IN THE SUPREME COURT OF FLORIDA

CASE NO. SC {FSC #s 85,781 (&) SC92144}
LOWER TRIBUNAL NO. 84-4000 CF

DUANE EUGENE OWEN,

Petitioner,

v.
MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,

Respondent,

and
ROBERT BUTTERWORTH,
Attorney General,

Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: The writ of habeas corpus shall be grantable of right, freely and without costs." This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Unites States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Owen was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

Citations will be as follows: The original record on appeal will be referred to as "R.____" and followed by appropriate page numbers. The supplemental record on appeal will be referred to "SR.____" and followed by the appropriate page numbers. The post conviction record will be referred to as "PCR." And followed by and followed by the appropriate page numbers Appellate counsel's appellate brief will be referred to as "Initial Brief" and followed by appropriate page numbers. All other references will be self-explanatory or otherwise explained in the text of this petition or by footnote.

REQUEST FOR ORAL ARGUMENT

Mr. Owen has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. 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 penalty that the State seeks to impose on Mr. Owen.

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INTRODUCTION

On direct appeal, appellate counsel failed to raise and argue significant errors that occurred during Mr. Owen's trial and sentencing procedures. Moreover, some of the issues raised on direct appeal were ineffectively presented to this Court for appellate review.

Appellate counsel's failure to raise and argue certain issues and failure to present effectively other issues, was clearly deficient and actually prejudiced Mr. Owen to the extent that the fairness and the correctness of the outcome were undermined. Mr. Owen was further prejudiced by appellate counsel due to an actual conflict of interest because appellate counsel could not raise certain issues on direct appeal, such as ineffectiveness of counsel, because the same individual, Craig Boudreau, was also Mr. Owen's primary trial counsel. Appellate counsel would have had to raise his own ineffectiveness, which appears on the record below, to ensure that Mr. Owen had thorough and fair appellate review. This conflict of interest prevented this Court from fairly and correctly determining all of the errors that led to Mr. Owen's conviction and death sentence.

This petition also presents questions that were raised on direct appeal, but should be reheard under subsequent case law

or legal argument to correct errors in the appellate process that denied Mr. Owen fundamental constitutional rights. This petition will demonstrate that Mr. Owen is entitled to habeas relief.

PROCEDURAL HISTORY

The judgment and sentence under consideration in this petition were entered by the Circuit Court of the Fifteenth Judicial Circuit, in and for, Palm Beach County. (R. 4565).

On July 11, 1984, the state indicted Mr. Owen for first degree murder, sexual battery and burglary of a dwelling with intent to commit sexual battery with an offense date of May 29, 1984. (PCR. 94-95). Attorney Barry Krischer argued a motion to suppress that encompassed the instant case, Mr. Owen's other capital case, and all of Mr. Owen's other felony cases that were before the trial court at that time. In the instant case, Mr. Owen was represented at trial by attorneys Craig Boudreau and Donald Kohl.

Mr. Owen went to trial and the jury found him guilty of all counts on February 18, 1986. (R. 3976). Following a penalty phase, on March 5, 1986, the jury recommended the death penalty by a vote of 10 to 2. (R. 4357). The trial court sentenced Mr. Owen to death March 13, 1986. (R. 4357). The trial court based

its decision on four aggravating circumstances: previously convicted of a violent felony; during the course of a felony; heinous, atrocious or cruel; and cold, calculated, and premeditated. (R. 4555).

Mr. Owen appealed the judgment and death sentence and this Court affirmed. Owen v. State, 596 So. 2d 985, (Fla. 1992). Mr. Owen was represented on direct appeal by Craig Boudreau.

While Mr. Owen's direct appeal of the instant case was pending attorney Donald Kohl filed an initial Rule 3.850 motion raising ineffectiveness of trial counsel and newly discovered evidence claims. Mr. Kohl later withdrew because the ineffectiveness of trial counsel claims in the Rule 3.850 Motion. The trial court appointed the former Capital Collateral Representative Larry Spalding. Mr. Spalding filed a petition for a writ of prohibition and mandamus. This Court ruled that CCR should not represent Mr. Owen before the direct appeal was final.

The trial court appointed attorney Anthony Natale for the initial 3.850 motion but later stayed the proceedings until the direct appeal was complete and CCR entered an appearance in 1994. The initial 3.850 motion was amended a fourth time by CCR, which had split and become CCRC-M.

In the interim, CCRC-M had filed a motion to disqualify the

trial judge which was denied and followed by petitions for extraordinary relief, writ of mandamus and prohibition all of which were eventually denied. Mr. Owen also filed his own supplemental pro-se motion which the trial court refused to accept although the trial court did suggest that CCRC-M consider these issues and raise any matters that needed to be raised. (PCR. 694).

The trial court denied Mr. Owen's Rule 3.850 motion after an aborted hearing and after first denying motions by CCRC-M and Mr. Owen's trial counsel on another homicide case, Carey Haughwout, that sought to postpone the Rule 3.850 motion to after the trial. Mr. Owen appealed the trial court's denial of the Rule 3.850 motion and this Court affirmed the trial court's denial. Owen v. State, 773 So. 2d 510 (Fla. 2000); cert. denied 121 S.Ct 1500 (2001).

Mr. Owen now petitions this Court for a writ of habeas corpus.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See. Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This petition presents constitutional issues which directly concern the judgment of this Court during

the appellate process and the legality of Mr. Owen's death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Owen's direct appeal. see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981) See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Owen to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving fundamental constitutional error. See Dallas v.Wainright,175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of basis of Mr.

Owen's claim.

GROUNDS FOR HABEAS CORPUS

This is Mr. Owen's first petition for habeas corpus in this Court. Mr. Owen asserts in this petition for writ of habeas corpus that his capital conviction and death sentence were obtained in and then affirmed by this Court in violation of Mr. Owen's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

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.

At trial, the state used statements that Mr. Owen made during plea negotiations. This clearly violated Section 90.410, Florida Statutes, and Florida Rule of Criminal Procedure 3.172. Section 90.410,Florida Statutes, and Florida Rule of Criminal Procedure 3.172, prohibit the use of statements made during plea negotiations. These provisions grant use immunity to individuals such as Mr. Owen who make statements during plea negotiations despite their Fifth Amendment right to remain silent.

The use of these statements at Mr. Owen's trial violated his

right to remain silent under the Fifth Amendment and his right to due process under the Fourteenth Amendment because the state used Mr. Owen's statements, which he could not be compelled to make, and which Mr. Owen made under the protection of this grant of immunity. This argument is distinct from the issue of whether Mr. Owen's confession was freely and voluntarily made discussed below.

Section 90.410, Florida Statutes provides:

> Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

Florida Rule of Criminal Procedure 3.172(h)provides:

> Except as otherwise provided in this rule, evidence of an offer or a plea of guilty or nolo contendre, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

This Court considered the application of this grant of immunity in Richardson v. State,706 So. 2d 1349, 1353 (Fla.

1998).

In Richardson, the pro-se defendant engaged in plea negotiations with the state. Id. at 1351. A detective acted as a negotiator between the defendant and the state. Id. On multiple occasions the detective saw the defendant in jail during the plea negotiations. Id. On one occasion, the detective told the defendant that "' the state would be willing to discuss a plea negotiation with [the defendant]'" if the defendant first confessed to the detective. Id. Later, the detective told the defendant that the defendant must first confess to the detective and "then we would present that to the [state] for consideration of new plea negotiations." Id. On the detective's final encounter with the defendant, the defendant made statements about the crimes at issue. Id.

Before the statements, the detective presented to the defendant a plea agreement already signed by the state. Id. The defendant refused to sign the plea agreement and asked the detective if the defendant could confess before signing the plea agreement. Id. The detective responded that if defendant confessed first, the defendant had "'... no plea [the defendant] [had] nothing.'" According to the detective, the defendant said that he understood and asked the same question again, to which the detective responded, "'...but if you don't sign that and

confess to me, you have absolutely nothing." Id. The defendant said that he would confess and that he would "... worry about that later." Id.

The trial court denied the defendant's motion to suppress. Id. On appeal before this Court, the issue was whether the trial court erred in admitting the defendant's alleged confession made pursuant to plea negotiations. Id. 1350. This Court held that the trial court did err and reversed the trial court. Id. at 1358.

In reaching this conclusion, this Court relied on the two-tiered analysis of U.S v. Robertson, 582 F. 2d 1356 (5th Cir. 1978).

Id. (citations omitted). The two tiered analysis of Robertson requires that the trial court must determine first, "whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion. Id. at 1353; citing Robertson 582 F. 2d at. Second, the trial court must "discern 'whether the accused's expectation was reasonable given the totality of the circumstances.'" Id.

When Mr. Owen made the statements used against him at trial, as in Richardson, Mr. Owen had an actual subjective expectation that he was negotiating a plea with law enforcement. Based on the totality of the circumstances, this expectation was

reasonable. Accordingly, any statements made by Mr. Owen were in furtherance of this reasonable expectation and were inadmissible.

What first led to Mr. Owen's reasonable expectation that he was negotiating a plea with law enforcement was that he had previously negotiated a plea with Detective Woods in 1982. This was referenced in the following exchange;

> **Woods:** What about me?
> **Owen:** Well, you are here to help because you are in a different city, you know.
> **Woods:** Have I proved to you that I have tried to help?
> **Owen:** He is out to help me because you got a hold of the doctors and everything else, ya know.
> **Woods:** Don't you think that I carried on?
> **Owen:** That's what I just said why you are here. To help, not just to get an answer. (SR. 74,75).

* * * * *

Law enforcement made numerous statements that led Mr. Owen to actually and reasonably believe that law enforcement had the power to negotiate which charges Mr. Owen would face, and ultimately the criminal penalties, as seen in the following dialogue and statements:

> **McCoy:** Well, only they got - - this is the only one problem there, okay, and what happens is a lot of times policemen, you know, they don't appear back with their cases. In other words, they send them up there, they file them.
> You know, maybe they go up on the

> depositions and something like that. And a lot of the never hear back from them again, and they do allow them to do that. But I am not going to do that, see. I am not going to let them do anything I don't want them to do. Okay. . . . .. (SR. 23).
>
> * * * * *
>
> **McCoy:** But me, see, I control these, okay. And it is not going to be dropped if I don't want it to be dropped, okay.(SR.24)
>
> * * * * *
>
> **McCoy:**(Referring to the possibility of charges being dropped). . . because I will go see David Bludworth himself if the prosecutor pisses me off and gets the cases changed, which can be done, you know. (SR.26)
>
> * * * * *

After establishing that law enforcement controlled what Mr. Owen would be charged with law enforcement began to convince Mr. Owen that he had to give law enforcement information if Mr. Owen were to ever receive the benefits of a plea deal relating to the charges. This was referenced in the following exchange and statements:

> **McCoy:** I mean because that's what I said to you. Offer me something. I'll go out and work that. Offer me something. Give me something. Don't just sit there and let me pile up all this shit. Give me something, you know . . . . .. (SR. 372).
>
> * * * * *
>
> **McCoy:** . . . I mean I'll go over to the attorney and I'm going to go over and tell him, you know, what you've told me so far and this and that an the other thing, and he may or may not want to sit and talk with you.
>
> He may just go full steam ahead and say well, I don't have to talk, because what's

> he telling us? He's not telling us anything. I mean all he is saying is what about this what about that? (SR. 392).
>
> * * * * *

Clearly, the above dialogue and statements by Mr. Owen showed that Mr. Owen manifested both an actual expectation to negotiate a plea under the first part of the <u>Robertson</u> test. <u>See</u> <u>Robertson</u>, at 1366. In the instant case law enforcement went to great lengths to convince the Mr. Owen that if he wanted to reduce the charges he faced or obtain a favorable deal, Mr. Owen had to first give law enforcement "something." Under the second part of the <u>Robertson</u> test, Mr. Owen's belief was reasonable because he had previously negotiated a plea with Detective Woods which is referenced above. (R. 74-75).

Appellate counsel should have raised and argued that the admission of Mr. Owen's statement made during plea negotiations was apparent in the record on appeal and constituted fundamental error because Section 90.410, Florida Statutes, granted Mr. Owen immunity from the use of the statements made by him during plea negotiations. The failure of appellate counsel to raise this issue was ineffective because it "deviated from the norm or fell outside range of professionally acceptable performance" and "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the

appellate result." Wilson v. Wainright,474 So. 2d 1162, 1163 (Fla. 1985); citing Johnson v. Wainright, 463 So.2d 207 (Fla. 1985).

Alternatively, appellate counsel could have raised the failure of trial counsel to move to suppress Mr. Owen's statements made during plea negotiations or to object at trial was ineffective on the part of trial counsel. One of the most essential duties of trial counsel was to protect the accused right to appellate review. If trial counsel failed to do this, Mr. Owen should not suffer the consequences.

Appellate counsel did not raise this issue as an ineffective assistance of trial counsel claim because appellate counsel had a conflict interest. Appellate counsel, Craig Boudreau, was the very same individual who served as trial counsel and was ineffective for not raising this issue. In other words, to have properly have raised this issue on appeal appellate counsel would have had to claim his own ineffectiveness.

This Court should grant Mr. Owen a new trial free from conflicts of interest and order that the state not use the statement's Mr. Owen made while engaged in on going plea negotiations under Section 90.410, Florida Statutes, and Florida Rule of Criminal Procedure 3.172.

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.

At the time of Mr. Owen's trial, Palm Beach County used an unconstitutional procedure for selecting a venire. Appellate counsel was aware of this issue and did not raise this issue on appeal. Accordingly, appellate counsel's failure to raise and argue this issue fell well outside the "range of professionally acceptable performance" and "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson v. Wainright,474 So. 2d 1162, 1163 (Fla. 1985); citing Johnson v. Wainright, 463 So.2d 207 (Fla. 1985).

While Mr. Owen's appeal was pending, this Court found in Spencer v. State, that the Palm Beach County jury selection process violated the constitution's fair cross section requirement and equal protection. 545 So. 2d 1352,1353-1354 (Fla. 1989). At the time of the Spencer's trial, and Mr. Owen's as well, Palm Beach County divided the county into two jury district; West Palm Beach and Glades. Id.

Each district had a courthouse and potential jurors were

summoned to the courthouse that was in the half of the county in which they lived. Id. Under an administrative rule in place at the time, all criminal cases were set in the West Palm Beach District unless the alleged crime occurred in the Glades district. Id. If the crime was alleged to have occurred in the Glades district, then, at the request of the defendant, the case would be transferred to the Glades district. Id.

The racial statistics at the time of appellant's trial were unrefuted:

GEOGRAPHIC AREA	TOTAL	BLACKS	PERCENTAGE BLACK
*Palm Beach County as a whole	398,797	29,859	7.487
*Western (Belle Glade) Jury District	9,549	4,974	52.080
*Eastern (West Palm Beach) Jury District	389,248	24,885	6.393

Id.

This Court found that the Palm Beach County jury selection procedure resulted "in an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool for the West Palm Beach district, from which the jury for [the appellant's] trial was drawn." Id. at 1355. This Court also found that Spencer had a "justifiable equal protection claim' because the procedure "of allowing a choice in one district but not the other violate[d] [appellant's] equal

protection rights guaranteed under article I, section 2, of the Florida Constitution and the sixth and fourteenth amendments of the United States Constitution." Id.

Since this Court's decision in Spencer, this Court extended relief under different procedural histories. In Craig v. State, the trial court denied the appellant's "motion to draw the jury pool from all of Palm Beach County, rather than from the West Palm Beach jury district." 583 So. 2d 1018, 1019 (Fla. 1991). An appeal to the district court denied this claim. Id. Appellant later filed a motion for post conviction relief and the trial court found that Spencer should be applied retroactively, but was reversed by the district court. Id.

On appeal to this Court, the appellant claimed "that the trial court's denial of [the appellant's] motion to draw the jury pool from all of Palm Beach County rather than from the West Palm Beach jury district denied him the equal protection of laws guaranteed by article I, section 2, of the Florida Constitution, and the sixth and fourteenth amendments of the United States Constitution." 583 So. 2d 1018, 1019 (Fla. 1991).

In Craig, the state argued that the appellant "failed to make further objections concerning this issue, failed to note the racial composition of the jury pool, and failed to refer to this issue in his motion for a new trial. Id. The state argued

that this waived the issue and that Spencer did not apply to Craig, who unlike Spencer, was white. Id. This Court was not persuaded, rejected the state's arguments and reversed the district court. Id.

In Moreland v. State, this Court held that Spencer applied retroactively to "persons who challenged the Palm Beach County jury districts at trial and raised that issue on appeal." 582 So. 2d 618, 619 (Fla. 1991). This Court reasoned that "Spencer, however, did not create new law or make a major constitutional change of law. Rather, at the first opportunity it applied existing sixth amendment law to a new situation." Id. This Court, however, still quashed the district court's opinion and directed it to affirm the trial court's order granting the appellant a new trial because "it would be fundamentally unfair to deny relief merely because the appellant's sentence directed the [appellant's] appeal to a court other then this [Court]." Id.

Finally, this Court denied Spencer relief in Nelms v. State,596 So. 2d 441, 442 (Fla. 1992). In that case, however, the appellant only filed a pretrial motion to dismiss the indictment because the grand jury had not been summoned from the same geographical area as the petit jury in violation of Section 905.01, Florida Statutes (1981). Id. This Court's opinion,

however, does not state that the appellant also sought a new panel drawn in the same manner and from the same area as the Grand Jury which returned the indictment. Id.

It is also important for this Court to note the timing of the above opinions: Spencer v. State,545 So. 2d 1352 was decided on June 15, 1989. Moreland v. State, 582 So. 2d 618, was decided July 11, 1991. Craig v. State, 583 So. 2d 1018 was decided July 3, 1991. Rehearing on Mr. Owen's case was not denied until April 1, 1992.

Accordingly, appellate counsel knew, or should have known of this Court's decisions in Spencer, Moreland, Craig, Supra.

Further evidence that appellate counsel knew of Spencer and its progeny was that appellate counsel, Craig Boudreau, was counsel of record in two cases that were based on Spencer; Mitchell v. State,567 So. 2d 1037 (Fla. 4th DCA 1990) and Amos v. State, 545 So. 2d 1352 (Fla. 1989).

In Amos, Craig Boudreau, was counsel for Amos on direct appeal. Id. at 1352. This Court reversed Amos' conviction and remanded for a new trial based on Spencer. Id. In Mitchell, Craig Boudreau was counsel for Mitchell on an application for a writ of habeas corpus that claimed that appellate counsel was ineffective for failing to raise the Spencer issue. Id. at 1037. This Court granted the writ because it was ineffective

assistance of appellate counsel to not raise the Spencer issue on direct appeal. Id. Important for this Court was that Spencer was decided before this Court had considered the petitioner's appeal at an oral argument waived conference. Id.

Mr. Owen was tried and convicted by a jury that was selected from a venire that was derived by the very same Palm Beach County jury selection procedure that this Court found constitutionally offensive in Spencer. Prior to trial, attorney's for Mr. Owen filed a motion nominally entitled "CHALLENGE TO GRAND JURY PANEL AND MOTION TO DISMISS INDICTMENT". (R. 4715-4716). Important to this claim, Mr. Owen "pray[ed]. . . . that this challenge to the panel be sustained and that . . . . a new panel be brought in, drawn in the same manner and from the same area as the Grand Jury which returned the indictment. . . . .."(R. 4716).

The relief asked for in the wherefore clause of Mr. Owen's pretrial motion would have cured the constitutional error that existed in the manner in which Palm Beach County drew its jury pool. Had a new panel been brought in, Mr. Owen would have been tried by a jury that did not unconstitutionally exclude African Americans, an act of discrimination that this Court found offended equal protection and the fair cross section requirement in Spencer. See Spencer supra. Mr. Owen moved for the exact same

relief that the appellant in Craig; "to draw the jury pool from all of Palm Beach County, rather than from the West Palm Beach jury district." See Craig supra. Unlike in Nelms, supra, Mr. Owen did not simply move to dismiss the indictment because the grand jury had not been summoned from the same geographical area as the petit jury in violation of Section 905.01, Florida Statutes (1981). Mr. Owen also sought a new panel drawn in the same manner and from the same area as the Grand Jury which returned the indictment. See (R. 4716).

Even after having been counsel of record on both Amos and Mitchell, supra, appellate counsel failed to raise the Spencer issue in the instant case in either the initial brief or a supplemental brief. This clearly "deviated from the norm . . . . fell outside range of professionally acceptable performance" and "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson v. Wainright,474 So. 2d 1162, 1163 (Fla. 1985); (citations omitted). Worse than failing to raise an issue because of ignorance, appellate counsel knew the law of Spencer and its progeny and raised the unconstitutionality of the Palm Beach County jury panel in two other appellate cases during the time frame before Mr. Owen's appeal became final.

Alternatively, if this Court were to find that the motion

on this issue lacked the technical precision necessary to preserve this important claim for appellate review, appellate counsel was also ineffective for failing to raise the ineffectiveness of trial counsel for not raising this issue properly at the trial level. Clearly, as this Court reasoned in Moreland "Spencer,[] did not create new law or make a major constitutional change of law. Rather, at the first opportunity it applied existing sixth amendment law to a new situation." Moreland, at 619. Appellate counsel had a conflict because he could not raise the issue of his own ineffectiveness for failing to preserve this issue at the trial level.

Lastly, in addition to the above arguments this Court should grant Mr. Owen a new trial because it would be fundamentally unfair to deny him Spencer relief when this Court afforded such relief to other individuals who were also tried by unconstitutional Palm Beach County juries. Similar to Moreland,supra, in which this Court refused to deny Spencer relief on fairness grounds, this Court should be fair to Mr. Owen, who requested relief at the trial level, specifically that the jury panel be drawn from Palm Beach in its entirety, (R. 4715), which would have prevented Mr. Owen from being tried by an unconstitutional jury.

Accordingly, because appellate counsel knew that Mr. Owen

was tried by an unconstitutional jury, and this issue was properly raised at the trial level, this Court should grant Mr. Owen a new trial before a constitutionally drawn jury. Moreover, if there were any errors in preserving this issue, this Court should still grant relief because such errors would be the result of ineffective trial counsel which could not have been raised because appellate counsel could not raise his own ineffectiveness when serving as appellate counsel. Fundamental fairness would also require a new trial because Mr. Owen should not be denied Spencer relief when he moved the trial court to correct the unconstitutionality of jury panel.

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 IMPROPER STATEMENT THAT THE "HURTING WOULD START ALL OVER AGAIN," AND THAT THE TRIAL COURT SHOULD HAVE GRANTED OWEN'S MOTION FOR A MISTRIAL.

Appellate counsel was ineffective by not raising on direct appeal the trial court's improper admission of Sgt. McCoy's statement "the hurting would start all over again," and that Mr. Owen "nodded his head in the affirmative." (R. 3354). Appellate counsel's failure to raise this issue "deviated from the norm" and fell well outside the "range of professionally acceptable performance." Wilson v. Wainright,474 So. 2d 1162, 1163 (Fla.

1985); citing Johnson v. Wainright, 463 So.2d 207 (Fla. 1985). Appellate counsel's obvious deficiency on this issue "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Id.

The trial court should have granted a mistrial or a new trial after Sgt. McCoy testified that he told Mr. Owen that if Mr. Owen were to go free, "the hurting would start all over again," and that Mr. Owen "nodded his head in the affirmative." (R. 3354). After this statement by Sgt. McCoy, any pretense of a fair trial for Mr. Owen ceased. This statement unfairly prejudiced Mr. Owen because it led the jury to believe that if found not guilty, Mr. Owen posed a threat of future violence to the community. This statement had no probative value and was only offered to show that Mr. Owen had a propensity for violence, which was not a relevant issue for the jury during the guilt phase or the penalty phase of Mr. Owen's trial.

Trial counsel, the same attorney who served as appellate counsel, properly objected, moved to strike the statement, and moved for a mistrial, which the trial court denied. (R. 3354). Counsel also moved for a new trial based on the admission of this statement which was also denied. (R. 4961).

The unfairly prejudicial statement that if Mr. Owen were to

go free, “the hurting would start all over again,” was inadmissible under Section 90.403, Florida Statutes, which states in relevant part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. . . .

There was no probative value to this statement because whether or not Mr. Owen would commit acts of “hurting” in the future was not a material issue to be decided by the jury. And the unfair prejudice was overwhelming; rather than decide if the state had proved the instant case beyond and to the exclusion of every reasonable doubt, the jury now had before it an apparent admission by Mr. Owen that if the jury found him not guilty he would commit further acts of “hurting.” Obviously, without even so much as a limiting instruction by the trial court, this affected the jury’s decision in both the guilt and penalty phases of Mr. Owen’s trial.

The statement that “the hurting would start all over again” also violated Section 90.404(1), Florida Statutes, prohibition on character evidence which provides in relevant part:

> **(1)Character evidence generally.-**Evidence of a person’s character or a trait of character is inadmissible to prove action in

> conformity with it on a particular occasion, except:
>
> (a) *character of accused.*-Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the trait.
>
> * * * * *
>
> **(2) Other crimes, wrongs, or acts.-**
>
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> * * * * *

Clearly, the "hurting" statement was evidence of Mr. Owen's character and a trait of character, namely that Mr. Owen was violent and would be violent in the future. While Mr. Owen could have offered his own pertinent trait of character he chose not to therefore the state was not seeking to rebut a pertinent trait of Mr. Owen's character under Section 90.404(1)(a), Florida Statutes. Nor was this evidence relevant to prove a material fact in issue under Section 90.404(2), Florida Statutes, because Mr. Owen's propensity for violence was not and, should never have been, an issue for the jury's consideration.

Florida case law also supports the exclusion of the "hurting" statement. In Jackson v. State, 451 So. 2d 458,459

(Fla. 1984), the appellant was prosecuted for murder. Id. During the appellant's trial a witness stated that the appellant was a "thoroughbred killer" and that the appellant had pointed a gun at the witness. Id. This Court reversed and found that the evidence was impermissible, prejudicial, and not relevant to the appellant's case. Id. "Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded." Id. (citations omitted.)

This Court has also reversed a death sentence because of the admission of a statement that was similar to the "hurting" statement. Derrick v. State, 581 So. 2d 31, 35(Fla. 1991). In Derrick, a state witness testified that the appellant stated that the appellant had killed the victim and that he would kill again. Id. On appeal, the appellant argued that this statement "was irrelevant to the penalty phase and impermissibly showed lack of remorse and the possibility that [the appellant] would kill again. Id. This Court agreed. Id.

The admission of the "hurting" statement went to the very heart of whether Mr. Owen received a fair trial and fair penalty hearing. Once the hurting statement was before the jury any consideration of whether or not Mr. Owen was guilty or whether or not Mr. Owen should receive the death penalty was secondary to whether the "hurting would start all over again." Without the

current instruction that a life sentence means that an individual will not be released on parole, the "hurting" statement led the jury to consider that Mr. Owen's threat of future violence could only be stopped by execution. It also allowed the jury to make the leap that someone who was admittedly of a violent propensity must have committed the offense at issue.

Trial counsel, the same attorney who served as appellate counsel, objected to the admission of the hurting statement and argued to the court how this statement prejudiced Mr. Owen. (R. 3354). Appellate counsel knew the importance of this issue because it was appellate counsel serving as trial counsel who objected and moved the trial court for a mistrial. (See R.3354).

Not raising this issue was clearly ineffective assistance of appellate counsel. This clearly fell outside the "range of professionally acceptable performance." Wilson at 1163. This was especially so because appellate counsel initially raised this issue during trial. Competent appellate representation required that appellate counsel raise a glaring error such as the "hurting" statement on appeal.

By not raising this issue, appellate counsel's deficiency "compromised the appellate process to such a degree as to

undermine confidence in the fairness and correctness of the appellate result." Id. This deficiency prevented this Court from determining ultimately whether the results in Mr. Owen's case were fair and correct after thorough appellate argument.

Effective appellate advocacy required nothing less than presenting this Court with all of the important issues that arose during Mr. Owen's trial. Because appellate counsel was ineffective by not raising the admission of improper character evidence of Mr. Owen's propensity for violence, this Court should grant Mr. Owen a new trial and penalty phase that will be free from this type of unfair consideration.

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.

Mr. Owen was denied due process of law when the trial court inquired into what effect granting the motion to suppress would have on the cases against Mr. Owen. (See R.1312-1320). This issue was briefly raised by trial counsel in Mr. Owens motion for new trial. (R. 4933). Appellate counsel, the same attorney who represented Mr. Owen at trial and who filed the motion for new trial, was ineffective for not raising and arguing this issue on appeal.

Appellate counsel's failure to raise and argue this issue fell well outside the "range of professionally acceptable performance" and "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson v. Wainright,474 So. 2d 1162, 1163 (Fla. 1985); citing Johnson v. Wainright, 463 So.2d 207 (Fla. 1985).

Any reasonably competent appellate counsel would have raised this issue that was so apparent on the record. Appellate counsel's obvious deficiency on this issue "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Id. Thus, Mr. Owen was denied the effective assistance of appellate counsel because this issue was never raised in a manner which would have allowed this Court to do justice and reverse Mr. Owen's conviction and death sentence based on an error which goes to the very heart of due process – the right to a fair and impartial judge.

Recently, this Court reiterated the importance of an impartial and unbiased judge. In Re McMillan, 2001 WL 920093 *10 (Fla. August 16, 2001). In McMillan, this Court stated:

> The promise of "Equal Justice Under Law" is essentially predicated upon an independent judiciary committed to fairness and justice in the application

> of the law to the individual case. In Rose v. State,601 So. 2d 1181 (Fla. 1992), we reaffirmed this long established and oft- repeated principle in our jurisprudence:
>
>> The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell: This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. . . . The exercise of any policy tends to discredit the judiciary and shadow the administration of justice. . . . The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.
>>
>> State ex rel. Davis v. Parks, 141 Fla. 516, 519-520, 194 So. 613, 615 (1939).
>
> Id. at 1183. Accordingly, no other principle is more essential to the fair administration of justice than the impartiality of the presiding judge.

Id. at 10-11.

The United States Supreme Court stated that the "Due Process Clause entitles a person to an impartial and disinterested tribunal in . . . criminal cases." Marshall v. Jerrico,446 U.S. 238, 242 (1980). The Court also stated that [t]he neutrality requirement helps guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Id.; (citations omitted).

In the instant case, the trial court raised, sua sponte, the question of what effect granting Mr. Owen's motion to suppress would have on the state's cases against Mr. Owen. (R. 1312-20). The trial court asked, "[w]ill the ruling on the Motion to Suppress as it relates to these matters be dispositive of this issue at this time, i.e., should I grant the Motion to Suppress, will that prevent the State from going forward with regard to this case?" (R. 1313).

Even the state, the very body which was prosecuting Mr. Owen, was uncomfortable with the trial court's inquiry as the trial court asked about each case against Mr. Owen. (SR. 1314). As the assigned prosecutor in Mr. Owen's case stated:

> I am a little uncomfortable with you asking those questions, because I am sure - - I guess maybe because I don't understand why you are asking the questions.
>
> I am not sure that that is a relevant consideration as to whether or not the motion should be granted or not. (R. 1314).

Although the trial court denied that it would consider the effect on the state's case in deciding the motion, the trial court continued on with this same line of questioning on the rest of Mr. Owen's cases addressed in the motion to suppress despite the state's objection. (R. 1314-1320). While the state indicated that the suppression of Mr. Owen's statements "probably" would not prevent the state from going forward on the

instant case involving Ms. Worden, the state did indicate that it would "specifically prevent [the state] from proceeding . . . . to trial" on the Slattery homicide. The state also indicated that granting the motion to suppress would prevent it from going forward on the armed burglary and attempted first degree murder of Marilee Manley. (R. 1316).

The Slattery homicide and the Manley attempted homicide were used in the instant case as prior violent felony aggravators. (4951-54). In the instant case the state presented evidence of the Slaughtery homicide and Manley attempted murder and Mr. Owen's subsequent conviction for both. (R.4951-54)The jury considered both of these cases in returning a death recommendation and the trial court used these cases as an aggravator to justify Mr. Owen's death sentence. (R. 4951-54).

The trial court's inquiry of the state concerning what effect that granting the motion to suppress would have on the state's ability to go forward with each case against Mr. Owen showed the trial court's bias and denied Mr. Owen due process in two distinct areas: First, Mr. Owen was denied a fair hearing and a fair finding of fact on the motion to suppress because the trial court was concerned with the effect of granting the motion, not whether the motion should have been granted. As a result, the trial court's denial of the motion and findings of

fact which it based the denial of the motion, denied Mr. Owen "the cold neutrality of an impartial judge." McMillan at 10; citing State ex rel. Davis v. Parks, 141 Fla. 516, 519-520, 194 So. 613, 615 (1939). The trial court's biased denial of the motion to suppress prejudiced Mr. Owen because it allowed the state to obtain convictions in the Manley case and the Slattery case both of which the state then used as aggravators to justify Mr. Owen's death sentence. The biased denial of the motion to suppress in the instant case made it certain that the jury would convict Mr. Owen and the use of the Slattery case and the Manley case as aggravators insured that the jury would recommend death.

Secondly, the trial court's bias affected the entire trial in the instant case and the trial court's imposition of the death sentence. Due process required that the trial court be free from bias as the trial court heard the evidence for and against Mr. Owen in the instant case. The trial court's bias calls into grave doubt its rulings on the law, the admissibility of evidence for and against Mr. Owen and its rulings on objections.

Most importantly, the trial court's bias raises a serious question of whether Mr. Owen was properly sentenced to death in the instant case. This Court addressed the requirement of an impartial trial court in Porter v. State, 723 So. 2d 191, 196

(Fla.1998). This Court stated:

> In sum, due process under Florida's capital sentencing procedure requires a trial judge who is not precommitted to a life sentence or a death sentence but rather is committed to impartially weighing aggravating and mitigating circumstances. As we have repeatedly stressed, a trial judge's weighing of statutory aggravating factors and statutory and nonstatutory mitigating circumstances is the essential ingredient in the constitutionality of our death penalty statute.
>
> * * * * *

Id. (citations omitted).

While appellate counsel did mention that the trial court's statement should overcome the presumption of correctness, (initial brief p. 24), this was far different from raising the fundamental error that the trial court was biased against Mr. Owen and in favor of the state throughout all of the proceedings against Mr. Owen including: all pre-trial motions, the actual trial, the penalty phase, and ultimately the sentencing hearing after which the trial court imposed death.

Effective appellate counsel would have raised the trial court's bias throughout all of the proceedings against Mr. Owen which would have led this Court to grant Mr. Owen a new trial and penalty phase with an unbiased trial court. Accordingly, this Court should grant Mr. Owen a new trial before an unbiased trial court which will be able to hear his motion to suppress

without concern for the effect granting the motion will have on the state's case and on the aggravators that the state seeks to use to justify a death sentence.

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.

Appellate counsel was ineffective for failing to raise and argue on direct appeal that the trial court committed reversible error by failing to instruct the jury that sexual battery required a live victim. Appellate counsel's failure to raise and argue this issue fell well outside the "range of professionally acceptable performance" and "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson, at 1163; (citations omitted).

Appellate counsel did raise on appeal the issue of whether the trial court erred in denying Mr. Owen's motion for judgment of acquittal. This, however, was not the same issue; while there may have been sufficient evidence overcome a motion for judgment of acquittal that the individual Mr. Owen was accused of murdering and sexually battering was alive during the

penetration, the jury did not know that it had to decide this beyond and to the exclusion of every reasonable doubt. Had the jury been properly advised of the law, the jury would have had a reasonable doubt that the state had met all of the elements of sexual battery and returned a verdict of not guilty and would not have considered the sexual battery as an aggravator for which to recommend death.

Trial counsel argued that the state did not prove that the alleged victim of the sexual battery was alive during a motion for judgment of acquittal. (R. 3673). During argument on the motion, trial counsel directed the trial court to Section 794.011 which states "'victim' means the person alleging to have been the object of a sexual offense.'" (R. 3674). Trial counsel also cited McCrae v. Wanwright,439 So. 2d 868,(1983), which discussed the requirement for a live body in dicta. (R.3679). The trial court still denied the motion. (R. 3677).

At the time of the motion for judgment of acquittal both the state and the trial court were under the misapprehension that Section 794.011 did not require a live person. (R. 3677-79). The trial court denied the motion and stated that "[O]ur statute does not necessarily require a person to be alive in order to have suffered a sexual battery." (R. 3677). The state later added that the state did not "believe that [a live victim] is an

element of the crime. . . ." (R. 3679)

Trial counsel referenced this argument during the charge conference and the trial court denied trial counsel's request for a special jury instruction that would have explained to the jury that in order to find Mr. Owen guilty of sexual battery the jury must find that the victim was alive during the actual penetration. (R. 3775). The trial court denied trial counsel's request for this jury instruction and the jury was never instructed that they must determine that the alleged victim of the sexual battery was alive in order to return a verdict of guilty on this charge. (R. 3776). The state later used this as an aggravator against Mr. Owen during the penalty phase and the trial court found that this aggravator was proved beyond a reasonable doubt.(R.4951-4954).

On appeal, appellate counsel raised the issue that "the trial court erred by not granting appellant's motion for judgment of acquittal as to count two of the indictment." (Initial Brief p. 14). Casting this issue in this manner, however, was ineffective assistance of appellate counsel because the real error on this matter was the trial court's denial of Mr. Owen's special jury instruction. Instead of presenting this viable issue, appellate counsel argued that the trial court should have granted a motion for judgment of acquittal. (Initial

Brief p.14). This Court denied this claim in a summary manner finding, "competent substantial evidence that..." supported the jury's finding. Owen v. State, 596 So. 2d 985, 987 (Fla. 1992) citing Owen v. State 560 So. 2d 207 (Fla. 1990). (Owen I).

In the instant case, unlike in Owen I, the trial court never instructed the jury that the state must prove that a sexual battery victim was alive beyond and to the exclusion of every reasonable doubt. (R. 3776). This Court stated in the instant case that "[w]hether the victim was alive or dead at the time of the sexual union, however, is an issue of fact to be determined by the jury. Competent, substantial evidence supports this finding. See Owen." Owen, 596 So. 2d at 987; citing Owen I. It certainly was an issue for the jury to decide, but the jury never knew this because the jury was not properly instructed by the trial court. Appellate counsel's failure to raise this issue led this Court to erroneously rely on Owen I to deny relief when, unlike in Owen I, in the instant case, the jury was not properly instructed. Had appellate counsel raised the proper issue this Court would have granted Mr. Owen a new trial in which the jury was properly instructed.

This failure to properly raise the denial of the jury instruction fell well outside the "range of professionally acceptable performance" and "compromised the appellate process

to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson, at 1163; (citations omitted). Accordingly, this Court should remand for a new trial.

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.

One of the most important functions of appellate counsel was to present any issues involving the determination of aggravators and mitigators. Appellate counsel either failed to raise the issues below, or alternatively, failed to raise these issues in an effective manner that would have allowed this Court to fully address the legitimacy of Mr. Owen's death sentence.

Appellate counsel's failure to raise and argue these issues fell well outside the "range of professionally acceptable performance" and "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson, at 1163; (citations omitted).

Appellate counsel failed to fully and thoroughly raise that the state's evidence was insufficient to establish the

heightened premeditation that this Court required to prove the cold, calculated, and premeditated aggravator in Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). In Rogers, this Court found that Rogers did not have a careful plan or prearranged design to kill anyone during the robbery. Id. The evidence at Mr. Owen's trial, like in Rogers, did not show that the homicide was part of a careful or prearranged plan to kill.

Appellate counsel should have developed this issue beyond merely arguing that this aggravator was reserved for "contract type murders." (See Initial Brief at p.36). Appellate counsel could have cited to the record were Mr. Owen talks about his intent to commit burglary and rape. Appellate counsel could have also cited to the record of Dr. Peterson's opinion on Mr. Owen's motivations. (R. 4175) The failure of appellate counsel to fully raise this issue was ineffective and this Court should remand this case for resentencing without this erroneous aggravator.

Appellate counsel should have also raised the trial court's error in failing to consider all nonstatutory mitigation under Hitchcock v. Dugger, 401 U.S. 393, 399 (1987). For example, appellate counsel could have argued that the trial court abused its discretion in failing to consider the 21 hours of video taped confessions which showed that Mr. Owen had mental health

problems and attempted to seek treatment and, Mr. Owen's cooperation with law enforcement. This was constitutional error. See Farr v. State, 621 So. 2d 1368,1369 (Fla. 1993). In Farr, this Court stated, "that mitigating evidence must be considered and weighed when contained anywhere in the record to the extent that it is believable and uncontroverted." Id. (citations omitted).

Trial counsel, the same attorney who served as appellate counsel, requested that the trial court consider the supplemental PSI report and evidence of Mr. Owen's cooperation with law enforcement. (R. 4523-25).

Appellate counsel was ineffective for not raising the trial court's failure to consider the non-statutory mitigation in the record and for not fully addressing the cold, calculating, and premeditated aggravator. Accordingly, this Court should reverse for a resentencing.

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.

The state charged Mr. Owen by indictment with first degree murder, sexual battery and burglary. (PCR. 94-95). These offenses were alleged to have occurred on May 29, 1984.(PCR. 94-95). Mr. Owen was convicted of all three offenses and

sentenced pursuant a guideline scoresheet in 1986.(   ).

In Smith v. State, this Court held that the sentencing guidelines were unconstitutional. 537 So. 2d 982,985-986 (Fla. 1989). This Court found the sentencing guidelines were unconstitutional only prior to the legislature adopting rules 3.701 and 3.988 the effective date of which was July 1, 1984. Id. After the effective date of Florida Statute 921.001(40(a), "a person whose crime was committed before the effective date of the guidelines but sentenced thereafter may affirmatively select to be sentenced under the guidelines." Id.

Because Mr. Owen"s offenses predated the effective date of the of the guidelines, July 1, 1984, his sentences on the non-capital offenses were illegal. Accordingly, this Court should vacate those sentences and a require a new sentencing where Mr. Owen may affirmatively elect to be sentenced under the preguideline procedure and be eligible for parole, or, to waive the illegality and be sentenced pursuant to the guidelines. This was clearly fundamental error and can be corrected at any time. See Bain v. State, 730 So. 2d 296,302 (Fla. 2d DCA 1999); (". . . . the correction of fundamental error is not merely a judicial power but; it is an unrenunciable judicial duty.)

CLAIM VII

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.

In the instant case, law enforcement engaged in ongoing systematic coercion to obtain an involuntary confession from Mr. Owen. To obtain this illicit confession, law enforcement which knew of Mr. Owen's mental illness, exploited his mental illness and Mr. Owen's desire for help to obtain a coerced confession.

This issue was never presented to this Court in a meaningful way by appellate counsel. Appellate counsel did not cite any case law and did not direct this Court to the applicable portions of the record that would have supported this position. (See initial brief p. 27-29.)

Appellate counsel's failure to properly raise and argue this issue with case law and record cites fell well outside the "range of acceptable professionally acceptable performance" and "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson, at 1163; (citations omitted). Appellate counsel's obvious deficiency on this issue "compromised the appellate process to such a degree as to

undermine confidence in the fairness and correctness of the appellate result." Id.

"The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to the arguments below without further elucidation will not suffice." Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). Appellate counsel was ineffective and should have made arguments on this issue that encompassed relevant case law and applied that case law to the facts taken from the record of Mr. Owen's case.

Appellate counsel should have cited and discussed Alabama v.Blackburn, 361 U.S. 199 (1960), in Mr. Owen's initial brief. In Alabama v. Blackburn, the Court held that Blackburn's confession was involuntary because the police learned that Blackburn had a history of mental problems and exploited this in order to get Blackburn to confess. Id. Colorado v. Connelly, 479 U.S. 157,164(1986),did not overrule Blackburn but merely stressed that "some sort of 'state action'. . ." was required to "support a claim of violation of the Due Process Clause of the Fourteenth Amendment." Id.

Appellate counsel could have applied the Blackburn Court's reasoning to the transcripts of Mr. Owen's interrogation by the police to properly present this gross deprivation of Mr. Owen's

rights under the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment. Appellate counsel could have also brought to this Court's attention that Detective Mark Woods who participated in Mr. Owen's interrogation knew of Mr. Owen's mental illness because he had previously arrested Mr. Owen for the theft of a bikini bottom in Palm Beach County case number 82-4415 and recommended that Mr. Owen be seen by a doctor for this illness. Detective Woods' knowledge of Mr. Owen's mental illness and exploitation of this illness was seen in the following statements and dialogue:

> **Woods:** What about me?
> **Owen:** Well, you are here to help because you are in a different city, you know.
> **Woods:** Have I proved to you that I have tried to help?
> **Owen:** He is out to help me because you got a hold of the doctors and everything else, ya know.
> **Woods:** Don't you think I carried on?
> **Owen:** That is what I just said why you are here. To help, not just to get an answer.(SR. 74-75)
>
> * * * * *
>
> **McCoy:** The bottom line is you need help, okay. You need help. You need this doctor, okay,__because you need to do something. Let's go back, let's go back okay- - we talked to you__about before, Friday night, okay. Let's talk about that. (S.R. 103).
>
> * * * * *
>
> **McCoy:** That is what I am saying, okay. That is what I told you Friday, see? That's why I am saying, John Doe needs the help because

he doesn’t know we can help him. (SR. 104).(John Doe refers to Mr. Owen. At the suppression hearing the witnesses were of the view that Mr. Owen was referring to himself as John Doe)

* * * * *

McCoy: So we said Friday, we said there is a time that John Doe has to stop, didn’t we, a lot of things, okay? Stealing, okay, things like at F.A.U., okay. (SR. 60).

* * * * *

McCoy: You said it your self Friday, okay, because you know, you came part of the way there because you told me you had a problem, you admit you had a problem, okay. (SR. 71)

* * * * *

McCoy: Friday I tried to prove it a little bit more by talking to you. I have n’t jerked you around okay. Like I told you Friday, okay, if I did n’t think there was any help for Duane, goodbye, I wouldn’t be here. (SR.73).

* * * * *

McCoy: What I said to you Friday, okay, and like you said to me, shrinks are full of sh*t. Well maybe they are, okay. But what they do, though, is they try to arm you with the tools. (SR. 85).

* * * * *

McCoy: The bottom line is, you need help okay. You need help. You need this doctor, okay, because you need to do something. Let’s go back, okay. Let’s go down to what we are really telling you about, okay- - we talked to you about Friday night, okay. Let’s talk about that. (SR. 103).

* * * * *

Detective Woods and other law enforcement exploited Mr. Owen's mental illness and Mr. Owen's desire for treatment to get Mr. Owen to confess during the over 21 hours of interrogation. Moreover, as discussed above in claim one, Detective Woods and other law enforcement continued throughout the interrogation to lead Mr. Owen to believe that they had the authority to negotiate what charges would be filed against Mr. Owen and whether or not Mr. Owen received help for his mental illness. (See record cites and claim one.) In other words, law enforcement led Mr. Owen believe that if Mr. Owen wanted to negotiate a plea and get help for his mental illness, Mr. Owen had to confess. Accordingly, any confession given by Mr. Owen was involuntary and not freely and voluntarily given under <u>Blackburn</u>, <u>supra</u>.

Appellate counsel could have raised this issue under Blackburn and directed this Court to the record cites above that showed law enforcement's exploitation of Mr. Owen's mental illness and false promises of a deal as seen in claim one. The failure to do so denied Mr. Owen the effective assistance of appellate counsel and this Court should reverse Mr. Owen's conviction and a new trial without the taint of this illegally coerced confession.

CLAIM IX

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Under Apprendi v. New Jersey, 120 S.Ct 2348, 2355 (2000), Mr. Owen's death sentence was unconstitutional because the aggravators were not submitted to for the jury to decide whether they had been proven beyond a reasonable doubt. In Apprendi the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt" Id. Because the aggravators in the case were not each individually submitted to the jury for an individual verdict of whether the state had proved each one beyond a reasonable doubt, Mr. Owen's death sentence was unconstitutional.

While this Court may have held otherwise, Mr. Owen claims that appellate counsel was ineffective for not raising this issue and that this issue was fundamental error so that this issue is preserved for federal review.

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.

In accordance with Florida Rules of Criminal Procedure 3.811

and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

Mr. Owen acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Owen acknowledges that before a judicial review may be held in Florida, the prisoner must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

This claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, Mr. Owen raises this claim now.

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. OWN BROUGHT TO THIS COURT'S ATTENTION THAT THERE WAS A CONFLICT OF INTEREST.

Mr. Owen raised a conflict of interest with appellate counsel in a pleading entitled; "objection to the motion for determination of counsel" filed on December 28, 1987, hereinafter Objection). In this pleading Mr. Owen drew this Court's attention to the fact that there was a conflict with appellate counsel, Craig Boudreau, who also was Mr. Owen's primary trial counsel.

In the objection Mr. Owen informed this Court that he had filed bar complaint number 15b86f35 against Craig Boudreau on January 20, 1986. See Objection. This ultimately gave rise to a writ of prohibition in which the district court stated "Should the trial judge and this Court be in error, surely the decisions to date do not prejudice their being raised at a later time in a different scenario." Owen v. Burk,481 So. 2d 998, 998 (Fla.4th DCA 1986). See Objection.

Mr. Owen then claimed that the above conflict of interest issue and ineffective assistance of counsel needed to be raised on direct appeal to avoid being procedurally barred. See

Objection.

Mr. Owen also alerted this Court that he had the "right to an effective appellant review with a conflict-free attorney and also the right to bring all pre-trial matters to the attention of the appellant court for immediate resolution. Furthermore, he has the right to pursue an issue an issue of ineffective assistance if it is part of the record. See Combs v. State, 403 So. 2d 422 (Fla. 1981) and also; Adam v. State, 456 So. 2d 888, 890 (Fla. 1984)." See Objection.

In Holland v. Arkansas, 435 U.S. 475,476 (1978), the Court reversed the lower court because the trial court "failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was to remote to warrant separate counsel." Id. The Court held,"that the failure in the face of representations made by counsel weeks before the jury was empaneled , deprived petitioners of the guarantee of 'assistance of counsel.'" Id.

Similar to Holland, this Court failed to take adequate steps to determine whether there existed a conflict of interest between Mr. Owen and appellate counsel. Mr. Owen properly alerted this Court that a conflict existed because appellate counsel could not raise his own ineffectiveness and could not raise the fact that Mr. Owen had filed a bar complaint.

Accordingly, this Court’s failure to inquire about whether there was a conflict requires reversal.

CONCLUSION

This Court should grant all relief requested in this petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this court to do justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 25th day of September.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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