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IN THE SUPREME COURT OF FLORIDA

RODERICK MICHAEL ORME,

Appellant,

vs.

CASE No. SC22-338
L.T. No. 92-0000-442 CFMA

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The Totality of the Punishment Imposed and The Thirty-Year Delay Between the Original Offense and the Current Sentence Violate the Prohibition Against Cruel and/or Unusual Punishment Under the Federal and State Constitutions.

The Answer Brief makes much of the original affirmance of Mr. Orme's conviction and sentence. However, the meritorious issue leading to his first resentencing could not have been raised on direct appeal — namely, the ineffective assistance he received when trial counsel did not adequately investigate mental health issues as potential mitigation. *See Orme v. State*, 896 So. 2d 725, 735 (Fla. 2005) (holding counsel's decision not to investigate Mr. Orme's bipolar diagnosis constituted deficient performance). Mr. Orme is not responsible for the bifurcation of capital litigation into direct and collateral proceedings.

The Answer Brief also mentions the second affirmance of Mr. Orme's sentence without mentioning the numerous errors this Court recognized in that sentencing proceeding. Among other things, this Court agreed with Mr. Orme "that the trial court erred in holding that a juror's refusal to consider remorse as a mitigator

could only be a basis for a peremptory challenge." *Orme v. State*, 25 So. 3d 536, 543 (Fla. 2009). The error was unpreserved, but it was still error. *Id.* The prosecutor in the second resentencing also made improper and misleading comments — which this Court recognized to be improper and misleading — during voir dire. *Id.* at 545. The Court found them harmless, which does not make them frivolous. And this Court found the trial court, in the second resentencing, did not properly consider some of Mr. Orme's mitigation. *See id.* at 548-49. The Court found that was error, but harmless. *Id.*

In affirming Mr. Orme's second death sentence, this Court also rejected a claim based on *Ring v. Arizona*, 536 U.S. 584 (2002), while noting that Mr. Orme had previously raised the issue in post-conviction proceedings. *See Orme*, 25 So. 3d at 552. There is no dispute, therefore, that Mr. Orme sought relief under *Ring* even before his resentencing; and, in light of subsequent developments, that argument cannot be deemed frivolous.

In addition, it is worth noting that observers and some legislators immediately recognized *Ring* would have consequences for Florida law. *See, e.g.*, Hon. O.H. Eaton, Jr., *Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact the Death Penalty in Florida*, 34 Stetson

L. Rev. 9, 30-35 (Fall 2004) (noting inter alia that the rationale for not applying *Ring* in Florida ignored several statutory provisions); Benjamin F. Diamond, Note, *The Sixth Amendment: Where Did the Jury Go? Florida's Flawed Sentencing in Death Penalty Cases*, 55 Fla. L. Rev. 905 (July 2003); Gary Blankenship, *With An Eye Toward Making Sure It Meets Constitutional Muster Lawmakers Examine Death Penalty Statute*, Fla. Bar News, Feb. 1, 2003, at 13. The length of time it took Florida to address the constitutional deficiencies in its capital sentence scheme after *Ring* cannot be attributed to Mr. Orme. This is an example of a delay squarely caused by Florida's failure to correct the constitutional deficiencies in its sentencing procedures. *Cf. Thomson v. McNeil*, 556 U.S. 1114, 1300 (2009) (Stevens, J., regarding the denial of a petition for writ of certiorari).

In 2015, Justice Kennedy recognized that "research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring) (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U.J.L. & Pol'y 325 (2006)). Among other things, suicide rates on death row exceed those in the general prison population. Eaton,

supra, at 145. Meanwhile, the length of time spent on death row continues to rise. *See* Death Penalty Information Center, *Time on Death Row*, https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row (available as of Dec. 5, 2022).

In the totality of the circumstances, Mr. Orme's current sentence violates his right to be free from cruel and unusual punishment under the Eighth Amendment and the Florida Constitution. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

II. Fundamental Error Occurred When the Court Failed to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances.

Mr. Orme relies on his Initial Brief regarding this issue, which is raised to preserve the question for further review.

CONCLUSION

For the reasons stated above and in his Initial Brief, Mr. Orme requests that his sentence of death be vacated as unconstitutional.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Steven E. Woods, Assistant Attorney General, Capital Appeals Division, on December 5, 2022. I certify that this brief complies with the font and word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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