

IN THE SUPREME COURT OF FLORIDA

CASE NO.01-2476

DUANE EUGENE OWEN,

Appellant,

STATE OF FLORIDA,

Appellee,

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

REPLY BRIEF OF APPELLANT

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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 motion. References to this record include a page number and are of the form, e.g., (PCR. 123). References to the transcript of these proceedings 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 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.

In this reply brief references are made to Appellant's initial appellate brief and are of the form, e.g., (IB 123). References are also made to the Appellee's answer brief and are of the form, e.g., (AB 123).

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 Appellant attempted to refute Argument One with four responses; first, Appellee claimed that Mr. Owen's *pro se* motion was a "second appeal" and that somehow this issue was "identical" to the claim this Court rejected on Mr. Owen's initial appeal from the denial of postconviction relief. (AB 9). Second, Appellee claimed that this "allegation . . . was not properly pled." (AB 10). Third, Appellee claimed that Mr. Owen's conflict of interest claim was untimely because Mr. Owen could have raised this claim at the time of the initial hearing. (AB 11). Fourth, Appellee claimed that Mr. Owen's access to the courts argument was "completely unavailing" because Mr. Owen previously had an evidentiary hearing. (AB 13). Each of Appellee's arguments was without merit and dispensed with below.

This was not a second appeal. Mr. Owen stands by his *pro se* motion and the appeal from its denial. The Appellee's response, however, must be refuted. Mr. Owen did not reraise the issue of whether it was an error for the trial court to fail to hold his evidentiary hearing because of attorney client privilege in Mr. Owen's initial brief. Rather, at issue in Mr. Owen's *pro se* motion was not what the trial court did but how Mr. Owen was placed in that position by prior post conviction counsel's conflict of interest. The issue of prior

postconviction counsel placing Mr. Owen on a collision course with default was not raised at the original 3.850 motion hearing or on the appeal therefrom. This Court never addressed this issue or was informed of the circumstances that led to Mr. Owen being placed in this position.

This was precisely why an evidentiary hearing should have been granted; this Court had no way of knowing the actions of prior postconviction counsel from the cold record this Court reviewed on the original postconviction appeal. At the evidentiary hearing that Mr. Owen sought Mr. Owen could have shown that prior post conviction counsel entwined themselves with Mr. Owen's counsel on the Slattery case in such a manner that a conflict of interest was created and the possibility of a full and fair evidentiary hearing was eviscerated.

While this Court has ruled that Mr. Owen had to go forward in good faith, the question remained as to just what type of evidentiary hearing Mr. Owen would have had if he could not have called any witnesses; or, if prior postconviction counsel did in fact call witnesses and those witnesses asserted the attorney client privilege at the command of Mr. Owen's Slattery retrial counsel. Being required to go forward in good faith and having witnesses to go forward with were two separate matters.

Had prior postconviction counsel not created a conflict of

interest, this Court would never have had to address the issue of whether Mr. Owen was required to go forward because prior postconviction counsel could have called independent witnesses and Mr. Owen's Slattery retrial counsel could not have invoked the attorney client privilege because these witnesses would not have seen Mr. Owen as part of the Slattery case. Moreover, prior counsel would not have been on the verge of an ethical melt down for failing to keep Mr. Owen's Slattery retrial confidences because they would not have been privy to any such confidences.

Avoiding the conflict of interest would not have made all the testimony that Mr. Owen needed to elicit possible because some of the witnesses needed would still have been unable to testify because of their involvement in the Slattery case. With independent experts and the possibility of eliciting favorable testimony on the postconviction motion, however, prior postconviction counsel would have been able to present a compelling case for relief and would have avoided this Court finding that Mr. Owen's claims were barred because he did not go forward. *Owen v State* at 773 So. 2d 510 514-15 (Fla. 2002). Because of the conflict of interest created by prior postconviction counsel there was simply nothing to go forward with at the time of the hearing.

Accordingly, the State's argument that this claim in Mr. Owen's *pro se* motion was somehow a second appeal was without merit and without persuasion. This claim in Mr. Owen's *pro se* motion and this argument on appeal are the first time that this issue has been raised by Mr. Owen and addressed by this Court and it requires relief.

Prior postconviction counsel did have a conflict of interest. In this argument, the Appellee argued that Mr. Owen did not "properly" plead his conflict of interest claim. (AB 10). As part of this argument the Appellee quoted *Herring v State*, 730 So. 2d 1264, 1267 (Fla. 1998):

To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Buenoano Dugger*, 559 So.2d 1116, 1120 (Fla.1990). Our responsibility is first to determine whether an actual conflict existed, and then to determine whether the conflict adversely affected the lawyer's representation. A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. See *Buenoano Singletary*, 74 F.3d 1078, 1086 n. 6 (11th Cir.1996); *Porter Singletary*, 14 F.3d 554,

560 (11th Cir.1994); *Oliver Wainwright*, 782 F.2d 1521, 1524-25 (11th Cir.1986). Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708, such a conflict is "insufficient to impugn a criminal conviction."

Id. (cited in AB at 11; other citations omitted).

Neither this quote nor the entire opinion in *Herring* justified the trial court's denial of a hearing on Mr. Owen's *pro se* conflict of interest claim. Foremost, the appellant in *Herring*, unlike Mr. Owen, received a hearing on a second postconviction motion. See *Id.* (citing *Herring State*, 580 So. 2d 135 (Fla. 1991)). As this Court stated in reversing the lower court's denial of a hearing in *Herring*, "[w]ith regard to *Herring's* public defender's service as a special deputy, we hold that due process principles require[d] an evidentiary hearing." *Herring*, 580 So. 2d at 138.

Just as the appellee in *Herring* was entitled to a hearing, so was Mr. Owen. While the appellee in *Herring* was unable to convince the lower court, or this Court, that an actual conflict existed, Mr. Owen was entitled to put on evidence of prior postconviction counsel's conflict of interest in his case. Due process required nothing less. Moreover, Mr. Owen was denied the opportunity to make a record for appeal because of the trial court denied his *pro se* motion without a hearing on a prior

postconviction counsel's conflict of interest.

It should also be obvious to this Court through Mr. Owen's *pro se* motion that Mr. Owen more than suggested "that his . . . interests were impaired or compromised for the lawyer or another party." *Herring*, 730 So. 2d 1267. Throughout Mr. Owen's *pro se* motion and on this appeal Mr. Owen has detailed and argued that prior postconviction counsel's conflict of interest led to him being denied any semblance of postconviction hearing and any sort of relief. This was not a mere possibility, but the cold hard reality that Mr. Owen was denied any opportunity for meaningful postconviction relief. It is also precisely why this Court should grant Mr. Owen the relief for which he prays.

Mr. Owen's *pro se* motion raising the claim of prior postconviction counsel's conflict was not untimely. By answer brief, the Appellee argued that this claim was untimely, (AB 11), and in doing so, supplied a rationale that was not found in the trial court's boiler plate order denying Mr. Owen relief. (See AB 11, arguing that Mr. Owen should have raised this issue at the hearing).

The Appellee's argument again highlighted the inadequacy of the trial court's order. In its order, the lower court never stated or found that Mr. Owen was procedurally barred from raising this claim because it could have been raised on the

original appeal from the denial of postconviction relief; the lower court's order uses no such language and offers no such rationale. Accordingly, this Court should not construe the trial court's order as finding that Mr. Owen knew of the factual basis at the time of the hearing.

The Appellee's analysis of the timeliness of the claim would demand absurdity; first, the litigation of the conflict of interest claim required an evidentiary hearing to develop the facts that were not apparent in the record on appeal. Appellate counsel on the original appeal from the denial of postconviction relief was limited to the record. The appellate record from the appeal from the trial court's original denial of postconviction relief provided only scant evidence of the conflict, if any evidence at all. Appellate counsel simply could not raise what was not in the record. This was why Mr. Owen needed an evidentiary hearing to develop and litigate this claim.

Second, because of prior counsel's own implication in the conflict, it was absurd that prior postconviction counsel could have, or should have, raised a conflict issue in any form when prior postconviction counsel failed to move to withdraw. This was again detailed and argued in the initial brief on this appeal from the denial of Mr. Owen's *pro se* motion for postconviction relief.

Lastly, as the victim of the conflict of interest, Mr. Owen certainly could not have been expected to raise his own objections about the conflict of interest "at the hearing." Mr. Owen, as argued in Argument Two of this Initial Brief, justifiably, but mistakenly, relied upon the representations of prior postconviction counsel, whom in that section, Mr. Owen argued were ineffective. Under the Appellee's theory, Mr. Owen, a layperson, would have had to foresee the ineffectiveness of prior postconviction counsel's advice to not proceed with the hearing and this Court's future opinion, (See *Owen*, 773 So. 2d 514-15), that brought this error to light. Then, Mr. Owen would have had to raise some sort of contemporaneous objection before the trial court, as the attorneys appointed to represent him stood nearby in the same courtroom, so that this issue could have been preserved for appeal. Holding Mr. Owen to this course of events would be not just impractical but also absurd.

In a final attempt to deny Mr. Owen relief, the Appellee argued that Mr. Owen was not denied access to the courts. (AB 12). Contrary to the Appellee's position Mr. Owen was denied access to this State's courts and may be denied access to the federal courts of this nation. As the Court stated in *Bounds Smith*, "its [d]ecisions have consistently required States to shoulder affirmative obligations to assure all prisoners

meaningful access to the courts. ..."430 U.S. 817, 817-818 (1977).

This Court should find that the State, in the above quote refers to not just the legislature, but also the court system as a whole. Any access that Mr. Owen may have had to this State's courts was rendered a nullity by prior postconviction counsel's conflict. This Court should shoulder its "affirmative obligation" to ensure that Mr. Owen has meaningful access to this State's courts and federal court if necessary, by granting the relief for which Mr. Owen prays. Absent such relief, Mr. Owen would again be denied meaningful access to this State's courts through a finding of a procedural bar.

Mr. Owen did not simply refuse to go forward, but rather, as pled in his *pro se* motion, Mr. Owen relied upon the erroneous advice of his prior postconviction counsel. This counsel was the method that this State provided for Mr. Owen's "meaningful access" to this State's courts. Because of prior post conviction counsel's ineffectiveness and conflict led to essentially no postconviction issues being litigated, the state court was as inaccessible and meaningless to Mr. Owen as if this State provided for no proceedings at all. Indeed, it may have been worse, since Mr. Owen could fall victim to procedural bars in federal court. Accordingly, Mr. Owen is entitled to relief.

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.

Mr. Owen never raised this issue in his appeal from the denial of postconviction relief. The issue raised in Argument Two was distinct from any issue that Mr. Owen may have raised in his original appeal from the denial of postconviction relief. This Court never addressed, in that appeal, the propriety of prior postconviction counsel's advice to not proceed with the hearing because of *Simmons v United States*, 390 U.S. 377, 394 (1968). See *Owen v State*, 773 So. 2d 510 (Fla. 2000). What is at issue in this appeal is whether Mr. Owen was denied effective representation and due process throughout the entire postconviction process.

In his *pro se* motion Mr. Owen alleged, numerous areas and examples of prior postconviction counsel's ineffectiveness in his *pro se* motion. In *Owen*, this Court only found that Mr. Owen was not entitled to relief under *Simmons*, not that Mr. Owen received adequate representation. *Id.* Here, and previously in his *pro se* motion, Mr. Owen was arguing that if *Simmons* did not apply, then prior postconviction counsel should not have told

him that it did and should have proceeded in good faith. In essence, prior post conviction counsel's opinion that *Simmons* did apply was an ineffective gamble that no reasonable attorney would have made.

Mr. Owen alleged in his *pro se* motion numerous other allegations of ineffectiveness on the part of prior postconviction counsel. Along with the erroneous advice concerning *Simmons*, and counsel's conflict, this denied Mr. Owen due process and effective representation. Here, unlike in Mr. Owen's original appeal from the denial of postconviction relief, Mr. Owen was not arguing that he was forced to surrender one constitutional right for another. Rather, Mr. Owen, in his *pro se* motion and in this appeal, was clearly arguing that he was outright denied important rights and that this Court should provide a remedy.

Raising this issue now, via a second postconviction motion, was the only option that Mr. Owen had for remedying the injustice that occurred at his original postconviction hearing, and ultimately at his trial for the crimes for which he sits on death row. Indeed, the issues as raised in Mr. Owen's *pro se* motion and in this appeal are in part, issues of first impression with unique facts and circumstances that warrant relief from this Court.

Once again, Mr. Owen could not seek redress of prior postconviction counsel's ineffectiveness on his original appeal from the denial of postconviction relief because prior post conviction counsel's ineffectiveness was not manifested in the record and would not have been apparent to Mr. Owen the individual until this Court's ruling in *Owen*. The cold record would not have provided this Court with facts necessary to evaluate a claim of ineffectiveness. At the time of the original postconviction appeal Mr. Owen was in the same position that other victims of ineffectiveness are placed - he could not raise a claim of ineffectiveness unless it was apparent on the record. (Cf. *Blanco v Wainright*, 507 So.2d 1377, 1384 "A proper and more effective remedy is already available for ineffective assistance of trial context under rule 3.850"). Accordingly, an evidentiary hearing was required for this Court to fully address these very serious allegations of ineffectiveness.

The merits of this claim are another matter, and one which this Court must still address. While this Court has found that ineffectiveness of postconviction counsel was not a claim in itself, Mr. Owen specifically argued in his initial brief that the facts and circumstances of his case do, or should, distinguish his case from cases such as those cited by the

Appellee. Mr. Owen stands by this argument.

With no case specifically refuting the arguments of Mr. Owen, in the initial brief Mr. Owen reasoned by analogy to cases that have found that postconviction counsel's failure to act warranted relief. See *Steele v Kehoe*, 747 So. 2d 931 (Fla. 1999) and *Williams State*, 777 So. 2d 947 (Fla. 2000). Mr. Owen never acknowledged that "that this Court has clearly and consistently found that this allegation does not form a proper basis for relief." (AB 16). Rather, Mr. Owen cited cases which this Court has denied relief and then argued why these cases did not apply and other cases which are similar to his own predicament did apply. (IB 33-38). What is important here is that Mr. Owen's allegation, as raised in his *pro se* motion and in this appeal does form a proper basis for relief and that this Court should grant relief.

This claim of Mr. Owen, in his *pro se* motion and in this appeal was more than specific and legally sufficient. Mr. Owen could not have been more explicit in his allegations of ineffectiveness in his *pro se* motion. In great detail, Mr. Owen discussed the mistaken advice, conflict and lack of experience of prior postconviction counsel. Mr. Owen's *pro se* brief does not warrant this Court finding that Mr. Owen's *pro se* claim of ineffectiveness was conclusory; only the unmistakable conclusion

- - that the lower court should have granted Mr. Owen a hearing and that he is now entitled to relief.

The actual evidence would have come at the hearing denied by the lower court. There was never any testimony or evidence as to what strategy prior postconviction counsel employed, if any, and the lower court did not cite any portion of the record that conclusively showed that prior counsel's errors were "strategy." The Appellee's categorization of counsel's entire performance and damage to Mr. Owen as strategy would not support this Court's finding of the same or justify this Court's failing to address the important issues raised in this case.

Accordingly, Mr. Owen stands by his initial brief and asks this Court to grant him the relief for which he prays.

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.

Mr. Owen stands by his initial brief on this issue but writes briefly to correct the Appellee's inaccurate portrayal of his arguments. Mr. Owen did not argue that *Schlup Delo* was binding precedent which required this Court to reverse the lower court. He did however argue that *Schlup* is persuasive and that

this Court should apply similar reasoning as *Schlup* and that it was an error for the lower court to deny Mr. Owen a hearing because Mr. Owen has made a showing of actual innocence of both the charges and the death penalty.

The Appellee misinterpreted *Schlup*. The Court stated: "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Schlup v Delo*, 513 U.S. 298, 323 (1995). (Emphasis added.) It is obvious that new relates to the trial, not a prior post conviction hearing. It is also obvious why Mr. Owen did not present these claims at a prior evidentiary hearing -- ineffective and conflicted counsel. Mr. Owen argued this throughout his *pro se* motion and in his initial brief. This Court should find under the unique circumstances presented by Mr. Owen's case that Mr. Owen is entitled to 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.**

Mr. Owen stands on his argument in Argument Four and the justifications for the lower court granting a hearing contained

therein. However, one important inaccuracy in the Appellee's brief must be corrected: Mr. Owen alleged in his *pro se* motion and on this appeal that "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." (IB 57 citing R. 18). Mr. Owen's notice of appeal from the denial of postconviction relief was filed on December 15, 1997 (PC-R. 1867-1869). Accordingly, if Mr. Owen only found out about the "steno" notes in 1999, contrary to the Appellee's view, it would have been impossible for him to have raised the issue during either his initial postconviction hearing on this matter or on its appeal therefrom.

Mr. Owen does reiterate that the lower court made no finding that the "steno notes" were not *Brady* material. Such a finding would have required an evidentiary hearing which the lower court again denied. Mr. Owen properly pled a *Brady* claim in his *pro se* motion and justification for raising the same in his *pro se* motion. The lower court's order denying relief on Mr. Owen's *pro se* motion did not address the merits of Mr. Owen's *Brady* claim and did not attach any portions of the record that showed he was not entitled to any relief on this claim. (R. 248). Accordingly, this Court should not accept the Appellee's *ex post facto* rationale for denying Mr. Owen relief on his *pro se* *Brady*

claim and should grant Mr. Owen relief.

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.**

This reply brief has shown just exactly how deficient the lower court's order was in this case and how it has affected review before this Court. Through Appellee's answer, Appellee has supplemented and created rationales from whole clothe when such rationales were not in the lower court's order. Absent any sort of rationale by the lower court, Mr. Owen must now not only argue the issues he raised in this appeal, he must also argue that the rationales that the Appellee attributes to the lower court are also without merit. The lower court did not state any rationale for the denial of Mr. Owen's *pro se* motion, just broad categories of denial. Because this appeal raises unique issues, some of first impression for this Court, this Court should neither find this acceptable nor attribute any sort of rationale to the lower court. 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 or that provides the necessary rationale for this Court to fully consider the issues raised by Mr. Owen.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of October, 2002.

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CERTIFICATE OF COMPLIANCE

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

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