IN THE SUPREME COURT OF FLORIDA

DUANE OWEN,

Appellant,

v. Case No. SC18-810

STATE OF FLORIDA,

Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW Appellee, the State of Florida, by and through undersigned counsel, and responds to this Court's June 25, 2018 Order to Show Cause. The order issued was in direct response to Appellant, Duane Owen's (herein Owen) Motion For Order To Show Cause filed on May 31, 2018. The pith of Owen's request to dispense with regular briefing in this case is based on the three facts; (1) Owen's second death sentence was final after *Ring v. Arizona* 536 U.S. 584 (2002), (2) the jury's recommendation for death was non-unanimous, (10-2); and (3) this Court has not upheld any "post-*Ring*" case where the recommendation for death was less than unanimous. *See* Motion at 3-4. Consequently, the initial question this Court is, whether a non-unanimous jury recommendation for death precludes application of the harmless error analysis. The trial court found that it does not, and although the

jury vote is a factor to consider, that alone does not warrant an automatic reversal. (PCR 371).

On January 6, 2017, Owen filed a successive *Fla. R. Crim P.* 3.851 motion challenging his death sentence pursuant to *Hurst v. Florida* 136 s. Ct. 616 (2016) (*Hurst I)* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) *(Hurst II)*. Relying on the numerous cases from this Court where harmless error has been found only in cases where the jury recommendation was unanimous, Owen argues that the non-unanimous recommendation for death in this case prohibits application of the harmless error analysis, and the trial court should have reversed without any further anaysis. (PCR 398, 399, 401, 403, 404, 442, 445, 481, 518-519).[1]

Before rejecting Owen's request to forego the harmless error analysis, the trial court noted the confusion generated by this Court's analysis is due to the emphasis placed on the actual numerical vote by the former jury. (PCR 515-519). If the vote for death was not unanimous, this Court seems to dispense with the harmless error analysis finding it impossible to discern the basis of the former jurors' recommendation for life. *Mosely v. State,* 209 So. 3d 1248 (Fla 2016)(reversing 8-4 recommendation for death as inquire regarding the reasons behind vote for life is mere speculation); *Doorbal v. State,* 227 So. 3d 110 (Fla. 2018) (attempting to

[1] The record from the proceedings below will be designated" PCR" and the transcript form the direct appeal record will be designated "ROA."

discern why some jurors voted for life while others voted for death amounts to speculation requiring reversal); *Deviney v. State*, 213 So. 3d 794 (Fla. 2017) (reversing for *Hurst* error as four jurors recommended life "for whatever reason" therefore we are unable to determine if error were harmless).

Ultimately after two rounds of pleadings and two oral arguments, the trial court conducted the analysis regardless of the fact that the jury's recommendation for death was 10-2. (PCR 514-517, 521). In its harmless error analysis, the trial court stated in part:

> **……..Second, to blindly determine harmless error based on the initial numerical vote of a jury that was not instructed that they needed to reach a unanimous verdict would make the harmless error analysis meaningless. Indeed, there would be no analysis……**
>
> This does not mean that the lack of unanimity should not be a significant factor in determining harmless error. However, **any meaningful review must also consider whether a rational jury instructed as to unanimity** would find beyond a reasonable doubt the existence of sufficient aggravators, that those aggravators outweighed any mitigating circumstances, and that an appropriately instructed jury would unanimously recommend a death sentence.

(PCR 371-372) (emphasis added). The State asserts that the trial court properly took this Court at its word, applied the objective rational jury analysis of *Neder v. United States*, 527 U.S. 1 (1999) and moved forward with the harmless error analysis, irrespective of the non-unanimous death recommendation. As explained in detail below, the trial court's reasoning is sound and should be upheld by this Court.

The gravamen of the trial court's ruling is that this Court has explicitly embraced the rational jury test for Sixth Amendment error espoused in *Neder, supra.* Further, this Court consistently has adopted United States Supreme Court precedent in this area and in fact, has overruled its own precedent when clearly contrary to the Supreme Court. *See Galindez v. State,* 955 So. 2d 517 (2007) (holding Florida decisions that suggest failure to submit factual issues to jury is not subject to harmless error analysis are superseded by United States Supreme Court's contrary precedent in *Washington v. Recueno,* 548 U.S. 212 (2006). Likewise, and without reservation, this Court embraced *Neder* and its harmless error analysis for *Hurst* error. *See Hurst II*, 202 So. 2d at 67. (reaffirming *Galindez* and *Neder* apply to Sixth Amendment error in capital cases)*; Mosley, supra* (explaining "it must be clear beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence."); *Hall v. State*, 212 So. 3d 1001 (Fla. 2017) ("[I]t must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances."). However, confusion abounds because this Court has included a subjective focus on the possible reasons why a member or members of the actual jury voted for life. (ROA 371). *Deviney, supra.*

The illogical nature of this Court's focus on the actual vote and reasoning behind the former jurors' life recommendation is underscored by the fact that it is impossible to ever ascertain what motivated a juror to recommend life.[2] *Jones v. State*, 928 So. 2d 1178, 1191-1192 (Fla. 2006) (reaffirming rule that jurors are not permitted to testify about matters that inhere in the verdict). By injecting that component into the equation, this Court has adopted an analysis that is the complete antithesis of the **objective analysis** espoused in *Neder*, and *Hurst II*, and has created a "legal hurdle," that even this Court admits it can never overcome. *Deviney, supra.* This hurdle amounts to a *per se* rule of reversible error and betrays the teaching of *Neder* and *Champman. See Johnson v, State*, 53 So. 3d 1000, 1007-1008 (Fla. 2010) (explaining that an error is *per se* reversible if the harmless error analysis involves "pure speculation" resulting in consistent and automatic finding of harmful error).

In recognizing the impossibility of assessing the effect an error may have had on a former jury's deliberations, the United States Supreme Court adopted the rational jury harmless error test in *Neder, supra*. The Court explained that Sixth Amendment error requires application of such a test and stated as follows:

> Such errors, **no less than the failure to instruct on an element in violation of the right to a jury trial, infringe upon the jury's factfinding role and affect the jury's deliberative process in ways**

[2] When pressed by the trial court regarding the objective standard with a rational jury, counsel for Owen argued that under the standard, the State would have to prove that a particular juror or jurors were either paid off or under the influence of drugs during deliberations. (PCR 496).

> **that are, strictly speaking, not readily calculable**. We think, therefore, that the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error? **To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place….**

Neder, supra, at 18) (e.a.). This test dismantles completely the unnecessary legal barrier constructed by this Court since *Hurst II*.

This Court's apparent fixation on "looking backward" to the improper instruction rather than "looking forward" to what a rational juror would do with a proper instruction, illogically ignores the import of the unanimity requirement and its effect on jury deliberations. In *Hurst II* this Court explained:

> Further, it has been found based on data that **"behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict.** Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness." See Elizabeth F. Loftus & Edith Greene, Twelve Angry People: The Collective Mind of the Jury, 84 Colum. L.Rev. 1425, 1428 (1984). **Another study disclosed that capital jurors work especially hard to evaluate the evidence and reach a unanimous verdict where they can find agreement**. See Scott E. Sundby, War & Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103 (2010). **Unanimous-verdict juries tend to be more evidence driven**, generally delaying their first vote until the evidence has been discussed. See Kate Riordan, Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald, 101 J.Crim. L. & Criminology 1403, 1429 (2011). **Further, juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus**….

202 So.3d at 58-59. (e.a.)

Finally, in addition to the truth finding aspects of the unanimity requirement, this Court has also recognized the effect of non-unanimity instructions on jury deliberations. In *Reynolds v. State*, 2018 WL 1633075, albeit in the context of the Eight Amendment, this Court recognized that jurors instructed that they are not required to reach a unanimous recommendation may feel that they are "off the hook" and can vote for life in a case that could very well merit the death sentence. And, fellow jurors would not feel compelled to urge further deliberations given that only a bare majority is required for a death recommendation. *Reynolds supra*, at *12. In other words, this Court recognized that the pre-*Hurst* instruction allowed an individual juror to hide behind the lack of unanimity requirement in its final recommendation. A juror may vote for life without consequence as this Court presciently acknowledged in its rejection of Reynold's Eight Amendment challenge.

Reynolds re-focuses the harmless error analysis that this Court must conduct for a post-*Ring Hurst* Sixth Amendment error claim. This Court must not query/ponder why a particular juror voted for life because, as observed by this Court, those reasons are varied and many. Indeed, as documented in the research cited by this Court, a juror is more prone to abdicate its responsibility knowing that his/her vote is of no consequence as only a majority vote is required thereby making a vote for life easier. A proper harmless error analysis mandates this Court evaluate as the trial court did below, would a rational jury, properly instructed, recommend

unanimously a sentence of death based on the same record.[3]

The trial court's application of the rational jury test was correct. The State respectfully requests this Court dispel the confusion and reject Owen's claim that no harmless error analysis should be conducted of non-unanimous recommendations. Instead, this Court should reaffirm application of the rational juror test as stated in *Neder, supra; Galindez, supra;* and the concurrence in *Johnson,* 53 So. 3d at 1015 by Justices Polston and LaBarga, reaffirming harmless error test of *Washington v. Recuenco* for Sixth Amendment errors including an erroneous read-back instruction irrespective of the fact that there is no way of knowing what the actual jury would have done absent improper instruction.

Based on the instant record, it is clear beyond a reasonable doubt, that a rational jury properly instructed would have unanimously recommended death in this case. Owen's death sentence was predicated on four aggravating factors: (1) the defendant had previously been convicted of a prior violent felony; (2) the murder

[3] The importance of looking at what a properly instructed rational jury would do is best exemplified in *Deviney, supra.* Therein, as mentioned above, this Court determined that because it could not discern why four jurors voted for life after receiving the erroneous instruction, the sentence of death had to be vacated. Yet, at Deviney's resentencing, a **properly instructed** jury unanimously recommended death. Albeit in hindsight, this certainly reinforces the argument that the analysis must focus on a **properly instructed rational juror.** It is certainly reasonable to ponder that if the proper harmless error test had been applied, this Court may not have reversed.

was committed during the course of a felony; (3) the crime for which the defendant was to be sentenced was especially heinous, atrocious, and cruel (HAC); and (4) the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (CCP). *See Owen v. State* 862 So. 2d 687, 691 (Fla. 2003).

In finding the *Hurst* error harmless, the trial court determined that the first two aggravators were undisputed by Owen and both were premised on prior convictions that were found unanimously by a jury. (PCR 372-373). Those findings are supported by the record as the sentencing court found the existence of the first two aggravators beyond all doubt because of the overwhelming evidence in support thereof and because Owen conceded their existence. (ROA 4053, 4054).

The evidence presented to the jury in support of these factors was as follows. In support of the "the defendant has previously been convicted of another capital offense of a felony involving the use of violence to some person" one of the weightiest aggravators in Florida, the jury heard testimony of police officer Kevin McCoy who interrogated Owen. The jury also viewed Owen's video tapped confessions from three separate cases. In the first case, Owen was convicted of attempted first degree murder and burglary while armed with a weapon against a seventeen-year old female asleep in her bed. Owen stated he had gone into the apartment looking for items to steal. In fact, he took money from a purse and a ring,

which he later pawned. Armed with a wrench, Owen repeatedly hit the female victim in the head as she was waking up and getting out of bed. He claims he hit her because she would have "stepped on him" if she had gotten out of bed. Her injuries required immediate brain surgery. Owen left the apartment after the attack and went to a waiting cab that he called prior to the attack. During this confession, Owen explained that when he heard the police sirens approaching, he contemplated what his next move should be. If the police stopped the cab, he confessed that he was prepared to jump out to escape. Owen sketched for the police the inside of the seventeen-year old victim's bedroom. (ROA 6329, 6337-6338, 6346, 6349, 6353, 6355).

The second case included his convictions for burglary with an assault or battery. (ROA 6356). Owen entered the apartment of a twenty-six year old female, living alone and asleep late at night. (ROA 6356-6358). The victim woke up and Owen, armed with a weapon of opportunity, an iron he found in her closet, struck her twice in the head. He described the incident to the police as "I hit the bitch." (ROA 6369). He repeatedly told the police that he was in the apartment looking for valuables to steal. (ROA 6362, 6365-6367).

The third case included convictions for the first-degree murder, sexual battery while armed, and burglary with a dangerous weapon of a thirty-eight year old mother of two, G.W. Owen received the death penalty in that case. *Owen v. State,* 596 So.

2d (ROA 6375, 6377).[4] G.W. was found dead, with a caved in forehead, the result of repeated blows to her head with a hammer. (ROA 6382-6383, 6407, 6424). There had been a struggle as evidenced by blood splattering and brain matter around the area. (ROA 6383). Before his attack, Owen considered just waking her up and raping her. (ROA 6409). Yet, before he was able to do so, she awoke and he hit her with a hammer because she was coming at him and screaming. (ROA 6410).

As noted above, Owen, conceded the existence of these convictions, and thus, under Florida law, the existence of this aggravator was proven beyond any doubt and a rational jury would have so found unanimously. *see Kopsho v. State*, 209 So. 3d 568 (Fla. 2017) (no reasonable juror would not have found the existence of the prior violent felony, during the course of an armed kidnapping, and under the sentence of imprisonment or felony probation aggravators); *Jackson v. State*, 213 So. 3d 754 (Fla. 2017) (same)

Similarly, with respect to the aggravator "during the course of a felony" for a sexual battery or burglary" (ROA 4954), the jury heard Owen's confessions to the burglary and attempted sexual battery of K.S. and convicted him of those crimes. Owen conceded the existence of this aggravator at the penalty phase, raised no challenge on direct appeal. Consequently, without any doubt, this factor was proven

[4] Summary denial of a *Hurst* claim was upheld by this Court on upheld on June 26, 2018. *Owen v. State*, Case no. SC18-382

beyond any doubt and a rational jury would have so found (ROA 4054). *See King v. State,* 211 So.3d 866, n. 7 (Fla. 2017) (noting that the jury was not required to find the existence of the aggravating circumstance that the murder was committed during the course of a sexual battery, because the defendant had already been convicted of a sexual battery when he was sentenced).

The trial court found the two remaining factors of "HAC and "CCP", were also supported by **overwhelming and uncontroverted evidence**, and upheld on direct appeal. Additionally, the court noted that they are of the most serious aggravators. (PCR 373-376). *Owen* 862 So. 2d at 698-702. These two factors, although normally heavily fact-dependent, **were not factually challenged by Owen,** and therefore, under the unique circumstance of this case, this Court can be certain that a rational jury would have found both factors unanimously. *King, supra.* The trial court below relied heavily on both the record evidence and this Court's factual findings on direct appeal to determine that a rational jury would find the existence of both these factors unanimously. (PCR 373-376).

For instance, with respect to "HAC", **Owen did not challenge the facts presented by the state's witnesses in support of this factor**. To the contrary, through his mental health experts Owen admitted all the facts necessary to find this factor as he acknowledged that he stabbed K.S. eighteen times; he agreed with the medical examiner's testimony that K.S. was conscious for approximately one minute

after the attack began; Owen intended to place the victim in as much fear as possible; and he conceded in closing argument, that the murder was very sick, horrific and that she obviously suffered. (ROA 6856-57). *Owen, supra*, at 699-700.

Owen's only and very specific challenge to the HAC factor was a legal one and not predicated on a fact contested at trial. According to Owen, the presence of defensive wounds was required to support the "HAC' factor, and because there were no defensive wounds on the victim's body, HAC could not be found. However, the State neither presented evidence nor argument in support of HAC based on the presence of defensive wounds on K.S. Consequently, there was no factual dispute in the evidence on that point.

After rejecting that legal argument, this Court relied on the **uncontroverted** testimony of the medical examiner that the multiple (eighteen in total and seven fatal) stab wounds would have cause severe pain, shock, terror, awareness of impending death, and inability to cry out for help, all within twenty seconds to two minutes. *Owen, supra* 862 So. 2d at 698-699. This Court concluded that the record in the case "**unquestionably** satisfied" the requirements of HAC. *Id,* a 700. Consequently, a rational jury would have found unanimously, beyond a reasonable doubt, the existence of this factor. *See King, supra,* (noting in *Hurst* harmless error analysis that that the evidence in support of "HAC" was overwhelming and essentially uncontroverted); *compare, Jackson, supra,* (explaining Court unable to

determine if beyond a reasonable doubt a rational jury would have found unanimously HAC because the evidence was contested).

Similarly, **Owen conceded to the jury all the facts that would support the "CCP" factor including that the murder demonstrated heightened premeditation; a careful deliberate plan; and Owen took actions both before and after the murder to ensure that he would not be detected.** (ROA 6865, 6576-6577). His sole challenge to this factor was that because he allegedly suffered from a delusion that he was a woman who needed the female essence of other women, his well thought-out and calculated plan to attack K.S. was not the result of calm and cold reflection, but rather the thoughts of a "crazy person." (ROA 6865). This Court explicitly rejected his argument finding, "mental, emotional disturbance, or illness" does not preclude a finding of the "CCP" aggravator, and recounted the uncontested facts that supported this factor. *Owen*, 862 So. 2d at 701. **Because there was no contested fact at issue with respect to "CCP**" and because his legal argument that his delusion negated CCP was rejected by the Court as a matter of law, a rational jury would have found the existence of this factor beyond a reasonable doubt. *King, supra; Jackson, supra.*

In conclusion, based on these unique facts and circumstances, the compelling, striking and un-assailed evidence in support of all the aggravators, along with the manner in which Owen challenged two aggravators and conceded the facts in

support of the remaining two factors, conclusively establishes beyond a reasonable doubt, that a rational jury would have found unanimously the four aggravators if instructed in accordance with *Hurst II*.

The trial court next considered the evidence in mitigation. The court noted that the evidence was vigorously challenged by the state, and the jury, during the guilt phase, rejected the identical premise of Owen's mitigation as it formed the basis for an insanity defense. (PCR 377). The trial court's findings are supported by the record below. (ROA 4055-4060).

For instance, cross-examination of his experts revealed that their opinions were not corroborated by any independent evidence; they were severely rebutted by the State's experts who found Owen to be a malingerer and anti-social; **and most important the facts of this case refuted completely the crux of his penalty phase presentation**. The theme throughout Owen's re-trial was premised exclusively on his **self-reported claim, told for the first time twelve years after the murder,** that he suffers from a delusional belief that he is a woman.[5] This schizoid delusion motivates Owen to capture the "female essence" of his victims, which can only occur

[5] In fact, this delusion was not "discovered" until Owen, personally reached out to Dr. Berlin. Owen told Berlin he had a court case and he was interested in gender identity disorders after he read Berlin's article on sexual disorders. (ROA 5337). His other expert, retained by counsel, Dr. Sultan, never mentioned this malady until after Berlin came on board.

during sex with them while they are unconscious and near death. This alleged delusion formed the basis of his doctors' opinions that he suffers from schizophrenia, and therefore, was insane at the time of the murder. (ROA 5346, 5426, 5383, 5352, 5979-5982, 5985-5987, 5514, 5997, 5592, 6000). The jury rejected unanimously this defense at the guilt phase. As such, a rational jury would have rejected it unanimously at the penalty phase.

Owen presented this same evidence at the penalty phase and relied upon the existence of this delusion as the sole basis in support for the two statutory mental mitigators of "the crime was committed while the defendant was under extreme mental or emotional mental disturbance," and that "the defendant's ability to appreciate the criminality his actions or conform his behavior to the requirements of the law was substantially." (ROA 6647, 6658, 6660). Owen's experts, Dr. Berlin and Dr. Sultan, stated that he was consumed with becoming a woman. (ROA 6637, 6675, 6547 6564, 6656, 6559, 6562, 6564). They relied almost exclusively on Owen's self-reported delusion in support of their opinions, conceding that if the delusion was fabricated by Owen, there was no basis to opine that he had any psychosis. (ROA 5350, 5368). Both doctors conceded that Owen's delusion was not directly corroborated by any other testing, and they conceded that he never told the police during his detailed and protracted discussions involving all the crimes, that he suffered from this delusional disorder. (ROA 6661, 6553). They found the delusion

existed because of Owen's history of sexual activity at a young age with males and females; that he liked to wear his hair long as a teenager[6]; his pattern was to commit sexual assaults after his victims were incapacitated; and from 1994-1999 he was consistent in his description of his delusion. (ROA 5494, 5350, 5562).

The bias of Owen's doctors was palpable. For instance, both were intractable in their opinions that Owen was telling them the truth, but lied during his confessions. In fact, the doctors admittedly believed everything Owen told them that supported the delusion and disbelieved anything Owen may have said that contradicted it. Doctors Berlin and Sultan discounted the idea that Owen could have an anti-social personality disorder and not a delusion. The rejection of anti-social disorder was that Owen did not steal anything from his victims during the crimes and he was not a rapist because he did not have sex with then until they were unconscious. Yet, in multiple confessions, Owen explained repeatedly that during the burglaries he was looking for items to steal, which he in fact did steal and pawn. Owen also admitted that at least one of the rapes was committed because he decided to take advantage of the fact that the victim was unconscious and she was "not bad looking." (ROA 6331-6335). Because the admissions contradict completely Owen's mental health penalty phase narrative regarding his delusion, incredibly, both Drs. Berlin and Sultan stated that they did not believe Owen's statements against interest

[6] It is common knowledge that men in the 196'0's-1970's wore their hair long.

in his several confessions, but instead believed his "delusional theory" announced for the first time twelve years after the instant murder. (ROA 6553, 6661)

Dr. Sultan steadfastly refused to let the objective facts get in the way of her defense friendly opinion that Owen suffers from this delusion. Although defense psychologist Dr. Barry Crown, unequivocally stated that Owen knew right from wrong, Dr. Sultan, in complete disagreement with Dr. Crown, testified that Owen could not appreciate the criminality of his actions. Even so, she was unable to explain away Owen's deliberate plan and pre-planned actions done to evade detection including turning the clocks back, wearing socks on his hand, and waiting until K.S. put the children to bed. Remarkably Dr. Sultan he also testified that Owen never intended to hurt K.S[7]., even though she was in great pain after being stabbed by Owen eighteen times, causing her to drown in her own blood.

Dr. Sultan also testified that Owen worshipped women, even though he had been convicted of extremely violent and depraved atrocities against six females ranging in age from fourteen to thirty-eight. All the women were home alone, and all vulnerable as most were sleeping when viciously attacked. In contradiction of Sultan's claim, Owen's affect and demeanor were on full display for the jury in his

[7] Owen explained to his doctors that he was required to instill as much fear as possible in his victims in order to successfully capture their essence. This notable facet of the delusion to which, Dr. Sultan opines exists, completely belies Dr. Sultan's other opinion that Owen never intended to hurt K.S.

video-taped confessions which showed his lack of empathy, and remorse; he was cold and exhibited no feeling at all during his banter with the police. He even laughed at times, while toying with the police and discussing his crimes. Although having viewed the tape, Dr. Sultan characterized Owen as horrified and upset when he read in the paper that K.S. was only fourteen years old. (ROA 5842).

Owen's final expert, Dr. Crown, testified Owen has organic brain damage, which impairs his ability to stay focused, causes him to be compulsive, and causes undue stress in certain situations. (ROA 6502, 652)0. Consequently, Dr. Crown found Owen was under extreme mental and emotional disturbance at time of the killing, regardless of the fact that no physical testing of Owen's brain had been done; no CT, PET or MRI had been administered. (ROA 6508). Nor had Dr.Crown ever spoken to Owen, nor viewed any of the video-taped confessions. (ROA 6502). Based on his review of the records, Dr. Crown admitted that Owen understood the nature and consequences of his actions, and was responsible for his behavior. (ROA 6525). The doctor conceded that Owen had the ability to plan and did plan and premeditate the murder; he covered-up his actions, and concocted an alibi. (ROA 6522-6523).

Owen's mental health experts were further challenged through the rebuttal testimony of state mental health experts Dr. Waddell, a psychologist, and Dr. Chesire a psychiatrist. (ROA 5678-5888, 6724-6796). Both opined that Owen was not and

had never been schizophrenic; Owen was sane at the time of the murder. The State's experts found Owen's claim of delusion to be fabricated and concocted simply as a defense for retrial.[8] (ROA 5834, 5850-5851). The facts of Owen's confessions show he knew what he was doing; he intended to rape and kill K.S.; he knew that his behavior was wrong; and he took steps to avoid detection. Owen is a sociopath, and has an anti-social personality. (ROA 5717-5719, 5834-5837).

The basis for Dr. Wadell's rejection of Owen's alleged delusion was very explicit. He explained to the jury that schizophrenia is a very serious and devastating illness and Owen did not exhibit any collateral symptoms nor demonstrate any serious emotional maladjustments in his videotaped confession. Dr. Wadell noted that in the past fourteen years since the murder there were no reports or indications from any mental health professional that Owen exhibited any psychotic behavior/disorder. In fact, Owen had never been treated for schizophrenia. Significantly for Dr. Wadell, it took Owen over twelve years to disclose this "delusion".[9] In his many years of practice, Dr. Wadell had never seen a diagnosis of schizophrenia with the only evidence of the psychosis being a self-reported delusion.

[8] Although unknown to the jury, Owen never presented this defense of a delusional belief system at either phase of his first trial for this murder nor at his trial for the murder of G. W.

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

Moreover, the delusion itself did not fit into any recognized symptom associated with schizophrenia. The standardized testing done by the doctor did not support a finding of a psychotic disorder; and without question, Owen has a significant motive to fabricate this malady. Rather, the testing and evaluations support the conclusion that Owen was and is mean, hates women and has an anti-social personality. Although Owen has a gender identity disorder and is not mentally healthy, those maladies did not diminish his culpability herein. (ROA 5707-5721, 6737).

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

Similarly, Dr. Chesire concluded that Owen's his life is about dominating and at times being dominated by others. Significant here, Owen, has a need to demean women. Dr. Chesire found Owen's confession to be critical, in his evaluation and explained that Owen was trying to dominate the police when he "chastised" them and "criticized" the investigation. This was evident when Owen laughed and thought at times the situation was funny. Dr. Chesire found Owen was callous, with no

compassion or empathy for K.S., and has anti-social personality. (ROA 5842).

In its sentencing order, the trial court noted that by all accounts Duane Owen is not mentally healthy[10]. (ROA 4056). However, his anti-social personality, paraphilic disorder[11] is not necessarily mitigation deserving of much weight. *Sochor v. State* 580 So. 2d 595, 604 285 (Fla. 1993) (commenting that evidence presented by defense witness at penalty phase that defendant becomes sexually aggressive, dangerous when he drinks is not necessarily mitigation entitled to great weight). Additionally, Dr. Sultan, the only expert who attempted to place Owen's troubled childhood into a mitigation context, opined that Owen's troubled past hampered his ability to stay focused, it made him impulsive, and it resulted in his inability to discern right from wrong because no one ever taught him that his adolescent behavior was unacceptable. (ROA 6638, 6640). The deficiency in this opinion is exposed by the fact that all of his experts, including Dr. Sultan, herself admitted that Owen went to great lengths to cover-up his acts including concocting an alibi. (ROA 6522-6523, 6681, 65548, 6576-6579).

Based on the horrific circumstances surrounding the stabbing death of fourteen-year old babysitter K. S. along with the **factually uncontested evidence** that supports all of the aggravating factors in this case, against the meager mitigation,

[10] This finding was based on Dr. Wadell's statement to that effect. (ROA 6737).
[11] Paraphilic disorder is defined as experiencing sexual arousal over things not accepted in society. (ROA 5513-5514).

it is clear beyond a reasonable doubt that a rational jury, when instructed properly based on the requirements of *Hurst II,* would have found unanimously all the aggravators and ultimately would have found unanimously that death was the appropriate sentence for the brutal stabbing murder of K.S.

This Court's conclusion regarding proportionality was not a close one, and in fact, it was "**inescapable"**. *Owen, II supra* at 703. (e.a.). That presumption must carry some weight). *Wood v. State,* 209 So. 3d 1217, 1235 (Fla. 2017) (explaining unique function of proportionality includes a finding death sentence under review is one of the most aggravated and least mitigated); *Yacob v. State*, 136 So. 3d 539, 553 (Fla. 2014) (explaining proportionality review ensures narrowing of class of death sentences and qualitative review of factors rather than quantitative review.)

In summation, Owen's mitigation was extremely weak in comparison to the very compelling factually uncontested aggravation and was qualitatively lacking in comparison to the objective facts. Moreover, the lack of credibility of his alleged mitigation was significantly exposed by the State's experts. It is important to note that this Court severely questioned the existence of Owen's delusion when it noted twice that Owen's mental illness was never brought to anyone's attention before this retrial years later. *Owen, supra,* 862 So. 2d at 701. It is beyond a reasonable doubt that the lack of substance of this mitigation presentation demonstrates that a reasonable jury, properly instructed, would recommend unanimously a death

sentence for Owen. *see Kopsho supra*; *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (finding no reasonable juror would not have found the existence of the aggravators); *Cf. Thomas v. State,* 456 So. 2d 454, 460 (Fla. 1984)(finding no reasonable basis in the record to support a life recommendation where victim was bludgeoned to death, the factors of HAC and CCP were strong and the evidence in support of two statutory mitigators was entitled to little weight); *Torres-Arboledo v. State,* 524 So. 2d 403 (Fla. 1988)(explaining override of jury life recommendation was proper were defense expert testimony was sole basis for mitigation that defendant was intelligent and possessed potential for rehabilitation).

The State respectfully asks this Court to apply equally the rational jury standard to those cases, such as here, where the death recommendation was not unanimous. The disparate treatment by this Court of such cases as opposed to applying the long standing harmless error test to cases where the previous recommendation was unanimous, does not in any way promote the truth finding function of the jury system. Moreover, automatic reversal of such cases is contrary to long standing precedent of both this Court and the United States Supreme Court. The trial court's denial of relief should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June, 2018, I filed the foregoing with the Clerk of the Court by using the E-Portal Filing System and sending a notice of electronic filing to the following: James Driscoll, driscoll@ccmr.state.fl.us, Gregory Brown, brown@ccmr.state.fl.us.

Celia Terenzio
COUNSEL, STATE OF FLORIDA