

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 01-2476

DUANE E. OWEN,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

DIRECT APPEAL

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Owen's postconviction motion titled "Defendant's Pro-Se Motion for Post-Conviction Relief and/or Extraordinary Writ" for which this Court has appointed undersigned counsel to represent Mr. Owen.

The record on appeal comprises the three volume record initially compiled by the clerk and successively paginated beginning with page one. References to the record include a page number and are of the form, e.g., (R. 123). Limited references are made to the record on appeal from Mr. Owen's original appeal from the denial of his Rule 3.850. References to this record include a page number and are of the form, e.g., (PCR. 123). References to the transcript of these proceedings and are of the form (T.123), and contain an appropriate page number. Limited references to the record of Mr. Owen's trial on the Worden case are also made in this brief. References to this record include a page number and are of the form, e.g., (Dir. 123). All other references are self explanatory or explained herein.

Duane Owen, the Appellant now before this Court is referred to as such or by his proper name. Mr. Owen was represented by a number of attorneys in this case and a companion case.

Counsel is differentiated by both the stage and time of their representation when necessary. Undersigned counsel refers to himself as undersigned counsel when necessary to distinguish himself from the Mr. Owen's counsel that are at issue in this appeal. Prior postconviction counsel is used and refers to the attorneys that represented Mr. Owen during his original Rule 3.850 motion. These attorneys are no longer employed by the Office of Capital Regional Counsel-Middle. All other references to counsel are understandable in the context of this brief.

Mr. Owen's Mr. Owen's postconviction motion titled "Defendant's Pro-Se Motion for Post-Conviction Relief and/or Extraordinary Writ" is referred to in the possessive, e.g., Mr. Owen's motion, to distinguish this motion from the original Rule 3.850 motion filed by prior postconviction counsel.

REQUEST FOR ORAL ARGUMENT

This case has been consolidated by this Court's order with Appellant's Petition for Writ of Habeas Corpus previously filed by undersigned counsel. Appellant has yet to receive an oral argument notice for the Petition for Writ of Habeas Corpus.

Mr. Owen has been sentenced to death. The resolution of the issues involved in this action will therefore 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, given the seriousness of the claims involved and the gravity of the penalty. Mr. Owen, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

Table of Authorities v

Statement of the Case and Facts 1

Procedural History Worden Case 1

Procedural History Slattery Case 2

Prior Postconviction Procedural History 4

Facts of instant appeal 7

State Petition for a Writ of Habeas Corpus 17

SUMMARY OF THE ARGUMENTS. 17

ARGUMENT I

THE LOWER COURT SHOULD HAVE GRANTED MR. OWEN AN
EVIDENTIARY HEARING ON CLAIM ONE OF MR. OWEN’S PRO SE
POSTCONVICTION MOTION BECAUSE MR. OWEN’S PRIOR
POSTCONVICTION COUNSEL HAD A CONFLICT OF INTEREST. 20

ARGUMENT II

THE LOWER COURT SHOULD HAVE GRANTED MR. OWEN AN
EVIDENTIARY HEARING ON CLAIM TWO OF MR. OWEN’S PRO SE
POSTCONVICTION MOTION BECAUSE MR. OWEN WAS DENIED
EFFECTIVE REPRESENTATION AND DUE PROCESS DURING THE
ORIGINAL POSTCONVICTION PROCEEDINGS 29

ARGUMENT III

THE LOWER COURT SHOULD HAVE GRANTED MR. OWEN A HEARING ON
CLAIM THREE SUB CLAIM A OF MR. OWEN’S MOTION BECAUSE MR.
OWEN PRESENTED A VALID BASIS FOR RELIEF IN THAT MR. OWEN
WAS INNOCENT DUE TO TRIAL COUNSEL’S INEFFECTIVENESS . . . 39

ARGUMENT IV

THE LOWER COURT SHOULD HAVE GRANTED MR. OWEN A AN
EVIDENTIARY HEARING ON CLAIM THREE SUB CLAIM B OF MR.
OWEN'S PRO SE POSTCONVICTION MOTION.50
ARGUMENT V

THE LOWER COURT'S WRITTEN ORDER WAS INADEQUATE TO DENY
MR. OWEN'S PRO SE POSTCONVICTION MOTION AND DEPRIVED MR.
OWEN A FAIR APPEAL BEFORE THIS COURT.59

CONCLUSION 62

CERTIFICATE OF SERVICE66

CERTIFICATE OF COMPLIANCE67

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Davis v. United States</u> , 512 U.S. 452, 461, 114 S.Ct. 2350, 2356 (1994)	3
<u>Kales v. Whitefly</u> , 514 U.S. 419, 434 (1995).	53
<u>Lambrix v. State</u> , 698 So. 2d 247 (Fla. 1996)	36
<u>LeCroy v. State</u> , 641 So. 2d 853 (Fla. 1994)	26
<u>Martin v. Dugger</u> , 515 So. 2d 185 (Fla. 1987),	31
<u>Minerva v. Singletary</u> , 830 F. Supp 1426 (Fla. M.D. 1993).	12
<u>Owen v. Florida</u> , 522 U.S. 1002, 118 S.Ct. 574 (1997).	4,7
<u>Reaves v. State</u> , 2002 WL 1338424*4 (Fla. 2002).	44
<u>Ring v. Arizona</u> , 2002 WL 1357257, ___ U.S.__(2002),	47
<u>Schlup v. Delo</u> , 513 U.S. 851 (1995)	64
<u>Smith v. Florida</u> , 410 F.2d 1349, 1351 (U.S. Ct. of App. 5 th Cir. 1969)	54
<u>Sprinkler v. Greene</u> , 527 U.S. 263, 280 (1999);	53
<u>State v. Owen</u> , 654 So. 2d 200, 201 (Fla. 4 th DCA 1995).	3,4
<u>Steele v. Kehoe</u> ,	

747 So. 2d 931 (Fla. 1999),	36
<u>Strickland v. Washington</u> , 466 U.S. 668, 686 (1984).	44
<u>U.S. v. Bailey</u> , 473 U.S. 667, (1985),	53
<u>White v. Board of County Comm'rs</u> , 557 So. 2d 1376. 1379 (Fla. 1989).	12
<u>Williams v. State</u> , 777 So. 2d 947, 948 (Fla. 2000).	36
<u>Wilson v. Wainwright</u> , 474 So. 2d 1162, 1164 (Fla. 1985).	12

STATEMENT OF THE CASE AND FACTS

The procedural history of the instant case is both complex and intertwined with a second capital case currently on direct appeal to this Court. For purposes of clarity and understanding the unique issues of Mr. Owen's case, each case is referred to by the victim named in the indictment. The instant case is referred to as the Worden case. The case that is intertwined with the Worden case is referred to as the Slattery case. To further explain the Appellant's unique procedural history, this section is divided into separate procedural histories for the Worden case and the Slattery case, then finally a history of postconviction procedural history of the Worden case with reference to the Slattery case as appropriate.

Both cases involve some of the same motions and some of the same attorneys.

Procedural History Worden Case

On July 11, 1984, the State charged Mr. Owen by indictment with first degree murder, sexual battery and burglary of a dwelling. (PCR 94-95). The case was prosecuted by the Palm Beach County State Attorney's Office and tried in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Mr. Owen pled not guilty and went to trial in

February of 1986. A jury found Mr. Owen guilty of all counts on February 18, 1986. (Dir. 3976). On March 5, 1986, the trial court sentenced Mr. Owen to death after the jury recommended death by a less than unanimous vote of ten to two. (Dir. 4357). The trial court sentenced Mr. Owen to death on March 13, 1986, (Dir. 4565), after the trial court found four aggravating circumstances: previously convicted of a felony; heinous, atrocious or cruel; and cold, calculated and premeditated (Dir. 4555).

On direct appeal this Court affirmed the convictions and death sentence. (PCR. 832-844) Owen v. State, 596 So. 2d 985 (Fla. 1992), Cert. Denied, 113 S.Ct. 338 (1992). The victim in this case was Georgianna Worden. This case will be referred to as the Worden case to distinguish it from the other case that it is intertwined with -- the Slattery Case.

Procedural History Slattery Case

The State charged Mr. Owen by indictment with first degree murder, sexual battery and burglary, lower court case number 84-4014 in the Palm Beach County Circuit Court. Mr. Owen was tried and convicted as charged. Owen v. State, 560 So. 207, 209 (Fla. 1990). The jury recommended and the trial court imposed a death sentence. Id. The trial predated the trial and conviction in the Worden case.

Following conviction and sentencing, Mr. Owen appealed the Slattery case. Id. Mr. Owen raised the issue of the admissibility of his confession, and argued that the conviction was the result of psychological coercion and that law enforcement violated Miranda. Id. at 210. In an opinion dated March 1, 1990, this Court found that the confession did violate Miranda because Mr. Owen's responses to law enforcement were "at the least an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified." Id. at 211. This Court then reversed all convictions and remanded the Slattery case for retrial. Id. at 212.

After remand, and prior to retrial, the United States Supreme Court held that unless a "suspect actually requests an attorney, questioning may continue." Davis v. United States, 512 U.S. 452, 461, 114 S.Ct. 2350, 2356 (1994). Before the retrial of the Slattery case, the State moved the trial court to reconsider the admissibility of Mr. Owen's confession, which the trial court again found inadmissible. State v. Owen, 654 So. 2d 200, 201 (Fla. 4th DCA 1995).

The State sought a petition for a writ of certiorari in the District Court of Appeals. State v. Owen, 654 So. 2d 200, 201. The district court denied the petition and certified a question as one of great public importance, to wit:

Do the principles announced by the United States Supreme Court in Davis apply to the admissibility of confessions in Florida, in light of Traylor ?

Id. at 202.

This Court answered in the affirmative, quashed the decision below and remanded to the district court with instructions to grant the petition for certiorari. State v. Owen, 696 So. 2d 715, 720 (Fla. 1997). The district court granted certiorari on remand. State v. Owen, 697 So. 2d 1309 (Fla. 4th DCA 1997). The United States Supreme Court denied Mr. Owen's petition for certiorari. Owen v. Florida, 522 U.S. 1002, 118 S.Ct. 574 (1997).

Prior Postconviction Procedural History

On March 18, 1986, Mr. Owen filed a Notice of Appeal for a direct appeal of the Worden case. (PCR. 588-89). Before this Court decided this direct appeal, Mr. Owen filed an initial Rule 3.850 motion on July 31, 1986 (PCR. 612-27) which was amended and verified on October 9, 1986 (PCR. 657-65). The motion was filed by Donald Kohl, one of Mr. Owen's original trial attorneys. (PCR. 657-65).

The trial court began an evidentiary hearing on the motion. (PCR. 1964-2191). Because of the ineffective assistance of counsel claim raised in this motion a conflict of interest resulted and Donald Kohl was allowed to withdraw as

postconviction counsel on December 9, 1986. (PCR. 691) The trial court then appointed the former Capital Collateral Representative (CCR) to represent Mr. Owen on the postconviction motion. Litigation followed concerning whether CCR could represent Mr. Owen in a postconviction proceeding while his direct appeal was pending. (PCR. 706-710, 724). This Court granted CCR's Petition for Writ of Mandamus and ordered the trial court to appoint conflict free counsel to represent Mr. Owen on his Rule 3.850 motion. (PCR. 740). (Although the trial court appointed Anthony Natale the proceedings were stayed completion of the direct appeal and CCR could enter its appearance in 1994.)

Mr. Owen filed a Second Amended Motion to Vacate Judgment of Conviction and Sentence on October 12, 1994. (PCR. 919-1032). After a series of judges, on May 29, 1996, the lower court transferred Mr. Owen's case back to Judge Burk. (PCR. 1109). Mr. Owen filed a motion to disqualify Judge Burk, which was denied by the trial court after motion to reconsider. (PCR. 1263-64). Mr. Owen then petitioned this Court for Writs of Mandamus and Prohibition and for extraordinary relief, all of which were denied on December 10, 1996, as was a Motion for Reconsideration was on February 17, 1997. (PCR. 1284)

Mr. Owen, through counsel, filed a third amendment to his

Rule 3.850 Motion. (PCR. 1379-1546). In response, the State conceded that an evidentiary hearing was required on several claims. (PCR. 1560-81). The trial court conducted a Huff hearing on the third amended motion on November 5, 1997. (T. 674-751). Mr. Owen filed a supplemental Pro-Se Motion for Postconviction relief (PCR. 1595-1622; T. 687-693). The trial court refused to accept Mr. Owen's pro se motion but advised predecessor collateral counsel to "take these matters into consideration" and "if those matters need to be raised, they can be raised." (T. 694).

Mr. Owen went to a hearing on December 8, 1997. Owen v. State, 773 So. 2d 510, 513 (Fla. 2000). (Prior postconviction counsel also filed a fourth amended post conviction motion on that date.) Before the hearing, Mr. Owen's counsel for the Slattery retrial informed the court that Mr. Owen had invoked the attorney-client privilege in the Slattery case and sought a stay of the Worden postconviction hearing. Id. Alternatively, Slattery retrial counsel sought the prohibition of disclosure during the Worden hearing of confidential information concerning the Slattery case. Id. "The court agreed to bar disclosure of privileged information." Id.

At the Worden hearing, Mr. Owen called Barry Krischer as his first and only witness. Id. Mr. Krischer was Mr. Owen's

counsel during the original Slattery trial and handled and a motion to suppress that covered Mr. Owen's statements used against him in the Worden trial. Id. Mr. Krischer declined to answer questions concerning the motion to suppress and prior postconviction counsel ended the questioning. Id. After the State cross-examined Krischer, counsel declined to proceed further. Id.

Following the lower court's denial of Mr. Owen's original Rule 3.850 motion, Mr. Owen appealed to this Court. Owen v. State, 773 So. 2d 510, 511 (Fla. 2000). Mr. Owen raised 18 claims on appeal. Id. at 513, fn5. In Owen, this Court addressed the claim that the lower court should have stayed the hearing pending the retrial of the Slattery case. Id. at 513-14. This Court denied Mr. Owen relief. Id. at 515.

This Court found that Mr. Owen waived the attorney-client privilege by filing ineffectiveness and conflict of interest claims against trial counsel in the Worden case. Id. at 514. This Court found that

"[a]lthough [Mr. Owen] subsequently invoked the attorney client privilege in the Slattery case, [Mr. Owen] still was obligated to proceed in good faith to the extent that the privilege permitted. . . . In fact, at the hearing below, [Mr. Owen] made no effort to introduce substantive evidence concerning the Worden trial. Instead, he called as his only witness Barry Krischer, i.e., his former trial counsel in

the Slattery case. Krischer knew virtually nothing about the Worden trial and his testimony was guaranteed to implicate the privilege, which expressly applied only to the Slattery case. Further. Although the court below agreed to bar disclosure of privileged information, Owen made no effort to proffer any substantive evidence that would have been excluded by the privilege. In short, [Mr.] Owen made no showing of prejudice."

Id. at 514-515.

Mr. Owen filed a petition for writ of certiorari to the Supreme Court of Florida which was denied. Owen v. Florida, 532 U.S. 964, 121 S.Ct. 1500.(2001).

FACTS OF INSTANT APPEAL

On June 29, 2001, Mr. Owen filed the Pro-Se Motion for Post-Conviction Relief and/or Extraordinary Writ. (R. 20). The trial court ordered the State to respond on August 2, 2001. (R. 28). The State responded on August 30, 2001. (R. 37). Mr. Owen filed a response on September 13, 2001. (R. 241).

On September 21, 2001, the lower court denied Mr. Owen's pro se motion. (R. 248). The court's one page order states in relevant part that:

THIS MATTER is before the Court on the Defendant's Pro-Se Motion for Post Conviction Relief. Upon consideration of the Motion, State's response with Attachments, the Court file, and being fully advised in the premises, it is thereupon ORDERED AND ADJUDGED that the Defendant's Pro Se Motion be and the same is

hereby denied as being successive, untimely and constitutes an abuse of process. . . .

(R. 248).

The lower court did not grant Mr. Owen the opportunity to be heard in the form of a court hearing or by further written submissions before denying Mr. Owen's motion. The lower court's order did not specify what information in the court file it considered or that the lower court had reviewed any of the transcripts from either the original trial of this case or from the postconviction litigation that followed. Moreover, no portions of the record or any matter at all was attached to the record that established that Mr. Owen was entitled to no relief. (See R. 248).

The lower court's order did not specify how the motion was successive, untimely or how it constituted an abuse of process. (See R. 248). Mr. Owen's pro se appeal followed on October 11, 2001. (R. 249).

Mr. Owen raised three claims in his pro se postconviction motion which are as follows:

Claim I: Capital Collateral Regional Counsel-Middle labored under a direct conflict of interest which precluded this firm from representing Defendant in the Post-Conviction proceedings.

Claim II: Capital Collateral Regional Counsel-Middle deprived Defendant of Effective Representation and Due Process

during postconviction proceedings.

Claim III

A. Defendant's Claim of Innocence

B. Brady Violations

Under Claim One Mr. Owen stated that he was entitled to relief because prior postconviction counsel had a conflict of interest that led to the procedural default that arose from the original postconviction hearing. (R. 7).

According to Mr. Owen's pro se motion, the conflict arose from the sharing of experts between Mr. Owen's postconviction attorneys and his trial attorney's on the retrial of the Slattery case and the attorney client privilege issue that resulted. (R. 6). Mr. Owen states in his motion that trial counsel and postconviction counsel "shared 'unified interests' in exchanging privileged information and resources surrounding Defendant's experts, investigations, document collection (work product) and defenses toward the Slattery retrial.(R. 5).

At the time of Mr. Owen's evidentiary hearing on the Worden case, the retrial of Mr. Owen on the Slattery case was pending. (R. 2-3). Mr. Owen's previous postconviction counsel hired Dr. Faye Sultan and Dr. Barry Crown to examine Mr. Owen and each administered several mental health tests. Prior postconviction counsel "shared all information and work product" with trial counsel on the Slattery retrial. (R. 4). Retrial counsel for

the Slattery case hired Dr. Sultan and Dr. Crown who reexamined Mr. Owen. (R.4). Retrial counsel "shared all information and work product with" Mr. Owen's prior postconviction counsel. (R. 4).

Mr. Owen argued that "[although a criminal defendant pursues an ineffectiveness claim against trial counsel waives the attorney-client privilege as to that claim, (citations omitted), the issue in the present case is not whether the filing of the Worden post-conviction motion waived the attorney-client privilege in this case, but, whether the invocation of the attorney-client privilege in the Slattery case barred [prior postconviction counsel] from representing [Mr. Owen] in the Worden postconviction proceedings." (R. 5).

Mr. Owen concluded that as a result of the extraordinary circumstances that surrounded his cases, he "was deprived of Article I, Section 16 (right to counsel), Article 1, Section (due process), Article 1, Section 2 (equal protection), Article 1, Section 9 (due process), Article 1, Section 13 (habeas corpus) and Article 1, Section 17(Cruel and unusual punishment) of the Declaration of Rights of the Florida Constitution." (R. 7).

Under Claim Two, Mr. Owen states that he was denied the effective assistance of counsel during the prior postconviction

proceedings. (R. 8). Mr. Owen believed postconviction counsel was ineffective in advising him not to proceed with the hearing because "The mandatory time limit to file postconviction motions and the assertion of the attorney-client privilege in the Slattery retrial created a Hobson(sic)choice since Defendant was forced to surrender his due process right to postconviction hearing by invoking his attorney client privilege to prevent damaging testimony from coming out concerning the pending Slattery case." (R. 9)

Mr. Owen offered as support for this claim that this Court rejected the Hobson's choice argument in finding a waiver of the postconviction proceedings. (R. 9; citing Owen). The facts surrounding this Court's denial of relief is detailed, as stated above, in this Court's opinion in Owen v. State, 773 So. 2d 510(2001).

Additionally, Mr. Owen claimed that prior postconviction counsel were unprepared to proceed to the evidentiary hearing in December of 1997. (R. 10-11). Specifically, Mr. Owen found that prior postconviction counsel "lacked sufficient time necessary for proper investigations, expert witness preparation and other support to conduct a full and fair evidentiary hearing" and that these attorneys "had a general lack of expertise and a specific lack of experience in the utilization of expert witnesses and

evidence, including but not limited to psychiatric and forensic science." (R.10-11).

Mr. Owen argued as a basis for the hearing that he was denied his statutory right to the effective assistance of postconviction counsel. (R. 8; citing Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Minerva v. Singletary, 830 F. Supp 1426 (Fla. M.D. 1993). Mr. Owen quoted this Court as stating that "since the State of Florida enforces the death penalty, its primary obligation is to ensure that indigents are provided competent, effective counsel in capital case. . . . and that "all capital cases by their very nature can be considered extraordinary and unusual" (R.8) citing White v. Board of County Comm'rs, 557 So. 2d 1376. 1379 (Fla. 1989).

Mr. Owen also quoted this Court as stating that:

However, the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case, in a case involving the death penalty it is the very foundation of justice."

Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985).

Mr. Owen argued that Section 27.7001, Florida Statutes, et. Seq, mandates that courts "shall monitor the performance of

assigned counsel to ensure the capital defendant is receiving quality representation. The Court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel." (R. 8-9).

Under Claim Three, Subclaim A, Mr. Owen argued that he was procedurally innocent based on his contention that the ineffectiveness of trial counsel denied Mr. Owen the full panoply of protections afforded to criminal defendants by the constitution. This subclaim and Subclaim B were presented by Mr. Owen as a "gateway through which to have the otherwise barred claims considered on the merits" (R. 12). Mr. Owen cited Schlup v. Delo, Delo, 513 U.S. 851 (1995) in support of this proposition. (R. 12).

Mr. Owen then discussed the specific instances of ineffectiveness committed by trial counsel. (R.12-15). First Mr. Owen argued that trial counsel was ineffective for "failing to conduct an investigation into Defendant's background which would have revealed that [Mr. Owen] has a gender identity disorder, paraphiliac disorder, suffers from dysthymia, and schizophrenic." (R. 12).

Mr. Owen next argued that trial counsel was ineffective for failing to contact and interview individuals from Gas City, Indiana. (R. 12). These witnesses would have testified about

Mr. Owen's horrific childhood in which he witnessed and suffered from numerous acts of sexual and physical brutality, suffered from gender confusion and the effects of an alcoholic home and the suicide of Mr. Owen's father. (R. 12).

Next, Mr. Owen argued that trial counsel was ineffective for failing to contact and interview witnesses from the Veteran's of Foreign Wars National Home, located in Eaton Rapids, Michigan. (R. 13). The VFW home was the orphanage that Mr. Owen went to live in following the suicide of Mr. Owen's father. (R.13).

At the VFW Home Mr. Owen again experienced sexual and physical abuse, this time by the adult caretakers and the children who also lived at the VFW Home.(R. 13). Mr. Owen's motion clearly stated that "[r]ecords from the home's psychologist reveal[ed] the first documentation of [Mr. Owen's] gender identity disorder and medical records show[ed] physical violence upon [Mr. Owen] by his house father."(R. 13).

Mr. Owen detailed the evidence of mental mitigation that followed his departure from the VFW Home. (R. 13). The beginning of Mr. Owen's adult life was filled with documented evidence of legal difficulties and a lack of meaningful intervention to help Mr. Owen develop. Mr. Owen detailed his arrest history and involvement with the criminal justice system. (R. 13-15). Mr. Owen also discussed his involvement with the

CATS(Correctional Assessment and Treatment)program while incarcerated in Michigan. (R. 14-15).

Mr. Owen concluded that trial counsel's failure to investigate Mr. Owen's mental illness and obtain the readily available mitigation meant that trial counsel "proceeded to trial 'with eyes closed' and 'entirely failed to subject the prosecution's case to meaningful testing', which caused the trial itself to become presumptively unreliable." (R. 15; citing U.S. v. Cronig, 466 U.S. 648, 659 (1984)). Mr. Owen also stated that "trial counsel's failure to investigate was deficient performance and so serious that counsel was not functioning "as the counsel guaranteed the Defendant by the Sixth Amendment." (R. 15-16; citing Strickland v. Washington 466 U.S. 668 (1984)).

Mr. Owen concludes this subclaim that a "new trial is warranted" because "but for trial counsel's ineffectiveness, [Mr. Owen] would have been able to pursue as a defense at trial, not guilty by reason of insanity." (R.17 footnote omitted).

In Claim Three, Subclaim B, titled "Brady Violations", Mr. Owen alleged that the State, "by and through their agents, withheld favorable evidence which is of such a nature and weight surrounding [Mr. Owen's] mental illness that confidence in the outcome of the trial is undermined to the extent that there is

a reasonable probability that had the had the sterno (sic) notes been disclosed pre-trial, the result of the proceedings would have been different.(R. 18); (citing Brady v. Maryland, 373 U.S. 83 (1963); Young v. State 739 So. 2d 553 (Fla. 1999)).

The "sterno notes" in question, referred to the steno notes of Linda Burkholder. (R. 18). Ms. Burkholder was assigned to Mr. Owen's case when Mr. Owen participated in the CATS program while incarcerated in Michigan. (R. 18). Ms. Burkholder kept notes of Mr. Owen's therapy sessions during which Mr. Owen discussed "various criminal cases he was involved in and the nature of his mental illness and belief system." (R.18). According to Mr. Owen, Ms. Burkholder kept notes in a steno pad.

Mr. Owen stated in his motion that he was only provided with the raw data sheets of admission from the CATS program and not the steno notes.(R. 18). According to Mr. Owen, in 1984, after Mr. Owen's arrest, Mr. Owen spoke to Sgt. McCoy of the Boca Raton Police Department about the mental health sessions with Ms. Burkholder, who later informed Mr. Owen that the F.B.I. did obtain Mr. Owen's records from the CATS program. (R. 18). Mr. Owen stated that in 1999, "Hillary Sheehan contacted Linda Burkholder and discovered that the notes existed and that the F.B.I. obtained her entire file in 1984. Therefore it can be established that the State of Florida withheld" the steno notes.

(R. 18).

Mr. Owen then stated that the steno notes "would have shown that as early as 1981, [Mr. Owen] suffered from delusional behavior" in that he believed that he could obtain the fluids necessary to become a woman through sexual intercourse. (R. 18). Mr. Owen argued further that the notes would have assisted trial counsel in preparation of a defense and was material towards a capital sentencing procedure. These notes also would have aided Dr. Peterson, a clinical psychologist who examined Mr. Owen and diagnosed Mr. Owen as schizophrenic, because the notes "would have been material towards an adequate assessment of Defendant's mental illness and sufficient to assist trial counsel in preparing a defense." (R. 19).

Mr. Owen concluded this subclaim by stating that "the withheld steno notes by the prosecution prejudiced [Mr. Owen's] right to a fair trial." (R. 20).

From the lower court's denial this appeal follows.

STATE PETITION FOR A WRIT OF HABEAS CORPUS

In September of 2002, Mr. Owen through CCRC Middle, filed a Petition for a Writ of Habeas Corpus. The State responded on December 2001. On January 4, 2002, CCRC-M, Mr. Owen filed a reply to the State's response one day late. This was followed by a motion to accept the reply as timely which this Court

granted on February 4, 2002. The case number for the habeas petition is S01-2146. This Court's case number for this appeal is S01-2476.

The State filed a Motion Not to Set Oral Argument and for Decision on the Pleadings which this Court denied in an order dated May 24, 2002. This Court granted Mr. Owen's pro se Motion for Appointment of Appellate Counsel on the instant appeal on the same date along with the State's Motion to Consolidate Appeals (with the state habeas petition).

SUMMARY OF THE ARGUMENTS

This is an appeal from the denial of Mr. Owen's pro se motion entitled "Defendant's Pro-se Motion for Post-Conviction Relief and/or Extraordinary Writ." Mr. Owen raised three claim's in his pro se motion. Claim three was also divided into two parts.

The lower court erred in denying Claim One of Mr. Owen's pro se motion. In Claim One of his pro se motion, Mr. Owen argued that prior postconviction counsel had a direct conflict of interest which precluded prior postconviction counsel from representing Mr. Owen in his original postconviction proceedings. This brief argues that the lower court erred in denying Mr. Owen a hearing or relief on this claim, because of the unique facts, circumstances and arguments presented.

In Claim Two of his pro se motion Mr. Owen argued that he was denied effective postconviction representation by prior postconviction counsel and due process. Mr. Owen detailed prior post conviction counsel's ineffectiveness, both generally, and based on their erroneous advice that led to the termination of Mr. Owen's original postconviction litigation. This brief argues that the lower court erred in denying Mr. Owen a hearing or relief because of the unique facts of Mr. Owen's case and legal justification presented in Mr. Owen's pro se motion. This brief also argues that prior postconviction counsel's ineffectiveness denied Mr. Owen access to this State's courts and perhaps further review.

Claim Three, Subclaims A and B of Mr. Owen's pro se motion presented some of the constitutional violations that occurred at his original trial on the Worden case and legal arguments as to why he should have been allowed to proceed at the lower court level. Mr. Owen argued in his pro se motion that he should have been allowed to proceed at the lower court level on his pro se motion based on an innocence theory. This brief argues that the lower court erred in denying Mr. Owen a hearing on these subclaims because he raised a valid ineffectiveness of trial counsel and a valid Brady claim. Moreover, this brief argues that Mr. Owen also presented a valid legal theory as to why the

lower court should have allowed him to proceed.

In Argument Five, this brief argues that the lower court's order denied Mr. Owen due process because it limits his ability to raise possible error that led to the lower court's denial of a relief. Moreover, Argument Five asks this Court to reverse the lower court's denial of Mr. Owen's motion so that the lower court can submit an order which conforms to this Court's requirements for orders of this nature.

In conclusion, and in conclusion of this summary, Mr. Owen calls upon this Court's inherent power to do justice to provide relief.

ARGUMENT I

THE LOWER COURT SHOULD HAVE GRANTED MR. OWEN AN EVIDENTIARY HEARING ON CLAIM ONE OF MR. OWEN'S PRO SE POSTCONVICTION MOTION BECAUSE MR. OWEN'S PRIOR POSTCONVICTION COUNSEL HAD A CONFLICT OF INTEREST.

The lower court erred in denying a hearing on Claim One of Mr. Owen's pro se postconviction motion because Mr. Owen presented a meritorious claim that can only be resolved after a fact finding inquiry by the lower court. Mr. Owen asks this Court to order the lower court to grant an evidentiary hearing on this claim and to allow Mr. Owen to freely amend his pro se motion through counsel. Because of the unique facts and procedural history of the Slattery and Worden cases, and the arguments raised in Mr. Owen's pro se postconviction motion and this brief, this Court should grant relief.

Contrary to the lower court's order, this claim was not impermissibly "successive," "untimely" and "an abuse of process." (See R. 248). The claim arose from unique procedural and factual occurrences that allowed for the litigation of Mr. Owen's motion. Mr. Owen could not have raised this claim at the time of his original postconviction litigation because this claim was not apparent until after the actual hearing on the original motion.

Certainly, after the denial of Mr. Owen's original

postconviction motion, and this Court's affirmance on appeal, (See Owen v. State, 773 So. 2d 510 (Fla. 2000)), the filing of the instant motion was not an abuse of process. Mr. Owen like any citizen had the right to petition the courts of this State for redress. As the old adage states where there is a wrong there is a remedy. Mr. Owen simply availed himself of the only process there was to remedy the wrongs of his case and did so as soon as it was possible and necessary. This Court, as did the lower court, has the inherent power to do justice. Mr. Owen asks this Court for justice.

In essence, Mr. Owen argued in Claim One of his pro se motion that at the time of his original 3.850 he suffered the effects of prior postconviction counsel's conflict of interest which ultimately denied him the right to a full and fair evidentiary hearing on the matters raised in his original 3.850 motion. (R. 3)

During his original postconviction litigation Mr. Owen raised issues of ineffective assistance of counsel, failure to present mental health mitigation and other issues of constitutional importance. (T. 742).

Mr. Owen was in a unique procedural situation at the time of his original postconviction motion; unlike most postconviction litigants, Mr. Owen had a second homicide case

that was awaiting retrial, the Slattery case. (R. 3-4). Whereas most postconviction litigants, having previously been convicted and having disposed of all cases, can safely pursue postconviction relief without the fear of attorney-client privileged information leading to harm, Mr. Owen had no such option. If Mr. Owen proceeded with the hearing privileged information would have been disclosed that may have been used at the Slattery retrial. The revealing of this information could likely have assured both Mr. Owen's conviction and sentence of death in the Slattery case.

Mr. Owen argued that the conflict of interest at his original postconviction motion resulted from the sharing of experts and other privileged information between his Worden postconviction counsel and his Slattery retrial counsel. (R. 3-6) This conflict could have initially been avoided by postconviction counsel keeping the experts and information of the Worden case separate from that of the Slattery retrial. Had prior postconviction counsel done so, Mr. Owen could have litigated the Worden postconviction motion without fearing the implications to the Slattery retrial.

To have kept the Worden case separate from the Slattery case would have been simple; first, there was never a reason for prior postconviction counsel to become involved with the

Slattery retrial. Doing so ensnared the attorney-client privilege from the Slattery retrial with the Worden postconviction litigation. Postconviction counsel were assigned to litigate the Worden postconviction motion and that alone. The attorney-client privileged information of the Slattery case did not in any way aid this purpose.

Second, prior postconviction counsel should never have shared experts with trial counsel on the Slattery retrial. If postconviction counsel hired mental health experts Dr. Faye Sultan and Dr. Barry Crown to examine Mr. Owen prior to Slattery retrial counsel's doing so, prior postconviction counsel should have maintained the expert's confidential status. Prior postconviction counsel should have also instructed the experts to only evaluate Mr. Owen for mitigation and the possibility of an insanity defense on the Worden case and should have barred discussion of the Slattery case in its entirety. Prior postconviction counsel could then have told the experts to discuss the case only with prior postconviction counsel and to not discuss their findings with Slattery retrial counsel.

If counsel on the Slattery retrial hired Dr. Sultan and Dr. Crown first, prior postconviction counsel should have hired different experts limited to the Worden case. Different experts could also have been instructed to limit their inquiries to the

Worden case and to not discuss the Worden case with Slattery retrial counsel.

Alternatively, if the conflict of interest in sharing experts was not apparent to prior postconviction counsel, it should have become obvious at the time of the Worden postconviction hearing. At that time, if not before, prior postconviction counsel should have moved to withdraw or for time to hire new experts. With new counsel, Mr. Owen would have been able to obtain new experts, unrelated to the Slattery case who would not have been entwined with the Slattery case.

For the Worden case, there was no interest in the economy of sharing experts between the Worden case and the Slattery case. (See R. 24-26). Any value to the Worden case was lost, and any money spent on the experts was wasted, because the experts that prior postconviction counsel hired were not called to testify at the Worden postconviction hearing.

The cases cited by Mr. Owen in his pro se motion support his argument therein. Mr. Owen was aware that "a criminal defendant who pursues an ineffectiveness claim against trial counsel waives the attorney-client privilege as to that claim." (R. 5); citing Reed v. State, 640 So. 2d 1094 (Fla. 1994); LeCroy v. State, 641 So. 2d 853 (Fla. 1994). The issue raised by Mr. Owen, however, was not the attorney-client privilege as it

relates to the Worden case. (R. 5). Rather, the issue, as Mr. Owen argued, was whether the invocation and existence of the attorney-client privilege in the Slattery case barred prior postconviction counsel from representing Mr. Owen on the Worden postconviction motion. (R. 5)

This Court found in Owen that Mr. Owen waived the attorney-client privilege in the Worden case by filing a postconviction motion alleging a conflict of interest and the ineffectiveness of Worden trial counsel. Owen, 774 So. 2d at 514. That finding, however, was quite a separate issue from whether the conflict of interest that resulted from prior postconviction counsel's involvement in the Slattery case prohibited that counsel from representing Mr. Owen and whether the lower court should have granted a hearing to determine whether Mr. Owen was entitled to new postconviction proceedings.

The end result of prior postconviction counsel's conflict of interest was that Mr. Owen was denied a real hearing because he could not present any evidence and testimony in support of his claims raised in the original postconviction motion. While an argument can be made that there was no right to effective assistance of counsel during postconviction, there at least was a due process right to a hearing on the original meritorious claims raised in Mr. Owen's original postconviction motion.

Because counsel could not go forward with the hearing, Mr. Owen was denied any sort of relief that was justified as a matter of postconviction. For a death sentenced individual such as Mr. Owen, the development of issues and an ensuing record was the only way that constitutional error that was not manifest in the cold trial record can be exposed and justice can be done. The conflict of interest prevented counsel from going forward on Mr. Owen's postconviction issues and from the lower court granting any relief that may have been appropriate.

It also prevented any sort of meaningful review by this Court of the constitutional violations that may have occurred in Mr. Owen's case that would make his conviction unconscionable and a violation of the laws of this state and this nation. Lastly, if there were non-record constitutional errors that occurred in Mr. Owen's case, prior postconviction counsel may have assured that the federal courts will not correct such error because of the federal procedural bars and the doctrine of exhaustion.

Murray v. Giarratano, did declare that neither the Eighth Amendment nor the due process clause required states to appoint counsel for indigent death row inmates seeking state postconviction relief. 492 U.S. 1 (1989). In Pennsylvania v. Finley, the Court declined to extend, under equal protection,

the right to appointed counsel to indigents in state created postconviction proceedings. 481 U. S. 551,559 (1987). The Court found that this rule in Finley applied to capital cases in Girratano. Girratano, 492 U.S. at 10.

Mr. Owen's argument, however, could have been properly seen as one of access to the courts being denied by the conflict of interest of prior postconviction counsel. In Bounds v. Smith, the issue presented was "whether States must protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge." 430 U.S. 817, 817-818 (1977). In Bounds, inmates held in North Carolina prisons sued because of the inadequacy of prison law libraries alleging in part that "they were denied access to the courts in violation of their fourteenth Amendment rights." Id. at 818. The Court stated that its:

decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial, Gideon v. Wainright, 372 U.S. 335, 83 S.Ct 9 L. Ed.2d 799 (1963); Argensinger v. Hamlin. 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530(1972), and in appeals

of right, Douglas v. California citations omitted.

Id. at 825.

Clearly, under Bounds, Mr. Owen was entitled to some sort of meaningful access to the courts. Florida has provided for this through Florida Rule of Criminal Procedure and the appointment of counsel on capital cases. (See Section 27, Florida Statutes et seq., Florida Rule of Criminal Procedure 3.850 and 3.851). In Mr. Owen's case, prior postconviction counsel's conflict of interest rendered Florida's provisions for meaningful access to the courts a nullity. Here, Mr. Owen effectively had no access to the courts because while Mr. Owen availed himself of the State created postconviction procedures and appointed counsel, prior postconviction counsel could not litigate the constitutional and legal issues raised in Mr. Owen's original postconviction motion because of their conflict and ineffectiveness.

Going forward with the illusions of a hearing and counsel, when because of the conflict no relief could be obtained, surely cannot be considered meaningful access. Mr. Owen could have had issues that would have relieved him from an unconstitutional conviction and resulting death sentence, but because counsel could not go forward, these issues were never heard. Worse yet, because of the illusion of access to the courts, Mr. Owen may

face difficult procedural hurdles to obtaining relief in federal court because of the weight that a federal court may give to the Florida court's decisions. Had this State provided no access to its courts, Mr. Owen would not have been placed in such a precarious position.

The lower court should have held a hearing to determine this claim and allowed Mr. Owen to argue that he was entitled to a new postconviction hearing. At a hearing, the lower court could have determined the facts that surrounded Mr. Owen's claim, heard arguments on the law and applied the same. The interests of justice required the lower court to so.

Accordingly, this Court should reverse the lower court and order that the lower court conduct a hearing on this claim or order the lower court to grant Mr. Owen new postconviction proceedings.

ARGUMENT II

THE LOWER COURT SHOULD HAVE GRANTED MR. OWEN AN EVIDENTIARY HEARING ON CLAIM TWO OF MR. OWEN'S PRO SE POSTCONVICTION MOTION BECAUSE MR. OWEN WAS DENIED EFFECTIVE REPRESENTATION AND DUE PROCESS DURING THE ORIGINAL POSTCONVICTION PROCEEDINGS.

This Court should reverse the lower court's denial of a hearing on Claim Two of Mr. Owen's pro se postconviction motion. Mr. Owen again presented a meritorious claim that could only have been resolved by a factual inquiry by the lower court. Mr. Owen asks this Court to order the lower court to grant a hearing on this claim and to allow Mr. Owen to freely amend his pro se motion through counsel. Because of the unique facts that gave rise to Claim Two, and the arguments made by Mr. Owen in his motion and in this brief, this Court should grant relief.

Contrary to the lower court's order, this claim was not impermissibly "successive," "untimely" and "an abuse of process." See R. 248. Claim Two arose during the hearing on Mr. Owen's prior postconviction motion. Mr. Owen could not have raised this claim at the time of his original postconviction litigation because it was not apparent that prior postconviction counsel was ineffective and had offered Mr. Owen erroneous advice until after this Court denied Mr. Owen's appeal. See Owen, 774 So. 2d at 514.

Mr. Owen argued that prior postconviction counsel was ineffective in their overall representation and specifically for giving Mr. Owen erroneous advice not to proceed with the hearing.(R. 9-11). According to Mr. Owen, this denied him due process. (R.8).

Mr. Owen argued in his pro se postconviction motion that prior postconviction provided ineffective assistance because they were "not prepared to proceed to the evidentiary hearing in December 1997." (R. 10). Moreover, prior postconviction counsel "lacked sufficient time necessary for proper investigations, expert witness preparations and other support services to conduct a full and fair evidentiary hearing." (R. 10-11).

Mr. Owen also asserted that "these attorneys lacked the professional expertise and qualifications to review and evaluate the pretrial and trial process, including the performance of counsel." (R. 10-11). Furthermore, Mr. Owen stated that prior postconviction counsel "lacked experience in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic science." (R. 11).

Mr. Owen specifically detailed the ineffectiveness of prior postconviction counsel's advising Mr. Owen not proceed on his postconviction motion. (R.9). Prior postconviction counsel advised Mr. Owen to not proceed because they were of the opinion "the mandatory time limit to file postconviction motions and the assertion of the attorney client privilege in the Slattery retrial created a Hobson [sic] choice since Defendant was forced to surrender his due process right to a postconviction hearing by invoking his attorney-client privilege to prevent damaging

testimony concerning the Slattery retrial." (R. 9).

Mr. Owen also argued under the logic applied in Martin v. Dugger, 515 So. 2d 185 (Fla. 1987), the waiver of going forward with the hearing was invalid. (R. 10). Accordingly, "to avoid any possible prejudice" to Mr. Owen, any waiver must be attributed to prior post conviction counsel. (R. 9 citing Martin). In Martin, postconviction counsel advised the petitioner to not undergo a competency evaluation because the state procedure was inadequate to protect his right not to be executed if incompetent. Id. This Court found that the waiver should not be attributed to the petitioner. Id. at 186. Likewise any such waiver in Mr. Owen's case should be attributed to prior post conviction counsel.

The erroneousness of prior postconviction counsel's advice became apparent in Mr. Owen's direct appeal from the denial of his original postconviction motion. In Owen, this Court affirmed the lower court's decision and in doing so found that prior postconviction counsel's "theory," that Mr. Owen was not required to proceed was erroneous. 774 So. 2d at 514.

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove deficient performance the defendant must show "that counsel made errors so

serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688. To prove the deficient performance caused prejudice to the defendant, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

The defendant must show both deficient performance and prejudice to prove that a "conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant had the assistance necessary to justify reliance on the outcome of the proceeding." Id. at 691.

A defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability

that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695.

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Id. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at 696.

If the lower court applied these standards to prior postconviction counsel's performance during the pendency of Mr. Owen's original postconviction litigation it would have found that Mr. Owen presented a meritorious claim of ineffectiveness and ordered a hearing. The performance of prior postconviction counsel was deficient in advising Mr. Owen to abandon the original postconviction proceedings as evidenced by this Court's denial of Mr. Owen's claim on appeal. See Owen, 774 So. 2d at 514. No reasonable counsel would have advised Mr. Owen to gamble his entire postconviction litigation on their "theory" without clear precedent supporting the position.

Prior postconviction counsel's deficient performance surely prejudiced Mr. Owen because counsel's advice denied Mr. Owen any

relief whatsoever and he remains convicted and sentenced to death without the resolution of any postconviction claims. Prior postconviction counsel's performance further prejudiced Mr. Owen because due to counsel's failure to proceed with postconviction litigation on the state level, Mr. Owen faces a myriad of procedural obstacles to obtaining justice on the federal level.

Moreover, lacking the experience, preparation and time necessary to fully litigate Mr. Owen's original postconviction motion, prior postconviction counsel were also deficient. Reasonable attorneys would have had the skill or obtained the skill necessary to proceed with Mr. Owen's postconviction litigation. Considering the limitations on successive motions and the need to exhaust state remedies before proceeding to federal court, this was imperative because this was Mr. Owen's one real opportunity to present any legal and constitutional error to the state courts for review. The lower court should have also found that this was a valid allegation requiring a hearing because Mr. Owen remains on death row, convicted and sentenced to death without any sort of meaningful collateral review.

Mr. Owen's pro se postconviction was properly before the lower court. While this Court has found that ineffectiveness of

postconviction counsel was not a valid basis of relief, See King v. State, 808 So. 2d 1237, 1245, (Fla. 2002), and found support for this position in federal precedent, Id. (citations omitted), this principal either does not apply to the instant case or should not be applied under the unique circumstances presented by Mr. Owen's case.

This principal does not or should not apply to Mr. Owen's case because he was not seeking relief merely because prior postconviction counsel was ineffective. Rather, Mr. Owen's pro se motion sought a new hearing because prior postconviction counsel in effect failed to go forward during Mr. Owen's one opportunity to collaterally challenge his conviction and death sentence in state court.

In an appellate context, and quoted in Mr. Owen's pro se motion, this Court has stated that "the basic requirement of due process in our adversarial system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). (quoted at R. 8).

Mr. Owen also argued that "Section 27.001, et seq," of Florida Statutes mandates that courts shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel." (Section 27.711, Florida Statutes cited in record at R. 9) As Mr. Owen stated, under this statute the lower court was "obligated to receive and evaluate [Mr. Owen's] claims herein." (R. 9). This Court has interpreted this statute to mean that a capital defendant must receive effective representation See Peede v. State, 748 So. 253 (1999) cited at (R. 9).

One instance where this Court has found the performance of postconviction counsel violated a litigant's rights was in the context of an appeal from the denial of postconviction relief. Williams v. State, 777 So. 2d 947, 948 (Fla. 2000). In Williams, the petitioner filed a 3.850 motion which the circuit court denied after evidentiary hearing. Id. at 949. The petitioner claimed that he had requested that postconviction counsel file a notice of appeal. Id. The petitioner sought a belated appeal in the district court. Id. After petitioner's motion for belated appeal was denied the petitioner sought review of the district court's decision in this Court. Id. A

second petitioner sought this Court's review under similar facts. Id.

In Williams, the petitioner's appeal came to be heard by this Court through a certified question: "Does the holding in Lambrix v. State, 698 So. 2d 247 (Fla. 1996), when considered in light of the Supreme Court of Florida's pronouncement in Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999), foreclose the provision of a belated appeal from the denial of a postconviction motion when the notice of appeal was not timely filed due to the ineffectiveness of counsel in the collateral proceeding?" Id. at 948. (footnote omitted). This Court answered the district courts' certified question in the negative and held that the issue was governed by Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999).

In Steele, this Court held that "due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner." Williams, 777 So. 2d at 947; citing Steele 747 So. 2d at 934.

In Steele, this Court restated its position that:

'[[P]ostconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States.' For

example, although a prisoner has no Sixth Amendment right to postconviction counsel, in *Weeks and Graham v. State*, 372 So. 2d 1363 (Fla. 1979), [this Court] held that due process required the appointment of postconviction counsel when a prisoner filed a substantially meritorious postconviction motion and a hearing on the motion was potentially so complex that the assistance of counsel was needed.'

Steele, 747 So. 2d at 934; citing State v. Weeks, 166 So. 2d 892, 896 (Fla. 1964); Graham, 372 So. 2d 1363 (Fla. 1979). Claim Two of Mr. Owen's pro se motion was most similar to the cases where this Court has found that counsel's ineffectiveness in failing to act entitled a petitioner or appellant to proceed with a postconviction motion or an appeal from the denial of postconviction relief. See Steele 747 So. 2d at 934.

It can be taken from Mr. Owen's pro se motion that he requested or knew that he had postconviction counsel at the time of his original postconviction litigation. The fact that these attorneys were assigned to him through a state agency was of no bearing. Prior postconviction counsel raised the claims found through their investigation with the input of Mr. Owen and presented these claims in a postconviction motion. The fact that a motion was filed did not distinguish Mr. Owen's case from cases in which counsel failed to timely file a motion or an appeal.

When an attorney fails to file a notice of appeal or a motion the client is injured, because, absent the intervention of the court, the client cannot go forward. The harm is that the client cannot go forward and is denied all relief. Here, Mr. Owen suffered the same injury; because counsel was ineffective and conflicted, Mr. Owen could not go forward and was denied all relief.

While there was the illusion of a hearing, Mr. Owen was placed in the same position by prior postconviction counsel's ineffectiveness that he would have been placed in had counsel simply failed to file a motion at all and let Mr. Owen's time lapse. This Court has provided a remedy in the form of a belated postconviction motion, See Steele 747 So. 2d at 934. Absent relief by this Court, Mr. Owen remains in an even worse position than had counsel simply neglected to file the motion at all; he cannot file a belated motion and he may be barred from relief in federal court. Even though, applying Martin, the right to a hearing was Mr. Owen's and Mr. Owen's alone. 515 So. 2d at 186.

The lower court should have held a hearing to determine whether Mr. Owen's prior postconviction counsel's ineffectiveness entitled Mr. Owen to a new postconviction hearing. Absent a hearing there simply was no way for the lower

court to determine whether Mr. Owen presented a valid argument that allowed for a second postconviction motion.

The unique circumstances in Mr. Owen's case in that he faced a pending retrial on a separate capital case coupled with prior postconviction counsel's ineffectiveness gave rise to Mr. Owen's pro se motion. Under the circumstances, the lower court improperly denied Mr. Owen's motion in that his pro se motion was not "an abuse of process" or impermissibly "untimely" or "successive." Indeed Mr. Owen availed himself of the only process that could remedy the injustice of his case. Accordingly, this Court should reverse and order an evidentiary hearing.

ARGUMENT III

THE LOWER COURT SHOULD HAVE GRANTED MR. OWEN A HEARING ON CLAIM THREE SUB CLAIM A OF MR. OWEN'S MOTION BECAUSE MR. OWEN PRESENTED A VALID BASIS FOR RELIEF IN THAT MR. OWEN WAS INNOCENT DUE TO TRIAL COUNSEL'S INEFFECTIVENESS.

The lower court erred in denying a hearing on Claim Three Sub claim A of Mr. Owen's pro se postconviction motion. In Subclaim A Mr. Owen presented a meritorious claim that could only have been resolved by a factual inquiry by the lower court. Mr. Owen asks this Court to order the lower court to grant a hearing on this claim and to allow Mr. Owen to freely amend his

pro se motion through counsel. Because of the unique facts that gave rise to this claim and the arguments made throughout this brief, this Court should grant relief.

Mr. Owen clearly distinguished this subclaim from a mere successive postconviction motion, both on the law, and on the facts presented, and argued how the Courts reasoning in Schlup v. Delo, 513 U.S. 851 (1995) applied to issues of Mr. Owen's case. Under a Schlup theory, Mr. Owen could validly present a claim of innocence. Accordingly, contrary to the lower court's order this claim was not impermissibly "successive," "untimely" and "an abuse of process." (See R. 248).

Mr. Owen cited Schlup v. Delo, 513 U.S. 851, 115 S.Ct. 851 (1995), in which the United States Supreme Court considered what standard federal courts should apply on second federal habeas petitions to protect against "the kind of miscarriage of justice that would result from the execution of a person who is actually innocent." Id. at 301.

In Schlup, the petitioner filed a second federal habeas petition that constitutional error deprived the jury of critical evidence that would have established the petitioner's innocence. Id. The Court distinguished the petitioner's claim of actual innocence from the claim of actual innocence asserted in Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853. Id. at 313-14 "In

Herrera, the petitioner advanced his claim of innocence to support a novel substantive constitutional claim, namely that the execution of an innocent person would violate the Eighth Amendment." Id. at 314 citing Herrera, 506 U.S. 390.

The Court found that the petitioner's claim in Schlup "on the other hand [was] procedural rather than substantive." Id. at 314. The Court found that the petitioner's claim differed from the claim in Herrera in two ways. Id. at 315. First, the petitioner's claim "did not by itself provide a valid basis for relief and instead it depended on the validity of the petitioner's Strickland and Brady claims." Id. (footnote omitted). Second, the petitioner in Schlup accompanied "his claim of innocence with an assertion of constitutional error at trial." Id. The Court held that the lower federal court applied the wrong standard in determining whether the petitioner should have received a second hearing on his claim. Id. at 332.

Schlup, clearly showed the United State's Supreme Court's refusal to allow the possibility off an actually innocent person being executed when there were constitutional errors at the trial that led to the individual's death sentence. Likewise, Mr. Owen presented claims of innocence and constitutional error that led to Mr. Owen's death sentence.

Mr. Owen presented claims in Claim Three, and throughout his

pro se postconviction motion, of grave constitutional errors that occurred at his trial. (R. 11). These errors were most specifically pled in both Subclaim A and B of Claim Three. (R. 11-17 and R.18-20). The errors that occurred at the Worden trial were that trial counsel was ineffective and the prosecution withheld evidence in violation of Brady. (R. 11-17 and R.18-20).

Mr. Owen discussed the specific instances of ineffectiveness committed by trial counsel. First Mr. Owen argued that trial counsel was ineffective for "failing to conduct an investigation into Defendant's background which would have revealed that [Mr. Owen] has a gender identity disorder, paraphiliac disorder, suffers from dysthymia, and schizophrenic." (R. 12).

Mr. Owen next argued that trial counsel was ineffective for failing to contact and interview individuals from Gas City, Indiana. (R.12). These witnesses would have testified about Mr. Owen's horrific childhood in which he witnessed and suffered from numerous acts of sexual and physical brutality, suffered from gender confusion and the effects of an alcoholic home and the suicide of Mr. Owen's father. (R. 12).

Next, Mr. Owen argued that trial counsel was ineffective for failing to contact and interview witnesses from the Veteran's of

Foreign Wars National Home, located in Eaton Rapids, Michigan. (R. 13). The VFW home was the orphanage that Mr. Owen went to live in following the suicide of Mr. Owen's father. (R. 13).

At the VFW Home Mr. Owen again experienced sexual and physical abuse, this time by the adult caretakers and the children who also lived at the VFW Home.(R. 13). Mr. Owen's motion clearly stated that "[r]ecords from the home's psychologist reveal[ed] the first documentation of [Mr. Owen's] gender identity disorder and medical records show[ed] physical violence upon [Mr. Owen] by his house father."(R.13).

Mr. Owen detailed the evidence of mental mitigation that followed his departure from the VFW Home. (R. 13). The beginning of Mr. Owen's adult life was filled with documented evidence of legal difficulties and a lack of meaningful intervention to help Mr. Owen develop. (R. 13). Mr. Owen detailed his arrest history and involvement with the criminal justice system. (R. 13-15). Mr. Owen also discussed his involvement with the CATS(Correctional Assessment and Treatment)program while incarcerated in Michigan. (R. 14-15).

Mr. Owen concluded that trial counsel's failure to investigate Mr. Owen's mental illness and obtain the readily available mitigation meant that trial counsel "proceeded to trial 'with eyes closed' and 'entirely failed to subject the

prosecution's case to meaningful testing', which caused the trial itself to become presumptively unreliable." (R. 15); citing U.S. v. Cronin, 466 U.S. 648, 659 (1984). Mr. Owen also stated that "trial counsel's failure to investigate was deficient performance and so serious that counsel was not functioning "as the counsel guaranteed the Defendant by the Sixth Amendment." (R. 15-16) citing Strickland.

Mr. Owen ended this subclaim by stating that a "new trial is warranted" because "but for trial counsel's ineffectiveness, [Mr. Owen] would have been able to pursue as a defense at trial, not guilty by reason of insanity." (R.17 footnote omitted). This Court has stated that insanity was a complete defense "if at the time of the crime the defendant was incapable of distinguishing between right and wrong as the result of a mental disease or defect." Reaves v. State, 2002 WL 1338424*4 (Fla. 2002). (Footnotes omitted).

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove deficient performance the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. The proper measure of attorney performance remains simply reasonableness under

prevailing professional norms." Id. at 688. To prove the deficient performance caused prejudice to the defendant, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

The defendant must show both deficient performance and prejudice to prove that a "conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant had the assistance necessary to justify reliance on the outcome of the proceeding." Id. at 691.

A defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating

and mitigating circumstances did not warrant death." Id. at 695.

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Id. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at 696.

This Court should first find that Mr. Owen presented a facially valid claim in Claim Three that Mr. Owen's trial counsel was ineffective during the Worden trial. Mr. Owen alleged that counsel's performance was deficient in failing to develop and present the available mitigation and insanity evidence that trial counsel could have easily obtained.(R. 12-13). This fell well below the standards of reasonable counsel. Mr. Owen also alleged that trial counsel's deficient performance resulted in prejudice to Mr. Owen; Had counsel presented or developed the mental health evidence available in the Worden case Mr. Owen could have successfully pursued an insanity defense and been found not guilty by reason of insanity or presented more effective mitigation that would have led to the jury recommending a life sentence and the trial court so imposing the same.

Mr. Owen presented the underlying claims of Claim Three

Subclaims A and B under reasoning similar to the Court in Schlup. See Schlup, 513 U.S. at 314 Here, applying Schlup, Mr. Owen presented evidence of innocence so strong that the lower court could not and this Court should not have confidence in the outcome of the trial unless "also satisfied that the trial was free of nonharmless constitutional error." Id. at 316.

Had the lower court allowed a hearing on this claim or a hearing on whether Mr. Owen should be allowed to proceed, Mr. Owen could have offered evidence that showed that he was actually innocent of the Worden homicide because he was insane at the time of the offense. Moreover, to the extent that the aggravating circumstances are properly considered elements of the offense under Ring v. Arizona, 2002 WL 1357257, ___ U.S.__(2002), mental health evidence would have gone to refute the State's position that these aggravator elements, found by the trial judge alone, were proven beyond a reasonable doubt.

The claim that Mr. Owen was innocent and that there were constitutional error that occurred during his trial justified that the lower court should have held an evidentiary hearing to determine whether the facts supported this. It remains, that because of the lower court's denial of Mr. Owen's postconviction motion, Mr. Owen still sits on death row when he may be innocent due to his being not guilty by reason of insanity or because the

mental health mitigation evidence never presented by his ineffective Worden trial counsel would have required a verdict of life.

In Wyzykowski v. Department of Corrections, the petitioner sought federal habeas relief outside the federal one year limitation for seeking such relief. 226 F. 3d 1213, 1215 (U.S. 11th Cir. 2000) In Wyzykowski, the petitioner raised claims of actual innocence and ineffective assistance of counsel. Id. at 1214. Important to Mr. Owen's case, the petitioner argued that he was actually innocent of second degree murder because the victim actually started the fight with the petitioner, and first degree murder, because he was too intoxicated to form the requisite intent and again because the victim started the fight with him. Id. The new evidence for these claims was the petitioner's own statements regarding the events that led to the victim's death. Id. Much like insanity, the petitioner's claim of actual innocence arose from a claims of an affirmative defenses, voluntary intoxication and self defense. See Id.

The federal magistrate issued a report that "noted in passing that petitioner had failed to exhaust his claims in state court but recommending that the petitions be dismissed for failure to conform with the one year time limitation" for seeking federal review. Id. at 1215. The federal district court

"dismissed the petition as time barred." Id.

Following the district court's denial, the petitioner appealed. Id. The issue presented for appellate review was "whether the Antiterrorism and Effective Death Penalty Act of 1996 . . . , as applied to Petitioner [was] an unconstitutional suspension of the Writ of Habeas Corpus in violation of the United States Constitution Article I, Section 9, clause 2." Id. At 1214. The appellate court declined to decide this issue before the lower court decided whether the petitioner could make a showing of actual innocence. Id. 1218. The court reasoned that the complete absence of a record concerning whether the petitioner could make a showing of actual innocence and because "such factual determinations are best made by the district court." Id. at 1219.

Importantly, the court in Wyzykowski noted the petitioner did not file a direct appeal or collateral challenge in state court. Id. at 1219 fn 8. As the court noted: "For the first time at oral argument before [the court] the State suggested that there may be an exception to the two- year statute of limitations in Fla. Crim.P. 3.850." Id.

Whereas the federal system allows for the determination of a successive habeas petition when a petitioner presents a claim of innocence and constitutional error at trial, so should this

Court, and so should have the lower court. Mr. Owen validly pled both his innocence and that there were constitutional error at the trial level in his pro se motion for postconviction relief. As the State suggested in Wyzykowski, this may be (and should be) an exception to the time requirements in Fla. Crim.P. 3.850. Id.

Where the writ of habeas corpus exists in federal court to remedy the unconstitutional detention of a federal prisoner, so exists this State's postconviction procedures. Mr. Owen presented these issues in his pro se motion as soon as possible because he was proceeding under the theory that he had unconflicted postconviction counsel who were effectively proceeding on his post conviction litigation. As seen throughout this brief, this was not the case.

This Court should ensure that Mr. Owen has access to all the courts, state and federal, but should not hesitate to allow redress of Mr. Owen's very valid claims now. Accordingly this Court should reverse the lower court's denial of Mr. Owen's pro se motion for postconviction relief.

ARGUMENT IV

**THE LOWER COURT SHOULD HAVE GRANTED MR. OWEN
A AN EVIDENTIARY HEARING ON CLAIM THREE SUB
CLAIM B OF MR. OWEN'S PRO SE POSTCONVICTION
MOTION.**

The lower court erred in denying Subclaim B of Mr. Owen's pro se postconviction motion. Mr. Owen again presented a meritorious claim that could only have been resolved by a factual inquiry by the lower court. Mr. Owen asks this Court to order the lower court to grant a hearing on this claim and to allow Mr. Owen to freely amend his pro se motion through counsel. Because of the unique facts that gave rise to claim three Subclaim B, and the arguments made by Mr. Owen throughout his motion and throughout this brief, this Court should grant relief.

Subclaim B was an attempt to raise some of the issues that would be litigated in a postconviction motion that Mr. Owen sought through his arguments in Claim One and Claim Two. Mr. Owen also justified a hearing on this subclaim based on the argument of innocence put forth in Claim Three Subclaim B of Mr. Owen's pro se postconviction motion.

Contrary to the lower court's order, this claim was not impermissibly "successive," "untimely" and "an abuse of process." (See R. 248). Subclaim B was not successive, untimely or an abuse of process when considered with Mr. Owen's arguments throughout his pro se postconviction motion. The justification for allowing a hearing on this subclaim was first that Mr. Owen

was denied a full and fair hearing at the original postconviction hearing because prior postconviction created a conflict by sharing experts with counsel for the Slattery retrial. This was discussed in this brief under Argument One.

Secondly, had prior postconviction counsel been effective, prior postconviction counsel would have discovered that the steno notes at issue were available and were not disclosed. Mr. Owen filed his pro se postconviction motion alleging this Brady violation within one year of this Courts denial of Mr. Owen's appeal. Any failure to discover the suppression of the steno notes falls squarely on the shoulders of prior postconviction conviction counsel.

Lastly, this Brady violation, the failure to disclose the notes when the notes were in the possession of the State, clearly falls within Mr. Owen's claim of innocence that he argued in Claim Three, Subclaim A and that was argued supra in Argument Three. Because the State withheld Brady material on the Worden case, Mr. Owen validly presented this issue as a claim of innocence because he pled both a claim of innocence coupled with constitutional error under a Schlup theory. Schlup, 774 So. 2d at 514.

Apart from the procedural questions surrounding Subclaim B, Mr. Owen presented a valid Brady question. As detailed in Mr.

Owen's pro se postconviction motion, the Brady material at issue were the steno notes of Linda Burkholder.(R.18). According to Mr. Owen, Linda Burkholder was the therapist that was assigned to Mr. Owen's case when Mr. Owen was Court ordered into the CATS program as part of a sentence Mr. Owen received in Michigan. (R. 18). Ms. Burkholder kept notes of her sessions with Mr. Owen in a steno pad.(R. 18).

In 1984, Mr. Owen was arrested by the Boca Raton Police Department and spoke with Sgt. Kevin McCoy of that department about the sessions with Ms. Burkholder. According to Mr. Owen, McCoy summoned F.B.I. agent Jim Cavanaugh and made arrangements to obtain Mr. Owen's records from CATS and Ms. Burkholder.(R.18). Sgt. McCoy informed Mr. Owen that the F.B.I. did obtain Mr. Owen's records.(R. 18).

During the discovery process in the Worden case, the State only provided Mr. Owen with the raw data sheets of admission from the CATS program and not the steno notes. In 1999,¹ Hillary Sheenan contacted Linda Burkholder and discovered that the F.B.I. obtained her entire file in 1984. (R. 18).

Mr. Owen pled a valid Brady claim. The prosecution has a duty under Brady v. Maryland, to disclose favorable evidence to

¹ Obviously during the investigation of the Slattery retrial since the postconviction litigation on the Worden case was complete.

the accused whether requested by the accused or not. 373 U.S. 83, 87 (1963). As the Court stated: "We hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Id. The Court later held "that the duty to disclose such evidence is applicable even though there has been no request by the accused." Sprinkler v. Greene, 527 U.S. 263, 280 (1999); citing United States v. Agars, 427 U.S. 97, 107 (1976). "[T]he duty encompasses impeachment evidence as well as exculpatory evidence." Id. citing United States v. Bailey, 473 U.S. 667, 676 (1985).

"There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching, that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. Id. at 281-82.

The Court detailed four aspects of materiality or prejudice for a Brady claim under U.S. v. Bailey, 473 U.S. 667, (1985), in Kales v. Whitefly, 514 U.S. 419, 434 (1995). One, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted

ultimately in the defendant's acquittal (whether based on the presence of a reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant. Id. citing Bailey, at 682. "Bailey's touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial worthy of confidence." Id.

The second aspect of Bailey materiality is that it is not a sufficiency of the evidence test. Id. The third is that once a reviewing court applying Bailey has found a constitutional error there is no need for further harmless-error review. Id. Fourth, the State's disclosure obligation turns on the cumulative effect of all of all suppressed evidence favorable to the defense, not on the evidence considered item by item. Id.

For a Brady claim, "the rule encompasses evidence 'known only to police investigators and not to the prosecutor.'" Sprinkler, 527 U.S. 280-81. As quoted in Smith v. Florida:

The police are also part of the prosecution, and the taint of the trial is no less if they, rather than the State's Attorney, were guilty of the non-disclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing

him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. 'The cruelest lies are often told in silence.' If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging.

The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he was too is the victim of police suppression of the material information, the state's failure is not on that account excused. We cannot condone the attempt to connect the defendant with the crime by questionable inferences which might be refuted by undisclosed and unproduced documents then in the hands of the police. To borrow a phrase from Chief Judge Bings, this procedure passes 'beyond the line of tolerable imperfection and falls into the field of fundamental unfairness.' (Citation omitted).

Smith v. Florida, 410 F.2d 1349, 1351 (U.S. Ct. of App. 5th Cir. 1969).

Mr. Owen's allegation that the failure of law enforcement to disclose the steno notes of Linda Burkholder, or at least the existence of the steno notes, warranted a hearing to determine whether the State denied Mr. Owen his rights under Brady. The lower court simply needed the fact finding of a hearing to determine whether Mr. Owen's due process rights were violated under Brady.

As pled in his pro se postconviction motion, Mr. Owen's Brady claim presented all of the elements necessary for a

violation of Brady. The evidence was favorable to Mr. Owen. Sprinkler, 527 U.S. at 281-82. As Mr. Owen states; "The steno (sic) notes taken by Linda Burkholder would have shown that as early as 1981 Defendant suffered from delusional behavior in the manner in which he believed that by having sexual intercourse with a woman that he could obtain fluids necessary to turn him into a complete woman." (R. 19). This was favorable because it would have "assisted trial counsel in preparation for a defense at trial and would have been material towards a capital sentencing proceeding." (R. 19). Mr. Owen argued further that the steno notes "would have been material towards an adequate assessment of [Mr. Owen's] mental illness" by Mr. Owen's retained psychological expert. R.19

In sum, even if not presented to the jury, the steno notes would have greatly effected Mr. Owen's expert's analysis and explanation of Mr. Owen's conduct. It also would have greatly affected Mr. Owen's Worden trial attorney's strategy and presentment to the jury. With this information trial counsel could have pursued an insanity defense or more effectively presented mitigation to the jury. Moreover, the opinion of the psychological expert would have been corroborated, altered or enhanced so that the expert could have presented a more accurate portrayal of Duane Owen. This probably would have led to a

different sentencing recommendation by the jury and different sentence by the trial court. Accordingly, the notes were exculpatory, in that they could have led to finding of not guilty by reason of insanity, or impeaching in that they contradicted the State's portrayal of Mr. Owen, or both. Sprinkler, 527 U.S. at 281-82.

Mr. Owen properly pled that the evidence was suppressed by the State. (R. 19). To quote Mr. Owen:

"In 1984, Defendant was arrested by the Boca Raton Police Department and spoke to Sgt. Kevin McCoy about the sessions with Ms. Burkholder. Sgt. McCoy summoned F.B.I. agent Jim Cavanaugh and made arrangements to obtain Defendant's records from CATS and Ms. Burkholder. Defendant was informed by Sgt. McCoy that the F.B.I. did obtain his records." (R. 18).

During pre-trial Mr. Owen was only provided with the raw data from the CATS program, not the steno notes. (R. 18) Only in 1999, did Mr. Owen learn that the F.B.I. obtained Linda Burkholder's entire file. "Therefore, it can be established that the State of Florida withheld" the steno notes. (R. 18).

Whether the State Attorney's Office knew of the steno notes was irrelevant to the lower court's determination and the merit of Mr. Owen's Brady claim. "The police are also part of the prosecution, and the taint of the trial is no less if they,

rather than the State's Attorney, were guilty of the non-disclosure." Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969).

In Mr. Owen's case "Sgt. McCoy summoned agent Cavanaugh and made arrangements to obtain [Mr. Owen's] records from CATS and Ms. Burkholder." (R. 18). Sgt. McCoy informed Mr. Owen that the F.B.I. did obtain Mr. Owen's records. (R.18) As part of the prosecution, Sgt. McCoy had a duty to disclose all of the CATS records obtained by Sgt. McCoy's agent, Jim Cavanaugh, to Mr. Owen. Even if Sgt. McCoy never personally had actual possession of the records, Sgt. McCoy still had a duty to disclose the existence of the records to Mr. Owen.

Clearly prejudice under Brady ensued in Mr. Owen's case; had the information in Linda Burkholder's notes been disclosed, there was a reasonable probability that the outcome in Mr. Owen's case would have been different -- Mr. Owen's trial counsel through Mr. Owen's expert could have presented an insanity defense under which Mr. Owen would have been found not guilty or trial counsel and the expert could have presented more corroborated and more persuasive mitigation that would have refuted the State's aggravators and led to a life sentence.

Mr. Owen clearly presented a valid Brady claim under Claim Three, Subclaim B. As Mr. Owen stated: "An evidentiary hearing

must be granted in order that [Mr. Owen] can fully explain and present this issue." Absent an evidentiary hearing the lower court could not make the required findings necessary to decide whether Mr. Owen was entitled to an evidentiary hearing to determine his claim of innocence, and second whether he was entitled to a hearing on this Brady claim.

The Brady claim of Claim Three, Subclaim B along with other similar and unsimilar claims would be litigated if Mr. Owen had, or does receive, an evidentiary hearing. Contrary to the lower court's order, this claim was not impermissibly "successive," "untimely" and "an abuse of process." (See R. 248). Most importantly, this was so because Mr. Owen was denied conflict free postconviction counsel, as discussed in Argument One, Due Process because of the ineffectiveness of postconviction counsel, as discussed in Argument Two, and because Mr. Owen is innocent, as discussed in Argument Three.

Accordingly, this Court should reverse the lower court and grant Mr. Owen an evidentiary hearing on this claim allowing Mr. Owen leave to amend through counsel.

ARGUMENT V

THE LOWER COURT'S WRITTEN ORDER WAS INADEQUATE TO DENY MR. OWEN'S PRO SE POSTCONVICTION MOTION AND DEPRIVED MR. OWEN A FAIR APPEAL BEFORE THIS COURT.

The lower court's order denying Mr. Owen's pro se Motion for Post Conviction Relief was inadequate under this Court's precedent and diminished Mr. Owen's appellate rights. Accordingly, if this Court does not reverse this case for the grounds stated elsewhere in this brief, this Court should remand this case with an order that the lower court enter a proper order in this case.

In the order denying Mr. Owen's pro se motion the lower court states in relevant part:

THIS MATTER is before the Court on the Defendant's Pro Se Motion for Post Conviction Relief. Upon consideration of the Motion, State's response with Attachments, the Court file, and being fully advised in the premises, it is thereupon ORDERED AND ADJUDGED that the Defendant's Pro Se Motion be and the same is hereby denied as being successive, untimely and constitutes an abuse of process. . . . (R. 248).

The lower court did not grant Mr. Owen the opportunity to be heard in the form of a court hearing or by further written submissions before denying Mr. Owens motion.

The lower court's order did not specify what information in the court file it considered or that the lower court had reviewed any of the transcripts from either the original trial of this case or from the postconviction litigation that followed. Moreover, no portions of the record or any matter at

all was attached to the record that established that Mr. Owen was entitled to no relief.(See R. 248). Also, the lower court's order did not specify how the motion was successive, untimely or how it constituted an abuse of process. (See R. 248).

This Court has instructed the lower courts on the requirements of an order denying a postconviction motion. See Asay v. State, 769 So. 2d 974, 989 (Fla. 2000). "To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." Anderson v.State,627 So. 2d 1170, 1171; citing Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990).

The lower court did not attach anything to the lower court's order. It was irrelevant that the lower court's order made reference to "having considered the State's response with attachments".(R. 248). The record will always contain the State's response if the State responds. This, however, was not attaching "those specific parts of the record that refute each claim presented in the motion" as this Court required in Anderson. See Id.(Emphasis added).

The lower court also did not state its "rationale" in the order denying Mr. Owen's pro se motion as required under Anderson. See Id. Rationale refers to the reason why a court

would deny a particular claim, not broad categorical terms under which a lower court can justify a denial. In other words, under a logical reading of Anderson, the lower court was required to state with specificity why each claim in Mr. Owen's motion was successive, untimely or an abuse of process, not simply that the motion was "successive", "untimely" and an "abuse of process".

The lower court's failure to attach any portions of the record hindered Mr. Owen's ability to fully present the issues of his case to this Court. Because the order does not contain attached portions of the record Mr. Owen cannot argue that the lower court's reliance was based on a misreading or misinterpretation of the record or present contradictory parts of the record to this Court.

The lower court's failure to state a rationale similarly prejudiced Mr. Owen. If the lower court's rationale was erroneous, Mr. Owen cannot present argument disputing the lower court's rationale because the lower court did not state a rationale. Referring to the motion as a whole. The lower court found that it was "successive", "untimely" and "an abuse of process." (R. 248). Because the lower court did not state why this was so Mr. Owen cannot ask this Court to review the reasoning behind this finding, thus he was limited to arguing against the result itself.

The lower court's order denied Mr. Owen due process of law because it diminished Mr. Owen's right to appeal. The lower court's order also failed to follow the requirements for summarily denying a motion such as Mr. Owen's if denial had been justified. Accordingly, if this Court does not reverse for the grounds stated elsewhere in this brief, this Court should remand for the lower court to enter an order which follows the law of this State.

CONCLUSION

Mr. Owen respectfully asks this Court for justice. Mr. Owen was faced with the unique situation of facing a retrial on the Slattery case at the same time he was forced to proceed with postconviction litigation on the Worden case. A diligent search has provided no clear answer on just how Mr. Owen should have proceeded. Clearly, there should have been some protection for the use of necessary testimony at the Worden postconviction hearing that would have been detrimental to Mr. Owen receiving a fair trial in the Slattery case.

Faced with this dilemma, prior postconviction counsel failed to act in manner that protected Mr. Owen's rights. First, as detailed in Argument One, counsel allowed a conflict to develop which prevented Mr. Owen from pursuing all postconviction litigation. This was not Mr. Owen's fault, he did not pick his

counsel and he certainly never waived an conflict. Counsel should have separated themselves from the Slattery case to avoid the problems that resulted in the one case that they had the responsibility to represent Mr. Owen, the Worden case.

Having created a conflict, prior postconviction counsel continued to represent Mr. Owen without the skill, time and preparation that this death sentenced man needed. More than in a general sense, prior postconviction counsel ill informed Mr. Owen to end the hearing without further witnesses, evidence and argument. The ultimate effects, such as what will become of Mr. Owen in the federal system, are unknown, but absent this Court's reversal of the lower courts decision, it is clear, Mr. Owen has been denied justice in this State because of the actions of prior postconviction counsel.

As pled in Mr. Owen's pro se motion, the lower court clearly should have allowed for a hearing to determine whether the arguments Mr. Owen presented and the facts that accompany his case warranted a postconviction hearing. This was not an abuse of process for Mr. Owen was undertaking the only process that he could obtain justice in this State's courts.

While this Court may find that Schlup v. Delo, was not necessarily controlling, the exception that the United States Supreme Court found for Mr. Schlup, and the principal that the

Court based the exception on should apply to Mr. Owen. The Court would not let a man who was not guilty and remained in prison on a trial that contained constitutional error remain there without a potential remedy. This Court should find that the possibility that Mr. Owen sits on death row, not guilty by reason of insanity, resulting from the State's suppression of evidence contrary to Brady and ineffective assistance of counsel is equally unacceptable on a State level. This Court can and should provide a remedy in the form of a new evidentiary hearing at which Mr. Owen can present these claims and argue why second postconviction litigation is necessary.

The lower court clearly did not do justice in this case. Mr. Owen calls upon this Court's inherent power to do justice and pleads to this Court to order either an evidentiary hearing as to why he should be able to proceed to a new evidentiary hearing or simply a new evidentiary hearing where Mr. Owen can outright litigate the important instances of trial error.

Accordingly, this Court should reverse the lower court and order either a new evidentiary hearing on whether new postconviction litigation is necessary or simply a new evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Direct Appeal of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 29th 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Direct Appeal of Appellant, was generated in a Courier New 12 point font, pursuant to Fla. R. App. P. 9.210.

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