

IN THE SUPREME COURT OF FLORIDA

CASE NO.01-2146

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DUANE EUGENE OWEN,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary,

Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,

Attorney General,

Additional Respondent.

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REPLY PETITION FOR WRIT OF HABEAS CORPUS

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## 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.

This claim is not procedurally barred. This claim is distinct from any other claim that has been made in this petition or in any prior court filing.

On direct appeal appellate counsel argued that the trial court "erred in denying the motion to suppress appellant's confession." (Initial brief of Appellant p.24-31.) Appellate counsel based this argument on three grounds: One, that the police lacked a well founded suspicion to stop and seize the Appellant. Two, the manner in which Appellant's statements were obtained , over the many hours of interrogation, resulted in psychological coercion. Three, the police continued to interrogate Appellant after he invoked his right to remain silent.

On direct appeal this Court found the question of the stop was without merit because the police stopped and arrested Mr. Owen based on outstanding warrants and a photographic identification. Owen v. State, 596 So. 2d 985, 987 (Fla. 1992). This Court found that the assertion that Mr. Owen's statements

to police were obtained through psychological had previously been rejected. Id. citing Owen v. State, 560 So. 2d 207 (Fla. 1990). Lastly, this Court found that Mr. Owen's confession was not obtained in violation of Miranda. Id. This Court did not find that Mr. Owen's statements were not part of plea negotiations.

On direct appeal from the denial of Mr. Owen's Rule 3.850 motion, this Court did not specifically find that this claim was procedurally barred. What this Court found was that the claim the on the issue of whether "attorney Kirscher was ineffective during the suppression hearing" was raised and rejected on direct appeal. Id. at 513 FN.5 number 10.

The issue of the improper admission of Mr. Owen's statements made during plea negotiations was raised on direct appeal following trial or the appeal from the denial of the Rule 3.850 motion. It also was never raised by trial counsel. The point of this issue is that appellate counsel was ineffective for failing to raise this issue on direct appeal either as an issue standing by itself or as an ineffectiveness claim in that trial counsel should have preserved Mr. Owen's rights by raising this issue at the trial level. This failure on the part of the same individual who served both as trial counsel and appellate counsel was ineffective.

The plea statements that were improperly admitted were all the statements made by Mr. Owen to law enforcement. Once plea negotiations were under way, any statements Mr. Owen made were in furtherance of the same and were inadmissible at trial apart from whether the requirements of Miranda and voluntariness were met.

Section 90.410, Florida Statutes grants immunity to individuals engaged in plea negotiations as was Mr. Owen. While the Respondent can point to statements made by law enforcement that suggested that the final authority was not with law enforcement, law enforcement made it clear that it controlled whether or not the charges were dropped and that Mr. Owen had to go through law enforcement if he wanted to receive the benefits of any plea deal.

Mr. Owen continues to rely on the quoted dialogue in the initial habeas petition, but asks this Court to consider that plea negotiations refers not only to the sentence but also to what charges Mr. Owen would have faced. In a case where the State could have charged Mr. Owen with second degree murder or not sought the death penalty this truly was a life or decision. Law enforcement made it clear that Mr. Owen "offer . . . something" if he ever wanted to avoid death.

The fact that law enforcement read Mr. Owen Miranda does not

give law enforcement the option of luring Mr. Owen in to a plea bargain for his life and then using that against him at trial. This issue should have been raised by any attorney who accepts the responsibility of representing Mr. Owen on a case in which the state seeks to take his life.

## 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.

Mr. Owen continues to rely on his initial habeas petition but reiterates that this issue was preserved. Trial counsel properly prayed in the wherefore clause that ". . . .this challenge to the panel be sustained and that. . . . a new panel be brought, in and drawn in the same manner and from the same area as the grand jury which returned the indictment. . . . ." (R. 4716). Alternatively, if this lacked the technical precision necessary to preserve this issue the fault lies with trial counsel who did not adequately draft the motion at issue.

Incorrectly, the Respondent states that this issue did not exist at the time of Mr. Owen's trial and appeal. As this Court stated in Moreland v. State, 582 So. 2d 618, 619 (1991), "Spencer. . .did not create new law or make a major constitutional change of law. Rather, at the first existing opportunity it applied existing sixth amendment law to a new situation." Id. Clearly, both appellate counsel and trial

counsel, the same individual in this case, should have known and utilized existing sixth amendment law as did Spencer's trial and appellate counsel.

### 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.**

Mr. Owen stands by his initial claim in his habeas petition but states that this issue is neither procedurally barred nor harmless error. The admission of this statement clearly influenced the jury to both convict and most importantly to recommend death.

Trial counsel objected to the "hurting statement" at trial and properly moved for a mistrial. The same individual also served as appellate counsel and failed to raise the trial court's failure to grant a mistrial or to strike the "hurting statement."

This Court's and the lower court's finding that Mr. Owen's statements were not coerced or involuntary is irrelevant in regards the admission of this unfairly prejudicial statement. Simply because a statement is not

inadmissible on voluntariness grounds does not mean that the statement is admissible where the prejudicial impact outweighs the probative value. Here, this statement was clearly inadmissible under Section 90.403 and 404, Florida Statutes and the case law cited in the instant petition.

This Court has repeatedly held that ineffective assistance of appellate counsel claims are appropriately raised in a petition for writ of habeas corpus. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). The cases cited by the Respondent are clearly distinguishable from the instant case.

The Respondent cited Parker v. Dugger, 550 So. 2d 459(1989). In that case the Petitioner filed a successor habeas petition and a successor Rule 3.850 while under a death warrant. Id. at 460. The instant case is different because there was a proper objection at trial and this is not a successor habeas petition. Mr. Owen raises this claim as ineffective assistance of appellate counsel not as an independent issue. While the Respondent may be correct that this issue could have been or should have been raised the error is that appellate counsel could have and should have raised this issue on direct appeal but because of his ineffectiveness he did not raise this issue. Ineffective

assistance of appellate counsel could not have been raised on direct appeal because the direct appeal had not occurred at that time. This Court should grant relief because Mr. Owen was denied the effective assistance of appellate counsel.

While the Respondent cited Jent v. State, 408 So. 2d 1024, 1029(Fla. 1981), for the well settled proposition that a trial court's ruling on admissibility will not be disturbed unless there has been an abuse of discretion, it is still incumbent on the trial court to use that discretion. This was not mere hearsay. In the instant case the trial court failed to grant a mistrial after the "hurting" statement was heard by the jury which recommended 10 to 2 that Mr. Owen be put to death. This certainly was not harmless, indeed, it was devastating to any hope that Mr. Owen would receive a fair trial and a fair penalty phase.

Lastly, it is important to note that appellate counsel has a responsibility to develop all issues on direct appeal to avoid falling into the procedural bar trap that the Respondent would have this Court believe exists. Simply stated, appellate counsel cannot simply raise just enough of the issues to avoid being declared ineffective but fail to fully raise all issues when relief may be granted.

#### **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.**

The Petitioner relies upon the initial habeas petition and the argument and authority therein. This issue is not procedurally barred because it is fundamental and appellate counsel could have raised this as a substantive issue on appeal.

The fact that the State in its view still proceeded with this case does not obviate the fact that without Mr. Owen's statements on this case the State's possibility of conviction was greatly diminished. The State obviously thought these statements were important enough to argue for admissibility and to present them during its case in chief.

Moreover, it is important to remember that had the trial court found that Mr. Owen's statements were inadmissible on one case it would have found that they were inadmissible on all cases. On some of these cases the State first gained a conviction and then used the convictions as prior violent felony aggravators to obtain a death sentence.

As the Respondent stated in its response to claim III, "A trial court has wide discretion concerning the admissibility

of evidence, and a ruling will not be disturbed unless there has been an abuse of discretion. Respondent's response at 17 citing Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981).

Inherent in this discretion is that the trial court will exercise its discretion in an unbiased manner without regard to the effect on the State's ability to prosecute.

Lastly, the trial court's bias calls into question not just the trial court's denial of the motion to suppress but the entire trial and the validity of Mr. Owen's death sentence. There is nothing more fundamental than a fair tribunal, especially in a case where the State seeks death.

#### 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.**

Mr. Owen relies upon the initial habeas petition and the argument and authority therein. This particular claim is not procedurally barred because it was not argued on direct appeal or on appeal from the denial of Mr. Owen's 3.850 motion.

Trial counsel properly requested that the jury be instructed on the applicable law, that in sum, sexual battery requires a

live victim. Accordingly, this issue was properly preserved for appellate review but not raised by appellate counsel due to ineffectiveness.

Mr. Owen's case presented unique facts where there was a question of whether the victim was alive or dead at the time of the alleged sexual battery. The trial court did deny the motion for judgment of acquittal. The denial of this motion only meant that the state had presented enough evidence to go to the jury, not that the jury did not have to still decide whether the a sexual battery had occurred. A sexual battery requires a live person. This was a jury question which the jury never were instructed they must decide. Accordingly, it is more than likely that the jury found that vaginal penetration had occurred but did not know that to return a verdict for sexual battery they had to find that the victim was alive.

The denial of the jury instruction, while preserved, was never raised on appeal. Based on the question surrounding whether the victim was alive or dead at the time of penetration, a proper instruction of the jury required that the trial court instruct the jury that the victim need to be alive beyond a reasonable doubt for the jury to return a verdict of guilty. Apart from the trial court's denial of the

motion for j.o.a. and this Court's finding sufficient evidence to convict the error still remains that the trial court's failure to give the requested jury instruction allowed the jury to return a verdict of guilty when the jury had a reasonable doubt that the victim was deceased at the time of the sexual penetration.

Any procedural bar applies to the 3.850 does not apply to this case. The point of the procedural bar was that this issue should have been raised on direct appeal. It was not raised because appellate counsel was ineffective.

#### 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.**

Mr. Owen relies upon the initial habeas petition and the argument and authority therein. Had appellate counsel raised fully raised these issues the result of Mr. Owen's appeal would have been different and this case would have been remanded for a new sentencing. Appellate counsel was ineffective for not using the record to show that Mr. Owen did not get a fair sentencing and that the trial court improperly found the cold, calculated and premeditated aggravator. Lastly, the non-statutory mitigation on the record would have also justified this Court overturning Mr. Owen's death sentence and remanding for either a new sentencing or for the trial court to sentence him to life.

#### 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.**

Mr. Owen relies upon the initial habeas petition and the argument and authority therein. Any other litigation that Mr.

Owen is pursuing pro-se is irrelevant to this petition. Whether or not Mr. Owen's direct appeal on another case or post-conviction litigation is successful in State court, the fact remains that he was illegally sentenced on this case and this Court should remand this case for resentencing.

**CLAIM VIII**

**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.**

Mr. Owen relies upon the initial habeas petition and the argument and authority therein. This claim asks this Court to take in consideration that appellate counsel has a duty to not merely raise an issue but to raise an issue in a matter that would allow for meaningful appellate review.

**CLAIM IX**

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

Mr. Owen relies upon the initial habeas petition and the argument and authority therein.

## CLAIM X

THIS COURT ERRED BY NOT APPOINTING CONFLICT FREE APPELLATE COUNSEL OR REMANDING THE CASE TO THE TRIAL COURT FOR A FINDING OF FACT ON WHETHER THERE WAS A CONFLICT OF INTEREST BETWEEN MR. OWEN AND APPELLATE COUNSEL AFTER MR. OWEN BROUGHT TO THIS COURT'S ATTENTION THAT THERE WAS A CONFLICT OF INTEREST.

Mr. Owen relies upon the initial habeas petition and the argument and authority therein. This claim is not procedurally barred and has merit.

This claim involves a claim of a conflict with appellate counsel. While the Respondent relies on the rejection during Mr. Owen's ill fated Rule 3.850 motion, that motion only would have involved a claim of conflict with trial counsel not with appellate counsel. The trial court lacked jurisdiction to hear any claim of conflict between Mr. Owen and appellate. The fact that these were the same person is irrelevant to this issue. This issue is properly raised in a habeas petition. See Freeman supra.

**PETITIONER 'S RESPONSE TO RESPONDENT'S MOTION TO NOT SET ORAL  
ARGUMENT AND FOR A DECISION ON THE PLEADINGS**

This Court should grant oral argument on this petition. 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.

The State is incorrect in asserting in its motion that Mr. Owen filed the instant habeas petition "[o]ver one year later" than this Court's denial of rehearing on its affirmance of the trial court's denial of post conviction relief. This Court denied rehearing on November 13, 2000. This Court issued its mandate on December 13, 2000. Mr. Owen then petitioned the United States Supreme Court for a writ of certiorari which was denied by the Court on April 1, 2001

While after January 1, 2002, Mr. Owen would have had to file his habeas petition with his direct appeal of the trial court, no such rule existed at the time that Mr. Owen first entered post conviction litigation.

Contrary to the Respondent's claims argument that all of the

claims raised by Mr. Owen are not procedurally barred or meritless. By filing this petition Mr. Owen is exercising his rights as an individual sentenced to death to petition this Court for redress of his unconstitutional conviction, judgment and sentence.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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 4<sup>th</sup> day of January, 2002.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing Reply  
Petition for Writ of Habeas Corpus, was generated in a, Courier  
New 12 point font, pursuant to Fla. R. App. P. 9.210.

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