IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 06-2104

DUANE E. OWEN
Appellant,

v.

STATE OF FLORIDA,
Appellee.

DIRECT APPEAL

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Owen's postconviction motion filed under Florida Rule of Criminal Procedure 3.851 and 3.850.

The record on appeal is comprised of nine (9) volumes, and two (2) supplemental volumes, initially compiled by the clerk, successively paginated, beginning with page one. References to the record include volume and page number and are of the form, e.g., (Vol. I PCR 123). References to the supplemental record are designated as Supp. PCR. References to the record on appeal from Mr. Owen's retrial appeal of his convictions and sentences are of the form, e.g., (Vol. I R. 123).

Duane Owen, the Appellant now before this Court is referred to as such or by his proper name. Mr. Owen was represented by Carey Haughwout and Larry Donald Murrell. They are sometimes referred to by name or as trial counsel, either separately or together. The phrase "evidentiary hearing" or simply "hearing" refers to the hearing conducted on Mr. Owen's motion for postconviction relief unless otherwise specified. The use of the term trial court refers to the court in which presided over Mr. Owen's retrial. The use of lower court refers to the court which presided over the postconviction proceedings.

REQUEST FOR ORAL ARGUMENT

Mr. Owen has been sentenced to death. The resolution of the issues involved in this appeal will determine whether he lives or dies. Oral argument would allow the full development of the issues before this Court. Accordingly, Mr. Owen requests oral argument.

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STATEMENT OF THE CASE

This is an appeal of the order from the Circuit Court, in and for Palm Beach County, Florida, denying Duane Owen's Motion to Vacate Judgment of Convictions and Death Sentences.

Mr. Owen was charged by indictment with first degree murder, sexual battery and burglary. After a jury trial Mr. Owen was convicted of first degree murder, attempted sexual battery and burglary and sentenced to death.

Prior to the first trial, counsel filed and litigated a motion to suppress statements by Mr. Owen about this case, the Worden homicide, and a number of non-capital cases. The trial court ruled against Mr. Owen and his statements made to law enforcement were admitted into evidence. On direct appeal, this Court reversed Mr. Owen's conviction and sentence and remanded for the retrial that is the subject of this appeal. *Owen v. State*, 560 So. 2d 207 (Fla. 1990). The Court held that Mr. Owen's post-Miranda statements to law enforcement, "I'd rather not talk about it," and "I don't want to talk about it," were "at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified." *Id*. at 211.

Before Mr. Owen was retried, the United States Supreme Court issued *Davis v. United States*, 512 U.S. 452 (1994), holding that an equivocal invocation of the right to an attorney

during custodial interrogation did not require police to stop questioning a suspect. The trial court refused to revisit the issue of Mr. Owen's confession in light of *Davis* despite the urging of the State.

The State filed a petition for a writ of certiorari in the Fourth District Court of Appeal which denied the petition because the suppression of the confession was the law of the case. The district court, however, certified the question of the applicability of *Davis* to the admissibility of confessions in light of previous state decisions. *State v. Owen*, 654 So. 2d 200 (Fla. 4th DCA 1995). This Court accepted the question and found that its prior decisions addressing the right to remain silent "were predicated on [the Court's] understanding of federal law that even an equivocal invocation of *Miranda* rights required the police to terminate the interrogation or clarify the suspect's wishes." *State v. Owen*, 696 So. 2d 715, 718-19 (Fla. 1997). This Court held that the *Davis* rationale applied to invocations of the right to remain silent and stated that "police in Florida need not ask clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights." *Id.* at 718.

For purposes of retrial, this Court stated, "with respect

to this issue, Owen stands in the same position as any other defendant who has been charged with murder but has not yet been tried. Just as it would be in the case of any other defendant, the admissibility of Owen's confession in his new trial will be subject to the *Davis* rationale that [the Court] adopt[ed] in this opinion." *Id*.

At retrial, Mr. Owen was represented by Carey Haughwout and Donnie Murrell. The prosecutors were A. Wayne Chalu and Christopher Moody, both employed by the Thirteenth Judicial Circuit State Attorney's Office. That State Attorney's Office was appointed because Mr. Owen's attorney from the first trial was the elected State Attorney for Palm Beach County.

Prior to the retrial that is the subject of these postconviction proceedings, trial counsel filed, (Vol. 16 R. 3019), and argued a new motion to suppress Mr. Owen's statements to law enforcement. (Vol. 28-31). The trial court denied the motion to suppress. (Vol. 32 R. 1333).

Mr. Owen filed a Notice of Intent to Rely on Insanity. (Vol. 17 R.3263-64). Mr. Owen pursued an insanity defense during the guilt phase and called two mental health professionals, Dr. Fredrick Berlin, (Vol. 55 R. 5389-5435), and Dr. Faye Sultan (Vol. 56 R. 5573-5661). Both opined that Mr. Owen was insane at the time of the offense. The jury rejected the insanity defense. Mr. Owen was convicted of first-degree murder, attempted sexual

battery with a deadly weapon or force likely to cause serious personal injury and armed burglary of a dwelling. *See* (Vol. 60 R.6113-14).

At the penalty phase, Mr. Owen called Dr. Berlin and Dr. Sultan as witnesses again. (Vol. 63 R. 6546-6587, 6627-6692). Additionally, Mr. Owen called neuropsychologist Dr. Barry Crown as a witness. (Vol. 62 R. 6486-6542). The jury recommended a death sentence, but the recommendation was not unanimous. (Vol. 65 R.6994). After a *Spencer* hearing the Circuit Court imposed a death sentence. (Vol. 65 R. 7023).

On direct appeal following retrial, this Court affirmed the trial court's denial of the motion to suppress. This Court found that "[b]ecause we have, on numerous occasions, deemed Owen's responses to be equivocal, the trial court properly rejected Owen's motion to suppress based on this claim as well." *Owen v. State*, 862 So. 2d 687, 697 (Fla. 2003). Mr. Owen petitioned the United States Supreme Court for a writ of certiorari. The Court denied Mr. Owen's Petition. *Owen v. Florida,* 543 U.S. 986 (2004).

On December 29, 2003, Mr. Owen entered postconviction following this Court's issuance of a mandate and appointing of CCRC-South. (Vol. I Supp. PCR. 2-3). On March 9, 2004, CCRC-South filed a motion to withdraw and appoint CCRC-M, which the lower court granted on March 16, 2004. (Vol. I Supp. PCR. 70-

83). The records process in this case was extraordinarily complicated and is discussed under Argument I.

On October 25, 2005, Mr. Owen sent a verified Motion to Vacate Judgment of Conviction and Death Sentence by Federal Express. (Vol. I PCR. 75). By order signed November 3, 2005, and docketed by the clerk on November 8, 2005, the lower court ordered the State to respond to Mr. Owen's postconviction motion. (Vol. I PCR. 80). The State responded on December 29, 2005, (Vol. I PCR. 89-138), and also filed record excerpts on February 10, 2006. (Vol. I PCR. 141-200).

The lower court never held any status conferences as required by Rule 3.851(c)(2). Before holding even a case management conference, also required under the Rule, the lower court issued an order summarily denying Mr. Owen an evidentiary hearing in part and granting an evidentiary hearing in part. (Vol. II PCR. 299-300).

The order, rendered on February 24, 2006, set an evidentiary hearing on the claims which were not denied for March 31, 2006. (Vol. II PCR. 300). The court also issued an Order of Transport and Order Setting Hearing for the March 31, 2006 date. (Vol. II PCR. 301). Mr. Owen filed a Motion for Rehearing on Order Denying Hearing in Part. (Vol. II PCR. 304-06). The Motion addressed the impropriety of the order setting an evidentiary hearing without holding case management

conference. (Vol. II PCR. 304-06). The Motion argued further that under Rule 3.851 Mr. Owen was entitled to a hearing on all claims for which he designated as requiring a factual determination. (Vol. II PCR. 304-06). The State also filed its own Motion for Reconsideration. (Vol. II PCR. 302-03).

The lower court vacated the February 24, 2006 order. (Vol. II PCR. 307). In this order the court set a case management conference for March 31, 2006. (Vol. II PCR. 307). At the case management conference the court heard arguments in favor and against holding an evidentiary hearing on each of Mr. Owen's claims. Mr. Owen's position was that he was entitled to what Florida Rule of Criminal Procedure 3.851(f)(A)(i) states he is entitled to - - "an evidentiary hearing . . .on the claims listed by [Mr. Owen] as requiring factual development." (Vol. VIII PCR. 1-49). The State took the contrary position on some of the claims and agreed to a hearing on others.

On May 18, 2006 Mr. Owen filed an Amended Motion to Vacate Judgment of Conviction and Death Sentence. (Vol. II PCR.315-391). The State responded. (Vol. II PCR. 392-400). On June 1 2006, the lower court held the second case management conference. (Vol. VIII PCR. 50-87). Once again Mr. Owen argued that under the Rule he was entitled to a hearing on each claim he designated as requiring a factual determination.

The lower court denied Mr. Owen an evidentiary hearing on

the claims which he amended and supplemented. *See* (Vol. VIII PCR. 82). The court set an evidentiary hearing for one day, August 11, 2006, despite Mr. Owen's request for more time to fully present the witnesses on even the limited claims for which he did receive a hearing. *See* (Vol. VIII PCR. 84).

At the evidentiary hearing, Mr. Owen called a number of witnesses that were peers of Mr. Owen during his developmental years in Indiana and Michigan. These witnesses testified to have personally seen Mr. Owen use drugs and alcohol as a child. In varying degrees, each of these witnesses detailed the pervasiveness, effect and devastation of the drugs and alcohol on Mr. Owen as a child. *See* (Vol. IX PCR.151-172, 253-276).

Mr. Owen called two witnesses who were employed by the VFW Boy's home when Mr. Owen was forced to live there following the death of both his parents during his childhood. Each generally recounted the VFW Home's environment, with specifics about the drug problem the Home suffered under. *See* (Vol. IX PCR. 133-51, 173-182). Fred Morlock was able to offer even greater insight having furthered his education since the time he interacted with Mr. Owen and the Home.

In further support of the claims for which he was granted a hearing Mr. Owen called two mental health professionals; Dr. Henry Dee and Heidi Hanlon-Guerra. Dr. Dee was qualified in neuropsychology and testified about the effects of drugs and

alcohol on Mr. Owen in combination with his numerous other mental infirmities. *See* (Vol. IX PCR. 95-133). Ms. Hanlon was accepted as an expert under her professional designations. She provided insight to the particulars of Mr. Owen's substance abuse and its effect on his development and later actions. *See* (Vol. IX PCR. 224-44)

Lastly, Mr. Owen called his lead trial attorney Carey Haughwout, and his lead investigator, Hilary Sheenan. (Vol. IX PCR. 183-224, 245-47). Both testified on a number of matters at issue in the evidentiary hearing. Mr. Owen rested. The State then called no witnesses.

Both parties tendered written closing arguments and supplemental closing arguments. (Vol III-IV PCR. 443-96,497-569, 573-648, 748-771). On September 22, 2006, the court rendered an order denying Mr. Owen postconviction relief. (Vol. IV PCR.684) This appeal follows.

SUMMARY OF THE ARGUMENTS

Mr. Owen was entitled to a hearing on each of the claims he designated as requiring a factual determination. The lower court illegally denied Mr. Owen an evidentiary hearing. Mr. Owen was also entitled to relief on the claims which Mr. Owen was given a hearing.

At the evidentiary hearing Mr. Owen proved that he was denied the effective assistance of counsel during jury

selection, guilt phase and penalty phase. This Court should reverse for either the full evidentiary hearing he was denied or the fair trial he never received.

STANDARD OF REVIEW

This Court should apply de novo review as per *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000).

ARGUMENT I

MR. OWEN WAS ENTITLED TO HEARING ON THE CLAIMS WHICH HE DESIGNATED AS REQUIRING A FACTUAL DETERMINATION. THE LOWER COURT'S DENIAL OF AN EVIDENTIARY HEARING AND RELIEFIN VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES COUNSTITUTION AND DENIED MR. OWEN'S RIGHT TO DUE PROCESS, HABEAS CORPUS AND ACCESS THE COURTS UNDER FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

PART I:

A. INTRODUCTION

In 2001, Florida Rule of Criminal Procedure 3.851 was revised and became effective. In 2006 the lower court, with not even a remote claim of authority, revoked the newly revised Rule and turned the calendar back to before 2001.

Mr. Owen entered postconviction in 2003 and accordingly filed a motion under the effective Rule in place at the time. Mr. Owen fully complied with the Rule and filed a motion which met all of the pleading requirements contained in Rule 3.851 (e)(1). In other words, Mr. Owen did exactly what the Rule

required, when it was required. Mr. Owen, however, was the only party to this litigation which fully complied with Rule 3.851 and suffered under the Rule's burdens without being afforded any of its benefits.

As an initial matter it is important to consider what the apparent purpose of the 2001 revision of Rule 3.851 was not; it was not an attempt to make postconviction more cumbersome. It was not an attempt to make it easier for the circuit courts to dispense with capital postconviction claims, nor to deny those with claims of constitutional violation access to the courts of this State or this Nation. And while the commentary mentions "the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process," the commentary gives no indication that the drafters chose expediency over the remedy of constitutional violations in capital cases. *See* COMMENTARY Florida Rule of Criminal Procedure 3.851

This argument describes how the postconviction process worked in Mr. Owen's case. The description should lead this Court to find that it did not work very well at all. Mr. Owen raised substantive constitutional violations, each discussed under this argument, each of which required a remedy which the lower court's denial of an evidentiary hearing in violation of Rule 3.851 foreclosed for Mr. Owen. This Court should remand Mr.

Owen's case for the hearing that he was entitled so that he may obtain the remedy which justice requires.

B. MR. OWEN ENTERS POSTCONVICTION

Mr. Owen appealed the judgment of conviction and death sentence in this case. This Court affirmed and denied rehearing on December 19, 2003. *Owen v. State*, 862 So. 2d 687(Fla. 2003). Mr. Owen timely sought a Writ of Certiorari in the United States Supreme Court. This Court appointed CCRC-South on December 19, 2003. (Vol. I Supp. PCR. 2-3). CCRC-South could not file the Petition for Writ of Certiorari and Mr. Owen's successor direct appellate counsel refused to do so. With no counsel to file a Petition before the highest Court, Mr. Owen filed his own petition representing himself until later when the United States Supreme Court appointed Mr. Owen counsel before that Court.

Meanwhile the records process of Rule 3.852 was underway. A number of agencies submitted records to the repository. *See* (Vol. I Supp. PCR. 187). With the noted exception of the State Attorney's Office most of the agencies claimed erroneous and improper exemptions under to the disclosure required under Rule 3.852. In order to review pretty much any records at all Mr. Owen was forced to file a Motion For In Camera Inspection and to Unseal Records Claimed to be Exempt. *See* (Vol. II Supp. PCR. 197-224).

By now the case had been transferred to Judge Krista Marx.

Mr. Owen needed records and he needed a judge to rule on his motion for in camera inspection. Effectively, however, Mr. Owen had no judge because Judge Marx had not received the required training to be death qualified. As a result, and with no Judge to hold the required status conferences required by Rule 3.851, on March 31, 2005 Mr. Owen filed a motion to transfer the case to a death qualified judge. (Vol. Supp. PCR. 240-42).

The Chief Judge of the Circuit appointed Judge Lindsey to hear Mr. Owen's Motion for In Camera Inspection. (Vol. II Supp. PCR. 243). On April 7, 2005 the court ordered the records sent to the clerk of the Court. (Vol. II Supp. PCR. 260-295). On July 22, 2005, the court granted Mr. Owen access to all of the records the various agencies claimed were exempt. (Vol. II Supp. PCR. 299-300).

CCRC-M sent investigators to the clerk's office to copy the records that were disclosed. After a comparison of the records disclosed and the records requested it was apparent that the court had not reviewed and disclosed all of the files. As Mr. Owen's state and federal time elapsed he filed another motion on August 11, 2005, for disclosure of the remaining, unreviewed boxes. (Vol. II Supp. PCR. 302-06).

Mr. Owen needed to file a postconviction motion to meet the State deadline for filing a motion for postconviction and stop the federal time from elapsing entirely. On October 25, 2005

Mr. Owen sent a verified motion to the clerk of the circuit court by overnight federal express. A hurricane hit the Palm Beach area closing the clerk's office and Mr. Owen's motion was rerouted through Memphis before the Clerk's Office finally received the motion on October 31, 2005.

On the same date that the clerk's office recorded the filing of Mr. Owen's Motion, October 31, 2005, the lower court, now with Judge Marx qualified and back on the case, issued an order allowing Mr. Owen to inspect and copy the remaining records. (Vol. I PCR. 76-79). CCRC-M again went to the clerk's office and copied the remaining records.

C. THE LOWER COURT DENIES CLAIMS WITHOUT A CASE MANAGEMENT CONFERENCE AND SETS AN EVIDENTIARY HEARING

On November 8, 2005, the lower court ordered the State to respond to Mr. Owen's postconviction motion. (Vol. I PCR. 80). The court next issued an order, on February 24, 2006, denying Mr. Owen's motion in part and granting a hearing on the remainder of his claims. (Vol. II PCR. 299). The court set the hearing for March 31, 2006. (Vol. II PCR.300). The lower court also ordered that Mr. Owen be transported to the Palm Beach County Jail for the hearing. (Vol. II PCR. 301).

Mr. Owen immediately filed a motion for rehearing. (Vol. II PCR. 304-06). The State also filed a motion for rehearing. (Vol. II PCR. 302-03). Mr. Owen's motion for rehearing argued

first, that at the very least, Rule 3.851 required a case management hearing to be held before the lower court set a hearing. (Vol. II PCR. 304-06). Additionally the motion argued setting a hearing with little more than a month to prepare and obtain the presence of Mr. Owen's out of state witnesses was prejudicial to Mr. Owen. (Vol. II PCR. 304-06).

Most importantly, Mr. Owen's rehearing motion argued that he was entitled to a hearing on all of the claims that he designated as requiring an evidentiary hearing as explicitly required by Rule 3.851 and supported by the Rule's commentary. (Vol. II PCR. 304-06). On March 9, 2006, the lower court vacated the previous order denying Mr. Owen's motion in part and setting a hearing. (Vol. II PCR. 307). The lower court set a case management conference to be held on March 31, 2006.

D. THE CASE MANAGEMENT CONFERENCES AND THE DENIAL OF MR. OWEN'S RIGHT TO A HEARING

At the first case management, counsel for Mr. Owen argued for an evidentiary hearing on all of the claims Mr. Owen designated in his postconviction motion as requiring factual determinations. (Vol. VIII PCR. 1-49). This was each of Mr. Owen's claims. The lower court indicated which claims would be denied and allowed Mr. Owen to amend the motion to overcome the lower court's denial of a hearing. On April 3, 2006, the lower court issued a written order. (Vol. II PCR. 314). The written

order memorialized that Mr. Owen was granted an evidentiary hearing on Claim II, part of Claim III, and Claim IV. The order denied an evidentiary hearing on the rest of the motion.

E. MR. OWEN WAS ENTITLED TO A HEARING ON ALL CLAIMS DESIGNATED AS REQUIRING A FACTUAL DETERMINATION UNDER RULE 3.851.

The revision of Rule 3.851 became effective on October 1, 2001. At issue here and as the commentary stated:

> Most significantly, [new subdivision (f)] requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. [This] Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims which will avoid this cause of delay.

In *Allen v. Butterworth*, this Court stated:

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in postconviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal there from takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system.

756 So.2d 52, 67 (Fla. 2000).

Reflecting this Court's concerns expressed in both the commentary to Rule 3.851 and *Allen*, Rule 3.851(5)(A)as effective on October 31, 2001 states in relevant part: "**At the case management conference, the trial court shall schedule an evidentiary hearing, to be held within 90 days, on claims listed by the defendant as requiring a factual determination . . ..**" Fla. R. Cr. Pro. 3.851(5)(A)(i)(emphasis added).

Based on the language of Rule 3.851 and the Rule's commentary it could not be clearer -- the court should have granted Mr. Owen an evidentiary hearing on all claims listed by Mr. Owen as requiring an evidentiary hearing. This was all of Mr. Owen's claims. Accordingly, this Court should reverse the lower court's summary denial of these claims and remand for the evidentiary hearing which the rule requires.

F. THE LOWER COURT DID NOT CURE THE DENIAL OF MR. OWEN'S RIGHT TO AN EVIDENTIARY HEARING ON THE DENIED CLAIMS BY ALLOWING AMENDMENT.

The lower court allowed Mr. Owen to amend the motion. (Vol. II PCR. 314). This did not cure the lower court's error in denying Mr. Owen a hearing and indeed compounded the prejudice that Mr. Owen suffered by the lower court's defiant refusal to follow this Court's rules.

In theory, all of the participants in the postconviction process are required to follow the rules. In practice it is only

defendants such as Mr. Owen who suffer consequences and may indeed pay with their life for not following the rules. For instance, had Mr. Owen not raised a claim or had he filed his motion a day late, Mr. Owen would be without a remedy for any real constitutional violation he suffered. With this reality hovering over Mr. Owen's seeking of postconviction relief the lower court's failure to follow this Court's rules becomes even more egregious.

As the only party under any consequences, it is important for this Court to consider the strictures under which Mr. Owen was forced to proceed in postconviction. Initially, because the then appointed Office of the Capital Collateral Regional Counsel--South was prohibited by statute from filing a Petition for a Writ of Certiorari and Mr. Owen's direct appeal counsel refused to file one, Mr. Owen filed his own. Had Mr. Owen not done so, and done so within the United States Supreme Court's time frame, the time for seeking state or federal relief would have started running for Mr. Owen. Failure to meet the Rule's time limits for seeking either state or federal relief would mean that under the respective rules Mr. Owen would be without a remedy.

CCRC-Middle was appointed. (Vol. I Supp. PCR. 82-83). CCRC-Middle reviewed the records. Effective with Rule 3.851 was Rule 3.852. This rule provides procedures for capital sentenced

defendants such as Mr. Owen to obtain records for postconviction. With those mechanisms, there are also time limits on the seeking of records that act in concert with the time limits for seeking postconviction. Nevertheless, the agencies that improperly claimed exemptions did not suffer any consequences. No, only Mr. Owen suffered the effects of the agencies' failure to comply with the records rules. Mr. Owen did not receive all of the records he was entitled to until after he filed his initial motion.

Mr. Owen could have recovered from the agencies' failure to disclose had he been given time after he finally received all of the records to review the records and amend his initial motion accordingly. Because the lower court denied Mr. Owen an evidentiary hearing, however, Mr. Owen was forced to use the limited time to amend the denied claims in a manner that explained to the lower court why these claims were not procedurally barred.

The lower court's denial of a hearing on these claims further prejudiced Mr. Owen because the lower court would not give Mr. Owen additional pages to explain to the lower court why he was not procedurally barred on these claims. Mr. Owen had to strategically amend the denied claims without altering the claims for which the lower court granted a hearing. Out of fear of losing the hearing on the claims he did receive a hearing Mr.

Owen had to take great care to avoid altering these claims in a manner in which the lower court could not find that these claims were amended and therefore deny those claims.

Laboring under these auspices, Mr. Owen was forced to use his limited space and his limited time to explain to the lower court why he should be granted a hearing on claims that he was entitled to a factual determination and thus an evidentiary hearing under this Court's Rule 3.851. Surely, this was not how Rule 3.851 envisioned the postconviction process would operate, and surely not how any remotely fair postconviction process should operate.

To the extent that Mr. Owen was limited in pages and had to use these limited pages to explain why he was entitled to a hearing, the lower court's actions rendered the postconviction process an insufficient mechanism for Mr. Owen to resolve his claims of constitutional violation in this State's courts. This Court should remand for new postconviction proceedings.

G. THE STATE'S STAKE IN THE LOWER COURT'S DENIAL OF A HEARING AND THE PRACTICAL EFFECT OF THIS DENIAL

Despite Rule 3.851 clearly requiring a hearing on all of Mr. Owen's claims the State either stood silent or urged the lower court to deny Mr. Owen his right to hearing. The lower court's denial of a hearing denied Mr. Owen his right to postconviction, due process, access to courts, (both state and

federal), to be free from cruel and unusual punishment and habeas corpus, as well as relief under the substantive claims and concordant constitutional violations under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

The denial of the aforementioned rights was aggravated if this Court looks at the practical effect of the denial of a hearing. Mr. Owen submits that the State's complicity in the lower court's denial of a hearing was an attempt to obtain an advantage that defending against Mr. Owen's claims could not provide. Certainly this Court can not tolerate the State's seeking of a tactical advantage at the expense of this Court's own Rules and Mr. Owen's right to seek a remedy for the denial of his rights under the United States Constitution.

Historically, and prior to the effective date of the current Rule 3.851, the State and unsympathetic lower court judges could take a calculated gamble on the denial of a hearing. With this gamble, if the State succeeded in denying an individual a hearing, no facts could be developed and accordingly, the chances of prevailing before this Court were far more diminished than had there been concrete evidentiary hearing facts developed for this Court to review on appeal.

The crux of this gamble is that if the State can convince a

circuit court to deny a claim on procedural grounds without a hearing the facts that underlie a constitutional violation, barring reversal for a hearing, will remain hidden. Should the gamble succeed, the State reaps further rewards on appeal before this Court in light of this Court's deference.

The greatest reward for the State's gamble comes when the case enters federal review. In response to a ground in a federal habeas petition, the State may now argue that the technicality of procedural bar, was an independent and adequate state ground or that the petitioner, failed to develop the claim in state court.

This is hardly meaningful postconviction review. Such tactics allow constitutional violations to remain unremedied and injects a degree of fickleness in to Florida's death penalty scheme that is both arbitrary and capricious. The result remains that substantive violations of the United States Constitution remain cloaked under darkness.

H. THE OPPORTUNITY COSTS OF A HEARING ON ALL CLAIMS WERE FEW WHILE THE BENEFITS TO THE SYSTEM AND THIS CASE WERE MANY

Other than preventing Mr. Owen from obtaining relief on substantive constitutional violations, the denial of a hearing on Mr. Owen's claims served no purpose. A hearing on the denied claims would have mostly involved further questioning of witnesses already under subpoena. Additional witnesses, mostly

on Claim I, would have essentially been the law enforcement officers and court personnel involved in Mr. Owen's arrest, detention and questioning.

The time it would have taken for a hearing on the denied claims would have been approximately one day making a grand total of two whole days on the entire postconviction hearing. Two whole days for a postconviction hearing, the ultimate outcome of which may have decided whether Mr. Owen lived or died, was hardly burdensome to this State's court system.

I. THE LOWER COURT'S REFUSAL TO REQUIRE THE STATE TO CERTIFY THE FACTS CONTAINED IN MR. OWEN'S MOTION WERE TRUE AND CORRECT

Mr. Owen moved, in his amended motion, that the lower court require that the State certify that the facts alleged in any claim that the lower court found to be legally insufficient are true and correct. (Vol. II PCR. 316). Mr. Owen also asked that the lower court require the State to certify that any facts contained in a claim which the State asserted was procedurally barred are true and correct and have been previously raised. (Vol. II PCR. 316). Upon such certification, Mr. Owen asked the lower court to make a finding that the facts asserted in the claims that the Court denies are true and correct and any ruling by the Court finding that Mr. Owen's claims are procedurally barred was made with the court's acceptance of the facts asserted by Mr. Owen as true and correct. (Vol. II PCR. 317).

The State, by silence, and the lower court did not agree to follow this procedure. *See* (Vol. VIII PCR. 55-56). While this procedure is not contained in the current Rule 3.851, it was implicit in the pre-2001 procedures and in this Court's decisions regarding the failure to grant an evidentiary hearing.

That both the State and the lower court were unwilling to certify that the facts at issue were true and correct showed that there were indeed factual disputes contained in the claims that the lower court denied an evidentiary hearing. With such facts in dispute, these claims, as pled in postconviction by Mr. Owen, needed a factual determination. Accordingly, this Court should reverse and remand for an evidentiary hearing that Mr. Owen was entitled.

J. CONCLUSION

The Florida Rules of Criminal Procedure mandated that Mr. Owen receive an evidentiary hearing on the claims that he designated as requiring a factual determination. The lower court denied Mr. Owen his right to present all of his claims. Because the postconviction process did not work in this case this Court should remand for new postconviction proceedings.

PART II: THE INDIVIDUAL CLAIMS, THEIR MERIT AND THE NEED FOR A HEARING IN PARTICULAR

This part briefly addresses the merits of the summarily denied claims. While ultimately, this Court may find that relief

is best postponed until after the lower court conducts the hearing that Mr. Owen was entitled to under Florida law, Mr. Owen still urges that this Court grant relief now so that he does not suffer from further constitutional deprivation.

A. CLAIM I

This claim pled that Mr. Owen was denied the effective assistance of counsel during the pre-trial phase of trial counsel's representation of Mr. Owen. (Vol. II PCR. 318). The nature of such a claim is that it cannot be raised on direct appeal. Understanding the nature of such claims, this Court has repeatedly found that claims of ineffective assistance of counsel are, barring gross and apparent on the record ineffectiveness, brought in postconviction.

Mr. Owen submits that the lower court misapprehended this Court's previous decisions in (1) *Owen v. State*, 560 So. 2d 207 (Fla. 1990), (2) *State v. Owen*, 696 So. 2d 715, 718-19 (Fla. 1997) and (3) *Owen v. State*, 862 So. 2d 687, 697 (Fla. 2003). None of these decisions addressed trial counsel's ineffectiveness or ruled on the substantive constitutional claims that Mr. Owen alleged counsel should have raised before trial. Because counsel never raised these claims in a properly filed motion to suppress, Mr. Owen could not appeal these violations of his rights on direct appeal.

When this Court denied the State's attempt to reimpose Mr.

Owen's conviction in *State v. Owen*, (2), this Court stated that for purposes of retrial, "with respect to this issue, Owen stands in the same position as any other defendant who has been charged with murder but has not yet been tried. Just as it would be in the case of any other defendant, the admissibility of Owen's confession in his new trial will be subject to the *Davis* rationale that [the Court] adopt[ed] in this opinion." *Id*. This Court's decision did not state that Mr. Owen was not free to raise any other grounds for the suppression of his statements, or any other evidence.

The State and the lower court's continual reliance on this Court's earlier decisions (1-3 above) missed the mark entirely. This Court could only decide what was presented to the Court on direct appeal. Apart from fundamental error, for this Court to address a matter it must have been raised below. This Court was not presented with the all of the issues surrounding the custody, arrest and statements, of Mr. Owen. This Court was denied the opportunity to remedy these issues, and in fact so was the trial court, because trial counsel was ineffective.

In subsection C, Mr. Owen argued that he was illegally seized because law enforcement lacked probable cause to arrest him for the charges relied upon to initially take Mr. Owen into custody. (Vol. II PCR. 327-29). This subsection was supplemented when the amendment was filed. (Vol. II PCR. 329-30). Contrary to

the lower court's order, both the original and the amended postconviction motions alleged both facts and legal support. *See* (Vol. IV PCR. 733). In fact Mr. Owen, despite significant page limits, was indeed more specific in his pleading than the State's pleading in an information or an indictment.

Within the factual and legal support for this subsection Mr. Owen did not argue the voluntariness of his confession. As such, the lower court's reliance on this Court's previous decision on voluntariness was clearly wrong. *See* (Vol. IV PCR. 734), *citing Owen*, 862 So.2d at 694.

If Mr. Owen had been able to show pretrial that he was illegally seized, in the manner in which he pled in his postconviction motion, the trial court would have excluded all of the poisonous fruit made possible by law enforcement's denial of Mr. Owen's rights. If these facts were available to trial counsel, Mr. Owen would have proved that he was denied the effective assistance of counsel in violation of the Sixth Amendment to United States Constitution. Accordingly, this Court should reverse the lower court's denial of relief or the lower court's denial of an evidentiary hearing.

In subsection D, Mr. Owen argued that counsel was ineffective for failing to move to suppress Mr. Owen's confession because the right to counsel attached in this case at first appearance for other charges. This subsection, as fully

pled in Mr. Owen's postconviction motion, was fairly simple. The Sixth Amendment right to counsel attaches at the initiation of adversarial proceedings "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

The lower court misapprehended what Mr. Owen pled. The underlying constitutional claim was not premised on Mr. Owen having a Sixth Amendment right to counsel because of his arrest on the other charges for which he went to first appearance. Nor did he argue that the charges in the instant case were "very closely related factually" or "factually interwoven" with the charges for which Mr. Owen was brought to first appearance. *See*(Vol. IV PCR. 735);*citing Texas v. Cobb*, 532 U.S. 162 (2001) To the contrary, Mr. Owen specifically pled that his Sixth Amendment right to counsel attached to the instant homicide when the State used the facts of this homicide to increase his bond in the cases before the first appearance court. This was the beginning of adversarial proceedings in the instant case.

In sum, there was nothing "automatic" from the other cases that vested the Sixth Amendment right to counsel in this case. It was the beginning of adversarial proceedings, as seen with the restraint of liberty that resulted from the excessive bond technically set in Mr. Owen's other cases, which triggered the right to counsel in this case. The fact that the State had not

created a case number for this homicide, and that the State had not arrested or formally charged Mr. Owen for this homicide is of no importance. The State used the facts of the instant case to keep Mr. Owen in custody. This was adversarial.

Under the law at the time of Mr. Owen's arrest and the time of Mr. Owen's retrial, Mr. Owen had the right to counsel when adversarial proceedings began. The raising of his bond, in itself and as evidence that adversarial proceeding had began should have been apparent to trial counsel. It was in fact apparent to predecessor counsel who filed a motion that was not heard. (Vol. II PCR. 333). Mr. Owen never claimed that the Sixth Amendment right to counsel automatically attached because of his other charges, only that the facts of his case, which he sought to develop at an evidentiary hearing showed that his right to counsel had attached. These facts were available to trial counsel had counsel been effective during the pre-trial stages. Accordingly, this Court should reverse the lower court's denial of relief or the lower court's denial of an evidentiary hearing.

In subsection E Mr. Owen argued that trial counsel was ineffective for failing to move to suppress Mr. Owen's statements made during plea negotiations. (Vol. II PCR. 335-40). The lower court and the State confused this subsection with Mr. Owen's other capital case. This alone denied Mr. Owen his due process right to an individualized and fair postconviction

proceeding.

In *Owen v. Crosby*, 854 So. 2d 182, 189-90 (2003), Mr. Owen raised claims that appellate counsel was ineffective. The issue that the State and lower court confused with subsection E was Claim I of Mr. Owen's State Habeas Corpus Petition. There Mr. Owen argued:

> APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AND ARGUE ON DIRECT APPEAL THAT THE PETITIONER WAS DENIED A FAIR TRIAL BECAUSE OF THE ADMISSION INTO EVIDENCE OF THE STATEMENTS PETITIONER MADE DURING PLEA NEGOTIATIONS WITH THE GOVERNMENT.

This Court ruled on this claim that appellate counsel was not ineffective for failing to raise this claim. *Id*. This Court stated that "it appears that Owen has misrepresented the record with respect to his actual, subjective expectation; clearly the record shows that Owen knew that the officers could not negotiate a plea in this case." *Id*. In writing this part of the opinion this Court quoted almost verbatim from the State's response to Mr. Owen's habeas petition.

All of the quotes that Mr. Owen relied in the Habeas Petition and in his postconviction motions were accurately reproduced from the transcript of his video interrogation. The State's tactic of alleging misrepresentation in both forums did not alter what was said. Mr. Owen never alleged that he somehow believed that the role of law enforcement was to formalize plea agreements. What he alleged was that law enforcement in his case

made statements that convinced him that law enforcement had the power to negotiate which charges he faced and ultimately the criminal penalties he suffered.

In the deciding habeas case, this Court relied solely on some of the Owen/law enforcement dialogue without addressing the specific dialogue that Mr. Owen raised in his petition. The fact that this Court could quote some dialogue that was not favorable to Mr. Owen's position hardly replaced the fact finding that Mr. Owen should have received in postconviction for this case. Mr. Owen never claimed in habeas or postconviction that law enforcement never made any statements which he submits were calculated to avoid the problems which would have occurred had law enforcement been explicit.

The point on this subsection was that while Mr. Owen, as he readily admitted at the retrial suppression hearing, knew that law enforcement could not finalize a deal, he reasonably, actually and subjectively believed that he had to go through law enforcement to obtain any sort of leniency and that law enforcement controlled whether he could in fact even attempt to obtain such aid.

Trial counsel used the information in support of the voluntariness argument for suppression. Counsel had another available ground for suppression or exclusion, Section 90.410, Florida Statutes and Florida Rule of Criminal Procedure

3.172(h). Counsel was ineffective for failing to present this available ground. This, however, can only be decided after a factual determination at an evidentiary hearing at which the lower court would have determined whether Mr. Owen had an actual and reasonable subjective expectation to negotiate a plea. Accordingly, this Court should reverse the lower court's denial of relief or the lower court's denial of an evidentiary hearing.

Subsection F argued that trial counsel was ineffective for failing to present expert testimony on Mr. Owen's mental illness as it impacted the voluntariness of Mr. Owen's confession. Counsel did raise the voluntariness of Mr. Owen's confession during the Motion to suppress hearing. The trial court found that Mr. Owen's statements were "voluntarily given after proper procedurally Miranda Rights were given." (Vol. 32 R. 1330).

Subsection F was a simple claim and one which an evidentiary hearing could have led to a full disposition. In sum, law enforcement knew Mr. Owen was mentally ill. Law enforcement lacked the knowledge to determine the scope and nature of Mr. Owen's illness. Law enforcement had an incentive to minimize Mr. Owen's mental illness at a suppression hearing. A mental health professional would have informed the motion court about the scope and nature of Mr. Owen's mental illness. Counsel could have very easily presented this information to the motion court which would have contributed to Mr. Owen's argument

that his confession was involuntary.

Had trial counsel presented evidence of this sort there is a reasonable probability that the trial court, or this Court hearing the case on appeal, would have found Mr. Owen's confession should have been suppressed. If Mr. Owen's confession were suppressed there is a reasonable probability he would not have been convicted. Accordingly, trial counsel was ineffective for failing to present such testimony.

Mr. Owen was entitled the effective assistance of counsel and he was entitled to an evidentiary hearing at which he was given the opportunity to prove this. Accordingly, this Court should reverse the lower court's denial of relief or the lower court's denial of an evidentiary hearing.

B. THE REMAINDER OF CLAIM III

Claim III addressed trial counsel's ineffective assistance during the guilt phase. (Vol. II PCR. 352). In addition to the drug and alcohol portions of this claim, Mr. Owen raised other instances of guilt phase ineffectiveness in Section C. (Vol. II PCR. 357-61). The lower court denied Mr. Owen a hearing on this section.

Section C raised counsel's failure to present neuropsychological expert testimony in support of Mr. Owen's insanity defense. Penalty phase defense expert Dr. Barry Crown testified that Mr. Owen was neuropsychologically impaired. *See*

(Vol. 62 R. 6486-6542).

At the evidentiary hearing, Dr. Henry Dee, also a neuropsychologist, testified that Mr. Owen suffers from profound neuropsychological impairment, and offered this opinion in conjunction with the impairment that Mr. Owen suffered from his years of drug and alcohol abuse. Just like drugs and alcohol, Mr. Owen's organic brain impairment acted in tandem with his other mental infirmities to make Mr. Owen the person he became and the person who acted the way he did during the events in question. Mr. Owen was entitled to present his entire mental condition, the same mental condition that existed at the time of the offense and operated with the insanity triggers that the defense mental health experts had explained at trial and in postconviction.

The lower court's denial never considered or overlooked key points about this subsection. First, there was never a question of admissibility about of neuropsychological testimony in general. Second, if there was something that was adverse to Mr. Owen's insanity defense there was no reason that trial counsel could not have simply asked about Mr. Owen's neuropsychological impairment generally, which was precisely how trial counsel presented Dr. Crown's testimony in the penalty phase. Without neuropsychological testimony during the guilt phase the jury was denied the full scope of Mr. Owen's mental condition, and thus,

Mr. Owen's insanity at the time of the offense. An evidentiary hearing would have proved that this was because counsel was ineffective in failing to present such evidence. Accordingly, this Court should reverse the lower court's denial of relief or the lower court's denial of an evidentiary hearing.

C. CLAIM VI

As raised in Claim VI, the State violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by not disclosing that law enforcement went to Michigan and seized notes from Linda Burkholder. (Vol. II PCR. 384-85). The notes were exculpatory in that they show the preexistence of Mr. Owen's mental health condition involving delusions and lend further support to the defense expert's opinions concerning Mr. Owen's mental condition generally and at the time of offense. Mr. Owen suffered from delusions which led to the conduct at issue in this case. Mr. Owen informed Linda Burkholder of this. Taking notes during Mr. Owen's sessions, Linda Burkholder would have documented Mr. Owen's delusional thinking and other mental infirmities.

The notes are also impeaching because they would have refuted the State's theory of recent fabrication. Through experts and argument, the State put forth the theory that Mr. Owen's delusional thinking was conjured up long after the events in question. Documents showing the disclosure by Mr. Owen of symptoms, delusions and any other attempt to communicate a

mental problem clearly would have refuted the State's position that Mr. Owen fabricated his mental condition after he was facing the death penalty.

Mr. Owen obtained the information about the notes after the Slattery retrial. Unlike Mr. Owen's pro-se successive motion, Mr. Owen filed a timely first Rule 3.851 motion in the instant case. The only question on time is subsumed in the *Brady* analysis. Mr. Owen would have been able to prove at an evidentiary hearing that the notes were exculpatory and impeaching, taken by law enforcement and not disclosed to trial counsel before the retrial. This Court should reverse the lower court's denial of relief or the lower court's denial of an evidentiary hearing.

As raised in Mr. Owen's Amended postconviction motion, the State also violated *Giglio v. United States*, 405 U.S. 150, 154 (1972)and *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The State purposely and willfully created a false impression that in contrast to the defense experts, the State's mental health experts were independent "court appointed" experts. This was false. After eliciting this misleading testimony, the State failed to correct the false impression it created and allowed the State expert's false testimony to remain uncorrected.

The prosecutor repeatedly characterized the State's experts as independent "court witnesses" and the defense experts as

hired specifically by the defense. The prosecutor in this case was very experienced and knew the realities of expert retention. The State had absolute discretion in obtaining State experts, especially during the penalty phase. During the selection and hiring of expert witnesses trial counsel was not consulted and could not in anyway veto or limit the State's use of experts.

Had trial counsel been consulted by the court or the State in the State's expert selection process, counsel certainly would have been ineffective if counsel acquiesced to the experts that the State selected. While the funding for both the State and defense experts may have come from the same source, the State nevertheless deliberately created a false impression that the State's experts were independent because they were "court appointed." The granting of expert fees in no way constituted an endorsement by the court or a finding by the court that the witnesses were independent.

The State presented false testimony through its experts. There is a reasonable likelihood that the false testimony could have affected the judgment of the jury in this case especially when it is considered that in both the guilt and penalty phases the jury needed to decide between the conflicting opinions of State and defense expert witnesses. Accordingly, Mr. Owen was entitled to relief under ***Giglio*** and ***Napue***.

A hearing was required because there is a question of fact

concerning the State's knowing misrepresentation concerning the State expert's status. Mr. Owen also incorporated the facts contained above in the Claim I C and the Amendment to Claim I, Section C, concerning the circumstances of his custody, which also required a hearing. Accordingly, this Court should reverse the lower court's denial of relief or the lower court's denial of an evidentiary hearing.

ARGUMENT II

MR. OWEN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION WHICH VIOLATED MR. OWEN'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THIS COURT SHOULD REVERSE THE LOWER COURT'S DENIAL OF POSTCONVICTION RELIEF.

A. INTRODUCTION

Mr. Owen was denied the most fundamental protection guaranteed by the United States Constitution under the Fifth, Sixth, Eighth and Fourteenth Amendments, the right to a fair and impartial jury for both the guilt and penalty phases of his trial. *See Duncan v. Louisiana*, 391 U.S 145 (1968). An essential ingredient of this right is that the jury be comprised of impartial jurors. *Irvin v. Dowd*, 366 U.S. 717 (1961) Trial counsel had an obligation to ensure that Mr. Owen was tried by an unbiased jury. In attempting to ensure this essential right trial counsel performed deficiently during jury selection.

Because of this deficiency Mr. Owen did not receive a fair trial that comports with the Constitution.

Mr. Owen fully and properly raised trial counsel's ineffectiveness in his postconviction motion under Claim II. The lower court granted an evidentiary hearing. The lower court should have granted postconviction relief after being comprised of the constitutional deprivation Mr. Owen suffered. Based on Mr. Owen's motion, the testimony at evidentiary hearing, and the arguments made below, this Court should reverse.

B. JURY SELECTION GENERALLY

Jury selection in any criminal case is one of the most important stages of a criminal trial. In a capital case the importance of jury selection takes on a greater dimension because each individual juror must decide ultimately whether an individual will live or die. Counsel have the added responsibility to ensure that the jurors selected will deliberate and consider mitigation in a manner that is consistent with the constitutional requirement that the death penalty must be reserved for the most aggravated and least mitigated of murders.

In deciding the professional standards that apply in a capital case the United States Supreme Court, as this Court should, has been informed by the ABA Guidelines for guidance in deciding whether defense counsel's acts and omissions violated

Strickland. *See Wiggins v. Smith*, 539 U.S. 510, 522 (2003). The ABA Guidelines recognize the importance of counsel during jury selection. Relevantly, the ABA Guideline 10.10.2 (B) states:

> B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

C. THE LEGAL STANDARD FOR DECIDING INEFFECTIVE ASSISTANCE CLAIMS

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove deficient performance the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id*. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. at 688. To prove the deficient performance caused prejudice to the defendant, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is

reliable." *Id*. at 687.

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

A defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case," only that there was a reasonable probability of a different outcome. *Id*. at 693-95. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id*. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id*. at 696.

Applying *Strickland*, this Court should find that counsel was ineffective at this stage of performance and reverse the lower court's decision.

D. TRIAL COUNSEL'S PERFORMANCE DURING JURY SELECTION

Trial counsel failed to act reasonably and effectively throughout jury selection. During this critical stage, juror bias and prejudice were not adequately addressed or were simply

ignored. Counsel failed to use the jury selection process to ensure that Mr. Owen was tried by a fair and unbiased jury. Counsel failed to effectively use the available information from the juror questionnaires and voir dire during this critical stage. Additionally, counsel failed to object when the court and the State made a number of improper statements to the potential jurors. Even the most compelling defense and mitigation will fail if the jury is not able to fully consider such matters because of bias and a lack of impartiality.

As a result of counsel's failures during jury selection, Mr. Owen was denied the most fundamental of rights guaranteed by the American system of justice – a fair and impartial jury. This prejudice was compounded by the bifurcated nature of the proceedings against Mr. Owen. Unlike a simple criminal case in which jury must only decide whether the State has proven its case beyond a reasonable doubt, Mr. Owen's case presented two additional considerations. First, the jury had to be able to fairly consider the insanity defense. Second, if Mr. Owen were convicted of first degree murder, whether the jurors should return a death recommendation.

Juror Sharon Knowles was not struck peremptorily or for cause. (Vol. 50 R. 4458). With one critical peremptory strike remaining, trial counsel accepted Juror Knowles and ensured that Mr. Owen would not receive a fair trial. In a capital trial,

defense counsel has to exercise significant judgments to adequately protect the accused's right to a fair trial. Under any judgment, based on legal experience, or simply common sense, Juror Knowles should not have been accepted for Mr. Owen's jury.

Routinely in jury selection, defense counsel asks potential jurors if they have been the victim of a crime. The reason for this line of questions is that if someone has been the victim of a crime it is more likely that he or she will be more sympathetic to the State and less willing to believe the defense. It is also likely that a crime victim will project the emotions of being a crime victim upon the accused and seek retribution upon the accused. In a death case, the possibility of juror vengeance is heightened beyond a mere conviction because a juror has the option of choosing between penalties, one of which is the most severe penalty, death. Accordingly, it is not without purpose that defense attorneys ask these questions because defense counsel must be certain that a potential juror will not decide any matter based on the experience of being a crime victim.

Trial counsel asked these very same types of questions of Juror Knowles. What Juror Knowles revealed was stunning and detailed. Within two years of Mr. Owen's trial Juror Knowles and her family were the victims of a horrible crime. (Vol. 44 R. 3446-47). On January 27, 1997, an armed and masked stranger

entered Ms. Knowles' home as she was seated on her bed. Ms. Knowles was the first person to see the stranger. (Vol. 44 R. 3446-47). At first Ms. Knowles thought it was somebody playing a joke but what followed proved otherwise. (Vol. 44 R. 3447.). When Ms. Knowles' daughter saw the stranger, she responded by saying, "oh, my God," at which point Ms. Knowles realized "that this thing was really happening." (Vol. 44 R. 3447).

Ms. Knowles tried to get off the bed only to be grabbed by the hand and told by the stranger to stay there. (Vol. 44 R. 3448). The stranger snatched the phone out of the wall. It was then that the attack began. (Vol. 44 R. 3448). The stranger pulled the daughter out of the chair and laid her face down on the bed. (Vol. 44 R. 3448). The stranger told the daughter to put her face in the mattress and then threw a quilt over Ms. Knowles' head. (Vol. 44 R. 3448). Ms. Knowles threw the quilt off her head and told the stranger that she "did not want it." (Vol. 44, R. 3448). Three times this happened until the stranger looked at Ms. Knowles and told her that if she removed the quilt again he would shoot her "so and so brains out." (Vol. 44 R. 3448). After her daughter asked that Ms. Knowles please do what the stranger said, Ms. Knowles complied and remained under the quilt as the stranger raped Ms. Knowles' daughter. (Vol. 44 R. 3449).

As the stranger raped Ms. Knowles' daughter, Ms. Knowles'

grandson was sitting on the same bed on which this occurred. (Vol. 44 R. 3448). As the child cried and hollered during the rape of his mother Ms. Knowles told him to be quiet. (Vol. 44 R. 3448). The stranger took Ms. Knowles' daughter into the bathroom. (Vol. 44 R. 3448). The grandson would not stop crying after the stranger told the child to "shut up." (Vol. 44 R. 3449). Ms. Knowles began praying and crying herself. (Vol. 44 R. 3449). The stranger told Ms. Knowles' daughter to tell her to shut up, to stop crying and making noise. (Vol. 44 R. 3449). Ms. Knowles said okay to her daughter's compelled admonitions. While Ms. Knowles was able to comply with the stranger's demands, the young grandson did not stop crying until the stranger threw glass at the child. (Vol. 44 R. 3451).

The rape of Ms. Knowles' daughter only ceased when the daughter's boyfriend knocked on the door. (Vol. 44 R. 3450). The armed stranger fled after gunshots and an attempt to kidnap the daughter. (Vol. 44 R. 3450). Ms. Knowles' daughter managed to jump out of the stranger's car and flee to Ms. Knowles' arms. (Vol. 44 R. 3450). Upon leaving the scene of the rape and burglary at Ms. Knowles' house, the stranger committed a robbery before he was apprehended. (Vol. 44 R. 3450). The impact of this horrific crime was heard in the words of Ms. Knowles:

> My daughter came to me crying and everything, and I just felt – at the time, I really felt that I wished somebody had caught and killed him at that time

> because, you know – then when I went in there I looked for my grandson, and they told me that he came out of the window behind me. He was only five. And the neighbors got him.
>
> And the next morning when we got home to clean up the room I noticed where this guy had threw a glass at my grandson. And I said to myself. That's probably why he just cut off his crying just like that, you know, by him throwing glass at him. But it hurt me a good while because I felt – at that time, I felt like me being there I should have done something. But, you know, like the officers told me, that wasn't something that I could do. When someone has a gun to your head, there's nothing I could do. And thank God all three of us came out alive.
>
> So I listened to them and I went to counseling once, and my daughter had more strength than I did because she told the counselor that she had never seen her mother drink and smoke and not eating, you know, and that she - - the counselor told me that wasn't good because it would bring on another problem. So by the support of the people I work with and the choir and other people, I went through.

(Vol. 44 R.3450-51).

Mr. Owen's case, even from the defense perspective, had key resonances with Ms. Knowles' tragic experience -- Mr. Owen entered a house where children were sleeping and committed a sexual act on the victim. Ms. Knowles' daughter suffered similarly in the presence of Ms. Knowles. Ms. Knowles witnessed a home invasion and crime committed on her daughter which was psychologically indistinguishable from the offense upon which the law says she would have to render an unbiased judgment. The comparisons between what Ms. Knowles witnessed and suffered and what the jury would hear in this case would have led any

reasonable counsel to move to strike Ms. Knowles for cause. The State might even have agreed to the removal of Ms. Knowles for cause as the State did with numerous other jurors who were excused because of work commitments.

Despite Ms. Knowles' answers that her experiences as a crime victim would not affect her decisions in this case, had counsel made a cause challenge, under Florida Rule of Criminal Procedure 3.300, the trial court still could have found that Juror Knowles was not qualified. *See also* Florida Rule of Criminal Procedure 3.330. If the removal for cause had been denied, any reasonable counsel would have then used a remaining peremptory strike to ensure that someone with Ms. Knowles' experiences would not serve on the jury.

Ms. Knowles' personal experience would have affected her decision on whether Mr. Owen should be sentenced to death. Sitting as a juror in a death penalty case, Ms. Knowles had to decide between a life sentence with the possibility of parole after 25 years, and death. Ms. Knowles' daughter's rapist received 18 years. (Vol. 44 R. 3452). Ms. Knowles, weighing whether to recommend death in this case, would have clearly found balance and proportion favored death –- if her daughter's rapist received 18 years after Ms. Knowles had "wished somebody had caught and killed" the man, Ms. Knowles would have considered life with the possibility of parole after 25 years

far too lenient when an actual life was taken.

The prejudice of failing to strike was not limited to the one vote that Ms. Knowles had during both phases. Ms. Knowles' personal experience would have impacted how she deliberated with other jurors and in turn affected their votes. Moreover, Ms. Knowles and the other jurors were not instructed that they could not discuss their personal experiences with the other jurors. Ms. Knowles very likely shared the events that happened to her and her daughter with the other jurors, and may well have told them of the 18 year sentence imposed. Having heard what Ms. Knowles experienced, and the degree of punishment imposed when no homicide occurred, the other jurors would have been more likely to vote for guilt and recommend death.

Counsel originally made an effort to examine Ms. Knowles during the individual voir dire, which would have prevented the other jurors from hearing that her daughter was a crime victim. During the general voir dire counsel inexplicably asked about Ms. Knowles' daughter's trauma. This certainly whetted the curiosity of the other jurors. Counsel did not go into any specifics but rather referred to the attack as "the situation with your daughter." (Vol. 50 R. 4345). Counsel proceeded to ask if Ms. Knowles' daughter received any counseling without specifying for what. (Vol. 50 R. 4350).

During the questioning of Ms. Knowles in the general voir

dire, after Ms. Knowles again denied that the rape of her daughter would have any effect on her, counsel attempted to ask if Ms. Knowles could follow the law on insanity. Ms. Knowles never said that she could follow and apply the law on insanity. Rather, Ms. Knowles said that she "would have to weigh the evidence to come to the conclusion, what I hear or listen to," and that she would not let concerns about "release" weigh on her mind in deciding a verdict. (Vol. 50 R. 4344-45). "Release" and following the law on insanity were two different matters. Despite Ms. Knowles' denial that the attack of her daughter would affect her decision-making, counsel should have struck her peremptorily had a cause strike failed. The events in question were too horrific and too close in time to this trial for counsel to have accepted that Ms. Knowles could put that aside. There was nothing in the record that showed that Juror Knowles was otherwise such an exceptional juror to overcome her past experiences.

Trial counsel was asked during the evidentiary hearing about whether there was a strategic reason for accepting Juror Knowles. Counsel could not specifically recall her conversation with Juror Knowles. (Vol. IX PCR. 199). Counsel did not remember that there was a strategic reason for accepting Juror Knowles. (Vol. IX PCR. 199-200). Moreover, trial counsel made clear during the evidentiary hearing that based on the facts of Mr.

Owen's case there was no strategic reason for accepting the victim of a horrible crime. (Vol. IX PCR. 199). While there may be circumstances in a case where there would be a valid reason for accepting a crime victim on a jury, such as when the defense presents a battered spouse defense or self-defense, Mr. Owen's case presented none of those considerations. Accordingly, when trial counsel stated that she could think of no strategic reason for the acceptance of a crime victim such as Ms. Knowles in Mr. Owen's case, the reason that nothing came to mind was because there simply was no reason based on the facts of Mr. Owen's case. Indeed, quite the opposite was true, the remaining potential jurors were more favorable and the acceptance of Juror Knowles was deficient.

The deficiency of accepting Juror Knowles was so great and the prejudice that resulted so undermining of Mr. Owen's right to a fair trial that this error alone was sufficient to justify relief under *Strickland*. But counsel's jury selection ineffectiveness did not end there. More than one significant mistake, trial counsel's ineffectiveness continued throughout the entirety of jury selection. Counsel had important responsibilities during jury selection beyond asking questions and making strikes.

Counsel needed to protect Mr. Owen's right to a fair and impartial jury by objecting to improper statements by the State

and incorrect comments by the court. Moreover, counsel needed to ensure that the comments or questions directed to one potential juror did not infect the other potential jurors and to ensure that each juror selected could follow the law in not automatically recommending death. During the individual portions of voir dire the State and the trial court repeatedly misstated the law on mitigation in a manner that misled the jurors into believing that they could only consider statutory mitigating factors. The mitigation that the jury could consider was not so limited. Counsel was deficient for failing to object to the misleading representations by the State and trial court on the subject of mitigation. *See Hitchcock v. Dugger*, 481 U.S. 107 (1987).

For example, the court informed Juror Prince that the "aggravating and mitigating circumstances will be defined for you, if we reach that portion of the trial. You'll be told what you can consider as aggravating and mitigating circumstances and they would be spelled out for you." (Vol. 34 R. 1716). Trial counsel filed "Defendant's Proposed Jury Instruction," which requested that the court instruct the jurors on some of the non-statutory mitigating factors. (Vol. 21 R. 3998). The court heard argument on this proposed jury instruction long after the jury was selected. (Vol. 63 R. 6776). The Court deferred ruling until after the closing argument and denied the requested jury

instruction after argument. (Vol. 64 R. 6828). Before deliberating on penalty the jurors were instructed that the jury could consider "any other aspect of the Defendant's character, record or background" and "any other circumstance of the offense" not on the specifics of such. (Vol. 64. R. 6887-88). This error also occurred during the questioning of Juror Roy Jackson and virtually every juror in one form or another. (See Vol. 36 R. 2073).

Contrary to what the court stated in voir dire, the non-statutory mitigating factors were not "spelled out" for the jury. When the court failed to specifically define all of the non-statutory mitigating factors, despite having defined all of the State's aggravating factors, the importance of the non-statutory mitigating factors was diminished thus prejudicing Mr. Owen's case for life. Counsel was ineffective for failing to object to the court telling the individual jurors that the "mitigating factors would be spelled out" when in fact the virtually unlimited non-statutory mitigators were not so defined.

Trial counsel's own argument and the State's response showed that counsel should have objected to the trial court's misleading the jury that the mitigating factors would be spelled out. Trial counsel conceded that whether the court defined, or in other words "spelled out" the defense's proposed non-

statutory mitigating factors was discretionary, and that the standard jury instruction did not "spell out" these factors. (Vol. 63 R. 6776-79). The State argued that based on the case law the standard jury instruction was correct and that the Court should not "spell out" the non-statutory mitigating factors. (Vol. 63 R. 6776-79). Both the State and the trial counsel knew at the time that the jurors were misinformed by the court that the standard jury instruction did not spell out the non-statutory mitigating factors.

Moreover, it was by no means certain that the trial court would exercise its discretion to spell out the non-statutory mitigating factors. The State, however, had no reason to object to the court's misstatement of what the jury would have spelled out because it was to the State's advantage to remain silent. By the State remaining silent, the impact of the non-statutory mitigating factors were diminished because the trial court never spelled them out. This allowed the jury to disregard the many non-statutory mitigating factors that trial counsel argued and still remain true to the jurors' agreement with the trial court during jury selection. Knowing that the non-statutory mitigating factors would not be "spelled out" counsel had a duty to object to the trial court's statement to the contrary. The failure to do so was deficient. The prejudice was overwhelming because the jurors based their death recommendation on only the statutory

mitigating factors that were spelled out and not the complete mitigation that counsel argued. This had a profound effect on the jury's recommendation which ultimately led to Mr. Owen's death sentence. Standing alone this error warrants relief under *Strickland.* When combined with the further ineffective assistance of counsel this result is even more certain.

Another important consideration in selecting a capital jury, as discussed in the evidentiary testimony of trial counsel, was the possibility that a juror might automatically recommend death. Holding such a position clearly disqualifies a potential juror from sitting on a capital trial. Routinely, defense counsel asks questions in capital cases to determine if a potential juror holds such a view. No defense attorney acting reasonably would fail to move to strike such a potential juror. Trial counsel was asked about this during the evidentiary hearing and agreed that discerning the potential jurors which would automatically vote for death is an important function of defense counsel in a capital case. (Vol. IX PCR. 201).

Juror Betty Matousek was one such juror but nevertheless was accepted onto the jury that recommended Mr. Owen's death. Juror Betty Matousek stated that she felt that the death penalty should be automatically imposed when the murder is premeditated and without mitigation. (Vol. 38 R. 2512-13). Counsel accepted this answer from Juror Matousek without further questioning and

did not move to strike Juror Matousek for cause or peremptorily. (Vol. 38 R. 2513). Juror Matousek's opinion did not accurately reflect the law that Juror Matousek was required to follow. The death penalty is never automatic, even with the proof of aggravating circumstances the jury always has the power to act with mercy.

By stating that the death penalty should be automatic when the murder was premeditated and unmitigated, it was the same as Juror Matousek stating that all first degree murder, with the exception of the rare felony murder without premeditation, would automatically lead to her death recommendation. Premeditation alone is not an aggravating circumstance under Florida law; it is simply one way in which the State can prove first degree murder. The view that premeditation without mitigation automatically leads to a death recommendation also showed that Ms. Matousek would require Mr. Owen to show mitigation to avoid her death recommendation even before the State had proved any aggravating circumstances.

Counsel's ineffectiveness in this area continued with Juror Betty Griffin. Juror Griffin informed the court that she believed that the death penalty should be automatic if more than one person is murdered. (Vol. 35 R. 1716). The Court then informed Juror Griffin that Mr. Owen's case did not "involve more than one alleged victim" and Juror Griffin informed the

court that under those circumstances Juror Griffin could go with the weighing process. (Vol. 35 R. 1844-45). This was a meaningless commitment elicited by the trial court because in Mr. Owen's case the State would argue during penalty phase that indeed Mr. Owen had killed a second person -- Georgianna Worden.

While Juror Griffin's decision on death may not have been automatic with one homicide victim, the court and trial counsel never obtained assurance from Juror Griffin that she would not automatically impose death if the State proved a second homicide as a prior violent felony aggravating factor. Juror Griffin, after a defense question that a death recommendation would probably be automatic where there was more than one homicide, stated that her decision would be so regardless of "anything she heard." (Vol. 35 R. 1856-57). In other words, Juror Griffin would automatically recommend death if someone was guilty of more than one murder, regardless of "anything she heard." Counsel was ineffective for failing to object to the court informing Juror Griffin that this case only involved one alleged victim, because as the State's penalty case proved it did not. Moreover, based on the facts and circumstances of the case, counsel was ineffective for not moving to strike Juror Griffin, for cause, peremptorily, or at least obtaining Juror Griffin's promise that she would not automatically recommend death if the State proved that Mr. Owen had committed two homicides.

Counsel performed deficiently in allowing the court to misinform the Juror Griffin and in failing to strike her based on her answers. The prejudice from this was indeed overwhelming in that Mr. Owen's death recommendation came from one juror who automatically voted for death once the State produced evidence that Mr. Owen was found guilty of a separate Murder, regardless of "anything she heard" from the defense in mitigation. Counsel's performance regarding Ms. Griffin standing alone requires relief under *Strickland*. When added to the overall ineffective assistance of counsel Mr. Owen received, this result is certain.

The State told Juror Draughon that the insanity defense can be raised in any case, whether or not it is valid. Counsel failed to object to this misstatement and diminishment of the insanity defense. (Vol. 41 R 2883). This occurred in front of the whole panel. Juror Randy Draughon indicated that he was involved in prison ministry. (Vol. 41 R. 2973). The State willfully asked Juror Draughon if he "had occasion to have contact in that capacity with this defendant, Mr. Owen." (Vol. 41 R. 2973). Counsel objected but failed to move to strike the entire panel after revealing that Mr. Owen was imprisoned, and eliciting that Juror Draughon, who was in prison ministry, was not opposed to the death penalty.

Additionally, while postconviction counsel has been able to

reconstruct the record of jury selection, the court reporter's transcription amounts to a substantive denial of Mr. Owen's rights and warrants a new trial. In the jury selection process, counsel and the individual prospective and selected jurors are repeatedly and incorrectly misnamed in the record. The most notable example of this is with Juror Griffin who was repeatedly misidentified as Mr. Cooke although the record makes clear that counsel and the court are addressing Ms. Griffin. *See* (Vol. 35 R. 1850-51). The errors in the record prevented Mr. Owen from fully addressing all of the constitutional violations that occurred during the jury selection process and prevented all reviewing courts from properly evaluating and determining the appropriateness of Mr. Owen's conviction and death sentence. This denied Mr. Owen's rights to appeal and habeas corpus under the United States and Florida Constitutions.

Mr. Owen was denied a fair and impartial jury during guilt and penalty phase. The facts of the offense, Mr. Owen's insanity defense and statutory and non-statutory mitigation presented difficult questions for the jury to consider. Counsel was deficient in failing to use the jury selection process to ensure that Mr. Owen's insanity defense and case for life would fairly and impartially be considered by the jury. Counsel's deficiency in this regard was prejudicial because it denied Mr. Owen the most basic rights, a fair and impartial jury that could fulfill

an essential role and assured Mr. Owen's conviction and death sentence. Accordingly, this Court should reverse.

E. TESTIMONY AT THE EVIDENTIARY HEARING RELEVANT TO THIS CLAIM

At the evidentiary hearing trial counsel was asked about jury selection in this case. (Vol. IX PCR. 197). Trial counsel had no specific recall of any of the particulars of jury selection despite having the opportunity to review the transcripts. (Vol. IX PCR. 197). Trial counsel agreed that what appears in the transcripts from jury selection would accurately reflect the dialogue between the court, the attorneys and the potential and selected jurors. (Vol. IX PCR. 197). Trial counsel did agree that jury selection in a capital case is one of the important phases of a capital trial and that capital jury selection presents additional concerns. (Vol. IX PCR. 197-98).

Counsel could not recall speaking with critical juror Sharon Knowles, or any other juror for that matter. (Vol. IX PCR. 198-99). Counsel did however state that she could not think of a strategic reason to seat a juror who was the victim of a violent crime. (Vol. IX PCR. 199).

Trial counsel did relate that it is important to object to misconduct by the State and move for a mistrial or a curative instruction. (Vol. IX PCR. 203-205). In particular counsel agreed that it is objectionable for the State to diminish the

role of the jury in sentencing and that in selecting a jury it is important to exclude jurors who would automatically vote for death. Counsel agreed that a jury sitting on penalty phase would in fact hear that Mr. Owen had been convicted of another homicide. *See* (Vol. IX PCR. 202). Finally trial counsel agreed that it is important that jurors in a capital case understand the importance of their decision. (Vol. IX PCR. 206).

F. THE LOWER COURT'S ORDER

After hearing testimony on this claim and being presented with written closing arguments from the parties, the lower court denied relief. The lower court's order failed to provide a remedy when one was clearly needed. Rather than address the obvious ineffectiveness in failing to move to strike Juror Knowles, the lower court simply noted some innocuous information obtained from jury selection. *See* (Vol. IV PCR. 691-93). The court ignored that a cause challenge was the decision of trial court as well and not solely a question of whether the jury answered some questions correctly. *See* Florida Rule of Criminal Procedure 3.300 and 3.330. The lower court's other findings were likewise incorrect.

G. CONCLUSION

For the forgoing reasons counsel performance was both deficient and prejudicial. This Court should reverse.

ARGUMENT III

MR. OWEN PROVED THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING PENALTY PHASE IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THE LOWER COURT'S DENIAL OF RELIEF ON THIS CLAIM VIOLATED MR. OWEN'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIION. THIS COURT SHOULD REVERSE.

PART I: DRUGS AND ALCOHOL

Mr. Owen suffered from a substance abuse problem throughout most of his childhood, formative years and when the events in question took place. Mr. Owen's drug and alcohol abuse acted in concert with his profound mental illness and brain damage which led to and explained the events in question.

A. INTRODUCTION

Mr. Owen was denied the effective assistance of counsel during penalty phase contrary to the Sixth Amendment to the United States Constitution. Mr. Owen raised this claim in Ground IV of his postconviction motion. The lower court granted a hearing on this claim. Despite overwhelming evidence and argument in support of a new penalty phase the lower court denied Mr. Owen relief on this claim.

Counsel, as proven in postconviction performed deficiently at this critical stage of the proceedings against Mr. Owen. *Strickland*. Mr. Owen was accordingly prejudiced because there was a reasonable probability that the outcome of Mr. Owen's case

for life would have been different had counsel not acted deficiently.

This Part addresses the nature and scope of Mr. Owen's drug and alcohol abuse as developed at the evidentiary hearing. Mr. Owen was afflicted with deep and pervasive mental illness and organic brain damage. Added to this cocktail of trouble was his drug and alcohol abuse. Mr. Owen began abusing drugs and alcohol as a child and continued to do so through his formative years, the events in question and his arrest. Counsel should have developed this area and utilized the readily available information in Mr. Owen's case for life.

B. MR. OWEN'S DRUG AND ALCOHOL ABUSE

Mr. Owen's drug and alcohol abuse was readily available to trial counsel. By merely asking Mr. Owen a few routine questions which any effective counsel would have, counsel would have gained valuable information that would have added to the mitigation that counsel did present.

As heard at the evidentiary hearing, and known in the courts and society, drugs and alcohol cause problems. Drug and alcohol abuse by children such as Mr. Owen is known and appreciated for its even greater scope. The average member of the community from which Mr. Owen's jury was drawn understood the problem that drugs present for individuals befallen by them.

Mr. Owen's tragic fall into drug and alcohol abuse did not

stand alone. More than the average drug and alcohol abusing child and young adult, Mr. Owen's abuse of alcohol, methamphetamine, cocaine, hallucinogens, and marijuana interacted with his mental illness and brain damage to make Mr. Owen the person he became and the person who acted the way he did. This Court should reverse.

C. LAY EVIDENTIARY HEARING TESTIMONY ON DRUGS AND ALCOHOL

The lower court's order reiterated the State's tired refrain of self-report regarding the evidence Mr. Owen presented at the hearing. (Vol. IV PCR. 709-10). Nothing could be further from the truth. Mr. Owen presented lay witnesses who detailed Mr. Owen's pre-teen and teenage struggles with drugs and alcohol. Most of these witnesses were eyewitnesses to Mr. Owen's early path that led to Mr. Owen's later problems. The witnesses' testimonies are summarized as follows:

1. FRED MORLOCK (Volume IX PCR. 133-149)

Mr. Morlock was a counselor at the VFW National Home in Eaton Rapids, Michigan, during part of the time Duane Owen lived there. (Vol. IX PCR. 137). He is currently a Licensed Social Worker employed by a mental health clinic in Riverside, Wyoming and had previously provided mental health services for the Departments of Correction in both Wyoming and Colorado. (Vol. IX PCR. 134-35).

At the time Mr. Morlock worked for the VFW National Home

and knew Mr. Owen Mr. Morlock had a B.A. degree and was not a certified mental health counselor. This lack of experience, training and advanced education prevented him from properly diagnosing and treating Mr. Owen for the symptoms of drug abuse and mental health problems that Mr. Owen exhibited.

Mr. Morlock described the symptoms he observed when Mr. Owen was a teenager: mood swings; inability to focus on school tasks or hobbies; a lack of self worth; a stay in the St. Lawrence Psychiatric Unit after self ingesting a quantity of aspirin; underage drinking; drug use and being with the wrong crowd. (Vol. IX PCR. 138-42). The observable signs of Duane Owen's drug use and mental illness when considered by Mr. Morlock in light of his further education and experience were significant. A proper diagnosis and treatment in his early years would have given Mr. Owen a chance at a far better outcome in his life.

Mr. Morlock testified that he was never contacted by anyone for the defense when Mr. Owen was pending retrial. He was at all times ready, willing and able to appear. Mr. Morlock was willing to testify for Mr. Owen and traveled from Wyoming for the evidentiary hearing. During the time of the trial in the instant case, Mr. Morlock held professional certifications that were a matter of public record. With persistence on the part of the defense team, Mr. Morlock could have been contacted and

testified for Mr. Owen in a compelling way. (Vol. IX PCR. 150). Mr. Morlock also provided an eyewitness account into Mr. Owen's slide into drug and alcohol abuse. As a live witness called at trial Mr. Morlock's testimony would have weighed heavily in favor of Mr. Owen's case for life. He also would have aided the mental health experts to provide a full picture of Mr. Owen's mitigating mental conditions.

2. KENNETH RICHARDS Vol. IX PCR. 151-162

Kenneth Richards currently resides in Indianapolis, Indiana. He grew up in the late 1960's and early 1970's in the Gas City, Indiana neighborhood with Duane Owen. Mr. Richards testified that the Owen household was the only family in the neighborhood to have their beer delivered by beer truck. (Vol. IX PCR. 155). Duane Owen's parents were alcoholics. He testified that Duane and his brother Mitch were left in the Owen home to fend for themselves, and at other times they ran wild. (Vol. IX PCR. 154). He testified about physical abuse in the Owen household, including beatings of the children at the hands of Duane's father, Gene Owen. (Vol. IX PCR. 156).

Easily accessible to the Owen children was beer, vodka, and whiskey. (Vol. IX PCR. 159-60). Mr. Richards recounted that when he and Duane were only about 9 years of age, even Mrs. Owen herself would supply them with "pea pickers." (Vol. IX PCR. 155). A "Pea Picker" is a drink containing vodka and sprite.

In addition to consuming alcohol, Duane and the neighborhood children would smoke marijuana. (Vol. IX PCR. 158). He also remembered seeing Duane with a strange purple powder believed to be the hallucinogenic drug mescaline. (Vol. IX PCR. 161). When Duane Owen's mother, Donna Owen, died of cirrhosis of the liver, it was devastating to the family. (Vol. IX PCR. 159). After the death of Donna Owen, Mr. Owen's father Gene Owen sank deeper into the abyss of alcoholism, even mixing his morning coffee with whiskey. (Vol. IX PCR. 162) At that point, the Owen children ran completely unsupervised and wild. (Vol. IX PCR. 162).

Following his wife's death, Gene Owen committed suicide by asphyxiating himself with carbon monoxide in his car in the garage. Upon Gene Owen's suicide, Kenneth Richards' father wanted to take the Owen boys in and care for them, but his wife refused because she felt the Owen boys were just too wild and incorrigible, and she felt they had no room for them in their home. (Vol. IX PCR. 163). At that point the Owen boys were shipped out to various foster homes. (Vol. IX PCR. 163).

Kenneth Richards was available to testify in 1999, and would have testified if asked to do so by Mr. Owen's trial attorneys. He signed an affidavit for the defense investigator back in the late 1990s, but was never asked to appear for trial. Kenneth Richards' knowledge of Duane Owen and the Owen family

was valuable information and mitigation. As a live witness, Mr. Richards would have added to Mr. Owen's case for life and aided the mental health experts to provide a full picture of Mr. Owen's mitigating mental conditions.

The lower court misapprehended the numerous reasons for calling Mr. Richards. (Vol. IX PCR. 164). Mr. Owen pled under claim IV that counsel was ineffective for failing to call live witnesses to make a compelling case for life. *See* (Vol. II PCR. 379). Having granted an evidentiary hearing the lower court improperly limited the scope of Mr. Richards' testimony.

3. KEITH CROUCHER (Vol. IX PCR. 168-71).

Keith Croucher resides in Gas City, Indiana and testified that he grew up there with Duane Owen. (Vol. IX PCR. 168). Mr. Croucher testified that Duane and his brother Mitch were left in the home to fend for themselves, and at other times they roamed the streets with virtually no parental supervision. (Vol. IX PCR. 169). Mr. Croucher remembered Duane and the neighborhood children would drink whiskey and beer in the garage. (Vol. IX PCR. 169). They would spend time in constructed "cabins" in the upper part of the garage. (Vol. IX PCR. 169). The Owen children would raid Mrs. Owen's medicine cabinet and take her Valium. (Vol. IX PCR. 170). Additionally, Marijuana was used by the children at the age of 11 or 12 according to Mr. Croucher's recollection. (Vol. IX PCR. 170). The lower court keyed on Mr.

Croucher's use of the word "experiment." This is incorrect. The use of valium, alcohol and marijuana by a pre-teen is not experimentation -- it is a problem. It was also a first hand account of the beginning of Mr. Owen's drug problem that was compounded by his mental illness and organic brain damage.

Mr. Croucher was with Duane Owen's brother Mitch when they found Gene Owen dead of in the Owen garage. (Vol. IX PCR. 170). The Owen children were very much affected by the death of their mother and father. Keith Croucher was available to testify in 1999, and would have testified if asked to do so by Duane Owen's trial attorneys. Keith Croucher's knowledge of Duane Owen and the Owen family was valuable information and mitigation in support of Mr. Owen's case for life. As a live witness, Mr. Croucher would have added to Mr. Owen's case for life and aided the mental health experts to provide a full picture of Mr. Owen's mitigating mental conditions.

4. KELLY BRAGG (Vol. IX PCR 253)

Kelly Bragg currently resides in Marion, Indiana. She testified at the evidentiary hearing that she grew up in the early 1970's with Duane Owen. (Vol. IX PCR. 253). She is Mr. Owen's age and was approximately 12-13 years old during this time. (Vol. IX PCR. 253). She remembers spending time in the Owen garage with Duane and the other neighborhood children. (Vol. IX PCR. 256). There was a lot of "partying" that took

place in the garage, with free-flowing beer, whiskey and marijuana smoking. (Vol. IX PCR. 255).

Kelly Bragg was available to testify in 1999 and would have testified if asked to do so by Duane Owen's trial attorneys. Kelly Bragg's knowledge of Mr. Owen and the Owen family was valuable information and mitigation in support of Mr. Owen's case for life. As a live witness, Ms. Bragg would have added to Mr. Owen's case for life and aided the mental health experts to provide a full picture of Mr. Owen's mitigating mental conditions.

5. WILMA BAILEY (Volume IX PCR. 172-182)

Wilma Bailey obtained a bachelor's degree from Michigan State University and studied social work there. (Vol. IX PCR. 173). She first met Duane Owen in the early 1970's while she was working as a counselor at the VFW Home in Eaton Rapids. (Vol. IX PCR. 173). She worked at the VFW home for over 23 years, starting in 1973 through 1997. (Vol. IX PCR. 173). The VFW Home was a place where widows of servicemen with their children, and orphans of deceased and absent military parents would reside. (Vol. IX PCR. 174). Ms. Bailey acted as a caretaker to these families and foster children in group settings. (Vol. IX PCR. 173). In that capacity she came to meet foster children Mitch and Duane Owen. Mitch and Duane were cared for by VFW Home parents who had their own natural children. In the mid 1970's,

there was a move and transition towards separating the parents with natural children from the other foster children. (Vol. IX PCR. 179).

The counselors and administration at the VFW Home felt that it was emotionally unhealthy for parents to be charged with the responsibility of providing care to their own natural children as well as foster children; this dynamic was thought to have a negative emotional impact on the foster children who had lost their natural parents. (Vol. IX PCR. 179). As a proffer of her testimony, Ms. Bailey recalled that in general there was an air of emotional separation, segregation, and favoritism shown towards the natural children of the VFW Home mothers. (Vol. IX PCR. 181). For example, at Christmas time, the families typically had two trees: one for their natural children, and one for the foster children under their care. Mitch and Duane would have experienced that type of emotional separation and segregation in the VFW Home as they arrived in the VFW Home without their natural parents. (Vol. IX PCR. 181).

Ms. Bailey remembered that Duane Owen associated in the drug using peer group. (Vol. IX PCR. 175). Duane Owen was close with a group of rough children known to do drugs, labeled by onlookers and outsiders as the “smokers” or the “losers.” (Vol. IX PCR. 175-76). An administrator named Don Wheatricks came to the VFW home and was apprehensive to discipline the children who

were obviously doing drugs for fear that child suicide would increase in the VFW Home. (Vol. IX PCR. 177). Wilma Bailey feels that the VFW Home provided inadequate care and supervision to the orphans such as Duane and Mitch Owen. (Vol. IX PCR. 178).

Wilma Bailey was available to testify in 1999, and would have testified if asked to do so by Duane Owen's trial attorneys. Wilma Bailey's testimony provided a descriptive look at Duane Owen's early teen years, including his difficult upbringing, transition, and struggles in the VFW Home. Wilma Bailey's knowledge of Duane and Mitch Owen was valuable information and mitigation. As a live witness, Ms. Bailey would have added to Mr. Owen's case for life and aided the mental health experts to provide a full picture of Mr. Owen's mitigating mental conditions.

6. TINO (Timothy) CERVANTES (Vol. IX PCR. 262)

Tino Cervantes testified at the evidentiary hearing that he spent time with Duane Owen in the 1970's in the Eaton Rapids, Michigan area when they were young teenagers. (Vol. IX PCR. 263). While Duane Owen was living in the VFW Home, Tino Cervantes was living in the Eaton Rapids community. (Vol. IX PCR. 263). Mr. Cervantes said that their peer group was known as "the Rebels who took a lot of drugs and alcohol." (Vol. IX PCR. 265).

Tino Cervantes testified that he sold marijuana to Duane

Owen and the other teenage children, and that he used to host parties where drugs were ingested in large amounts, including marijuana, speed, and LSD. (Vol. IX PCR. 269). These drugs would be consumed by Duane and the others in conjunction with alcohol binge drinking. (Vol. IX PCR. 265-270). Tino Cervantes remembers purchasing sheets of LSD for $100, which would be typically 100 “hits” or doses. (Vol. IX PCR. 269). He would sell individual “hits” or doses of LSD for one dollar a piece. He would sell five “hits” or doses of LSD for two dollars. (Vol. IX PCR. 269). Duane Owen was certainly taking LSD with the group. (Vol. IX PCR. 266).

As a proffer, Tino Cervantes explained the role that drugs and alcohol played in his own life. (Vol. IX PCR. 271). Tino Cervantes killed a man while he was on drugs and was convicted of second degree murder. (Vol. IX PCR. 271). Because of his drug problem the court mitigated his sentence. (Vol. IX PCR. 272). It was error for the lower court to not consider this.

Tino Cervantes was available to testify in 1999, and would have testified if asked to do so by Duane Owen’s trial attorneys. Tino Cervantes’ testimony provided a descriptive look at Duane Owen’s early teen years, including the pervasive drug and alcohol abuse in his life. Tino Cervantes knowledge of Duane Owen’s drug and alcohol abuse was valuable information and mitigation. As a live witness, Mr. Cervantes would have added to

Mr. Owen's case for life and aided the mental health experts to provide a full picture of Mr. Owen's mitigating mental conditions.

Trial counsel was ineffective for failing to fully investigate Duane Owen's background and call live witnesses such as Tino Cervantes and the witnesses discussed above.

D. EXPERT WITNESSES

Mr. Owen called expert witnesses as well. Each witness was well qualified. Each witness relied on a number of sources of information in formulating their opinions and not simply the "self report" of Mr. Owen. Each witness utilized their professional skills and training to ensure that their evaluations were accurate. The testimony of the experts is summarized as follows:

1. DR. HENRY DEE

Dr. Dee is neuropsychologist and was well qualified in his field and was accepted as an expert by the lower court. (Vol. IX PCR. 199). Dr. Dee's testimony was based on three sources: One, Dr. Dee reviewed various documents including the testimony of state and defense experts including Dr. Berlin, Dr. Sultan and Dr. Peterson, whose notes he received; two, three detailed interviews with Mr. Owen; and three, a battery neuropsychological testing he conducted on Mr. Owen. (Vol. IX PCR. 99-100).

Based on neuropsychological testing Dr. Dee found that Mr. Owen was organically brain damaged. (Vol. IX PCR. 102). The area of Mr. Owen's brain that was damaged included the part which controlled Mr. Owen's impulse control. (Vol. IX PCR. 103). This was a profound impairment standing alone and in agreement with the neuropsychologist called by the defense during the penalty phase. Dr. Dee, however, could offer an even more insightful opinion because he was asked to evaluate Mr. Owen's mental status in relation to Mr. Owen's drug history. Dr. Dee was able to do this because postconviction counsel asked him to do so and he was provided with the relevant information to do so.

What Dr. Dee found was significant. By simply discussing with Mr. Owen's drug abuse history Dr. Dee was able to find that Mr. Owen began using drugs at an early age and that Mr. Owen's drug use continued throughout his adult life. (Vol. IX PCR. 105-07). Mr. Owen's drug use was not mere experimentation, but prolonged use of severely mind altering substances such as cocaine, acid, methamphetamine and alcohol. (Vol. IX PCR. 105-07). These drugs greatly effected Mr. Owen's development, socialization, decision making skills and mental illness. These drugs affected Mr. Owen's ability to develop into a law abiding citizen and had an even greater effect on Mr. Owen because of his other mental illnesses and neuropsychological impairment. While these drugs would affect these areas in any person, Mr.

Owen did not come with a clean slate because he suffered from organic brain damage, delusions, mental illness and a horrible upbringing. The effects on someone with Mr. Owen's poor mental health and neuropsychological impairment was substantial even in comparison to someone who did not suffer from such disability.

The trial court in sentencing Mr. Owen to death found the two statutory mental mitigating factors:

> 1. The crime for which the defendant is to be sentenced for was committed while he was under the influence of extreme mental or emotional disturbance. (The Court gave this factor considerable weight).
>
> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. (The Court gave this factor some weight).

(Vol. 65 R. 7013-14).

The trial court also found as non-statutory mitigation that "the Defendant suffered from organic brain damage: In 1981, the defendant was injured when a car that had been jacked-up fell on his head. He may also be the product of fetal alcohol syndrome due the extensive use of alcohol by his mother as described [above in the sentencing order]." The court found some further non-statutory mitigation because of Mr. Owen's deprived background, alcoholic parents, his father's suicide and similar information concerning Mr. Owen's background.

The trial court correctly found these mitigating factors, which were also argued to the jury by trial counsel. This

evidentiary hearing has showed that both the court and the jury were denied essential mitigation concerning Mr. Owen's drug abuse, standing alone and integrated with the testimony and evidence that supported the above findings of mitigation by the court. In other words, the court and the jury were denied the complete picture. As Mr. Owen has submitted, the jury recommended death and the court imposed it without a full understanding of Mr. Owen's mental health and what made him act the way he did throughout his life and at the time of the offense.

Dr. Dee was aware that the above mentioned mitigating factors were already found by the Court in sentencing Mr. Owen to death. (Vol. IX PCR. 110-112). Dr. Dee made clear, however, that in analyzing Mr. Owen in relation to his drug and alcohol use, there was nothing about Mr. Owen's drug history which would have diminished the finding of these mitigating factors. Indeed Dr. Dee found that these factors were made stronger by considering Mr. Owen's drug and alcohol abuse. (Vol. IX PCR. 112).

Dr. Dee also stated that there was nothing about the evidence of Mr. Owen's drug and alcohol abuse that would have negated or diminished the findings of the mental health experts called by the defense in support of the above mentioned mitigating factors. (Vol. IX PCR. 111). Indeed, these too would

have become stronger. Drugs made Mr. Owen act differently and make different choices than he would have made had he only had the mental illnesses addressed during the penalty phase by the defense experts. Dr. Dee also clarified that impaired impulse control does not prevent an individual such as Mr. Owen from acting intentionally. (Vol. IX PCR. 132)

Dr. Dee clearly established that Mr. Owen's culpability was lessened because of Mr. Owen's drug abuse, in addition to his mental illnesses, delusions and background. Either standing alone or to increase the weight of Mr. Owen's mitigation, the jury and the trial court should have heard this information.

2. HEIDI HANLON-GUERRA (Vol. IX PCR. 224-244).

Mr. Owen called Heidi Hanlon-Guerra at the evidentiary hearing. (Vol. IX PCR. 224). Ms. Hanlon-Guerra holds the credentials of L.M.H.C.; C.A.P.; C.R.C.; and N.C.C. (Vol. IX PCR. 225-26). Ms. Hanlon-Guerra testified about her professional background and experience which included extensive work within the court system and for private clients. (Vol. IX PCR. 227-28). Her work experience included over a thousand evaluations including evaluation for private clients and for the State of Florida through the Department of Juvenile Justice. (Vol. IX PCR. 227-28). Ms. Hanlon-Guerra was accepted by the lower court as an expert in the field of mental health counseling, addiction counseling and rehabilitation counseling without State

objection. (Vol. IX PCR. 228).

Ms. Hanlon-Guerra described how she evaluated Mr. Owen. This included: her lengthy personal interview of Mr. Owen on August 26, 2005; the social, drug and alcohol history she obtained; and the long list of collateral sources she consulted to further understand Mr. Owen and verify her evaluation. (Vol. IX PCR. 229-30). Ms. Hanlon-Guerra came to the conclusion that Mr. Owen had a longstanding and pervasive drug problem going back to age nine and continuing until the time of his arrest; that Mr. Owen used a wide variety of drugs -- alcohol, marijuana, LSD, crystal methamphetamine, peyote, airplane glue, paint and cocaine. (Vol. IX PCR. 230-238). The use of these mind-altering substances when coupled with mental illness was devastating on Mr. Owen. (Vol. IX PCR. 230-238) Mr. Owen's judgment was impaired and his choices in life suffered. Mr. Owen was far from being just a troubled adolescent. (Vol. IX PCR. 230-238)

Ms. Hanlon-Guerra's vast courtroom experience allowed her to testify about drug use as a mitigator in criminal cases. (Vol. IX PCR. 237-38). Drug and alcohol use are regularly accepted mitigators by both ordinary citizens who make up a jury and by judges who pass sentences. The public and the courts see the harm of drug use on a daily basis. Ms. Hanlon-Guerra also testified that drug use in our society is pervasive. (Vol. IX

PCR. 235). It knows no socio-economic, racial or sexual boundaries. Those who make up a jury would have a great likelihood of having a close experience with the horrible problem of drugs and accordingly find Mr. Owen's drug use greatly mitigating.

E. THE TESTIMONY OF TRIAL COUNSEL CAREY HAUGHWOUT AND INVESTIGATOR HILLARY SHEENAN

Mr. Owen called his lead trial counsel Carey Haughwout and his lead investigator Hillary Sheenan.

1. CAREY HAUGHWOUT (Vol. IX PCR. 183-224)

Mr. Owen called trial attorney Carey Haughwout to testify at the evidentiary hearing. (Vol. IX PCR. 183). Ms. Haughwout is now the elected public defender for the 15th Judicial Circuit. (Vol. IX PCR. 183). Trial counsel was the lead attorney on the case and admitted that while she did listen to the input of co-counsel in this case, as lead counsel she was ultimately responsible for Mr. Owen's representation. (Vol. IX PCR. 184).

Trial counsel recalled that she presented two mental health experts in support of the insanity defense, Dr. Faye Sultan and Dr. Fred Berlin. (Vol. IX PCR. 185). During the penalty phase, trial counsel recalled these experts and also called neuropsychologist Dr. Barry Crown. (Vol. IX PCR. 186). Importantly, trial counsel conceded that as lead counsel, part of her duties was to present the experts with information that

she developed from herself or from the other people who worked on the defense team. (Vol. IX PCR. 186). In this case there were a number of sources of information that she looked to in developing the defense trial and mitigation case. (Vol. IX PCR. 186). One important source was Duane Owen, who trial counsel admitted was cooperative despite his mental illness. (Vol. IX PCR. 186-87). From her discussions and numerous meetings with Mr. Owen trial counsel pursued further investigation based on the information Mr. Owen related. (Vol. IX PCR. 187).

Having practiced in the Palm Beach County area for a number of years, and serving now as the elected Public Defender, trial counsel was able to testify to the relationship of drugs to the commission of crimes and the understanding of the problems of drugs in the legal community and the community from which the jury was selected. (Vol. IX PCR. 187-88). In sum, there was an understanding of the devastating effects of drugs on young people in the community.

Counsel did not recall, one way or the other, asking Mr. Owen about drugs or asking anyone else to discuss drugs with Mr. Owen. (Vol. IX PCR. 183). Trial counsel did not offer any reason for not investigating Mr. Owen's drug history and could recall no strategic reason why trial counsel did not present Mr. Owen's substance abuse problem in either the penalty or the guilt phase. (Vol. IX PCR. 195). Clearly, trial counsel did not

investigate Mr. Owen's drug history because based on Mr. Owen's level of cooperation she would have obtained the information that Mr. Owen presented at the evidentiary hearing and presented it to the jury. The trial record in this case does not contain the crucial evidence of Mr. Owen's substance abuse history.

2. HILLARY SHEENAN (Vol. IX PCR. 245-253)

Hillary Sheenan is now the Chief Investigator for the Public Defender's Office in and for the Fifteenth Judicial Circuit. (Vol. IX PCR. 245). Mr. Owen's defense team obtained funding for Ms. Sheenan's private investigator services. Ms. Sheenan remained Mr. Owen's investigator through the time of trial and testified during the penalty phase before the jury and at the *Spencer* hearing. During her investigation, Ms. Sheenan traveled to interview witnesses and reported her findings to trial counsel. (Vol. IX PCR. 246).

Ms. Sheenan did not recall trial counsel asking her to obtain a drug history. (Vol. IX PCR. 247). She could not recall discussing Mr. Owen's drug history with him. (Vol. IX PCR. 247). Had trial counsel requested Ms. Sheenan to investigate Mr. Owen's drug history she would have done so. (Vol. IX PCR. 247).

All of the witnesses called by Mr. Owen supported his claims. The State's cross-examination did not disprove any of Mr. Owen's claims for relief or the truthfulness of the witnesses Mr. Owen called on his behalf. Mr. Owen's witnesses'

recollections were true, although at times painfully true. Now, because of this truth, this Court should reverse.

F. THE APPLICABLE LAW

In addition to *Strickland v. Washington*, 466 U.S. 668, 686 (1984), see discussion above under Argument II, two cases since *Strickland* add further understanding regarding the ineffective assistance of counsel: the above mentioned *Wiggins* and *Rompilla v. Beard*, 545 U.S. 374 (2005). Each case is discussed here in turn and both support relief in Mr. Owen's case.

In *Rompilla*, the United States Supreme Court reversed the federal appellate court's reversal of the federal district court's granting of federal habeas corpus relief. 545 U.S. at 393. Rompilla was convicted of murder and sentenced to death. *Id*. at 379. The state supreme court affirmed. *Id.* at 378. Rompilla claimed in state postconviction that trial counsel was ineffective for failing to present significant mitigating evidence. *Id*. at 379. The state "postconviction court found that trial counsel **had done enough** to investigate the possibilities of a mitigation case, and the Supreme Court of Pennsylvania affirmed the denial of relief." *Id.* (Citation to state court case omitted and emphasis added).

In granting federal habeas relief, the district court in *Rompilla* found "that in preparing the mitigation case the defense lawyers had failed to investigate 'pretty obvious signs'

that Rompilla had a troubled childhood and suffered from mental illness and **alcoholism, and instead relied unjustifiably on Rompilla's own description** of an unexceptional background." *Id.* (Emphasis added). The federal court of appeals reversed the district court's grant of relief. *Id*.

The Supreme Court found that relief was appropriate even though Rompilla's counsel interviewed Rompilla, spoke to family members, and consulted **three mental health experts**. *Id.* at 381. The Court found that defense counsel was deficient for not looking at an available file which revealed amongst other fruitful mitigating information, that Rompilla "had been drinking at the time of the offense" and that counsel, although being informed by one mental health expert of his trouble with alcohol, "did not look for evidence of a history of dependence on alcohol that might have extenuating significance." *Id.* at 382. In discussing the reasonableness of Rompilla's counsel's performance the Supreme Court referred to the applicable ABA Guideline which provided:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction. The investigation should always include efforts to secure the information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 ABA Standards for Criminal Justice

4-4.1 (2d ed. 1982 Supp.).

Id. at 387;(fn. Omitted). The Court looked to this standard because the Court had "long have referred [to these ABA Standards] as guides to determining what is reasonable." *Id*. citing *Wiggins*, 539 U.S. at 524 quoting *Strickland*, 466 U.S. at 688; internal quotation marks omitted.

Having found that Rompilla's counsel acted unreasonably, the Court addressed the prejudice prong of *Strickland*. *Id*. at 389. The Court found that had Rompilla's counsel looked at the Court file on his prior conviction, counsel would have found a range of mitigation leads that no other source had opened up and counsel would have become skeptical of the information that portrayed otherwise. *Id.* at 292-93. Because of counsel's deficiency, the jury never heard any of the critical mitigation evidence and "neither did the mental health experts who examined Rompilla before trial." *Id*. at 392. While the Court found that even with the omitted mitigation the jury still could have found for death, what mattered was that "the undiscovered mitigating evidence, taken as a whole might well have influenced the jury's appraisal of [Rompilla's] culpability and the likelihood of a different result if the evidence had gone [before the jury] [was] sufficient to undermine confidence in the outcome actually reached at sentencing." *Id*. at 393(Internal quotations and citations omitted).

The importance of *Wiggins* to Mr. Owen's case is that it established that this Court should refer to the ABA Guidelines in determining the reasonableness of trial counsel's performance. The importance of *Rompilla* is that Mr. Owen is clearly entitled to relief. In Mr. Owen's case, trial counsel clearly had a more cooperative client than in *Rompilla*. Had counsel merely taken the time to ask Mr. Owen about his drug history, counsel, like in *Rompilla* would have tapped a rich source of information to inform further investigation and the mental health expert's evaluation of Mr. Owen.

According to trial counsel, Mr. Owen was a cooperative client. Rompilla was not and denied the very facts which the Court found mitigating. *Id*. at 381. Rompilla, unlike Mr. Owen, went so far as to actively obstruct his counsel by sending counsel off on false leads. *Id*. The point here is that had Mr. Owen even been asked about drugs, and had Mr. Owen even lied like Rompilla did, trial counsel still had an obligation to investigate Mr. Owen's drug history. While counsel never even asked, Mr. Owen's drug history was as available to trial counsel as Rompilla's criminal file was to his attorneys. Mr. Owen's counsel had possession of his PSI because it was sent to defense counsel. Trial counsel also had possession of Dr. Peterson's notes, which disclosed that Mr. Owen had a problem with drugs because these notes were disclosed in discovery by the State.

See (Vol. IX PCR. 194). Trial counsel did not have to go to the clerk's office to review these materials because unlike in *Rompilla*, counsel received both the PSI and Dr. Peterson's notes in the mail.

Clearly, any claim by that trial counsel "had done enough," to investigate and present mitigation on Mr. Owen's behalf, such as merely interviewing him and hiring experts, much like in *Rompilla*, was not enough. Counsel's failure to investigate and present Mr. Owen's drug and alcohol abuse was ineffective. This Court should reverse.

PART II: OTHER INEFFECTIVENESS

Trial counsel's ineffectiveness during penalty phase was not limited to the failure to present Mr. Owen's drug and alcohol abuse. Based on the arguments and testimony that Mr. Owen presented in postconviction, and the arguments made here, this Court should reverse the lower court's denial of penalty phase relief. *Strickland,* 466 U.S. at 686

Throughout the penalty phase trial counsel failed to object to a number of instances of prosecutorial misconduct and improper questioning. This was deficient and fell below the standards for counsel in a capital case. The prejudice that resulted was indeed overwhelming in its scope and degree.

Counsel had significant duties to protect Mr. Owen's rights during the penalty phase because any evidence and argument

improperly before the jury and the court led to an improper death sentence. Moreover, even if an objection were overruled, if counsel objected under a proper legal theory, Mr. Owen would have at least had his rights protected for further review. Here, the State's actions were aggravated and grave and ensured that the jury would determine Mr. Owen's case for life based on improper considerations such as sympathy and scorn towards Mr. Owen. Standing alone, or in combination with trial counsel's other ineffectiveness, Mr. Owen was entitled to relief.

The first example of prejudice was made possible by Mr. Owen's own counsel. On cross-examination of Captain McCoy, a State witness, in reference to his interrogation of Mr. Owen, trial counsel asked and Captain McCoy answered as follows:

> Trial Counsel: And that he told you what we watched and told you about what happened with Miss Manley?
> McCoy: Correct.
> Trial Counsel: And in addition, he told you he had sex with her after she was unconscious?
> McCoy: That's correct.

(Vol. 62 R. 6445).

Mr. Owen was convicted of the attempted murder of Marilee Manley, not of sexual battery. The State had redacted this portion from the video-tape the sentencing jury viewed. Had counsel not elicited from Captain McCoy that Mr. Owen stated that he had sex with the Ms. Manley the jury would never have heard that Mr. Owen admitted to an offense for which he was not

convicted. Moreover, by eliciting this information from Captain McCoy, counsel opened the door for the jury to hear that Mr. Owen stated in reference to the sexual battery: "So she was still knocked out, so at that point I figured, well, hell, man, I might as well just go over there and take advantage of her shit. ... Because she wasn't that bad looking. ... So I went over there and I ended up raping her." (Vol. 62 R. 6453-54).

Counsel, after initially agreeing to have Captain McCoy read the transcript, later objected to this procedure in that "it overemphasizes a certain part that he's reading versus hearing it in context if there's some particular objection about what he said, but to have this officer read the transcript, I don't think that this is the appropriate way to go about it." (Vol. 62 R. 6451). The court overruled the objection to overemphasis and appropriateness. (Vol. 62 R. 6452).

In reference to this testimony, counsel's performance was deficient. Counsel should not have elicited from a law enforcement witness that Mr. Owen had sex with Ms. Manley. Counsel's question allowed the jury to hear, in rather crass description, that Mr. Owen committed an additional offense for which he was not convicted. If counsel's strategy was to show a sexual component to the Manley case, as part of a mental health mitigation strategy, this could have been accomplished through the mental health experts. This would have avoided the

statements being heard by the jury in the State's case for death.

Besides the deficiency in choosing to present this information during cross-examination of a State witness, counsel was deficient in failing to make a legal objection that would have been sustained. The initial question asked of Captain McCoy only elicited that Mr. Owen admitted to having sex with Ms. Manley after she was unconscious. The exact statements Mr. Owen made to Captain McCoy were irrelevant, unfairly prejudicial and improper character evidence under the evidence code. If counsel's question did not open the door to the reading of Mr. Owen's exact statements, the statements on an offense he was not convicted of were not admissible.

At the time that Mr. Owen made these statements he lacked insight into his own condition and the capacity to accurately describe his condition to a law enforcement officer. Mr. Owen's apparent attitude toward the victim was bad character evidence and non-statutory aggravation. The State was prohibited from introducing evidence that showed a lack of remorse because that is not a statutory aggravating factor. Because counsel opened the door or failed to object effectively, the State was able to accomplish this illicit purpose. The prejudice was great, the jury heard bad character evidence without any limit on their consideration. Moreover, because of counsel's deficiency in this

regard, the defense mitigation theory concerning Mr. Owen's search for the essence of a woman was contradicted.

While occurring during the guilt phase the State committed misconduct during the cross-examination of expert mental health witness Faye Sultan concerning Dr. Sultan's work with the Capital Counsel Regional Counsel. The entire line of questioning, contained between pages 5580-89, Vol. 56, was grossly improper. The most egregious example of this misconduct was when the State interjected by an apparent question the view that, "in hiring experts" . . . CCRC is "attempting to find psychological or psychiatric defenses or mitigation or factors that might help them to get off death row, right?" (Vol. 56 R. 5587).

Counsel had a duty not simply to object, but to do so on all available legal grounds. While Counsel did object on relevance counsel should have moved for a mistrial after the State improperly commented on the right to counsel, appeal and postconviction and diminished the juror's role in sentencing. Clearly, after the State's improper tactics, nefariously hidden in the guilt phase, Mr. Owen could not receive a fair trial and penalty phase. This was a comment on Mr. Owen's right to counsel and a *Caldwell* error and should have been objected to as such. Counsel was ineffective for failing to do so and move for a mistrial. Because of counsel's deficiency, Mr. Owen was

prejudiced.

Counsel failed to object to the improper prosecutorial argument during the State's closing arguments. In addition to failing to suppress the statements form Mr. Owen's other cases, counsel failed to object to the State's bootstrapping of aggravating factors from the Manley, Simpson and Worden cases. The State repeatedly made reference to Mr. Owen's other convictions during closing argument. (Vol. 64 R. 6845, 6847, 6852). In the penalty phase the State could argue that Mr. Owen had previously been convicted of a prior violent felony. The State could not, however, use the facts and circumstances of the other cases to argue to the jury that the State proved the other aggravating factors in this case. In the penalty phase, the State is limited to arguing the aggravating factors listed by statute.

Aggravating factors that may have been present in the cases upon which the State proved the aggravating factor of a prior violent felony were simply irrelevant to whether the State proved the aggravating factors it urged in this case. The misconduct of the State was even worse when it is considered that the Worden homicide occurred after the instant case. The State therefore was illogically and improperly arguing that facts which occurred after the instant offense proved the existence of the CCP aggravator during the commission of this

offense. Without objection the State used the facts of the cases that were only admissible to prove one aggravating factor to improperly raise the ire of the jurors and ensure that the jurors' recommendation would be based on passion and sympathy for the victims of all the cases against Mr. Owen.

During closing argument, rather than simply address the aggravators that the State believed were proved, the State repeatedly called Mr. Owen a "cunning rapist." (Vol. 64 R.6841-42, 6851). This was prosecutorial misconduct which permeated every aspect of the State's closing argument and denied Mr. Owen a fair penalty phase. Trial counsel was deficient for failing to object to this outrageous misconduct and move for a mistrial to protect Mr. Owen's rights.

As detailed in Mr. Owen's motion, the State committed serious acts of prosecutorial misconduct during both the guilt and penalty phase which denied Mr. Owen a fair trial during these stages. The State's misconduct permeated all the proceedings against Mr. Owen and affected the outcome of both stages. Counsel failed to contemporaneously object in a manner that fully defended Mr. Owen's rights, if counsel objected at all. Counsel also failed to move for a mistrial when it should have been apparent that any semblance of a fair trial was lost. Trial counsel was questioned in this area at the evidentiary hearing. Counsel readily admitted that an important purpose for

objecting is to protect the accused's rights, limit the improper conduct's affect on the jury and to preserve the client's rights for appeal. *Green v. State*, 907 So. 2d 489 (Fla. 2005). (Stating that to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court).

Despite counsel's knowledge of the importance of objecting on all available legal grounds, and moving for a mistrial or curative instruction, counsel ineffectively failed to do so for Mr. Owen. Accordingly, Mr. Owen was denied the effective assistance of counsel at both stages. This Court should reverse.

ARGUMENT IV

MR. OWEN PROVED THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING GUILT PHASE ON THE PARTS OF CLAIM THREE THAT THE LOWER COURT DID NOT IMPROPERLY DENY AN EVIDENTIARY HEARING CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIION.

Like trial counsel's penalty phase ineffectiveness, counsel's failure to develop and present Mr. Owen's drug and alcohol abuse during guilt phase was likewise deficient. *Strickland*. Mr. Owen was indeed prejudiced by counsel's deficiency in this regard because had counsel presented this evidence there was a reasonable probability the outcome of Mr. Owen's guilt phase would have been different.

The lower court granted an evidentiary hearing on what the court narrowly termed "voluntary intoxication." *See* (Vol. II PCR. 313). Mr. Owen amended his motion after which the lower court held a second case management conference. *See* (Vol. VIII PCR. 50-85). The lower court did not issue a second written order but essentially denied Mr. Owen a hearing on the amended claims.

The part of Claim III which was not denied without an evidentiary hearing was greater in scope than the lower court ruled. Mr. Owen pled that he was denied the effective assistance of counsel because counsel did not present evidence concerning Mr. Owen's drug and alcohol use. This evidence, fully discussed in Argument III, supported two areas in Mr. Owen's guilt phase defense. The first area, which the lower court ignored despite the evidence and closing arguments presented by Mr. Owen, was the impact of his continual and pervasive use of alcohol and drugs on Mr. Owen's sanity at the time of the offense. The second area which was addressed by the lower court was voluntary intoxication.

A. FAILURE TO DEVELOP AND PRESENT EVIDENCE OF MR. OWEN'S DRUG AND ALCOHOL ABUSE TO FORTIFY THE INSANITY DEFENSE.

Trial counsel presented an insanity defense during the guilt phase. Had counsel investigated and developed Mr. Owen's extensive drug and alcohol use prior to trial, counsel acting

effectively, could have presented this evidence to fortify the insanity defense. There was nothing about Mr. Owen's ongoing and persistent drug and alcohol use that was inherently contradictory of insanity.

Trial counsel should have supplemented the testimony from the defense mental health experts in support of the insanity defense with the readily available evidence of Mr. Owen's drug and alcohol abuse. Mr. Owen began abusing drugs and alcohol at an early age and continued to do so until the time of his arrest. Mr. Owen's history of drug and alcohol use prior to the offense would have added weight to the insanity defense. Mr. Owen's drug history would have fortified the expert's opinion on his insanity. Also, unlike the bizarre information from Mr. Owen's past upon which the experts based their opinions, Mr. Owen's use of drugs through his formative years would have been within the ordinary experience of the jury. It would have been well known by the jury that the taking of the types of drugs that Mr. Owen ingested would have affected the mental development of any young person let alone someone like Mr. Owen who suffered severe mental illness and deprivation.

While presenting an insanity defense, trial counsel was not limited to presenting a clinical analysis of Mr. Owen's mental state at the time of the offense. Indeed, trial counsel presented background and social history as part of the insanity

defense. Mr. Owen's insanity was the product of a number of developmental, organic and environmental factors that led to and controlled his actions. If counsel could present background about Mr. Owen's family, his upbringing and development, in support of insanity, Mr. Owen's substance abuse history was likewise relevant to the his insanity.

While certainly Mr. Owen's drug and alcohol abuse was mitigating on penalty, effective counsel would have developed and presented this evidence in support of an insanity defense. Trial counsel did not make an informed strategic decision not to present this evidence because counsel never developed it. This was deficient. Mr. Owen was prejudiced because the jury decided the question of insanity without a full understanding of his mental conditions. Had the jury been fully informed, based on the compelling and overwhelming evidence that was developed in postconviction, there was a reasonable probability the outcome would have been different.

The lower court's orders blurred whether this part of Claim III was heard at the evidentiary hearing or denied as part of the lower court's sweep of pre-hearing denial. The lower court's order denying postconviction relief addressed voluntary intoxication as Claim III (A), (Vol. IV PCR. 703-07). Section A of Claim III in Mr. Owen's initial and amended postconviction motion was an introduction. *See* (Vol. II 352-54). Section B was

actually the so called “voluntary intoxication” section. In Section B Mr. Owen overwhelmingly discussed counsel’s failure to present his drug and alcohol abuse as part of the insanity defense. Indeed, the phrase “voluntary intoxication” appeared only once in Claim III at section B paragraph 7. (Vol. II PCR. 355).

Clearly, the lower court’s order misapprehended Mr. Owen’s contention that he was denied the effective assistance of counsel during guilt phase because counsel failed to present evidence of his drug and alcohol abuse. Further proof of this is seen in the unauthorized annotations that appear on the face of Mr. Owen’s Amended Motion. At page 42 and 43 some unidentified person wrote “intox” in the margin of Mr. Owen’s Motion. (Vol. II PCR. 356-57). The point is that this was not Mr. Owen or his counsel because Part B of Claim III was not so limited. Indeed it was a much broader claim which based on the evidentiary hearing testimony, a claim for which Mr. Owen was entitled to relief.

B. VOLUNTARY INTOXICATION

Mr. Owen submits that he was also directly under the influence of drugs and alcohol when the homicide took place. The evidentiary hearing was limited to one day at which the Dr. Dee and expert Heidi Hanlon-Guerra certainly offered testimony that there were few periods in Mr. Owen’s life that he was not on

drugs. Had counsel discussed drugs and alcohol with Mr. Owen, it certainly would have led to the conclusion that Mr. Owen was voluntarily intoxicated after consuming alcohol and using other drugs at the Gipper bar. *See* (Vol. 53 R. 5116)

Because trial counsel was ineffective in failing to investigate and develop Mr. Owen's drug and alcohol history, counsel did not make a reasonable strategic determination on whether to present a voluntary intoxication defense. Voluntary intoxication, contrary to the implications of the lower court's order, did not require that Mr. Owen testify or that an expert testify as to his intoxication.

C. CONCLUSION

Trial counsel's failure to investigate Mr. Owen's entire drug history first manifested itself during the pre-trial stage. As part of effective preparation, trial counsel should have met with Mr. Owen and developed this area as discussed in Argument III. By not developing this area, Mr. Owen was denied the effective assistance of counsel at every stage of the proceedings against him. While Mr. Owen has presented most of the discussion of counsel's failure to develop and present Mr. Owen's drug and alcohol history in Argument III, the fact remains that Mr. Owen was entitled to guilt phase relief as well. Accordingly, this Court should reverse.

ARGUMENT V CONCLUSION AND CUMULATIVE ERROR

THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERROR THROUGHOUT MR. OWEN'S TRIAL DENIED MR. OWEN'S RIGHTS UNDER FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Mr. Owen was denied the full protections of the United States Constitution at both his guilt phase and penalty phases of his trial. When Mr. Owen entered postconviction, he once again was denied his rights, this time by the lower court which refused to follow Florida law by denying Mr. Owen an evidentiary hearing on claims for which he was entitled to an evidentiary hearing. As a result, the full cumulative effect cannot be assessed by this Court. Nevertheless, Mr. Owen is still entitled to relief based on the cumulative effect of the error that he proved in postconviction.

While each error Mr. Owen proved requires relief independently of the next, when these errors are looked at cumulatively, the result is inescapable – Mr. Owen should be afforded a new trial that comports with the United States Constitution. If such relief is not appropriate yet, Mr. Owen should be afforded new postconviction proceedings that comport with the United States Constitution and Florida law.

Only upon this Court's grant of a remedy can it be said that Mr. Owen's convictions and death sentence are worthy of confidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States mail to all counsel of record on this has been furnished by United States mail to the assigned judge and all counsel of record on this 9th day of April, 2007.

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CERTIFICATE OF COMPLIANCE

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

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