IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 06-2105

DUANE E. OWEN
Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

_____

REPLY BRIEF OF THE APPELLANT

_____

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INTRODUCTION

Mr. Owen denies all of the arguments made in the State's Answer Brief. Based on the arguments contained herein, and in Mr. Owen's Initial brief, this Court should grant relief.

REPLY ON 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.

Mr. Owen was entitled to a hearing on the claims that he designated as requiring a hearing and he was entitled to relief on those claims. The claims that the postconviction court denied involved the ineffective assistance of counsel during pretrial and guilt phase and the State's violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Mr. Owen urges this Court to reverse the denial and grant relief on all of his claims. Should, however, this Court find that this is not appropriate at this time, this Court should remand for a hearing so that there can be a full and fair disposition of all of Mr. Owen postconviction claims.

In the first part of Argument I of Mr. Owen's brief, Mr. Owen argued that the postconviction process broke down in his case. Beginning with the manner in which he was forced to obtain records through the postconviction court's denial of hearing on claims which Mr. Owen was entitled to a hearing, it did not work. Nothing in the State's argument under Issue I changed this fact. Mr. Owen should be afforded a new postconviction process free from this.

Despite the State's citation to *Bryant v. State*, 901 So. 2d 810, 821 (Fla. 2005), 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). The commentary also states:

> 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.

Mr. Owen was entitled to an evidentiary hearing on all of the claims that were factually based. The use of "shall" in the

rule and "requiring" in the commentary settles this matter.

Turning to the specifics of the State's Answer, even if Mr. Owen was not entitled to a hearing as a matter of designation, he was entitled to a hearing based on the substance of the claims he pled.

Claim I involved a number of allegations of ineffective assistance of counsel at the pretrial stage. Contrary to the State's and the postconviction court's view, Mr. Owen did not raise these issues on direct appeal. *See* (AB 20). Mr. Owen never even hinted at ineffective assistance of counsel on direct appeal. Mr. Owen also did not raise a voluntariness issue in postconviction with the exception of arguing that counsel was ineffective for failing to present mental health testimony in support of his claim of involuntariness. *See* (IB at 31-32).

Mr. Owen claimed that counsel was ineffective for failing to fully investigate and litigate that he was illegally seized and his resulting confession was the fruit of this illegal seizure. It did not involve a claim that his confession was involuntary. This Court did not rule that Mr. Owen was not illegally seized in his last direct appeal. This Court ruled 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).

This Court did address Mr. Owen's seizure in the first direct appeal. There, the entirety of this Court's finding on Mr. Owen's stop was:

> He claims that the police had no well-founded suspicion upon which to stop and seize him on the street and that all subsequent confessions were thereby tainted. This argument is without merit. Owen was the subject of outstanding warrants and had been identified in a photographic lineup as a burglar. The officer who stopped him had been given a photograph and specifically alerted to watch for him in his known habitat. The police had more than founded suspicion, they had probable cause.

Owen v. State, 560 So.2d 207, 210 (Fla.1990). Of course, if none of these facts, or some of them, were not true, Mr. Owen would have had a valid motion to suppress on Fourth Amendment grounds. That was precisely why Mr. Owen was entitled to a hearing.

Retrial counsel could have developed the facts that the original motion counsel failed to put forth at the original motion hearing. Contrary to the State's footnote, this Court did not hear a challenge to the admission of Mr. Owen's confession on three grounds. *See* (AB 21, fn 5). In the direct appeal opinion following retrial this Court heard two issues; voluntariness and the right to remain silent. *Owen v. State*, 862 So. 2d 687, 693-698 (Fla.2003). There was no mention of Mr. Owen's illegal seizure because retrial counsel did not develop the facts necessary and available to raise this issue before

this Court.

Mr. Owen also disagrees with the State's characterization that Mr. Owen's claim was that he was psychologically coerced. This Court did use the term psychologically coerced in both opinions, and coercion does have a psychological component, but this misses the point. Mr. Owen's postconviction claim I, subsection F, as discussed in the initial brief, was that if counsel were going to argue that Mr. Owen was psychologically coerced, a psychologist should have been called to support this argument. At both suppression hearings there was no testimony from any mental health professional.

On Mr. Owen's Sixth Amendment claim, counsel was ineffective for failing to raise this issue as part of a motion to suppress. Contrary to the State and the Court's view Mr. Owen never argued that the right to counsel attached as a byproduct of Mr. Owen's other cases. The Sixth Amendment's protection attached because adversarial proceedings commenced in this case when the State used the facts of this case to increase his bond in Mr. Owen's other cases. The determining factor of when adversarial proceedings began was the increase in his bond, not when the State finally formally charged Mr. Owen.

The State's argument on the so-called third sub-issue also confused what Mr. Owen was arguing. *See* (AB 25-26). Mr. Owen, as the State pointed out, readily agreed it was the prosecutors

who would have had to approve and finalize any sort of plea negotiation. It was law enforcement, however, who Mr. Owen had to go through if he wished to obtain a plea bargain. Under this reasonable, actual and subjective expectation, Mr. Owen confessed to law enforcement. Accordingly, had counsel moved to suppress on these grounds, Mr. Owen's confession should have been suppressed.

On postconviction Claim III, the court summarily denied Mr. Owen's claim that counsel should have presented neuropsychological testimony to fortify the insanity defense. Mr. Owen's neuropsychological condition was relevant to his sanity at the time of offense. As a result of trial counsel's ineffectiveness, the jury was denied the complete picture of Mr. Owen's mental conditions as they related to his sanity. Without a hearing, Mr. Owen could not question trial counsel on whether Mr. Owen's neuropsychological impairment could have been presented without diminishing Mr. Owen's insanity defense. The remainder of the State's answer on this point was just mere conjecture and assumption. *See e.g.,* (AB 29)(arguing that Crown's opinion was not based on any physical examination of Mr. Owen. Dr. Crown is a neuropsychologist, not a medical doctor).

On the *Brady* claim, Mr. Owen pled each element. *See Brady v. Maryland*, 373 U.S. 83 (1963). A hearing was necessary to rebut the alleged deficiencies argued by the State in its

answer. On the *Giglio* claim, Mr. Owen submits that the State was wrong to argue that the State's experts were court appointed and accordingly stands on his initial brief and postconviction motions. *See Giglio v. United States*, 405 U.S. 150 (1972)

Throughout the State's Answer Brief the State relied on a number of "facts" to argue that the postconviction court should be affirmed. Mr. Owen was entitled to a hearing to offer evidence which would support his meritorious claims and to refute the State's "factual conclusions."

REPLY 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.

Mr. Owen denies the State's answer and submits that he is entitled to a new trial. Jury selection was one of the most critical stages of the proceedings against Mr. Owen. At this stage counsel failed to provide the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution.

In selecting a jury trial counsel had two overarching considerations. First, counsel had to select the best jury for determining Mr. Owen's sanity at the time of offense. This involved questions concerning whether the potential jurors

accepted insanity as a defense and whether their decision would be overcome by concerns of Mr. Owen's release. Second, counsel needed to select a jury that would be receptive to Mr. Owen's case for life. Like the first concern, this involved the potential juror's willingness to understand and consider mental illness.

The selection of a jury was at all times the responsibility of trial counsel. Again, the State recounted the postconviction court's observation that Mr. Owen participated in every bench conference. (AB at 36).The State then offered the postconviction court's observation that when the trial court asked Mr. Owen if he agreed with all of his lawyer's decisions in the jury selection process he "affirmatively responded." (AB 36). In support of this observation the State listed 21 record citations.

Clearly, the record citations refer to instances where Mr. Owen was present at a jury selection bench conference and not that Mr. Owen "affirmatively" agreed with his attorney's decisions. Mr. Owen was not *pro se* at this trial and, for the most part, only spoke through counsel. With the exception of when the trial court asked Mr. Owen a direct question he did not state anything, affirmatively or otherwise.

Until the jury was sworn there existed the possibility that a more favorable juror would emerge. Thus, even if Mr. Owen's

acquiescence was relevant, the only time it would be so was before the jury was sworn. Right before the jury was sworn the trial court asked Mr. Owen, "Defense accepts the panel. Mr. Owen, you have conferred with counsel. Do agree that this is the panel to try your case?" (Vol. 50 R. 4452). To which Mr. Owen responded, "yes." (Vol. 50 R. 4452).

That was not an affirmative response to whether Mr. Owen "agreed with all of his lawyer's decisions." Rather, coming after trial counsel accepted the panel and the trial court indicated as much, this showed that Mr. Owen merely agreed that the jury that trial counsel selected would try Mr. Owen's case. Considering that the State and trial counsel just accepted the panel, this was the only answer that Mr. Owen could have given.

At best, this was an opportunity for Mr. Owen to voice any disagreements he had about the individual jurors that trial counsel selected. Whether this opportunity could have been used by Mr. Owen was another matter. Foremost, Mr. Owen did not have the responsibility to select his own jury. The Sixth Amendment does not envision do it yourself representation. The purpose of the right to counsel was that counsel function in that role.

Mr. Owen also was not required to voice any objections he had with trial counsel's performance during trial. There was no contemporaneous objection rule for Mr. Owen to later raise ineffective assistance of counsel claims in postconviction.

This was only reasonable considering that Mr. Owen was not a lawyer and suffers from brain damage and mental illness.

Beyond *Strickland*, *Gideon v. Wainright*, 372 U.S. 335(1963), ensured that individuals on trial, in Mr. Owen's case for his very life, are afforded the protection and assistance that trial counsel provides. Trial counsel knew this and rightfully did not place the burden of jury selection on Mr. Owen, either at the evidentiary hearing, or during the actual jury selection. The postconviction court copied the citations to Mr. Owen's presence during bench conferences from the State's written closing argument. Cf. (Vol. 3 PCR. 516 fn2) and (Vol. 4 PCR. 690) This was not the independent factual determination that Mr. Owen was entitled to under Rule 3.851 and was extraordinarily offensive to the Constitution. Accordingly, this Court in rendering a decision that comports with the Constitution should not allow Mr. Owen's right to counsel to be violated any further.

The State's offer of trial counsel's experience as an excuse for ineffectiveness was also unfair and unavailing. Certainly counsel was experienced. This was beside the point. Even the most experienced defense counsel may perform ineffectively. What matters was how trial counsel performed in this case when the nature and effect of the errors is considered in relation to the prejudice Mr. Owen suffered.

This was not a case in which trial counsel exhibited a lack of concern or did not make a significant effort, especially in comparison to some of the cases which this Court has heard. While the State and Mr. Owen can point to areas where trial counsel performed well, moving towards a just result for Mr. Owen, this was all rendered futile by the errors counsel did commit.

The most devastating and prejudicial error that trial counsel committed involved Juror Sharon Knowles. The State and the postconviction court failed to consider the nature of the dilemma presented by Ms. Knowles. Ms. Knowles certainly did nothing wrong and indeed was the victim of violent crime. To find that these experiences, fully detailed in Mr. Owen's initial brief, did not make it impossible for Ms. Knowles to impartially render a verdict and death recommendation, ignored the obvious; Individuals who recently were the victim of violent crime should not sit on cases where closely parallel violent crimes are at issue.

In addressing the issues concerning Ms. Knowles, the State argued that there was no legal basis for striking her for cause. (AB at 41). The postconviction court and the State ignored that a cause challenge was the decision of trial court and not solely a question of whether a juror answered some questions correctly. *See* Florida Rule of Criminal Procedure 3.300 and 3.330. Under

Florida Rule of Criminal Procedure 3.300 and 3.330 it was the trial court which ultimately would have made the decision on any cause challenge. Under Rule 3.330 "[t]he court may consider also any other evidence material to such a challenge."

Had counsel challenged Ms. Knowles for cause, based on the State's course of conduct throughout jury selection, the State and the trial court would have agreed to excuse Ms. Knowles from jury selection. If individuals were excused from serving on the jury because of scheduling conflicts, certainly having Ms. Knowles excused was likely considering how recently she was the victim of a number of horrid crimes. In the highly unlikely event that the State would not have agreed to excuse Ms. Knowles, the trial court could still have excused Ms. Knowles for cause based on the other evidence that would have been at issue under Rule 3.330. That other evidence was the human experience that being a victim of a violent crime is a traumatic experience that affects the victim's entire life. If it had not affected Ms. Knowles, certainly that would also be a reason to excuse her from jury service, either peremptorily or for cause.

Ms. Knowles' answers and her lack of "hesitation" did not overcome her experiences. Whether Ms. Knowles hesitated or not was mere speculation. *See* (AB 41). Her being an ideal juror does not account for the fact that other jurors remained who gave similar answers. It never was Ms. Knowles or nothing - -

trial counsel still had options at the time the jury was seated.

Counsel could not recall speaking with Ms. 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). In a case in which self-defense was not an issue, this was certainly correct. Ms. Knowles should have been struck for cause, and if that failed, peremptorily. The failure to do so was deficient and the prejudice of having a juror with the experience that Ms. Knowles brought to the deliberations in Mr. Owen's case was great.

Trial counsel's ineffectiveness did not end with Ms. Knowles. Other juror's should have been questioned further and struck from the panel. The State claimed in particular that Mr. "Owen brought forth nothing at the evidentiary hearing supporting his reading of the record." (AB 45). This was at least partially correct, Mr. Owen did not provide support for his reading of the record because the record read as it appeared on the page. There was no need for an interpreter.

Nothing in the record was "misread" in Mr. Owen's initial brief. If the State disagrees with Mr. Owen, that is the State's prerogative. It does not alter the fact that when Mr. Owen stated that something was in the record and offered a

record citation in support, the record supported what Mr. Owen states occurred.

On Juror Prince, Mr. Owen provided the exact language that he has raised as an issue. Mr. Owen stated in his initial brief "that 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). Mr. Owen misread nothing relative to this and is unaware of any other "reading" of "spelled out" than that these circumstances would be defined for the jury.

The point was that despite the trial court saying that the mitigating circumstances would be spelled out, this never occurred because the trial court denied Mr. Owen's motion to spell out the mitigating instructions. (Vol. 64 R. 6828). The final jury instructions were proper. Trial counsel was correct to argue non-statutory mitigating circumstances. The trial court was wrong to say that the mitigating circumstances would be spelled out and counsel was ineffective for failing to object to the trial court's statements. The weight of the trial court telling the jurors that the non-statutory mitigating factors would be spelled out and then giving only the standard jury instruction diminished the importance of the mitigating factors

that were not spelled out by the trial court. Any guidance that trial counsel offered to the jury surely did not overcome the trial court's pledge to spell out the jury instructions. This denied Mr. Owen a fair penalty phase.

The State disagreed that Juror Matousek should have also been struck peremptorily or for cause. (AB 49). Juror Matousek's position that the death penalty should be automatic was made clear in response to trial counsel's question. Ms. Matousek stated: "Well I believe that if it was a premeditated murder and there was no mitigating circumstances at all then it should be automatic." (Vol. 38 R. 2513). Whether trial counsel began this exchange by referencing Ms. Matousek's questionnaire was irrelevant. Ms. Matousek clearly stated that the death penalty should automatically be imposed. This was not the law and counsel should have gained specific assurance from Ms. Matousek that she would be able to set aside her view that it should be imposed automatically.

The State's position concerning Juror Griffin was likewise divorced from the realities of Mr. Owen's case. During penalty phase the jury was going to hear that Mr. Owen committed another murder. Juror Griffin expressed the view that the death penalty should be automatic if a person killed more than one person in both her written questionnaire and during questioning from trial

counsel. (The citation to the Vol. 35 page 1716 was incorrect in Mr. Owen's initial brief).

The first relevant exchange between Ms. Griffin and the trial court began at page 1841. There, in reference to Ms. Griffin's questionnaire, the following took place:

> Trial court: And then B, a person kills more than one? And you put a circle. Does that mean you think that it should be automatically imposed when someone kills more than one?
>
> Ms. Griffin: Yes.

(Vol. 35 1841-42). The trial court then went on to instruct Ms. Griffin that "this case does not involve more than one alleged victim so we're talking about one person. Under those circumstances you've indicated that you do not believe this should be automatic; is that correct? (Vol. 35 R.1844-45). Ms. Griffin responded, "yes." (Vol. 35 R.1845).

This case did involve more than one victim. For the trial court to instruct Ms. Griffin to the contrary should not have occurred and should have been objected to by trial counsel. Counsel, at the very least should have followed up with Ms. Griffin to determine whether she could follow the law and would not automatically impose the death penalty. 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).

Mr. Owen entered into penalty phase with one vote for death prior to the conclusion of that proceeding. Counsel never obtained assurance from Ms. Griffin that she could set aside her belief in favor of the death penalty for those who commit more than one homicide. Once Juror Griffin heard about Mr. Owen's involvement in the homicide of Georgianna Worden, Ms. Griffin's vote in favor of death was cast.

The next area raised regarding jury selection was in regards to the State's comments. The State's quotation of the text from the record does not provide the "context" the State alleged Mr. Owen failed to address. *See* (AB 51) The prosecution diminished the insanity defense while engaged in a dialogue with Juror Draughon. This was the best context to commit this offense. Insanity was a valid defense. By interjecting this point the State diminished the defense and Mr. Owen's right to a jury trial. Because of the prosecutor's comments the entire prospective panel was left with the impression that Mr. Owen could raise the insanity defense without a basis for it. Counsel should have objected and moved to strike the panel.

The same was true with the prosecutor's interjection of the fact that Mr. Owen was previously in jail. This brought to the jury selection process that Mr. Owen had previously been

incarcerated without the context that Mr. Owen would provide during trial. Here, because of counsel's inaction the jury was left to form the opinion that Mr. Owen was previously incarcerated without the understanding of his mental deterioration.

When considered in context and completely, trial counsel's performance was deficient. As a result, Mr. Owen suffered significant prejudice because he was found guilty and recommended for death by a jury that was not questioned fully, relied on improper factors and was misinformed. The State's reliance on assorted positive attributes discerned from questioning as related to the bare minimum of legal qualifications to serve as a juror does not equal constitutionally effective counsel. Trial counsel, in a case in which the State was seeking death had the duty to do more. This Court should reverse.

REPLY ON 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.

Again and again, the State has argued the tired refrain of

self-report. Meanwhile in the real world so called self-report is regularly used to make decisions in the legal system. Right as this is being read, there is probably some Assistant State Attorney arguing to a jury that the accused should be found guilty because of the defendant's self-report, otherwise known as a confession. In obtaining a death sentence, the State never even hesitated in using Mr. Owen's self-report to obtain a conviction and a death sentence.

Inherent in the State's argument and the postconviction court's order is the notion that somehow simply because Mr. Owen stated something it must be false. While Mr. Owen was not presumed innocent at the postconviction hearing there still was no presumption that anything he said was incorrect. The postconviction court should have at least been neutral in determining the weight and credibility of all the witnesses. This was at the very heart of what a judge hearing a postconviction matter is called on to do. Because of the court's and the State's argument of self-report, Mr. Owen was denied a fair determination of his postconviction issues.

The postconviction court did not hear, and the record did not show, that Mr. Owen's discussion with the postconviction experts was inaccurate. This Court will not find any testimony from a State witness or any of the witnesses called at the hearing which stated that Mr. Owen's accounts of drug and

alcohol abuse was inaccurate. Indeed, there were no witnesses that said Mr. Owen was clean and sober for any part of his life other than before his earliest years.

The findings of the trial court recounted by the State were patently unreasonable and not based on what the postconviction hearing actually showed. *See* (AB 60-61). The State and the postconviction court's first inference was that "the totality of the circumstances imply that Mr. Owen did not address substance abuse as a problem with trial counsel." (AB 60-61, citing PCR. 717). This was incorrect. The totality of the circumstances showed that counsel never asked Mr. Owen about substance abuse. Had counsel done so, counsel would have obtained the information about Mr. Owen's drug and alcohol abuse that was presented at the postconviction hearing. Moreover, as the client and not the attorney, Mr. Owen was not required to make a declaration of mitigation. This was trial counsel's responsibility.

The State and the postconviction court's second inference contradicted the first. The postconviction court inferred "that trial counsel considered and rejected substance abuse as a mitigator or defense in light of the stronger and more complete defense of insanity." (AB 61 citing PCR 717-718). It defies logic and the first inference to find that trial counsel considered and rejected substance abuse when the court found Mr. Owen did not address substance abuse with counsel. Counsel never

considered Mr. Owen's drug and alcohol abuse history compared to other "stronger or more complete defenses" because counsel never asked Mr. Owen about it in the first place.

The third inference that followed was no more reasonable. As quoted in the State's Answer, "[t]he court further explained:"

> While Ms. Haughwout could not attest to making a strategic decision, the experience of counsel, the care to with which the insanity evidence was developed and presented, and the relative weakness of the substance abuse mitigation in comparison to the insanity mitigation leads to the conclusion there was a conscious decision to forgo substance abuse as a mitigator.

(AB 61 citing PCR 718). This finding was not based on any facts that the postconviction court heard at the hearing. Simply creating a strategy when there was no such strategy testified to at hearing was unreasonable.

Trial counsel did not recall any investigation into drug and alcohol abuse. 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.

The mitigation of Mr. Owen's drug and substance abuse did not contradict the mitigation presented in Mr. Owen's case for life. Dr. Dee testified 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). Had counsel investigated and developed Mr. Owen's substance abuse history it could have been offered separately or to fortify the existing experts opinions on mitigation.

The evidentiary hearing did not produce one piece of evidence that showed that trial counsel considered substance abuse. There also was no record that investigator Hillary Sheenan investigated such a matter. The State had access to trial counsel's files as did trial counsel and Ms. Sheenan.

There also should be no confusion about the difference between an insanity defense and the presentation of mitigation during Mr. Owen's penalty phase. While the State and the postconviction court seem to use mental mitigation and the

insanity defense interchangeably, they are not. The jury had already denied Mr. Owen's insanity defense by the time the penalty phase began. Mitigation was another matter and one which trial counsel had an obligation to present as much evidence as possible.

The State and the postconviction court's interpretation and characterization of the testimony of Mr. Owen's drug and alcohol abuse were incorrect. First and foremost, Mr. Owen must take issue with the State and the postconviction court's characterization of Ms. Hanlon-Guerra's testimony.

Ms. Hanlon-Guerra was well qualified. (Vol. IX PCR. 227-28). Only her interview with Mr. Owen was a so called self-report. Ms. Hanlon-Guerra reviewed a number of sources. The State believed that it was important to note that that much of this evidence was gathered by trial counsel's defense team and was available to the defense team at the time of trial. (AB 70-71 n.15). There was nothing at the hearing that supported this important note. Moreover, many of the items such as trial transcripts from Mr. Owen's retrial and transcripts are not fairly seen as being gathered by trial counsel.

The State's characterization of Ms. Hanlon-Guerra's testimony continues in a similar direction in regards to her conclusions. Ms. Hanlon-Guerra did not "readily admit" that Mr. Owen was able to control his drug usage during college. *See*

(PCR Vol. IX 232). Mr. Owen's drug use was an ongoing and persistent problem. It was also progressive; Mr. Owen was so forthright with Ms. Hanlon-Guerra that he did point out times when he varied his drug use. Using harsher drugs on the weekend and marijuana and alcohol on weekdays for a brief period when he was in college hardly can be considered Mr. Owen controlling his drug use. Ms. Hanlon-Guerra never used the word control because someone with Mr. Owen's mental illnesses and organic brain damage who use drugs such as methamphetamine, cocaine, LSD and marijuana, weekly and in some cases daily, can hardly be considered in control. The same can be said about Mr. Owen's brief stints in the military, where he experienced withdrawal. (PCR Vol. IX 233).

The State's characterization of Dr. Henry Dee's testimony was also incorrect. The State argued in its answer brief that "Dr. Dee, a neuropsychologist, admitted that the facts of this crime rebutted his diagnosis of impulsivity and memory loss." (AB 73 citing to PCR 713). This citation was inaccurate. Page 713 does not contain the transcript of Dr. Dee's testimony. This page contains the postconviction court's order denying relief. There was no record citation in the postconviction court's order because Dr. Dee never admitted that "the facts of the crime rebutted his diagnosis of impulsivity and memory loss."

The State's cross-examination of Dr. Dee at the hearing was irrelevant. The State at any penalty phase or evidentiary hearing will always try to make a point about something. The strategy that the State employed at the evidentiary hearing was similar to that employed at trial; stand up and argue self-report if the mental health expert spoke with the defendant. If not, argue that the mental health expert never spoke with the defendant. If impulsivity or the ability to make rational decisions is at issue, ignore that this is in reference to the decision whether or not to commit the crime. Instead, point out decisions besides the decision to commit the crime; show pictures, play confession from mentally ill man and ask jury for death sentence.

Despite the State's efforts at Mr. Owen's penalty phase, Mr. Owen received the two statutory mental health mitigators and a non-statutory mitigator for his organic brain damage. Dr. Dee did not refute these mitigating factors, he enhanced them by considering Mr. Owen's drug abuse in relation to what the defense experts presented at trial. Had trial counsel developed Mr. Owen's drug abuse history in the manner seen in the postconviction hearing, these mitigating factors would have been given greater weight by the jury and the judge. Had this occurred, there was a reasonable probability that the outcome in this case would have been different.

The State's attack on the lay witnesses that Mr. Owen called at the evidentiary hearing was likewise incorrect. None of these witnesses could provide an account of every time Mr. Owen used drugs and alcohol. Each, in their own way, corroborated Mr. Owen's position and refuted the State's argument of self-report.

Mr. Owen was denied the opportunity to present a complete picture of the mitigation concerning his character and the nature of his crime. Drugs and alcohol are understood by the courts and the individuals who serve on juries. To have investigated a client's drug and alcohol history was a step even the least experienced attorney should take, let alone one with the experience of trial counsel. After denying Mr. Owen the opportunity to present a complete picture of his mitigation, trial counsel allowed the State to present a prejudicial picture by failing to object to prosecutorial misconduct and allowing the admission of the evidence which should not have been heard by the jury. When this Court considers all of the ineffective assistance of counsel discussed here and in Mr. Owen's initial brief, the result should be clear - - Mr. Owen should be granted a new penalty phase.

REPLY ON 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.

In this argument, Mr. Owen relied upon much of the evidence that he discussed in Argument III. This argument had two parts. Only the second part addressed voluntary intoxication. On the first part it was clearly Mr. Owen's position that counsel should have developed Mr. Owen's drug and alcohol history and presented it as part of a cohesive and integrated guilt phase defense.

The State's argument hardly touched Mr. Owen's contention that apart from any voluntary intoxication defense, counsel could have presented Mr. Owen's drug and alcohol history to fortify the expert's opinion concerning Mr. Owen's sanity at the time of offense. Mr. Owen's drug and alcohol abuse could have been part of an insanity defense; it was not in addition to or instead of it.

The postconviction court did not recognize this point and other than a brief mention neither did the state. This was a proper claim that required adjudication on its entirety. It was also a claim that was entitled to relief.

The State did write a lot about voluntary intoxication

whereas Mr. Owen did not. Had trial counsel discussed Mr. Owen's drug and alcohol abuse history a defense of voluntary intoxication would have emerged. Here counsel cannot even be found to have investigated the defense to make a reasonable strategic decision. This too was the result of counsel's ineffectiveness.

REPLY ON 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. This Court does not have all of the error that occurred before it to consider whether Mr. Owen was denied his rights under the constitution. Nevertheless, Mr. Owen submits that the error before this Court when considered cumulatively requires relief. This Court should reverse.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States mail to all counsel of record on this Reply Brief has been furnished by United States mail to the all counsel of record on this 13th day of September, 2007.

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CERTIFICATE OF COMPLIANCE

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

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