IN THE SUPREME COURT OF FLORIDA

RODERICK MICHAEL ORME

Appellant,

v. CASE NO. SC02-2625

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, Roderick Michael Orme, appeals the March 8, 2002 denial of his motion for post-conviction relief, and the October 29, 2002 denial of his motion for rehearing, filed in the Circuit Court of the Fourteenth Judicial Circuit, Bay County, Florida. References to appellant will be to "Orme" or "Appellant," and references to appellee will be to "the State" or "Appellee." The record on appeal in the instant case consists of twenty-one (21) volumes and will be referenced as (PCR) followed by the appropriate volume and page number. The record on appeal from Orme's direct appeal, Case Number 81,645, will be referenced as (TR) followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

Orme appeals the trial court's March 8, 2002 denial, after an evidentiary hearing, of his motion for post-conviction relief and the October 29, 2002 denial of his motion for rehearing. At trial, Orme was represented by Mr. Walter Smith. The State was represented by Mr. Steve Meadows. Many of the "facts" cited by Orme in his initial brief are without record support or citation. Accordingly, the State will provide its own statement of the facts in this case.

Orme was charged on March 26, 1992 with first degree murder, one count of robbery and one count of sexual battery. The relevant facts concerning the March 1992 murder of Lisa Redd are recited in this Court's opinion on direct appeal:

> ··· Roderick Michael Orme had an extensive history of substance abuse for which he previously had sought treatment at a recovery center in Panama City. On the morning of March 4, 1992, Orme suddenly appeared at the center again, despite a lapse of about a year since his prior treatment. He was disoriented and unable to respond to questions, but he did manage to write a message. It was "LEE'S MOT RM15."
>
> While a breathalyzer returned negative results, Orme's blood tested positive for cocaine and he was showing signs of acute cocaine withdrawal. He was cold, his face was flushed, and he was exhibiting symptoms like delirium tremens. An attending physician placed Orme in intensive care for thirty hours. Illegal barbiturates were found in Orme's possession.
>
> Lee's Motel was located only a few blocks from the recovery center. Someone at the center telephoned the motel and said that a man who sounded hysterical had said to check room 15. The owner did so and found the body of a woman who had been badly beaten. Semen was found in the victim's orifices, but DNA testing could not identify a DNA match. One sample taken from the victim's panties, however, held material that matched the pattern of Orme's DNA. Orme's underpants also had a mixed blood stain matching both Orme and the victim's genotype. Orme's fingerprints were found in the motel room, and his checkbook and identification card were found in the victim's car, which was parked outside.
>
> The cause of death was strangulation. There were extensive bruising and hemorrhaging on the face, skull, chest, arms, left leg, and abdomen, indicating a severe beating. The abdominal hemorrhaging extended completely through the body to the back and involved the right kidney. Jewelry the victim always wore was missing and was never found. Police later identified the body as that of Lisa Redd, a nurse. Orme acknowledged that he had summoned Redd to his motel

room the day she was killed because he was having a "bad high" after freebasing cocaine. Orme and Redd had known each other for some time, and Orme called her because she was a nurse.

On March 4, 1992, Orme told police he had last seen Redd twenty minutes after she arrived at his motel. Orme said she had knocked a crack pipe from his hands, apparently resulting in the loss of his drugs. He left to go partying soon thereafter. In this statement, he also said that this was the first time he had abused cocaine since 1990 and that he did not remember being at the addiction recovery center.

The following day Orme gave a lengthier statement to police. In this one, he said that Redd had arrived at his motel room between 9 and 10 p.m. She slapped his crack pipe out of his hands and swept several pieces of crack into the toilet. Orme said he then took the victim's purse, which contained her car keys, and drove away in her car. Orme said he left and returned several times and that it was still dark when he realized something was wrong with Redd. The last time he returned, however, he could not enter because he had left the motel key inside the room.

At trial, Orme testified that Redd had arrived at his motel room at 7, 8, or possibly 8:30 p.m. He again said he returned to the motel room at some point. At this time he realized Redd's body was cold and that something was wrong. But he said the next thing he remembered was being in the hospital. Robert Pegg, a cab driver, testified at trial that he had picked up Orme at Lee's Motel around 8 p.m. A man who lived across from the motel, Joseph Lee, also testified. He said that he generally kept track of what was happening at the motel and had first noticed the victim's automobile there around 9:30 or 10 p.m. Lee said he saw Orme leave and return several times. Before going to bed around 2 a.m., Lee said he saw Orme leave in the victim's car once more. Another witness, Ann Thicklin, saw someone slowly drive the victim's car into Lee's Motel around 6:15 a.m.

The jury convicted Orme on all counts and recommended death on a vote of seven to five. The defense waived the mitigator of no prior criminal history and asked for the jury to be instructed on the age mitigator, the two statutory mental mitigators (substantial impairment and extreme emotional disturbance), and the

> catch-all mitigator. The state asked for three instructions: murder committed in the course of a sexual battery; heinous, atrocious, or cruel; and pecuniary gain.
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> Shortly before sentencing, the defense asked the court to consider the "no significant prior criminal history" factor based on the presentence investigation ("PSI") and penalty-phase testimony. The defense stated that it had waived the factor to prevent the State from introducing a rebuttal witness about an alleged prior sexual assault committed by Orme.
>
> The trial court stated that it had considered this motion. Shortly thereafter the judge sentenced Orme to death, finding all three aggravators argued by the State. In mitigation, the trial court found both statutory mental mitigators and gave them "some weight," but concluded they did not outweigh the case for aggravation. The Court rejected the other factors argued by Orme: his age (30), his love for his family, an unstable childhood, potential for rehabilitation, and good conduct while awaiting trial.

Orme v. State, 677 So.2d 258, 260-261 (Fla. 1996).

Orme raised eight issues in his direct appeal.[1] This court affirmed Orme's conviction and sentence in Orme v. State, 677 So.2d 258 (Fla. 1996). On August 22, 1996, this court issued its mandate in Orme's direct appeal. Orme filed a Petition for Writ of Certiorari with the United States Supreme Court. The United States Supreme Court denied review on January 13, 1997, in Orme v. Florida, 117 S.Ct. 742 (1997)(PCR III. 416).

On December 12, 1997, Orme filed a timely motion to vacate his judgment and sentence with special leave to amend. On July 19, 2001, Orme filed an amended motion to vacate his convictions

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[1] (1) it was error to deny Orme's motion for a judgment of acquittal when the case against him was purely circumstantial and the State failed to disprove all reasonable hypotheses of innocence; (2) it was error to deny Orme's motion to suppress his statements to officers on grounds he was too intoxicated with drugs to knowingly and voluntarily waive his right to remain silent; (3) death is not a proportionate penalty in this case because his will was overborne by drug abuse, and because any fight between the victim and him was a "lover's quarrel"; (4) because his mental state at the time of the murder was such that he could not form a "design" to inflict a high degree of suffering on the victim, the trial court erred in instructing the jury regarding, and in later finding, the aggravating factor of heinous, atrocious, or cruel; (5) the trial court erred when it failed to weigh in mitigation the fact that Orme had no significant prior criminal history; (6) the trial court erred in declining to give a special instruction that acts perpetrated on the victim after her death are not relevant to the aggravator of heinous, atrocious, or cruel; (7) the instruction on heinous, atrocious, or cruel violated the dictates of Espinosa v. Florida, 505 U.S. 1079(1992); (8) he was incapable of forming the specific intent necessary for first-degree murder and accordingly he cannot be sentenced to death.

and sentence.[2] He once again requested special leave to amend as additional public records become available. Orme raised twenty-five claims in his amended motion for post-conviction relief.[3]

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[2] At a status conference held on March 21, 2001, counsel for Mr. Orme informed the court he had no objections to the state agencies' compliance with his request for public records. Counsel informed the trial court "we've finished with the public records aspect of this case." (PCR Vol. XIII 1486). At counsel's request, with no objection from the State, the trial court set July 20, 2001 as the deadline for Orme to file his amended motion for post-conviction relief. Orme's amended motion for post-conviction relief was timely filed on July 20, 2001 (PCR V. 706-811).

[3] (1) counsel was ineffective for failing to challenge the general jury qualification procedure employed in Bay County; (2) trial counsel was rendered ineffective because the State withheld evidence that was material and exculpatory, specifically jail records demonstrating Orme was bipolar; (3) counsel was ineffective for failing to object to the prosecutor's improper arguments during both phases of Orme's trial; (4) counsel was ineffective when he failed to adequately investigate and prepare the defense case and by failing to adequately challenge the State's case; (5) trial counsel was ineffective for failing to present evidence that Orme was bipolar during both phases of Orme's trial; (6) trial counsel was ineffective when counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the mental health consultants; (7) counsel was ineffective for failing to investigate and develop mitigation including evidence of Orme's history of severe mental illness, closed head injury, and exposure to neurotoxins; (8) Orme is innocent of first degree murder and the death penalty; (9) Orme was involuntarily absent from critical stages of his trial; (10) counsel was ineffective for his failure to adequately litigate against the introduction of gruesome and unfairly prejudicial crime scene photographs; (11) counsel was ineffective for failing to adequately challenge penalty phase jury instructions which improperly shifted the burden to Orme to prove that death was inappropriate and to prove that mitigating circumstances

On September 26, 2001, the court held a Huff [4] hearing on Orme's amended post-conviction motion. The court summarily

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outweigh aggravating circumstances; (12) counsel was ineffective for failing to adequately challenge constitutionally defective penalty phase instructions regarding the three aggravating factors upon which the jury was instructed; (13) counsel was ineffective for failing to object or argue effectively when the prosecutor introduced and argued non-statutory aggravation during the penalty phase of Orme's trial; (14) counsel was ineffective for failing to object to comments made by the prosecutor as well as to the penalty phase instructions, both of which unconstitutionally diluted the jury's sense of responsibility towards sentencing; (15) execution by lethal injection is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution and international law; (16) counsel was rendered ineffective because of rules prohibiting the interview of jurors; (17)counsel was ineffective for failing to adequately challenge Florida's capital sentencing statute on the grounds it allows the arbitrary and capricious imposition of the death penalty; (18) the court improperly refused to consider mitigating circumstances presented at trial; (19) the omission of the jury qualification procedure, discussions in chambers, and bench conferences from the record denied Orme a proper appeal; (20) Orme's sentence was improperly predicated upon an automatic aggravator in violation of Orme's Eighth and Fourteenth Amendment rights; (21) Florida's death penalty sentencing procedure is unconstitutional pursuant to Apprendi v. New Jersy because the statute allows a bare majority to render an advisory sentence of death; (22) inadequate funding of CCR precludes Orme from fully investigating, preparing, and presenting post-conviction pleadings; (23) the State violated Orme's rights by failing to disclose Brady material and by allowing a witness to intentionally give misleading testimony during discovery and trial; (24) Florida's public records law, Section 27.708 Florida Statutes, and Rule 3.852, Florida Rules of Criminal Procedure are unconstitutional; and (25) cumulative error deprived Orme of a fair trial guaranteed by the Sixth, Eighth, and Fourteenth Amendment to the United States Constitution (PCR V. 706-811)

[4] Huff v. State, 622 So.2d 982 (Fla. 1993).

denied most of Orme's twenty-five claims. The court granted Orme an evidentiary hearing on his claim that trial counsel was ineffective for failing to challenge the general jury qualification procedure employed in Bay County. In his order, the trial court concluded the gravamen of Orme's claim was that counsel was ineffective for not attending the general qualification of the jury pool and that the State Attorney improperly influenced the general qualification. The court noted, however, that any claim concerning Orme's absence from that proceeding was procedurally barred because it could have been raised on direct appeal. Additionally, the court ruled this proceeding was not a critical stage of the trial at which a defendant must be present. (PCR VI. 902).

The court also granted an evidentiary hearing on Orme's claim that counsel was ineffective for failing to seek a continuance because he was unprepared for trial, failing to discover the defendant was mentally ill, and failing to provide information concerning Orme's mental illness to defense mental health experts and to the jury. (PCR VI. 905-906). Finally, the court granted Orme an evidentiary hearing on Orme's allegation his counsel was ineffective for failing to develop and present more evidence in mitigation. (PCR VI. 906). The evidentiary hearing was held on December 12-14, 2001.

On March 8, 2002, the trial court entered an order denying Orme's Amended Motion for Post-conviction Relief (PCR VII.1217-1219). The court ruled that Orme had not presented any evidence trial counsel failed to attend the general qualification of the jury pool or that the prosecutor improperly influenced the judge's decisions on who to excuse from jury duty. The court ruled the State presented evidence at the evidentiary hearing that Orme's claim was false and mere speculation (PCR VII. 1217). [5] The trial court also denied Orme's claim that trial counsel was ineffective for failing to request a continuance. The court ruled that trial counsel was an experienced attorney and was prepared for trial.

Further the court denied Orme's claim that counsel was ineffective for failing to present more evidence in mitigation, specifically his early life and his parents' separation. The court ruled that Orme presented no evidence at the evidentiary hearing that trial counsel failed to present such testimony. The court noted that Orme's friends and relatives testified at trial as did Dr. McClane and Dr. Warriner. (PCR VII. 1218).

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[5] While Orme chides the trial court for citing to testimony, not touching on the general qualification issue, in its order denying post-conviction relief, Orme ignores the record evidence specifically refuting his claim. (IB. 93-94).

The trial court also denied Orme's allegation that trial counsel was ineffective for failing to present convincing evidence to the jury that Orme's bipolar disorder rendered him legally insane and/or unable to form the requisite intent to commit first degree murder. Likewise, the court denied Orme's claim that trial counsel was ineffective for his failure to present such evidence so as to cause Orme's evidence in mitigation to outweigh the aggravating factors for the purposes of sentencing.

In its order, the trial court pointed to several factors that influenced trial counsel's decision to focus on a voluntary intoxication defense in order to convince the jury that Orme was not guilty of premeditated murder and to save his life. The trial judge found that Mr. Smith, who has a degree in biochemistry, probably has more knowledge about toxic reactions to drugs than most attorneys. The trial judge noted that Mr. Smith believed that Orme was the most drug toxic defendant he represented and that presenting a voluntary intoxication defense from the use of cocaine was the strongest strategic defense against a charge of premeditated murder. The court also cited to Mr. Smith's conclusion that Dr. Walker would not make a good witness for the defense even though Dr. Walker diagnosed Orme with bipolar disorder. The trial court pointed to trial

counsel's interview with Orme's family and friends, none of which could present evidence that Orme suffered from any mental illness.[6] The court noted that "[w]ithout strong evidence [trial counsel] reasoned that a diagnosis of bipolar disorder could and would be strongly attacked by the State's mental health experts." (PCR VII. 1218). The court found that trial counsel did prepare for trial and presented professional testimony in the form of one psychiatrist and one psychologist as well as members of Orme's family. The court observed that as a result of Dr. McClane's testimony during the penalty phase, the jury heard that both statutory mental mitigators applied to Orme. The trial court also considered both mental mitigators in rendering sentence. (PCR VII. 1218).

The trial court further found, after hearing what he described as "lengthy" testimony, that "at best, the expert testimony revealed that bipolar disorder has been ever changing in the psychological and psychiatric profession since [Orme's] trial in 1993." The court went on to conclude that "among

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[6] Orme alleges that trial counsel's interviews with family members and friends were cursory and that a reasonable counsel would have discovered objective evidence of Orme's disorder. He also alleges trial counsel did not try to find specific information about indicators of bipolar disorder. Not only did Mr. Smith testify he always addresses mental health issues with family and friends of capital defendants, Orme called no family members of friends at the evidentiary hearing in support of these allegations.

professionals there was still much disagreement on how to diagnose Mr. Orme back in 1993 or presently, even with additional information." (PCR VII. 1218). Id. The court concluded, however, that all experts had agreed that Orme was addicted to cocaine and that drug addiction was a factor in his murder trial. The court ruled that Orme had failed to prove that counsel's representation was unreasonable under prevailing professional norms. The court also ruled that Orme had failed to both prove that trial counsel's actions were not the result of a strategic decision and that but for counsel's errors, there is a reasonable probability the results of the proceedings would have been different. (PCR VII. 1219).

Orme filed a motion for rehearing on March 21, 2002 (PCR VII. 1228-1229). The court rendered an order denying the motion for rehearing on October 31, 2002. (PCR VII. 1239). Orme filed his notice of appeal on December 6, 2002. (PCR VII. 1240).

SUMMARY OF THE ARGUMENT

ISSUE ONE:

The trial court properly denied Orme's post-conviction motion challenging his death sentence. Orme's claim rests primarily on the fact that at the evidentiary hearing held on Orme's motion for post-conviction relief, two "new" mental

health experts testified Orme suffered from bipolar disorder. Orme also relies on the fact that two mental health experts who originally testified at trial that Orme was depressed and a cocaine addict seemingly changed their mind and determined Orme is bipolar and a cocaine addict. Orme claims that trial counsel was ineffective for failing to provide his mental experts the information they needed to come to this latter conclusion or to present this evidence at trial. Neither the testimony of the two new expert witnesses nor the amended testimony of Dr. McClane and Dr. Warriner compel this court to grant Orme the relief he seeks.

Trial counsel put on evidence that Orme was high on cocaine at the time of the murder. During the guilt phase of the trial, the jury was instructed on Orme's voluntary intoxication defense. Trial counsel employed the assistance of two mental health experts and put no limitations on their investigation into Orme's mental health. Trial counsel interviewed family members and friends, none of whom provided any information leading counsel to believe Orme was actually bipolar. Dr. McClane, a psychiatrist, who examined Orme and testified at trial, told the jury that both statutory mental mitigators applied to Orme. The jury was instructed on the mental

mitigators and the trial court considered them in rendering sentence.

Simply because a defendant secures the testimony of a more favorable mental health expert in post-conviction proceedings and the mental health experts who testified at trial changed their diagnosis some nine years later does not mean trial counsel's presentation or investigation was either unreasonable or incompetent. The trial judge properly found trial counsel made a reasoned strategic decision to pursue voluntary intoxication in attempting to rebut evidence of premeditation and to save Orme's life. The trial court also properly concluded that trial counsel's investigation and preparation of Orme's case did not constitute ineffective assistance of counsel.

ISSUE TWO:

Orme's Ring claim is procedurally barred as he failed to raise the constitutionality of Florida's death penalty scheme on direct appeal. Additionally, Ring has no retroactive application to Orme's judgment and conviction, which was already final at the time Ring was decided. Even so, Orme's Ring claim fails on the merits. This court has consistently rejected relief under Ring in cases similar to his.

ISSUE THREE:

Orme's claim that trial counsel was ineffective for failing to challenge the constitutionality of the general jury qualification proceedings in Bay County is without merit. Orme's claim that trial counsel was absent from the proceedings and the state attorney allowed to provide input to excusals is either not supported or specifically refuted by the record. Additionally, these proceedings are not critical stages of the trial for which the defendant's or defense counsel's presence is constitutionally required. The trial judge's order denying Orme's motion for post-conviction relief should be affirmed.

ARGUMENT

JURISDICTION

It appears this Court is without jurisdiction in this case. The order denying Orme's motion for rehearing was entered on October 29, 2002 and rendered on October 31, 2002. (PCR. VII 1239). Orme filed a notice of appeal on December 6, 2002, thirty-seven (36) days after the rendition of the final order. (PCR VII. 1240). Rule 9.110(b) and 9.140(b)(3), Florida Rules of Appellate Procedure provides that jurisdiction of the appellate court is invoked by filing two copies of a notice of appeal with the clerk of the lower tribunal within 30 days of rendition of the order. An order is rendered when a signed

written order is filed with the clerk of the lower tribunal. It appears the notice of appeal was not timely filed.

ISSUES PRESENTED

> I. **WHETHER THE TRIAL JUDGE ERRED IN DENYING ORME'S CLAIM HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE ORME WAS BIPOLAR DURING THE GUILT AND PENALTY PHASES OF ORME'S TRIAL.**

Orme contends his trial counsel was ineffective for failing to present evidence that Orme suffered from bipolar disorder at both phases of Orme's capital trial. While Orme captions his claim as one alleging ineffective assistance of counsel at both phases of the trial, Orme focuses his arguments almost entirely on the penalty phase of the trial.[7]

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[7] To the extent Orme attempts to argue the combination of his drug use and bipolar disorder rendered him incapable of formulating a specific intent to kill Lisa Redd, such evidence would have been inadmissible as evidence of Orme's diminished capacity, a defense not recognized in Florida. Henry v State, 28 Fla. L. Weekly S753 (Fla. Oct. 9, 2003); State v. Bias, 653 So.2d 380, 382 (Fla. 1995); Chestnut v. State, 538 So.2d 820, 821-25 (Fla. 1989). At trial, trial counsel presented evidence that Orme's cocaine intoxication rendered him unable to form the specific intent to kill Lisa Redd and the jury was instructed on the defense of voluntary intoxication. Counsel cannot be ineffective for failing to pursue a "defense" not recognized in Florida law. Hodges, *supra*. See also Henry v. State, 28 Fla. L. Weekly S753 (Fla. Oct. 9, 2003) (ruling that counsel was not ineffective for failing to pursue an inadmissible defense of "diminished capacity" by presenting evidence and arguing that Henry was incapable of forming specific intent to kill the victim because his abuse of crack cocaine before the murder exacerbated his underlying psychotic mental condition.

In particular, Orme complains trial counsel failed to provide two mental health experts, who testified for the defense at trial, with the diagnosis of a physician (Dr. Walker) who evaluated and treated Orme one time while Orme was incarcerated awaiting trial. Orme complains that trial counsel knew that Dr. Walker had diagnosed Orme with bipolar disorder and unreasonably failed to provide Dr. Thomas McClane and Dr. Clell Warriner with that information. Additionally, Orme alleges that trial counsel failed to provide Dr. McClane and Dr. Warriner with other background information[8] that would have led them to a conclusion that Orme was bipolar. Given that both defense experts testified at trial about Orme's mental health and addiction issues, the gravamen of Orme's claim is that Dr. Warriner and Dr. McClane improperly diagnosed Orme due to counsel's failure to provide them with sufficient background information.

Orme also claims that a diagnosis of bipolar disorder would have eliminated the HAC aggravator because Orme was substantially unable to conform his conduct to the requirements of the law. Orme argues that because HAC is a specific intent

[8] Orme alleges trial counsel failed to provide defense mental health experts with affidavits or statements from Orme's contemporaries and family members, a deposition from Orme's ex-girlfriend, and his school, medical, military, and jail records. (IB. 24).

aggravator, Orme's "impaired and incapacitated mental state negates this aggravator." (IB. 42).

A. STANDARD OF REVIEW

To establish a claim of ineffective assistance of counsel, two elements must be proven. First, the defendant must show that trial counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also* Gorby v. State, 819 So.2d 664 (Fla. 2002); Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).

Moreover, to establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford,

727 So.2d at 220. Where Orme alleges his counsel was ineffective during the penalty phase for failing to adequately investigate and present mitigating testimony of mental health experts, Orme must show, that but for trial counsel's alleged errors, he probably would have received a life sentence. Gaskin v. State, 822 So.2d 1243 (Fla. 2002). This Court has held the performance and prejudice prongs of the Strickland standard are mixed questions of law. Accordingly, this court will review the judge's legal conclusions after an evidentiary hearing *de novo* but will give deference to the trial court's factual findings. Hodges v. State, 28 Fla. L. Weekly S475 (Fla. June 19, 2003); Porter v. State, 788 So.2d 917 (Fla. 2001); Stephens v. State, 748 So.2d 1028, 1034 (Fla. 1999). So long as the trial court's decisions are supported by competent, substantial evidence, this Court has determined it will not substitute its judgment for that of the trial court on questions of fact, the credibility of the witnesses, and the weight to be given to the evidence by the trial court. This Court has specifically recognized the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. Porter at 923.

In evaluating claims such as Orme's, this Court has ruled that even if a defendant secures the testimony of a more favorable mental health expert(s) in post-conviction

proceedings, it does not mean trial counsel's investigation was either unreasonable or incompetent. Jones v. State, 2003 WL 22146407 (Fla. Sep. 11, 2003); Gaskin v. State, 822 So.2d 1243 (Fla. 2002). Though Orme eventually secured mental health experts who testified Orme suffers from varied types of bipolar disorder, this Court need not conclude that trial counsel was ineffective. Additionally, simply because Dr. Warriner and Dr. McClane changed their diagnosis between the time of trial and the evidentiary hearing does not render counsel's background investigation ineffective. Pace v. State, 854 So.2d 167 (Fla. 2003) (simply because mental health experts who testified at trial have changed their diagnosis does not render counsel's investigation into mitigation ineffective. *See also* Asay v. State, 769 So.2d 974, 986 (Fla. 2002); Jones v. State, 732 So.2d 313, 320 (Fla. 1999); Rose v. State, 617 So.2d 291, 294 (Fla. 1993); Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) (ruling that "mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.").

B. TESTIMONY

The testimony at trial and at the evidentiary hearing from both sides mental health experts as well as Orme's trial counsel, is summarized as follows:

Dr. Clell Warriner

(i) Trial (Penalty Phase)

Dr. Warriner testified he was a clinical psychologist and first met Orme on April 4, 1992.[9] Dr. Warriner testified he saw Orme eight to nine times and spent a total of 12-14 hours with him. (TR. XVI 1066). Dr. Warriner testified that he evaluated Orme and discovered Orme was in "desperate psychological shape." Dr. Warriner told the jury that Orme showed all the symptoms "you get from an individual who has done serious cocaine abuse." (TR XVI. 1067). Dr. Warriner testified, in conjunction with his evaluation, he reviewed a substantial amount of evaluation and treatment records from the Chemical Addictions Recovery Effort (CARE) and from Reliance House. Dr. Warriner testified these records were consistent with the history Orme provided him. Dr. Warriner testified he also gave Orme some psychological tests. (TR XVI. 1068). Dr. Warriner told the jury that Orme was a long term substance abuser. He testified that individuals like

[9] About thirty days after Orme murdered Lisa Redd.

Orme, who have done cocaine for years, have "serious deficits in self concept, there's increased anxiety, there's a great deal of self criticality and a considerable amount of thought disorder that are associated with long term substance abuse." (TR XVI. 1069). Dr. Warriner testified that, under the circumstances, this level of addiction would amount to an extreme mental or emotional disturbance. He also told the jury that, undoubtedly, Orme's ability to appreciate the criminality of his conduct would be impaired because of the use of cocaine. (TR XVI. 1069).

Dr. Warriner also testified that because Orme was in an extreme nervous and depressed state he asked a psychiatrist to come and evaluate Orme. Dr. Warriner testified that Dr. Walker came and did that and prescribed some medications which "did not do much to alleviate the condition." (TR XVI. 1074). He could not recall what medications were prescribed. He testified it was antidepressant and anti-anxiety medication. (TR XVI. 1084). Dr. Warriner testified that in his opinion, Orme was both depressed and a cocaine addict. He also testified Orme was anxious about what was happening to him. (TR XVI. 1084-1085).

(ii) Rule 3.850 Evidentiary Hearing

Dr. Warriner testified, on direct, that he did not recall being told prior to trial that Dr. Walker had diagnosed Orme as

being bipolar. He testified, however, that his findings and psychological tests results were not “inconsistent” with bipolar manic type. (PCR. XVII 1760). In evaluating a patient, Dr. Warriner testified that any history in the family should be considered. He described his preparation with the defense counsel in this case as “minimal”. He did not, however, testify he protested to trial counsel about the lack of preparation or background materials or that trial counsel refused to speak with him or take his calls. He also did not testify he requested, but was not provided, any particular materials from defense counsel. During cross-examination, he testified he was aware Dr. Walker prescribed lithium for Orme and had discussed the case with Dr. Walker one time. (PCR XVII. 1757,1766-1767). He also testified there is no other use of lithium, that he knew of, other than for treating bipolar disorder. (PCR. XVII 1766-1767). When asked whether he was on notice, prior to trial, that Dr. Walker had prescribed medication for bipolar disorder, Dr. Warriner testified he knew Orme was taking Lithium and that Dr. Walker was the only one prescribing medication. (PCR. XVII 1767). When the prosecutor asked Dr. Warriner what he gleaned from the Dr. Walker’s letter, that he did not already know when

he testified in 1993, he told the prosecutor it "simply enhanced that belief[10] on my part."

Dr. Warriner testified that he did not recall telling anyone in 1992-1993 that he though Orme was bipolar. When queried about the reason Dr. Warriner did not come forward with his opinion at the time of trial, Dr. Warriner explained that he had not been asked to make a diagnosis. He explained that he "was not told to make a diagnosis but to tell generally what I thought was wrong with the guy..." (PCR XVII. 1765). According to Dr. Warriner, had he been asked to do so, it is "very likely" that bipolar disorder would have been one of the diagnosis that would have been "suitable." (PCR XVII. 1768).

He also testified that he disagreed with Dr. Walker's diagnosis of bipolar manic type and instead believed that Orme suffered from bipolar mixed type. According to Dr. Warriner, he always thought Orme was bipolar, mixed type. (PCR XVII. 1780). He testified the best evidence of that was the three statements take from friends and relatives who described "serious mood swings over an extended period of his life." (PCR XVII. 1781). The affidavits were made in November 2001.

Dr. Thomas McClane

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[10] Dr. Warriner was referring to his belief that bipolar disorder would have been a diagnosis that would have been suitable. (PCR XVII. 1767-1768).

(i) Trial

Dr. McClane testified that he was a board certified psychiatrist. He told the jury that about half of his practice was in forensic psychiatry which involved him evaluating approximately 80-120 persons accused of a crime each year. He also testified he also had extensive experience and training in pharmacology.

Dr. McClane told the jury that trial counsel had asked him to review Orme's case. Dr. McClane testified he reviewed a stack of records "about three or four inches thick" including records of emergency room records from 1988 and a three day hospitalization at Bay Medical in 1980 for a drug overdose. He also reviewed tapes and transcripts of Orme's interview with the police after he murdered Lisa Redd, numerous records from CARE dating back to 1987, a MMPI psychological test profile and computer generated report from a test given in 1987 and a profile of the same test given by Dr. Warriner in April 1992. He told the jury he also reviewed handwritten notes from CARE, the autopsy report on Lisa Redd, and the complete medical records from Orme's hospitalization at Bay Medical for the two days following the murder, including the emergency room record. (TR XVI. 1090). Dr. McClane testified he met with Orme on one occasion, on February 28, 1993.

Dr. McClane testified that it was his opinion, within a reasonable degree of medical certainty, that Orme suffered from a mixed personality disorder with chronic intermittent depression and addiction to cocaine. Dr. McClane described a person with a personality disorder as one who possesses traits, manifested since at least mid-childhood, such as pervasive low self-esteem and lack of self-confidence, chronic depression and anxiety, and difficulty in forming close relationships and in trusting others. Dr. McClane testified that people with personality disorders tend to be manipulative, defensive, suspicious, mistrustful, and passive-aggressive. (TR XVI. 1107, 1109).

Dr. McClane testified that cocaine addiction is an illness. Dr. McClane told the jury that during binges there is an impairment of judgement, of the ability to think in a logical, reasoned manner, of the ability to plan, and an impairment of the ability to control ones impulses or urges. He also testified there is a major impairment of judgement of all types ranging from simple judgments such as driving an automobile to important judgments involving life or death. (TR XVI. 1093-1094).

Dr. McClane testified that Orme was a drug addict. He also told the jury that someone who is an addict or dependant on a drug, like cocaine, cannot keep from using it. (TR XVI. 1099-

1100). Dr. McClane told the jury that Orme's symptoms the morning after the murder were consistent with someone who had overdosed on cocaine or taken cocaine to a toxic level. He testified that someone in acute cocaine intoxication would lose the capacity to appreciate the criminality of his conduct and conform his conduct to what is expected of him. Dr. McClane also testified that Orme suffered from an extreme mental or emotional disturbance. (TR XVI. 1099-1101).

On cross-examination, Dr. McClane was asked whether he was aware that Orme was prescribed medication in the jail. Dr. McClane responded, that he was not on medication at this time but "apparently he was on some lithium before." He also testified he was aware Orme saw Dr. Walker and that he knew Orme "had been evaluated, put on some medication earlier and that he was not taking medication currently." (TR XVI. 1117).

(ii) Rule 3.850 Evidentiary Hearing

Dr. McClane testified he saw Orme between the trial and the penalty phase and had practiced psychiatry for 32 years. (PCR XIX. 1999). He testified that trial counsel forwarded to him records in Mr. Orme's case on February 11, 1993. (PCR XIX. 1976). He testified that examining a defendant the day before the penalty phase was not normal practice and ordinarily he would examine a defendant "weeks to months" before the actual

trial. He also testified that he would have liked but did not have Orme's jail medical records or any interview data from family, friends, employers, and people who had observed his behavior over some period of time. (PCR XIX. 1979). He did not get an opportunity to interview anyone.[11]

Dr. McClane testified he received some materials from post-conviction counsel which included an affidavit from Brenda Reed, Eric Orme, and Richard Gibbons. He said that had he had these three affidavits before Orme's trial, they would have been useful and are the type of information a psychiatrist would reasonably rely upon in rendering a diagnosis. (PCR XIX. 1981). Dr. McClane told the court that since the trial, he saw a "brief report" of a psychiatric evaluation done of Mr. Orme by Dr. Walker. Dr. McClane testified that he had not seen Dr. Walker's diagnosis prior to trial. (PCR XIX. 1982). He also claimed that when he testified that Orme had been on lithium at trial, he did not actually know that Orme had been prescribed lithium but that Orme had told him that he had been given lithium. (PCR XIX. 1983). Dr. McClane testified that it would be within the standard of care within the psychiatric profession to rely on a patient's report as to what medication they were

[11] This lack of records, however, did not prevent Dr. McClane from testifying at trial, "within a reasonable degree of medical certainty."

taking or had taken if that's all that is available. He told the court that one always tries, however, to corroborate that with other sources, particularly if the patient does not seem confident in that recollection. Dr. McClane testified that was the case here. (PCR XIX. 1983-1984).

Dr. McClane testified that given the additional information he had at the time of the evidentiary hearing, rather than diagnose Orme as depressed, he would diagnose him as "probable bipolar disorder in a depressed phase." (PCR XIX. 1985). He todl the court that had he had the information prior to trial, his testimony would have been "quite different." (PCR XIX. 1985). He said he would have provided two important mitigation facts. One, that bipolar itself constitutes an additional mitigating factor since that is a major mental illness. Two, that someone who has bipolar disorder is considerably more likely to use and abuse alcohol and other substances.

According to Dr. McClane, bipolars are more likely to become dependant on alcohol or other substances. He explained that someone with a chronic personality disorder tends to be a "little less free in their choices [and] a little more likely to use drugs or alcohol." [12] (PCR XIX. 1986). He noted that people with bipolar disorder are a somewhat less free because of

[12] Dr. McClane at trial that testified Orme suffered from a personality disorder.

the genetic makeup that results in the illness. (PCR XIX. 1987). He noted that anybody, with or without bipolar disorder who becomes chronically addicted to drugs and chronically uses drugs is much more likely to overuse and become intoxicated by using so much drugs.

When Dr. McClane was asked whether this illness is important to consider when considering the behavior of a defendant in a capital trial, Dr. McClane said it was relevant to how free a person's choice is. He explained that when bipolars are hitting on all cylinders in their brain, their choice is optimally free but to the extent they have some brain disorder, they are more driven and less free in the choices they make. (PCR. XIX 1987).

During cross-examination, Dr. McClane testified that he had been approached by trial counsel some two months before trial. He explained that though he initially recommended someone closer to Pensacola, he agreed to assist in Orme's case about a month before trial commenced. He testified that in preparation for trial, he received CARE records that documented a number of counseling sessions over a several year period as well as the results of an MMPI, some staffing summaries and their conclusions about Orme. (PCR XIX. 1994). Dr. McClane testified there was nothing in those records which would cause him to diagnose Orme with bipolar disorder. He testified he had

no documentation to show he had requested trial counsel to provide him with any additional information. (PCR XIX. 1997). He had no recollection of Mr. Smith refusing him any information he requested. Dr. McClane testified that when he examined Orme before trial, there was nothing in his mental status examination that raised concerns about the presence of mania. (PCR XIX. 2000). He also testified that when a patient reports taking lithium, the first thing that comes to mind is that he may have bipolar disorder but that there are several other things that are treated with lithium, including resistive depression. He did not recall asking to see Orme's jail medical records and also could not remember anyone refusing access to them. (PCR XIX. 2001).

Dr. McClane testified his diagnosis now would be probable bipolar disorder. He told the judge he could only make a probable diagnosis because he had never seen Orme in a manic state. (PCR XIX. 2006). He testified he could have made a definitive diagnosis in 1993 if he would have had some information he had confidence in, even though he did not observe Orme in a manic state. Dr. McClane noted that if other competent psychiatrists have made a diagnosis and he sees the criteria upon which they made the diagnosis, he could make a definitive diagnosis. (PCR XIX. 2007). He also testified he would have preferred for Dr. Walker's notes to "be a little

more elaborate and to detail the behavioral observations on which he based the diagnosis." (PCR XIX. 2007). He also observed that if Dr. Walker was a competent psychiatrist, he would not have made the diagnosis without supporting data. (PCR XIX. 2008). Dr. McClane testified that he had never seen any supporting data Dr. Walker used to make his diagnosis. (PCR. XIX 2008).

Contrary to his testimony on direct, Dr. McClane told the court that his testimony back in 1993 would not really be that different but that he would have added a little bit more regarding the bipolar disorder. He also testified that his diagnosis would have changed to probable bipolar depressed. He agreed that at Orme's trial in 1993, he testified that Orme suffered from a major mental illness. He testified that his testimony regarding the effects of cocaine, its effects on a person's impaired ability to control his impulses or urges, and the major impairment of cocaine intoxication on a person's judgement would remain the same if he testified today. (PCR XIX. 2011). He also testified he still believes Orme suffers from a personality disorder but that the term personality disorder is no longer used. Rather, the profession uses the term personality traits and then notes the traits. (PCR XIX. 2015).

Dr. McClane testified that nothing he has seen to date changes his observations about Mr. Orme's personality traits, including pervasive low self-esteem, lack of self confidence, chronic depression, difficulty in trusting people and forming close relationships, being manipulative and defensive, and tending to expect others to be disloyal to him. (PCR XIX. 2016). Dr. McClane told the trial judge that, as he did in 1993, he still believes Orme suffers from chronic depression though he now thinks it is the type of depression present in bipolar disorder. Dr. McClane testified that in order to be bipolar there has to be at least one manic episode. He testified he relied on the affidavits provided by collateral counsel as well as Dr. Walker's diagnosis. He noted that the only specific instance was Dr. Walker's diagnosis and the affidavits were "vaguer." (PCR XIX. 2019).

Dr. McClane testified that during his interview with Orme at the jail, he got nothing that gave him a high index of suspicion that Orme was manic. He told the court that, in depressed patients, it was common to diagnose someone with severe depression and then find out later that there is some evidence of hypomania or mania in the past. (PCR XIX. 2023). He said in the past he has diagnosed at least several hundred patients as bipolar. Dr. McClane testified that even adding bipolar disorder, this could not change his ultimate

conclusions that the statutory mental mitigating factors were met. He noted it would add somewhat to the weight of it but would not change his opinion that Orme met the statutory criteria. He observed that bipolar is not necessarily a more severe illness than mixed personality disorder because "we know less about the genetics of personality disorders" but that Orme has both illnesses. (PCR XIX. 2033).

Dr. McClane testified that data received regarding Orme's behavior toward his girlfriend just before he went to the Lee motel indicated he was in a depressive state. (PCR XIX. 2034-2035). He testified that given the use of a great deal of cocaine, there is no way to tell whether he was manic at the time of the murder. (PCR XIX. 2035). Dr. McClane told the judge there was also no information that leads him to think Orme was manic at the time of the murder. (PCR XIX. 2035). He testified that the largest mitigator at the time was Orme's severe cocaine addiction and "even more significant" severe intoxication. He testified that chronic depression in the context of a bipolar disorder made those things more likely. (PCR XIX. 2036).

Dr. John Herkov

Rule 3.850 Evidentiary Hearing

Dr. Herkov testified that he is a psychologist specializing in cocaine addiction and substance abuse. He was offered and accepted as an expert in clinical psychology. Dr. Herkov evaluated Orme on June 25, 2001 for two hours. (PCR XVII. 1823). He testified that after reviewing the materials provided by collateral counsel and evaluating Orme, he concluded that Orme suffered from biploar disorder and had a history of poly substance abuse, including cocaine dependency. Dr. Herkov opined his particular diagnosis was bipolar, NOS (not otherwise specified). (PCR XVII. 1826).

Dr. Herkov opined that bipolar disorder was a more severe mental illness that a personality disorder. He said he based his diagnosis of bipolar on a "couple of things." The first is that Orme had been described by a number of people as having mood swings, that is he is very up, starts a lot of projects but does not follow through and then depression sets in. Dr. Herkov testified that Orme also reported these types of episodes. He also testified that a compelling piece of evidence is that he was diagnosed with bipolar before trial and given Lithium for 3-4 months. He told the court it is important to understand a person's underlying mental state in order to form an opinion about how cocaine will affect different people. He told the

trial court there was a high correlation between bipolar disorder and substance abuse and that is not true for depression. (PCR XVII. 1807). He testified that the voluntariness of drug use is not the same in bipolars as it is in people who are not bipolar. Dr. Herkov told the judge that use of cocaine can exacerbate systems of mania and while cocaine intoxication may mimic the manic stage, it does so only for a brief period of time. (PCR XVII 1870). He testified that had he testified at trial he could have explained the link between substance abuse and bipolar disorder, how bipolar predisposes a person to drug abuses and doesn't eliminate, but reduces, their options in voluntariness in terms of their substance abuse. Dr. Herkov opined that at the time Lisa Redd was murdered, Orme was suffering from extreme mental disturbance and his capacity to appreciate or to conform his conduct to the law was substantially impaired. (PCR XVII 1816).

During cross-examination, Dr. Herkov testified he reviewed the CARE records from 1987-1992 and there was no diagnois of bipolar. Dr. Herkov observed there were some behaviors that might be considered a symptom for bipolar but no diagnosis. (PCR XVII. 1817-1818). He told the court that the standard for diagnosing someone with bipolar disorder, presently, requires evidence of a manic episode lasting at least a week or any duration of hospitalization. Dr. Herkov testified that in 1993,

however, the DSM did not require manic symptoms for a week. (PCR XVII. 1824-1825, 1856). There was no evidence presented that Dr. Herkov ever observed Orme in a manic state.

Dr. Michael Maher

Rule 3.850 Evidentiary Hearing

Dr. Maher told the court he was a psychiatrist practicing in Tampa, Florida and was a expert in forensic psychiatry. He told the court he evaluated Orme in November 2001 for about two hours and 45 minutes (PCR XVIII. 1908, 1912). Based on his evaluation as well as the materials provided, Dr. Maher concluded Orme was bipolar most recent episode unspecified. (PCR XVIII. 1875, 1927). He could not give any specific dates that Orme may have had a manic episode, nor could he cite any particular manic episode upon which he based his diagnosis. (PCR XVIII. 1929, 1935). He testified bipolar disorder puts a person at much greater risk for developing drug abuse as an escape. (PCR XVIII. 1876). He opined that Orme's behavior toward his ex-girlfriend on the day of the murder was indicative of a manic position. (PCR XVIII. 1880- 1881).[13] Dr. Maher also opined that if a prior evaluation is done competently, it is a standard practice for a psychiatrist to rely on that earlier

[13] This testimony is directly contrary to Dr. McClane's testimony who believed Orme's behavior toward his girlfriend right before he went to the Lee motel was indicative of being in a depressed state. (PCR XIX. 2034-2035).

evaluation and diagnosis. He testified that, apart from Dr. Walker's diagnosis, there was a tremendous amount of evidence that indicated Orme was bipolar including family members affidavits, his family history and his personal evaluation of Orme. Dr. Maher also testified that after his interview with Orme but prior to reviewing all the materials, he considered several diagnoses including major depression with psychotic features, adult attention deficit disorder, intermittent explosive disorder, and a full range of substance abuse diagnosis. He had no information about how Dr. Walker came to the conclusion Orme was bipolar. He also reported he did not know whether Dr. Walker had observed Orme in a manic state. (PCR XVIII. 1956). Dr. Maher noted that both poly-substance abuse and bipolar are major mental illnesses. (PCR XVIII. 1928).

Dr. Maher told the court that DOC records indicated that a number of psychiatrists and psychologists were assigned to Orme while he was on death row and none of them diagnosed him as bipolar. He noted there was consistent diagnoses of depression, one of which was depression with psychotic features which is closer to bipolar than simple depression. (PCR XVIII. 1929-1930). Dr. Maher also agreed that Orme had symptoms of a person with a borderline personality disorder. He opined,

however, Orme suffered from a personality disorder, not otherwise specified. (PCR XVIII. 1963).

Dr. Harry McClaren

Rule 3.850 Evidentiary Hearing

Dr. McClaren testified that he is a psychologist specializing in forensic psychology and has testified hundreds of times as an expert in the field of clinical and forensic psychology. (PCR XIX 2142). He testified he examined the same records apparently provided to the defense experts by collateral counsel. He also reviewed the clinical notes of the two psychiatrists who spoke with Orme and sat through the testimony of the defense mental health experts who testified at the evidentiary hearing. (PCR XXI. 2146). Dr. McClaren testified he felt pretty confident that Orme was intelligent with an IQ of about 120, had repeated episodes of depression, and had been dependent on cocaine for a number of years. (PCR XIX. 2147-2148). Dr. McClaren observed that there have been times in Orme's life where he has been depressed and other times when he has shown a relatively normal or euthymic mood. (PCR XIX. 2148). He noted that while there has been some period of of expansive or elevated mood, these periods seem to be very "ill defined" in regard to degree and duration. According to Dr. McClaren, he saw no evidence of a manic period. (PCR XIX.

2149). Dr. McClaren reported that the only evidence of a family history of bipolar disorder was family interviews however there were no medical records to substantiate it. (PCR XIX. 2150). He noted that the only person who diagnosed Orme with bipolar disorder was Dr. Walker and that over the years, people who have had close contact with him have not diagnosed Orme as suffering with bipolar disorder, but instead the most frequent diagnosis is major depression. (PCR XIX. 2151). He said that Orme came into contact with psychologists who worked with him during drug treatment as far back as 1987, including a Dr. Hord, and he was not perceived as in need of extensive psychiatric care other than for depression. Dr. McClaren observed that Dr. McClane's trial testimony was consistent with the diagnosis of five different DOC psychiatrists who also diagnosed Orme with depression. (PCR XIX. 2153).

Dr. McClaren opined that there were a number of things that weighed against a bipolar diagnosis. First there was nothing in Orme's mental condition that had been severe enough to prompt treatment before the murder for anything other than substance abuse. (PCR XIX. 2153-2154). Second, Orme had many successes prior to the murder including completing boot camp even though he got pneumonia twice during training, completing his GED, securing employment as a merchant seaman, passing the captains test up to 500 tons, which was in Dr. McClaren's view a

significant accomplishment, working in a war zone, qualifying with various weapons, and attending and graduating from various other types of training. (PCR XIX. 2155-2156). Dr. McClaren testified the behavior that was relied upon to support the previous bipolar disorder was in his view more likely attributable to his substance abuse. (PCR XIX. 2156).

According to Dr. McClaren, his depression coupled with drug abuse can explain Orme's changes in mood, behaviors, and in himself. (PCR XIX. 2156). Dr. McClaren told the judge that Orme had never been hospitalized except for an overdose and had not been described as suffering from mania by anyone. Dr. McClaren also noted that Dr. Walker's diagnosis contained no description of the defendant's behavior, mental status or history and that the MMPI administered by Dr. Warriner was not interpreted as reflecting bipolar disorder. Dr. McClaren testified that Orme's profile on this MMPI was consistent with three others given from 1987-1993 and none of which resulted in a bipolar diagnosis. Dr. McClaren also found it telling that no one other than Dr. Walker had diagnosed Orme with bipolar manic type and Drs. Herkov and Maher disagreed about the form he had. Dr. McClaren testified that in his view the most sensible diagnosis was depressive disorder, not otherwise specified. (PCR. XIX 2157-2159). He also told the judge that he thinks

it is very difficult to opine in 2001 about Orme's mental state in 1993.

During cross-examination, Dr. McClaren testified that mental health experts can disagree on diagnoses. Dr. McClaren testified he thought Dr. Herkov's evaluation was reasonable but that Dr. Warriner's post-conviction opinion was very close to unreasonable. (PCR XIX. 2164-2166).

Dr. McClaren testified that he had not made a diagnosis but had concluded that a number of factors present in Orme' case weighs against a diagnosis of bipolar disorder. When asked by collateral counsel whether he disagreed with Dr. Maher's diagnosis, Dr. McClaren testified he believed there was a lot of evidence against the diagnosis. (PCR XIX. 2186).

Dr. McClaren told the trial court that in his opinion, there is more information to support a conclusion that Orme was not bipolar than there was to support a conclusion he was bipolar. (PCR XIX. 2187). Dr. McClaren testified that as an expert testifying in a capital trial he would want to know about any prior diagnosis or prescription of psychotropic drugs. (PCR XIX. 2195). He also testified that he had worked with trial counsel before. Dr. McClaren testified that Mr. Smith always provided and assisted him to get the information to do a good evaluation. He told the court that it is incumbent on any psychologist to take whatever steps necessary to get whatever

information he needs to make a diagnosis and if he cannot get that information, not to make a diagnosis.

Lisa Wiley

Rule 3.850 Evidentiary Hearing

Ms. Wiley testified she was employed as a psychological specialist at Union Correctional Institution where Orme is housed on death row. She told the court that she is responsible for providing mental health services to death row inmates which would include case management, referrals to psychiatry, counseling, and confinement evaluations. (PCR XX. 2081). She testified she saw Orme weekly in the performance of her duties. One of her responsibilities is to document unusual psychological symptoms. Ms. Wiley detailed Orme's mental health treatment and diagnoses while at UCI. She testified that Dr. Hankins saw Orme on June 22, 1994 and diagnosed him with major depression, severe without psychotic features. (PCR XX. 2094). Dr. Bradley evaluated Orme on July 13, 1994, and diagnosed Orme with major depression, severe without psychotic features and polysubstance abuse by history. (PCR XX. 2095). He was also seen by Dr. Weldon in October 1994 and diagnosed with major depression, single episode, moderate, ADD, and

cocaine dependance. Ms. Wiley explained that Dr. Bradley saw Orme again in December 1994 and October 1995 and diagnosed him with depression, recurrent, once with psychotic features and one time moderate.

Ms. Wiley testified that on one occasion she observed what she considered hypomanic features in Mr. Orme. She was not alarmed and did not refer Orme to a psychiatrist as a result of that observation. A few days later, Orme was seen by Dr. Weldon and was not diagnosed with bipolar disorder. (PCR XX. 2100). Ms. Wiley testifed that Orme was never placed on lithium or any other drug to control bipolar disorder. She also testified that in the absence of this medication, she has never observed Orme have a manic episode. (PCR XX. 2101). Ms. Wiley's testimony established that in all the years Orme has been confined on death row, he has never been diagnosed as bipolar despite being seen by several mental health experts.

Walter Smith-Trial Counsel

Rule 3.850 Evidentiary Hearing

Mr. Smith testified he assumed responsibility for Orme's case when Mike Stone and Pam Sutton left the Public Defender's Office in October 1992. (PCR XVI. 1663). Mr. Smith told the court that he had been involved in six to seven capital trials at the time of Orme's trial and hundreds and hundreds of felony

cases. (PCR XX 2056). At the time of the evidentiary hearing, Mr. Smith had tried 27 capital jury trials. (PCR XVI. 1664). He also testified that selection and assistance to a mental health expert was not new to him. (PCR XX 2056). Mr. Smith's undergraduate degree was in biochemistry. (PCR XVI. 1684). He testified he was familiar with the effects of drugs on the human and that in his opinion he had a greater degree of knowledge in that particular area that the average attorney. He told the court that based on his investigation, he elected to pursue a voluntary intoxication defense. (PCR XVI. 1685).

Mr. Smith told the court that prior to assuming primary responsibility for Mr. Orme's case, he served as the Capital Coordinator. He testified that shortly after Orme's arrest in March 1992, he, along with an investigator from his office, interviewed Mr. Orme. He told the court he got a detailed version from Orme about the events of March 3, 1992. He testified he was sure they asked about Orme's background and allowed him to relate anything to them that he wished to tell them. (PCR XVI. 1667). Mr. Smith testified it is his practice to start on the penalty phase before he does the guilt phase so that he can determine if there is potential mitigation and then try to get the records and documents to back it up. (PCR XVI. 1668). Mr. Smith told the court he typically does a complete social background on his client and gets things such

as school records, mental history, hospital records, family history, the "whole gamut." (PCR XVI. 1668).

Mr. Smith testified that at the time of trial he felt that he had done everything he could in preparing the case for trial. He told the court he felt he had adequate time to investigate and prepare the case, was prepared for trial and was "comfortable with the trial date." (PCR XX. 2062, XVI. 1672). Mr. Smith related that he did not feel the need to seek a continuance in the case. (PCR XVI. 1672). Mr. Smith testified he felt there was a pretty strong case in mitigation. (PCR XVI. 1671).

Mr. Smith testified the court that when he took over the case, he concluded, based on his review of the case, they were headed toward looking at the parameters of cocaine abuse and toxicosis and how that might affect behavior and tend to mitigate whatever actions Orme took on the night Lisa Redd was murdered. Accordingly, he contacted Dr. McClane for use as a potential expert witness.

Mr. Smith related that, in his view, the case called for some type of medical-type testimony. Mr. Smith wanted a forensic psychiatrist with experience in pharmacology and Dr. McClane "fit the bill." (PCR. XX 2055). Mr. Smith testified he contacted Dr. McClane because of his expertise in pharmacology and the effects of drugs on human behavior. Mr.

Smith told the court that in his opinion, it would be useful to have such an expert because of the abundant evidence of drug abuse, the cocaine toxicosis, and Orme's trip to the hospital. Mr. Smith testified that in his opinion, Dr. McClane's expertise was in line with the presentation he wanted to make to the jury. (PCR XX 2060).

Mr. Smith testified he thought he has sent Dr. McClane everything that would be relevant in conducting his analysis and evaluation. He had no recollection of Dr. McClane requesting any materials from him other than the ones he provided. He also said that in his view, it was within the expert's domain to talk to anyone he needed to in order to get information. Mr. Smith also said that if an expert asked him for any information, he would try to get it for him.

When queried about his reason for not pursuing Dr. Walker as a witness, especially given his bipolar diagnosis, Mr. Smith outlined his concerns about Dr. Walker's testimony. First, Mr. Smith testified that he recalled Dr. Walker was difficult to get in touch with because he has been ill and in the hospital. Mr. Smith testified he met with Dr. Walker for about two hours in January 2003 and prior to that there probably had been some telephone contacts. He observed that Dr. Walker was ill and frail when he met with him. (PCR XX. 2057).

Mr. Smith testified that Dr. Walker was "in pretty bad shape.... he was physically weak and he would not have made a real strong, he would not have been a real strong witness, I didn't think, I mean, he just looked terrible." (PCR XVI. 1661). Mr. Smith reported that when he spoke with Dr. Walker, he concluded that because Dr. Walker had cancer and was in bad health, he did not feel comfortable relying on him as a witness. Mr. Smith noted that he did not think Dr. Walker's health was good enough to allow him to be able to testify when needed. (PCR XVI. 1651).

In addition to his failing physical condition, Mr. Smith related his concerns about the substance of Dr. Walker's testimony and its potential impact on the jury. Mr. Smith told the court that it was his impression that "Dr. Walker's testimony again was not compelling and would be subject to cross-examination and was fraught with some difficulties." (PCR XX. 2058). When asked what troubled him about Dr. Walker's examination, he responded that Dr. Walker had only seen Orme one time in May and had no contact subsequent to that. Mr. Smith related that, as he recalled, Dr. Walker did not spend a lot of time with Orme and there were no other records that Dr. Walker used to make his diagnosis. (PCR. XVI. 1673).[14] Orme

[14] Such as the results of psychological testing, social history, or a record of interviews with friends, relatives,

presented no testimony at the evidentiary hearing that Dr. Walker's diagnosis was based on anything except one short visit with Orme some two months after the murder.

Mr. Smith told the court he may have presented testimony that Orme was bipolar, if "I felt that it had a strong impact, if there was, you know, if it was more than just an expert throwing out an opinion." Mr. Smith went on to testify that if "there was corroboration of [bipolar disorder], if there was a strong history of it, certainly I would. I'm always a little leary of having experts stick their necks out and having them chopped off. I've had that happen to me." (PCR XVI. 1658). He told the court that had he had evidence from associates, friends, acquaintances, and family members who could provide anecdotal evidence of behavior that would fit within a diagnosis of bipolar, that would have pushed him further towards presenting such evidence. (PCR XVI. 1658).

When questioned about his attempt to obtain such evidence, Mr. Smith related that he met with Orme's father and stepmother shortly after his arrest and spoke with family members and friends on the eve of trial in preparation for the penalty phase. (PCR. XVI. 1655). He testified he was sure he

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police, or jail personnel. Mr. Smith testified that as far as he knew, at the time he made his diagnosis, Dr. Walker didn't have any materials relating to his mental history, medical history, or family accounts. (PCR XX. 2058).

questioned Orme's family members and friends about any history of mental illness as "that's obviously something we would ask about." (PCR XVI. 1687). He said he had no recollection of anything from those interviews that he would characterize as being indicative of bipolar. He also related that based on an investigation that spanned over 11 months, he found no strong evidence that Orme was bipolar. (PCR XVI. 1688). Mr. Smith testified he was not persuaded by the strength of Dr. Walker's testimony and he was concerned about his physical ability to testify. (PCR XX. 2073). When asked whether he would have presented evidence that Orme was bipolar if Dr. Walker had been healthy or there was another mental health expert who was willing to give an explanation as to the self-medicating aspect and take away some of the volitional arguments the State would have as to the drug use, Mr. Smith testified that is what he intended to do in retaining Dr. McClane. (PCR XVI. 1661).

Mr. Smith related he felt Dr. McClane was a stronger card to play than was Dr. Walker. He testified that he had never before

had a client who was actually suffering from toxicosis. He testified that this factor was the most compelling thing about Orme's situation and that is what he wanted to focus on. (PCR XVI. 1677). He said that, other than the diagnosis from Dr.

Walker, he had no information from his review of the case file or his investigation, which included extensive interviews with his family members, to support a bipolar defense. (PCR XVI. 1678). None of Orme's family members or friends testified at the evidentiary hearing.

Mr. Smith agreed with collateral counsel the letter from Dr. Walker to Mike Stone indicating Orme was bipolar was something that would have been appropriate to sent to Dr. McClane. He testified that he apparently neglected to send the letter and that if he had to do it over, he certainly would send the letter to Dr. McClane.

C. ANALYSIS OF APPELLANT'S CLAIM

Orme's claim that counsel was ineffective for failing to provide Dr. Walker's diagnosis to Dr. Warriner is not supported by the record. Dr. Warriner testified he was aware at the time of trial that Dr. Walker had prescribed Lithium and that the only use of Lithium, of which he was aware, was to treat bipolar disorder. Dr. Warriner testified at the evidentiary hearing that Dr. Walker's letter did nothing except "enhance [his] belief" that Orme was bipolar. Additionally, there is no evidence that Dr. Warriner communicated to trial counsel he believed he had inadequate information to evaluate Orme or to

present to the jury his opinion of "... what [he] thought was wrong with the guy..." (PCR XVII. 1765).

There was no evidence Dr. Warriner ever communicated to trial counsel he needed more information than counsel provided him or that he was unable to glean from his review of Orme's evaluation and treatment records, test results, and personal interviews with Orme, the information necessary to testify at trial. Certainly, there was nothing that prevented Dr. Warriner from seeking any additional information he believed necessary, as began his evaluation of Orme just one month after Orme's arrest. In fact, Dr. Warriner saw Orme more than any other expert who testified at trial or at the evidentiary hearing.

Yet, Dr. Warriner did not tell trial counsel or the jury he believed Orme was bipolar. Instead, Dr. Warriner testified at trial that Orme was a long term substance abuser. Dr. Warriner told the jury that under the circumstances this level of addiction would amount to an extreme mental or emotional disturbance. He also told the jury that, undoubtedly, Orme's ability to appreciate the criminality of his conduct would be impaired because of the use of cocaine. (TR. XVI 1069).[15] Trial counsel cannot be ineffective for failing to provide information that Dr. Warriner already knew nor can he be

[15] It is reasonable to conclude Dr. Warriner communicated this same information to trial counsel before trial.

ineffective for relying on Dr. Warriner's opinion. Pace v. State, 854 So.2d 167 (Fla. 2003)

In any event, Orme has failed to bear his burden to show counsel was ineffective. Based on his own background in biochemistry, his investigation of the case, his conclusions as to the level of Orme's use of cocaine on the night of the murders, and the availability of a mental health expert to explain to the jury the debilitating effect cocaine intoxication had on Orme's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, trial counsel made a strategic choice to pursue voluntary intoxication in order to save Orme's life.

Trial counsel clearly considered an alternative approach to the conduct of Orme's defense (Dr. Walker's bipolar diagnosis). The record established he made an informed decision to reject it and pursue a course of action supported by the evidence. Trial counsel assessed the potential impact of Dr. Walker's testimony, not only, as Orme claims, upon Dr. Walker's physical health, but upon trial counsel's evaluation of the credibility of Dr. Walker's opinion and the strength of his testimony. Mr. Smith concluded that because Dr. Walker's diagnosis was unsupported by any objective observations or documentation, uncorroborated by any other evidence or opinion in the case, and was based solely on one short visit with Orme in jail, he would retain and rely

upon Dr. McClane. Certainly, the fact that Dr. Warriner, who spent an extended amount of time with Orme, never related to trial counsel that in his opinion Orme was bipolar lends credence to the notion that Mr. Smith reasonably determined that Dr. Walker's diagnosis and testimony was an inadequate foundation upon which to rest Orme's fate.

Additionally, as found by the trial judge, the testimony at the evidentiary hearing was conflicting. In 1992, Dr. Walker, after one visit with Orme in jail, diagnosed Orme with bipolar manic type. Dr. Warriner testified that while he agreed that Orme was bipolar, he disagreed with the type, diagnosing Orme with bipolar disorder, mixed type. (PCR XVII. 1780). Dr. McClane also disagreed with Dr. Walker and Dr. Warriner on the type of bipolar disorder. Dr. McClane would diagnose him as "probable bipolar disorder in a depressed phase." (PCR XIX. 1985). Dr. McClane would not commit to a definitive diagnosis, however, because he had never observed Orme in a manic state. (PCR XIX. 2006). Dr. Maher, on the other hand, concluded Orme was bipolar most recent episode unspecified, while Dr. Herkov opined his particular diagnosis was bipolar, NOS (not otherwise specified). (PCR. XVII 1826, XVIII 1875,1927). Dr. McClane and Dr. Maher came to two completely different conclusions as to whether Orme was in a manic or depressed state immediately before he checked into the Lee Motel. None of the doctors

testified they observed or had any objective evidence Orme had suffered a manic period for a week or more, yet Dr. Herkov told the court that the standard for diagnosing someone with bipolar disorder, presently, requires evidence of a manic episode lasting at least a week or any duration of hospitalization.

Dr. McClaren, who testified for the State, told the court that his review of Orme's case, including all the materials relied upon by Orme's experts, led him to the conclusion that it was likely Orme was not bipolar but was instead suffered from a depressive disorder. While Orme points to the fact that, of all the mental health experts who testified, Dr. McClaren was the only who had never talked to Orme, it is apparent that a personal interview with Orme is not particularly enlightening. Dr. McClane, a physician with thirty-two years of experience, detected no signs of Orme's alleged bipolar disorder in 1993, even though he followed the standard protocol intended to elicit information indicative of the presence of mania. (PCR XIX. 1999). Dr. McClaren's testimony, as did some of the other mental health experts, also established that while Orme had a history of contact with mental health experts both before his arrest and while on death row, none of those experts diagnosed Orme with bipolar disorder.

Accordingly, the trial court correctly concluded there was disagreement over how to diagnose Orme's mental state. The

court found that trial counsel presented testimony that resulted in both an instruction to the jury and a finding by the trial judge that both mental mitigators applied in his case. Additionally, the trial judge considered both statutory mental mitigators in rendering a sentence. The court correctly concluded that trial counsel was prepared and called two mental health experts as well as lay family witnesses on Orme's behalf. Finally, the court concluded that while there was conflict about Orme's diagnosis, all agreed Orme was addicted to cocaine and that drug addiction was a factor in the murder trial. While not directly saying so, it is clear the trial court concluded it was a reasonable strategy on trial counsel's part to choose to pursue a strategy clearly supported by objective and supportable evidence and not to pursue one that was not.

A defense counsel's informed strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected. Wiggins v. Smith, 123 S.Ct. 2527 (2003); Henry v. State, 28 Fla. L. Weekly S753 (Fla. Oct. 9, 2003); State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987). In this case trial counsel investigated the case in mitigation. Mr. Smith did nothing to unreasonably limit the investigation of Dr. McClane. Certainly, he did not limit Dr. Warriner's investigation and evaluation as Dr. Warriner was brought on board just a month after Orme's arrest. He saw Orme

before, and more than, any other mental health expert. While Dr. Warriner maintains now he thought Orme was bipolar all along, he did not share that with trial counsel.

Additionally, trial counsel interviewed Dr. Walker, was aware of the dearth of evidence supporting his diagnosis and decided to play his strongest card - Dr. McClane. Orme has failed to demonstrate that counsel's performance was deficient or that Orme was prejudiced by trial counsel's strategic approach to Orme's defense.

Finally, Orme claims, without pointing to any case law supporting his contention, that had evidence of his bipolar disorder been presented at trial, the heinous, atrocious, or cruel (HAC) aggravator would have been eliminated "since [HAC] is a specific intent aggravator." (IB. 42). In fact, the HAC is not a specific intent aggravator.

Orme raised this issue on direct appeal, albeit it not in terms of a bipolar diagnosis. Rather, Orme made a general claim that his "mental state" precluded a finding of HAC. On appeal this court observed that:

> Orme contends that his mental state at the time of the murder was such that he could not form a "design" to inflict a high degree of suffering on the victim. Thus, argues Orme, the trial court erred in instructing the jury regarding, and in later finding, the aggravating factor of heinous, atrocious, or cruel. Our case law establishes, however, that strangulation creates a prima facie case for this aggravating factor; and the defendant's mental state

> then figures into the equation solely as a mitigating factor that may or may not outweigh the total case for aggravation. Michael v. State, 437 So.2d 138, 142 (Fla.1983), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984).

Orme v. State, 677 So.2d at 263. As this issue has already been decided adversely against Orme, it is procedurally barred.

Even so, Orme's underlying assumption as to this claim is faulty. This Court has ruled the HAC aggravator does not turn on the intent of the defendant. Rather, this court has ruled that HAC "focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death." Barnhill v. State, 834 So.2d 836, 849-850 (Fla. 2003). In Barnhill, the court noted that "if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference." Id. *See also* Cox v. State, 819 So.2d 705 (Fla. 2002)(intent to cause unnecessary and prolonged suffering is not necessary element of aggravating circumstance in capital murder prosecution that the murder was especially heinous, atrocious, or cruel); Bowles v. State, 804 So.2d 1173, 1177 (Fla.2001) (stating that "there is no necessary intent element to HAC

aggravating circumstance"); Hitchcock v. State, 755 So.2d 638, 644 (Fla.2000) (same). Accordingly, because specific intent is not at issue in establishing the murder was especially heinous, atrocious or cruel, Orme can point to no prejudice in failing to present evidence that Orme was bipolar.

II. **WHETHER THE TRIAL JUDGE ERRED IN DENYING ORME'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE**

Orme claims that, pursuant to the United States Supreme Court's decision in Ring v. Arizona, Florida's capital sentencing structure is unconstitutional. Specifically, Orme claims he was not found guilty beyond a reasonable doubt of each element of capital murder. Orme challenges the State's failure to include, in Orme's indictment for first degree murder, the aggravating factors upon which it intended to rely in seeking the death penalty.

Orme contends that because Ring established that aggravating factors operate as the functional equivalent of an element of a greater offense, the State is required to allege such factors in the charging document, submit them to a jury, and prove them beyond a reasonable doubt. Orme also argues that Florida law requires a finding by a unanimous jury that "sufficient aggravating factors exist to call for a death sentence... [and] the mitigating circumstances are insufficient to outweigh the

aggravating circumstances." (IB. 62, 67). Orme claims that, like aggravating factors, these weighing processes constitute separate elements of capital murder and, as such, must be charged in the indictment, submitted to the jury and proven by a reasonable doubt. Finally, Orme argues that this court's decisions in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002) do not control the outcome of his case because Orme, unlike Bottoson and King, had not been previously convicted of a violent felony. Orme also points out that unlike King's jury that recommended 12-0 that King be put to death, his jury was split 7-5 in favor of death. Finally, Orme makes a general argument that his Ring claim should be granted in light of emerging case law. (IB. 72).

A. Orme's Claims Are Procedurally Barred

Orme's Ring claims are procedurally barred. Orme did not raise any constitutional challenge to Florida's capital sentencing structure on direct appeal. Orme also failed to raise, on direct appeal, any claim concerning the State's alleged failure to include all of the elements of capital murder in the indictment. Failure to do so acts as a procedural bar to Orme raising this issue now. Allen v. State, 28 Fla. L. Weekly S604 fn. 4, (Fla. July 10, 2003); Fennie v. State, 831 So.2d 651 (Fla. 2002) (ruling that because Fennie could have

raised a claim that Florida's capital sentencing statute was unconstitutional on direct appeal, this claim was procedurally barred on postconviction motion); Floyd v. State, 808 So.2d 175 (Fla. 2002) (claim that Florida's death penalty statute is unconstitutional is procedurally barred because it should have been raised on direct appeal); Arbelaez v. State, 775 So.2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal; Smith v. State, 445 So.2d 323, 325 (Fla. 1983) (claim that Smith was deprived of due process by the state's failure to provide notice of the aggravating circumstances upon which it intended to rely in violation of the eighth and fourteenth amendments should have been raised on direct appeal and is not cognizable on collateral attack).

Orme failed to proffer any legally sufficient excuse for his failure to seek resolution of these issues in the appropriate forum. The fact that Ring had not yet been decided at the time Orme pursued his direct appeal does not preclude this Court from finding a procedural bar. This Court has applied procedural bar to bar claims brought under the predecessor decision rendered in Apprendi v. New Jersey, 530 U.S. 466 (2000), even in cases tried before the opinion in Apprendi was issued. Barnes v. State, 794 So.2d 590, 591 (Fla. 2001); McGregor v. State, 789 So.2d 976, 977 (Fla. 2001).

The issue addressed in Ring is by no means new or novel. This claim or a variation of it has been known since before the United States Supreme Court issued its decision in Proffitt v. Florida, 428 U.S. 252 (1976), in which it held that jury sentencing is not constitutionally required. In fact, the very existence of earlier decisions addressing judge versus jury sentencing demonstrates that the issue is not novel; it has been raised and addressed repeatedly. *See e.g.* Hildwin v. State, 531 So.2d 124, 129 (Fla. 1988) (concluding petitioner's claim that "the death penalty was unconstitutionally imposed because the jury did not consider the elements that statutorily define the crimes for which the death penalty may be imposed" was without merit); Spaziano v. State, 433 So.2d 508, 511 (Fla. 1983) (concluding that a judge's consideration of evidence not before the jury in deciding to sentence convicted murderer to death over jury's recommendation of life in prison was not improper); *See also* Barclay v. Florida, 463 U.S. 939 (1983) (upholding Florida capital sentencing structure). Thus, the basis for any Sixth Amendment attack on Florida's capital sentencing procedures has always been available to Orme. Yet, Orme failed to pursue these issues on direct appeal.

In Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003), the 11th Circuit ruled that Turner's Ring claim was procedurally

barred. In doing so, the Court rejected any notion that claims, like the one raised by Orme here, could not have been raised before the Supreme Court handed down the decision in Ring. The Court held that Turner could not excuse his failure to raise the issue in Florida's courts because Turner's Ring claim was not so new and novel that its legal basis was not reasonably available to counsel. Because Orme failed to seek resolution of these issues on direct appeal, his claim here is procedurally barred.

B. Ring Is Not Applicable Retroactively To Orme's Case

This court has consistently rejected the proposition that Ring applies to invalidate Florida's capital sentencing structure when the jury has recommended a sentence of death. Assuming, *arguendo*, that Ring has any effect on Orme's death sentence, Ring is not applicable retroactively to Orme's case.

On June 26, 2000, the United States Supreme Court decided the case of Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the court held that a criminal defendant is entitled to a jury determination of any fact, other than the existence of a prior conviction, that increases the penalty for a crime beyond the statutory maximum.

Almost two years to the day after the Court's decision in Apprendi, on June 24, 2002, the United States Supreme Court

issued its decision in Ring v. Arizona, 536 U.S.584 (2002). Neither the United States Supreme Court nor the Florida Supreme Court has directly addressed retroactivity of either Ring[16] or Apprendi[17]. However, all eleven federal circuit courts, as well as several state courts, have addressed the issue of whether Apprendi should be applied retroactively.[18] These cases are instructive because Ring served to extend the dictates of Apprendi to death penalty cases. *See* Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002)(noting that Ring is simply an extension of Apprendi to the death penalty context.

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[16] Justice O'Connor in her dissent in Ring apparently concluded that Ring was not retroactive as she noted that capital defendants will be barred from taking advantage of the court's holding on federal collateral review. Ring, 122 S.Ct. 2428, 2449-2450.

[17] The United States Supreme Court held, however, that an Apprendi error is not plain error because failing to include the quantity of drugs in an indictment, while an Apprendi violation, did not affect the fairness, integrity or public reputation of judicial proceedings. United States v. Cotton, 122 S.Ct. 1781 (2002). Certainly, if a found error is not of such magnitude as to constitute plain (fundamental) error, it is not of such fundamental significance as to warrant retroactivity.

[18] Three Florida courts of appeal have determined that Apprendi is not retroactive on collateral attack. Hughes v. State, 826 So.2d 1070 (Fla. 1st DCA, 2002)(holding that the decision announced in Apprendi is not of sufficient magnitude to be fundamentally significant, and thus, does not warrant retroactive status), *rev. granted*, Hughes v. State,837 So.2d 410 (Fla. 2003), Figarola v. State, 841 So.2d 576 (Fla. 4th DCA 2003); Gisi v. State 848 So.2d 1278, 1282 (Fla. 2d DCA 2003). All eleven federal circuits have determined Apprendi is not to be applied retroactively.

As a result of its more recent arrival on the landscape of American jurisprudence, fewer courts have been called upon to address Ring's application to cases already final at the time Ring was decided. A majority of the courts have determined that Ring should not be applied retroactively.

Recently, in Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003), the 11th Circuit Court of Appeals, in considering a challenge to Turner's Florida capital murder conviction, ruled that Ring outlined a procedural, rather than a substantive, rule "because it dictates what fact finding procedure must be employed in a capital sentencing hearing." Id at 1284.[19] Specifically, the court noted that Ring changed neither the underlying conduct the state must prove to establish a defendant's crime warrants death nor the state's burden of proof". The court went on to observe that "Ring affected neither the facts necessary to establish Florida's aggravating factors nor the State's burden to establish those factors beyond a reasonable doubt. Instead, Ring altered only who decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure." Id. The 11th Circuit ruled that Turner could not collaterally attack his convictions and

[19] In contrast to new rules of criminal procedure, new rules of substantive criminal law are applied retroactively (Bousley v. United States, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L. Ed. 2d 828 (1998).

sentences on the basis of a Ring error because Ring did not apply retroactively[20]. Shortly after the Turner decision issued, a different panel of the 11th Circuit ruled in Ziegler v. Crosby, 345 F.3d 1300 (11th Cir. 2003) that Zeigler's challenge to his Florida death sentence fails because neither Apprendi nor Ring applies retroactively on collateral review to convictions that became final before these cases were decided.

Likewise, in In Re Johnson, 334 F.3d 403 (5th Cir. 2003), the Fifth Circuit Court of Appeals observed that because Ring is essentially an application of Apprendi,[21] "logical consistency" suggests the rule announced in Ring is not to be applied retroactively to convictions that became final before the Ring decision was announced.

In State v. Lotter, 664 N.W.2d 892 (Neb. 2003), the Nebraska Supreme Court determined that Ring established a rule of criminal procedure applicable in capital cases and not, as Lotter urged, a substantive rule of criminal law. Lotter argued that because the Ring court considered aggravating circumstances in capital cases to be the functional equivalent of an element

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[20]The court declined to address the merits of Turner's Ring challenge.

[21] In United States v. Brown, 305 F.3d 304, 309 (5th Cir. 2002), the court ruled that Apprendi is not retroactively applicable to final convictions. The court in Johnson, was not called upon directly to rule on the issue of Ring's retroactivity.

of the greater offense of capital murder, the Ring decision essentially redefined the elements of capital murder.

In rejecting Lotter's argument, the Nebraska Supreme Court relied heavily on the Arizona Supreme Court's rejection of a similar contention in State v. Towrey, 64 P.3d 828 (Ariz. 2003). In Towrey, the Arizona court described the distinction between substantive rules, which "determine the meaning of a criminal statute" and "address the criminal significance of certain facts or the underlying prohibited conduct," and procedural rules which "set forth fact-finding procedures to ensure a fair trial." Towrey at 832). The Towrey court found that Ring did not announce a new substantive rule because it was simply an extension of the procedural rule announced in Apprendi.

Like the Nebraska Supreme Court in Lotter, the Towrey court ruled that Ring is not to be retroactively applied.[22] *See also* Colwell v. State, 59 P.3d 463 (Nev. 2002) (concluding that Ring should not be applied retroactively to overturn a final conviction and sentence to death sentence handed down a three judge panel); Moore v. Kinney, 320 F.3d 767, 771, n.3 (8th Cir.) (*en banc*) (Absent an express pronouncement of retroactivity from the Supreme Court, the rule from Ring is not retroactive); Szabo v. Walls, 313 F.3d 392, 398-399 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 2580 (2003); Sibley v. Culliver, 243 F. Supp.2d 1278

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[22] *But see* Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) (concluding that Ring applies retroactively so as to require that the penalty of death in this case be vacated). A petition for writ of certiorari in Summerlin is now pending.

(M.D. Ala. 2003) (like Apprendi, Ring should not be applied retroactively to disturb Silbey's 1993 murder conviction).

In examining the issue of retroactivity, federal courts, as do a growing number of state courts, apply the test outlined by the United States Supreme Court in Teague v. Lane, 489 U.S. 288 (1989).[23]

This Court has not yet adopted Teague when examining the retroactive application of changes in federal constitutional rules of criminal procedure. Instead, retroactivity in Florida is determined by subjecting a procedural change in the law to the three part test outlined in Witt v.State, 387 So.2d 922 (Fla. 1980). The Florida Supreme Court held in Witt that a change in decisional law will not be applied retroactively to convictions final at the time the new rule is announced unless the change (1) emanates from the state supreme court or the

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[23] In Teague, the United States Supreme Court announced that new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within an exception to the general rule. There are two exceptions to the general rule of non-retroactivity. First, a new rule should be applied retroactively if it places a certain kind of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Id. at 311. The second exception, derived from an earlier view by Justice Harlan, requires that the new rule must "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Thus, this exception is limited in scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague at 311-313.

United States Supreme Court, (2) is constitutional in nature, and (3) constitutes a development of fundamental significance.[24]

This Court should adopt Teague in examining the retroactive application of new rules of constitutional procedure. This Court should do so for at least two reasons. First, the question presented here concerns the retroactivity of a federal constitutional decision, which is itself a federal question. Accordingly application of federal retroactivity principles is appropriate. *See* American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 178 (1990); Michigan v. Payne, 412 U.S. 47 (1973); State v. Tallard, 816 A.2d 977, 979 (N.H. 2003); State v.

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[24] In analyzing whether a new rule constitutes a development of fundamental significance, this court explained that major constitutional changes in the law can be grouped into two categories. The first are those "jurisdictional upheavals" that warrant retroactive application. These are changes of law which (1) place beyond the authority of the state the power to regulate certain conduct or impose certain penalties or (2) which are of sufficient magnitude to necessitate retroactive application.

The second type of change, identified by this court as "evolutionary refinements" do not warrant retroactive application on collateral attack. According to this court in Witt, evolutionary refinements would include such things as changes "affording new or different standards for the admissibility of evidence, for procedural fairness,[and] for proportionality review of capital cases..." (Witt at 929). The court, in observing that these "evolutionary refinements" do not compel retroactive application, noted that"[e]mergent rights in these categories..., do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Witt at 929-930.

Sepulveda, 32 P.3d 1085, 1086-87 (Ariz. Ct. App. 2001); Meadows v. State, 849 S.W.2d 748, 754 (Tenn. 1993).

Second, given the similarity of purpose behind federal habeas review and state collateral proceedings, application of the Teague test promotes consistency during collateral review while still protecting the finality of those convictions arising from proceedings that comported with constitutional norms at the time of trial. *See* Teague, 489 U.S. 309-311; Daniels v. State, 561 N.E.2d 487, 489 (Ind. 1990).[25]

In Turner v. Crosby, *supra*, the court, applying Teague, ruled that Ring's new rule of criminal procedure is not sufficiently fundamental to fall within Teague's second exception to the general rule of non-retroactivity.[26] The court

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[25] Courts applying the Teague standard to the same question now before this court, have determined that neither Apprendi nor Ring should be applied retroactively. *See* State v. Towrey, 64 P.3d 828, 835 (Ariz. 2003) (ruling that Ring does not meet either exception carved out by the general rule of non-retroactivity carved out in Teague); Colwell v. State, 59 P.3d 463, 470-473 (Nev. 2002) (adopting the Teague test for determining retroactivity of new constitutional rules and ruling that retroactive application of Ring is not warranted). *See also* People v. De La Paz, 2003 Ill. LEXIS 775 (Ill. May 8, 2003) (applying Teague); State v. Tallard, 816 A.2d 977 (N.H. 2003)(applying Teague); Teague v. Palmateer, 57 P.3d 176 (Ore. App. 2002) (applying Teague); Greenup v. State, 2002 Tenn. Crim. App. LEXIS 836 (Tenn. App. 2002) (applying Teague); People v. Bradbury, 68 P.3d 494 (Colo. App. 2002) (applying Teague); Whisler v. State, 36 P.3d 290 (Kan. 2001) (applying Teague), cert. denied, 535 U.S. 1066 (2002).

[26] Teague's first exception is not at issue because the rule announced in Ring did not purport to decriminalize any conduct or preclude the state from punishing Orme for murdering Lisa Redd. See Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000) (holding that "the first exception identified in Teague is plainly

explained that Teague's second exception must be applied only to "watershed" rules of criminal procedure that affect the "fundamental fairness of the trial." Turner at 1285, citing to Teague at page 312). *See also* Sawyer v. Smith, 497 U.S. 227, 242-243 (1990)(explaining this second Teague exception should only be applied to those "watershed rules of criminal procedure" which are "essential to the accuracy and fairness of the criminal process"); Graham v. Collins, 506 U.S. 461, 478 (1993) (explaining the Teague exception is limited to a small core of rules which seriously enhance accuracy).

Orme's argument that his Ring claim should be granted based on emerging law seems to rest on the notion that Ring implicates the fundamental fairness of Florida's capital sentencing procedures or casts serious doubt on the veracity or integrity of the original trial proceeding. Orme claims that creation of the right to trial by jury establishes that a "jury trial is more reliable that a bench trial." (IB. 91). The United States Supreme Court, in Ring, reached no such conclusion. To the contrary, the Court noted the Sixth Amendment right to a jury trial did not "turn on the relative rationality, fairness, or efficiency of potential factfinders." Ring, 536 U.S. at 607.

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inapplicable here, where the state's authority to punish Petitioner for attempted murder is beyond question"). The United States Supreme Court in Sawyer v. Smith, 497 U.S. 227 (1990) explained that this first exception is only applicable when the new rules place an entire category of criminal conduct beyond the reach of criminal law or prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense (e.g. prohibiting imposition of the death penalty for rape as violative of the Eighth Amendment).

Similarly, the Turner court observed that "[p]re-Ring procedure does not diminish the likelihood of a fair sentencing hearing." The court went on to note the new rule in Ring, "at most would shift the fact-finding duties during Turner's penalty phase from (a) an impartial judge after an advisory verdict by a jury to (b) an impartial jury alone." Turner at 1286. Nothing in Ring or Turner, suggests this new rule of criminal procedure is essential to the accuracy and fairness of the criminal process, or was intended to resolve lingering doubts about the veracity or integrity of Florida's capital sentencing proceedings.

This interpretation is logical when one considers that the United States Supreme Court, in directly addressing the Sixth amendment right to a jury trial, has refused to apply the right to a jury trial retroactively because it could not be said that the fact finding process is more fair or reliable when done by a jury rather than by a judge. DeStefano v. Woods,392 U.S. 631 (1968). By comparison, the United States Supreme Court ruled that its decision in Burch v. Lousiana, 441 U.S. 130 (1979)(ruling that conviction of a non-petty criminal offense by a non-unanimous six-person jury violates the accused's constitutional right to a jury trial) would apply retroactively. Brown v. Lousiana, 447 U.S. 323, 328 100 S.Ct 2214 (1980). The decision in Brown turned almost entirely on the Court's conclusion that conviction by only five members of a six person jury raises substantial doubts as to the reliability of the

verdict and the fairness of the proceedings–"the very integrity of the fact-finding process." Brown, 100 S.Ct. at 2223, citing to Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

These cases illustrate that retroactivity turns not on the "right" implicated, but rather upon whether retroactive application of the new rule is necessary to correct serious flaws in the fact-finding process and to ensure the fundamental fairness of the proceedings.[27] As noted by the 11th Circuit Court of Appeals in Turner, Florida's capital sentencing procedure "does not diminish the likelihood of a fair sentencing hearing." The court went on to note that "Ring is based on the Sixth Amendment right to a jury

trial, not on a perceived, much less documented need to enhance accuracy or fairness of the fact-finding in a capital sentencing context." Turner at 1286.

Even if this court adheres to the dictates of Witt v. State, 387 So.2d 922 (Fla. 1980), Orme is entitled to no relief. Because

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[27] In Burch, the United States Supreme Court observed that "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." quoting Johnson v. New Jersey, 384 U.S. at 728, 86 S.Ct. at 1778. Burch, 447 U.S. 334

the new rule at issue here, undisputedly, satisfies the first two retroactivity factors of Witt, it is the third factor upon which this court's decision must rest. In accord with Witt, this court must look only to whether the rule of criminal procedures outlined in Ring constitutes a development of fundamental significance.

In New v. State, 807 So.2d 52 (Fla. 2001), this court explained that retroactive application of a new development in the law is warranted only if it "so drastically alters the substantive or procedural underpinnings of a final conviction and sentence that individual instances of obvious injustice would otherwise exist." New, 807 So.2d at 53. Because the Florida Supreme Court has consistently refused to apply Ring to invalidate Florida's capital sentencing structure, logic dictates that Ring did not drastically alter the capital sentencing landscape in Florida, especially in cases where a jury has recommended death. Even so, this "obvious injustice" language in New supports a conclusion that like the United States Supreme Court in Teague, this Court must consider retroactivity in terms of whether the new development affects the fundamental fairness of the proceedings or casts serious doubt on the veracity or integrity of the defendant's trial. Orme offers no support for the conclusion that a jury sitting alone, without the considered judgment of an impartial trial judge sitting as a co-sentencer, would increase the likelihood of a more fair or accurate sentencing proceeding. Indeed, the

judicial role in Florida provides defendants in Florida with a second opportunity to secure a life sentence, enhances appellate review, and provides a reasoned basis for a proportionality analysis. Orme has failed to demonstrate that Ring should be applied retroactively to invalidate his sentence.

C. Orme's Claims Fail On The Merits

This Court has consistently held that Florida's death penalty statute is not unconstitutional in light of the United States Supreme Court's pronouncement in Ring v. Arizona. Specifically, this court has rejected the same facial claims underlying Appellant's argument. Orme argues this court's decisions in Bottoson and King do not preclude granting relief here because unlike Bottoson and King, "Mr. Orme does not have any violent felonies prior to being convicted of murder..." (IB. 70). Orme's argument is not well-founded.

This court has, after its decision in Bottoson and King consistently rejected Ring-based challenges to Florida's capital sentencing scheme. *See e.g.* Allen v. State, ___ So.2d ___, 28 Fla. L. Weekly S604 (Fla. July 10, 2003)(rejecting Allen's constitutional challenge to Florida's capital sentencing scheme in light of Ring); Doorbal v. State, 837 So.2d 940 (Fla. 2003)(denying claim for relief on the basis that Florida's death penalty is unconstitutional under the holding of Ring); Butler v. State, 842 So.2d 817 (Fla. 2003) (denying Butler's claim that Florida's capital sentencing scheme violates protections granted by the United States Constitution pursuant to Ring); Lawrence v.

State, 846 So.2d 440 (Fla. 2003); Kormondy v. State, 845 So.2d 41 (Fla. 2003).

In arguing that he entitled to relief because he had no prior violent felony convictions, Orme ignores the fact he was contemporaneously convicted by a unanimous jury beyond a reasonable doubt of both sexual battery and robbery.[28] In Doorbal v. State, 837 So.2d 940 (Fla. 2003),the Florida Supreme Court rejected Doorbal's claim that Florida's capital sentencing scheme violates both the United States and Florida Constitutions under the holding of Ring v. Arizona, 536 U.S. 584 (2002).

Doorbal was sentenced to death for the murders of a wealthy businessman and his girlfriend in a kidnapping and extortion scheme. In affirming his sentence to death, the Court observed that one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely two contemporaneous murders and the kidnaping, robbery, and the attempted murder of a third victim. The court ruled that because "these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions." Doorbal at 963.

In the case at bar, Orme was charged with first degree murder. The indictment alleged, *inter alia*, that Orme killed

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[28] In Blackwelder v. State, 851 So.2d 650 (Fla. 2003), this Court ruled that sexual battery is "per se" a crime of violence.

Lisa Redd in the course of committing robbery or sexual battery, both undisputedly violent felonies. Additionally, the indictment charged that Orme robbed Lisa Redd of her purse, U.S. currency, and some jewelry by force, violence, assault or putting in fear and committed a sexual battery with physical force likely to cause serious bodily harm. (TR I. 3-4). The jury found Orme guilty of each of the charged offenses unanimously and beyond a reasonable doubt. (TR IV. 619-620). The trial judge found one of the aggravating factors in this case was that Orme murdered Lisa Redd while engaged in a sexual battery. The trial judge also found the murder was committed for pecuniary gain as "the evidence establishes and the jury unanimously found, that the defendant did unlawfully by force, violence, assault or putting in fear" take Lisa Redd's purse, car keys, chain, pendant, and a ladies watch. (TR IV. 731-732). Like in Doorbal, the fact that Orme was charged and found guilty of two contemporaneous violent felonies by a unanimous jury satisfies the dictates of Ring.[29]

Orme next alleges his death sentence must be vacated because the State failed to include three essential elements of capital murder within the indictment. He also contends that Ring requires these three elements to be submitted to the jury and found to exist by a unanimous verdict beyond a reasonable doubt.

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[29] It is logical a prior violent felony conviction or a contemporaneous violent felony conviction is excepted from a Ring analysis. In both instances, the convictions resulted from a jury determination of guilt beyond a reasonable doubt.

In addition to the statutory elements of first degree murder, Orme claims that after Ring, the State must also allege in the indictment and prove (1) the aggravating factors upon which it intends to rely in seeking the death penalty (2) there are sufficient aggravating factors to justify a death sentence, and (3) the mitigating factors are insufficient to outweigh the aggravating circumstances. Orme claims that because Florida's sentencing scheme does not require the jury to make these three findings, Section 921.141, Florida Statutes violates the Sixth and Fourteenth Amendment to the United States Constitution. Orme's argument is not supported in the jurisprudence of this state nor required by the United States Supreme Court's decision in Ring.

In arguing that Ring created three "extra" elements of capital murder, Orme presupposes the statutory maximum based upon conviction for first degree murder is life in prison. It also assumes that death eligibility does not arise until sentencing. Both of Orme's assumptions underlying his argument are misplaced. Both before and after the decision in Ring issued, the Florida Supreme Court has ruled that, in Florida, the statutory maximum upon conviction for first degree murder is death. *See e.g.* Mills v. Moore, 786 So.2d 532 (Fla. 2001), (ruling that death is the statutory maximum sentence upon conviction for murder); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003), (observing, in scrutinizing Porter's 1985 murder conviction, that "we have repeatedly held that the maximum

penalty under the statute is death"). Thus, while Ring holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury; once Orme was convicted of the first degree murder of Lisa Redd, Orme stood convicted of capital murder and was death eligible.[30] Neither the sufficiency of the aggravators nor the weighing process increase the penalty beyond the statutory maximum.

No Florida court has ever held the jury's consideration of the sufficiency of the aggravating factors or the weighing of the mitigating factors against the aggravating factors constitute elements of capital murder. Certainly Ring does not require such

[30] Even if this were not the case, Orme's contemporaneous convictions for sexual battery and robbery would make Orme death eligible in any event.

a conclusion.[31] Even Ring is limited to the finding of an aggravator. In a concurring opinion, Justice Scalia noted that jury fact finding is limited to the finding of a single aggravating factor. Ring, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to an aggravating factor and does not extend to the ultimate life or death decision which may continue to be made by the judge). Likewise, Justice Kennedy observed in his concurring opinion that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the

[31] The sentencing factors to which Orme points are not elements of the crime. Florida's capital sentencing scheme, found in section 921.141, Florida Statutes, affords the jury guidelines to follow by providing statutory aggravating factors and mitigating circumstances to be considered. Given the fact a convicted defendant faces the statutory maximum sentence of death upon conviction, the employment of further proceedings to examine the assorted "sentencing selection factors," including aggravators, mitigators, and the sufficiency of these factors, does not violate due process. In fact, a sentencer may be given discretion in selecting the appropriate sentence, so long as the jury has decided (by its finding of guilt of first degree murder) that the defendant is eligible for the death penalty. Florida's sentencing considerations are constitutionally mandated guidelines created to satisfy the Eighth Amendment and protect against capricious and arbitrary sentences. These factors are limitations on the jury and judge; they are not sentence enhancers or elements of the crime.

jury's verdict.[32] Ring, 122 S.Ct. at 2445 (Kennedy, J., concurring).

The Florida Supreme Court has directly addressed the issue of whether, after Ring, the State is required to include within the indictment the aggravating factor(s) it intends to rely on in seeking the death penalty. Additionally, the Court has considered whether these aggravating factors must be submitted to the jury[33] and found unanimously beyond a reasonable doubt. In cases decided well after Ring, the Florida Supreme Court has specifically rejected claims identical to Orme's.[34]

In Kormondy v. State, 845 So.2d 41 (Fla. 2003), *cert den.*, 2003 WL 21805073 (Oct. 14, 2003) this Court ruled that the absence of any notice of the aggravating factors the State will

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[32] In Arizona, the maximum sentence authorized by the jury's verdict of guilt for first degree murder is life. Of course, in Florida, as discussed above, death is the maximum sentence authorized by jury verdict of guilt for first degree murder

[33] If required, this ordinarily would be accomplished by a special verdict form.

[34] To the extent Orme argues that a unanimous jury "verdict" is required, the United States Supreme Court has held, even in the guilt phase of a trial, jury unanimity is not required. *See* Johnson v. Louisiana, 406 U.S. 356 (1972) (finding nine to three verdict was not denial of due process or equal protection); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding conviction by non-unanimous jury did not violate Sixth Amendment). Schad v. Arizona, 501 U.S. 624, 631 (1991) (plurality opinion) (addressing felony murder and holding due process does not require unanimous determination on liability theories)

present to the jury and the absence of specific jury findings of any aggravating circumstances does not violate the dictates of Ring.[35] This Court went on to rule that a special verdict form indicating the aggravating factors found by the jury is also not required by the decision in Ring. *Accord* Fennie v. State, 28 Fla.L.Weekly S619 (Fla. July 11, 2003)(rejecting Fennie's claim that Florida's death penalty statute was unconstitutional because it fails to require aggravators to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt); Owens v. Crosby, 28 Fla.L.Weekly S615 (Fla. July 11, 2003)(denying Owens' challenge, in light of Ring, to Florida's death penalty statute on constitutional grounds because the jury is not required to make specific factual findings as to aggravation and mitigation); Blackwelder v. State, 28 Fla.L.Weekly S523 (Fla. July 3, 2003)(specifically rejecting Blackwelder's argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict).

This Court has also rejected the notion that due process requires the State to provide notice as to the aggravating

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[35] This Court was not called upon in Kormondy or Fennie to determine whether Ring requires the statutory weighing processes (sufficiency of the aggravating factors or the weighing of the mitigating factors against the aggravating factors) to be included in the indictment and proven to a unanimous jury beyond a reasonable doubt.

factors it intends to rely upon by alleging them in the indictment. In Vining v. State, 637 So.2d 362 (Fla. 1994), the Florida Supreme Court noted that "[t]he aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), Florida Statutes (1987). Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove." Vining, 637 So.2d at 928. *See also* Lynch v. State, 841 So.2d 362 (Fla. 2003) (rejecting Lynch's claim that Florida's death penalty scheme is unconstitutional because it fails to provide notice as to aggravating circumstances based on the ruling in Vining). [36] This court should reject Orme's argument that Ring created three extra elements of capital murder.

Finally, Orme's catch-all "emerging case law" argument is without merit. Orme cites to case law from other states, none of which impact or actually touch upon the constitutionality of Florida's sentencing scheme. First Orme cites to cases from Nevada and Missouri which Orme claims have "hybrid" sentencing

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[36] The Florida Supreme Court in Kormondy, *supra,* also rejected Kormondy's claim that the absence of any notice of the aggravating circumstances that the State will present to the jury and the absence of specific jury findings of any aggravating circumstances offends due process and the proscription against cruel and unusual punishment.

laws like Florida.[37] However, neither states' sentencing scheme, as examined in the cases cited by Orme, resembles Florida's capital sentencing structure. In both states, if the jury is unable to render a unanimous verdict, either a three judge panel or a single judge determines the sentence without any input from the jury. It was this provision that was at issue in the cases cited by Orme. These sentencing schemes are unlike Florida's because the jury is completely removed from the process once it cannot reach a unanimous verdict.

Additionally, Orme cites to Esparaza v. Mitchell, 310 F.3d 414 (6th Cir. 2002). Orme claims the Sixth Circuit granted habeas relief because the Ohio jury was not required to return a verdict identifying the aggravating factors that were present and that rendered the defendant death eligible under state law. Like the others cited by Orme, this case has no application to Florida law. Even more compelling, however, is that Esparaza does not even rest on a Sixth Amendment Ring analysis. The court in Esparaza noted that the "principal problem in the case arises from the fact that the indictment did not charge the aggravating circumstance that made the crime capital, nor did the trial court instruct the jury on the subject, nor did the

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[37] Orme cites to Johnson v. State, 59 P.3d 450 (Nev. 2002) and State v. Whitfield, 2003 WL 21386276 (Mo. June 17, 2003).

jury return a verdict finding one or more of the aggravating circumstances that permit a sentence of death." Esparaza at 416.

Under Ohio law, the indictment in a capital case charging aggravated murder must state the "aggravating circumstances" that make the defendant eligible for the death penalty. Failure to do so makes a life sentence mandatory. *§ 2929.03 (A), Ohio Statutes*. Likewise, Ohio's sentencing statute requires the jury verdict to separately state whether the offender is guilty or not guilty of each aggravating circumstance. The statute also requires the jury to be instructed that an aggravating factor specification must be proven beyond a reasonable doubt in order to support a guilty verdict on the particular aggravating circumstance. *§ 2929.03 (B), Ohio Statutes*.

In Esparaza, the indictment failed to include the required aggravating factors to make the crime capital[38], no instruction was given and the jury did not return a verdict finding any aggravating circumstance. Instead the trial judge found the murder was committed while in the commission of a robbery and

[38] Specifically, the State failed to allege Esparaza was either the principal offender in a felony murder or that he committed the murder with prior calculation and design.

that Esparaza was the principal offender in the commission of the murder.

The court ruled that Ohio violated the dictates of the Eighth Amendment, as well as state law, when it failed to charge Esparza in the indictment with the aggravating circumstance for which the death penalty was imposed, to instruct the jury on the aggravating circumstance, and have the jury reach a verdict on the existence of the aggravating circumstance. While the 6th Circuit cited Ring to support the notion the Eight Amendment prohibits a judge from determining the existence of a factor that makes a crime a capital offense, Esparaza did not turn on a Ring analysis. Instead, it turned primarily on an application (and violation) of the Ohio capital sentencing scheme, a scheme entirely different from Florida's.[39]

Orme next argues that this Court should consider decisions from states "lumped in the same category as Florida, hybrid states." (IB. 75). Orme cited to decisions from Indiana, Delaware and Alabama. None of the cases cited by Orme support his cause.

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[39] Ohio's statute requiring the aggravating circumstances to be included in the indictment and found by the jury was Ohio's response to 8th Amendment jurisprudence that requires states to narrow or restrict the class of persons who are subject to the death penalty.

In Bostick v. State, 773 N.E.2d 266 (Ind. 2002), a case cited by Orme in support of his argument, the Indiana Supreme Court found a Ring violation when the judge sentenced Bostick to life without parole. When seeking a sentence of death or life without the possibility of parole, Indiana law requires the State to allege, in a document separate from the charging document, the aggravating factor upon which it intends to rely.[40] In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. The jury is instructed to identify each aggravating factor found beyond a reasonable doubt on a special verdict form.[41] If the jury is unable to reach a unanimous sentencing recommendation after reasonable deliberation, the court discharges the jury and sits as the only sentencer in the case.

In Bostick, the jury was unable to reach a unanimous recommendation during the sentencing phase. The judge then discharged the jury pursuant to law, found the required aggravating circumstances proved beyond a reasonable doubt, and sentenced Amy Bostick to three sentences of life without parole.

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[40] In this case it was that the victims were under age 12.

[41] In 2002, the Indiana legislature amended the statute to require special verdict forms. *Ind. Code § 35-50-2-9(d), amended by P.L. 117-2002, § 2*.

The court observed that, by deadlocking, the jury failed to find the victims were under twelve years old at the time their mother murdered them by locking them in their bedroom and setting the house ablaze. The court noted that, as such, the defendant's sentence to life without parole was based on facts extending the sentence beyond the statutory maximum authorized by the jury's verdict finding her guilty of murder. Bostick at 273.

As in Missouri and Nevada, under some circumstances Indiana law allowed the judge to sentence a defendant without jury input. This is not the case in Florida where the jury sits as a co-sentencer to the trial judge. Additionally, under Florida law, Orme was death eligible upon conviction for first degree murder, a verdict rendered beyond a reasonable doubt by a unanimous jury. Accordingly, Bostick is neither controlling nor persuasive.[42]

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[42] Subsequent to the decision in Bostick, the Indiana Supreme court noted Ring was satisfied when the jury recommended the defendant be sentenced to life without parole. The court held that implicit in the jury's recommendation is the jury's finding beyond
a reasonable doubt that the charged aggravating circumstance exists. The court came to this conclusion because the jury was instructed that before it could recommend that a death sentence be imposed, the jury must find (1) the existence of the charged aggravating circumstance beyond a reasonable doubt and (2) that the aggravating circumstance outweighed the mitigating circumstances. The court noted that, as such, the jury necessarily determined the fact of the aggravating circumstance beyond a reasonable doubt. Brown v. State, 783 N.E.d 2d 1121

Orme also cites to case law from two other hybrid states in support of his emerging case law argument. Orme first cites to Brice v. State, 815 A.2d 314 (Del. 2003). In Brice, the Delaware Supreme Court observed that in Delaware, like in Florida, Indiana, and Alabama, the jury renders an advisory sentence in the penalty phase that is not binding upon the judge who is the ultimate sentencer. Orme argues that Brice stands for the proposition that

a Ring analysis must focus on the Florida Statutes which sets forth three "factual findings" that must be made before the defendant is death eligible. (IB. 79, fn 42). In reality, Brice stands for just the opposite. Indeed the Delaware Supreme Court rejected a claim similar to Orme's. The court in Brice specifically ruled that the United States Supreme Court's mandate in Ring does not extend to the weighing process. Brice at 322.

While Delaware law now requires a unanimous jury finding of at least one aggravating factor,[43] the court refused to extend

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(Del. 2003). Likewise, in Florida, any death sentence which is imposed following a jury recommendation of death, as in the instant case, cannot fail to satisfy the Sixth Amendment as construed in Ring v. Arizona, 122 S. Ct. 2428 (2002), because the jury necessarily found beyond a reasonable doubt that at least one statutory aggravating factor existed.

[43] The Delaware statute was amended in 2002 to require a jury to find, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance

Ring to require the jury to find as a "fact" that the aggravating circumstances outweigh the mitigating circumstances. The court also refused to extend Ring to require jury sentencing. Of particular interest is the court's ruling that "[e]ven though Ring may be read to extend the jury's role to the finding of aggravating circumstances during the sentencing phase, a function made explicit and necessary under the 2002 Statute, nothing in Ring suggests that the trial judge may not retain the responsibility of making the ultimate sentencing decision, subject to affording the jury its acknowledged role in the sentencing process.[44] Orme cannot look to Brice to lend support to his Ring claim.

Orme's cites as well to *Ex parte Waldrop*, 2002 Ala. Lexis 336 (Ala. November 22, 2002), cert den., Waldrop v. Alabama, 2003 U.S. LEXIS 7750 (U.S., Oct. 20, 2003). In Waldrop, the defendant argued that Ring requires a jury to find that at least

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before the sentencing judge may consider imposing the death sentence.

[44] In Brice, the court recognized that a jury finding during the guilt phase of the existence of the underlying facts that are necessary to establish a statutory aggravator beyond a reasonable doubt complied with the construction of the United States Constitution in Ring. In Reyes v. State, 819 A.2d 305 (Del. 2003), the court concluded as well that when a jury's guilty verdict simultaneously establishes a statutory aggravating circumstance that jury verdict authorizes a maximum punishment of death in a manner that comports with the United States Supreme Court's holding in Ring.

one statutory aggravating circumstance exists and that the aggravating circumstances outweigh the mitigating circumstances.[45] In rejecting Waldrops' claim, the court noted that "the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum." Waldrop at ____. The court went on to observe that "the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof." Id.

The Alabama Supreme Court found specifically that Alabama's capital sentencing structure requires jury participation in the sentencing process but gives ultimate sentencing authority to the trial judge. The court also ruled the trial judge's determination the murders were especially heinous, atrocious, or cruel was a part of the weighing process, not a "fact" required

[45] Under Alabama law, a capital defendant may not be sentenced to death unless the jury determines that at least one statutory aggravating circumstance exists. An Alabama jury is instructed, as well, that if the jury finds that one or more aggravating circumstances exist but these aggravators do not outweigh the mitigating factors, it shall return an advisory sentence of life without parole. A jury recommendation of death must be based on a vote of at least 10-2. *See Ala. Code 1975, § 13A-5-46(e)(3) and (f)*.

to be found by a jury nor an element of the crime of capital murder. [46]

Orme cites Brice and Waldrop, apparently, in support of his claim that pursuant to both Delaware and Alabama law after Ring, the jury must find an aggravating circumstance at the guilt phase of a capital trial to render a defendant death eligible. Orme claims that Justice Pariente, when she observed that Brice supports the notion the weighing process is not a factual finding that must be made by the jury, overlooked the fact that under Delaware law, the jury is required to find an aggravating factor at the guilt phase. (IB. 79, n.42). Orme claims this "fact" clearly distinguishes these states' capital sentencing structures from Florida's in a critical fashion. (IB. 81). Orme misunderstands both states' sentencing schemes.

In fact, neither Delaware nor Alabama law require the jury to find the existence of an aggravating circumstance at the guilt phase of a capital trial in order to sentence a defendant to death. The Alabama sentencing scheme provides that at the sentencing hearing the state shall have the burden of proving

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[46] Recently, in *Ex parte Hodges*, 2003 Ala. LEXIS 84 (Ala. March 14, 2003), the Alabama Supreme Court ruled that the determination of whether aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Accordingly, the court ruled that Ring and Apprendi do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.

beyond a reasonable doubt the existence of any aggravating circumstances. Any aggravating circumstance, which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial, shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing. *Section 13A-5-45(e), Alabama Code*. Thus, like in Florida, the Alabama scheme recognizes that some aggravating circumstances are inherent in the jury's verdict and need not be proven a second time during the penalty phase.

Likewise, under Delaware's capital sentencing statute, a sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least one (1) statutory aggravating circumstance as enumerated by the statute. If at least one statutory aggravating circumstance has been found beyond a reasonable doubt by the jury, the Court shall impose a sentence of death if it finds by a preponderance of the evidence that aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. *11 Del.C. § 4209(d)*. The statute recognizes that a conviction under certain sections of Delaware's first degree murder statute establishes the existence of a statutory

aggravating circumstance. *11 Del.C. § 4209(e)(2)*.[47] In Brice, the Delaware Supreme Court observed this provision precludes the jury "through inadvertence or ignorance [from rending] a finding in the narrowing phase that rejects the statutory aggravator found in the guilt phase." Brice at 323. Contrary to Orme's suggestion, neither Delaware nor Alabama law provide that "unless there is a finding of an aggravating circumstance at the guilt phase proceeding, the sentence is life imprisonment." (IB. 81). Accordingly, these cases lend no support to Orme's argument.

Finally, in support of his claim that Florida's statutory aggravators and sentencing considerations form elements of capital murder, Orme points to the Missouri Supreme Court's decision in State v. Whitfield, 107 S.W. 3d 253 (Mo. 2003).

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[47] These sections of 11 Del. C. § 636 (a) 2-7 (Delaware's felony murder law) includes such things as intentionally causes another person to commit suicide by force or duress, causing the death of another person by the use of or detonation of any bomb or similar destructive device, and causing the death of another person in order to avoid or prevent the lawful arrest of any person, or in the course of and in furtherance of the commission or attempted commission of escape in the second degree or escape after conviction. In Delaware, intentional murder under 11 Del. C.§ 636 (a) (1), is a separate offense from felony murder. The Supreme Court noted in Brice that a guilty verdict under the felony murder statute authorizes a maximum punishment of death. Brice at 323.

Orme urges this Court to look to Whitfield and grant him the relief he seeks.

The Whitfield decision offers Orme no support as Missouri's and Florida's capital sentencing procedures are quite different. First, the Missouri Supreme Court implicitly ruled that the statutory maximum penalty upon conviction for first degree murder is life in prison while in Florida, the statutory maximum upon conviction is death. Interestingly, this same Missouri Supreme Court found death to be the statutory maximum in State v. Cole, 71 S.W. 3d 163, 171 (Mo. 2002). Second, unlike Florida, Missouri does not have a hybrid capital sentencing scheme and is not a weighing state. Third, in cases of jury deadlock on sentencing, the Missouri jury no longer participates in sentencing.

In Whitfield, the jurors were split 11-1 in favor of a life sentence, and returned a verdict that they could not decide upon punishment. Under Missouri's capital sentencing structure, when a jury returns such a verdict, Missouri Revised Statutes section 565.030.4 requires the judge alone to determine the punishment. Hence, Missouri's procedure is very different from Florida's, because the jury is completely removed from the process once it cannot reach a unanimous verdict. There is no such provision in Florida, as the judge and the jury, in every instance, sit as co-sentencers in a capital jury trial.

It is also clear the Missouri Supreme Court went far afield from Ring in issuing its decision. The Missouri Supreme Court, without citation, stated that Ring "held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury." Whitfield at 257; *see also* 258, 262, 263, 264; Ring, 536 U.S. at 589, 597, 597 n. 7, 602, 604, 609. In doing so, the Missouri Supreme Court held that the first three steps in Missouri's capital sentencing structure—the finding of at least one statutory aggravating circumstance, the determination that evidence in support of aggravation warrants death, and the conclusion that mitigating evidence is outweighed by aggravating evidence—are all required to be found by a jury under Ring for a defendant to be considered "death-eligible." Whitfield, 107 S.W.3d at 261.

Despite the clear language of Ring, limiting that decision to the finding of the existence of aggravating circumstances, the Missouri Supreme Court extended Ring far beyond its holding. Ring expressly declined to address whether the jury was required to make any finding other than that of the statutory aggravating circumstance because that was the only question presented to it. Id., 536 U.S. at 597 n. 4. More importantly, Ring and Apprendi specifically exclude from this holding any sentencing factor

that "supports a specific sentence within the range authorized by the jury's finding." Apprendi, 530 U.S. at 494 n. 19; Ring, 536 U.S. at 609. Nothing in the United State's Supreme Court's decision in Ring or Florida's statute supports a finding that Orme's alleged "three factors" are elements of the crime. Instead, these are part of the sentencing selection process and, as such, not implicated by Ring. [48] This court should afford no weight to the Missouri Supreme Court's decision in Whitfield and Orme's claim should be denied.

III. WHETHER THE TRIAL JUDGE ERRED IN DENYING ORME'S CLAIM HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE GENERAL QUALIFICATION PROCEDURE EMPLOYED IN BAY COUNTY

Orme claims the jury qualification procedure in Bay County is unconstitutional because it is held outside the presence of the defendant and his counsel, the State is allowed to participate in the proceeding, and the proceeding is unrecorded. Orme recognizes this Court has already ruled that the general jury qualification procedure is not a critical stage at which

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[48] Throughout his Ring argument, Orme makes some reference to Orme's confrontation rights. For instance, Orme claims that during his trial, the State relied upon hearsay evidence to establish the aggravating circumstances. (IB. 77. n.38). Orme neither identifies what evidence he takes issue with nor develops any argument to support his claim that Ring implicates a capital defendant's right to confrontation. This court has rejected claims not specifically raised or developed in the appellant's brief.

the defendant must be present.[49] Orme argues these cases are distinguishable from the case at bar because his counsel was not present to safeguard his rights nor was there a trial transcript made of the proceedings. Orme contends this *ex parte* system of juror qualification is "practically an invitation for abuse by the State." (IB.95). Orme suggests hypothetical improprieties whereby the State might object to the release of jurors who are seemingly pro-state while not objecting to the release of prospective jurors who are pro-defense, object to the release of whites but not to the excusal of minorities, or remain silent when liberals are released from jury duty while protesting the excusal of those with conservative viewpoints. (IB. 95).

The record establishes, however, that Orme's accusations are completely unfounded. Not only are they not supported by the record, Orme's claims are specifically contradicted by testimony presented at the evidentiary hearing.

For instance, Orme asserts his attorney was absent from the general qualification proceedings. There is absolutely no evidence that trial counsel was absent from the proceedings. Though trial counsel could not specifically recall being present at jury qualification held some nine years before the

[49] Orme cites to Wright v. State, 688 So.2d 298 (1996) and Bates v. State, 750 So.2d 6 (Fla. 1999)

evidentiary hearing, he testified he generally attends jury qualification proceedings, listens to the excuses proffered by prospective jurors, and take notes (PCR XX. 2066). Likewise, Mr. Meadows, the Assistant State Attorney who prosecuted Orme, testified he could not recall a time this procedure was done without defense counsel present. The prosecutor told the trial court he has tried perhaps a dozen murder cases with Mr. Smith and in all of these cases, it was Mr. Smith's practice to attend the excusal portion of jury qualification proceedings. (PCR XXI. 2202). In short, Orme presented no evidence to support his claim that Mr. Smith was absent from the general jury qualification proceedings at issue.

Orme also claims a state attorney[50] was present and participated in the proceeding (IB. 97). Orme cites to Mackey v. State, 548 So.2d 904 (Fla. 1st DCA 1989) in which a state attorney, outside the presence of the defendant and his counsel, was allowed to give a speech to prospective jurors regarding their duties. According to Orme, unlike in Mackey where the court refused to find reversible error, his counsel was not allowed to question the state attorney at a pre-trial hearing to

[50] Orme does not identify this state attorney but presumably refers to the Assistant State Attorneys responsible for selecting juries from those potential jurors not excused at the general qualification proceeding.

determine what had transpired or to question the jurors about any prejudice that may have arisen (IB. 96-97).

Orme ignores the fact the evidence presented at the evidentiary hearing unequivocally established the assistant state attorneys who attend these proceedings do not participate in any way, let alone provide input to the trial judge on whether to release or not release a prospective juror. (PCR XXI. 2202). Both Mr. Smith and Mr. Meadows testified that prosecutors do not participate in the proceedings (PCR XX. 2067; XIX. 2202). Mr. Meadows testified, without contradiction, he had never participated in jury qualification proceedings. The prosecutor told the trial judge at the evidentiary hearing that "I can state absolutely and without a doubt that I know I have never intervened in that excuse process..." (PCR XX. 2202).[51] Orme has failed not only to provide any support for a finding of prejudice in his case, he has failed to present any evidence at all to support his allegations.

In any event, this Court has found that the general jury qualification proceeding is not a critical stage of the proceedings requiring the defendant's presence. In Robinson v.

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[51] Though Mr. Meadows referred to the venire members as witness, his testimony on this point concerned only his involvement in the jury qualification proceedings. It is manifestly clear that Mr. Meadows inadvertently misspoke when he referred to potential jurors as "witnesses" (PCR XXI. 2202).

State, 520 So.2d 1 (Fla. 1998), this Court held the presence of the defendant at jury qualification proceedings is not constitutionally required. The court noted that:

> We do not reach the question of whether appellant validly waived his presence during the prior general qualification process because we do not find that process to be a critical stage of the proceedings requiring the defendant's presence. We see no reason why fundamental fairness might be thwarted by [the] defendant's absence during this routine procedure.

Robinson at 4.

Likewise, in Wright v. State, 688 So.2d 298 (Fla. 1996)[52], this Court distinguished between general jury qualification proceedings and the qualification of a jury in a specific case[53]. This Court ruled that the presence of the defendant is not required at general qualification proceedings where no pretrial juror challenges are exercised. This Court observed in Wright that unlike jury selection in a specific case, general jury qualification proceedings are:

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[52] In both Robinson and Wright, trial counsel were present for general jury qualification. However, the absence or presence of trial counsel was not dispositive to this Court's rulings in those cases. Instead, it was this Court's conclusion the general qualification procedures are not critical stages of the trial requiring the defendant's presence. In both of these cases, the court recognized, without concern, that often both the defendant and his attorney are not present.

[53] In this appeal, Orme makes no claim he was absent from the qualification proceedings, any portion of the voir dire, or the exercise of challenges of his particular jury.

> ... often conducted by one judge, who will qualify a panel for use by two, three, or more judges in multiple trials. Counsel or a defendant does not ordinarily participate in this type of qualification process, although neither is excluded from doing so. In many instances, counsel and the defendant are not present. In short, the general qualification process is not "a critical stage of the proceedings requiring the defendant's presence" (*citing to* Robinson, 520 So.2d 1,4).

Wright, 688 So.2d 298, 300. *See also* Muhammad v. State, 782 So.2d 343 (Fla. 2001); Wike v. State, 813 So.2d 12, reh. denied (Fla. 2002) (affirming trial court's ruling that general qualification proceeding is not considered a critical phase of the trial at which the defendant's presence is required).

Orme's claim that the general jury qualification procedures employed prior to his jury trial are unconstitutional is without merit. The trial judge correctly ruled that Orme's counsel cannot be found ineffective for failing to pursue a meritless claim. Walton v. State, 847 So.2d 438 (Fla. 2003); Card v. State, 497 So.2d 1169 (Fla. 1986)(holding that trial counsel is not ineffective in failing to raise meritless claims).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Orme's successive motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to D. Todd Doss P.O. Box 3006, Lake City, Florida 32056-3306 this ____ day of November 2003.

_____

MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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MEREDITH CHARBULA