IN THE SUPREME COURT OF FLORIDA

NO. 02-2625

RODERICK MICHAEL ORME,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF

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I. Preliminary Statement

This proceeding involves an appeal by Roderick Michael Orme of the circuit court's denial of Rule 3.850 relief as to Mr. Orme's sentence of death. The following symbols will be used to designate references to the record in this appeal:

"R" (followed by page number) -- record on direct appeal to this Court;

"PCR [vol.] (followed by page number) -- record on post-conviction appeal

All other citations, such as those to exhibits introduced during the evidentiary hearing are self explanatory.

II. Standard of Review

Mr. Orme's appeal involves claims of ineffective assistance of counsel. As such these claims present mixed issues of law and fact and are to be reviewed *de novo* by this Court. *Stephens v. State*, 748 So. 2d 1028.

III. Request for Oral Argument

Mr. Orme has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Orme lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Orme, through counsel, accordingly urges that the Court permit oral argument.

IV. Statement of Case and Facts[1]

Roderick Michael Orme, known to his family and friends as Michael, was born to Linda Henley and Roderick Burr Orme on November 24, 1961, in Washington, D.C. His parents' marriage was beset by fighting and infidelity from the start, and by Mr. Orme's first birthday they had separated. When the divorce became final in 1963, Mr. Orme's father was granted custody of the boy and moved with him from Maryland to Virginia. The bitter fighting between his parents continued, however, and Mr. Orme was used by each parent to manipulate the other. At the age of six Mr. Orme was abducted by his mother, who took him back to Maryland. Less than a year later, Mr. Orme's father walked into the third grade classroom at Jessup Elementary School, punched the third grade teacher in the face, and dragged Mr. Orme from the room. He took the boy to Florida and severed all contact with Mr. Orme's mother. Mr. Orme would not see her again until he tracked her down when he was eighteen.

Mr. Orme's father eventually remarried and the family settled first in Lakeland, then in Panama City. The rest of Mr. Orme's childhood was

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[1] Citations from the records on appeal will be noted "R. page #." Citations from the postconviction record, including the transcript, will be noted "PCR at page #." Citations from the DSM III-R will be noted "DSM III-R, page number."

characterized by instability and severe psychological and physical abuse. Four maternal uncles had serious substance abuse disorders (one died of a drug overdose), as well as various forms of mental illness. There was a history of mental illness on the paternal side of the family, too, and Mr. Orme's father himself suffered from bipolar disorder. Rod Orme, Sr., was a short-tempered and abusive man. Some of the abuse was direct—as when Mr. Orme's father struck him or ridiculed him. Other forms of abuse were less immediate but more devastating—for example, one of Mr. Orme's duties as a young boy was to sit on the front porch and keep watch for his stepmother while his father had sex with various women. His father's behavior eventually grew even more perverted: When Mr. Orme was a teenager and had girlfriends of his own, his father would order Mr. Orme to have sex with these girls while his father watched from the closet.

As Mr. Orme grew older, he struggled with the psychological effects of his dysfunctional childhood at the same time as the first symptoms of his own bipolar disorder began to emerge. Careening from incapacitating depressive periods to soaring manic highs, Mr. Orme experimented with drugs as a way to escape his nightmarish home life and achieve some kind of equilibrium. His drug use began with marijuana, then progressed through barbiturates, amphetamines, alcohol, mushrooms, LSD, and cocaine. At the age of eighteen, in a state of despair, Mr.

Orme attempted to commit suicide by taking an overdose of Valium and Demerol. His brother Eric discovered him unconscious and took him to the hospital where he was revived. Mr. Orme never received therapy for this incident.

Shortly afterward, Mr. Orme tracked down his biological mother, who had moved to West Palm Beach. He moved in with her and her new husband for a period of time, but Mr. Orme's drug abuse and his mother's unsteady marriage led to his returning to Panama City. Mr. Orme was unwelcome at his father's home, however, because of what his father perceived as his defiant behavior in going to live with his mother. Broke, depressed, and with no place to live, he enlisted in the U.S. Marine Corps at the age of 19.

After serving a year in the Marines, Mr. Orme was given a "convenience of government" discharge and returned to Panama City where he held a series of odd jobs. During this time he sought treatment for his drug addiction, which had worsened as his self-esteem plummeted and his bipolar disorder went untreated. At the drug rehabilitation center he was given psychological testing which suggested that, in addition to a bipolar disorder, Mr. Orme may also suffer from schizophrenia.

In 1989 Mr. Orme enlisted in the Merchant Marines. He achieved a measure of success as a seaman and later a captain, even receiving commendation for his

service during the Persian Gulf War. However, the problems which drove him to join the Merchant Marines followed him on his voyages. He struggled with mental illness and drug abuse, often binging on crack cocaine while he was on shore leave. Fearful that his family would reject him if they discovered he was still using drugs, Mr. Orme became adept at concealing his addiction. When visiting Panama City, he confined his drug use to cheap motel rooms where he would not be recognized. Although he was by now a severe cocaine addict, his family believed he led a normal life.

By 1991, less than one year before Lisa Redd was killed, Mr. Orme was out of control. He was spending hundreds of dollars a day on his cocaine habit, and he could no longer endure the extremes of mood brought on by his mental illness. He resumed drug and mental health counseling and succeeded in arresting his crack cocaine addiction for a short period of time. This success was short-lived, however, and the relapse which followed was worse than anything which had preceded it. On March 3, 1992, at the Lee Motel in Panama City, Mr. Orme was in the grips of a full-blown psychosis. He checked himself into the Lee Motel to begin a cocaine binge. Mr. Orme called for a cab and went to the Cove Boulevard area of Panama City, an area known for drug sales. He bought the first bag of crack rocks for the day and returned to Lee's Motel. Mr. Orme shared his crack with the

prostitute that had helped him buy it and had sex with her. The prostitute left a little later and Mr. Orme went back to Cove Boulevard to buy more crack. This time when he returned to his room, he began feeling extremely ill and started to panic. Although he had recently attempted to end their off again on again affair, Mr. Orme called his girlfriend Lisa Redd. Ms. Redd was a nurse and could help him out on her way to work. Ms. Redd stopped by to see Mr. Orme at his motel room and the crack binging was evident. Mr. Orme attempted to smoke more crack while she was there, but she slapped it into the toilet. Mr. Orme then left the motel room to get more crack. He left in Ms. Redd's car after taking her keys from her purse. Mr. Orme then remembers returning later to find Ms. Redd cold and stiff. High on crack and in the throes of his mental illness, Mr. Orme left the motel room again. When he returned, the room was the same and Ms. Redd was only colder and stiffer. In a panic and desperately ill, Mr. Orme went to the drug treatment facility down the street where he had received help before. Mr. Orme walked through the door and instantly Ms. Mackey, the attending registered nurse, recognized that Mr. Orme was a medical emergency. R. at 438-9. He was suffering from a toxic reaction to the hundreds of dollars of cocaine he had consumed in the previous evening. Mr. Orme did manage to scribble on a piece of paper "LEE MOT RM15." R. at 358-9; *See also* State's Exhibit 1. As Mr. Orme was taken to the

emergency room, Panama City Police were directed to room fifteen of Lee's Motel to find Lisa Redd's dead body. Mr. Orme was questioned by investigators and relayed substantially the story above. Lisa Redd's purse was missing was missing and the semen found when a rape kit was utilized was connected to Mr. Orme. Mr. Orme has no memory of Lisa Redd's death, any sexual contact with Lisa Redd that night or how her purse came up missing and testified to such at his trial. Mr. Orme's trial counsel used an involuntary intoxication defense in the guilt phase and then presented the drug abuse and cocaine toxicosis as mitigation in the penalty phase. Unfortunately trial counsel neglected to present the powerful mitigation evidence of Mr. Orme's bipolar disorder that Dr. Ralph Walker had observed while treating Mr. Orme at the jail to the judge and jury.

Mr. Orme was convicted of one count of first degree murder, one count of robbery, and one count of sexual battery in the Circuit Court, Bay County, before Judge Judy Pittman. Thereafter the jury recommended death by a vote of 7-5 and the trial court sentenced Mr. Orme to death. The trial court in its sentencing order found three aggravators and two statutory mitigators.[2] . Mr. Orme subsequently

[2]The Court found the murder was committed in the course of a sexual battery, the murder was heinous, atrocious, or cruel (HAC), and that the murder was perpetrated for pecuniary gain. In mitigation the Court found Orme suffered from an extreme emotional disturbance and his ability to conform his behavior to the law was substantially impaired. The Court rejected as mitigation Orme's age, his

appealed said conviction to this Court raising eight issues challenging his conviction and sentence.[3] *Orme v. State*, 677 So.2d 258 (Fla. 1996). This Court rejected Orme's appeal and affirmed the trial court decision. Orme petitioned the U.S. Supreme Court to grant certiorari and was denied in *Orme v. Florida*, 117 S.Ct. 742 (1997), and he subsequently challenged his conviction and sentence by filing his Amended Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend on July 19, 2001. 3.850. PCR at 706. A *Huff* hearing was held on September 26, 2001 and the trial court granted Mr. Orme an evidentiary hearing as to Claims I, IV(I), V, and VII, while denying the other claims. PCR at 902. The evidentiary hearing was held on December 12, 13, and 14, 2001.

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love for his family, an unstable childhood, potential for rehabilitation, and his good conduct while awaiting trial.

[3]Orme raised the following points: (1) the trial court should have directed a judgment of acquittal because the State's case was circumstantial and was not inconsistent with all reasonable hypothesis of innocence; (2) his statements to law enforcement were not knowing and voluntary due to his extreme intoxication; (3) death was not a proportionate penalty; (4) HAC aggravator should not have been found because his mental state prevented him from forming the requisite intent to inflict a high degree of suffering on the victim (5) failure of trial court to find he had no significant criminal history; (6) the trial failed to give a special instruction that acts perpetrated on a victim after death are not relevant to determining whether the murder was HAC; (7) the jury instruction as to HAC was in violation of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); (8) he was incapable of forming the specific intent to commit murder and his death sentence was barred under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

The trial court issued its Order Denying Motion for Postconviction Relief on March 8, 2002. PCR at 1217. The instant appeal follows.

V. Summary of Argument

Mr. Orme was denied his right to effective assistance of counsel at both phases of his capital trial, when evidence of his mental state was not provided to the jury and judge in violation, all in violation of his rights due to Due Process and Equal Protection under the Fourteenth Amendment to the U.S. Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments.

Trial counsel failed to provide sufficient background data and prior diagnoses to the mental health experts upon whom Mr. Orme relied to present mitigation testimony. This failure resulted in Dr. Walker's pre-trial diagnosis of bipolar disorder never being investigated nor revealed to the mental health experts that assisted Mr. Orme at trial. Additional collateral information indicative of bipolar disorder was never developed and was unknown to trial counsel at the time of trial.

The collateral information was not discovered because trial counsel was ineffective in failing to request and receive a continuance of Mr. Orme's trial; and, additionally, for failing to adequately prepare and investigate mitigating evidence. Due to trial counsel's failure to provide his mental health experts with sufficient data, the jury never heard that Mr. Orme suffers from a major mental illness, and,

thus, the jury never considered the impact the illness had on his mental state. Mr. Orme's bipolar disorder would have provided an explanation for his drug use and addiction. Additionally, Mr. Orme's bipolar disorder would have provided substantial weight to both statutory and nonstatutory mitigation. Furthermore, Mr. Orme's bipolar disorder could have eliminated the heinous, atrocious, and cruel aggravator by negating the specific intent required to establish it.

The trial judge never made an explicit finding as to whether trial counsel was ineffective for not presenting evidence that Mr. Orme suffered from bipolar disorder, as presented in Claim V of Mr. Orme's motion for postconviction relief. The trial court failed to realize that voluntary intoxication and bipolar disorder are not mutually exclusive mitigating evidence. This failure resulted in a flawed order that does not address the powerful mitigating effect that a combination of Mr. Orme's bipolar disorder and his extreme cocaine intoxication represents.

Four competent experts diagnosed Orme as suffering from bipolar disorder. Knowing a person's mental state is essential to accurately assessing the effects of intoxication and addiction. If evidence of Mr. Orme's bipolar disorder had been presented at trial, the two statutory mental mitigators and non-statutory mitigation that were found would have been afforded much greater weight. Prejudice should have been found based upon the testimony and evidence produced at the post-

conviction evidentiary hearing that the bipolar disorder was available, yet not presented at trial.

Florida's capital sentencing procedure deprived Mr. Orme of his Sixth and Fourteenth Amendment rights to notice, to a jury trial and of his right to due process. Mr. Orme was not found guilty beyond a reasonable doubt by a unanimous jury on each element of the offense necessary to establish capital murder, therefore, his death sentence should be vacated.

Mr. Orme's death sentence must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Florida Constitution, and Due Process. Mr. Orme's case is distinguishable from *Bottoson* and *King* and his *Ring* claim should be granted in light of emerging case law.

The general jury qualification procedure employed by the Bay County Circuit Court deprived Mr. Orme of his rights under the Fifith, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of Florida law, this procedure constitutes fundamental error, and counsel was ineffective for failing to litigate this issue.

VI. Mr. Orme was denied his right to effective assistance of counsel

at both phases of his capital trial, when evidence of his mental state
was not provided to the jury and judge in violation, all in violation of his rights due to Due Process and Equal Protection under the Fourteenth Amendment to the U.S. Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments.

The above caption represents Claim V that Orme argued at the evidentiary hearing on his motion for postconviction relief. The pertinent information developed at the evidentiary hearing regarding Mr. Orme's affliction, bipolar disorder, is as follows. Roderick Michael Orme has bipolar disorder, a major mental illness, which manifests in dramatic mood swings. The disorder is characterized by one or more depressive episodes and one or more manic episodes. *See* Diagnostic and Statistical Manual of Mental Disorders, Third Edition Revised (1987) (DSM III-R).[4] Although the shift between moods can be influenced by the person's environment and its level of structure, PCR at 1887, the shift occurs with immense variability. PCR at 2024. "It is classic that each

[4] At this hearing, the State repeatedly attempted to use the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (2000) (DSM IV-TR). However, this edition did not exist at trial. The focus of this hearing was whether trial counsel was ineffective during the penalty phase, which occurred in 1993. The information trial counsel had at that time, as well as the information relied upon by the experts was the DSM III-R. As such, Mr. Orme's mental state at the time of the crime should be assessed under the DSM III-R. Any reference by the State to the DSM IV-TR is irrelevant and improper.

individual that is diagnosed bipolar has a different phase cycle." PCR at 1759. Consequently, a bipolar individual, at irregular occurrences, will present three identities: a depressed identity,[5] a manic identity,[6] and a euthymic identity.[7]

Although Mr. Orme suffers from this severe mental illness, bipolar disorder, the jury that recommended death – by a vote of only seven to five – never heard about his illness, its effect on his mental state or on his life. The jury never heard this information because Mr. Orme's trial counsel, Walter Smith, did not present evidence of the disorder, nor did he present testimony from mental health professionals who could testify to his bipolar disorder. The psychologist and

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[5] In a depressive episode, an individual will exhibit at least five of the following symptoms during the same two-week period: a depressed mood; a diminished interest or pleasure in almost all activities; significant weight loss or gain; insomnia or hypersomnia; psychomotor agitation; fatigue or loss of energy; feelings of worthlessness or guilt; diminished ability to think or concentrate; recurrent thoughts of death or suicide. *See* DSM III-R, 222.

[6] In a manic episode, an individual will exhibit a persistently elevated, expansive, or irritable mood and at least three of the following symptoms: inflated self-esteem or grandiosity; decreased need for sleep; distractibility; increase in goal-directed activity or psychomotor agitation; excessive involvement in pleasurable activities that have a high potential for painful consequences (such as sexual indiscretions); pressured speech; flight of ideas or racing thoughts. There is no exact duration the symptoms need exist to constitute a manic episode. *See* DSM III-R, 217.

[7] During a euthymic period, an individual will exhibit relatively normal or stable moods. However, even in these periods, a bipolar individual is not truly normal and is still influenced by the illness. PCR at 1886-87 and 18388.

psychiatrist who testified at trial were unable to identify bipolar disorder in Mr. Orme, because they were provided insufficient background materials and were never informed of Mr. Orme's previous diagnosis, rendered by Dr. Walker during a pretrial assessment at the jail.

While mental health professionals generally review collateral data and records of the patient to "get a full picture of a person," PCR at 1759, this background material is even more vital when diagnosing bipolar disorder. PCR at 1891. Due to the "episodic" nature of the disorder, "the opportunity to have information that spans a significant period of time or observe the patient . . . over a significant period of time is a very important aspect in making an accurate diagnosis." PCR at 1891. Trial counsel understood the "episodic" nature of this major mental illness as well as its severity.[8] PCR at 1655-6. Nonetheless, he neglected to give his expert witnesses sufficient background information. For his mental health professionals to have been able to detect and diagnose Mr. Orme's major mental illness, trial counsel needed to provide them with background material as well as the diagnosis rendered by Dr. Ralph Walker.

A. Trial counsel failed to provide sufficient background data and

[8] Trial counsel explained that when he visits bipolar clients, he may not see them in manic or hypomanic states. With Mr. Orme specifically, trial counsel only observed him in a depressed state. PCR at 1678-9.

prior diagnoses to the mental health experts upon whom Mr. Orme relied to present mitigation testimony.

1. Dr. Walker's diagnosis of bipolar disorder

Trial counsel knew that Dr. Walker had diagnosed and treated Mr. Orme for bipolar disorder. *See* PCR at 1650; PCR - Defense Exhibit 5. While trial counsel may have had an acceptable reason for not using Dr. Walker personally,[9] he had no reason for not providing Dr. Walker's diagnosis to his mental health experts. Forensic evaluators, such as Dr. Thomas McClane and Dr. Clell Warriner, properly expect to receive previous diagnoses from other mental health professionals.[10] *See* PCR at 1894. Nevertheless, trial counsel never gave them Dr. Walker's diagnosis.[11] *See* PCR at 1982; 1756. Trial counsel testified that he did not know why he did not provide the diagnosis, as it is the type of information he would generally give to penalty phase mental health experts. *See* PCR at 1650.

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[9] Due to Dr. Walker's failing health, he chose not to call Dr. Walker as a witness. *See* PCR at 1651.

[10] Dr. McClaren, the State's mental health expert, also testified that Dr. Walker's diagnosis is the type of information he would expect the defense attorney to give him in preparation of penalty phase testimony. *See* PCR at 2195.

[11] Trial counsel does not have an independent recollection of giving Dr. McClane or Dr. Warriner the diagnosis from Dr. Walker but has no reason to doubt the doctors' recollection that he neglected to provide Dr. Walker's diagnosis. *See* PCR at 1649 and 1652.

According to Dr. Maher, who assesses the competency of psychiatrists and psychologists for the Agency of Health Care Administration, it is proper and reasonable for mental health professionals to give great weight to reports of earlier evaluations "especially if . . . the presently evaluating psychiatrist doesn't have access to the time period that the prior doctor did." PCR at 1869, 1884. This is frequently the case with bipolar disorder which is largely "an episodic disorder"; PCR at 1891, thus, an evaluation can occur when the patient is in a depressed, euthymic, or manic state.

When an evaluation occurs during someone's manic stage, a psychiatrist can competently and appropriately diagnose the patient with bipolar disorder, based solely on the evaluation and the observation of mania. *See* PCR at 1955. After an evaluation post-arrest at the Bay County Jail, Dr. Walker diagnosed Mr. Orme with bipolar disorder, manic type, severe, without psychotic features. According to the DSM-III-R, to diagnose a patient with the manic type of this disorder, the patient must be manic at the time of the diagnosis.[12] *See* DSM-III-R, 226. Any mania Dr.

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[12] Although it is impossible to discern precisely upon what data or observations Dr. Walker based his diagnosis, evidence suggests that he saw Mr. Orme in the midst of a manic episode. On 5/19/92, Mr. Orme was reported as having "[t]rouble with the environment: the other inmates are bugging him . . . afraid going to blow." *See* Defense Exhibit 5. He was consequently given Valium and Ativan, medications generally prescribed when someone is "agitated or extremely

Walker observed could not be attributed to drugs, as Mr. Orme had been in jail and substance-free for the two months prior to the evaluation. *See* PCR at 1811.

The standard in psychiatry is to expect that another psychiatrist's evaluation was performed competently and that any reports of that evaluation were prepared competently. *See* PCR at 1884. If Dr. Walker was competent, and neither the State nor the defense has suggested otherwise, he would not have diagnosed Mr. Orme with bipolar disorder without having data to support such a diagnosis. *See* PCR at 2007-8. In reviewing Dr. Walker's work, Dr. Michael Maher, who regularly reviews the performance of psychiatrists for the Florida Agency for Health Care Administration (*see* PCR at 1869-70), stated:

> The letter is a clear and unambiguous, although, brief report of a practicing psychiatrist who gives a detailed diagnostic description after indicating he has done a psychiatric evaluation. Absent other information, it is absolutely incumbent on a future examiner to presume that the evaluation was done competently and professionally and the diagnoses were justified by the information the doctor found.

PCR at 1965-6.

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anxious." PCR at 1783. Agitation and anxiety are often "precursor[s] to a manic phase." PCR at 1783. Additionally, this report is the type of information upon which a mental health professional, such as Dr. Walker, could reasonably rely. PCR at 1784. Five days after this report, Dr. Walker made his diagnosis. *See* Defense Exhibit 5.

The standard is not only to presume that Dr. Walker's evaluation and diagnoses were competent, but to afford them additional weight, because Dr. Walker was a treating physician.[13] *See* PCR - Defense Exhibit 5. Omitting a forensic evaluation from a future assessment of Mr. Orme is not as detrimental as omitting an evaluation of a treating physician who reached the "diagnosis for the purpose of treatment and initiated treatment. The treating physician's diagnosis would properly be given more weight than someone who is evaluating him and not treating him." PCR at 1965.

The mental health professionals at this hearing were proper in presuming that Dr. Walker's diagnosis was competently rendered and then giving his diagnosis weight.

2. Collateral information indicative of bipolar disorder[14]

Although the mental health professionals who testified at this hearing

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[13] When diagnosing Mr. Orme with bipolar disorder, Dr. Walker also prescribed him Lithium Carbonate, Prozac, and Xanax. *See* Defense Exhibit 5. Dr. Walker then renewed his initial prescription, and Dr. Epstein and Dr. Clodfelter also renewed Mr. Orme's prescriptions. *See* Defense Exhibit 11D.

[14] Mr. Orme does not, in any manner, suggest that trial counsel may have been justified in not providing Dr. McClane and Dr. Warriner with the diagnosis of bipolar disorder. However, at a minimum, trial counsel was obligated to provide Dr. McClane and Dr. Warriner with collateral data sufficient for them to render an adequate diagnosis and fully explain Mr. Orme's mental illness to the jury.

properly considered Dr. Walker's diagnosis, his diagnosis was not the sole basis of their opinions. The mental health experts who testified at this hearing also relied upon extensive background material, which enabled them to render a complete and accurate diagnosis of Mr. Orme. *See* Defense Exhibits 11A-J. Dr. Michael Herkov diagnosed Mr. Orme with bipolar disorder, as did Dr. Michael Maher.[15] *See* PCR at 1800, 1963. Additionally, Dr. McClane and Dr. Warriner each testified that, in light of extensive background data, they have receded from earlier opinions about Mr. Orme and believe that he suffers from bipolar disorder. *See* PCR at 1780-1, 2010.

Both Dr. Maher's and Dr. Herkov's evaluations included a personal interview with Mr. Orme and a review of extensive data, such as affidavits from Mr. Orme's associates,[16] jail and prison medical records, Cheryl Wetzel's deposition, records from drug treatment, the United States Marine Corps, schools, and an employer, Mr. Orme's statements to the police following the crime, Mr. Orme's trial testimony, and the testimony of penalty phase witnesses. Dr. Herkov and Dr.

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[15] "There are a number of factors that are entirely independent of Dr. Walker's diagnosis that I, I believe demand that that diagnosis be considered and that [bipolar disorder] is in fact the proper diagnosis." PCR at 1894.

[16] While these affidavits were prepared by post-conviction counsel in 2001, they consist of information available prior to trial. Each of the affiants described the behavior and moods of Mr. Orme that they witnesses before the offense, during the course of their interactions and relationships with Mr. Orme.

Maher also reviewed a detective's case summary, this Court's sentencing order, and the Florida Supreme Court's direct appeal opinion. *See* PCR at 1747-8, 1872-4; *see also* Defense Exhibits 11A-J. Both Dr. Warriner and Dr. McClane considered the same materials to reassess the testimony they gave at trial. Each piece of information considered contributed to the mental health professionals' final diagnoses. For example, the affidavits of Mr. Orme's associates as well as Mr. Orme's brother described Mr. Orme's history of mood swings, as well as his pattern of setting goals and subsequently abandoning them. *See* PCR at 1802-3; Defense Exhibit 11F. Brenda Reed stated that "out of the blue and for no apparent reason, [Mr. Orme] would abandon all of his goals and just give up on himself," which Dr. Maher testified "suggests an underlying cycling biological process." PCR at 1882; *see also* Defense Exhibit 11F. "[I]t's a red flag for someone who is coping with and trying to deal with an internally driven . . . basic biological process that is affecting his brain." PCR at 1882. Both Dr. Herkov and Dr. Warriner also explained that the affidavits illustrated mania. *See* PCR at 1781, 1802.

The affiants further described behavior which, because of the duration that Mr. Orme exhibited the behavior, cannot plausibly be contributed to drug use. Specifically, Ms. Reed talks about times where Mr. Orme is "really driven and

confident." PCR - Defense Exhibit 11F. As Dr. Herkov explained, what "separates the cocaine intoxication from the more manic is that the time that this would last." PCR at 1835. Ms. Reed does not say that "one day he seems this way and then he was down." PCR at 1835. Instead, she states that there were "periods" where he behaved in this manner. *See* PCR - Defense Exhibit 11F. Similarly, Eric Orme discussed how his brother would set goals and make big plans, but these time would never last because Mr. Orme would become depressed. *See* PCR at 1803; PCR - Defense Exhibit 11F. Cocaine intoxication could not lead be the cause of those long periods of time where Mr. Orme exhibited euphoria and goal-directed behavior. *See* PCR at 1849.

> [T]he manic symptoms of cocaine would be self-limiting to the intoxication period . . . So, they would be limited . . . from 24 to 48 hours. If you look at a manic phase and some of the things that [the affiants are] talking about with Mr. Orme, about, regarding his plans, that's stretched much longer over days to weeks. And it would be my professional opinion, I don't know how you would keep that level of intoxication up like that for that period of time when you would still expect to see those grandiose, manic type things. So, while there is some similarity, the length of time would be much shorter.

PCR at 1810. In their entirety, the affidavits corroborated what Dr. Maher found during his clinical evaluation of Mr. Orme. *See* PCR at 1882-3; Defense Exhibit

11F. Similarly, Mr. Orme spoke with Dr. Herkov about the mood swings that he had experienced throughout his life. *See* PCR at 1804. He also described hypersexuality, another symptom of bipolar disorder. *See* PCR at 1830. Dr. Herkov on cross-examination by the State testified that while in drug treatment at CARE, Mr. Orme "worked on shame and guilt and identified his fear concerning his sexual compulsion." PCR at 1831; Defense Exhibit 11C.

Additionally, the doctors learned that Mr. Orme's family has a history of mental illness. His maternal uncle suffers from bipolar disorder and is treated with Lithium. Dr. Herkov personally interviewed Mr. Orme's biological mother and learned of a history of substance abuse and mental illness in her family. Her ex-husband, Mr. Orme's father exhibits "bipolar like symptoms," which Eric Orme also mentioned in his affidavit. PCR at 1848; PCR - Defense Exhibit 11F.
The mental health professionals also considered Cheryl Wetzel's pre-trial deposition, in which she described Mr. Orme's behavior on the afternoon preceding the offense. *See* Defense Exhibit 11E. Ms. Wetzel feared that he was suicidal, because he kept apologizing and acted as though "he was kind of trying to tie up loose ends." *Id.* However, at the same time, "he was pacing back and forth in front of me, smoking a cigarette furiously . . . he was just real fidgety." *Id.* According to Dr. Maher, Ms. Wetzel's description is of a person in a manic state:

> People in a manic phase do not necessarily have a lot of energy, confidence, and euphoria . . . and then low energy and unhappiness when in a depressed state. What is more accurate is that they do go through states of very high energy and very low energy, but their mood isn't necessarily always matched to that energy level. So that often, [bipolars] will begin in a manic episode and they'll feel good and they'll be functioning well. And as the manic episode progresses, . . . their mood will change from enthusiasm and optimism . . . to agitation and irritability and extreme distress, so that they are in a manic state and can be extremely suicidal. They are also extremely impulsive and likely to seek out anything in their environment to change their state of mind. Drugs, alcohol, unpredictable behavior, all kinds of things. So, [Mr. Orme's] condition at that time that's described [in Ms. Wetzel's deposition] absolutely fits that behavior.

PCR at 1880-81.

The mental health experts from Mr. Orme's trial never received affidavits or statements from Mr. Orme's contemporaries; they never received Ms. Wetzel's deposition; they never received Mr. Orme's school, medical, military, or jail records. As a result, they never learned of the abundant indications of bipolar disorder in Mr. Orme's history. *See* PCR - Defense Exhibits 11A-J. As a result of trial counsel's failure to adequately prepare his mental health professionals, they did not have data sufficient to accurately portray Mr. Orme's mental health to the jury, thereby resulting in extreme prejudice to Mr. Orme's defense.

Courts have expressly and repeatedly held that in capital sentencing proceedings trial counsel has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. *See Wiggins v. Smith*, No. 02-311 (U.S. June 26, 2003), (reversing and remanding on ineffective assistance of counsel claim where "strategic decision" was not based upon a thorough and complete investigation); *Phillips v. State*, 608 So. 2d 778 (Fla. 1992) (granting a new penalty phase on ineffective assistance of counsel claim where the trial attorney failed to present substantial existing mitigation); *Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001) (same); *Rose v. State*, 675 So. 2d 567, 571 (Fla. 1996) (same); *Hildwin v. Dugger*, 654 So. 2d 107, 110 (Fla. 1995) (same). Within the trial court's order denying Orme's postconviction claims, the first sentence of the order incorrectly suggests Orme's claim was that trial counsel was ineffective "by not presenting 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 and/or such mitigation would outweigh the aggravating factors . . .." However, the claim is more accurately assessed as; (1) trial counsel did not present any evidence of Orme's bipolar disorder, convincing or otherwise; and, (2) the bipolar disorder should not be considered alone. To assess whether he had the requisite intent, the jury should have been presented with and considered Orme's bipolar disorder in

conjunction with his intoxication. Trial counsel presented evidence of Orme's intoxication, but the testimony of Dr. Herkov demonstrates that Orme's bipolar state would have supported and helped to explain his severe intoxication.

Similarly, in order for the jury to have a clear idea of Orme's mental state at the time of the crime, they needed to hear about his underlying mental illness. Without that crucial information, the jury and the experts do not have an accurate idea of how Mr. Orme was functioning at the time of the crime. In addition, Orme's bipolar disorder should not have been evaluated to see if it *alone* would outweigh the aggravators. Rather, the testimony from the hearing should have been combined with the mitigation from trial to see if the aggravators outweigh the *cumulative* mitigation.

Trial counsel did very little to prepare for Mr. Orme's penalty phase and consequently provided Mr. Orme with ineffective representation. Trial counsel testified that if he had background information corroborating Dr. Walker's diagnosis, such as anecdotal evidence consistent with the criteria of bipolar disorder, he would have presented Mr. Orme's mental illness to the jury. *See* PCR at 1693-4. However, trial counsel never attempted to obtain any such data – data he himself admitted was imperative to a mitigation defense. Rather than conducting a proper investigation, he relied on the one preliminary interview he had with Mr.

Orme's relatives immediately after Mr. Orme's arrest, which was conducted *before* Dr. Walker's diagnosis. *See* PCR at 1700-1.[17] After learning Mr. Orme had been diagnosed with a major mental illness, trial counsel neglected to revisit Mr. Orme's relatives to obtain the corroborative information he desired. Had trial counsel spoken with Mr. Orme' relatives and associates, he would have discovered the information contained in the affidavits upon which the mental health experts from this hearing relied.

The U.S. Supreme Court recently made the following statement regarding the standard to utilize in assessing whether a proper investigation was performed in a capital case: "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, **but also whether the known evidence would lead a reasonable attorney to investigate further.**" *Wiggins* at 14 (emphasis added); *see also Ragsdale v. State*, 798 So. 2d 713, 721 (2001) (citing, as one reason for granting

[17] Trial counsel also relied upon an 6/16/92 interview conducted by Paul Parker, then a law clerk with Stone and Sutton (Mr. Orme's initial trial attorneys), with Linda Henley, Mr. Orme's biological mother. *See* PCR at 1703. However, because counsel was not present at this interview, he has no knowledge of whether Mr. Parker asked about behavior indicative of a mental illness. *See* PCR at 1703-4. Mr. Stone also testified this was a preliminary interview that he planned to followed up on. *See* PCR at 1710-11.

defendant's penalty ineffective assistance of counsel claims, that mitigation "witnesses would have been available if counsel had conducted a minimal investigation"); *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995) ("[H]ad defense counsel conducted a reasonable investigation, [he] would have unearthed this mitigating evidence."); *see also* PCR - Defense Exhibit 11F.

Trial counsel testified at this hearing that he had no reason for not giving Dr. Walker's diagnosis to the mental health experts, and that if he had an expert who would have testified to bipolar diagnosis and the evidence of the disorder in Mr. Orme's background, he would have presented it. *See* PCR at 1693-4. Apparently, trial counsel understood that the bipolar disorder Orme suffered from would support and further explain the intoxication defense actually presented in the guilt phase and then dovetail into the penalty phase as mitigation. "[D]ecisions must flow from an informed judgment. Here, counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect." *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989). The failure of Mr. Orme's trial counsel to present bipolar disorder was due solely to his failure to investigate Mr. Orme's background and provide adequate materials to his mental health witnesses and not a strategic or tactical decision. Without accurate information regarding the defendant, the sentencer "cannot make the life/death decision in a

rational and individualized manner." *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985). Because of trial counsel's failure to present evidence of Mr. Orme's major mental illness, the jury that decided his fate had an incomplete, and thus inaccurate, idea of who Mr. Orme is. Trial counsel's performance was utterly deficient and prejudicial to Mr. Orme.

B. Trial counsel was ineffective for failing to request and receive a continuance of Mr. Orme's trial and for failing to adequately prepare and investigate mitigating evidence.

The trial court erroneously denied relief on claims IV(I) and VII. Trial counsel entered his appearance on behalf of Orme due to the withdrawal of Mr. Stone and Ms. Sutton as counsel for Mr. Orme. When trial counsel began his representation of Mr. Orme, he had numerous death penalty trials scheduled. During the period of time trial counsel represented Mr. Orme, he tried three other first degree murder cases. Due to trial counsel's failure to request that Mr. Orme's trial be continued, he was unable to retain confidential defense experts in DNA analysis and pathology; nor was he able to provide adequate and timely documentation and assistance to his drug addiction/mental health experts. These experts would have provided trial counsel the means to adequately test the scientific evidence the State presented, and thereby provided the necessary testimony regarding how intoxication and mental illness served to negate Mr. Orme's ability to

form specific intent.

Trial counsel was rendered ineffective by the staffing problems in the Public Defender's Office. Although trial counsel had no control over the loss of Mr. Orme's prior counsel or the timing of his entry into the case, he did have an obligation to inform the court he did not have enough time to fully investigate and prepare for Mr. Orme's case. If trial counsel had requested and received a continuance, it would have been likely that Dr. McClane would have received the records he needed to diagnose Orme with his major mental illness, bipolar disorder. Recall that Dr. McClane, the defense's expert in pharmocology and mental health, examined Orme *the day before testifying in the penalty phase*. *See* PCR at 1977-8. Dr. McClane requested, yet never received, Mr. Orme's jail records. The jail records contained Dr. Walker's notes diagnosing Mr. Orme as suffering from bipolar disorder, indicating he examined Orme while he was in a manic state, and detailing the specific drugs prescribed to treat Mr. Orme's bipolar disorder. These records are significant because as described *supra* great weight is to be attributed to a diagnosis by a treating physician (PCR at 103-5), and the State never produced any testimony to impeach Dr. Walker's qualifications, performance, or diagnosis. In fact, the State's own expert in post-conviction, Dr. McClaren, admitted the diagnosis was of Drs. Warriner and McClane are reasonable. PCR at 2171, 2173-

4. Additionally, the State's expert, Dr. McClaren, agreed on cross-examination that there are two differences between his diagnosis and the bipolar diagnosis rendered by the other five doctors – namely, he did not personally see or evaluate Mr.Orme, and they diagnosed him differently. *See* PCR at 2187.

The importance of the mental health testimony has been discussed at length, *supra*, and will not be re-addressed here; instead, Orme will rely on the previous discussion as if argued within this section. However, Orme does assert the bipolar diagnosis should have been utilized in the guilt phase in combination with his extreme intoxication to negate specific intent.

In *Bunney v. State*, 603 So.2d 1270 (Fla. 1992), the defendant wished to "raise epilepsy as a defense to his ability to form the intent required to commit a first-degree felony murder and kidnapping outside the context of an insanity plea." The Florida Supreme Court held that while "evidence of diminished capacity is too potentially misleading to be permitted routinely in the guilt phase of criminal trials, evidence of diminished 'intoxication, medication, epilepsy, infancy, or senility' is not. *Id*. at 1273. Here, evidence of Mr. Orme's bipolar disorder, addictive disorder, and intoxication would certainly fall within the class of impairments that the Florida Supreme Court highlighted in *Bunney*.

At trial, defense counsel only presented evidence of Mr. Orme's mental state

during the penalty phase. If defense counsel would have adequately developed the mental health history and the social history of his client, he would have found that Mr. Orme was not capable of forming specific intent. Mr. Orme would have been entitled to the jury instruction that his mental deficiencies may negate the specific intent necessary for first degree murder.

In *Bunney*, the Florida Supreme Court held that the condition of epilepsy was analogous to a voluntary intoxication defense:

> Although this Court did not rule in *Chestnut* that evidence of any particular condition is admissible, it is beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent. *See Gurganus v. State*, 451 So.2d 817 (Fla. 1984). If evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that are beyond one's control, such as those noted in *Chestnut* (epilepsy, infancy, or senility), should also be admissible. In the present case Bunney simply sought to show that he committed the crime during the course of a minor epileptic seizure. A jury is eminently qualified to consider this. *Id*. at 1273 (footnote omitted).

Mr. Orme was entitled to present a defense that the combined effects of his bipolar disorder and voluntary intoxication combined to negate any ability to form specific intent. Trial counsel was ineffective in not discovering the bipolar diagnosis and arguing it to the jury in the guilt phase. The bipolar disorder would have negated the State's improper argument that the jury should not let Mr. Orme hide behind his crack pipe. R. at 201; (*See also* R. At 142, 252, 302, 303, 309). The volitional

aspect of drug use is typically not looked upon favorably in many more conservative communities such as Panama City. *See* PCR at 1657. The addictive tendencies of people who suffer from bipolar disorder and the fact of the mental illness being beyond Orme's control would have strengthened his defense and altered the outcome of the trial as required by *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires Mr. Orme to establish deficient performance and prejudice which are obvious from the foregoing discussion. *Id.*

C. Due to trial counsel's failure to provide his mental health experts with sufficient data, the jury never heard that Mr. Orme suffers from a major mental illness, and thus, the jury never considered the impact the illness had on his mental state.

As a direct result of trial counsel's deficient performance, Mr. Orme's death sentence is unreliable. *See Strickland* at 687. Had counsel provided his experts with Dr. Walker's diagnosis and/or collateral data, they would have diagnosed Mr. Orme's bipolar disorder, and the jury could have learned about his mental state and the profound mental illness that afflicts him.

Dr. McClane testified at trial that Mr. Orme suffered from polysubstance abuse, a mixed personality disorder, and chronic intermittent depression. R. at

1091. During his evaluation, however, Mr. Orme was in a depressed state.[18] R. at 1116-17. If he had reviewed extensive background information, such as that provided by post-conviction counsel, Dr. McClane's testimony would have been significantly different in that he would have diagnosed Mr. Orme with bipolar disorder instead of chronic intermittent depression.[19] *See* PCR at 2010.

Similarly, at the time of trial, Dr. Warriner thought that Mr. Orme suffered from polysubstance abuse and a serious depressive disorder. *See* PCR at 1757. Dr. Warriner also believed that Mr. Orme had difficulties and problems in his past which were not drug induced or drug related. *See* PCR at 1757. However, Dr. Warriner had never observed Mr. Orme in a manic or hypomanic state but only in a depressed state. PCR at 1760. Until Dr. Warriner was given the data from post-conviction counsel, he had no indications of mania in Mr. Orme's past; with this

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[18] In addition to having inadequate data, Dr. McClane also evaluated Mr. Orme the night before the penalty phase, which also compromised the accuracy of the evaluation. "[I]t's a different kind of evaluation when you're evaluating a defendant who's just been convicted. The particular stress of the conviction can alter the quality of the interview and the quality of the data that you're after." PCR at 1978.

[19] The State may attempt to argue that Dr. McClane testified at the hearing that he would have diagnosed Mr. Orme with "probable bipolar disorder." Although he did state "probable bipolar disorder," Dr. McClane explained that all diagnoses are accompanied by a certain level of probability. PCR at 2019. A diagnosis with the very highest level of probability, 100% certainty, would be "definitive." PCR at 2008. Otherwise, all diagnoses are "probable."

data, he was able to identify manic symptoms. *See* PCR at 1781. For some reason, the preparation Dr. Warriner received for his penalty phase testimony was minimal and the background information he was given was limited to drug treatment records. *See* PCR at 1757, 1762.

With additional background materials, Dr. Walker's diagnosis, or the chance to observe Mr. Orme in a manic state, the mental health experts from trial would have discovered that Mr. Orme had bipolar disorder, and they would have testified to this mental illness. Trial counsel admitted that if he had an expert willing to testify to a bipolar disorder, and explain how the family history and anecdotal evidence was consistent with the diagnostic criteria for bipolar disorders, he would have presented it to the jury in conjunction the with intoxication defense. *See* PCR at 1693-4. Unfortunately, however, trial counsel precluded such a possibility by failing to turn over the bipolar diagnosis to his trial experts. As a result, the jury never heard that Mr. Orme suffers from a severe mental illness; they never heard how the disorder is a constant influence on his mental processes; they never heard how such an illness predisposed Mr. Orme to abuse drugs. Nonetheless, the jury's decision fell only *one vote* short of a life recommendation. *See* R. 1201. Had *one* juror been swayed by the fact that Mr. Orme suffers from a major mental illness, he would have received a life sentence.

1. Orme's bipolar disorder would have provided an explanation for his drug use and addiction.

Instead of hearing how Mr. Orme's mental illness made it harder for him to successfully treat his drug use, the jury only heard the State's claim that he shouldn't be "less reprehensible" for his behavior, as he didn't "have the courage to get off drugs." R. 1169. If trial counsel had presented evidence of his illness, the jury would have had an explanation for his drug use, which was vital. Explaining Mr. Orme's addiction was especially crucial because the State used his addiction to persuade the jury to return a recommendation for death. Throughout the trial, the State characterized Mr. Orme as a "drug addict" who had "a particular thirst for crack cocaine." R. 327. Repeatedly, the State emphasized that Mr. Orme's addiction should not be mitigating: "Now, each of you assured me during the course of voir dire that you wouldn't let this defendant hide behind his crack pipe, that everybody has to be held accountable for what they do. Whether they're remorseful, whether they're . . . just stoned out of their head, whatever, they have to be held accountable for what they do." R. 937. The jury was encouraged to return a death sentence, which the State argued was "a verdict that grants no mercy for a crack addict." R. 1173. Drug use can be seen by juries as an aggravating factor, which was exactly how the State depicted Mr. Orme's addiction; however, if the

link between Mr. Orme's addiction and his mental illness had been properly established, it is very likely that Mr. Orme's drug use would have been "seen by the jury as a less blameworthy prospect." PCR at 1708. Since the jury never heard about his bipolar disorder, they had no way to account for Mr. Orme's drug use, and therefore no explanation of how to view it as mitigating.

Trial counsel knew that juries "tend to look at drug abuse as more of a volitional type activity. They don't like it." PCR at 1657. Jurors do not usually "appreciate . . . the effect that drug usage has on physiology and brain chemistry. And . . . it does leave the area of volition and becomes an uncontrollable type of activity." PCR at 1657. Nonetheless trial counsel failed to provide the jury with the information that bipolar sufferers are predisposed to drug addiction. Instead of having an understanding of Mr. Orme's intertwined illness and addiction, the jury was left with the State's mantra that Mr. Orme was merely "hiding behind his crack pipe."R. 1169, 937.

The jury never heard that because of his mental illness, Mr. Orme was predisposed to develop a drug addiction. "The capacity to choose to use drugs or not is substantially diminished in individuals who suffer from bipolar disorder."[20]

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[20] At the time Mr. Orme's trial in 1993, research in the mental health field already indicated a link between bipolar disorder and cocaine use and addiction.

PCR at 1877. As a result, bipolar disorder greatly increases the risk for people to develop drug dependencies.[21] *See* PCR at 1875. Bipolars are "less free because of their genetic endowment resulting in the bipolar disorder," and are "significantly more likely" to abuse and depend on drugs. PCR at 1987. There are two primary reasons why bipolars use drugs. Stimulants, like cocaine, can pull people out of a depressive episode by giving them a sense of euphoria and bringing up their mood. *See* PCR at 1807. From his own account, this is one reason that Mr. Orme used cocaine. Mr. Stamps's affidavit corroborates this by explaining that Mr. Orme tended to use drugs when he was depressed. *See* PCR at 1807; Defense Exhibit 11F. Additionally, "bipolars may use cocaine to sort of modulate the hypomanic or the manic phase of the illness." PCR at 1807.

> [I]ndividuals who suffer from depression and manic depressive disease . . . often seek escape from those problems in ways that are not useful or adaptive. And very often that includes escape through drug use. That then sets up a pattern of drug use and ultimately drug abuse, which tends to worsen their underlying psychiatric disorder and makes them much more difficult to treat in terms of their drug abuse disorder.

This is not recent information, but rather, information that was available for trial counsel to present to the jury. *See* PCR at 1813-4; Defense Exhibit 12.

[21] Bipolars use and abuse cocaine three times more frequently than individuals without such a mental illness, *see* PCR at 1807, and it is frequently the drug of choice for bipolars. *See* PCR at 1876-7.

PCR at 1876.

2. Orme's bipolar disorder would have provided substantial weight to both statutory and nonstatutory mitigation.

Bipolar disorder itself, as a major mental illness, amounts to a nonstatutory mitigating factor. As a bipolar, Mr. Orme experiences both manic and depressive episodes, and even in his euthymic states, Mr. Orme is not without the influence of bipolar disorder:

> [Bipolars'] affect at times, that is their overall mood, can sometimes be clearly in a normal range. The problem in terms of saying are they ever normal is that their judgment regarding how they respond to stress in particular is not normal unless they have been quite successful in treatment. Then, then one might say there are times that they are, are truly normal. But otherwise, they're not [truly normal] because even if their affect and their moods are normal, there is this underlying very serious vulnerability to either a severe depression episode or a manic episode which the person is neither able to anticipate nor manage in an adaptive way.

PCR at 1886.

To understand Mr. Orme's mental state at the time of the offense, the jury needed to know of his mental illness. "It is a temptation to attempt to segregate different parts of human functioning, but in the real world we deal with whole human beings, and in whole human beings the interaction between underlying psychiatric disorders and substance abuse is often inseparable." PCR at 1931.

Though Mr. Orme's mental illness qualifies as nonstatutory mitigation, with Dr. Walker's diagnosis, the mental health witnesses could have explained to the jury that he also qualified for the two mental state statutory mitigators. *See* Section 921.142(7)(b)(e), Fla. Stat. For example, Dr. Herkov testified that based on Mr. Orme's use of drugs as well as being a bipolar, at the time of the offense, Mr. Orme was thereby suffering from an extreme mental disturbance and his capacity to conform his conduct to the law was substantially impaired. *See* PCR at 1816. Dr. Maher also testified to the existence of these mitigators. *See* PCR at 1903. Although Dr. McClane testified during the trial that, as a result of his cocaine addiction and intoxication, Mr. Orme already met both of the statutory mitigators, his testimony would have been different had he known of Mr. Orme's bipolar disorder. He would have explained to the jury that bipolar disorder *increased* Mr. Orme's impairments and intensified his mental disturbance. *See* PCR at 2025. This testimony would provide substantial weight to this mitigator because the volitional aspect of drug use would have been effectively negated.

As Dr. McClane explained, the intoxication itself substantially impaired Mr. Orme's capacity to conform his conduct to the law and constituted an extreme mental disturbance. In addition, Mr. Orme's mental illness itself also created an extreme disturbance and a substantial impairment. Therefore, combining the two

automatically increases the weight of the mitigation. *See* PCR at 2029-30. Unfortunately, the jury never learned this necessary information. For example, when a bipolar uses cocaine, the cocaine can trigger a manic episode. "So somebody who has bipolar and takes cocaine can actually get themselves into a bipolar manic phase in addition to the effects of the cocaine." PCR at 1809-10. Similarly, when a person is in a manic stage and also takes cocaine, his manic symptoms will be exacerbated. *See* PCR at 1810. Because Mr. Orme may have been in a manic stage at the time of the offense, the effects of the cocaine may have intensified. *See* PCR at 1881; PCR - Defense Exhibit 11E. However, not knowing that he is bipolar, much less that he may have been in a manic state, neither expert at trial could testify to the increased intoxication. For Mr. Orme's mental health experts to accurately describe the effects the cocaine had on his mental state, they needed to know about his underlying mental illness. *See* PCR at 1806. Unfortunately, they did not know about it and could not correctly assess his mentality at the time of the offense.

The State diminished Mr. Orme's impairments by stressing that he is one of many addicts:

> Even if you find that he has an emotional disturbance, the question is, is it extreme. When twenty percent of the population has it. We've got a hundred thousand addicts

> in this country, cocaine addicts. Is it anything out of the ordinary upon which you should base your mercy in this case?

R. 1170-71. However, while there may be many cocaine addicts in the United States, there are far fewer bipolars – only 0.4 to 1.2% of the adult population. *See* DSM III-R, 225. Not only did the jury not hear this, they did not that Mr. Orme's mental illness exacerbated his emotional disturbance and impairments.

3. Orme's bipolar disorder could have eliminated heinous, atrocious, and cruel aggravator.

Because Mr. Orme was substantially unable to conform his conduct to the requirements of the law, he could not have intended to be heinous, atrocious, and cruel. Since the heinous, atrocious, and cruel aggravator is a specific intent aggravator, *see* Section 921.142(6)(j), Fla. Stat., Mr. Orme's impaired and incapacitated mental state negates this aggravator.

Mr. Orme suffered substantial prejudice as a result of the jury never hearing of his mental illness. *See Rose*, 675 So. 2d at 573 ("[W]e have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it may constitute prejudicial ineffectiveness"). In Mr. Orme's case, presenting evidence of his mental illness would have served several purposes. First, the mental health evidence would have explained his drug

use and substantially negated the volitional aspect of it that often serves as an unspoken, nonstatutory aggravator in communities like Panama City. Additionally, the mental health evidence would have provided substantial weight to the two statutory mitigators that were found, as well as the nonstatutory mitigators. Finally, the mental health evidence, combined with Mr. Orme's severe intoxication, would have eliminated the HAC aggravator because he did not possess the ability to form specific intent.

D. The trial judge never made an explicit finding as to whether trial counsel was ineffective for not presenting evidence that Mr. Orme suffered from bipolar disorder, as presented in Claim V of Mr. Orme's motion for postconviction relief.

Within the fourth full paragraph of page two of the Order Denying Motion for Postconviction Relief, the trial judge states that the question of whether trial counsel was ineffective still remains. Apparently, the trial judge did not make a finding of fact that trial counsel was not ineffective and deficient, nor did she make a strategic decision regarding trial counsel's complete failure to present evidence of Orme's bipolar disorder in either the guilt phase or the penalty phase. *See* PCR at 1218. If she had found that a strategic or tactical decision had been made, then the question of ineffectiveness would not remain.

A review of the trial judge's Order Denying Motion for Postconviction Relief

will demonstrate that trial counsel was indeed ineffective.

1. Voluntary intoxication and bipolar disorder are not mutually exclusive mitigating evidence.

In the third full paragraph on page two of the trial court's order, the trial judge states that a voluntary intoxication defense was the strongest strategic defense against premeditation. PCR at 1218. However, that does not accurately portray trial counsel's testimony. He said that *he should have presented the bipolar evidence and that he does not know why he didn't*. He went on to also testify that *he could have presented both the bipolar and the intoxication*, as they were not mutually exclusive. *See* PCR at 1690-1. Trial counsel also stated that bipolar is one of the most severe and significant of all mental illnesses; on the spectrum, it is equivalent to schizophrenia. *See* PCR at 1655-7.

The trial court noted that Smith's background is in biochemistry and that he "probably has more knowledge in the field of toxic reactions to drugs than most attorneys." PCR at 1218. Smith's background gave him no reason to ignore the bipolar evidence, and none of his additional knowledge provided any justification for him not presenting it. With Smith's education in biochemistry and his experience as an attorney, he should have known the importance of understanding a client's underlying mental state. If he did not recognize the importance of

presenting such evidence, then he should have listened to his experts. In his notes, Dr. McClane had a list of things he requested from trial counsel, including Mr. Orme's jail records. *See* PCR at 1979-80. Had trial counsel furnished Dr. McClane with these records, he would have seen the diagnosis and treatment of bipolar disorder, which would have impacted Dr. McClane's analysis to result in a diagnosis of bipolar disorder.

Also, in the files that Mike Stone and Pam Sutton gave to Smith, there was a journal article. This article laid out the significance of a jury hearing about a criminal defendant's underlying mental state in conjunction with any evidence of intoxication. *See* PCR at 1654; Defense Exhibit 6. These clear indications of the need to present all of Mr. Orme's background mental health information makes it impossible to justify trial counsel's failure to turn over such evidence.

The bipolar diagnosis would not have thwarted the intoxication defense, but rather would have provided a convincing explanation for Mr. Orme's crack addiction. Both Smith and Stone testified that drug addiction can be seen as aggravation in conservative areas, such as Panama City. However, with the testimony of experts, trial counsel could have explained to the jury that Mr. Orme did not choose to go use drugs, but rather that his addiction was an unfortunate part of his mental illness. Dr. Herkov equated it to a severely depressed person

choosing to commit suicide – it is technically a choice, but it is intertwined and a symptom of the mental illness. *See* PCR at 1806-9. This relationship is key, because in his closing argument, the State argued not to let the Defendant hide behind his crack pipe. R. at 936. In its order, the trial court never discussed Mr. Orme's addiction and intoxication as interrelated things; instead, she suggests that trial counsel could have legitimately presented one defense or the other.[22] However, this characterization is simply erroneous. Voluntary intoxication and bipolar disorder are not mutually exclusive. The two combine to form a powerful combination to explain Orme's actions, his lack of intent, and mitigate the responsibility for those actions. To view the two as an either/or proposition completely miscasts and misunderstands the interrelated nature of the intoxication and the mental illness, particularly as to how they enhance the weight to be afforded to the powerful statutory mitigators that were found.[23]

2. The interviews with family members were cursory, non-specific to mental illness, and incomplete.

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[22] Trial counsel testified at the hearing that it would have been possible, and a reasonable option, to present voluntary intoxication in conjunction with Mr. Orme suffering from a major mental illness. *See* PCR at 1691.

[23] The Court found that Mr. Orme suffered from an extreme emotional disturbance and his ability to conform his behavior to the law was substantially impaired.

The trial court also states that trial counsel interviewed the family and friends of Mr. Orme, they could not give information about his mental illness, and trial counsel did not want to put on the diagnosis without strong evidence. Yet the history of trial counsel's investigation on Mr. Orme's case belies this testimony. When Mr. Orme was first arrested, trial counsel had his case for about one week. It was then transferred to Mr. Stone and Ms. Sutton. Most of trial counsel's interviewing came during that first week – before Mr. Orme had been diagnosed. *See* PCR at 1655. Therefore, at the time he interviewed Mr. Orme and his family, trial counsel was not trying to find specific information about mood swings, mania, and other indicators of mental illness, specifically bipolar disorder. Later, when trial counsel was reassigned the case[24], he essentially relied upon the interviews conducted by Mr. Stone, Ms. Sutton, and a law clerk – interviews conducted without the knowledge of Mr. Orme's bipolar status. As a result, these interviews, though important, were also deficient. In addition, Mr. Stone and Ms. Sutton testified at the evidentiary hearing that they were not nearly finished with their

[24]Mr. Stone and Ms. Sutton had resigned due to what they considered an improper, compromising agreement between the Office of the Public Defender and the Office of the State Attorney in the Fourteenth Judicial Circuit regarding them being prevented from arguing that the medical examiner, Dr. Sybers, was shading his testimony in favor of the State as a result of being investigated for the murder of his wife. *See* PCR at 1712-19.

investigation, and would have interviewed Mr. Orme's family and friends further. *See* PCR at 1709-11. Trial counsel's representation and investigation of Mr. Orme's mental health and mitigation defense was inadequate and resulted in clear and significant prejudice to Mr. Orme's case.

3. Health concerns, not any deficiencies in his diagnosis, prevented Dr. Walker from testifying.

In its Order, the trial court additionally states that trial counsel testified that Dr. Walker (the psychiatrist who diagnosed Orme with bipolar disorder a couple of weeks after his arrest) would not make a good witness. However, this is an erroneous characterization of trial counsel's testimony. Trial counsel stated that he didn't think Dr. Walker would be able to testify, because he was dying of cancer. He also said that Dr. Walker probably would not come off very strong, because he was so sick and weak. As a result, trial counsel did not want to rely on Dr. Walker, because his health was so poor – not because of any deficiencies in his diagnosis or analysis.[25]

4. Trial counsel failed to seek expert assistance in a timely fashion and failed to provide adequate information to the expert.

The trial court stresses that trial counsel relied on Dr. McClane as his expert.

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[25] In Dr. Walker's notes, there is documentation of one meeting with trial counsel. However, trial counsel had no independent recollection of the meeting.

At the time of trial, he diagnosed Mr. Orme with depression, but he also had a list of additional information he wanted, including Mr. Orme's jail records, which he never received from trial counsel. *See* PCR at 1978-80. However, Dr. McClane diagnosed Mr. Orme with bipolar disorder once he had all the information. *See* PCR at 1984-5. If he had been presented the whole picture by trial counsel at the time of trial, Dr. McClane would have diagnosed him as suffering from bipolar disorder.

Dr. McClane also testified that the majority of bipolar patients are initially diagnosed with depression and that it is not until the psychiatrist sees the patient in a manic state, or gets some other information about mania, that a bipolar diagnosis is possible. *See* PCR at 2022. Ironically enough, the very information (jail records) that Dr. McClane requested would have provided him the necessary information to diagnose and testify at trial to Orme's disorder.

The fact Dr. McClane was not retained in a timely fashion also greatly contributed to his not possessing the adequate information to make a proper diagnosis. Dr. McClane's original evaluation of Orme occurred after the jury had already found Orme guilty as charged and the day before the penalty phase was to begin. Upon realizing Dr. Walker's health would not allow him to testify, trial counsel should have immediately hired Dr. McClane. This timely acquisition of a

competent expert would have allowed time to provide the additional records and material requested by Dr. McClane. Then Mr. Orme would have been diagnosed with the bipolar disorder by Dr. McClane and this evidence and testimony could have been presented at trial.

5. The DSM-III comprised the relevant guidelines at the time of trial.

The trial court states that "[a]t best, the expert testimony revealed that bipolar diagnosis has been ever changing" since the 1993 trial. With this statement, the trial judge was alluding to a dispute at the evidentiary hearing. In 1993, the DSM-III was in place, but now, the DSM-IV-TR is in place. There is one major difference in the two versions' bipolar criteria. In the DSM-III, there is no specified time requirement that a manic stage must last.However, the DSM-IV-TR states that one manic stage must be present and that it must last for at least one week.

At the evidentiary hearing, the State tried to cross all of the experts using the DSM-IV-TR, emphasizing that there is no evidence of a one-week manic state in Mr. Orme's history. Yet several problems are present that prevent that approach from being relevant. First, the DSM is just a set of guidelines. Dr. Maher (who reviews the performance of psychiatrists for the Florida Agency for Health Care Administration) testified that if a psychiatrist believes that a patient is bipolar but

has not seen a one-week span of mania, he would be deficient for not diagnosing bipolar. *See* PCR at 1889-90. Secondly, bipolar disorder more than most illnesses varies greatly from patient to patient – some people cycle slowly, while others cycle very rapidly. As Dr. Maher testified, "There are individuals who are referred to as rapid cyclers. Their manic episodes tend to last a relatively brief period of time. Sometimes as short as a day or two." PCR at 1887-8. Third, what the DSM-IV-TR states is completely irrelevant to these proceedings. In assessing ineffectiveness, the focus is on the information available at the time of trial, which here is the DSM-III. The DSM-IV-TR did not exist at trial and therefore has no place in determining trial counsel's ineffectiveness.

6. Four competent experts diagnosed Orme as suffering from bipolar disorder.

The trial court goes on to state that "[a]t the evidentiary hearing, among professionals there was still much disagreement on how to diagnose Mr. Orme back in 1993 or presently, even with additional information." That is simply not true. Four experts testified at the hearing that Mr. Orme was bipolar – Drs. Herkov, Maher, McClane, and Warriner. Both Dr. Herkov and Dr. Maher testified that under either version of the DSM, Mr. Orme is bipolar. *See* PCR at 1800, 1827,1874-5, 1927. At the time of trial, Dr. Walker, who was treating Mr. Orme,

diagnosed him as suffering from a bipolar disorder. At trial, Dr. Warriner also testified that Mr. Orme was agitated and depressed, which is characteristic of bipolar. The only doctor to ever testify that Orme was not bipolar is the State's expert, Dr. McClaren, and he never evaluated Mr. Orme or even spoke to him directly. Although Lisa Wiley (a psychological specialist at Union Correctional Institution and not a doctor) suggested that he was not bipolar, she is not qualified to make any diagnosis. Also, her notes and observations of Mr. Orme at UCI include some language that indicate signs of bipolar disorder – including, most notably, her impression that Mr. Orme was "hypomanic."[26]

7. Knowing a Person's Mental State is Essential to Accurately Assessing the Effects of Intoxication and Addiction.

The trial court additionally notes that all the experts agreed Mr. Orme was addicted to drugs and that is what trial counsel chose to present. However, she neglects to explain that Mr. Orme's bipolar diagnosis played into his drug addiction. There is an extremely high correlation between addiction and bipolar disorder, and a high percentage of bipolars are addicts. *See* PCR at1875-77. Dr. Maher testified "I think the very strong implication of that and general opinion of

[26] One instance of mania or hypomania precludes a person from being diagnosed with just depression.

psychiatrists, certainly mine, is that the capacity to choose to abuse drugs or not is substantially diminished in individuals who suffer from bipolar disorder." PCR at 1877. The experts also testified that knowing a person's underlying mental state is essential to accurately assessing intoxication or addiction. On cross-examination by the State, Dr. Maher testified as follows:

> Q. Okay. What evidence or what, what indication do you have that bipolar disorder was more prominent than the polysubstance abuse that has been documented by all these other witnesses and hospital records?
>
> A. Well, the, both of the diagnoses are particularly present. What, what you're asking me to do is sort of the equivalent of saying, well, here's a man who, who walks with a wooden leg and normally he walks just fine and today he's drunk and he falls down. Now, what's more relevant to his falling down; his being drunk or his, wooden leg and not being able to walk with it? They are both potentially necessary and essential elements of what happens. There is an interaction between those two things that is relevant to understanding what ultimately occurs. It may be that either one alone would not lead to the events or circumstances in question. It is a temptation to attempt to segregate different parts of human functioning, but in the real world we deal with whole human beings, and in whole human beings the interaction between underlying psychiatric disorders and substance abuse is often inseparable. PCR at 1930-1.

Obviously the trial court's characterization of the voluntary intoxication defense and a mental health defense as mutually exclusive is flawed. This Court should remand for imposition of a life sentence or for a new trial.

8. Prejudice Should Have Been Found Based Upon the Testimony and Evidence Produced at the Post-Conviction Evidentiary

Hearing.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court held that an ineffective assistance claim should undergo a two part analysis: (1) A petitioner must show that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. *Id*. at 687. For counsel to be held deficient, counsel's representation of a defendant must fall below an objective standard of reasonableness. *Id*. at 688.

In the recent case of *Wiggins v. Smith*, 539 U.S. _____,No. 02-311 (U.S. June 26, 2003), the U.S. Supreme Court observed that when considering whether a decision represented a "reasoned professional judgment" the question

> "is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins background *was itself reasonable*. (emphasis in original) *Ibid. Cf. Williams v. Taylor, supra,* at 415 (O'Connor, J., concurring) (noting counsel's duty to conduct the 'requisite, diligent' investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' *Strickland*, 466 U.S., at 688, which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,' *id*., at 689 ('Every effort [must] be made to eliminate the distorting effect of hindsight'.) *Wiggins* at 10.

Trial counsel failed to conduct the requisite diligent investigation contemplated in *Strickland, Williams,* and *Wiggins*. Dr. Walker's diagnosis that Mr. Orme suffered

from a bipolar disorder should have been thoroughly investigated and then subsequently provided to the mental health experts to utilize in their evaluation. Not only was trial counsel's investigation of Dr. Walker's diagnosis unreasonable and deficient, it was virtually non-existent. Within *Wiggins* the U.S. Supreme Court instructs: "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins* at 11 (emphasis in original). Trial counsel neglected this clearly defined duty in Mr. Orme's case.

Failing to investigate and develop the fact that Mr. Orme suffered from a major mental illness and not present that fact to the jury constitutes deficient performance. The *Wiggins* Court observed, "As the Federal District Court emphasized, any reasonably competent attorney would have realized pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." *Wiggins* at 12 (citations omitted). The mitigating evidence counsel failed to discover and present in Mr. Orme's case is powerful and the failure to present it is inexcusable.

In *Strickland,* the U.S. Supreme Court held that to satisfy the prejudice

prong of the ineffective assistance analysis a "defendant must show that 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." *Strickland* at 694. Here, the mental health evidence would have provided substantial weight to the fact Mr. Orme was suffering from an extreme mental disturbance and could not conform his action to the requirements of law. Both of these statutory mitigators were found by the trial court. Additionally, the impact of this very important mental health evidence would have lessened the impact of Mr. Orme's drug use as less volitional, thus strengthening the voluntary intoxication defense.

The trial court attempted to distinguish *Phillips v. State*, 608 So. 2d 778 (Fla. 1992), from the instant case. However, Orme mainly relied on *Phillips* for this Court's explanation of the 7-5 jury recommendation and how the evidence from the hearing likely would have swayed one juror, since Orme was sentenced to death by such a narrow jury recommendation

Appellant also cited numerous other cases that the trial court failed to address. Significantly, *Blanco v. Dugger*, 691 F.Supp. 308 (S.D. Fla. 1988) was not addressed. In *Blanco*, a federal district court found unreliable an expert's testimony when he failed to evaluate the defendant but relied solely on files,

records, and interviews with the defendant's brother. Based on that, Dr. McClaren's testimony is also unreliable. Without Dr. McClaren, there is no evidence that rebuts the expert testimony Orme presented. All the evidence points to Orme suffering from a bipolar disorder that was not presented to the jury or the judge. Even with Dr. McClaren, Orme's bipolar disorder still carries great weight. Therefore, this Court should remand for a life sentence or new sentencing proceedings.

VII. Florida's capital sentencing procedure deprived Mr. Orme of his Sixth and Fourteenth Amendment rights to notice, to a jury trial and of his right to due process.

The role of the jury provided for in Florida's capital sentencing scheme, and in Mr. Orme's capital trial, fails to provide the necessary Sixth Amendment protections as mandated by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona*, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Ring* extended the holding of *Apprendi* to capital sentencing schemes by overruling *Walton v. Arizona*, 497 U.S. 639 (1990). The *Ring* Court held Arizona's capital sentencing scheme unconstitutional "to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 497 U.S. at 2443. Interestingly, *Walton* was premised upon a Florida case, *Hildwin v. Florida*, 490

U.S. 638 (1989) that held Florida's capital sentencing system constitutional. Indeed, the Florida Supreme Court has previously relied upon *Walton* while erroneously rejecting the application of the holding in *Apprendi* to Florida's capital sentencing procedure. In *Mills v. Moore,* 786 So.2d 532,537 (Fla. 2001), the Florida Supreme Court held that "because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." However, the subsequent overruling of *Walton* in *Ring* thus renders Florida's capital sentencing scheme, and Mr. Orme's death sentence, constitutionally infirm.

Ring found *Walton* and *Hildwin* inextricably intertwined when the Court stated:

> The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' Id., at 648, 110 S.Ct.3047 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989)(*per curiam*)). *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U.S., at 648, 110 S.Ct. 3047 (internal quotation marks omitted). *Ring* 497 U.S. at 2437.

The subsequent overruling of *Walton* in *Ring* gutted the premise of *Mills*, and therefore *Mills* is no longer a viable precedent.

On October 24, 2002, in *Bottoson v. Moore*, 2002 WL 31386790 (Fla. 2002)

and *King v. Moore*, 2002 WL 313386234 (Fla. 2002), the Florida Supreme Court revisited the *Mills* holding and addressed the concerns raised by *Ring* and its impact upon Florida's capital sentencing structure. The *Bottoson* and *Moore* decisions resulted in each Florida Supreme Court justice rendering a separate opinion. In both cases, a *per curiam* opinion announced the result denying relief in those cases. In each of the cases, four separate justices wrote separate opinions specifically declining to join the *per curiam* opinion, but "concur[ring] in result only," *Bottoson*, 2002 WL 31386790 at 2; *King*, 2002 WL 313386234 at 1-2[27], based upon key facts present in those cases. However, those key facts utilized by the Court to deny relief in *Bottoson* and *King* are not present in Mr. Orme's case. A careful reading of those four separate opinions and the facts in Mr. Orme's case reveal that he is entitled to relief.

A. Mr. Orme was not found guilty beyond a reasonable doubt by a unanimous jury on each element of the offense necessary to establish capital murder, therefore, his death sentence should be vacated.

Florida juries are not required to render a verdict on elements of capital murder. Even though "[Florida's] enumerated aggravating factors operate as 'the

[27] In many ways, the *Bottoson* decision contains the primary opinions of the seven participating justices. In *King*, Justice Quince was recused. The separate opinions in *King* generally refer back to the separate opinions expressed in *Bottoson* as more fully reflecting the opinion of its author.

functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, *Ring*, at 2443 (*quoting Apprendi*, 530 U.S. at 494, n.19), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141 (2) does not call for a jury verdict, but rather an "advisory sentence." The Florida Supreme Court has made it clear that "the jury's sentencing recommendation in a capital case is only advisory.[28] The trial court is to conduct its own weighing of the aggravating and mitigating circumstances. . . ." *Combs*, 525 So. 2d at 858 (*quoting Spaziano v. Florida*, 468 U.S. 447, 451) (emphasis original in *Combs*). "The trial judge. . .is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." *Engle*, 438 So. 2d at 813. It is reversible error for a trial judge to consider himself bound to follow a jury's recommendation and thus "not make an independent [determination] whether the death sentence should be imposed." *Ross v. State*, 386 So. 2d 1191, 1198 (Fla. 1980). Florida law only requires the judge to consider "the recommendation of a majority of the jury." Fla. Stat. Sec. 921.141(3). In contrast, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim.P. 3.440. Neither the sentencing statute, the Florida Supreme Court's

[28] And this is exactly what Mr. Orme's jury was told.

cases, nor the jury instructions in Mr. Orme's case required that all jurors concur in finding any particular aggravating circumstance, or "whether sufficient aggravating circumstances exist," or "whether sufficient aggravating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. Sec. 921.141(2).

Because Florida law does not require any number of jurors, much less twelve, to agree that the government has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in *Combs*, Florida law leaves these matters to speculation. 525 So. 2d at 859 (Shaw., J., concurring).

Further, it would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. In *Harris v. United States*, 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), rendered on the same day as *Ring*, the United States Supreme Court held that under the *Apprendi* test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the

crime for the purposes of the constitutional analysis." *Id*. at 14. And in *Ring*, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. 2002 WL 1357257 at 16. In other words, pursuant to the reasoning set forth in *Apprendi*, *Jones*, and *Ring*, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

One of the elements that had to be established for Mr. Orme to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. Sec. 921.141 (3).[29] The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on any standard by which to make this essential determination. Such an error can never be harmless. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"). Where the jury has not been instructed on the reasonable doubt standard:

> There has been no jury verdict within the meaning of the Sixth

[29]It is important to note that although Florida laws requires the judge to find that sufficient aggravating circumstances exist to form the basis for a death sentence, Fla. Stat. Sec. 921.141 (3) , only asks the jury to say whether sufficient aggravating circumstances exist to "recommend" a death sentence. Fla. Stat. Sec 921.141(2).

> Amendment, [and] the entire premise of *Chapman*[30] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. *Sullivan*, 508 U.S. at 280.

Viewed differently, in a case such as this where the error is not requiring a jury verdict on the essential elements of capital murder, but delegating that responsibility to a court, no matter how inescapable the findings to support the verdict might be, "for a court to hypothesize a guilty verdict that was never rendered . . . would violate the jury-trial right." *Id*. 508 U.S. at 279. The review would perpetuate the error, not cure it. Permitting any such findings of the elements of a capital crime by a mere simple majority, is unconstitutional under the Sixth and Fourteenth Amendment of the U.S. Constitution. In the same way that the Constitution guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendment require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). The standards for imposition of a death sentence may be even more exacting than the *Apodaca* standard (which was not a death case) – but they cannot

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[30] *Chapman v. California*, 386 U.S. 18 (1967).

be constitutionally less. Clearly, a mere numerical majority – which is all that is required under section 921.141(3) for the jury's advisory sentence – would not satisfy the "substantial majority" requirement of *Apodaca*. *See, e.g.*, *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate the Due Process Clause of the Fourteenth Amendment). Significantly, Mr. Orme's jury made a recommendation of death by a vote of 7-5.

Ultimately, the State was not required to convince the jury that death was a proper sentence beyond a reasonable doubt as required by the Sixth Amendment. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt. *Ring* at 2441. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstances, but on a judicial finding "[t]hat sufficient aggravating circumstances exist." Fla. Stat. Sec. 921.141(3). Although Mr. Orme's jury was told that individual jurors could consider only those aggravating circumstances that had been proved beyond a reasonable doubt, it was not required to find beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty." *Id*.

B. Mr. Orme's death sentence must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Florida Constitution, and Due Process.

Mr. Orme was indicted on one count of premeditated murder. The indictment failed to charge the necessary elements of capital first degree murder. *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law.[31] *Ring v. Arizona*, 122 S.Ct. 2428 (2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" *Ring*, 122 S.Ct. at 2441 (*quoting Apprendi*, 530 U.S. at 494, n. 19).

In *Jones*, the United States Supreme Court noted that "[much turns on the determination that a fact is an element of an offense, rather than a sentencing

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[31] The grand jury clause of the Fifth Amendment has not been held to apply to the States. *Apprendi*, 530 U.S. at 477, n. 3.

consideration," in significant part because "elements must be charged in the indictment." 526 U.S. at 232. On June 28, 2002, after the Court's decision in *Ring*, the death sentence imposed in *United States v. Allen*, 247 F. 3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgement of the United States Court of Appeals of the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of *Ring*'s holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. *Allen v. United States*, 122 S.Ct. 2653 (2002). The question presented in *Allen* was:

> Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of 1994, 18 U.S.C. sec 3591 et. seq,, are elements of a capital crime and thus must be alleged in the indictment in order to comply with the Due Process and Grand Jury clauses of the Fifth Amendment.

Like the Fifth Amendment to the United States Constitution, Article I, Section 15 of the Florida Constitution provides that "no person shall be tried for a capital crime without presentment or indictment by a grand jury." Like 18 U.S.C sections 3591 and 3592(c), Florida's death penalty statute, Florida Stats. §§ 775.082 and 921.141, make imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing "sufficient aggravating circumstances" to call for a death sentence, and that the mitigating circumstances

are insufficient to outweigh the aggravating circumstances. Fla. Stat. § 921.141 (3). Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977), the Florida Supreme Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983), this Court stated "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus". *Gray*, 435 So. 2d at 818. Finally, in *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996), this Court stated "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid." It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances, and thus charging Mr. Orme with a crime punishable by death. The State's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides - and, in fact, is an archetypical reason for – the constitutional requirement of neutral review of prosecutorial intentions. *See e.g., United States*

v. Dionisie, 410 U.S. 19, 33 (1973); *Wood v. Georgia*, 370 U.S. 375, 390 (1962); *Campbell v. Louisiana*, 523 U.S. 393, 399 (1998).

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . be informed of the nature and cause of the accusation . . ." A conviction on a charge not made by the indictment is a denial of due process of law. *State v. Gray*, supra, citing *Thornhill v. Alabama*, 310 U.S 88 (1940), and *DeJonge v. Oregon*, 299 U.S. 353 (1937). By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Orme "in the preparation of a defense" to a sentence of death. Fla. R. Crim. P. 3.140(o).

Because the State did not submit to the grand jury, and the indictment did not state the essential elements of the aggravated crime of capital murder, Mr. Orme's rights under Article I, Section 15 of the Florida Constitution, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. Mr. Orme's death sentence should be vacated.

C. Mr.Orme's case is distinguishable from *Bottoson* and *King*.

Mr. Orme will focus on some of the issues that distinguish his case from that of Mr. King's. Additionally, because several of the concurrences in the *King* decision rely upon opinions rendered in *Bottoson v. Moore,* 833 So.2d 693 (Fla.

2002), Mr. Orme will further analyze his claims and distinguish his position from that of Mr. Bottoson's.

Three concurring opinions set forth in both *King* and *Bottoson* relied specifically upon the existence of the "previously convicted of a crime of violence" aggravating circumstance as a basis for denying relief in those two cases. These justices (Justice Shaw, Justice Pariente, and Chief Justice Anstead) concurred in result only in the denial of habeas relief in both *King* and *Bottoson.* In Justice Pariente's and Justice Shaw's concurrences in *Bottoson*, they held that the presence of a prior violent felony conviction was the basis for their votes to deny Mr. Bottoson relief. Similarly, their opinions in *King* cited to their reasoning in *Bottoson* as the basis for denying relief to Mr. King. Nevertheless, both Justice Pariente and Justice Shaw expressed their concern that the Florida sentencing scheme failed to meet the dictates of *Ring*. As Justice Pariente stated in her opinion concurring in result only in *Bottoson*, "I believe we must confront the fact that the implications of *Ring* are inescapable." 833 So.2d at 723. Later in that opinion, she elaborated:

> The crucial question after *Ring* is "one not of form, but of effect." 122 S.Ct. at 2439. *In effect,* the maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors. *In effect,* Florida juries in capital cases *do not do* what *Ring* mandates – that is, make specific findings

> of fact regarding the aggravators necessary for the imposition of the death penalty. *In effect,* Florida juries *advise* the judge on the sentence and the judge *finds* the specific aggravators that support the sentence imposed. Indeed, under both the Florida and Arizona schemes, it is the judge who *independently* finds the aggravators necessary to impose the death sentence. *Id.* at 725.

Likewise, in *King,* Chief Justice Anstead specially concurred to Justice Pariente's opinion stating her reasons for concurring in the denial of relief to Mr. King. Thus, he found the presence of the "prior conviction of a crime of violence" aggravating circumstance and the unanimous death recommendation determinative in that instance. Inferentially, it would seem that he, like Justices Shaw and Pariente, would vote to grant a petitioner relief under *Ring* if no prior violent felony aggravator existed, **or** if there was a question as to validity of the death recommendation due to lack of unanimity. Mr. Orme does not have any violent felonies prior to being convicted of murder in the above-styled cause.

In Mr. King's case, jurors reached a unanimous (12-0) recommendation for death. *See King v. Moore,* 831 So.2d at 149. In her concurring opinion in *King,* Justice Pariente specifically referenced Mr. King's 12-0 jury recommendation as an indication that the jury "necessarily [found] the existence of one or more aggravators beyond a reasonable doubt." *Id.* In contrast, Mr. Orme's jury recommended death by a 7-5 vote, the slimmest margin by which a jury can

recommend death. Mr. Orme's case is not in the same posture as Mr. King's. A 7-5 recommendation violates the principle enunciated in *Ring*, as explained by Justice Shaw in *Bottoson v. Moore*:

> Nowhere in Florida law is there a requirement that the finding of an aggravating circumstance must be unanimous. *Ring*, however, by treating a "death qualifying" aggravation as an element of the offense, imposes upon the aggravation the same rigors of proof as other elements, including Florida's requirement of a unanimous jury finding. *Ring*, therefore, has a direct impact on Florida's capital sentencing statute. . . .When the dictates of *Ring* are applied to Florida's capital sentencing statute, I believe our statute is rendered **flawed** because it lacks a unanimity requirement for the "death qualifying" aggravator.

833 So.2d at 718.

Chief Justice Anstead agreed with this assessment of *Ring*, stating that "*Apprendi* and *Ring* . . . stand for the proposition that under the Sixth Amendment, a determination of the existence of aggravating sentencing factors, just like elements of a crime, must be found by a unanimous jury vote." *Id.* at 709.[32] Mr. Orme's jury was specifically instructed that their decision was merely "advisory," a "recommendation," and/or that the trial judge was the "ultimate

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[32] Also in *Bottoson*, (in an opinion relied upon in his holding in *King*), Chief Justice Anstead additionally stated that "another factor important to my decision to concur in denying relief [ ] is that the U.S. Supreme Court has specifically denied Bottoson's petition for review and lifted the stay it previously granted to his execution." *Id.* at 704 n. 17. However, that circumstance is not present in Mr. Orme's case, and therefore, a different result is warranted.

sentencer."

Under the analyses employed by Chief Justice Anstead, Justice Shaw, Justice Pariente, and Justice Lewis in both *Bottoson* and *King*, Mr. Orme's sentence of death stands in violation of the Sixth and Eighth Amendments. The circumstances present in *Bottoson* and *King* that caused those justices to concur in the denial of post-conviction relief are not present here, therefore, relief should issue. Mr. Orme respectfully moves this Court to vacate the sentence of death and order a new trial.

D. Mr. Orme's *Ring* claim should be granted in light of emerging case law.

The Supreme Court has recently elaborated upon the meaning of *Ring*. In *Sattazahn v. Pennsylvania*, 123 S.Ct. 732, 739 (2003), the Supreme Court explained:

> Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact–no matter how the State labels it– constitutes an element, and must be found by a jury beyond a reasonable doubt.

In *Ring*, the Supreme Court noted that Arizona was one of five states that committed sentencing factfinding and the ultimate sentencing decision to judges. *Ring*, 536 U.S. at 609 n. 6 (the other four were identified as Colorado, Idaho, Montana, and Nebraska). The Supreme Court further noted that four additional states had hybrid capital sentencing schemes. *Id*.

(Alabama, Delaware, Florida, and Indiana). Subsequently, it has been recognized that additional hybrid states were overlooked by the United States Supreme Court. *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002)(under Nevada law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence); *State v. Whitfield*, 2003 WL 21386276 (Mo. June 17, 2003)(under Missouri law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence). Even in a state with jury sentencing in a capital cases, error has been found. In *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), the Sixth Circuit granted federal habeas relief because the 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.[33]

this Court should consider the jurisprudence that has developed in the wake of *Ring*. Not surprisingly the states labeled by the United States Supreme as

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[33]Even though the United States Supreme Court in its opinion did not suggest that *Ring* had any implications for the capital sentencing schemes in Nevada or Missouri or in jury sentencing states like Ohio, the courts in those states took the logic of the decision in *Ring*, analyzed their state law, and reached the conclusion that under the principles enunciated in *Ring* that Sixth Amendment error was present in individual cases.

being in the same category as Arizona have generally recognized that Sixth Amendment error pervades their capital sentencing schemes. *State v. Fetterly*, 52 P.3d 875 (Idaho 2002)(in light of *Ring*, death sentence vacated and remanded for further proceedings); *State v. Gales*, 658 N.W.2d 604, 624 (Neb. 2003)("It is clear that the jury made no explicit determination that any of the statutory aggravating circumstance existed in this case. Instead, that determination was made by a judge."); *Woldt v. People*, 64 P.3d 256 (Colo. 2003)(death sentences vacated in consolidated direct appeal for two of the three individuals sentenced to death under 1995 scheme providing for three-judge panel to conduct capital sentencing factfinding and cases remanded for the imposition of life sentences); *State v. Ring*, 65 P.3d 915 (Ariz. 2003)(in a consolidated case involving those on Arizona's death row, Arizona Supreme Court established parameters for evaluating each case for harmless error analysis).[34] Each of these states has found that the necessary facts under *Ring* to render the defendant death eligible were not made by the jury at the

[34]These opinions show disparity in application of harmless error analysis to the Sixth Amendment violation defined by *Ring*. *See also Esparza v. Mitchell*, 310 F.3d at 421.

guilt phase of the capital case.[35]

This Court should also consider the decisions from those states lumped in the same category as Florida, hybrid states. For example in Indiana, the hybrid sentencing scheme is employed not just in determining whether to impose death, but also in determining what sentence to impose in murder cases not reaching the capital level. In *Bostnick v. State*, 773 N.E.2d 266 (Ind. 2002), the Indiana Supreme Court was faced with a case in which the judge overrode a jury's recommendation against a sentence of life without parole. The *Bostnick* court concluded, "[t]he jury during the sentencing phase was unable to reach a unanimous recommendation, and thus there was no jury determination finding the qualifying aggravating circumstances beyond a reasonable doubt." *Id*. at 273. Under the Indiana sentencing scheme, the judge made the finding of the aggravating circumstances necessary to warrant the imposition of life without parole. "Because of the absence of a jury determination that qualifying aggravating circumstances were proven beyond a reasonable doubt, we must therefore

[35]Undersigned counsel has not been able to find any cases from the Montana Supreme Court addressing *Ring*.

vacate the trial court's sentence of life without parole." *Id*.[36] *See Esparza v. Mitchell*, 310 F.3d at 420 ("the jury never found the statutorily required aggravating circumstance").

Another case further illuminates Indiana law and its interplay with *Ring*.[37] In *Overstreet v. State*, 783 N.E.2d 1140, 1160-61 (Ind. 2003)(emphasis added), while addressing a capital case, the Indiana Supreme Court explained, "[u]nder the terms of our death penalty statute, before a jury can recommend a sentence of death, it must unanimously find that one or more of the charged aggravating circumstances was proven beyond a reasonable doubt."[38] In *Overstreet*, the defense had requested to have a

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[36]A similar decision was reached in *People v. Swift*, 781 N.E.2d 292 (Ill. 2002)(non-capital application of *Ring* in a murder case). There the Illinois Supreme Court stated, "the 'sentencing range' for first degree murder in Illinois is 20 to 60 years imprisonment. This is the only range of sentence permissible based on an ordinary jury verdict of guilt." 781 N.E.2d at 300. Accordingly, a sentence above that range imposed after a judge found one aggravating factor was overturned.

[37]In *Wrinkles v. State*, 776 N.E.2d 905 (Ind. 2002), the Indiana Supreme Court found it unnecessary to consider the implications of *Ring* in a successor post-conviction motion because the defendant had been convicted of three murders thereby rendering the defendant death eligible.

[38]The obvious and important distinctions from Florida include: 1) the unanimity requirement on which the jury is instructed, 2) the charging requirement, and 3) the provision under Indiana law specifically requiring the jury to determine whether one or more aggravating circumstances are present.

The Indiana legislature specifically defined the eligibility issue solely upon the

special finding to this effect made by the jury. The Indiana Supreme Court noted that on the basis of *Hildwin v. Florida*, 490 U.S. 638 (1989), the trial court had denied the requested special verdict. No reversible error was found because the jury had been explicitly instructed that this unanimous finding beyond a reasonable doubt was necessary before it could return a death recommendation.[39] No issue was present in *Overstreet* regarding the State's failure to comply with a capital defendant's right of confrontation while attempting to prove the elements of capital first degree murder.

In another hybrid state, the Delaware legislature enacted legislation following the decision in *Ring*. In pending capital prosecutions, four

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presence of one aggravating circumstance. The Florida legislature has defined the issue differently, and has not sought to modify the statute in the wake of *Ring*. The sentencer is to determine whether "**sufficient** aggravating circumstances exist" to warrant the imposition of a death sentence, and if so, whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3)(emphasis added).

In Mr. Orme's trial, the State relied upon hearsay evidence to establish the aggravating circumstances. Thus, if the Sixth Amendment applied as to the right to a jury determination of the elements, it also applied to guarantee the right of confrontation.

[39]However, the Indiana legislature had amended the statute after the *Ring* decision to require that the jury make a special finding that it had unanimously found one or more of the charged aggravating circumstances beyond a reasonable doubt. Both the Indiana Supreme Court and the Indiana legislature implicitly recognized that *Hildwin v. Florida* did not survive the reasoning of *Ring*.

questions were certified to the Delaware Supreme Court in light of the new legislation passed in an effort to conform with *Ring*. The Delaware Supreme Court thereupon undertook a review of Delaware's capital sentencing scheme. *Brice v. State*, 815 A.2d 314, 322 (Del. 2003). The new statutory language provided that a death sentence could not be imposed unless "a jury (unless waived by the parties) first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstances exists."[40] Further, under Delaware law, first degree murder was defined by the statute in seven alternative ways. Delaware Code, Title 11, §636(a)(1-7).[41] According to Delaware law, "[i]n any case where the defendant has been convicted of murder in the first degree in violation of any provision of §636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed." Delaware Code, Title 11, §4209(e)(2). Thus, the

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[40]This is decidedly different than Florida law which requires 1) the presence of an aggravating circumstance; 2) the determination that sufficient aggravating circumstances are present to justify a death sentence; and 3) the aggravating circumstances are not outweighed by the mitigating circumstances. §921.141, Fla. Stat.

[41]The first definition under the statute is intentional murder. The second through the seventh definitions are premised upon alternative aggravating circumstances.

Delaware legislature had defined first degree murder on the basis of the presence of six alternative aggravating circumstances and determined that a finding by the jury of the presence of one these circumstances constituted capital first degree murder subject to the death penalty. Accordingly, the Delaware Supreme Court found that the provisions complied with *Ring*. *Brice*, 815 A.2d at 322-23.[42]

In *Brice*, the Delaware Supreme Court indicated that it would review cases in which death had been imposed under the old law case-by-case to determine whether any *Ring* error was harmless or whether relief was warranted. Subsequently, the court has issued opinions. *Garden v. State*, 815 A.2d 327, 342 n.4 (Del. 2003)(death sentence vacated in an override case because judge failed to give life recommendation sufficient weight; therefore the *Ring* challenge was held to be moot); *Reyes v. State*, 819 A.2d 305, 316 (Del. 2003)(jury that returned a nine to three death recommendation

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[42]Recently, Justice Pariente cited *Brice* for the proposition that the "determination that aggravators outweigh the mitigators is not a factual finding that must be made by jury under *Ring*." *Duest v. State*, FSC Case No. SC00-2366, slip at 34 (Fla. June 26, 2003). Unfortunately, this overlooks the fact that the Delaware legislation specifically defined the issue differently than the Florida legislature has defined it (under Delaware law, at the guilt phase verdict includes aggravating circumstances from the penalty phase). The real lesson of *Brice* is that the proper *Ring* analysis must focus on the Florida statute which sets forth three factual findings that must be made before the defendant is death eligible.

had first explicitly and unanimously found during a the guilt phase a statutory aggravator; therefore relief was denied). In these cases, the Sixth Amendment right of confrontation was neither implicated nor discussed.

The Alabama Supreme Court has also analyzed its capital sentencing provisions in light of *Ring*. The Alabama Supreme Court has explained that under Alabama's statutory definition of capital first degree murder, the jury must find an aggravating circumstance at the guilt phase of a capital trial to render a defendant death-eligible. *Ex parte Waldrop*, – So.2d –, 2002 Ala. LEXIS 336, *13 (Ala. November 22, 2002)("'Unless at least one aggravating circumstance as defined in Section 13A- 5-49 exists, the sentence shall be life imprisonment without parole.'"); *Martin v. State*, – So.2d – , 2003 Ala. Crim. App. LEXIS 136, *55 (Ala. App. May 30, 2003)("the jury in the guilt phase entered a verdict finding Martin guilty of capital murder because it was committed for pecuniary gain. Murder committed for pecuniary gain is also an aggravating circumstance").[43] Thus, like Delaware, Alabama provides that unless there is a finding of an aggravating circumstance at the guilt phase proceeding, the sentence is life imprisonment. This clearly distinguishes

[43]In the Alabama proceedings, the Sixth Amendment right of confrontation has neither been implicated nor discussed.

Alabama law from Florida law in a critical fashion.

Additionally, this Court should also consider the decisions from two states not mentioned in *Ring* that have found reversible *Ring* error. Recently, the Nevada Supreme Court found that its capital scheme was a "hybrid" scheme because if the jury failed to return a unanimous verdict, the judge made the sentencing findings. *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002). Nevada law "requires two distinct findings to render a defendant death-eligible." There must be at least one aggravating circumstance and no mitigation sufficient to outweigh the aggravating circumstances.[44] Because in *Johnson*, the jury had been unable to return a unanimous verdict, the Nevada Supreme Court concluded that the error was not harmless, and it vacated the death sentence.

The Missouri Supreme Court also found that its death sentencing scheme was a "hybrid" scheme because the judge imposed the sentence whenever the jury could not return a unanimous verdict. That Court

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[44]The steps are defined and numbered somewhat differently than they are in Florida's statute. But, the Nevada statute is much closer to the Florida statute than either the Alabama or Delaware statutes. According to the Nevada Supreme Court, the legislative definition of capital murder determined what "facts" were subject to the right to trial by jury. Certainly, the right of confrontation would apply to proceedings at which the State was held to prove these elements at a jury trial because both rights arise from the same source, the Sixth Amendment.

explained that in those circumstances *Ring* was violated because the first three steps of the Missouri procedure for determining death-eligibility had not been decided beyond a reasonable doubt by a jury:

> In the second, or "penalty" phase, the jury is required to be instructed to follow the four-step process set out in section 565.030.4:
>
> > The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
> >
> > (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
> >
> > (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or
> >
> > (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
> >
> > (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.
>
> *Id* . Section 565.030.4 on its face requires that steps 1, 2, 3, and 4 be determined against a defendant before a death sentence can be imposed. *Id.; see Whitfield*, 837 S.W.2d 503, 515 (Mo. banc 1992).
>
> Step 1**.** Step 1 requires the trier of fact to find the presence of one or more statutory aggravating factors set out in section 565.032.2. Both

the State and Mr. Whitfield agree that this is a fact that normally must be found by the jury in order to impose a sentence of death.

The State contends that steps 2, 3, and 4 merely call for the jury to give its subjective opinion as to whether the death penalty is appropriate, however, not to make findings as to whether the factual predicates for imposing the death penalty are present. It urges that the principles set out in *Ring* are not offended even if the judge rather than the jury determines those three steps. This Court disagrees.

Step 2. Step 2 requires the trier of fact (whether jury or judge) to find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating factors, warrants imposition of the death penalty. As noted, the State argues that this step merely calls for a subjective opinion by the trier of fact, not a finding. But, the State fails to note that this Court rejected this very argument in its opinion on Mr. Whitfield's appeal of his initial conviction, in which it remanded for the new trial at issue here. In that decision, this Court held that step 2 requires a "finding of fact by the jury, not a discretionary decision." *Whitfield*, 837 S.W.2d at 515 . This holding is supported by the plain language of the statute. In order to fulfill its duty, the trier of fact is required to make a case-by-case factual determination based on all the aggravating facts the trier of fact finds are present in the case. This is necessarily a determination to be made on the facts of each case. Accordingly, under *Ring*, it is not permissible for a judge to make this factual determination. The *jury* is required to determine whether the statutory and other aggravators shown by the evidence warrants the imposition of death. . . .

Step 3. In step 3 the jury is required to determine whether the evidence in mitigation outweighs the evidence in aggravation found in steps 1 and 2. If it does, the defendant is not eligible for death, and the jury must return a sentence of life imprisonment. While the State once more argues that this merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding, this Court again disagrees.

The analysis undertaken in three recent decisions by other state courts of last resort, interpreting similar statutes, is instructive. In *Woldt v. People*, 64 P.3d 256 (Colo. 2003), the Supreme Court of Colorado reversed the death sentences of two capital defendants after determining that Colorado's three-judge capital sentencing statute was unconstitutional in light of *Ring*. Colorado's death penalty statute, like Missouri's, requires the fact-finder to complete a four-step process before death may be imposed. First, at least one statutory aggravator must be found. Second, whether mitigating factors exist must be determined. Third, mitigating factors must not outweigh the aggravating factors. Finally, whether death is the appropriate punishment is considered.

The Supreme Court of Colorado described the first three of these four steps as findings of fact that are "prerequisites to a finding by the three-judge panel that a defendant was eligible for death." *Woldt*, 64 P.3d at 265. It noted that states are sometimes grouped into "weighing states" that require the jury to weigh the aggravating circumstances against those in mitigation in arriving at their determination of punishment, and "non-weighing states." It explained that, while in steps 1, 2, and 3 the jury is permitted to consider and weigh aggravators and mitigators, and to that extent Colorado's process is like that used in weighing states, Colorado is a non-weighing state in that, in step 4, in which the jury decides whether to impose death or to give a life sentence, the jury is permitted to consider all of the evidence without being required to give special significance to the weight of statutory aggravators or mitigators. *Id.* at 263-64 . This last step thus "affords the sentencing body unlimited discretion to sentence the defendant to life imprisonment instead of death." *Id.* at 265 . Because Colorado's death penalty statute required a three-judge panel to make the first three of these findings, the statute was declared unconstitutional. *Id*. at 266-67.

Similarly, in *Johnson v. State*, 59 P.3d 450 (Nev. 2002), Nevada's Supreme Court considered the constitutionality of its capital sentencing scheme in light of *Ring*. Its sentencing scheme provides for a three-judge panel to determine punishment if the jury is unable to do

so. *Johnson* noted that Nevada "statutory law requires two distinct findings to render a defendant death-eligible: 'the jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.'" *Johnson*, 59 P.3d at 460 (citation omitted).

Johnson determined the requisite statutory finding that the mitigating circumstances are not sufficient to outweigh the aggravating circumstances is at least "in part a factual determination, not merely discretionary weighing." *Id*. at 460 . It held that, as a result, the rule announced in *Ring* required a jury rather than a judge to determine the mitigating as well as the aggravating factor issues. *Id.*

Finally, on remand from the United States Supreme Court, the Supreme Court of Arizona rejected the state's contention that the requirement of Arizona law -- that the court weigh mitigating circumstances against aggravating circumstances -- did not require a factual determination, stating:

> In both the superseded and current capital sentencing schemes, *the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency*. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. [sections] 13-703.E (Supp.2002) and 13-703.F (Supp.2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme.

Ring II, 65 P.3d at 943 (emphasis added). The Court continued:

> We will not speculate about how the State's proposal [to allow

> the judge to make these findings] would impact this essential process. *Clemons v. Mississippi*, 494 U.S. 738, 754, 110 S.Ct. 1441, 1451, 108 L.Ed.2d 725 (1990) ('In some situations, a state appellate court may conclude that peculiarities in a case make appellate...harmless error analysis extremely speculative or impossible.'); *see also Johnson v. Nevada* , 59 P.3d 450 (Nev. 2002) (as applied to Nevada law, *Ring*... requires [a] jury to weigh mitigating and aggravating factors under Nevada's statute requiring the fact-finder to further find whether mitigating circumstances are sufficient to outweigh the aggravating circumstances).
>
> *Id.* Accordingly, the Court held that, even were the presence of a statutory aggravator conceded or not contested, resentencing would be required unless the court found that the failure of the jury to make these factual findings was harmless on the particular facts of the case. *Id.* This was a necessary result of applying *Ring's* holding that "[c]apital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589.
>
> Missouri's steps 1, 2, and 3 are the equivalent of the first three factual determinations required under Colorado's death penalty statute, so that, as in Colorado, the jury is told to find whether there are mitigating and aggravating circumstances and to weigh them to decide whether the defendant is eligible for the death penalty. These three steps are also similar to the aggravating and mitigating circumstance findings required under Nevada and Arizona law. As in those states, these three steps require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible.

State v. Whitfield, 2003 WL 21386276 (Mo. June 17, 2003) (footnote omitted).

The three steps in Florida's statute, like the steps in Missouri, also "require factual findings that are prerequisites to the trier of fact's determination that a

defendant is death-eligible." Step 1 in the Florida procedure requires determining whether at least one aggravating circumstance exists. As in Missouri, Colorado, Indiana, Delaware, Arizona, and Nevada, this step involves a factual determination which is a prerequisite to rendering the defendant death-eligible.

Step 2 in the Florida procedure requires determining whether "sufficient" aggravating circumstances exist to justify imposition of death.[45] Missouri's Step 2 is indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." This step is obviously not the ultimate step of determining whether death will or not be imposed because other steps remain. Rather, in Florida as well as Missouri, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible.

Step 3 in the Florida procedure requires determining whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Missouri's and Colorado's Step 3, as well as Nevada's and Arizona's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances. Again, this step is not the ultimate determination of

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[45]Significantly, a second step is missing in the capital schemes in Indiana, Alabama and Delaware as construed by the state supreme courts in those states.

whether or not to impose death because an additional step remains. Rather, in Florida as well as these other states, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible.

In Florida, as in Missouri and the other states discussed in *Whitfield*, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the first three steps, the Florida statute directs the jury to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Section 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur before this determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible.

The question which *Ring v. Arizona* decided was what facts constitute "elements" in capital sentencing proceedings. Following the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Mr. Ring raised an *Apprendi* challenge to his death sentence. In addressing that challenge, the Arizona Supreme Court stated that the United States Supreme Court's description of Arizona's capital sentencing scheme contained in *Walton v. Arizona*, 497 U.S. 639 (1990), was incorrect and provided the correct construction of the scheme. *Ring*, 122 S. Ct. at 2436. Based upon this correct construction, the United States

Supreme Court then determined that *Walton* "cannot survive the reasoning of *Apprendi*." *Ring*, 122 S. Ct. at 2440.

The bulk of the *Ring* opinion addresses how to determine whether a fact is an "element" of a crime. *See Ring*, 122 S. Ct. at 2437-43. The question in *Ring* was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. The question was what facts are elements. Justice Thomas explained this in his concurring opinion in *Apprendi*:

> This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, [Sec.] 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, *see Hurtado v. California*, 110 U.S. 516, 538 . . . (1884), the Court has held that these protections apply in state prosecutions. *Herring v. New York*, 422 U.S. 853, 857, and n.7 . . . (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. *In re Winship*, 397 U.S. 358, 364 . . . (1970).
>
> *All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime.* In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to

> be proper, all elements of the crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt).

Apprendi, 120 S. Ct. at 2367-68 (Thomas, J., concurring) (emphasis added). Justice Thomas explained that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here, *Winship* and the right to trial by jury." *Id*. at 2368.

The essence of criminal law is the definition of the offense. *Jones v. United States*, 526 U.S. 227 (1999), construed the federal statute at issue in that case, and stated that facts which increase the maximum punishment for an offense are elements of the offense. *Apprendi* applied the well-established rule that elements must be found by a jury and determined that the sentencing factor identified by the New Jersey legislature was in fact an element. *Ring* merely held that based upon the clarification of the Arizona statute provided by the Arizona Supreme Court, aggravating circumstances in Arizona were elements subject to the Sixth Amendment right to a jury trial.

Ring's requirement that juries, not judges, find the elements of the charge is derived from ancient principles of law: "The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as

early as 1628 by Coke. *See* 1 E. Coke, Institutes of the Laws of England 155b (1628)." *Jones*, 526 U.S. at 247. *Walton* did not contravene those principles but simply misread the Arizona statute. The *Ring* decision merely rejuvenated the longstanding rule which *Walton* temporarily rejected.

The Framers of the Bill of Rights included the Sixth Amendment's guarantee of a right to jury trial as an essential protection against government oppression. "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968). Only by maintaining the integrity of the factfinding function does the jury "stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). Thus, the adoption of the jury trial right in the Bill of Rights establishes the Founders' recognition that a jury trial is more reliable than a bench trial.

Just as Justice Thomas explained in *Apprendi*, there was no question that the jury trial right applies to elements. The dispute in *Ring* involved what was an element. Thus, the question in *Ring* is akin to a statutory construction issue, and "retroactivity is not at issue." *Fiore v. White*, 531 U.S. 225, 226 (2001); *Bunkley v.*

Florida, 123 S. Ct. 2020, 2023 (2003). That is, the Sixth Amendment right to have a jury decide elements is a bedrock, indisputable right. Mr. Orme was entitled to this Sixth Amendment protection at the time of his trial. The Sixth Amendment guarantees not only the right to a jury trial, but also the right of confrontation. *Ring* simply clarified that facts rendering a defendant eligible for a death sentence are elements of capital murder and therefore subject to the Sixth Amendment guarantees that are applicable to the states.

The ruling in *Ring* concerns an issue of substantive criminal law. In concluding that the Sixth Amendment requires that the jury, rather than the judge, determine the existence of aggravating factors, the Supreme Court described aggravating factors as "the functional equivalent of an element of a greater offense." *Ring*, 122 S.Ct. at 2243 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19 (2000)). *Ring* clarified the elements of the "greater" offense of capital murder. As explained above, *Ring* did not decide a procedural question (i.e., whether the Sixth Amendment requires that juries decide elements), but a substantive question (what is an element). Thus, retroactive application is required under *Bousley v. United States*, 523 U.S. 614 (1998), because the ruling addresses a matter of substantive criminal law, not a procedural rule.

VIII. The general jury qualification procedure employed by the Bay County Circuit Court deprived Mr. Orme of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of Florida law, this procedure constitutes fundamental error, and counsel was ineffective for failing to litigate this issue.

The above-entitled claim was Claim I of Mr. Orme's Amended Motion to Vacate Judgments of Convictions and Sentence With Special Request for Leave to Amend. The trial court's order denied relief on this claim stating that "The State presented evidence at the hearing that in fact the above claim is false and was made as mere speculation by the Defendant. (See Evidentiary Hearing transcript, volumn (sic) VI, pages 17-18, 71, 73, 74, 66)". PCR at 1217. The substantial majority of cites to the record are incorrect and do not even deal with the jury qualification issue. Volume VI pp. 71, 73, 74, and 66 all concern the cross-examination of Lisa Wiley, a Department of Corrections employee. Ms. Wiley is a mental health counselor on death row and had absolutely nothing to do with the jury qualification issue. Ms. Wiley's testimony strictly dealt with mental health issues. Interestingly enough, contrary to the trial court's statements, the cited testimony was elicited during cross-examination by defense counsel and not presented by the State.

The only cited testimony that dealt with the jury qualification issue was Volume VI, pp. 17-18. *(*PCR at 2066-7). The Assistant State Attorney questioned

trial counsel, Mr. Smith, about the general procedures typically used in Bay County; however, he does not elicit specific testimony regarding Orme's case. The only testimony specific to Orme's case within the cited testimony was elicited on cross-examination that trial counsel had no recollection of being present for the general jury qualification in Orme's case.

The Bay County Circuit Court's general jury qualification procedure is unconstitutional; 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's case is distinguishable from those in which this Court has held that general jury qualification is not a critical stage at which the defendant must be present. *See Wright v. State*, 688 So.2d 298 (Fla. 1996); *Bates v. State*, 750 So.2d 6 (Fla. 1999).

In every case in which this Court has held that the defendant's presence is not required during general jury qualification, the defendant's attorney was present to safeguard his client's rights and/or a transcript was made. Neither occurred in Orme's case, his attorney was not present and a transcript was not made.[46] This

[46]Because no record was made and all documentation relating to the jury pool was destroyed before Orme's conviction became final and the witnesses have no recollection of this specific case; through no fault of Orme, precise details of the general jury qualification proceeding are not available. In *Bates v. State*, *supra,* the State attorney for the Fourteenth Judicial Circuit admitted that the circuit Court in

Court continuously acknowledges and alludes to the fact that defense counsel was present in upholding general jury qualification procedures conducted without the defendant present. *See Bates v. State*, 750 So.2d 6 (Fla. 1999); *Wright v. State*, 688 So.2d 298, 300 (Fla. 1996); *Robinson v. State*, 520 So.2d 1,3 (Fla. 1988), transcript was also made; *Remeta v. State*, 522 So.2d 825,827 (Fla. 1988), transcript was made and defense counsel obtained waiver of client's presence. This ex parte system of juror qualification is practically an invitation for abuse by the State. Hypothetically, the State might object only to the release of persons who are seemingly pro-state, while not objecting to prospective jurors who are seemingly pro-defense. More insidious would be a situation where the only objections lodged were to the release of whites and no objections lodged tot he release of minorities. Possibly no objections would be lodged to those venirepersons who are known or suspected to have conservative viewpoints, while no objections would be lodged if the person was an outspoken activists or liberal minded. These actions would not produce a fair cross section of the community and would result in a jury pool already ideologically slanted against Orme. Unlike the cases cited *supra* defense counsel was not present to protect against any

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Bay County has long engaged in the practice of allowing a state attorney to participate in general jury pool qualification without a defense lawyer present.

prejudice to Orme.

The fact no transcripts or questionnaires exists is equally troubling. No written record of the reasons for disqualification are available. Determining the race, ethnicity, gender, religion, income level, social class, or any other aspects of the disqualified venirepersons is impossible. A transcript could have operated as a check on any type of abuse; but, just as defense counsel was missing, so is a transcript.

Mackey v. State, 548 So.2d 904 (Fla. 1st DCA 1989), is similar to and instructive for Mr. Orme's case. *Mackey* also originated in Bay County Circuit Court. A state attorney, outside the presence of the defendant and his counsel, was allowed to give a speech to prospective jurors regarding their duties as jurors. Defense counsel in *Mackey*, unlike in Orme's case, was allowed to question the state attorney at a pre-trial hearing to determine what had transpired; additionally, the trial court offered defense counsel the opportunity to question prospective jurors regarding any prejudice that may have arisen. *See Mackey* at 904-5. Although the First District Court of Appeal found that Mackey's appeal failed to demonstrate reversible error, the court was disturbed by the potential for prejudice inherent in the Bay County Circuit Court's general jury qualification system:

[We] write further to express to the bench and bar our concern with the

> practice of assigning or permitting the state attorney to advise prospective veniremen as to the legal requirements relating to jury service and the statutory entitlements to request exemption or excuse from jury duty ... We cannot say that, in the future, questions of substance will not arise concerning state attorney qualification of jurors which may dictate a result different than that reached here today. 548 So.2d at 905-6.

In contrast to *Bates*, Orme's and his attorney were both absent from the general jury qualification; a state attorney was present and participating in the proceeding; and no record exists to verify that the proceeding was conducted without prejudice to orme. Moreover, unlike the situation in *Mackey*, no hearing was ever held in Orme's case to determine the nature of the proceeding; nor was defense counsel given the opportunity to question prospective jurors about the proceeding. Defense counsel was effectively denied the opportunity to challenge the panel under Rule 3.290 of the Florida Rules of Criminal Procedure.

Not only was no record made of this critical stage of jury selection; Orme bears the additional burden that all records relating to the jury pool were destroyed before his conviction became final, thus rendering these important records unavailable to collateral counsel. The lack of any documentation of this proceeding is an omission in the record which denied Orme a proper appeal, and now, a proper collateral review. Under similar circumstances, this Court has in the past required that the cause be remanded for a new trial. *Delp v. State*, 350 So.2d 462

(Fla. 1977); *See also, Blalock v. Rice*, 707 So.2d 738 (Fla. 2d DCA 1997) (lack of record of contempt hearing required vacating plea and conviction).

IX. CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, Roderick Michael Orme, urges this Court to reverse the lower court's order and grant Mr. Orme Rule 3.850 relief.

X. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Cassandra Dolgin, Office of the Attorney General, The Capitol, PL - 01, Tallahasse, Florida 32399, on August 7, 2003.

XI. CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 14 point Times New Roman type, a font that is not proportionately spaced.

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