). Furthermore, with multiple mental health experts over a period of decades diagnosing Owen as schizophrenic and delusional (one of the most severe and seriously debilitating conditions in the field of psychiatry) to proceed with his execution without this Court conducting a review of this mitigation would be unconscionable. There is still time to get this right, expediency should never trump the proper administration of justice.

Owen has now spent 37 years[5] on death row due to deprivation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution. As a result of the injustice caused by the unique timing of the procedural postures of the GW and KS cases, no jury or court has ever heard all the mitigation present in this case. No court has considered this claim on the merits.

Owen did not receive the fundamentally fair trial to which he was entitled under the Constitution, and due process interests dictate that this Court allow Owen to finally be heard. *See Derden v. McNeel*, 938 F.2d 605, 610 (5th Cir. 1991). Courts must "be vigilant to ensure that no fundamental injustices occur." *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999). To allow Owen to be executed without factual development of his claims and never having a jury or court consider the weighty mitigation in this case

[5] Owen submits that spending 37 years on death row constitutes cruel and unusual punishment under the Eighth Amendment. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari). However, Owen recognizes that this Court has not yet recognized this claim. *Carroll v. State*, 114 So. 3d 883, 890 (Fla. 2013).

constitutes a manifest injustice.

The circuit court also repeatedly noted that this Court heard a similar claim 23 years ago, but in one of Owen's own cases this Court stated that it can "reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case." *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997); W/2079, 2081. Owen submits that continued reliance on the predecessor Court's holding that Owen's waiver in the instant case did not need to be knowing, intelligent, and voluntary because he was not waiving professional legal representation to proceed unrepresented results in a manifest injustice. *See Owen*, 773 So. 2d at 515. Especially in light of the fact that this Court has required such inquiry in similarly situated capital cases where, like in Owen's case, a waiver of postconviction penalty phase claims took place. *See Garcia*, 949 So. 2d at 986; *see also Gore*, 24 So. 3d at 13-14; *Davis*, 257 So. 3d at 102-08.

In recent years, this Court has not hesitated to recede from prior precedent in order to correct erroneous holdings. *See Lawrence v. State*, 308 So. 3d 544, 552 (Fla. 2020); *see also Phillips v. State*, 299

So. 3d 1013, 1024 (Fla. 2020). "While this Court has consistently acknowledged the importance of *stare decisis*, it has been willing to correct its mistakes." *State v. Poole*, 297 So. 3d 487, 506 (Fla. 2020). The instant case should be no different.

Therefore, this Court should recede from *Owen*, 773 So. 2d 510, stay Owen's execution, remand for the circuit court to hold the EH that Owen was entitled to during his initial postconviction proceedings (without the constraints of accelerated warrant scheduling), and after taking the proper testimony, decide his ineffective assistance of counsel claim on the merits.

II. THE CIRCUIT COURT ERRED IN DENYING OWEN'S CLAIM REGARDING OWEN'S BRAIN DAMAGE, DECLINING MENTAL CONDITION, AND COMPETENCY

In light of counsel's concerns that Owen's mental condition was declining, counsel retained Dr. Hyman Eisenstein, a neuropsychologist, to evaluate Owen after the death warrant was signed. On May 15, 2023, Dr. Eisenstein evaluated Owen and expressed concerns about his competency. He issued his report on May 16, 2023. W/788-91.

a. Brain Damage

The circuit court found that Owen's claims regarding brain

damage were procedurally barred due to being "previously raised and waived by the Defendant" in his 1997 PC Motion. W/2081. The circuit court also held that Owen's claims of newly discovered evidence were "untimely as the record conclusively shows these issues were known to defense counsel more than 20 years ago." W/2081. However, the circuit court neglected to consider the manifest injustice exception, which would overcome any procedural or time bar. *McBride*, 848 So. 2d at 292. As such, this Court should review this claim under the appropriate lens of preventing a manifest injustice.

Evidence regarding Owen's organic brain damage is crucial in this matter because no jury or courts in the GW case have ever been privy to any testimony regarding brain damage or deficits in functioning. Furthermore, Dr. Eisenstein recommends that a neurodiagnostic battery including neuroimaging of Owen in the form of MRI and PET scans of his brain be conducted. W/789. The MRI and PET scans are necessary in order to render a more definitive opinion as to the extent of Owen's brain damage. Regardless of these facts, on May 18, 2023, Owen's Motion for MRI and PET Scan was denied by the circuit court. W/2075-77.

This Court has long held brain damage to be weighty mitigation. *See Hurst v. State*, 18 So. 3d 975, 1011 (Fla. 2009) (evidence of organic brain damage is "significant, relevant mental mitigation"); *Crook v. State*, 813 So. 2d 68, 74-78 (Fla. 2002) (finding that "the existence of brain damage is a significant mitigating factor that trial courts should consider in deciding whether a death sentence is appropriate in a particular case" and overturning a death sentence where the trial court failed to properly find and weigh mitigating evidence of brain damage). In addition, federal courts have also found that jurors are sympathetic to mitigation related to brain damage. *United States v. Barrett*, 985 F.3d 1203, 1222 (10th Cir. 2021) ("evidence of mental impairments is exactly the sort of evidence that garners the most sympathy from jurors, and that is especially true of evidence of organic brain damage") (internal quotation omitted). Not only is brain damage "compelling mitigating evidence," but it "is the type of evidence that the Supreme Court [of the United States] has recognized as relevant in assessing a defendant's moral culpability." *Lynch v. Sec'y, Dept. of Corr.*, 897 F. Supp. 2d 1277, 1303 (M.D. Fla. 2012), *aff'd in part, rev'd in part sub nom. Lynch v. Sec'y, Florida Dept. of Corr.*, 776 F.3d 1209 (11th Cir. 2015) (citing *Porter v.*

McCollum, 558 U.S. 30, 41 (2009) (concluding that prejudice resulted when counsel failed to present evidence of the defendant's brain abnormality).

Neuroimaging of Owen's brain would not only corroborate the results of neuropsychological testing but would also constitute newly discovered mitigating evidence. *See Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (newly discovered evidence standard); *see also Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Even if trial counsel had not been ineffective and had investigated Owen's brain damage and obtained neuroimaging, significant advancements have occurred since the time of Owen's trial in 1986. MRI was first introduced to clinical practice around the time of Owen's trial and the image quality has evolved and improved over time. The sensitivity of the scanners has also increased. Owen is aware of this Court's adverse decisions in *Long v. State*, 271 So. 3d 938, 942-43 (Fla. 2019) and *Davis v. State*, 742 So. 2d 233, 236-37 (Fla. 1999), which the circuit court also cited in its order denying the Successive Motion. W/2081-82. However, Owen respectfully submits that this Court should reconsider its ruling in cases such as Owen's where almost 40 years

have passed since the crime and where Owen had not been evaluated by an expert in approximately 20 years.

Based on the neuropsychological testing performed by Dr. Eisenstein, an MRI and PET scan are expected to yield vital mitigating evidence regarding Owen's cerebral damage that would not only constitute newly discovered evidence but would also likely corroborate Owen's declining mental condition. Due to the weighty nature of mitigation related to brain damage, it is probable that the neuroimaging evidence would produce a new result. *See United States v. Reed*, 887 F.2d 1398, 1404 (11th Cir. 1989) (federal standard for newly discovered evidence is that "the evidence must be of such a nature that a new trial would probably produce a new result").

b. Competency

Dr. Eisenstein's neuropsychological evaluation on May 15, 2023 uncovered new evidence regarding Owen's competency and insanity. W/788-91. To begin with, Dr. Eisenstein's recent evaluation of Owen revealed that Owen is not competent to proceed in postconviction proceedings. Dr. Eisenstein concluded, based on his interview and evaluation of Owen, that Owen meets the criteria for a diagnosis of

schizophrenia and "has an ongoing psychotic delusional belief system that has never changed but has only been enhanced and became more embedded over time." W/791. Owen has "continually focused on his fixed delusions and irrational thinking." W/791. Therefore, Owen is "unable to provide legal counsel with any significant assistance at the present time." W/791. As a result, a Motion for Determination of Competency Pursuant to Florida Rule of Criminal Procedure 3.851(g) ("Competency Motion") was filed on May 17, 2023.

The circuit court denied the Competency Motion on May 18, 2023. W/2072-74. The result of which is akin to a blanket finding that defendants in a warrant posture are unable to receive a determination of competency even though the Rule states a determination can be made "***at any stage*** of a postconviction proceeding." Fla. R. Crim. P. 3.851(g)(3) (emphasis added). Dr. Eisenstein's report provided more than enough reasonable grounds for the circuit court to believe Owen was incompetent to proceed and to appoint experts to inform the court as to Owen's current mental state and competency. The report goes beyond the requirement of

Rule 3.851(g) and specifically outlines his diagnosis of schizophrenia, delusions, and his inability to consult with counsel.

Dr. Eisenstein is a qualified neuropsychologist who has evaluated Owen and found he suffers from schizophrenia and severe delusional thought processes which render him legally insane and incompetent to proceed. A client with the kind of severe delusional and schizophrenic thought processes about facts inextricably intertwined with the case and legal process forecloses any development of newly discovered evidence claims. With these difficult circumstances, especially at this warrant stage, it is problematic to ask counsel to "identify specific factual issues that require the defendant to competently consult with counsel." W/2072 (quoting *Kocaker v. State*, 311 So. 3d 814, 820 (Fla. 2020)). In the short period of time provided under the warrant schedule, in this case a single week, it is impossible to obtain enough information from an incompetent defendant to fully identify specific issues. Accordingly, Owen respectfully requests that this Court reconsider its ruling in *Kocaker* and find that in a warrant posture, the inability for a defendant to competently consult with counsel to develop any newly

discovered evidence claims is enough for a court to appoint experts and conduct a competency determination.

Although Owen submits that he should not have made it to this stage of the appeal as he is incompetent to proceed, is it also clear that Owen's declining mental condition, schizophrenia, and fixed delusions also place Owen outside of the class of individuals allowed to be executed. Executing Owen would violate the Eighth Amendment because Dr. Eisenstein opined that Owen meets the criteria for insanity to be executed. W/791. Owen understands that he must pursue all administrative remedies first. *Grossman v. State*, 29 So. 3d 1034, 1045 (Fla. 2010) ("under rule 3.811(c) and section 922.07, [defendant] must exhaust his administrative remedies before he can raise this issue in court"). However, in light of the short period of time remaining prior to his scheduled execution date, Owen is simultaneously pursuing all administrative remedies at this time. On May 17, 2023 Owen invoked section 922.07(1), Florida Statutes. If the Governor makes a determination that Owen is sane to be executed, counsel will "move for a stay of execution and a hearing based on the prisoner's insanity to be executed." Fla. R. Crim. P. 3.811(d).

Owen's competency issues and insanity place him outside of the class of individuals eligible to be executed because the Supreme Court of the United States has held that the Eighth Amendment "prohibits the execution of a prisoner whose mental illness prevents him from 'rationally understanding' why the State seeks to impose that punishment." *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). "Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Panetti*, 551 U.S. at 960. This Court has also made it clear that "[i]ndividuals who lack the mental capacity to understand their pending execution and the reasons for it cannot be executed." *King v. State*, 211 So. 3d 866, 889 (Fla. 2017). Owen's severe mental illness and delusions inhibit his ability to rationally understand why the ultimate punishment is to be imposed upon him. W/791. Owen is precisely the case that the Eighth Amendment seeks to protect.

Further, Dr. Eisenstein stated that "there appears to be the onset of an insidious dementia process." W/789. If Dr. Eisenstein had more time to fully explore Owen's memory problems and conduct

the associated testing, as well as obtain MRI and PET scans, Owen's dementia could be confirmed. "[A] person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution." *Madison*, 139 S. Ct. at 726-27. The Eighth Amendment applies similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions, because either condition may impede the requisite comprehension of his punishment." *Id.* at 722. Owen appears to be suffering from both conditions.

Regardless, the Supreme Court of the United States has made clear, "[w]hat matters is whether a person has the 'rational understanding' *Panetti* requires—not whether he has any particular memory or any particular mental illness." *Id.* at 727. Dr. Eisenstein stated that "Owen's gross delusions stemming from his schizophrenia are so far removed from reality that they foreclose any possibility of a rational understanding of the reason for his execution." W/791. His findings confirm that Owen's execution is barred by the Eighth Amendment to the United States Constitution.

c. Conclusion

This Court should stay the execution to determine Owen's

competency pursuant to Florida Rule of Criminal Procedure 3.851(g), as well as his competency to be executed. This Court should also grant a stay to allow Dr. Eisenstein to conduct further neuropsychological testing and to grant Owen the completion and interpretation of neuroimaging in the form of an MRI and PET scan.

CONCLUSION

Based on the foregoing arguments, Owen respectfully requests that this Court remand his case for a competency determination; remand his case for an evidentiary hearing; vacate his sentence of death; grant a stay of execution; and/or grant any other relief it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on this 24th day of May, 2023, the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal which will send a notice of electronic filing to the following: Assistant Attorney General Celia Terenzio at Celia.Terenzio@myfloridalegal.com and capapp@myfloridalegal.com; Assistant Attorney General C. Suzanne Bechard at carlasuzanne.bechard@myfloridalegal.com; Assistant Attorney General Leslie Campbell at Leslie.Campbell@myfloridalegal.com; and the Florida Supreme Court, at warrant@flcourts.org.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045, we hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief is not subject to word count, and instead complies with the page limit as it does not exceed 75 pages.

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