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

DUANE E. OWEN
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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REPLY ON 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 argued under Ground I that appellate counsel was ineffective for failing to raise argue the preserved issue of the State's improper impeachment of Dr. Berlin concerning his views on the death penalty. The Respondent's arguments do not overcome this clear error. This Court should grant relief.

This violation of Mr. Owen's rights took place in the guilt phase, not the penalty phase. At trial, the State's offer of *Power v. State*, 605 So.2d 856 (Fla. 1992), in support of this position did not justify improper impeachment and the interjection of Dr. Berlin's personal views. This area of inquiry was completely irrelevant at the guilt phase where the issue of life or death was not yet before the jury.

Perhaps a relevant question at the guilt phase where insanity is at issue would have been "Dr. Berlin, what is view on the conviction of the criminally insane." It can be presumed that Dr. Berlin's answer to that question would have been that he was opposed to it. The State never would ask this question because hopefully everyone on the jury would be opposed to the

conviction of such individuals.

Not everyone shared Dr. Berlin's view of the death penalty. In fact, none of the jurors were so opposed to the death penalty that they would have had any moral reservations in opposing it. And while trial counsel made some efforts to exclude jurors who were exceptionally zealous, many of the jurors could not only impose death, they also thought that it was the right thing to do. These jurors would have seen Dr. Berlin's view as not just different from their view but also morally wrong.

It is mere speculation by the Respondents that somehow the testimony of the State's experts overcame Mr. Owen's insanity defense. Dr. Berlin's testimony was well reasoned. It was the product of a distinguished career and level of education not even approached by the State's experts. With one question concerning his moral and religious views that had no bearing on the insanity defense, the State managed to place him in opposition morally and religiously to the jurors. After that any chance of a fair hearing of Dr. Berlin's findings in support of Mr. Owen's insanity defense, and any pretense of a fair trial, was lost. Accordingly, this Court should grant relief.

REPLY ON 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 alleged under this Ground that appellate counsel was ineffective in three ways: First, because of the unfair prejudice of the detailed description by Sgt. McCoy and Mr. Owen's videotaped confession to each offense was unfairly prejudicial, had limited probative value, and risked a sentence of death on improper grounds. The State's evidence went beyond what was necessary and was cumulative.

The Respondent argues that the hearsay statements at issue were admissible. In support of this argument the Respondent reproduces the text from this Court's opinion in *Rodriguez v. State*, 753 So.2d 29, 45 (Fla. 2000):

> We distinguish this case from those cases in which the police officer gave hearsay testimony concerning a defendant's prior violent felonies. *See Hudson v. State,* 708 So.2d 256, 261 (Fla.1998); *Clark v. State,* 613 So.2d 412, 415 (Fla.1992); *Waterhouse v. State,* 596 So.2d 1008, 1016 (Fla.1992). Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial, provided the defendant has a fair opportunity to rebut any hearsay testimony. *See* Rhodes v. State, 547 So.2d 1201, 1204 (Fla.1989); Tompkins v. State, 502 So.2d 415, 419 (Fla.1986).
>
> In the case of prior violent felony convictions, because

> those details are admissible, it is generally beneficial to the defendant for the jury to hear about those details from a neutral law enforcement official rather than from prior witnesses or victims. **In fact, we have cautioned the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceedings. *See Finney v. State,* 660 So.2d 674, 683-84 (Fla.1995); *see also Duncan v. State,* 619 So.2d 279, 282 (Fla.1993)(stating that details of prior felony convictions should not be made a feature of the penalty phase proceedings);** *Stano v. State,* 473 So.2d 1282, 1289 (Fla.1985) (same). Nonetheless, in many cases, any error in admitting the hearsay testimony has been considered harmless because the certified copy of the conviction itself conclusively establishes the aggravator. *See, e.g., Hudson,* 708 So.2d at 261; *Tompkins,* 502 So. 2d at 420.

Response at 8-9 *citing Rodriguez* at 45. (Emphasis added).

In Mr. Owen's case the State did much more than "conclusively establishing" the aggravator. Here, contrary to the Respondent's position, it was not harmless because the State made the details of the prior violent felonies not just a feature of the case, but also of the State's calculated plan to undermine the compelling mitigation that Mr. Owen offered.

Mr. Owen did not have a fair opportunity to rebut the hearsay statements that were testified to by Sgt. McCoy. Trial counsel objected and argued that 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).

Lastly, 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 introduction 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 Respondents did not offer a defense to this allegation. Mr. Owen simply should not have a prior violent felony which he may have been convicted under an unconstitutional theory weighed against his case for life.

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.

REPLY ON GROUND III

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

The Respondents argue that the record establishes that Mr. Owen was sentenced under the guidelines. (RTHP at 11). That is exactly the point. Before Mr. Owen was sentenced on the non-capital cases he should have been afforded the opportunity to elect whether he was sentenced under the guidelines or not. 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.

The Respondent's listed two citations to show that Mr. Owen was sentenced under the guidelines. *See* (RTHP at 11)*citing* Vol. 65 at 6994, 7024 of the retrial appeal). The Respondent's record citations are from the oral pronouncement of Mr. Owen's non-capital sentence by the retrial court. Mr. Owen cited the written sentencing order. (Petition at 19, citing Vol. 22 R. 4060).

Mr. Owen simply cannot cite to any portion of the record where he was offered the choice of whether to be sentenced under the sentencing guidelines. Even the sentencing score sheet does not contain any indication that Mr. Owen elected to be sentenced under the guidelines. *See* (Vol. 21 R. 4044-4047).

Mr. Owen had a right to elect whether to be sentenced under the guidelines. Had Mr. Owen been afforded the opportunity to elect to be sentenced under the guidelines, there would be an indication in the record of this fact. Accordingly, because Mr. Owen does not abandon the rights that he has, and because the State and the courts must also follow the law, Mr. Owen continues to ask this Court for relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus has been furnished by United States mail to all counsel of record on this on this 12th day of September, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply 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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