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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Appellant, Duane E. Owen, offers the following reply to the Answer Brief of Appellee ("Answer Brief"). Owen will not reply to every issue and argument raised by the State and will only address the most salient points. Owen expressly does not abandon any issue not specifically replied to herein and relies upon his Initial Brief of the Appellant ("Initial Brief") in reply to any argument or authority not specifically addressed.

Page references to the postconviction record on appeal (Case No. 92,144) are designated with R[volume number]/[page number].

References to the record of the direct appeal (Case No. 95,526) of the retrial in the 84-4014 circuit court case ("KS retrial") are of the form S/[page number].

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

Page references to the Initial Brief are designated with IB/[page number].

Page references to the Answer Brief are designated with AB/[page number].

The initials GW and KS are used when referring to the victim in

each case referred to herein. All other references will be self-explanatory or otherwise explained.

ARGUMENT IN REPLY

This Court must review these claims under the proper lens. Owen is not only sentenced to death. His death warrant has been signed and an execution date has been set. "[E]xecution is the most irremediable and unfathomable of penalties. . . death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The instant case is literally a matter of life or death, because once the State has executed Owen, he will not have any recourse. Accordingly, this Court must exercise its duty to review cases and prevent manifest injustice. When post-warrant litigation calls upon this Court to correct past wrongs in circumstances where a death sentence was upheld based on the denial of constitutional rights, this Court can and should intervene.

REPLY TO ISSUE I

This claim encompasses much more than simply a waiver of Owen's original postconviction litigation. This claim is a fundamental constitutional claim that Owen was denied due process when he was

forced to choose between his constitutional rights, and as a result no jury or court ever considered all of the compelling and weighty mitigation in the instant case. The State's Answer Brief mischaracterizes the issue Owen presents.

Characterizing the fact that Owen was forced to choose between his constitutional rights as "a now-regretted decision" is plainly improper. AB/48. Owen should have never been placed in a position of having to choose whether to go forward with an evidentiary hearing in the instant case or waive attorney client privilege in the pending KS retrial. No defendant should be placed in the position of choosing between constitutional rights, and this has been made abundantly clear by the Supreme Court of the United States. *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.") Choosing between two constitutional rights should not be regarded as a "now-regretted decision" in any case, much less one where a human life is at stake. Further, Owen raising this claim should not be mischaracterized as "complain[ing] about his decision to waive meaningful mitigation." AB/47. It would be a manifest injustice for this Court to further depict Owen's position as such.

Owen maintains that the postconviction judge should have conducted a *Faretta*-type[1] inquiry to ensure Owen's waiver of his constitutional rights was voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 748 (1970) ("[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."). The Answer Brief neglects to address that a nearly 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 where an evidentiary hearing was granted, 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 respectfully maintains that this Court's previous interpretation of the minimal inquiry that did occur as a valid waiver of his constitutional rights, constitutes manifest injustice. *Owen v. State*, 773 So. 2d 510 (Fla. 2000) (finding Owen's waiver of postconviction claims and evidentiary hearing was valid).

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

Owen further maintains that due to the inextricably intertwined nature of his two cases, the only solution to ensure he received due process would have been to issue a stay in the GW evidentiary hearing. The State alleges in its Answer Brief that Owen refused to advise the postconviction court as to when a stay, if issued, could be lifted. No reasonable judge would believe a defendant in Owen's position was "seeking an indefinite stay and one over which he had complete control." AB/35. Such a request would admittedly be objectionable. As noted in Owen's Initial Brief, there were other options available to the court that would have prevented Owen from having to choose between his constitutional rights. IB/23.

There is no direct evidence in the December 8, 1997 hearing transcript that Owen never intended to make a good faith effort to move forward with his claims. Rather, collateral counsel who represented Owen at that hearing did provide a reasonably adequate answer when the court inquired as to how long Owen's relationship with his trial attorneys could be expected to last. R28/861. As the KS retrial date had not been set, it would have been impossible for counsel to speculate and provide an exact time frame for which this conflict would exist.

Without an evidentiary hearing and proper consideration of the compelling mitigation evidence in the GW case, manifest injustice will result. The State notes identical evidence was presented to Owen's jury in the retrial proceedings of the KS case. AB/39. It is inappropriate for the State to insinuate that because the KS retrial resulted in a guilty verdict and a death recommendation, that the same would occur in Owen's GW case if a jury or court heard all of his weighty mitigation. AB/39. Although the KS case exhibits arguably worse facts; Owen received a 10-2 jury recommendation during the KS retrial.

This Court must keep in mind that Owen also received a 10-2 jury recommendation during his 1986 GW trial, with only two penalty phase witnesses presenting minimal mitigation: Mitchell Owen, Owen's older brother, and Dr. J. Patrick Peterson, a court appointed psychologist. The jury in the instant case was never presented with a considerable amount of poignant mitigation that would have led a reasonable jury to return a life recommendation. The mitigating circumstances in the GW case are arguably weightier than in the KS case, and 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 continues to submit 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.

In addition, the State attempts to discredit Dr. Faye Sultan's 1998 opinion diagnosing Owen with schizophrenia and gender identity disorder. The State goes so far as to say that Dr. Sultan's opinion would "be discredited today" simply because one of the State experts, Dr. Thomas Waddell, had never seen the coexistence of schizophrenia and gender identity disorder. AB/44. Notably, Dr. Sultan was not the only expert to conclude that Owen was experiencing both diagnoses at the same time. The State fails to recall the portion of Dr. Fredrick Berlin's testimony during the KS retrial, where he testified that in very rare cases schizophrenia and severe gender identity disorder may coexist, as they do in Owen. S/4072.

The State further fails to recognize that within Dr. Waddell's report, he did find Owen exhibited "severe mental disorders," notably gender identity disorder and "depression of moderate intensity." R/5713, 5722. Further, the State does not point out that anther one of its experts during the KS retrial, Dr. McKinley Cheshire, confirmed

Owen's diagnosis of Sexual Disorder Not Otherwise Specified and explained that this diagnosis encompasses various sexual attitudes, including such diagnoses as gender identity disorder. S/5874.

Lastly, the Answer Brief maintains its focus on time and procedural bars and summarily dismisses the manifest injustice exception. AB/28, 48. However, as the highest court in Florida, this Court has the responsibility to exact justice and ensure Owen's rights under the United States Constitution. Then Chief Justice Anstead's special concurrence in *Baker v. State*, 878 So. 2d 1236, 1246 (Fla. 2004), joined by Justice Pariente and Justice Lewis, provides a reminder that the Florida Constitution provides the means to correct manifest injustices when all other remedies have been exhausted. "This Court will, of course, remain alert to claims of manifest injustice, as will all Florida courts. As we reaffirmed in *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999), "'we will continue to be vigilant to ensure that no fundamental injustices occur.'" *Id.* This Court has the duty to uphold the Constitution and remedy errors that amount to a manifest injustice.

If this Court fails to remedy the claims that Owen presents, such as being denied his constitutional rights without even so much

as a proper waiver colloquy, it raises a similar concern to that which the Supreme Court of the United States recently addressed in *Cruz v. Arizona*, 143 S. Ct. 650 (2023). In *Cruz*, the opinion rested on the proposition that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 658 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)). The dissent fully embraced that rule but argued that it was not violated in the circumstances at hand. *Id.* at 665. An application of a procedural bar would also be "novel" considering that this Court has the jurisdiction to correct manifest injustice.

The instant case raises such manifest injustices and Owen asserts that the law of the case, *res judicata*, and collateral estoppel have been overcome. *State v. Owen*, 696 So. 2d 715 (Fla. 1997); *State v. McBride*, 848 So. 2d 287 (Fla. 2003). Furthermore, *stare decisis* does not prevent this Court from granting Owen relief. Recently, this Court has routinely set aside long-standing precedent to apply what this Court believes was a correct standard of law. *See State v. Poole*, 297 So. 3d 487, 491 (Fla. 2020); *Bush v. State*, 295 So. 3d 179, 201

(Fla. 2020); *Phillips v. State*, 299 So. 3d 1013, 1022 (Fla. 2020); *Lawrence v. State*, 308 So. 3d 544, 549 (Fla. 2020). To the extent that there is case law that would seem to prevent relief, including Owen's own case, this Court should overrule such precedent. Reaching the correct application of the law should be of paramount importance to this Court. It is no less important here based on the manifest injustice that Owen has already suffered. Regarding *stare decisis*, this Court has stated:

> While this Court has consistently acknowledged the importance of *stare decisis*, it has been willing to correct its mistakes. In a recent discussion of *stare decisis*, we said:
>
> > *Stare decisis* provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court."
>
> *Shepard v. State*, 259 So. 3d 701, 707 (Fla. 2018) (quoting *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995)). Similarly, we have stated that "[t]he doctrine of stare decisis bends … where there has been an error in legal analysis." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). And elsewhere we have said that we will abandon a decision that is "unsound in principle." *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (quoting *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012)).

> It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty. A conclusion that the earlier Court erred must be based on a searching inquiry, conducted with minds open to the possibility of reasonable differences of opinion. "[T]here is room for honest disagreement, even as we endeavor to find the correct answer." *Gamble v. United States*, ___U.S. ___, 139 S. Ct. 1960, 1986, 204 L. Ed. 2d 322 (2019) (Thomas, J., concurring).
>
> In this case we cannot escape the conclusion that, to the extent it went beyond what a correct interpretation of *Hurst v. Florida* required, our Court in *Hurst v. State* got it wrong. We say that based on our thorough review of *Hurst v. Florida*, of the Supreme Court's Sixth and Eighth Amendment precedents, and of our own state's laws, constitution, and judicial precedents. Without legal justification, this Court used *Hurst v. Florida* — a narrow and predictable ruling that should have had limited practical effect on the administration of the death penalty in our state as an occasion to disregard decades of settled Supreme Court and Florida precedent. Under these circumstances, it would be unreasonable for us *not* to recede from *Hurst v. State*'s erroneous holdings.

Poole, 297 So. 3d at 506 (emphasis in original).

This Court also recently receded from its decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016). In doing so, this Court relied on *Poole* and discussed the decision to overturn the prior erroneous decision:

> We cannot escape the conclusion that this Court in *Walls* clearly erred in concluding that *Hall* applies retroactively.

> We say that based on our review of *Hall*, our state's judicial precedents regarding retroactivity, and the decisions of federal habeas courts concluding that *Hall* does not apply retroactively. Based on its incorrect legal analysis, this Court used *Hall* — which merely created a limited procedural rule for determining intellectual disability that should have had limited practical effect on the administration of the death penalty in our state — to undermine the finality of numerous criminal judgments. As in *Poole*, "[u]nder these circumstances, it would be unreasonable for us not to recede from [Walls'] erroneous holdings." *Id.* at___, at S48.
>
> "[O]nce we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason why not to recede from that precedent. ... The critical consideration ordinarily will be reliance." *Id.* But
>
> > reliance interests are "at their acme in cases involving property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828 [111 S. Ct. 2597, 115 L. Ed. 2d 720] (1991). And reliance interests are lowest in cases—like this one — "involving procedural and evidentiary rules." *Id.*; *see also Alleyne [v. United States]*, 570 U.S. [99] at 119 [133 S. Ct. 2151, 186 L.Ed.2d 314 (2013)] (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of stare decisis is reduced.").

Phillips, 299 So. 3d at 1022.

Thus, if overcoming *stare decisis* was correct in the above-mentioned cases to reach what this Court believed to be a just and required outcome, the same result should be reached in the instant

case. Whatever precedent that could be used to affirm the Circuit Court's denial of relief, "must yield to [the Florida C]onstitution" and the United States Constitution. *Lawrence*, 308 So. 3d at 548. This Court must be as willing to confront past error in an individual case such as Owen's as it is to overcome *stare decisis* in cases in which the impact is far wider.

Any procedural or time bar to the above issue can certainly be overcome by the manifest injustice exception. *McBride*, 848 So. 2d at 292. If this Court fails to exercise its power to correct erroneous decisions, Owen will be executed in violation of the United States Constitution. As such, this Court should review Owen's claim under the appropriate lens of preventing a manifest injustice.

REPLY TO ISSUE II

Contrary to the State's assertions, Owen's second claim is premised on much more than Dr. Hyman Eisenstein's May 16, 2023 report. AB/48. The Answer Brief minimizes the issues Owen presents. This claim is centered on the evidence regarding Owen's brain damage, declining mental condition, and competency that

place Owen outside of the class of individuals eligible to be executed.[2]

Owen was first evaluated by a psychologist nearly forty years ago. Owen's symptoms have progressed and are not simply "repackaged" with a new diagnosis as the State claims. AB/52. The State cites *Asay v. State*, 2010 So. 3d 1, 23 (Fla. 2016), where this Court held, merely obtaining a new expert to review the same records does not constitute newly discovered evidence. In the instant case, Dr. Eisenstein did not merely review the same records as other experts in the 1990s and come to a new conclusion. Rather, in compiling his report, in addition to reviewing records, he met with Owen for six hours on May 15, 2023 at Florida State Prison, less than a week after Owen's death warrant was signed.

The report issued by Dr. Eisenstein on May 16, 2023 is far from a repackaging of previous symptoms as a new diagnosis as the State asserts in its Answer Brief. AB/52 (citing *Rodgers v. State*, 288 So. 3d 1038, 1039-40 (Fla 2019)). Instead, the report illustrates a

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[2] 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)).

compilation of new conditions not previously known, including a decline in cognitive functioning and the apparent onset of dementia. W/788-91. The new evidence of cognitive decline and early onset dementia has never been reported by any doctor that has previously evaluated Owen. The neuropsychological evaluation Dr. Eisenstein conducted also confirmed a diagnosis consistent with schizophrenia, as he has an ongoing psychotic delusional belief system that has remained unchanged. W/790.

The State argues that Owen is attempting to resurrect "25-year old claims." AB/51, 54. Nonetheless, this Court is well versed in the cruciality of brain damage as weighty mitigation. *Hurst v. State*, 18 So. 3d 975, 1011 (Fla. 2009) (evidence of organic brain damage is "significant, relevant mental mitigation."). Owen asserts that when a death warrant has been signed, such evidence and consideration of a defendant's organic brain damage becomes even more crucial.

Owen is aware of this Court's adverse decisions in *Davis v. State*, 742 So. 2d 233 (Fla. 1999), *Barwick v. State*, SC2023-0531, 2023 WL 3151079 (Fla. Apr. 28, 2023), and *Jones v. State*, 708 So. 2d 512 (Fla. 1998). 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 over 20 years. Further, given the recent advancements in the field of neuroimaging, manifest injustice would certainly result if this Court does not allow exploration of critical evidence of a death-sentenced individual's brain damage.

The Answer Brief argues that the signing of a death warrant does not relieve Owen of the consequences of procedural bars. AB/51. Yet again the State fails to consider that a procedural bar can be overcome to avoid a manifest injustice and that this Court constantly recedes from precedent that it finds to be erroneous in order to correct past mistakes. *See supra* pp. 8-13.

Finally, in addressing Owen's competency, the State argues that none of the issues at hand require the defendant's input under *Ferguson v. State*, 101 So. 3d 362, 367 (Fla. 2012). AB/51-52. However, Owen maintains that especially at the stage after a death warrant is signed, under the accelerated timelines imposed, 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)). Notably, the State, by virtue of its position in all cases it handles, has never

experienced the myriad of challenges that arise when working with an incompetent client. The time constraints of the warrant posture are such that obtaining enough information from an incompetent defendant to fully identify specific issues is impossible. Consequently, this Court should remand for a competency determination.

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 30th 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 Reply 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 25 pages.

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