IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-650
LOWER TRIBUNAL NO. 84-4014

DUANE E. OWEN,

Petitioner,

v.

JAMES MCDONOUGH,
Secretary,
Florida Department of Corrections,

Respondent,

and

BILL MCCOLLUM,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without costs." This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Unites States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Owen was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

The record on appeal is comprised of 65 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 R. 123).

REQUEST FOR ORAL ARGUMENT

Mr. Owen has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Owen.

Table of Contents

Table of Authorities

Page

JURISDICTION FOR PETITION AND HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See. Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Owen's death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Owen's direct appeal. See, e.g., *Smith v. State*, 400 So.2d 956, 960 (Fla. 1981). *See Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985); *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969); *cf. Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Owen to raise the claims presented herein. See, e.g., *Way v. Duqqer*, 568 So.2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Rilev v. Wainwright*, 517 So.2d 656 (Fla. 1987); *Wilson*, 474 So.2d at 1162.

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition. This petition pleads claims involving fundamental constitutional

error. *See Dallas v. Wainright*, 175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those pled herein, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Owen's claims.

GROUNDS FOR HABEAS CORPUS

This is Mr. Owen's first petition for habeas corpus in this Court. Mr. Owen asserts in this petition for writ of habeas corpus that his capital conviction and death sentence were obtained in and then affirmed by this Court in violation of Mr. Mansfield's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

GROUND I

APPELLATE COUNSEL WAS INEEFFECTIVE FOR FALLING TO RAISE AND ARGUE THE STATE'S IMPROPER IMPEACHMENT OF DEFENSE EXPERTS DURING THE GUILT PHASE. THIS VIOLATED MR. OWEN'S RIGHT TO A FAIR TRIAL AND APPEAL AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL THUS DENYING MR. OWEN'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Owen pursued the defense of insanity at trial and relied upon expert testimony from Dr. Frederick Berlin, (Vol. 55 R. 5322-5444), and Dr. Fay Sultan, (Vol. 56 R. 5482-5671). Both experts found that Mr. Owen was insane at the time of offense. (Vol. 55 R. 5389; Vol. 56 R. 5569). Until Mr. Owen was convicted and the State proceeded to a penalty phase, the Jury's only consideration was guilt or whether to find Mr. Owen not guilty by reason of insanity.

Dr. Berlin testified via video-tape during the guilt phase because he was unavailable at that time. Prior to the publishing of Dr. Berlin's testimony to the Jury, trial counsel objected to the admission of a line of questioning and Dr. Berlin's answers concerning his views on the death penalty. Trial counsel objected on the basis of relevancy because Dr. Berlin's views on the death penalty were irrelevant on the question of Mr. Owen's guilt and sanity. (Vol. 54 R. 5229). Mr. Owen raised counsel's failure to adequately object to the State's improper impeachment as ineffective assistance of counsel in his postconviction motion. Nevertheless, the error was preserved for appeal based on trial counsel's relevance objection.

In response to the objection the State argued that that Dr. Berlin's view towards the death penalty was relevant to establish bias and cited *Power v. State*, 605 So.2d 856 (Fla. 1992), in support of this position. None of these cases supported the State's position. In *Power*, this Court's full address of the expert's views on the death penalty was as follows:

> Turning to the penalty phase, Power first claims that the trial court erred in restricting defense counsel's attempts to rehabilitate Dr. Radelet after the State impeached him regarding his personal bias against the death penalty. The primary relevance of Dr. Radelet's testimony related to Power's lack of future dangerousness because he was already serving ten consecutive life sentences for other crimes he had

> committed. The State's impeachment regarding the witness's personal bias against the death penalty cannot be seen as damaging to his testimony regarding future dangerousness. The marginal relevance of Dr. Radelet's testimony to issues other than Power's future dangerousness makes any error in this instance harmless.

Id. at 863.

Contrary to the State's position *Power* did not allow the impeachment of a defense expert by eliciting the expert's views on the death penalty. Unlike in Mr. Owen's case, the defense in *Power* opened the door to the impeachment. In *Power* the testimony was not relevant and found to be harmless. Moreover, this Court's decision on this issue in *Power* related only to the admission of such testimony in the penalty phase. Under the State's broad view of impeachment the State could select a jury that was in favor of the war and then proceed to elicit from the expert whether he or she was against the war. This would be no more relevant to the question before the jury in a guilt phase than Mr. Owen's expert's view of the death penalty. This would have prejudiced Mr. Owen in the guilt and penalty phase because the State had elicited an illegitimate area of bias.

The trial court found this to be a close question. (Vol. 54 R. 5245). While the trial court thought that such impeachment was probably admissible, the court questioned whether the prosecutor wanted to present this information because obviously it was not "going to be a frivolous appellate point." (Vol. 54

R. 5260). In this regard the trial court was correct because indeed it was an appellate point that entitled Mr. Owen to relief had this Court considered that this impeachment occurred during the guilt phase.

This error, while it should have been preserved on further grounds, was properly preserved in the trial court, both by objection and trial counsel's argument and by motion for new trial (Vol. 19 R. 3546-47). Moreover, it was identified by the trial court as being an issue on appeal.

The evidence of the defense experts' personal views on the death penalty during the guilt phase to establish bias was not probative of credibility on Dr. Berlin's opinion on the sanity of the Petitioner. The State's questions in this area were impermissibly calculated to prejudice the jury, comprised of jurors who at least could impose the death penalty if not favored it, and was irrelevant to the issue of whether Mr. Owen was insane at the time of offense. Many of the jurors expressed religious viewpoints in favor of the death penalty and all were death qualified.

Effective appellate counsel would have raised the error of the trial court's allowing the state to question Dr. Berlin on his views on the death penalty during the guilt phase. Appellate counsel indeed had the appellate argument almost

written based on the oral argument that trial counsel presented during trial.

Douglas v. California, 372 U.S. 353 (1963), recognized that "the principles of *Griffin*, required a State that afforded a right of appeal to make that appeal more than a 'meaningless ritual' by supplying an indigent appellant in a criminal case with an attorney." *Evitts v. Lucey*, 469 U.S. 387, 393-94(1985); *citing* 372 U.S. at 358. Thus, a "first appeal of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Lucey*, 469 U.S. at 396. The United States Supreme Court stated in *Lucey*, "the promise of *Douglas* that a criminal defendant has the right to counsel on appeal -- like the promise of *Gideon* that a criminal defendant has the right to counsel at trial -- would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Id*. at 397.

"Generally, an ineffective assistance of appellate counsel claim is analyzed under the two-prong test enunciated in *Strickland v. Washington*." *Grubbs v. Singletary*, 120 F.3d 1174, 1176 (11th Cir. 1997). "The test requires that a defendant to show that (1) appellate counsel's performance was deficient; and (2) the deficient performance prejudiced the defense." *Id*. at 1176-77. In the instant case, appellate counsel's deficiency as

detailed above proved both prongs. Accordingly, this Court should grant habeas relief.

GROUND II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OBVIOUS ERRORS FROM THE PENALTY PHASE OF MR. OWEN'S TRIAL. THIS VIOLATED MR. OWEN'S RIGHT TO A FAIR TRIAL AND APPEAL AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL THUS DENYING MR. OWEN'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Owen was denied the effective assistance of counsel to appeal the errors that occurred at his penalty phase. This violated Mr. Owen's right to a fair trial and appeal and his right to the effective assistance of appellate counsel thus denying Mr. Owen's rights under the Fifth, Sixth, Eighth and Fourteenth amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

First, Mr. filed a motion in limine concerning details of prior violent felonies which the prosecutor intended to introduce into evidence during the penalty phase proceeding. These consisted of three separate cases involving prior violent felony convictions. (Vol. 21 R. 3913-15). After hearing arguments from the prosecutor and defense, (Vol. 60 6155-74), the trial court denied the motion. (Vol. 60 R. 6266).

The prior violent felony convictions used in aggravation against Petitioner consisted of the Worden homicide (04-4000-CF), the Manley attempted first-degree murder (04-4001-CF) and the Simpson attempted first degree murder (04-4001-CF). (Vol. 56 R. 6329-6459). The prosecutor not only introduced certified copies of the convictions, but was allowed over objection, to introduce Petitioner's videotaped confession to each of these offenses which consisted of extensive details of how each offense was committed. The testimony of Sgt. Kevin McCoy, in addition to the videotaped interrogation of each offense became the central feature of the penalty phase. ***Williams v. State***, 117 So.2d 473 (Fla. 1960). ***Accord***, ***Finney v. State***, 660 So.2d 674 (Fla. 1995), ***Duncan v. State***, 619 So.2d 279 (Fla. 1993); ***Trawick v. State***, 473 So.2d 1235 (Fla. 1985).

The defense attempted to stipulate that Petitioner confessed to each offense based upon the theory that the details of these prior offenses were unnecessary under section 921.141(b), Florida Statute. (Vol. 21 R. 3913-15). Since the confession was used to prove the elements of the prior convictions, it was error not to accept the stipulation. ***Brown v. State***, 719 So.2d. 882 (Fla. 1998).

Allowing into evidence the videotaped confession to each offense, which went beyond what was necessary in establishing that Petitioner had a prior violent felony conviction was

irrelevant to establishing the aggravating circumstances as defined by 921.141(b), had limited probative value, and risked a sentence of death on improper grounds. *Old Chief v. United States*, 519 U.S. 172, 191 (1997).

Second, appellate counsel should have argued that the prosecutor was improperly permitted to allow Sgt. Kevin McCoy to testify to hearing statements relating to what Dr. Davis conveyed as to the injuries Ms. Manley suffered (Vol. 61 R. 6376), the injuries Ms. Simpson suffered (Vol. 61 R. 6350), and numerous hearsay statements conveyed by Mr. John Ettinger as to the Worden homicide. (Vol. 61 R. 6370).

Trial counsel objected on the grounds of hearing since the prosecutor could have readily called these witnesses and on confrontational grounds. (Vol. 61 R. 6334, 6357, 6378). A continuous objection was lodged. (Vol. 61 R. 6336).

The hearsay statements consisted of well over two hours of testimony. (Vol. 61 R. 6378). Although evidence of prior violent felony convictions is admitted during a penalty phase proceeding, Petitioner was deprived of a fair opportunity to rebut these hearsay statements. *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000).

Third, appellate counsel should have argued that the prosecutor was improperly allowed to introduce as evidence the prior violent felony conviction of attempted first degree murder

of Marilyn Manley (84-4001 CF). Trial counsel filed a motion to prohibit introduction of prior conviction of attempted first degree murder on the grounds that it cannot be determined whether a verdict was returned upon the theory of premeditated or felony murder. (Vol. 21 R. 3957-62).

In *State v. Gray*, 654 So.2d 552 (Fla. 1995), this Court held that the crime of attempted felony murder does not exist in Florida. Since the jury in the Manley case may have relied on the legally unsupported theory of felony murder in finding Mr. Owen guilty, the conviction was for a non-existent crime. *See Valentine v. State*, 688 So.2d 313, 317 (Fla. 1996) (where a jury was instructed on both theories, the conviction for attempted murder must be reversed). The introductions of the Manley case constitutes fundamental error since the conviction is for a non-existent crime and was improper for the jury's consideration in this case. *See Mundell v. State*, 739 So.2d 1201 (Fla. 5th DCA 1999).

The use of this conviction for a crime that no longer exists to support the imposition of the death penalty is arbitrary, capricious, and unreliable. As such, it is violative of Article I, section 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The cumulative effect of these asserted errors during the penalty phase rendered the entire sentence unreliable. Appellate counsel should have raised these errors on direct appeal of this case. This was deficient. *Strickland* and *Douglas*, *supra*. Mr. Owen was prejudiced because he was denied a hearing on direct appeal of these reversible issues.

GROUND III

MR. OWEN'S SENTENCES FOR THE NON-CAPITAL OFFENSES ARE ILLEGAL THIS COURT SHOULD REMAND FOR RESENTENCING ON THESE OFFENSES.

Petitioner was sentenced under the guidelines for the non-capital offenses of attempted sexual battery and burglary. The trial court sentenced Petitioner to fifteen years for the attempted sexual battery and a life sentence for the crime of burglary. (Vol. 22 R. 4060).

These sentences are illegal under *Smith v. State*, 537 So.2d 982 (Fla. 1989). In *Smith*, this Court held that the sentencing guidelines were unconstitutional for crimes that occurred before July 1, 1984. *Id*. at 988. Following *Smith*, Mr. Owen should have been given the opportunity to elect to be sentenced under the guidelines or not. *Id*. at 987.

At the sentencing hearing, Petitioner was not given the opportunity to elect whether to be sentenced under the guidelines as pre-guidelines and as such, resentencing is

mandated under *Smith.* *See Owen v. State*, 864 So.2d 557 (Fla 4th DCA 2004).

Because Mr. Owen is capitally sentenced he may not proceed under Florida Rule of Criminal Procedure 3.800(b). Despite the nature of his death sentence, this Court should still correct this error. *See Leonard v. State*, 760 So.2d 114,116 fn4 (Fla. 2000).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus 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 Petition for Writ of Habeas Corpus was generated in a courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

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