No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARIAN PAPACSI OWENS,
Petitioner,

vs.

SUE MICKENS, Warden &
COMMISSIONER, Georgia Department of Corrections,
Respondents.

On Petition for Writ of Certiorari *to the United States Court of Appeals for the Eleventh Circuit*

(CA11 No. 19-11553-B)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

The state trial judge who presided over Petitioner Marian Papcsi Owens' murder trial refused to let her fire her lawyer because of her mental illness. Her lawyer, while recognizing her absolute right to testify at her trial, wanted Ms. Owens to be allowed to testify by narrative because he did not feel that he could ask any questions that would be helpful to her defense. But the trial judge, over vigorous objection, made him question his client. His direct examination of his client was, as he told the judge at one point before being ordered to continue, "selling her out and [he felt] horrible about what [he was] doing…" [App. 46].

Below, both the district court and the Eleventh Circuit refused to issue a certificate of appealability ("COA") on Ms. Owen's habeas petition. A COA was needed because a federal habeas petitioner challenging a state conviction cannot obtain appellate review unless and until a COA issues. 28 U.S.C. § 2253(c). A COA must issue whenever "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDanie*l, 529 U.S. 473, 484 (2000).

The question presented here is the following:

1. Did the Court of Appeals err below in denying Ms. Owens a COA as to whether Ms. Owens received effective assistance of counsel when the

trial judge forced counsel to ask questions of his client that trial counsel believed fatal to her defense?

LIST OF PARTIES

In addition to the parties listed on the cover page, the following additional parties are relevant to this Petition. The current commissioner of the Georgia Department of Corrections is Timothy C. Ward.[1]

LIST OF RELATED PROCEEDINGS

State Judgments

Habersham County (Georgia) Superior Court:

State v. Owens. No. 12-FR-02-M. Judgment entered August 9, 2013. (Motion for new trial and denied June 29, 2015)

Georgia Supreme Court:

Owens v. State, No. S16A0058. Judgment entered March 7, 2016. (Re-hearing denied April 4, 2016).

Federal Judgments

U.S. Supreme Court (direct appeal)

Owens v. Georgia, No. 15-9830. Certiorari denied October 3, 2016.

U.S. District Court for the Middle District of Georgia

Owens v. Mickens, No. 5:17-cv-00057-TES-CHW. Judgment entered April 15, 2019.

[1] During the proceedings below, the commissioner was Gregory C. Dozier.

U.S. Court of Appeals for the Eleventh Circuit

Owens v. Warden, No. 19-11553-B. Judgment entered July 3, 2019.

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TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Marian Papacsi Owens respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

On July 3, 2019, the Eleventh Circuit Court of Appeals issued an unpublished order denying Ms. Owens a COA. It is reprinted in the Appendix.

The district court did not prepare a reported opinion. Its rulings are reprinted in the appendix.

JURISDICTION

The district court had jurisdiction over the petition for habeas corpus. 28 U.S.C. § 1331; 28 U.S.C. § 2254.

This Court has jurisdiction to review the judgment of the Eleventh Circuit. 28 U.S.C. § 1254(1). Judgment was entered on July 3, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Provisions

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI

* * * * *

Federal Statutes

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253

STATEMENT OF THE CASE

I. THE STATE PROCEEDINGS

Ms. Owens was indicted and tried before a jury for the murder of her boyfriend, Tommy Janes.

Prior to her trial, she had complained about her public defender, against whom she had a litany of complaints. At a pretrial hearing, she was permitted to discharge him and proceed *pro se*. She and her public defender evidently resolved their differences, however, as he appeared with her as her counsel at her jury trial.

A. The Trial

At trial, the jury heard from the decedent's neighbor, Mr. Crane. He testified that the morning of December 23, 2011, he heard Mr. Janes yelling from inside Mr. Janes' home. The neighbor's wife called 911. Mr. Crane heard a woman "singing over and over, Jesus is with me and the devil is standing behind me." Mr. Crane ran around to the back of the house and saw Ms. Owens beating Mr. Janes with a nutcracker. She was completely naked. During the incident, Mr. Crane was relaying what he saw to his wife, who was on the phone with 911.

When Ms. Crane testified, the State played her 911 call for the jury. The audio was somewhat unclear, but Ms. Crane denied that she had said on the tape "Tommy [Janes] raped a woman," even after defense counsel played it multiple times for her and the jury.

On the second day of trial, defense counsel informed the court that Ms. Owens wished to absent herself from the courtroom while a lengthy audio recording was played, because she did not want to hear it. The trial judge informed her that she "ha[d] the right to not be present if [she did] not want to." Accordingly, she absented herself from the courtroom, returning after the recording concluded.

After lunch on the second day, the associate medical examiner testified. Besides testifying about the numerous wounds that the victim had suffered, he testified that the victim had a penile prosthesis, to help obtain erections.

The next witness was Investigator LeCroy. During his testimony, Ms. Owens again complained that she had not previously seen the pictures that the State was introducing via his direct testimony. Shortly thereafter, she audibly complained to her trial counsel: "You might as well just go ahead and just tell the jury I am going to be convicted. I am innocent." The trial court admonished her to keep her voice down when talking to her attorney. A few pages later in the transcript, Ms. Owens asked to be removed from the courtroom, accusing the trial judge of being biased and accusing her lawyer of "setting [her] up." The judge ordered her removed.

After a break, the trial court brought Ms. Owens back into the courtroom. She requested that trial counsel be fired and that she be tried *in absentia*. The trial court refused to allow Ms. Owens to fire her attorney, but it did allow her to absent herself from the courtroom for as long as she wished.

With Ms. Owens outside the courtroom, the examination of Investigator LeCroy continued. Trial counsel had the investigator establish that law enforcement had not done anything to "confirm or rule out whether there was any evidence of a sexual assault in this case." Following cross-examination, Ms. Owens was returned to the courtroom, at her request.

Eventually, Ms. Owens took the stand against counsel's advice and expectation. Nonetheless, trial counsel first examined her via structured questions, rather than asking for a pure narrative. When counsel eventually tried to use narrative, the prosecutor objected. [App. 41 ("MR. WHITE: Judge, that's a narrative. I object. THE COURT: You need to focus. Just a moment. Mr. Wasserman, you need to keep her focused on the testimony.")]. Later, when the state again objected, trial counsel asked for "a little leeway or [he was] not going to question her anymore," to which the trial court responded by saying that the testimony needed to "stay on track about the events."

With respect to Mr. Janes, Ms. Owens testified that she had known Mr. Janes for two or three years before the incident. She had called him to pick her up from the Sheriff's Office on December 22. When they arrived at his house, she showered. They then discussed the sleeping arrangements, which were to

be in the same bed in his bedroom, which was full of guns. She denied that she had sex with him that night. After they had woken up in the morning, he grabbed her butt very hard, which made her upset. After that, she blacked out and did not really recall anything, other than him chasing her at one point. She also remembered pulling off her clothes but could not remember why.

At a sidebar conference, counsel expressed his concern that he felt himself ineffective because he had not prepped for her testimony, and he had no idea the answers to his questions, much less whether they were what she wanted him to ask. The trial court directed him to proceed. [App. 42].

When trial counsel resumed the examination, trial counsel quickly became frustrated again, at which time the trial court instructed: "You ask her the questions. She will answer them." [App. 43].

Ms. Owens continued her testimony. She testified that after having been outside while still naked, she had returned back to the house and remembered Mr. Janes chasing her, and her chasing him, while holding a knife in her hand.

When trial counsel repeated questioning about what happened once she came back inside, the State objected to the repeat questioning. [App. 46]. At that point, trial counsel had a small meltdown in front of the jury:

> MR. WASSERMAN: Your Honor, I am not asking any more questions. I am trying to help everybody here.
>
> THE COURT: Mr. Wasserman.
>
> THE DEFENDANT: Stay calm, Harvey. It's okay. I promise. Everything is okay.

> THE COURT: Now, I allowed you to talk, and I am simply making a ruling. That's my job. Now, my recollection is that you have asked her three times about coming back in the house.
>
> MR. WASSERMAN: Yeah, I am not asking her any more questions, your Honor. I feel I am selling her out and I feel horrible about what I am doing and I am trying to do my best and I understand he is objecting to me –
>
> THE DEFENDANT: We are friends to the end. I need you.
>
> MR. WASSERMAN: Tell your story. Judge, I am not –
>
> THE DEFENDANT: Just stay, Harvey.
>
> MR. WASSERMAN: – asking her any more questions.

[*Id.*].

The trial court excused the jury and reproached trial counsel for his outburst and then ordered a lunch recess to allow trial counsel to cool off. [App. 47].

After the lunch recess, and an apology from counsel, the trial court inquired whether, in light of Ms. Owens' testimony that had included references to things like blessed or magical shoes, the defense was re-asserting insanity instead of the self-defense argument that counsel had made at opening statements. The trial court accepted Ms. Owens' personal statement that she did not wish to raise an insanity defense.

Ms. Owens' testimony resumed. She testified that she only had flashes of memory, of bullets on the floor and of Mr. Janes' hands cupped over her mouth. [App. 53]. She said that she stabbed him because she was afraid that a "demon

was in him." [App. 54]. When asked whether Mr. Janes had raped her, she denied it to her trial counsel, and accused trial counsel of trying to harm her case:

> THE DEFENDANT: I see where you are going with this. You are trying to lead me into hanging myself, and I will allow you to do that, if that's what you feel you need to do that, if that's what you feel you need to do –
>
> MR. WASSERMAN: No, I – I –
>
> THE DEFENDANT: – but the jury will find me innocent of these charges, and if -- you know, and God will permit for that to happen because...
>
> MR. WASSERMAN: I know

[App. 57-58]. She then reiterated that she was not "trying to dirty [Mr. Janes'] name." [App.58].

During closing argument, trial counsel apologized that the evidence presented was at odds with his opening statement, due to his client's testimony. And he apologized for his outburst during his examination of Ms. Owens, which he said was attributable to being forced to "lead [his] client up to the sacrificial altar to testify in way that [he didn't] think is in [his client's] best interests." And he proceeded, in contrast to Ms. Owens' testimony, to paint Mr. Janes as having attempted to rape Ms. Owens.

The jury convicted her, and she received life without parole.

B. The Georgia Supreme Court

On appeal to the Georgia Supreme Court, it affirmed her conviction. [App. 22]. As relevant here, it rejected her claim that she had received ineffective assistance due to trial counsel's questioning that brought out evidence harmful to her defense. [App. 28-29].[2]

III. THE DENIAL OF HABEAS AND A COA

Below, the district court denied Ms. Owens habeas relief on her claim of ineffective assistance without a hearing and declined to issue a COA. [App. 6-7].

The U.S. Court of Appeals for the Eleventh Circuit likewise denied a COA. [App. 1].

REASONS FOR GRANTING THE PETITION

Although the federal question involved in this Petition normally might not merit *certiorari*, this Court will nonetheless intervene when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup. Ct. R. 10(a). This case presents such a need for this Court's supervisory power. A summary disposition is appropriate. *See, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) ("[A] summary

[2] Ms. Owens filed a petition for certiorari to this Court on direct appeal, seeking review of whether the trial court wrongfully denied her request to fire her trial counsel and whether she had the right to order her counsel to stop presenting evidence. *See Owens v. Georgia*, No. 15-9830. This Court denied *certiorari* without comment.

reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.").

Where, as here, habeas relief has been denied, a court of appeals may not hear the appeal unless and until either the district court or the court of appeals issues a COA. *See* 28 U.S.C. § 2253(c).

I. THE STANDARD REQUIRED FOR A COA IS VERY LOW.

A showing is substantial enough to merit a COA when "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDanie*l, 529 U.S. 473, 484 (2000). Ms. Owens can be entitled to a COA even if the Court does not ultimately believe that she will ever prevail on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("[A] COA does not require a showing that the appeal will succeed…. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail.").

In the Eleventh Circuit, a single judge can consider a request for COA. 11th Cir. L.R. 22-1(c). "The denial of a certificate of appealability…may not be the subject of a petition for panel rehearing or a petition for rehearing en banc." *Id.*

II. REASONABLE JURISTS CAN DEBATE WHETHER MS. OWENS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL

JUDGE MADE COUNSEL ASK MS. OWENS QUESTIONS HARMFUL TO HER DEFENSE.

The Sixth "Amendment requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.' Thus…[i]f no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." *United States v. Cronic*, 466 U.S. 648, 654 (1984). *See also Anders v. California*, 386 U.S. 738, 743 (1967) (holding that the Sixth Amendment guarantees the defendant "counsel acting in the role of an advocate"). Given the critical function of the lawyer to devise an effective trial strategy, the "Government violates the right to effective assistance when it interferes…with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citations omitted).

Despite those black-letter rules, trial counsel here was clear at the outset that he did not want his mentally ill client to testify and would hurt her defense if he did anything other than ask her to provide a narrative:

> In my humble opinion, her taking the stand would be a death nail to this case. I am not going to participate or question her, other than to ask her to tell her story to the jury, your Honor. I cannot as a lawyer….[do] my duty to protect and defend her, despite her wish to testify, be a party to self-destruction; and I am just go-ing to ask her to please tell the jury what you want…I just feel it would be inconsistent with my obligations to represent her to the best of my ability in accordance with the law to participate in what I see as a very self-destructive move.

[App. 37]. But the trial judge did not allow it. *E.g.*, [App. 41 ("MR. WHITE: Judge, that's a narrative. I object. THE COURT: You need to focus. Just a moment. Mr. Wasserman, you need to keep her focused on the testimony.")]. *See also*, *e.g.*, [App. 43 ("THE COURT: You ask her questions. She will answer them.")].

Trial counsel continued the examination as ordered for a time before again, in an outburst, declaring that he would not continue asking questions that he believed harmful to his client: "I am not asking her any more questions, your Honor. I feel I am selling her out and I feel horrible about what I am doing…." [App. 46]. Yet he was made to continue. At one point, even his client accused him in front of the jury of asking questions that she thought were harmful, too: "I see where you are going with this. You are trying to lead me into hanging myself, and I will allow you to do that, if that's what you feel you need to do." [App. 614]. Still the examination continued, and Ms. Owens was at one point ordered to "respond to the question" that her trial counsel had reluctantly posed. [App. 62].

Given the circumstances, "reasonable jurists could debate whether" Ms. Owens received the effective assistance of counsel guaranteed under the Sixth Amendment; therefore, a COA was appropriate. *Slack*, 529 U.S. at 484. The Court of Appeals was wrong to have withheld one.

CONCLUSION

For the forgoing reasons, this Court should grant the petition, summarily reverse the denial of the COA on whether Ms. Owens received effective assistance of counsel.

Dated: September 30, 2019

Respectfully submitted,

MARIAN PAPACSI OWENS

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