IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,144

DUANE EUGENE OWEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Owen's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied some claims, "left open" four claims and granted an evidentiary hearing on five claims. The following symbols will be used to designate references to the record in the instant case:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court;

"PC-SR." – supplemental record on 3.850 appeal to this Court;

"T." -- transcript of the hearings held.

REQUEST FOR ORAL ARGUMENT

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 would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Owen, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, entered the judgments of conviction and sentence under consideration (R. 4565).

Mr. Owen was charged by indictment July 11, 1984 with first-degree murder, sexual battery and burglary of a dwelling with intent to commit sexual battery inside (PC-R. 94-95). He pleaded not guilty (R. 23).

Mr. Owen's trial was held in February, 1986. A jury found Mr. Owen guilty on all counts on February 18, 1986 (R. 3976). On March 5, 1986, following a penalty phase, the sentencing jury recommended, by a vote of 10 - 2, that Mr. Owen be sentenced to death (R. 4357). The trial court sentenced Mr. Owen to death on March 13, 1986 (R. 4565). The trial court found four aggravating circumstances: previously convicted of a violent felony; during the course of a felony; heinous, atrocious, or cruel; and cold, calculated, and premeditated (R. 4555).

On direct appeal this Court affirmed the convictions and sentence of death, despite the fact that Mr. Owen's conviction for the murder of Karen Slattery, which had been relied upon by the judge and jury in order to sentence Mr. Owen to death in this case, had been reversed (PC-R. 832-844). Owen v. State, 596 So. 2d 985 (Fla. 1992), cert. denied, 113 S.Ct. 338 (1992).

Mr. Owen filed his Notice of Appeal on March 18, 1986 (PC-R. 588-589). Before the judgment of conviction and sentence were appealed and affirmed by this Court, Owen, 596 So. 2d 985 (Fla.

1992), Mr. Owen prematurely filed his initial Rule 3.850 motion on July 31, 1986, before his direct appeal had been completed (PC-R. 612-627). An amended and verified motion was filed on October 9, 1986 (PC-R. 657-665). This initial Rule 3.850 motion was filed by Attorney Donald Kohl, who represented Mr. Owen at his capital trial, and was based on ineffective assistance of counsel and newly-discovered evidence claims (PC-R. 657-665).

Judge Burk went forward with an evidentiary hearing on the motion (PC-R. 1964-2191). Judge Burk knew that Mr. Kohl had an obvious conflict of interest in raising ineffective assistance of counsel against himself (PC-R. 1975). After receiving advice on how to conduct the evidentiary hearing from clerks at the Florida Supreme Court, Judge Burk attempted to bifurcate the hearing with a different attorney for the ineffective assistance of counsel claims (PC-R. 2170-2171, 2176).

On December 9, 1986, citing a conflict of interest, Donald Kohl was allowed to withdraw as postconviction counsel, and Judge Burk appointed Larry Spalding, the former Capital Collateral Representative, (CCR), to represent Mr. Owen during his motion for postconviction relief (PC-R. 691). Mr. Owen's conviction and sentence of death had not been through the direct appeal process and was not yet final. Therefore, CCR, was by statute, unable to represent Mr. Owen.

Judge Burk attempted to proceed with the appointment of CCR. Having no other recourse, CCR sued Judge Burk to prevent the appointment (PC-R. 706-710; 724). CCR filed a Writ of

Prohibition in this Court against Judge Burk. (PC-R. 706-710; 724). An Alternative Writ of Mandamus was filed on April 1, 1987 by CCR, seeking to remove from the trial court's calendar the evidentiary hearing scheduled on Mr. Owen's Rule 3.850 motion.

This Court issued an Order to Show Cause to Judge Burk, who was defended by the Office of the Attorney General (PC-R. 1141). On April 24, 1987, this Court ruled that CCR could not represent Mr. Owen prematurely before the direct appeal had been resolved (PC-R. 740). This Court granted CCR's Writ of Mandamus and directed Judge Burk to appoint conflict-free counsel to represent Mr. Owen on his Rule 3.850 motion (PC-R. 740). Attorney Anthony Natale was appointed to represent Mr. Owen on his 3.850 motion (PC-R. 735). However, the proceedings were ultimately stayed until the direct appeal was completed 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, before Judge Rodgers, now retired (PC-R. 919-1032). After Judge Rodgers' retirement, the case was assigned to Judge Roger Colton, who was presiding over the re-trial of Mr. Owen's other murder case. Judge Colton began to conduct hearings on Chapter 119 issues in this case (T. 493-542).

On May 29, 1996, Circuit Court Judge Roger B. Colton transferred Mr. Owen's case back to Judge Burk, who was in the juvenile division (PC-R. 1109). Upon learning of the transfer back to Judge Burk, Mr. Owen, through counsel, filed a Motion to

Disqualify Judge and Supporting Memorandum of Law on June 21, 1996 based on Fla. R. Jud. Admin 2.160 and 3.810 (PC-R. 1217-1262). Judge Burk denied both the Motion to Disqualify and the Motion to Reconsider (PC-R. 1263, 1264). He stayed all proceedings in this case until the issue was resolved (PC-R. 1268). Mr. Owen filed a Petition for Extraordinary Relief, a Writ of Prohibition and a Writ of Mandamus in this Court on July 19, 1996. It was denied on December 10, 1996 (PC-R. 1272). A Motion for Reconsideration was denied on February 17, 1997 (PC-R. 1284). Mr. Owen filed a third amendment to his Rule 3.850 motion on September 24, 1997 (PC-R. 1379-1546).

In it's response to Mr. Owen's Third Amended Motion to Vacate Judgment of Conviction and Sentence the state conceded an evidentiary hearing on several claims (PC-R. 1560-1581).

The circuit court conducted a Huff hearing on Mr. Owen's third amended motion on November 5, 1997 (T. 674-751). At that hearing, Mr. Owen filed a supplemental Pro-Se Motion for Postconviction Relief (PC-R. 1595-1622; T. 687-693). Judge Burk refused to accept Mr. Owen's pleading, but he advised Mr. Owen's counsel to "take these matters into consideration, that if those matters need to be raised, they can be raised" (T. 694).

Although no written order was ever received, Judge Burk indicated at the Huff hearing that he would conduct an evidentiary hearing on five issues -- various claims of ineffective assistance of counsel at the guilt and penalty phases, including counsels' failure to properly prepare mental

health experts, and trial counsels' conflicts of interest (T. 742). In addition, the court "left open" four claims that involved incomplete allegations because, after Mr. Owen had filed his Third Amended Motion to Vacate, the assistant state attorney agreed to turn over records to which his predecessor had previously denied Mr. Owen access (T. 708-710). Those records had previously not been disclosed and involved the Slattery case, which is now being tried in the circuit court. The court summarily denied the other claims (T. 742).

On November 13, 1997, Mr. Owen's counsel filed a Motion to Continue the Evidentiary Hearing (PC-R. 1591-1594). This motion was heard on November 25, 1997, two weeks before the evidentiary hearing (T. 752-764). Mr. Owen's counsel informed the court that the state was going to disclose approximately four thousand documents regarding the Slattery case that had previously been withheld (T. 754). Counsel informed Judge Burk that she would not receive the documents until the Friday before the evidentiary hearing (T. 754). In accordance with the case law, Mr. Owen's counsel requested sixty days to review the documents and amend his Rule 3.850 motion (T. 754).

Also, at this hearing, Judge Burk announced his retirement, effective January 31, 1998 (T. 756). Judge Burk indicated that if he granted a continuance, he didn't think he would "be called back as a senior judge" (T. 756). Later that day, Judge Burk entered an order denying the motion to continue (PC-R. 1628).

On December 8, 1997, without an order as to the scope of the hearing, the evidentiary hearing that Judge Burk had set proceeded as scheduled (T. 765-919).

Before commencement of the evidentiary hearing, the court addressed several motions. Carey Haughwout, Mr. Owen's trial attorney on the Slattery case, no. 84-4014, argued a motion to stay the evidentiary hearing (PC-R. 1637-1638; T. 770-774). Ms. Haughwout explained that since the entire law firm represented Mr. Owen on all of his cases, she believed the attorney-client privilege with regard to the pending trial was still in effect and could only be waived by Mr. Owen (T. 771).

Alternatively, Ms. Haughwout requested the court "not to allow any disclosure of privileged information in these proceedings, given his invocation of his rights in the other case" (T. 772).

Ms. Haughwout informed the court that the Slattery case was scheduled for retrial before Judge Colton later in the year (T. 770). Ms. Haughwout also stated that she had sent letters to all of Mr. Owen's trial attorneys invoking his attorney-client privilege (T. 771).

Ms. Haughwout explained:

> Just to make it clear, Mr. Owen was represented originally by one law firm in all of these cases. Although separate lawyers eventually tried some of the cases, it was one law firm that litigated the Motion to Suppress and other pretrial investigations and issues. So, I believe, that his attorney/client privilege with regard to the case that I represent him on 84-4014 is still in effect and cannot be waived at this time.

> The uniqueness of the situation is that, obviously, sometimes in post-conviction proceedings there are implied waivers as a result of litigation, the allegations in the post-conviction motions, and in this case ... there are some claims of ineffective assistance of counsel. My concern is that there will be testimony requested of the lawyers that, I believe, would violate Mr. Owen's attorney/client privilege in his pending case ...
>
> * * *
>
> ... secondly, the problem is, Judge, Mr. Owen in this proceeding is acting untimely (sic), it's imposed by the Rules of Criminal procedure.
>
> So it's not a question of him opting to proceed with the motion and proceed with a hearing while he's also pretrial in another case, he is forced to do that by way of the Rules of Criminal Procedure and the time limits imposed therein.
>
> It's our position that he shouldn't be required to waive privileges in order to comply with those rules that then will irreparably harm him in his pending case where he has every right to invoke those privileges.

(T. 771-773)(emphasis added).

In addition, Ms. Haughwout noted that the state had filed a notice of using the Worden homicide and conviction as Williams rule evidence in the Slattery retrial (T. 806).

Mr. Owen's postconviction counsel agreed with Ms. Haughwout's characterization of the unique situation and the problems that had arisen due to the procedural posture of his cases (T. 774).

The assistant state attorney argued that Ms. Haughwout had no standing to raise the issue before the court (T. 775). The state further argued that Mr. Owen had waived the privilege upon

filing his 3.850 motion alleging ineffective assistance of counsel (T. 775).

While arguing the state's position regarding Ms. Haughwout's motion and the state's motion for continuance, the assistant state attorney argued that he had been prevented from speaking with the former trial attorneys and reviewing their files because Mr. Owen had invoked his right to maintain his attorney-client privilege (T. 779-780). Mr. Chalu informed the court that he was unable to locate all of the trial attorney files (T. 786, 793), and that the former trial attorneys had been reluctant to speak with him because of Mr. Owen's pending case (T. 793). After learning that Ms. Haughwout may have had possession of the former trial attorney files, Mr. Chalu suggested that Ms. Haughwout separate the files and allow him to review only the Worden files (T. 793).

Noting that her motion had turned into a motion to compel by the state, Ms. Haughwout told the court that she wasn't sure whose file she had received, (T. 789), but that none of those files had "been maintained in any discreet fashion" (T. 791). Further, she told the court that separating the Worden files from her other files would take at least a month (T. 800).

The court agreed that Ms. Haughwout had received no notice of the ore tenus motion to compel and therefore he denied it based on the fact that it violated Mr. Owen's due process rights (T. 819-820).

After a short recess, Judge Burk denied Ms. Haughwout's motion to stay, but granted her motion to prohibit disclosure of privileged information as it related to all of the cases except the Worden case, no. 84-4000 (T. 812). Judge Burk denied the state's motion to continue and ordered counsel to proceed on the motion to vacate judgment of conviction and sentence (T. 813).

Postconviction counsel informed the court that she was: "ethically unable to proceed" (T. 814). She further told the court that she could not call the trial attorneys because Mr. Owen was not waiving the privilege in the Slattery case and that she did not know how to prove her case without the trial attorneys' testimony (T. 821).

After Judge Burk informed counsel that he was prepared to deny the 3.850 motion (T. 821), postconviction counsel agreed to proceed and called Barry Krischer to testify (T. 831).

In accordance with Judge Burk's statement at the Huff hearing, counsel for Mr. Owen filed his Fourth Amended Motion to Vacate Judgment of Conviction and Sentence incorporating the facts contained in his supplement into the motion (PC-R. 1646-1845, T. 823-824). The lower court accepted the motion and the parties proceeded at the hearing on Mr. Owen's Fourth Amended Motion (T. 824).

Mr. Owen's counsel called Mr. Krischer to testify (T. 832). Mr. Krischer testified that he was one of the attorneys who represented Mr. Owen at his trial regarding the Karen Slattery homicide (T. 833). He testified that the firm was appointed to

represent Mr. Owen on all of his cases because the firm consisted of "five or six lawyers that were all criminal specialists" (T. 834, 908). He testified that he and Mr. Salnick were responsible for litigating the motion to suppress as to all of Mr. Owen's cases (T. 835).

Because of the pending Slattery retrial, Mr. Krischer refused to answer any questions relating to the motion to suppress (T. 837). Mr. Krischer also refused to answer any questions regarding mental health reports and Mr. Owen's competency because of the pending retrial in the Slattery case (T. 839).

Mr. Krischer could not recall if Mr. Owen had told him anything of substance concerning his involvement in the Worden case (T. 843). He further could not recall if he had any strategic discussions with the attorneys representing Mr. Owen at the Worden trial, although "it would make sense that we did since we went to trial first" (T. 846).

During cross examination, Mr. Krischer stated that Ms. Haughwout had informed him that Mr. Owen was not waiving his attorney-client privilege with regard to the Slattery case (T. 845). Mr. Krischer indicated that he did not want to disclose any information unless an "appellate court told [him] that he had to" (T. 845).

A few questions later, Mr. Krischer refused to answer a question about the defense used in the Slattery case (T. 846). The court then asked the assistant state attorney what his

perception of the defense was in the Slattery trial (T. 848). The assistant state attorney responded that it appeared that "the defense was that he didn't do it, that he did not commit the crime" (T. 848-849). The court then turned to Mr. Krischer and inquired: "Do you take issue with that being what was presented by way of the defense ...?" (T. 849), to which Mr. Krischer told the court he agreed with that characterization (T. 849).

After Mr. Krischer refused to answer a question regarding the possible conflict Mr. Owen alleged he had (T. 855-856), Judge Burk amended his earlier ruling as to the disclosure of privileged information:

> If I perceive of the question, the one that is asked of you, it could be a limited waiver of the attorney/client privilege without a full waiver, I am going to designate that as a limited disclosure.
>
> If I perceive that it is an unlimited disclosure of a waiver of attorney/client privilege, I may or may not order you at that point to address the matter.

(T. 866).

When Mr. Owen's trial counsel objected, Judge Burk refused to allow her to be heard on his new ruling (T. 867). Postconviction counsel also objected and requested that she be allowed to discuss Judge Burk's revised ruling with Mr. Owen to determine if he wanted to proceed (T. 869). Judge Burk responded:

> My ruling at this time is that you have already elected to go forward. You can discuss it with Mr. Owen, certainly, but you have already elected to go forward by proceeding.

(T. 869).

After further cross examination of Mr. Krischer, the state requested that Mr. Krischer be declared an expert and be allowed to speculate as to what he would have done in the Worden trial (T. 902). Over post conviction counsel's objection, the court granted the motion (T. 903). Mr. Krischer went on to testify that he would not have used Dr. Blackman or Dr. Peterson at the guilt phase of Mr. Owen's capital trial (T. 903, 906).

After hearing Judge Burk's amended ruling on the disclosure of privileged information and hearing Mr. Krischer testify, Mr. Owen's post conviction counsel stated:

> In light of the Court's ruling, and in light of Mr. Krischer's testimony today, and in light of the fact that Mr. Owen feels that his rights are being chipped away as the witness -- each witness who is going to come up will probably say the same thing, I don't feel that I could go forward anymore.
>
> I am not abandoning any claims. I am not waiving any claims. I do not feel that it is in Mr. Owen's best interest to go forward.
>
> * * *
>
> I have to preserve Mr. Owen's rights.

(T. 909-910) (emphasis added).

Thereafter, the court denied Mr. Owen's Fourth Amended Motion to Vacate (PC-R. 1862; T. 914).

Timely notice of appeal was filed on December 15, 1997 (PC-R. 1867-1869). This appeal is properly before this Court.

SUMMARY OF ARGUMENT

1. Mr. Owen was denied due process at his evidentiary hearing when he was forced to choose between asserting his right to prevent attorney-client privileged information from being disclosed and pursuing relief through postconviction proceedings.

2. The trial court failed to conduct an adequate Faretta inquiry to determine if Mr. Owen was knowingly, voluntarily and intelligently waiving his right to pursue postconviction relief.

3. Mr. Owen was denied a full and fair hearing on ineffective assistance of counsel and a conflict of interest claim. These claims entitle Mr. Owen to relief.

4. Mr. Owen's jury was not given the limiting jury instruction on the "heinous, atrocious and cruel" aggravating circumstance, contrary to Espinosa v. Florida.

5. Mr. Owen's jury was improperly instructed on the "felony-murder" aggravating circumstance.

6. Mr. Owen's jury was improperly instructed on the "avoiding arrest" aggravating circumstance.

7. Mr. Owen's jury was improperly instructed on the "previous conviction of a violent felony" aggravating circumstance.

8. Mr. Owen's jury was not given the limiting jury instruction on the "cold, calculated and premeditated" aggravating circumstance, contrary to Espinosa v. Florida.

9. During Mr. Owen's penalty phase, improper evidence of prior felonies was introduced.

10. Mr. Owen's right to remain silent and his right to effective assistance of counsel, at the motion to suppress, were violated.

11. The penalty phase jury instruction improperly shifted the burden to Mr. Owen to prove that death was inappropriate.

12. The jury's role in sentencing was diminished at every stage of the proceedings.

13. Mr. Owen's capital trial was infected by inflammatory and improper prosecutorial comments.

14. The rules prohibiting Mr. Owen's lawyers from interviewing jurors is unconstitutional.

15. Mr. Owen did not receive a fair trial when the trial judge failed to grant the defense's motion for a change of venue.

16. Florida's sentencing statute is unconstitutional.

17. Mr. Owen did not receive a fair trial because the jury was allowed to see an unduly prejudicial crime scene video.

18. The cumulative effect of the errors that occurred during Mr. Owen's trial cannot be considered harmless.

ARGUMENT I

MR. OWEN WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS.

Mr. Owen’s evidentiary hearing was not full and fair and violated his right to due process. Because of the procedural posture of Mr. Owen’s two pending capital cases, he was

confronted with a Hobson's choice:[1] He could proceed with his postconviction appeal and fully waive the attorney-client privilege pertaining to the retrial of the Slattery case or he could have his postconviction motion denied and be unable to pursue relief in postconviction, but maintain his attorney-client privilege. In addition, Mr. Owen was improperly denied access to files and records that were relevant to the outcome of his Rule 3.850 proceedings. This Court must remand this case for a full and fair evidentiary hearing.

A. MR. OWEN'S POSTCONVICTION PROCEEDINGS CREATED AN UNCONSTITUTIONAL CONDITION.

In Simmons v. United States, 390 U.S. 377, 394 (1968), the United States Supreme Court held that: "we find it intolerable that one constitutional right should have to be surrendered in order to assert another."

In Simmons, a criminal defendant who testified at his motion to suppress hearing in order to establish his standing to raise a Fourth Amendment challenge was prejudiced by the prosecutor's use of that testimony during the guilt phase of his trial. 390 U.S. at 389-90. The Court held that the use of those statements violated the defendant's Fifth Amendment right against self incrimination. Id. Thus, the Supreme Court recognized the potential tension between constitutional provisions. Id. at 394. The Court also acknowledged that although the defendant was given

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1 A Hobson's choice is defined as: "An apparent freedom of choice with no real alternative." American Heritage Dictionary of English Language 626 (1976).

the opportunity to testify at the suppression hearing he risked sacrificing one important benefit to exercise another, and that result was unacceptable. Id.

Because of the posture of Mr. Owen's two capital cases, an unconstitutional condition arose. Mr. Owen was faced with being denied due process in his postconviction proceedings or waiving his attorney-client privilege in the pending retrial of the Slattery case.

1. Mr. Owen is guaranteed due process in his postconviction proceedings under the Fourteenth Amendment to the United States Constitution.

Due process is required in postconviction proceedings. Holland v. State, 503 So. 2d 1250, 1252-1253 (Fla. 1987); see also Russo v. Akers, No. 91,943, 1998 WL 821778, at *2 (Fla. Nov. 25, 1998)(noting that due process is a concern in postconviction proceedings); Huff v. State, 622 So. 2d 982 (Fla. 1993); Spalding v. Dugger, 526 So. 2d 71 (1988); O'Neal v. McAninch, 1998 WL 887294 (6th Cir., Dec. 9, 1998).

Clearly, Mr. Owen was entitled to due process in his postconviction proceedings. However, he did not receive the due process to which he was entitled when the circuit court judge prevented him from litigating his Rule 3.850 motion because he invoked his attorney-client privilege relating to his pending capital retrial.

2. The trial court attempted to coerce Mr. Owen to waive his attorney-client privilege as to the pending retrial in the Slattery case in abrogation of the Sixth and Fourteenth Amendments to the United States Constitution.

a. Mr. Owen's attorney-client privilege as to the Slattery case extended to the entire law firm.

In 1984, after Mr. Owen had been charged with several felonies, including two capital homicides, Judge Burk appointed the firm of Kohl, Springer, Springer, Mighdoll, Salnick and Krischer to represent Mr. Owen. Although the attorneys in the law firm divided the cases amongst themselves, there was still a great deal of overlap between the two cases. For example, all of the pretrial motions were consolidated.

Clearly, the privilege Mr. Owen maintains in the Slattery retrial extends to the entire law firm. Cf. Fla. Bar R. 4-1.10. Ms. Haughwout attempted to make this point clear as she explained:

> [I]nitially, it was one law firm that represented Mr. Owen in both cases and it is my understanding that it was Barry Krischer, Michael Salnik, Craig Boudreau, Donald Kohl.
> ...
> There was one Motion to Suppress on (sic) the pretrial investigation was all that law firm, obviously did, the privilege extends to the entire law firm.

(T. 787-788).

At the evidentiary hearing, the assistant state attorney conceded that he would expect the attorneys to consult one another in preparing their respective cases for trial:

> Now, the State does not intend to interview defense lawyers in 4014 as to any matters in that case, but simply to find out if they consulted with the lawyers who represented Mr. Owen's (sic) in the 4000 case, which is the case before Your Honor ...
> I think it's important to keep in mind that the 4014 case was tried first,

> therefore, counsel in that case would have had a lot more familiarity, initially, with Mr. Owen's cases, the issues, the law and so forth. I fully believe that those lawyers consulted in part to help prepare the lawyers in 4000 for the subsequent trial in the case which is before Your Honor now.

(T. 778) (emphasis added). However, despite his concession, the assistant state attorney argued that Mr. Owen had waived his attorney-client privilege even as it related to the Slattery case (T. 862-863).

The circuit court was also well aware that the same law firm represented Mr. Owen in both the Slattery and Worden cases and therefore the privilege would extend to all of his attorneys (T. 802-803). There were no efforts made by the firm to screen lawyers working on one case from learning of Mr. Owen's confidences in the other cases. Cf. Fla. Bar R. 4-1.10. The representation of Mr. Owen in both cases was essentially a joint effort by the entire firm. Judge Burk admitted:

> Ms. Haughwout, with regard to the Motion for Protective Order or for the State pending the other case, that if these matters are separated out and I am cognizant that you have addressed that these lawyers were in one firm, I am cognizant of my perception that they, certainly, all were working together on his cases and sharing information with regard to that, I am not coming down hard and if it may that they compartmentalized it, as some firms may do as the State Attorney might do, or the Public Defender might do, but I doubt it and I know that the Motion to Suppress was addressed through a number of cases in one Motion to Suppress, and I don't know how, I don't know, ultimately, how those matters can be pulled out and put in boxes now when they weren't put in boxes then.

(T. 802-803)(emphasis added).

In 1986, attorney Donald Kohl filed a postconviction motion for relief before Mr. Owen's direct appeal was final (PC-R. 612-627). In that motion he raised an ineffective assistance of counsel claim (PC-R. 612-627). Although he was premature in filing that motion, Mr. Owen had no way of knowing that it would take seven years for the parties to exhaust their appeals and be prepared to retry the Slattery case. Even if he had known this, Mr. Owen had to challenge the Worden conviction within the timeframes imposed by Rule 3.851. Mr. Owen should not be prejudiced and barred from challenging the Worden conviction because he also desires to assert his attorney-client privilege in the Slattery case. See, e.g., Simmons, 390 U.S. at 394. (holding due process violation for prosecutor to force defendant to choose between Fifth and Sixth Amendment rights).

Mr. Owen had a legitimate right to demand that the confidences relating to his pending case not be disclosed. See Fla. Stat. § 90.502 (1998). Despite his awareness that the entire firm was involved in Mr. Owen's cases, Judge Burk improperly ordered that Mr. Owen's former attorneys disclose attorney-client privileged information (T. 864-865); id.

In order to prove the allegations in his Rule 3.850 motion and attain the relief to which he was entitled, Mr. Owen must be allowed to delve into information that is currently protected by his assertion of his attorney-client privilege.[2]

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2 This Court has held that a postconviction defendant waives his right to the attorney-client privilege upon filing a motion (continued...)

b. The attorney-client privilege.

Like many courts, this Court has recognized that aspects of the attorney-client privilege can rise to the level of a constitutionally protected right. Myles v. State, 602 So. 2d 1278, 1280 (1992); L.T. Bradt v. Smith, 634 F.2d 796, 800 fn.4 (5th Cir.), cert. denied 454 U.S. 830 (1981)(noting that the attorney-client privilege can assume constitutional significance); Black v. United States, 172 F.R.D. 511, 516 (S.D. Fla. 1997) (holding that there is a need to protect the constitutional guarantees of confidentiality that flow from the attorney-client privilege concept).

In United States v. Noriega the court held:

> The attorney client privilege is not per se a constitutional right; however, the privilege takes on a constitutional aspect when, as here, it serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communication and disclosure by the defendant to his attorney.

752 F. Supp. 1032, 1033 (S.D. Fla. 1997)(emphasis added). Because the attorney-client privilege rises to the level of constitutional protection under the Sixth Amendment right to counsel, the posture of Mr. Owen's capital cases effectively created an unconstitutional condition wherein he was forced to choose between asserting his attorney-client privilege and

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2(...continued)
for postconviction relief alleging ineffective assistance of counsel. Lecroy v. State, 641 So. 2d 853 (1994); Reed v. State, 640 So. 2d 1094 (1994). However, as counsel made clear, Mr. Owen only waived his right as to the Worden case and not to the Slattery case (PC-R. 867-868).

pursuing relief through postconviction. See, e.g, Simmons, 390 U.S. at 394.

Mr. Owen made his intention to invoke the privilege as to the Slattery case abundantly clear (T. 807-808).[3] Postconviction counsel told the court:

> MS. IZAKOWITZ: Your Honor, may I interrupt for a minute?
> Your Honor, Mr. Owen has the privilege. It is up to Mr. Owen to determine whether or not any of that privilege is revealed or not.
>
> THE COURT: I have ruled previously that there is a waiver of the attorney/client privilege. As I understand the law in Florida, once the issue is raised that a lawyer was ineffective, the lawyer has a right to defend himself. The only unique situation about this case is the fact that there are several cases involved here and the attorney/client privilege has been waived by Mr. Owen.
> I am protecting it up to the point that the matters as they relate to the Slattery case are not being opened up. Mr. Owen made his decision when he filed this motion, legally to waive his attorney/client privilege.
>
> MS. IZAKOWITZ: Only as it relates to the Worden case.
>
> THE COURT: I am accepting a non-full waiver with regard to it based upon the uniqueness of this situation.

(T. 867-868)(emphasis added).

Mr. Owen's right to invoke the attorney-client privilege in the Slattery case was necessary for the protection of his Sixth Amendment right to counsel. The fact that the same law firm

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3 The Preamble to the Florida Rules of Professional Conduct states: "The attorney-client privilege is that of the client and not of the lawyer".

represented Mr. Owen in both the Slattery and Worden cases and that the same group of attorneys worked on both cases is prima facie evidence that those attorneys shared privileged information about both cases. Clearly, the two cases were inextricably intertwined. Moreover, Mr. Owen had no choice but to file his Rule 3.850 motion when he did given the time constraints imposed by Fla. R. Crim. P. 3.851. Judge Burk failed to fulfill his duties as an impartial arbiter by forcing Mr. Owen to proceed after an unconstitutional condition arose.

3. The doctrine of the unconstitutional condition.

After Simmons, the doctrine of unconstitutional condition was expanded when the United States Supreme Court applied the analysis to a statute governing testimony of public employees in Lefkowitz v. Cunningham, 431 U.S. 801 (1977). In Lefkowitz, the statute at issue provided for immediate dismissal of public employees and restriction of any future public employment for five years if they refused to testify concerning conduct of their office. 431 U.S. at 801. The Court found that the statute implicated the Fifth Amendment right against self incrimination. Id. at 805. The Court held that the "State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." Id.; see also Gardner v. Broderick, 392 U.S. 273, 279 (1968)(reversing decision upholding a statute that mandated petitioner's discharge from employment because of the assertion of a constitutional right); Garrity v. New Jersey, 385 U.S. 493,

496 (1967)(finding that statute forced petitioners to choose between self-incrimination and job forfeiture); State of Florida ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 489 (Fla. 1973)(holding that a statutory requirement of a response, under the threat of license revocation, amounted to a Fifth Amendment violation).

In another line of cases, the federal courts have also applied the doctrine of unconstitutional condition to the situation where an individual was involved in civil litigation and was also a potential criminal defendant for the conduct at issue in the civil case. For example, in Wehling v. Columbia Broadcasting System, a civil plaintiff had been made a target of a grand jury investigation before he filed a libel suit against CBS. 608 F.2d 1084, 1086 (5th Cir. 1979). Both the grand jury inquiry and the libel suit arose from accusations that Wehling had defrauded federally insured student loan programs. During discovery, Wehling asserted his Fifth Amendment privilege nineteen times, resulting in a punitive dismissal of his lawsuit by the district court. The Court of Appeals for the Fifth Circuit held that the case should be remanded in order for the district court to enter a protective order staying further discovery until the applicable statute of limitations had run on the criminal offenses being investigated by the grand jury. 608 F.2d at 1089. See also Pillsbury v. Conboy, 459 U.S. 248, 261 (1983)(approving court's decision to stay discovery pending the completion of grand jury investigation); In re Grand Jury

Proceedings, 995 F.2d 1013, 1019 (11th Cir. 1993)(staying discovery and stating that for a civil litigant fearing criminal prosecution, relying on a protective order is ill-advised).

Similarly, the lower court imposed a substantial penalty on Mr. Owen by forcing him to choose between properly litigating his Rule 3.850 motion and asserting his Sixth Amendment rights as they affect his attorney-client privilege. Cf. Wehling, 608 F.2d at 1086. Clearly, if the doctrine of unconstitutional condition applies in a case where an individual seeks only to protect property interests, Mr. Owen's scenario also creates an unconstitutional condition since his ability to seek relief from the conviction and death sentence implicate his constitutionally protected life interest. See U.S. Const. Amend XIV; Ohio Adult Parole Auth. v. Woodward, 118 S.Ct. 1244, 1250 (1998)(conceding that death-sentenced prisoner maintained a residual life interest).

Unconstitutional conditions have arisen in various contexts. Whenever an unconstitutional condition arises, the courts must rectify the tension created by the statute, provision or procedure that has created the problem. For example, in United States v. Jackson, 390 U.S. 570, 571-572 (1968), under the Federal Kidnapping Act those individuals who were charged with violating the Act and pleaded guilty received life sentences, while those who chose to be tried were subject to the possibility of receiving the death penalty. The Supreme Court held that the effect of the provision discouraged individuals from exercising

their Sixth Amendment right to demand a jury trial. Id. at 581. Therefore, the provision in the statute that created the Hobson's choice was unconstitutional in that it impeded defendants from exercising their Sixth Amendment rights. Id. at 581-582; see also City of Daytona Beach v. Del Percio, 476 So. 2d 197, 205 (Fla. 1985).

In Miller v. Smith, under a Maryland statute regarding direct appeals, Mr. Miller had to choose between accepting the representation of the public defender and receive a free transcript of his trial, or having pro bono counsel represent him but not receiving a free transcript of trial. 99 F.3d 120, 122-123 (4th Cir. 1996). The two constitutional rights implicated in Miller were his due process right to a proper appeal that entitled him to a free transcript and his Sixth Amendment right to counsel. Id. at 127. In holding that Mr. Miller had been improperly forced to choose between two fundamental rights the court relied on a Third Circuit Court of Appeals decision:

> [a] defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.

Id. at 128 (quoting United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 120 (3rd Cir. 1977))(emphasis added).

In Brecheen v. Reynolds, the Circuit Court of Appeals for the Tenth Circuit addressed a statute that allowed a convicted defendant to raise ineffective assistance of counsel claims

during his direct appeal. 41 F.3d 1343 (10th Cir. 1994). The district court had determined that the appellant's claims of ineffectiveness raised in postconviction were waived because they were not raised during his direct appeal. Id. at 1364. On appeal the court held that the practical effect of the lower court's ruling creates a "Hobson's choice" for convicted defendants' and therefore reversed the lower court's ruling. Id.

The case law regarding the doctrine of unconstitutional condition makes clear that:

> [i]f the person was forced to choose between waiving his privilege or foregoing another substantial benefit, such as his job, property or other guaranteed right, there is no choice at all ...

Davis v. Wainwright, 342 F. Supp. 39, 42 (1971)(emphasis added).

Because of the procedural posture of Mr. Owen's two capital cases, in order to exercise his statutory right to pursue relief through Rule 3.850 proceedings, he would have been penalized by the court's decision that attorney-client privileged information pertaining to his case pending retrial was subject to disclosure.

At the evidentiary hearing, it became obvious that the issues included in the Rule 3.850 motion could not be properly addressed. Mr. Owen presented the testimony of Mr. Barry Krischer, Mr. Owen's former trial attorney and the current State Attorney from the Fifteenth Judicial Circuit (T. 833). Mr. Krischer repeatedly stated that he could not answer the questions

because Mr. Owen had invoked his attorney-client privilege (T. 837, 838, 847, 855, 856, 871, 873).

However, rather than stay the proceedings until the Slattery case was resolved, the court forced counsel to proceed. Judge Burk was "not concerned what the rights are as they relate to the pending case" (T. 864).

Judge Burk went so far as to require that Mr. Krischer reveal attorney-client confidences even though Mr. Krischer testified that he could not answer the question (T. 855-856).

Judge Burk told Mr. Krischer:

> I am going to require you under the circumstances of this case to answer that question because my perception is that it relates to the Worden case, even though it may cut across all of the other cases that relate to the Worden case.

(T. 859-860)(emphasis added).

The unconstitutional condition that had arisen because of the situation was emphasized further when a few questions later, Judge Burk amended his earlier ruling and allowed the disclosure of privileged information. Judge Burk informed counsel that he would determine whether or not the attorney-client privileged information that was requested would "prejudice any matters as it relates to Mr. Owen's pending Slattery retrial" (T. 866).

After Judge Burk made it clear that he was not going to protect Mr. Owen's attorney-client privilege, postconviction counsel objected and requested that she be allowed to discuss Judge Burk's revised ruling with Mr. Owen to determine if he

wanted to proceed (T. 869). Judge Burk indicated that Mr. Owen no longer faced a Hobson's choice, he faced no choice at all:

> My ruling at this time is that you have already elected to go forward. You can discuss it with Mr. Owen, certainly, but you have already elected to go forward by proceeding.

(T. 869)(emphasis added).

Thereafter Judge Burk ordered Mr. Krischer to testify to information that he determined would violate Mr. Owen's attorney-client privilege with regard to the Slattery retrial (T. 871).

Judge Burk continued to violate Mr. Owen's constitutional rights when he allowed Mr. Krischer to testify about a mental health expert's opinion and report (T. 898-901). That expert's report indicated that he was only retained for the Slattery case, yet the assistant state attorney took advantage of Judge Burk's order when he proceeded to question Mr. Krischer about the report, knowing that it had absolutely no relationship to the Worden case (T. 898-901).

As the facts indicate, Mr. Owen was forced to surrender his right to a full and fair evidentiary hearing in order to protect his right to his attorney-client privilege. See Simmons, 390 U.S. at 394. This Court should remand this case for a full and fair evidentiary hearing.

B. MR. OWEN WAS DENIED DUE PROCESS WHEN THE COURT DENIED ACCESS TO VIDEOTAPES; CERTAIN STATE AGENCIES' WITHHELD FILES AND RECORDS PERTAINING TO MR. OWEN'S CASE, IN VIOLATION OF CHAPTER 119, FLA. STAT.; AND MR.OWEN'S TRIAL ATTORNEY'S FILES WERE NOT DISCLOSED.

The circuit court denied Mr. Owen due process when it erroneously denied his request for access to the original videotapes of his statement (PC-R. 1364, 1372). Mr. Owen made numerous requests to obtain the original video tapes (PC-R. 1042-1048, 1361-1363, 1367-1369; T. 639-649, 650-659). Mr. Owen's initial Rule 3.850 motion, filed on July 31, 1986, included a claim regarding the tampering and/or alteration of the video tapes made during the pre-charging interviews between the Boca Raton Police Department and Mr. Owen (PC-R. 612-627). This claim was based on an initial, cursory analysis of the video tapes.

In 1997, after reviewing reports that were generated in 1986 that suggested the possibility of tampering and/or altering the videotapes, postconviction counsel requested access to the original videotapes (PC-R. 1361-1363; T. 639-649). The State objected to releasing the original tapes, and cited a September 5, 1997 letter from Joel Charles to the Office of the State Attorney in Hillsborough County (T. 639-649). Mr. Charles analyzed the tapes via computer and found "no evidence of tampering" (T. 639-649).

Mr. Charles' letter, however, fails to explain where he analyzed the tapes, who hired him to analyze the tapes, which tapes he analyzed, what equipment he used in his analysis and whether he has any documentation to support his analysis. Furthermore, Mr. Charles was <u>not</u> employed by postconviction counsel (T. 639-649). As postconviction counsel told the lower court, in a phone conversation with Mr. Charles on September 14,

1997, Mr. Charles stated that he was hired by Ms. Carey Haughwout (T. 650-659). Ms. Haughwout is Mr. Owen's trial counsel in State v. Owen, Case No. 84-4014 CF. Mr. Charles confirmed that, until recently, he was not contacted or requested to analyze the tapes by Mr. Owen's postconviction counsel. He further stated that he placed the postconviction case number on his letter to the State Attorney's Office because a Boca Raton Police Department employee gave him both case numbers when he went to copy the tapes (PC-R. 1367-1369; T. 650-659).

Mr. Owen filed a motion for costs so that counsel could depose Mr. Charles which was never addressed by the lower court (PC-R. 1374-1377).

Despite Mr. Charles' determination that he "detected no evidence of tampering," counsel has reason to believe that there was tampering or alteration of the tapes and that counsel is entitled to independently evaluate the physical evidence in this case. Postconviction counsel's expert indicated several years ago, after a cursory review of copies of the tapes, that there may have been tampering (PC-R. 612-627). Furthermore, as the lower court was told, an expert has reviewed Mr. Charles' September 5, 1997 letter and indicates that Mr. Charles' analysis was inadequate to determine tampering (PC-R. 1361-1363, 1367-1369).

The lower court erred when it denied Mr. Owen access to the videotapes.

Due process has also been denied Mr. Owen because various state agencies refused to disclose files and records. The incomplete records are the result of a retrial of a separate case currently pending in Palm Beach County, Owen, 560 So. 2d 207 (Fla. 1990). This case is inexorably intertwined with the Slattery case, and cannot be separated. The conviction in the Slattery case was used in the instant case as an aggravating circumstance. Therefore, any and all files in the possession of the State Attorney's Office are critical in order for Mr. Owen to present claims relating to the other conviction. However, because Mr. Owen's retrial in the Slattery case is currently pending, the agencies involved have not disclosed their complete records relating to that case.[4]

Capital post-conviction defendants are entitled to Chapter 119 records disclosure. State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990).

Further, the Court has extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed. Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991). In these cases, sixty

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4 On November 7, 1997, Assistant State Attorney Wayne Chalu offered access to some of the Karen Slattery files in his possession. Mr. Chalu has more than 4,000 documents, in addition to the more than 1,000 pages of records he exempted as work product. On December 5, 1997, six business hours before the evidentiary hearing, counsel received three bankers boxes full of records on the Slattery cases from the Hillsborough County State Attorney's office. The records are in no defined order and are not in file folders.

(60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials.

Despite the fact that Mr. Owen received approximately four thousand documents the weekend before the evidentiary hearing, Judge Burk refused to allow him any time to review those records and amend his Rule 3.850 motion (PC-R. 1628). Mr. Owen was denied his rights under Florida law and the Eighth and Fourteenth Amendments to the United States Constitution. See id.

Mr. Owen was denied access to files and records that pertained to the Slattery case by the Hillsborough County State Attorney Office (PC-R. 1106-1108). The State Attorney relied upon an exemption to the public records statute that allowed for nondisclosure of active criminal investigative information. See Fla. Stat. 119.07(3)(b).

It is fundamentally unfair for the state to take such a position. The state should not be allowed to hide behind the pending Slattery case in its refusal to produce public documents while simultaneously objecting to Mr. Owen relying upon the same open case to support his invocation of the attorney-client privilege.

Furthermore, the state complained that the Slattery retrial had created difficulties in speaking with the trial attorneys and examining the trial attorney files:

> MR. CHALU: Your Honor, I would have but for the fact that defense counsel, basically, was very hesitant to speak to me. Two of the defense lawyers would not speak to me or return my phone call.

> Two other defense lawyers would speak to me only in a limited capacity concerning matters that would not be attorney/client privilege (sic), would talk to me concerning things like strategy tactics...
>
> Now, Ms. Haughwout, who has herself this morning admitted that she has written letters to those defense counsel and instructed them not to make any disclosures, this has, in effect, hampered the State from preparing for this hearing.
>
> * * *
>
> ... I suspect the files may very well be in the possession of Ms. Haughwout ...

(T. 779-782). The assistant state attorney, although willing to concede the problems that had arisen because of the pending capital retrial, was unsympathetic to Mr. Owen's own problems.

Just as the state had difficulty in speaking to Mr. Owen's trial attorney and locating the trial attorney files, so too did Mr. Owen. Mr. Owen attempted to locate the trial attorney files well in advance of the evidentiary hearing (PC-R. 1042-1048). The original trial attorney files from Attorneys Boudreau and Kohl, who defended Mr. Owen on the Worden case, could not be located.

When postconviction counsel attempted to contact defense counsel Krischer regarding his defense attorney files, Assistant State Attorney Paul Zacks, purporting to act on Mr. Krischer's behalf, informed collateral counsel that it was inappropriate for Mr. Krischer to be supplying any information to Mr. Owen's current counsel. Notwithstanding Assistant State Attorney Zacks' efforts to intervene in a situation to which he had no relation and to obstruct Mr. Owen's efforts to contact Mr. Krischer and

obtain his files, Mr. Owen is clearly entitled to this information. See Fla. Stat. § 27.51 (1991). The files belong to Mr. Owen, not to Mr. Krischer. See Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990).

After the initial indication that counsel received from Mr. Zachs, Mr. Owen requested that he be allowed to depose Mr. Krischer since Mr. Krischer was unwilling to speak to postconviction counsel (T. 394-397). The lower court denied these requests (T. 411).

At the evidentiary hearing, some light was shed on where the trial attorney files may be located. Ms. Haughwout indicated that she may have some of the files (PC-R. 788). Ms. Haughwout explained:

> After the firm started splitting up, some of the files were divided. Some of the files stayed together. After Mr. Owen's conviction, Ted Borris did the direct appeal. I believe, he was still with part of the firm during that time. When it came back for a new trial, he was appointed as trial counsel. I believe, he received then most of the files from Mr. Krischer, Mr. Salnick, Mr. Boudreau possibly, but I am not sure about that., and I don't know as to Mr. Kohl. ...
>
> So the files I have, I can't tell you exactly where they came from is what I am getting to. I would hope that they contained most of the files of the trial lawyers and the law firm that represented Mr. Owen originally.

(T. 788-789). Mr. Krischer agreed that the Slattery files may be in the possession of Ms. Haughwout (PC-R. 790). However, although Ms. Haughwout may have possession of Mr. Owen's original trial attorney files from his cases, as she told the court: "none

of those files have been maintained in any discreet fashion" (PC-R. 791).

Clearly, the posture of the Slattery retrial made it difficult for Mr. Owen to properly present his claims. In addition, the state indicated that they were inhibited from countering Mr. Owen's allegations because of the posture of the Slattery case. Had Judge Burk acted prudently and in accordance with due process he would have granted Mr. Owen a stay until the Slattery case was resolved. Cf. Wehling, 608 F.2d at 1089; Pillsbury, 459 U.S. at 261.

C. THE CIRCUIT COURT ERRED IN DENYING MR. OWEN THE OPPORTUNITY TO APPEAL IT'S DECISION REGARDING THE DISCLOSURE OF ATTORNEY-CLIENT PRIVILEGED INFORMATION.

Rule 4-1.6 of the Rules of Professional Conduct states, in part:

> Confidentiality of Information:
>
> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.
>
> **(c) When Lawyer May Reveal Information.** A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> **(d) Exhaustion of Appellate Remedies.** When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.
>
> **(e) Limitation on Amount of Disclosure.** When disclosure is mandated or permitted, the

> lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Fla. Bar Rule 4-1.6 (1998) (emphasis added).

During argument on Ms. Haughwout's motion to stay the evidentiary hearing, Barry Krischer stated:

> MR. KRISCHER: Your Honor, I have indicated to both counsel that the nature of the evidence I have to refute Mr. Owen's allegations in the 3.850 would be so damaging to him in his pending trial that I want the Appellate Court to tell me to repeat those words.

(T. 801)(emphasis added).

Judge Burk erred when he failed to allow Mr. Krischer and the other trial attorneys as well as Mr. Owen's trial counsel to appeal his decision to allow the disclosure of privileged information. See Fla. Bar Rule 4-1.6.

Mr. Owen repeatedly invoked his attorney-client privilege with regard to the Slattery case (PC-R. 807-808). According to the rule, Mr. Owen and his attorneys should have been allowed to appeal Judge Burk's determination that the attorneys could reveal attorney-client privileged information. Mr. Owen's Sixth Amendment and due process rights were violated by not allowing counsel to exhaust their appeals. This Court should remand Mr. Owen's case for a full and fair evidentiary hearing.

ARGUMENT II

THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE FARETTA INQUIRY TO DETERMINE IF MR. OWEN WAS KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVING HIS RIGHT TO PURSUE POSTCONVICTION RELIEF.

In denying Mr. Owen's Rule 3.850 motion the lower court stated:

> After hearing the only witness called by the Defendant ... and the Defendant announcing his intention not to proceed further with the Motion, the Court hereby denies the Fourth Amended Motion to Vacate Judgments of Conviction and Sentences ...

(PC-R. 1862; T. 914)(emphasis added).

In Durocher v. Singletary, this Court held that: "competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose." 623 So. 2d 482, 484 (Fla. 1993). However, in order to represent himself, the defendant must "knowingly and intelligently" relinquish the right to collateral counsel. Id. at 485. Therefore, the lower court should "conduct a Faretta-type evaluation of [the defendant] to determine if he understands the consequences of waiving collateral counsel and proceedings." Id.

A waiver of counsel requires that the accused know, and the court ensures that he knows, the full ramifications of such a waiver. See Faretta v. California, 422 U.S. 806, 836 (1975).

In a Faretta hearing, the trial judge has an affirmative duty to protect the essential rights of a defendant. The lower court failed to make an adequate Faretta inquiry in Mr. Owen's case.

Mr. Owen was faced with a Hobson's choice at his evidentiary hearing: he could assert his attorney-client privilege as it related to the Slattery case and forego pursuing his statutory right to challenge various constitutional violations through

postconviction as it related to the Worden case. Mr. Owen was compelled under the time limitations to file a Rule 3.850 motion. It was clear that in order to pursue postconviction relief, Mr. Owen would have to waive his attorney-client privilege with regard to the Slattery case.[5]

As a result of this Hobson's choice, Mr. Owen's postconviction counsel told the court that she could not go forward (T. 909-910). Then, the following exchange occurred:

> THE COURT: If you are telling me you are not planning to call any additional witnesses, I am prepared to enter an order denying Mr. Owen's 3.850 motion, Counselor; you do realize that?
>
> MS. IZAKOWITZ: I understand that, Your Honor, I have to do --
>
> THE COURT: You discussed that with him?
>
> MS. IZAKOWITZ: I have to preserve Mr. Owen's rights. And I think, in light of this Court's rulings today, in light of Mr. Krischer and how he testified, yes, I understand that, Your Honor.
>
> THE COURT: You have discussed this with Mr. Owen?
>
> MS. IZAKOWITZ: Yes.
>
> THE COURT: Mr. Owen, you understand what she is telling me?
>
> THE DEFENDANT: Yes; we had discussions.
>
> THE COURT: You understand what she is telling me; she is planning not to pursue

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5 Mr. Owen's former trial attorney in the Slattery case told the court: "the nature of the evidence I have to refute Mr. Owen's allegations in the 3.850 would be so damaging to him in his pending trial that I want the Appellate Court to tell me to repeat those words" (T. 801).

> further your 3.850 motion at this time. If it is not pursued, it is my intention to enter an order dismissing that 3.850. That will be the end of it. And if the Florida Supreme Court upholds that, that's the end of your 3.850 in regard to the Worden case; you understand?
>
> THE DEFENDANT: Well, I understand what the Court has just said. I don't understand the procedure.

(T. 910-912)(emphasis added).

The trial court failed to conduct a Faretta-type evaluation to determine whether Mr. Owen understood the consequences of what the court characterized as a waiver of his postconviction proceedings.

Postconviction counsel requested that Judge Burk inquire further of Mr. Owen (T. 912), but Judge Burk refused to do so. The lower court could not have concluded that Mr. Owen made a knowing, intelligent and voluntary decision to waive his collateral counsel and appeals without further inquiry. The record does not affirmatively demonstrate that Mr. Owen knowingly, intelligently and voluntarily waived his postconviction proceedings. This Court should remand Mr. Owen's case for a full and fair hearing or an adequate Faretta hearing.

ARGUMENT III

MR. OWEN WAS DENIED A FULL AND FAIR HEARING ON THE FOLLOWING ISSUES.

The state conceded and the judge granted Mr. Owen an evidentiary hearing on five issues. However, due to the

circumstances explained in Argument I, Mr. Owen was denied a full and fair hearing.

A. MR. OWEN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING PRE-TRIAL, TRIAL AND SENTENCING OF HIS CAPITAL PROCEEDINGS REGARDING FAILURE TO PROVIDE THE MENTAL HEALTH EXPERTS WITH AVAILABLE INFORMATION.

Mr. Owen had the right to competent mental health assistance and effective counsel pre-trial, trial, and at sentencing. His due process right to a professionally competent, court-funded evaluation of his competence to stand trial and his sanity at the time of the crime was violated, however, by defense counsel's failure to ensure that the experts had the necessary and vital information they needed to render an adequate and accurate diagnosis of Mr. Owen's mental condition. Trial counsel conducted an inadequate investigate and did not provide adequate background material to the appointed experts. Strickland v. Washington, 466 U. S. 668 (1984).

In Mr. Owen's case, Bert Winkler, the public defender appointed to represent Mr. Owen, requested a mental health expert within days of being appointed to Mr. Owen's case (R. 10). Mr. Winkler told the court that Mr's Owen's mental health was at issue at trial, and he sought funds for an insanity defense (R. 40). Attorney Winkler also requested funds to have a CAT scan conducted and neurological testing of Mr. Owen. Attorney Winkler also requested an additional expert beyond Dr. Peterson. The court appointed Dr. Blackman (R. 61, 67). Shortly thereafter, the Public Defender's Office withdrew from Mr. Owen's case in January, 1985 (R. 305-315).

Under Florida law, an indigent defendant is entitled to an appointed mental health expert to assist in the preparation of a defense. Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1st DCA 1991). Mr. Owen's right to effective mental health assistance was violated due to his attorney's failure to provide the experts with the information they clearly needed to arrive at an accurate diagnosis of his client's mental condition.

Attorneys Boudreau and Kohl never requested additional experts to evaluate Mr. Owen and did not follow up on any investigation done by previous defense counsel. Dr. Blackman was not called as a witness, and Dr. Peterson was only called as a witness in Mr. Owen's penalty phase (R. 4146-4240). Dr. Peterson testified that he did not review police reports or witness statements; he did not review Mr. Owen's statements to police; and he did not review transcripts of the videotapes of Mr. Owen's statements to police (R. 4189-4190). In fact, Dr. Peterson said the jury heard many more facts about the case than he did. (R. 4191).

Dr. Peterson testified that Mr. Owen was sane during the commission of the Worden homicide. He said that Mr. Owen "met the legal criteria at the initiation of the act, not being insane, but it isn't true throughout the whole course of events" (R. 4195-4196). Dr. Peterson stated that Mr. Owen was sane and used rational control over the act, but at one point, after the initial assault, Mr. Owen lost control and therefore became

insane. Dr. Peterson, however, did not have the type of background materials at that time that would have assisted him in making a more accurate diagnosis of Mr. Owen's condition which would have corroborated and strengthened his findings. Even with the scant amount of information that he possessed Dr. Peterson was still able to determine that Mr. Owen lost touch with reality.

At his evidentiary hearing, Mr. Owen was prepared to prove that, had counsel investigated Mr. Owen's mental state and provided the court-appointed experts with adequate information, there is more than a reasonable probability that those experts would have found Mr. Owen psychotic, delusional and meeting the legal criteria for insanity at the time of the Worden homicide.

Background information, discussed below in detail, was available at the time of Dr. Peterson's evaluation but was inexplicably not provided to him by defense counsel. Mr. Owen is psychotic and suffers from a delusional disorder. He is out of touch with reality. Mr. Owen is under the delusional and motivating belief that the crimes he committed would turn him into a female. Mr. Owen committed the crimes in an effort to have the female hormones and essence of women transferred to him. Mr. Owen was under the delusional belief that the victim he killed would live on and enter his body. Mr. Owen believes that he is a female.

Inexplicably, defense counsel never provided the experts with the materials they needed to make an adequate and accurate

diagnosis of Mr. Owen's mental condition. These materials include police reports detailing Mr. Owen numerous counts of indecent exposure, public exposure, and exposure of sexual organs beginning in 1980 and continuing until 1984. In one telling example in May, 1984, Mr. Owen was seen at Florida Atlantic University by a woman in the humanities department. The woman told police she saw a white male, early 20s, clean shaven and nude. He had a knife. He was lying on the hallway floor stroking his penis and inserting a stick or paintbrush into his rectum.

Additionally, a presentence report prepared for the court in March, 1985, indicates that Mr. Owen's criminal record "reveals a pattern of criminal behavior which is apparently an expression of his bizarre sexual interest."

Other information that counsel failed to provide the experts relates to the fact that Mr. Owen suffers from organic brain damage that was present when he suffered from a car hitting him on the head in 1982. Inexplicably, defense counsel failed to pursue this area of utmost importance in assessing his client's mental health so the trial court and the experts were unaware of this critical information. See Mason, 489 So. 2d at 736-37 (remand ordered because "too great a risk exists that these determinations of competency were flawed as neglecting a history indicative of organic brain damage").

The severity of Mr. Owen's head injury resulted in inappropriate affect and attention deficit disorder and includes

problems in abstract thinking and judgment capabilities. This information would have significantly altered the expert's opinions regarding Mr. Owen's mental condition.

Defense counsel did not investigate and thus did not provide the experts with information regarding Mr. Owen's life history. Such information also was essential to the experts' evaluations.

Additionally, the law firm of Kohl, Mighdoll, Springer, Springer, Salnick and Krischer failed to obtain a geneticist to test Mr. Owen for the possibility and determination of insanity.

A "normal" human being has 46 chromosome in each body cell, including the two sex chromosomes designated in genetics as either XX (female) or XY (male). In 1961, the first man with an extra Y chromosome was scientifically described.[6]

It has been suggested that the issue of the effect of the XYY syndrome (or XXY suggesting transsexualism) or criminal responsibility may arise in various contexts, such as in deciding the issue of sanity, in deciding whether a specific intent was present if the crime requires such an intent, in considering whether to charge the defendant with a lesser crime or in fixing punishment on a finding of guilt.[7]

In Melbourne, Australia, Lawrence Edward Hannell was on trial for the fatal stabbing of a 77-year-old widow and faced a maximum sentence of death. Hannell had earlier pled not guilty

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6 Sandberg, Koeph, Ishihana, and Hauschka, an XYY human male. 2 Lancet 488 (1961).

7 Note, Criminal Law: The XYY Chromosome Complement and Criminal Conduct, 22 Okla. L. Rev. 287 (1969).

by reason of insanity. Dr. Allen Bartholomew, psychiatric superintendent of Melbourne's Pentridge Prison, testified that he had examined Hannell, and found him to be an XYY. The imbalance, coupled with mental retardation, an aberrant brain wave pattern and evidence of neuropsychological disorder, led Bartholmew to conclude that when Hannell killed the widow, "he did not know that what he was doing was wrong." After deliberations (only 11 minutes), a Melbourne criminal court jury found Hannell not guilty on the ground that he was insane at the time of the crime. See Time, October 25, 1968. Some researchers have found that the XYY syndrome is 50 to 60 times more prevalent among convicts than the general population. Id.

Prior to trial, Mr. Owen was examined by Dr. Peterson and was determined to be antisocial, aggressive, and indicative of bizarre sexual (criminal) behavior. Mr. Owen answered in the affirmative that he felt he was trapped in the wrong body and believed he was a female. All of this information was available to defense counsel. Mr. Owen is entitled under the due process clause to a competent doctor to determine whether he is competent to stand trial, sane at the time of the offense and to establish mental mitigating factors for the purpose of sentencing. Ake v. Oklahoma, 105 S.Ct. 1087 (1985); State v. Sireci, 536 So.2d 231 (Fla. 1988). Mr. Owen also is entitled to effective assistance of counsel. Strickland, 466 U.S. 668 (1984).

Had Mr. Owen received a competent psychological evaluation, there exists a reasonable probability that defense counsel would

have been successful in an insanity defense. Because Dr. Peterson did not provide a competent psychological evaluation, Mr. Owen was deprived of due process and effective assistance of counsel under the Sixth Amendment. See Ake, Strickland, Sireci.

B. THE ADVERSARIAL TESTING AT THE GUILT PHASE ISSUE.

In Strickland v. Washington, the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (internal citation omitted). Strickland v. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Owen pleads each in the instant motion.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979).

The Office of the Public Defender for Palm Beach County was initially appointed to represent Mr. Owen (R. 3). Within days of his appointment, Assistant Public Defender Bert Winkler sought to have an expert appointed for Mr. Owen's cases (R. 10). A short time later, on September 6, 1984, Attorney Winkler told the court that Mr. Owen:

> has been seen by some mental health individual and his mental status is very much at issue and will be at issue in any and all of these trials. ...
>
> In addition, we are also in the process of preparing motions and asking the court for additional funds to develop an insanity defense and mitigation. All that is very much at issue...

(R. 40).

Mr. Winkler continued:

> ....in addition to the mental status we are attempting to conduct an investigation into his background and particularly his youth which is an extremely important fact critical to any proper determination as to his competency and particularly to his sanity. We are attempting to find individuals who were at the orphanage, the staff administration and so forth. It is extremely important to have time to do that.
>
> The Court: Does it go to competency to stand trial with regard to the charges we have discussed?
>
> Mr. Winkler: Particularly to his sanity as to all his cases.
>
> The Court: Sanity at the time of the offense?
>
> Mr. Winkler: Yes, sir. Without a proper history and particularly in Mr. Owen's case, without a proper history of his youth, no doctor can make a proper determination.

(R. 40-41).

Citing a conflict of interest, Mr. Winkler was later allowed to withdraw from Mr. Owen's case (R. 310).

On February 14, 1985, Judge Burk appointed the law firm of Kohl, Springer, Springer, Mighdoll, Salnick and Krischer to represent Mr. Owen. The court said that attorneys Salnick and

Krischer would represent Mr. Owen on the capital cases (R. 373-379).

By August, 1985, the law firm of Kohl, Springer, Springer, Mighdoll, Salnick and Krischer began to unravel. On August 2, 1985, Donald Kohl announced that Richard Springer would be leaving the firm and that he represented Mr. Owen on a non-capital case (R. 608).

Mr. Owen's motion to suppress was heard by the court beginning on July 29, 1985. Barry Krischer represented Mr. Owen at the week-long motion to suppress hearing.

By January, 1986, the law firm had disbanded. Attorney Springer opened his own office. Attorneys Salnick and Krischer opened their own office. All that remained of the firm was Kohl, Boudreau and Mighdoll (R. 1583-1591). The court ordered Attorneys Boudreau and Kohl to proceed with the Worden homicide case (R. 1591). Even though attorney Boudreau had never tried a felony case, he told the court that he felt competent to proceed (R. 1579).

Mr. Owen felt differently. On January 17, 1985, Mr. Owen filed a bar complaint against Mr. Boudreau, citing ethical concerns and lack of experience on Mr. Boudreau's part. Mr. Owen told the court:

> Mr. Owen: I am ready to go to trial tomorrow, if possible. But I don't want to go to trial with Mr. Boudreau. Possibly if Mike Salnick or Mr. Krischer, or even Donald Kohl, was to represent me as trial attorney, I would be ready. ...

> The Court: You don't want to be his first capital client?
>
> Mr. Owen: Not necessarily that. There are several reasons, including that one also. You know, Mr. Kohl mentioned the other day that he was going to assist in case he made mistakes.
>
> The Court: You don't want the mistakes being made to start with.

(R. 1684-1685).

Despite Mr. Owen's concerns, Judge Burk determined there was no conflict and that attorneys Boudreau and Kohl would represent Mr. Owen in the Worden homicide.[8]

Had counsel adequately investigated and prepared for the guilt phase of the trial, and provided the experts with available information, the mental health expert would have significantly altered his opinion regarding Mr. Owen's mental condition. (See Argument III, Section A).

Trial counsel failed to pursue an insanity defense. The test for insanity in Florida is the M'Naghten Rule. Under M'Naghten, the issues are the individual's ability at the time of the incident to distinguish between right and wrong; and his ability to understand the wrongness of the act committed. Gurganus v. State, 451 So. 2d 817 (Fla. 1984). Trial counsel failed to file a notice of intent to rely on an insanity defense, pursuant to Fla. R. Crim. P. 3.216 (b).

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8 During the trial, Donald Kohl told a business associate that he considered himself a "dinosaur" in the field of criminal law and that he had no knowledge of the Owen case.

Mr. Owen continued to receive ineffective assistance of counsel when his trial began in February, 1986. In the face of substantial and compelling evidence of severe mental illness and insanity, defense counsel failed to ask one question of any potential juror regarding mental health issues. Given the fact that defense counsel should have been aware of Mr. Owen's obvious mental health problems, the failure to even ask one question in this area falls below reasonable professional standards.

Moreover, defense counsel unreasonably failed to present any defense whatsoever at the guilt phase. Not one defense witness was called in the guilt phase (R. 3709). There was essentially no effective challenge to the State's case.

There clearly was indicia that Mr. Owen was insane at the time that these crimes were committed. In addition to the overwhelming evidence that Mr. Owen was insane, there was compelling information about Mr. Owen's mental state at the time of the offense. This material was available to defense counsel at the time of trial. Trial counsel failed to discover this material. See Strickland, 466 U.S. at 668.

Mr. Owen's records are replete with instances of him exposing his sexual organs in public. Mr. Owen dressed as a female on many occasions, and police reports confirm this fact. In 1982, Mr. Owen was arrested for the burglary of a dwelling and stealing a bathing suit (Case No. 82-4415-CF-A02). Judge Edward Rodgers, who heard the case, ordered that Mr. Owen be evaluated by a psychologist. Mr. Owen, however, fled the state and did not

see any mental health expert. In the court records on that case, it said:

> Defendant is serving a sentence in Michigan and requires mental health counseling....This case involves an entry into a dwelling and the stealing of a bathing suit. In view of the defendant's other problems and holds, this case does not warrant returning defendant to Florida.

Defense counsel should have been on notice that Mr. Owen suffered from severe mental illness. The police reports and other court documents leading up the Worden murder clearly show that Mr. Owen was experiencing severe psychological problems and that his behavior was abnormal. Trial counsel failed to investigate or put on an insanity defense.

Defense counsel also rendered ineffective assistance of counsel by failing to investigate, prepare, and present evidence of Mr. Owen's abnormal mental condition which rendered him incapable of forming the requisite specific intent for a finding of first-degree murder.

Mr. Owen was entitled to a defense built around his inability to form the requisite specific intent due to his mental condition:

> When specific intent is an element of the crime charged, <u>evidence of any condition relating to the accused's ability to form a specific intent is relevant</u>. <u>Cirack v. State</u>, 201 So.2d 706 (Fla. 1967); <u>Garner v. State</u>, 28 Fla. 113, 9 So. 835 (1981).

<u>Gurganus</u>, 451 So. 2d at 823-24 (emphasis added). No such defense was ever presented on Mr. Owen's behalf, despite its viability in this case.

Evidence of the effects of severe mental illness upon a particular defendant's mental state relating to the accused's ability to form specific intent is relevant for consideration. In Mr. Owen's case, the court was not given the opportunity to decide the merits of such evidence and defense.

Experts were prepared to testify that Mr. Owen's psychosis and delusional beliefs existed at the time of the crime, that they were indeed genuine, and given this situation in conjunction with his brain damage, Mr. Owen's capacity was so diminished at the time of the crime that he lacked the requisite intent to establish specific intent and premeditation.

Incredibly, the jury that convicted Mr. Owen of premeditated first-degree murder never knew about Mr. Owen's mental state on the day of the offense. Not one shred of evidence was provided to them that Mr. Owen was psychotic and suffered from a serious delusional disorder.

Defense counsel also failed to disclose to Mr. Owen his conflict of interest. (See Argument III, Section A).

Mr. Owen did not receive the fundamentally fair trial to which he was entitled under the eighth and fourteenth amendments. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors involved in his trial, when considered as a whole, resulted in the unreliable conviction and sentence that he received. See Gunsby v. State, 670 So.2d 920, 924 (1996).

C. THE CONFLICT OF INTEREST ISSUE.

1. The conflict with attorney Donald Kohl.

At the time of his capital proceedings, Mr. Owen's defense counsel, Donald Kohl, was writing a documentary book about Mr. Owen. During the guilt phase, Donald Kohl approached a business associate of his and asked if she would be willing to meet with Mr. Owen to gain his confidence and learn about what Donald Kohl described as "the mind of a serial killer."

This witness will testify that a contract was drawn up giving her rights to a documentary book on Duane Owen. Donald Kohl was to write the manuscript, but the woman's name was to be listed as the author. Profits were to be split equally. Donald Kohl arranged for her to work out of his law firm as an in-house investigator exclusively on the Owen documentary book. Donald Kohl arranged for business cards to be printed that listed her as an investigator/paralegal. Donald Kohl also arranged for this business associate to have unlimited access to Mr. Owen in the Palm Beach County Jail.

The book, titled "Outline Report" describes background information into "the social, economic, environmental and criminal history of subject, Duane Eugene Owen." The report also says that a portion of the investigation was completed May 30, 1986, two months <u>after</u> the penalty phase had concluded.

The report describes the early childhood of Mr. Owen, including the impact of his mother's death and his father's suicide. The report says:

> As a child, Duane enjoyed life in Gas City, Indiana. ... The sudden death of Donna May,

> his mother, devastated the Owen family in 1972. Cancer claimed her life and her death came quickly. Grief stricken husband, Eugene, mourned his love loss into a state of mental illness, abusing alcohol excessively until constant depression induced his suicide just 18 months after the loss of his loved Donna May.

Outline Report, p. 2.

The report discusses how Mr. Owen was taken to the VFW home in Eaton Rapids, Michigan, after both his parents died. It was at the VFW children's home where Donald Kohl learned about reports of sexual and physical abuse.

The Outline Report also indicates that defense counsel knew about the possibility that Mr. Owen suffered from a mental illness:

> Mitchell (Owen) stated that police indicated an illness, possibly a mental illness or a schizophrenic or dual personality existing in his brother, Duane, and therefore put great importance on the necessity for Duane to seek medical attention. Being aware that his brother, Duane had in fact suffered a head injury sometime earlier, Mitchell realized this possibility to be a valid one.

Outline Report, p. 2.

While Donald Kohl was investigating Mr. Owen for his own profits and interests, Donald Kohl failed to investigate or present mitigation at his capital murder trial. Mr. Owen's penalty phase began on March 4, 1986, where <u>none</u> of the information in the Outline Report was presented to the jury. In phase two of Mr. Owen's capital murder case, only two witnesses were called by the defense -- Mitchell Owen, and Dr. J. Peterson. None of the information about sexual or physical abuse at the

home was presented to the jury in mitigation. None of the trauma that Mr. Owen suffered from the loss of his mother and father was presented to the jury in mitigation.

In fact, based on Donald Kohl's Outline Report, he learned of this information by May 30, 1986, two months after the penalty phase had been completed. It is unknown when Donald Kohl became aware of this critical and vital mitigating evidence.

Mr. Kohl's dual positions as a writer and as an attorney violate the Florida Constitution as well as Mr. Owen's rights to effective and conflict-free counsel as guaranteed by the United States Constitution. Counsel's status as a documentary writer adversely affected his representation of Mr. Owen.

After the State rested its case, Mr. Owen was informed that if he took the stand to testify, that the State Attorney would put on Williams Rule evidence.[9] This evidence would consist of the Slattery homicide, the Mary Lee Manley attempted first-degree murder, the Gorman burglary and others. Additionally, Mr. Owen was informed that if he took the stand in an effort to mitigate, saying that he did the crimes, but did not mean to, that his testimony would eradicate the appellate issues on the motion to suppress. Relying on this advice, Mr. Owen chose not to take the stand.

As to the Williams rule evidence, counsel's advice that the jury would have been advised of the similarities of the crimes or propensity to commit similar crimes are not accurate statements.

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9 Williams v. State, 110 So. 2d 654 (Fla. 1959).

The prosecution's presentation of similar fact evidence is not contingent on whether or not the defendant takes the stand. Mr. Owen was ill-advised. See Hicks v. State, 666 So. 2d 1021 (Fla. 4th DCA 1996).

Counsel's advice to Mr. Owen that he would lose the appellate issues on the motion to suppress if he took the stand was likewise ill-advised. Mr. Owen's decision to testify at trial under the protection of the Fifth Amendment does not waive his challenge to evidence obtained in violation of the Fourth, Fifth or Sixth Amendments. See Davis v. Wainwright, 342 F. Supp. 34, 42 (MD. Fla.), affirmed, 469 F.2d 1405 (5th Cir. 1972).

Donald Kohl had an ulterior motive for providing this erroneous advice. If Mr. Owen took the stand in an attempt to express his innocence or mitigate the degree and the jury returned a verdict of not guilty or guilty of a lesser included offense, this would undermine Donald Kohl's efforts or success in his documentary. This created a situation of inherently divided loyalty because the success of an acquittal would eradicate Donald Kohl's efforts to write the documentary about the mind of a serial killer.

The general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence as well as prejudice. A defendant predicating an ineffectiveness claim on a conflict of interest faces no such requirement. Strickland v. Washington, 466 U.S. 668 (1984); Kimmleman v. Morrison, 477 U.S. 365 (1986); Cuyler v.

Sullivan, 446 U.S. 335 (1980). Mr. Owen need not show that the lack of effective representation "probably changed the outcome of the trial." See Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir. 1985). Rather, "it is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances the error cannot be considered harmless." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1982).

Once an actual conflict is demonstrated, there is no need to adduce proof that the "actual conflict of interest adversely affect[ed] his client's defense." Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983). Instead, prejudice is presumed. Barham v. United States, 724 F.2d 1529, 1534 (11th Cir. 1984) (Wisdom. J., concurring), cert. denied, 467 U.S. 1230 (1984). Conflicts of interest are especially egregious and violative of the Sixth Amendment where, as here, the conflict is not disclosed to Mr. Owen.

2. The conflict with attorney Barry Krischer.

Mr. Krischer, a former assistant state attorney, represented Mr. Owen on many of the significant pre-trial issues, including the motion to suppress, all the pre-trial depositions, as well as the sentencing proceedings on both cases.

Court records indicate, however, that Barry Krischer was involved in Mr. Owen's case as a prosecutor before he became Mr. Owen's defense attorney.

At no time during his representation of Mr. Owen did Mr. Krischer make it known to the Court or Mr. Owen that he was involved in the prosecution of Mr. Owen. At no time before trial or sentencing did Mr. Krischer disclose to the trial court this conflict of interest.

Mr. Krischer gained confidential information from his lengthy attorney-client relationship with Mr. Owen. As a result, attorney-client confidences were exchanged and a strong attorney-client relationship was established. Mr. Owen's due process rights were blatantly violated by this conflict of interest.

Barry Krischer was involved in Mr. Owen's 1982 case as a prosecutor before he became a defense attorney for Mr. Owen in 1985. Detective Mark Woods arrested Mr. Owen in 1982 and charged him with burglary of a dwelling and the theft of a female bathing suit, Case No. 82-4415 CF A02. Before the 1982 burglary, Mr. Owen entered the residence of Jana Keenan on May 10, 1982 (police report 82-11635) and took a pair of blue bikini bottoms. On May 27, 1982, Mr. Owen entered the residence of Patricia Sherer while wearing the blue bikini bottoms from the May 10, 1982 incident and had sexual relations with her (police file 82-13245).

Mr. Owen was interrogated on July 17, 1982 by Detective Woods and was confronted with various unsolved crimes. Specifically, Mr. Owen was confronted with the incident that occurred on February 2, 1982 when Mr. Owen was investigated about a suspicious person showing a gas station attendant transsexual photographs while wearing a female bikini bottom. Mr. Owen

admitted to this incident and informed Detective Woods that he was a transsexual. Detective Woods then questioned Mr. Owen about a sexual assault case that occurred on May 27, 1982 and a burglary that occurred on May 10, 1982. Mr. Owen was then confronted with the fact that the photograph taken of Mr. Owen on February 2, 1982 matched the composite of the suspect in the May 27, 1982 sexual assault case. At this time, Mr. Owen admitted that he did commit the burglary on May 10, 1982 and stole a pair of bikini bottoms, and that this was the female attire that he wore when he entered the residence of Patricia Sherer on May 27, 1982 and had sexual relations with her. Detective Woods informed Mr. Owen that he was not going to formally charge him with the sexual assault, but that the burglary charge would remain.

On November 1, 1982, Judge Rodgers ordered that Mr. Owen be evaluated by psychologist David Bortnick, Ph.D. However, before Mr. Owen could be treated, he left the state. On June 1, 1983, then Assistant State Attorney Barry Krischer entered a nolle prossequi in case number 82-4415 CF AO2. Mr. Krischer stated:

> Defendant is serving a sentence in Michigan and requires mental health counseling. Defendant's sentence in Michigan is to run concurrent with any Florida sentence imposed in this case. Further, Defendant has an AWOL hold for the Army. This case involves an entry into a dwelling and the stealing of a bathing suit. In view of the Defendant's other problems and holds, this case not warrant returning the Defendant to Florida.

Since Detective Woods recommended to the State Attorney and the court that Mr. Owen be treated for his mental problems, a presumption exists that this information was conveyed to the then

assistant state attorney Barry Krischer since he nolle prossed the 1982 burglary case premised on Mr. Owen's mental health and other problems.

This information relevant to the events of 1982 could have been used during the motion to suppress and for impeachment purposes of Detective Mark Woods. For instance, the credibility and truthfulness of Detective Woods could have been challenged by the fact that Mr. Owen was never charged with the sexual assault case in 1982, even though Mr. Owen gave a statement implicating himself. Mr. Owen was only charged with the sexual assault case in 1984 (Case No. 84-4167 CF AO2) because other law enforcement officials witnessed the second statement of Mr. Owen on videotape.

During Mr. Owen's interrogation, from May 29, 1984 through June 21, 1984, there were discussions relating to dismissal of charges in exchange for cooperation from Mr. Owen, recommendations to the State and court regarding sentences, compromises, agreements in reference to Mr. Owen obtaining treatment from a hospital and a promise that Mr. Owen would get help for the "other person" in him and his sexual identity problem. All of this information was available before the motion to suppress and would have supported Mr. Owen's claim of psychological coercion. This information available from the 1982 incidents, combined with the factors relevant to the interrogation sessions, are sufficiently coercive to render all

statements involuntary. See Colorado v. Connelly, 479 U.S. 157 (1986); Haliburton v. State, 514 So.2d 1088 (Fla. 1987).

An additional actual conflict of interest existed when Barry Krischer represented Mr. Owen at the same time that he represented Palm Beach County as a lead attorney for the Child Protection Team. See Chapter 415, Fla. Stat. (1985).

From 1983 through 1992, Barry Krischer was the attorney for the Child Protection Team representing Palm Beach County. When a child is murdered, the combined efforts and resources of both the Crimes Against Children Unit and Major Crimes Unit were brought to bear.

As an attorney for the Child Protection Team, Barry Krischer cooperated with law enforcement and prosecutors to aggressively investigate, pursue and prosecute individuals. Barry Krischer never informed Mr. Owen or the Court that he worked for the Child Protection Team. Had Mr. Owen been advised of this conflict, he would have insisted that Mr. Krischer be discharged as his defense attorney.

Mr. Owen was not given the option to waive the conflict between himself and Mr. Krischer. Mr. Owen did not know of the conflict until after his trial, conviction, sentence and direct appeal to this Court.

To prove an actual conflict, Mr. Owen "must make a factual showing of inconsistent interests." Buenoano v. Singletary, 74 F.3d 1078, 1083 (11th Cir.), cert. denied 117 S.Ct. 520 (1986); Freund v. Butterworth, 117 F.3d 1543 (11th Cir.

1997). In Mr. Owen's case, he has satisfied the burden by demonstrating that Mr. Krischer prosecuted him in 1982.

D. THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE ISSUE.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." (internal citation omitted).

Beyond the guilt-innocence stage, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion).

In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206; see also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Phillips v. State, 608 So. 2d 778 (Fla. 1992); State v. Lara, 581 So.2d 1288 (Fla. 1991).

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Owen's sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed below had been presented to the sentencer. See Strickland, 466 U.S. at 694.

In Mr. Owen's capital penalty phase proceedings, substantial mitigating evidence, both statutory and nonstatutory, went undiscovered and was not presented for the consideration by the judge and jury, both of whom are sentencers in Florida. Espinosa v. Florida, 112 S.Ct. 2926 (1992). Mr. Owen was sentenced to death by a judge and jury who knew very little about him. The evidence set forth in this claim demonstrates that an unreliable death sentence was the resulting prejudice. As confidence in the result is undermined, relief is appropriate. Strickland, 466 U.S. at 694.

At the penalty phase, defense counsel called Mitch Owen, Duane's brother to testify on his behalf. His testimony consists of nine (9) transcript pages (R. 4154-4162), and provides only scant information about Mr. Owen. Trial counsel had in its possession a "To Do" list created by Public Defender Bert Winkler, in which it said to "Focus on Phase II." Mr. Winkler listed seven (7) areas to investigate for mitigation, including:

1.Contact Duane's brother at Abbey Road in Boca Raton;

2.Check with people at orphanage in Eaton Rapids, Michigan;

3.File death penalty motions;

4.Contact Dr. Peterson and Dr. Blackman;

5.Get E.E.G. & Cat-Scan done on Duane;

6.Check Duane's army records (at Boca Raton Police Dept.);

7.Get records from Ingham Cty. Jail in Mason, Michigan -- Duane saw a psychiatrist or psychologist there by the name of Linda Burkholder for approximately a year.

Trial counsel failed to follow through on these important mitigation areas. No mitigation evidence was offered on Mr. Owen's life at the orphanage; the sexual and physical abuse at the orphanage; his brain damage; or his history of seeing a psychologist or psychiatrist while in Michigan. Failure to pursue such mitigation, when trial counsel was on notice from prior counsel, clearly violated Mr. Owen's rights to effective assistance of counsel at the penalty phase.

Trial counsel also was on notice from Mr. Owen himself. During his taped statements to police, Mr. Owen admitted to indecent exposures at Florida Atlantic University, stealing bathing suits and exposing himself to women. When asked if he was getting any better, Mr. Owen told the police he was not and that his problems had gotten worse (R. 799-800; 888; 901).

The most glaring mitigation omission is that of mental health issues. See Argument III, section A, above.

Mental health evidence is amongst the most compelling of mitigation, a fact which is evidenced by a review of Florida's statutes regarding mitigation. Fla. Stat. § 921.141 (6) provides a list of statutory mitigating circumstances to be considered by a judge and jury when assessing the propriety of a death sentence. Of the seven (7) enumerated mitigating factors in the statute, four (4) deal with the mental condition of the defendant.

Florida law is clear that insanity and mental health mitigation are assessed under distinctly different standards. Blanco v. Singletary, 943 F.2d 1477, 1503 (11th Cir. 1991) ("[o]ne can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider") (citing Perri v. State, 441 So. 2d 606, 609 (Fla. 1983)("[a] defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state")).

Specifically regarding the two major statutory mental health mitigating factors, this Court reiterated the appropriate standard to be employed in order to establish their existence:

> In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), we explained that extreme mental or emotional disturbance as used in section 921.141 (6)(b) is interpreted as "less than insanity but more than the emotions of an average man, however inflamed." We went on to explain that substantial impairment of the

> defendant's capacity to appreciate the criminality of his conduct to the requirements of the law, as used in section 921.141 (6)(f), refers to mental disturbance that "interferes with but does not obviate the defendant's knowledge of right and wrong." Id.

Duncan v. State, 619 So. 2d 279, 283 (Fla. 1993).

In Mr. Owen's case, the overwhelming evidence of his severe mental health disabilities should have been presented to the judge and jury charged with deciding whether he should live or die. This evidence was readily available, yet defense counsel inexplicably failed to investigate its existence and present it. See Argument III, Section A.

In addition to the mental health mitigation, had counsel done any background investigation, he could have presented the jury and judge with evidence that Mr. Owen's upbringing was marked by physical and emotional abuse.

Donna Mae Heath, Duane's mother, at the age of 16, married Mr. Swetnam. Her first child, Gary, was born in 1949. Shortly thereafter, Donna began having an affair with Herb Warren. While still married to Mr. Swetnam, she gave birth to Monty Swetnam. Monty's biological father was Herb Warren. This extra-marital affair led to a divorce between Donna and Mr. Swetnam.

On September 29, 1958, Donna married Eugene Kenneth Owen. They lived in Gas City, Indiana and had two children, Mitchell Owen, who was born March 23, 1959, and Duane Eugene Owen, born February 13, 1961.

Donna and Eugene Owen were serious alcoholics who drank all day, beginning in the morning. Before going to work as a dispatcher for a trucking company, Eugene would take a fifth of vodka from the ice box and drink a fourth of it just to get to work. Donna often started drinking in the morning and would be passed out by the afternoon when the boys got home from school.

Donna and Eugene showed no interest in the boys' school work or activities. Donna never cooked regular meals for the boys because she would be passed out. A neighbor who lived nearby would often do Mitch and Duane's mending and washing because their mother did not. Alcohol was always available at the Owen home, even to the neighborhood teenagers, who were not legally old enough to drink.

Neighbors report that Eugene abused Donna and there was loud arguments between the Owens. There also was abuse inflicted on Monty, Donna's son from her previous marriage. A neighbor recalled that when he would be at the Owen house, he would hear Monty screaming while Eugene beat him. Eugene would not allow Monty to urinate, so he would wet himself and then be forced to sleep in the basement with his soiled clothes and bed linens.

The drinking eventually took its toll. Neighbors believe that Donna Owen died in 1972 of cirrhosis of the liver. One neighbor reported that Eugene showed up drunk to his wife's funeral.

As an impressionable and vulnerable young child, Duane struggled to find someone to trust while he wrestled with his

mother's death. A baby sitter, who was hired by Eugene Owen after his wife's death, reported that Duane changed when he lost his mother. He felt abandoned, lost, sad and angry. She said he needed help and attention. Her attempts to explain to Eugene Owen how Duane was coping with his loss fell on deaf ears.

After Donna Owen's death, Eugene continued his drinking. He neglected the boys. The home had no food and was filthy. One relative reported that the only food in the home was a bottle of ketchup and some vodka.

School records indicate that after his mother died, Duane's grades dropped dramatically. He had to repeat the sixth grade.

After his wife's death, Eugene Owen began to drink uncontrollably. He did not care about anything, including his two boys. Mitch and Duane were left to virtually raise themselves. The boys solicited food and money from their neighbors. No one was there to provide them with guidance, support or love. Duane began drinking and participating in sex parties.

Without a stable and consistent introduction to society's definition of right and wrong and in the absence of positive, protective adult nurturing, Duane and Mitch began to get into trouble. They ran with a street gang called the "Black Cats" and both had minor scrapes with the law. Duane was molested at a young age.

Eugene Owen eventually lost his job as a dispatcher for a trucking firm in Gas City because of his drinking. In July,

1974, Eugene Owen was arrested for DWI and agreed to seek treatment at the VA Hospital in Marion, Indiana. During this time, Duane and Mitch were removed from their father's custody and placed in a foster home for about a month while he was receiving treatment. When he completed his treatment, the two boys were returned to live with him. After returning home, however, Eugene Owen continued to drink.

A short time later, Eugene Owen committed suicide in the family garage. He died of carbon-monoxide poisoning. After Eugene's death, relatives found the boys in the home without gas, electricity or phone service.

After their father's death, Mitch and Duane were temporarily placed in a group home in Marion, Indiana. The only relatives to show any interest in the boys were Don and Edith Owen, Eugene's brother and wife.

After Eugene's death, Don and Edith put the Owen home up for sale. While cleaning out the home, Edith found several items in the second level of the garage where the boys hung out. She found girls' underpants and bras, bloody undergarments, 25 jars of Vaseline, and books on the occult.

The boys went to live with Edith and Don. A month later, Mitch and Duane were sent to the VFW National Home in Eaton Rapids, Michigan. The boys were abandoned in the home as well.

An April 6, 1978 letter from Duane's counselor to the aunt and uncle states:

> ....The reason for my writing you is to express my concern for Duane's lack of

> contact with members of his natural family...I was wandering [sic] if you folks might be receptive to establishing a "family" contact with Duane in the form of letters and maybe an initial visit with you some weekend...

While in the home, Duane suffered physical, mental and sexual abuse. His house parents were abusive. Because of Duane's small stature, Duane was physically abused by the bigger kids. Records indicate that Duane felt inadequate and had low self-esteem because of his size. Duane was forced to have sexual intercourse with a 35-year-old child care director who worked in the home.

Duane's adjustment to the VFW Home was poor. Records indicate that Duane was heavily involved in drugs and took acid. He did not get along with others. He was involved in a fight with four other boys who threw Duane to the ground and kicked him unmercifully in the nose until it was broken. Duane suffered a concussion and was treated at the emergency room.

In 1976, Mitch ran away from the home. Duane was forced to stay and found himself again in the position of coping with feelings of abandonment, rejection, and unworthiness. Duane began smoking marijuana on a routine basis.

In 1977, Duane took approximately 40-50 aspirin in a suicide attempt. He was taken to Ingham Medical Hospital where he was treated and released. On his release from the hospital, Duane was admitted to St. Lawrence psychiatric unit and held for observation and care. He was released back to the home in

December, 1977. In April, 1978, the home requested that Duane be removed because of continued drug involvement.

In May, 1978, Duane sought medical attention because of the abuse he suffered at the hands of a house father. Medical records from the home indicate that Duane had two distinct red areas that were visible on his scalp and forehead.

On October 4, 1978, Duane was released from the custody of the VFW Home. He was 17-years-old. Before his release, a psychological report was completed. After psychological testing, it was determined that Duane tested in the "psychopathic deviate" scale. This meant a personality trait disturbance, passive aggressive personality....a degree of immaturity and emotional controls which may result in impulsive behavior and poor self control."

The report said that Duane "is very ambivalent about many life situations, being inclined to approach them actively at times and being inclined toward fantasy and repression at other times. There is reflected a degree of psychological inferiority and lack of willingness to come to terms with others in order to achieve gratification." (Emphasis added). Duane also indicated that others see him as "crazy."

The summary of his assessment contained the following:

> I would view Duane as being a mild to moderately troubled young man. The factors that strike me the most about him are:
>
> 1.poor ego development and related lack of self competency, coupled with, at times, severe self criticism and fear of failure;

2.a naive and simplistic world view which is quite immature and, almost TV related ("I would like to be like Baretta.")

3.the beginnings of a belief in the image that he is trying to project as being real. He works at leading others to believe he is "cool";

4. a strong dependency need.

At the time of this report, the author ventured a "guardedly optimistic prognosis for Duane." He added, however, that "it may be too late."

After leaving the VFW Home, Duane was sent to the New Way Inn, a halfway house. It was at this time that Duane started frequenting adult book stores dressed as a female and renewed his sexual encounters with men. He saw counselors at the New Way Inn.

After he was released from the New Way Inn, Duane found his brother in January, 1979. Mitch was out of the service and working in construction. In February, 1979, Duane was arrested for larceny and spent a year in jail in Michigan. After his release in 1980, he began attending Lansing Community College and again continued his struggle with his sexual identity. He appeared in public dressed as a female, frequented adult book stores and had encounters with men. He attended college until his brother moved to Colorado. Duane followed his brother there.

In 1981, Duane moved to Panama City, Florida. He was working underneath a car that had been put up on jacks. The car rocked off its supports and fell on Duane. He was taken to an emergency room at Bay Memorial Hospital.

In January, 1982, Duane moved to Delray Beach to be with his brother. In December, 1982, Duane entered the army and was stationed at Fort Benning. While on Christmas break, Duane was arrested in Ingham County, Michigan, for possession of stolen property and was sentenced to 10 months in jail. He was discharged from the Army in June, 1983.

After his discharge, Duane tried again enrolling in Lansing Community College. While in Lansing, Michigan, Duane was caught in the Velvet Fingers Adult book store with bikinis and transsexual magazines. Duane fled Michigan in January, 1984 and came to Florida.

On April 18, 1984, Duane re-enlisted in the Army, this time under the name of Dana Brown. Dana Brown had been Duane's house brother at the VFW Home. Duane was sent to Fort Jackson for basic training. On May 18, 1984, Duane received a medical discharge for flat feet. He once again returned to live with his brother, Mitch.

Between 1980 and 1984, Duane was arrested for countless incidents of indecent exposure, public exposure and exposure of sexual organs in nearly every place he ever lived: Lansing, Michigan, Dillon, Colorado, Delray Beach and Boca Raton, Florida.

On May 28, 1984, Duane was suspected in a burglary in Boca Raton. The victim described the burglar as appearing "either high on drugs or perhaps mentally ill." Most telling of all was a police report from 1984 where at Florida Atlantic University, a woman ran to police saying she saw a white male, early 20s, nude

and with a knife. She saw him lying on the hallway floor stroking his penis. He was hurting himself as he inserted a stick or a paintbrush into his rectum. Duane admitted this incident to police.

A 1985 probation and parole report described Duane Owen's criminal record as revealing "a pattern of criminal behavior which is apparently an expression of his bizarre sexual interest."

An expert will be able to testify that numerous statutory mitigating circumstances apply in this case. At the time of the offense, Mr. Owen, due to his severe mental health problems, was acting under an extreme mental or emotional disturbance and due to his condition was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.

Based on neuropsychological testing and Mr. Owen's history, an expert is also prepared to testify that Mr. Owen suffers from severe impairment due to brain damage. The expert would be able to testify how his findings of severe organic impairment have affected Mr. Owen throughout his life and at the time of the offense, particularly in conjunction with his other mental disabilities.

Incredibly, none of the evidence relating to Mr. Owen's mental condition was presented to his sentencing jury. The prejudice resulting from counsel's failure to present sufficient mental health mitigation at the penalty phase is clear -- Mr. Owen was sentenced to die. The jury was never informed of the

significant mitigating evidence that was available at the time of trial.

In addition to the existence of statutory and nonstatutory mitigating circumstances, the aforementioned mental health experts could have rebutted the mental state requirements and weight of the aggravating circumstances presented by the prosecution, including Mr. Owen's prior convictions for murder and attempted murder. Due to Mr. Owen's long-standing mental illness, expert testimony could have been presented to lessen the import of these aggravating factors.

This Court has ruled that "[e]vents that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). Mr. Owen's case presents a tragic case in which this basic tenet of capital jurisprudence was ignored. See Id.

As Mr. Owen's life shows, substantial mitigation was amply available. None of this evidence, however, reached the jury or the judge because counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings. Counsel's failure in this regard was not based on "tactics;" rather, it was based on the failure to adequately investigate and prepare. The evidence was not hard to find, and it cried out for presentation.

Defense counsel was ineffective when he conceded that the state's burden had been met regarding the aggravating circumstances (R. 4318). The job of a defense attorney is to zealously defend his client. However, in this case, counsel's actions relieved the state of its constitutional responsibility to prove the existence of aggravating factors, thereby affirmatively assisting the prosecution prove its case for death. Trial counsel's performance in this regard was unreasonable and violative of Mr. Owen's rights as guaranteed by the Sixth amendment.

When a defense attorney concedes that there is no reasonable doubt concerning factual matters in dispute, the Government has not been held to its burden of persuading the jury that the defendant is guilty. United States v. Swanson, 943 F.2d 1070, 1073 (9th Cir. 1991). Moreover, the state bears the burden of producing the evidence and convincing the factfinder of a defendant's guilt. Speiser v. Randall, 357 U.S. 513, 526 (1958). This applies to the standard attendant to the prosecution's burden in Florida capital penalty phases regarding aggravating circumstances. See Banda v. State, 536 So. 2d 221, 224 (Fla. 1988).

It is clear that counsel's unreasonable concessions prejudiced Mr. Owen. Due to counsel's statements, the prosecution was relieved of its burden of proving beyond a reasonable doubt one aggravating circumstances relied upon by the

prosecution in its case for death. Id. Counsel, without a tactic or strategy, failed to zealously defend his client.

E. THE INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE.

Mr. Owen was sentenced to death by Judge Richard B. Burk on March 13, 1986. Mr. Owen was represented at trial by Attorneys Craig Boudreau and Donald Kohl. On July 31, 1986, attorneys for Mr. Owen filed an initial Rule 3.850 motion, before exhausting his direct appeal, Owen v. State, 596 So. 2d 985 (Fla. 1992). An amended motion for postconviction relief was filed on October 9, 1986. The two motions appear identical.

The Rule 3.850 Motion was filed by Donald Kohl based on ineffective assistance of counsel and newly-discovered evidence claims.

Trial attorneys filed a motion for new trial on February 27, 1986. It was denied on March 13, 1986. They then filed the initial 3.850, claiming newly-discovered evidence not previously known.

The initial 3.850 motion raised the following claims:

> a. That Mr. Owen was arrested on May 29, 1984 and not on May 30, 1984, as was testified to at the motion to suppress. Trial counsel said it learned of this through police reports prepared in May or early June, 1984.
>
> b.That a photo identification used by victims to identify Mr. Owen was taken after he was arrested, and not before May 29, 1984, as was testified to by police.
>
> c.That Mr. Owen spent many more than 20 hours with police, but that only 20 hours of taped conversations were introduced into evidence. Trial attorneys also argued that confession

> tapes were "altered, erased, stopped and started periodically, and edited."
>
> d.That the law firm that was appointed to represent Mr. Owen on his two capital trials and "eight to ten rape/burglary cases" was Kohl, Springer, Springer, Mighdoll, Salnick & Krischer. However, before any of the cases went to trial, "the law firm began a series of dissolutions which resulted in the formation of three separate new firms. Cooperation between the attorneys of the various firms left much to be desired." Trial counsel told the court that it was "economically impractical and unreasonable to expect any of these attorneys to have watched all 20 hours of the videotaped conversations."
>
> e.That trial counsel failed to learn before the Worden case that Mr. Owen suffered from a head injury in 1982 while working as a car mechanic in Florida. "It has now been confirmed by X-rays taken at that time, that the Defendant in fact suffered a skull fracture for which he was never medically treated, which could very well have lasting neurological consequences." Trial counsel said this fact is important because Mr. Owen suffers from headaches and was unable to assist counsel in watching the videotapes.
>
> f.That police misled the Court and the jury by testifying that Mr. Owen was dishonorably discharged from the U.S. Army, when in fact he was honorably discharged twice.

Donald Kohl had an obvious conflict of interest in raising ineffective assistance of counsel against himself. After receiving advice on how to conduct the evidentiary hearing from clerks at the Florida Supreme Court, Judge Burk attempted to bifurcate the hearing with a different attorney for the ineffective assistance of counsel claims.

A defense attorney representing a defendant in a capital penalty phase "has a duty to conduct a reasonable investigation"

regarding evidence of mitigation. Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988); see also Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

The failure to investigate and the resulting failure to present available mitigation constitutes deficient performance. Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1991). As Horton noted, "our case law rejects the notion that a `strategic' decision can be reasonable when the attorney has failed to investigate his options and made a reasonable choice between them." 941 F.2d at 1462. Thus, an attorney's performance is unreasonable when the attorney "fail[s] to investigate and present mitigating evidence." Id. at 1463.

Even when some mitigation is presented at a capital penalty phase, prejudice occurs when other available evidence is not presented.

Trial counsel's performance in this regard was unreasonable and violated of Mr. Owen's rights as guaranteed by his right to counsel, in violation the federal and state constitutions.

ARGUMENT IV

THE ESPINOSA V. FLORIDA ISSUE.

The jury was instructed on the especially heinous, atrocious or cruel aggravating circumstance (R. 4346). The jury was told only that "the crime . . . was especially wicked, evil, atrocious, or cruel" (R. 4346). No additional words or

definitions were given to the jury to explain what was necessary to establish the presence of this aggravator.

Mr. Owen's trial counsel objected to this aggravator as being vague and without proper definition under the Eighth Amendment to the United States Constitution (R. 4026-33; 4262-78). This objection was overruled by the trial court. Trial counsel proposed an alternate instruction (R. 4940). The trial court rejected the proposed instruction on March 5, 1986 (R. 4940).[10]

On direct appeal the "wicked, evil, atrocious and cruel" aggravating instruction was raised as being unconstitutionally vague under the Eighth Amendment.

The instruction provided to Mr. Owen's jury is the exact instruction struck down by the United States Supreme Court in Espinosa v. Florida, 112 S.Ct. 2926 (1992). See also Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

In Mr. Owen's case, the jury was never guided or channeled in its sentencing discretion. No constitutionally sufficient limiting construction, as construed in Dixon and approved in Proffitt, was ever applied to the "wicked, evil, atrocious, or cruel" aggravating circumstance before this jury. See Shell v. Mississippi, 111 S.Ct. 313 (1990).

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10 On direct appeal, trial counsel sought review of all pretrial motions (R. 4958). Thus, the "wicked, evil, atrocious and cruel" aggravating circumstance was raised and challenged as being unconstitutionally vague under the Eighth Amendment. Davis v. Singletary, 853 F. Supp. 1492 (M.D. Fla. 1994).

Under Espinosa, it must be presumed that the jury found this aggravator and weighed it against the mitigating circumstances. The judge considered the jury's death recommendation in sentencing Mr. Owen. As a result, an extra thumb was placed on the death side of the jury's scale. See Espinosa. Accordingly, this instruction was erroneous and prejudicial to Mr. Owen and he is entitled relief on this issue. Id.

ARGUMENT V

THE IMPROPER FELONY-MURDER INSTRUCTION ISSUE.

At the penalty phase, Mr. Owen's jury was instructed:

> The crime with which the defendant is to be sentenced was committed while he was engaged in the commission of or the attempt to commit any burglary or sexual battery.

(R. 4346).[11]

Florida law establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So.2d 221, 224 (Fla. 1988). Unfortunately, Mr. Owen's jury received no instructions regarding the elements of this or any of the other aggravators.

The jury's understanding and consideration of aggravating factors may lead to a life sentence. Yet, Mr. Owen's jury was not given adequate guidance as to what was necessary to establish

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11 Trial counsel was ineffective for failing to properly object to the unconstitutional instruction.

the presence of an aggravator. This left the jury with unbridled discretion. This violated the Eighth Amendment.

Mr. Owen was denied a reliable and individualized capital sentencing determination.

ARGUMENT VI

THE IMPROPER APPLICATION OF THE AVOIDING ARREST AGGRAVATING FACTOR.

In sentencing Mr. Owen to death, the trial court instructed the jury on the aggravating factor of avoiding arrest (R. 4346).[12] However, the jury instructions regarding this aggravator did not include the Florida Supreme Court's limiting construction of this aggravating circumstance in finding this factor. As a result, this aggravating factor was overbroad as applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S.Ct. 1853 (1988), and failed to genuinely narrow the class of persons eligible for the death sentence. See Zant v. Stephens, 462 U.S. 862, 876 (1983). Although the trial court did not find this aggravator beyond a reasonable doubt (R. 4561), the jury nevertheless was instructed on it. Moreover, the trial court allowed the prosecutor to argue this aggravating factor to the jury (R. 4289-90). Mr. Owen's death sentence was therefore imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

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12 Trial counsel was ineffective for failing to properly object to the unconstitutional instruction.

ARGUMENT VII

THE PREVIOUS CONVICTION OF A VIOLENT FELONY AGGRAVATING CIRCUMSTANCE ISSUE.

Mr. Owen's penalty phase jury was given the following instruction regarding the "previous conviction of a violent felony" aggravating circumstance:

> The defendant was previously convicted of another capital offense or of a felony involving the use of or threat of violence to some person. The crime of first-degree murder is a capital felony.

(R. 4346).

This instruction violates Espinosa v. Florida, 112 S.Ct. 2926 (1992); Stringer v. Black, 112 S.Ct. 1130 (1992), and the Eighth and Fourteenth Amendments. It fails to define the elements of the aggravating factor which the jury must find beyond a reasonable doubt.

ARGUMENT VIII

THE IMPROPER "COLD, CALCULATED" AGGRAVATING CIRCUMSTANCE INSTRUCTION ISSUE.

The trial court failed to instruct the jury in Mr. Owen's case as to the limitations of the "cold, calculated" aggravator required by this Court.[13] This claim is being presented on the basis of new case law. James v. State, 615 So. 2d 668 (Fla.1993); Jackson v. State, 648 So. 2d 85 (Fla. 1994).

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13 On direct appeal, trial counsel sought review of all pre-trial motions (R. 4958). Thus, the "cold, calculated and premeditated" instruction was raised and challenged on direct appeal as being unconstitutionally vague under the Eighth Amendment. Davis v. Singletary, 853 F. Supp. 1492 (M.D. Fla. 1994).

This Court has held that this aggravating circumstance is unconstitutionally vague. Jackson v. State, 648 So. 2d 85 (Fla. 1994)("we find merit to Jackson's claim that the instruction given in this case on the aggravating factor of cold, calculated, and premeditated (CCP) is unconstitutionally vague"). This Court recognized the vagueness of this aggravator and has required that it must be narrowed.

The instructions provided to Mr. Owen's jury are constitutionally inadequate. See Jackson; Espinosa; Stringer v. Black, 112 S.Ct. 1130 (1992), and the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT IX

THE IMPROPER EVIDENCE OF PRIOR FELONIES ISSUE.

Despite the objection by Mr. Owen's trial counsel (R. 4062), the trial court allowed the state to introduce evidence of the specific acts and occurrences that resulted in Mr. Owen's convictions for prior violent felonies (R. 4069, 4087-89, 4097). Specifically, the trial court allowed William Helm and Helen and Marilee Manley to testify before the jury during the penalty phase in detail as to specific actions for which Mr. Owen was convicted. The admission of this irrelevant evidence was exceedingly prejudicial and violated Mr. Owen's rights under the Eighth and Fourteenth Amendments.

In Mr. Owen's case, the prejudicial effect of the evidence clearly outweighed its probative value. Cf. Holland v. State, 636 So. 2d 1289 (Fla. 1994).

Additionally, Mr. Owen's right to due process was violated through the admission of this evidence. "The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" Simmons v. South Carolina, 114 S.Ct. 2187 (1994). In this instance, Mr. Owen was effectively denied his opportunity to deny or explain these events because he stood convicted of them.

ARGUMENT X

THE MOTION TO SUPPRESS ISSUE.

On May 29, 1984, Mr. Owen was arrested by officers from the Boca Raton Police Department.

On Dec. 28, 1984, Mr. Winkler filed his motion to suppress. (R. 4609-4610).

A hearing on the motions to suppress confession in all of the cases was heard on July 29, 1985, prior to trial of any of the cases. At that hearing, Mr. Krischer argued the motions before the court for all of the cases. At that time, the defense challenged the integrity of the video tapes of the confession and the voluntariness of the statements themselves (R. 617-618).

On May 29, 1984, Mr. Owen was arrested by the Boca Raton Police Department on burglary charges and warrants. On May 31, 1984, Mr. Owen was transported to the Palm Beach County Jail at 1:30 a.m. That same day, Mr. Owen received appointed counsel at his first appearance. On June 1, 1984, Lt. Woods from the Delray Beach Police and Sgt. McCoy from Boca Raton Police interrogated Mr. Owen concerning various offenses, including the

two homicides.[14] Over the next three weeks, these two detectives and other investigators interrogated Mr. Owen in excess of twenty hours. Throughout the twenty-one days of interrogation, plea negotiations were discussed. These officers were representatives of the State during negotiations in which each side desired a quid pro quo. See Anderson v. State, 420 So. 2d 574 (Fla. 1982). These negotiations consisted of discussions relating to dismissal of other charges in exchange for cooperation from Mr. Owen; recommendations to the state and court regarding sentencing; compromises; and agreements in reference to Mr. Owen obtaining treatment from a hospital and a promise by Sgt. McCoy that he [Mr.Owen] would definitely get help for the "other person" in him and his sexual identity problems (Supp. R. 121). Even though counsel had been appointed at his first appearance, Mr. Owen's counsel was never contacted.

After the suppression hearing the trial court denied all of the motions to suppress the confession (R. 1512).

In the Worden case, this Court's reasoning was based on omitted and misconstrued facts. This Court found that right to counsel attached at Mr. Owen's initial appearance only as to the

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14 Although there were discussions made regarding deals, concessions and plea negotiations, there were no recordings of these communications in violation of Mr. Owen's due process rights and the Fifth Amendment. See Stephans v. State, 711 P.2d 1156 (Alaska 1985). Between June 3 and June 21, 1984, numerous interrogation sessions by McCoy and Woods were selectively recorded on videotape. None of these recordings were provided to Mr. Owen. Thus, it is impossible to determine, particularly without Chapter 119 materials, how many interviews were selectively recorded. See Hunter v. State, 518 So. 2d 304 (Fla. 4th DCA 1988).

initial burglary charges and outstanding warrants, not as to the Worden homicide case. Owen, 596 So. 2d at 987. The court relied on Mr. Owen's re-initiation of discussions with Lt. Woods of Delray Beach as the basis for ruling that the confession was admissible. This reasoning is in error in that Mr. Owen only initiated contact with Lt. Woods of Delray Beach, not the Boca Raton Police. Further, this Court specifically found that "Owen confessed to the Worden Homicide on June 21, during police-initiated questioning." Id. In reality, the June 21st session, which included Sgt. McCoy of Boca Raton, was police initiated. This is the same officer to whom Mr. Owen has previously invoked his right to remain silent on June 8th.

During the interrogation on June 8th, Mr. Owen invoked his right to terminate questioning as to the Boca Raton homicide:

> MCCOY: What -- what are we going to do with Georgiana Worden? What are we going to do about that?
>
> DEFENDANT: There ain't much to do about it, chief...
>
> MCCOY: Do you want to talk anymore?
>
> DEFENDANT: No, because you've got to get back over there and I really ain't got nothing to say any more, you know. And all we've been doing is beating around the bush you know.

(S.R. 966). Clearly, Mr. Owen's right to cease questioning was not "scrupulously honored."

Barry Krischer rendered ineffective assistance of counsel when he failed to fully investigate, research, and pursue issues that would have fully supported a claim of psychological

coercion, right to remain silent and infringement of right to counsel under the Sixth Amendment.[15]

The psychological coercion began in 1982 when Detective Mark Woods from the Delray Beach Police Department arrested Mr. Owen for burglary of a dwelling and the stealing of a female bathing suit. Detective Woods knew of Mr. Owen's mental health problems and the fact that the defendant was a transsexual. Detective Woods promised Mr. Owen that charges would not be filed against him for the sexual assault case, even though Mr. Owen confessed to the crime. Detective Woods promised Mr. Owen that a doctor would be obtained to treat him for his mental health problems and his transsexualism. Detective Woods honored his promise and David Bortnick, Ph.D. was appointed.

Mr. Owen was arrested on May 29, 1984 by the Boca Raton Police Department. Detective Mark Woods was contacted because of his prior contacts with Mr. Owen in 1982. Detective Woods obtained permission from his lieutenant to initiate contact with Mr. Owen. It was during this police-initiated contact that

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15 Mr. Owen chose not to testify at the motion to suppress hearing premised on erroneous advice from Barry Krischer. Mr. Krischer informed Mr. Owen that because the police failed to record all interrogation sessions, this created a due process claim and that Mr. Owen's Fifth Amendment right would be violated if he was compelled to testify as to those communications that were not recorded. This Court found this argument to be without merit, Owen 596 So. 2d at 987, thus establishing Mr. Krischer's advice as erroneous and deprived Mr. Owen of his Sixth Amendment right to effective assistance. Additionally, Mr. Krischer rendered ineffective assistance of counsel when he failed to obtain a psychologist/psychiatrist to testify at the motion to suppress as it related to the coercion issue. See Carter v. State, 697 So. 2d 529 (Fla. 1st DCA 1997).

Detective Woods reminded Mr. Owen that, "I stuck my neck out for you in 1982 by recommending and filing the cases as I did and you burned me." Detective Woods asked Mr. Owen whether he still had the problems that were addressed in 1982 and Mr. Owen said yes.

Barry Krischer rendered ineffective assistance of counsel during the motion to suppress when he failed to pursue Mr. Owen's Fifth Amendment right to counsel was violated.

Mr. Owen was arrested on May 29, 1984 by the Boca Raton Police Department. Mr. Owen requested counsel when he was arrested for unrelated offenses; however, Sgt. Brady informed Mr. Owen that counsel could only be supplied by a judge and that this would not occur until his first appearance. Not only was this a misstatement of law, but it was contrary to Mr. Owen's Fifth Amendment right to be assisted by counsel during subsequent interrogations. Miranda, Edwards, Arizona v. Roberson, 486 U.S. 675 (1988).

Mr. Owen's first appearance was on May 31, 1984 where he requested and received appointment of counsel on case numbers 84-3459 CF A02 and 84-3460 A02. Owen, 596 So.2d at 987. Sgt. McCoy and an FBI Agent were present at the first appearance and were aware that Mr. Owen asserted and requested the appointment of counsel. Sgt. McCoy and Mr. Cavanaugh certainly knew that Mr. Owen was in custody. Traylor v. State, 596 So. 2d 957, 966, n. 17 (Fla. 1992). In Miranda the Court held, "if the individual indicates in any manner at any time prior to or during questioning that he wishes to remain silent or right to counsel,

the interrogation must cease." Id., 384 U.S. at 473-474 (emphasis added). The suspect's request for counsel must be clear enough to alert a reasonable police officer under the circumstances that the suspect is requesting an attorney. Davis v. United States, 114 S.Ct. 2350 (1994). The police officers are required to determine whether the suspect has ever requested counsel before initiating any questioning. Roberson.

Among the procedural safeguards established by Miranda is the right to cease questioning. 384 U.S. at 474. The determination of whether a suspect's right to cut off questioning was scrupulously honored requires a case-by-case analysis. U.S. v. Hernandez, 574 F. 2d 1362, 1369 (5th Cir. 1978).

There is no doubt that Mr. Owen invoked his right to counsel at his first appearance on case numbers 84-3459 CF A02 and 84-3460 CF A02. The Court understood Mr. Owen's request as unequivocal and appointed counsel to represent Mr. Owen. Owen, 596 So. 2d at 987. Since Sgt. McCoy and Mr. Cavanaugh were present, there can be no doubt that under the circumstances Mr. Owen was requesting an attorney. "Once a suspect invokes the Miranda right to counsel regarding one offense, he may not be re-approached regarding any offense unless counsel is present." Roberson (reaffirmed in McNeil v. Wisconsin, 501 U.S. 171 (1991).

All of these facts were available to Mr. Krischer. Mr. Owen informed Nancy Perez, an assistant public defender, that he requested an attorney upon arrest and was told by Sgt. Brady that the judge had to appoint one and that would not occur until first

appearance. This information was available to Mr. Krischer.

Barry Krischer rendered ineffective assistance of counsel during the motion to suppress as it relates to the attachment of the right to counsel on the two homicide cases at first appearance and by and through several other offenses to which counsel was appointed. The "offense specific" right to counsel on the Dover street burglary, case no. 84-3460, carried over to the two homicide cases as a "closely related", but uncharged crimes. See Brewer v. William, 97 S.Ct. 1232 (1977); Maine v. Moulton, 106 S.Ct. 477 (1985).

After Mr. Owen's arrest, Sgt. McCoy requested that Mr. Owen provide samples of his body hair, saliva and xerox copies of foot imprints. Sgt. McCoy also questioned Mr. Owen about the Dover Street burglary and the whereabouts of his tennis shoes. Mr. Owen signed a consent to search form for his apartment. Sgt. McCoy explained that all of this was needed for the investigations of all suspected offenses. The tennis shoes, which were recovered from the Dover Street burglary were compared to those impressions left at both homicide scenes. Further, both the tennis shoes and bicycle were tested for blood or trace evidence which would match the forensic evidence found at the scene of the homicides.

There is no doubt that the various law enforcement officials used the physical evidence obtained from the Dover Street burglary to further investigate the homicides and other uncharged

offenses. Thus, the evidence obtained from the Dover Street burglary is "inextricably intertwined" with both the homicides and other uncharged offenses. See United States v. Arnold, 106 F.3d 37, 41 (3rd Cir. 1997).

On June 21, 1984, Sgt. McCoy and Lt. Livingston initiated contact with Mr. Owen. Lt. Livingston informed Mr. Owen prior to any statement that, "You've been formally charged and arrested for first degree murder and burglary." (SR. 969-974). In Traylor, the Court has long recognized in our rules of procedure this right of impoverished defendants to court-appointed counseling commencing at the point in time when they are charged, either formally or informally, with a criminal act." Id. at 596 So.2d 969. In Mr. Owen's mind, he was formally charged and arrested for the Worden homicide. At this point, Mr. Owen was entitled to the assistance of counsel during the subsequent interrogation regarding the Worden homicide.

But for Barry Krischer's deficient performance during the pre-trial motion to suppress, it is more likely than not that the statements pertaining to the Worden homicide would have been suppressed. Smith, Traylor, DeAngelo.

ARGUMENT XI

THE BURDEN SHIFTING ISSUE.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Owen's proceedings. To the contrary, the court shifted the burden to Mr. Owen to prove whether he should live or die.

Mr. Owen's sentencing jury was specifically instructed that Mr. Owen bore the burden of proof on the issue of whether he should live or die (R. 4346).

The State's examination during voir dire and judicial instructions at Mr. Owen's capital trial required that the jury impose death unless mitigation was not only produced by Mr. Owen, but also unless Mr. Owen proved that the mitigation he provided outweighed and overcame the aggravation. The standard given to the jury violated both state and federal constitutional law.

ARGUMENT XII

THE CALDWELL V. MISSISSIPPI ISSUE.

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert denied, 109 S.Ct. 1353 (1989).

In Mr. Owen's case, as in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), at each stage, the jurors heard statements from the judge or prosecutor that diminished their sense of

responsibility for the awesome capital sentencing task that the law would call upon them to perform (R. 3917).

During the penalty phase, the jury was told it merely recommended a sentence to the judge, its recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first-degree murder.

The significant role of the jury in Florida's capital sentencing scheme was underscored by the United States Supreme Court in Espinosa v. Florida, 112 S.Ct. 2926. The improper comments and arguments provided to Mr. Owen's jurors were at least as egregious as those in Mann and went far beyond those condemned in Caldwell.

The Caldwell violations here had an effect on the jurors.

ARGUMENT XIII

THE INFLAMMATORY AND IMPROPER COMMENTS ISSUE.

The prosecutor urged the jurors during closing argument at both the guilt and penalty phases to sentence Mr. Owen to death on the basis of inflammatory, improper comments, facts not in evidence and other numerous impermissible factors. For example, during the guilt phase the prosecutor urged the jury to abdicate its responsibility:

> ... I, as an assistant state attorney, as a prosecutor, I don't convict anyone. You as the jury in this case don't convict anyone. The reason we are here today is because of what that man did on May the 29th of 1984. Don't let the defense put a burden on your shoulders that simply is not yours. Your returning a verdict of guilty as charged in this case is nothing more and nothing less

> than an affirmation, a solemnization, a formal statement of the truth.

(R. 3917) (emphasis added).

Further, the prosecutor's inflammatory argument left the jury with the impression that there was no adequate sentence for Mr. Owen and that death was the most the state could do and therefore the only permissible result. The only purpose of the prosecutor's argument was to evoke an impermissible emotional response from the jury. See Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991)

The cumulative effect of this closing argument was to "improperly appeal to the jury's passions and prejudices." Id. Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974).

ARGUMENT XIV

THE INTERVIEWING JURORS ISSUE.

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial.

The prohibition violates equal protection in that a defendant who is not in custody can freely approach jurors to determine if juror misconduct occurred when an incarcerated defendant is precluded from doing so.

ARGUMENT XV

THE CHANGE OF VENUE ISSUE.

When he was arrested in May, 1984, Mr. Owen was charged with two first-degree murder cases and nine felony charges. The publicity was extensive. Between his arrest in May, 1984 and trial in February, 1986, scores of newspaper articles and television and radio broadcasts carried stories about Mr. Owen and his victims.

The father of victim Karen Slattery was interviewed by every local newspaper in the area. Mr. Slattery also appeared before the Jupiter City Commission and the Palm Beach County Commission. He publicly debated the death penalty with an assistant public defender (R. 196).

Due to the extensive publicity, defense counsel filed a motion for individual private voir dire (R. 4545-47) and a motion to waive Mr. Owen's presence to avoid excessive publicity each time he appeared in court. (R. 4595-95).

Defense counsel moved for a change of venue, citing extensive publicity in Palm Beach County, including details of Mr. Owen's confessions in the press. The trial court denied the motion (R. 1655).

Mr. Owen's detailed confession was featured prominently in the media, as were the names of <u>both</u> homicide victims.

It simply cannot be said that Mr. Owen's trial comported with the mandate or spirit of the constitutional guarantee of a "fair tribunal." To assert that Mr. Owen's jury was "impartial"

is to render due process "but a hollow formality." Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

It is clear that the prejudice pervading the community "enter[ed] the jury box", Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991), and created prejudice. In this context, jurors' statements that they would set aside pretrial knowledge of the case and their feelings about the victims or their family are not dispositive.

ARGUMENT XVI

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme denies Mr. Owen his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied.

Execution by electrocution imposes physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to the arbitrary and

capricious imposition of the death penalty, and is thus violative of the Eighth Amendment.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances envisioned in Proffitt v. Florida, 428 U.S. 242 (1976).

The Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT XVII

THE UNDULY PREJUDICIAL CRIME SCENE VIDEO ISSUE.

The prosecution introduced into evidence a video tape of the crime scene. Defense counsel objected to the showing of the video tape, saying it was inflammatory and would be cumulative to any photos the state intended to introduce (R. 2868). To the extent that defense counsel failed to effectively argue this issue, they rendered deficient performance.

During trial, the state showed the jury the video tape of the crime scene through Sgt. Livingston (R. 2939-2962). The gruesome video included shots of the victim, her head, and blood splatters throughout the room.

During the medical examiner's testimony, the state attempted to introduce photographs of the victim. Defense counsel objected to the use of the photographs stating that they were cumulative of what the jury of what the jury had already seen (R. 3058). The trial court ruled in favor of the state (R. 3060).

The use of video tape, as with photographs of a crime scene, can be admitted into evidence when relevant to any matter that is in dispute, such as when it establishes the element of intent, or the circumstances of death. Adams v. State, 412 So. 2d 850, 854 (Fla. 1982).

Use of this video tape, which had no probative value, denied Mr. Owen a fair trial in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT XVIII

THE FUNDAMENTAL ERROR ISSUE.

Mr. Owen contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). The process failed Mr. Owen because of the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. The cumulative effects of harmless error must be carefully scrutinized in capital cases. State v. Gunsby, 670 So.2d 920 (Fla. 1996).

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Appellant respectfully submits that he is entitled to relief from his unconstitutional death sentences, to a full and fair evidentiary hearing, and to all other relief that the Court deems proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Ms. Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, on January 19, 1999.

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