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**

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

MR. OWEN WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS BECAUSE HE WAS DENIED ACCESS TO FILES AND RECORDS, HIS TRIAL ATTORNEY FILES COULD NOT BE LOCATED, AND THE COURT CREATED AN UNCONSTITUTIONAL CONDITION WHICH PRECLUDED MR. OWEN FROM PRESENTING EVIDENCE AT HIS EVIDENTIARY HEARING ON HIS POST-CONVICTION 3.850 MOTION IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Owen did not receive a full and fair evidentiary hearing, and his right to due process was violated. The procedural posture of Mr. Owen's two pending capital cases placed him in a precocious position because he was confronted with a Hobson's choice.[1]

He could either proceed with the hearing on his postconviction 3.850 motion and fully waive the attorney-client privilege pertaining to the upcoming retrial of the Slattery case or he could refuse to present evidence which would prevent such a waiver, and have his postconviction motion denied even though he was exercising his rights as to both cases. Thus, he would be unable to pursue postconviction relief in this case, but he would maintain his attorney-client privilege as to the upcoming trial. This was the choice! Give up one right to secure another all in the name of expediency!

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

The appellee's answer to this issue reveals such a dichotomy that it must be exhibited to demonstrate the emptiness of their response. The State's position is, on the one-hand, allow us the right to utilize several years to obtain a ruling, so we can use Mr. Owens' confession in a retrial, but deny him the right to have additional time to pursue his postconviction remedies. (The necessary time to accomplish that protection would have been a far cry from the years consumed by the State in securing it's ruling).

On page 25, the appellee argues that there was no guarantee that the waiver would ever materialize as it related to the Slattery case, yet, the appellee points out on page 15 of his argument that the defendant was convicted in the retrial of Slattery. Obviously, this could have been continued for resolution, and not as appellee suggests, of it never taking place or having a time certain. The trial court could have stayed the proceedings and this issue would not be at bar.

Mr. Owen was granted a protective order, however it would not have precluded the State from breaching the attorney client privilege because they did it in the limited questioning that the court allowed with Mr. Krischer when the court allowed them to ask about a psychiatric report that had no relevance to the Worden case.

The appellee insists that Mr. Owen unequivocally understood the ramifications of his choice to stop presenting evidence and allow the court to rule against him on his postconviction motion.

On page 10, the appellee states that "Owen and his counsel told the court that he was well aware of the ramifications of his decision to conclude the hearing", and this is incorrect. The defendant never stated he was aware of the ramifications. In fact, CCRC stated, "I am not abandoning any claims. I am not waiving any claims." (PRC Vol. 28, 882-919). The defendant stated upon inquiry from the court that, "Well I understand what the court has just said. I don't understand the procedure". (PCR Vol. 28, 911-912). CCRC also requested that the court inquire of Mr. Owen about dismissing the motion. (PRC Vol. 28, 912).

Appellee relies heavily upon the case of Scott v. State, 717 So. 2d 908 (Fla. 1998), for their conclusion. However, a careful reading of that case indicates that factually it has a different holding. For instance, the court in that case conducted a hearing in the absence of the defendant because his counsel's actions had caused him not to be present for the hearing. On appeal, this court held that a denial of a continuance was not unreasonable, and because the issue to be decided was not dependent upon the defendant's input there was no harm.

In the instant case the facts are totally different and distinguishable. Mr. Owen was trying to protect himself from revelation of evidence that would convict him in another capital case, and he was not attempting to create delay for any purpose other than protecting his rights. Further, the breach of attorney client privilege could not be said to be harmless since

his life was at risk. The appellee's argument is that Mr. Owen must bear the consequences of his own actions while disregarding procedural safeguards that are fundamental constitutional values.

The appellee also argues on pages 20 and 21, that there is no Simmons claim since there was no harm; however, that flies in the face of Simmons which stands for the proposition that the trial court should not allow irreparable harm to occur under the guise of a waiver. Simmons v. United States, 390 U.S. 377 (1968).

Appellee on page 25 relies on the fact that the trial court has discretion to refuse a continuance where a defendant has acted in bad faith and been dilatory. Appellant takes no issue with this premise, however the case cited by the appellee, United States v. Gates, 557 F. 2d 1086 (5th Cir. 1977), is distinguishable. In Gates, the defendant was an attorney who repeatedly assured the court that he was going to secure an attorney to represent him and months later at the time of trial still did not have counsel. The court said it could conclude that he was engaged in delay tactics and denied a continuance, which was upheld. Certainly this factual setting has no application to the instant case, and it does not bolster appellees' argument.

Appellee asserts on page 23, that Mr. Owen's actions were a veiled attempt to delay since the Slattery case was at least a year away from trial. Three years of that delay was attributable

to the State for its persistence in securing a ruling which would allow use of Mr. Owen's statements in the retrial.

Mr. Owen was faced with being denied due process in postconviction proceedings (Worden) or waiving his attorney-client privilege in the pending retrial of (Slattery). It is recognized that a defendant with two (2) pending capital cases is in an untenable position at the onset; however, a defendant should not have to choose his rights in one case over the other since it would violate fundamental fairness and the constitutional guarantees which apply equally to both cases. Clearly, Mr. Owen did not receive due process when the judge prevented him from litigating his Rule 3.850 motion.

Mr. Owen had to challenge the Worden conviction within the time frames imposed by the Fla. Rules of Crim. Procedure. Mr. Owen should not be prejudiced and barred from challenging the Worden conviction because he also desired to assert his rights the Slattery case. See, e.g., Simmons, 390 U.S. at 394.

Mr. Owen demanded that the confidences relating to his pending trial case not be disclosed. See Fla. Stat. § 90.502 (1998). Despite his assertion of privilege, Judge Burk improperly ordered Mr. Owen's former attorneys to disclose attorney-client privileged information (T. 864-865); id.

In order to prove the allegations in his Rule 3.850 motion and attain relief, Mr. Owen had to delve into information that was protected by his assertion of the attorney-client privilege

in the trial case.[2] While Lecroy holds that the attorney client privilege is waived by the filing of a postconviction motion, the facts are readily distinguishable.

In Lecroy there was no pending trial in a capital case nor was the attorney who was being questioned in the postconviction proceeding the same one in the pending case that also had to worry about attorney client privilege while testifying. Therefore, waiver was not crucial, such as in the instant cause. Thus, this is a case of first impression, and it must be reviewed carefully. Here, Mr. Owen was prevented from proving his allegations in his postconviction proceedings in order to preserve and preclude harm to himself in the other case. The posture of Mr. Owen's capital cases effectively created an **unconstitutional condition.**

The lower court imposed a substantial penalty on Mr. Owen by forcing him to choose. Clearly, the doctrine of unconstitutional condition applies where an individual seeks to preserve 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).(emphasis added)

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

It became obvious at the evidentiary hearing that the Rule 3.850 motion could not be properly addressed after Mr. Owen presented the testimony of Mr. Barry Krischer, Mr. Owen's former trial attorney.

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).

However, rather than stay the proceedings, the court forced counsel to proceed and even required that Mr. Krischer reveal attorney-client confidences, even though Mr. Krischer testified that he could not answer the questions (T. 855-856).

After Judge Burk made it clear that he was not going to protect Mr. Owen's attorney-client privilege as to the pending capital case, postconviction counsel objected, and she requested that she be allowed to discuss the revised ruling with Mr. Owen. Judge Burk then 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).

Mr. Owen received approximately four thousand documents the weekend before the evidentiary hearing, but Judge Burk refused to allow him time to review the records and amend his Rule 3.850 motion (PC-R. 1628). However, the State had asserted an exemption and refused to allow access to all the files, and they only provided those which had been given in discovery to trial counsel in the Slattery case. Thus, there was no reason to have filed a motion to get the records as suggested by the appellee on page 27 where they state “Owen never pursued the matter”.

While the appellant accepts the majority of the appellee’s additions to the statement of facts, there are some discrepancies which must be corrected. On page 3, the appellee makes a statement that “Owen filed a final amended motion for postconviction relief on September 23, 1997" (PCR Vol., VIII 1379-1546), however this is incorrect because a 4th motion was filed on December 8, 1997 which was premised upon a pro-se motion filed by the defendant at the Huff hearing held on November 5, 1997. (PCR Vol. IX, 1646-1845). The court denied the pro-se motions, but allowed CCRC to amend the 3rd amended motion to include claims raised by the pro-se motions. Additionally, the court stated, “ I will give you a Huff hearing when we come back to court on December 8, 1997". (PCR Vol.27, 674-751).

The State should not be allowed to hide behind the Slattery case in refusing to produce documents while simultaneously objecting to Mr. Owen relying upon the same case to support his

invocation of the attorney-client privilege. 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 KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO PURSUE POSTCONVICTION RELIEF, AND UNDERSTOOD THE COURT'S OFFER OF A "HOBSONS" CHOICE.

Mr. Owen's Rule 3.850 motion was denied by the lower court because he would not proceed and waive his rights. (PC-R. 1862; T. 914).

The appellee on pages 34 suggests that Owen chose not to question evidence in support of his claims, but ignores the reality of the trial court's ruling.

In Durocher v. Singletary, this Court held, "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, 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 ...counsel and proceedings." Id.

A waiver of counsel requires that the accused know, and the court must ensure that he knows, the full ramifications of such a waiver. See Faretta v. California, 422 U.S. 806, 836 (1975). This same principle would apply to a waiver of the attorney client privilege where information would be revealed that would

cause irreparable harm. The lower court should have conducted an adequate Faretta inquiry in Mr. Owen's case as to his alleged waiver of rights in the postconviction proceeding.

The record is devoid of clear, unequivocal, and unambiguous language showing that Mr. Owen's alleged waiver has been established, and that it was done intelligently. United States v. Rodriguez, 982 F. 2d 474 (11th Cir. 1993).

An exchange occurred with the court that fails the Farretta standard of ensuring that the defendant understood the waiver he allegedly made relating to his Rule 3.850 motion in the Worden case. Postconviction counsel requested that Judge Burk inquire further of Mr. Owen (T. 912), but Judge Burk refused. The record does not demonstrate Mr. Owen knowingly, intelligently and voluntarily waived his rights.

In the case of Martin v. State, 515 So. 2d 185 (Fla. 1987), the court held that an attorney could waive a claim, but unless the accused waived the claim then it is not waived. The situation is exactly the same here. Mr. Owen did not waive and the record is clear, he said, "I understand what your saying, but I don't understand the procedure". (PCR Vol. 28, 911-912).

The trial court never asked anything except did Mr. Owen understand the ramifications of his decision even though it was requested by counsel. Intimately, it appears counsel waived in some fashion, but not Mr. Owen which is evidenced by his own statements.

ARGUMENT III

MR. OWEN WAS DENIED A FULL AND FAIR HEARING ON THE ISSUES OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING BOTH THE GUILT AND PENALTY PHASES OF HIS TRIAL, AND ON THE CONFLICT OF INTEREST ISSUES OF TRIAL COUNSEL.

Appellee has addressed the issues in this claim in a cursory fashion by alluding to Mr. Owen not presenting evidence to support his claims herein. They have failed to address the real issues of ineffective counsel.

The appellee ignores the attempt to protect client confidentiality, and the limited purpose of Mr. Krischer testifying for conflict of interest issues.

Mr. Owen did not chose not to put on evidence as stated by the appellee on page 34, on the contrary he was forced by the court's rulings not to do so in order to protect his rights as they related to the Slattery case.

ARGUMENT AS TO REMAINING CLAIMS

The appellee argues that as to claims 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 that they are procedurally barred for one reason or another. The appellant will therefore not present further argument as to these claims beyond the initial brief except to state that not all of the claims are procedurally barred.

CERTIFICATE FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant, which has been done in **Font Courier 12**, has been furnished by United States Mail, first-class, to all counsel of record on August 6, 1999.

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