IN THE FLORIDA SUPREME COURT

RODERICK MICHAEL ORME,

Appellant,

v. **CASE NO. 02-2625**

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BAY COUNTY
STATE OF FLORIDA

REPLY BRIEF

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On behalf of Mr. Orme

ARGUMENT IN REPLY TO STATE'S ANSWER BRIEF

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROVIDE HIS EXPERTS WITH THE PROPER INFORMATION TO DIAGNOSE MR. ORME'S BIPOLAR CONDITION AND SUBSEQUENTLY PRESENT THAT CONDITION TO THE JURY

Wiggins v. Smith, 539 U.S. _____ , 123 S.Ct. 2527, 156 L.Ed.2d 471, 2003 U.S. Lexis 5014 (2003), was recently decided by the U.S. Supreme Court on June 26, 2003. In *Wiggins,* the U.S. Supreme Court reviewed Wiggins' claim that his trial counsel were ineffective for failing to investigate his background and present mitigating evidence of his life history and presenting such evidence at his penalty phase. *See Wiggins* at **481-2. The *Wiggins* Court's analysis produced a detailed review of the standard governing strategic decisions made by trial counsel. The *Wiggins* Court stated:

> "When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* (emphasis in original) rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing... because counsel had *some* (emphasis in original) information with respect to petitioner's background ... they were in a position to make a tactical choice not to present a mitigation defense. (citation omitted) 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. Even assuming Schlaich and Nethercott limited the scope of their investigation for strategic reasons, *Strickland* does

> not establish that a cursory investigation justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." (citation omitted).
> *Wiggins* at **488.

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 by 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.

The State attempts to characterize trial counsel's failure to present evidence that Mr. Orme suffers from bipolar disorder as a strategic decision. *See* A.B. at 51.

However, the trial court never made such a finding. The State admits no finding was made within their brief by stating: "While not directly saying so, it is clear the trial court concluded it was a reasonable strategy on trial counsel's part to choose to pursue a strategy clearly supported by objective and supportable evidence and not to pursue one that was not." *See* A.B. at 51. 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. The trial judge made no finding of fact that trial counsel was not ineffective and deficient, nor did she find that a strategic decision had been made regarding trial counsel's total failure to present evidence of Mr. Orme's bipolar disorder in either phase of the trial. *See* PCR at 1218. Had she found that a strategic decision had been made, then the question of ineffectiveness would not remain.

The State attempts to extrapolate a finding that trial counsel made a strategic decision to not pursue an investigation or presentation of Mr. Orme's bipolar disorder and then attempts to justify that extrapolated "strategic decision." A.B. at 51. In support of the decision to not investigate or present evidence of Mr. Orme's bipolar disorder, the State opines that trial counsel did not unreasonably limit Dr. Warriner's or Dr. McClane's investigation, interviewed Dr. Walker, and determined there was a dearth of evidence to support Dr. Walker's diagnosis. This argument

reeks of the type of *post-hoc* rationalization of trial counsel's conduct that the U.S. Supreme Court condemned in *Wiggins*. *Wiggins* at 488.

The State attempts to lay the burden of investigation at the feet of the doctors. However, neither Dr. Warriner nor Dr. McClane was provided a copy of Dr. Walker's report diagnosing Mr. Orme as bipolar shortly after he was incarcerated. A prior diagnosis by a competent professional is critical information when diagnosing a patient.

To somehow expect that Dr. McClane would be able to investigate this case is unreasonable when the true facts are revealed. Dr. McClane's original evaluation occurred after the jury had already found Mr. Orme guilty and just one day before the start of the penalty phase. The obvious time limitation prevented Dr. McClane from performing any investigation on his own. Dr. McClane had a list of information he needed to make a more informed diagnosis that he gave to trial counsel, including Mr. Orme's jail records. PCR at 1978-80. Had he received the jail records, Dr. McClane would have been alerted to Dr. Walker's diagnosis and that Mr. Orme had been prescribed medication in an attempt to manage his bipolar disorder. The record does not reflect Dr. McClane as being provided any affidavits of family members or being given the opportunity to interview them until they were provided by postconviction counsel. Trial counsel had a duty to investigate and

provide all the information to the experts, particularly since trial counsel's actions placed severe time limitations upon Dr. McClane.

Providing complete medical records and a thorough family history are elemental components of effectively preparing a capital case. The U.S. Supreme Court in *Wiggins* instructed:

> The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* (emphasis original) evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p.93 (1989) (emphasis added) Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Wiggins* at **486-7.

Clearly, a medical record that was in trial counsel's possession, jail records of a defendant who trial counsel knew was prescribed medication and receiving medical treatment for a severe mental illness at the county jail, and a complete family history was basic information that trial counsel should have provided his experts. Failure to provide these records was clearly ineffective.

Although Dr. McClane diagnosed Mr. Orme with depression prior to trial, he changed his diagnosis to bipolar once he was provided Dr. Walker's report and diagnosis and the affidavits from family members by post-conviction counsel. PCR at 1984-5. Dr. McClane explained that most bipolar patients are initially

diagnosed with depression. The bipolar diagnosis then occurs only after the doctor sees the patient in a manic state or receives other information evidencing mania. PCR at 2022. Trial counsel could have provided Dr. McClane with both sources of information had he conducted an effective investigation, which would have allowed Dr. McClane to make the bipolar diagnosis at trial.

The State and the trial court mistakenly obfuscate the issue when they focus on the minor discrepancies between the doctors diagnoses. A.B. at 49. The conflict as to diagnoses is overstated. Four competent experts diagnosed Orme as suffering from bipolar disorder. Any minor discrepancies as to whether it is a mixed type or NOS (not otherwise specified) and the like does not justify rejecting the defense. The jury could have and should have simply considered the discrepancies in assessing the proper weight to assign this powerful mitigation. 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.

The State attempts to portray trial counsel's failure to present the evidence of Mr. Orme's bipolar condition as a strategic choice. A.B. at 48-9. This argument is not supported by the record. Trial counsel stated he should have presented the

bipolar evidence and that he does not know why he didn't. He also testified he could have presented evidence of both the bipolar and the intoxication, as they were not mutually exclusive. PCR at 1690-1. Trial counsel acknowledged that bipolar is one of the most severe and significant of all mental illnesses, somewhat akin to schizophrenia. PCR at 1655-7.

The failure to present evidence of the bipolar disorder severely prejudiced Mr. Orme's defense. Had the bipolar evidence been presented there is a reasonable likelihood that the outcome of the trial would have been different. Mr. Orme's jury recommended death by a 7-5 vote. One juror switching his or her vote would have resulted in a life recommendation. The power of presenting evidence of intoxication and a bipolar disorder together in combination cannot be understated. Within the files provided to trial counsel, Mr. Smith, by Mr. Orme's original trial counsel, Pam Sutton and Mike Stone, was a journal article. The article specifically discussed the importance of a jury understanding a defendant's underlying mental state in conjunction with any evidence of intoxication. PCR at 1654; *See* Defense Exhibit 6. The State's argument that the failure to present evidence of Mr. Orme's bipolar disorder is a *post-hoc* justification that is not corroborated by the record and is condemned in *Wiggins*.

The State's arguments at trial made it imperative that the evidence of bipolar

be presented. At trial the State negated and demeaned the intoxication defense as hiding behind a crack pipe or a liquor bottle. *See* R. at 142, 201, 252, 302, 303, 309. 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 could have swayed the one juror needed to change the jury's recommendation from death to life. This explanation was particularly important since the State used Mr. Orme's addiction to convince the jury to return a death recommendation. Throughout the trial, the State characterized Mr. Orme as a "drug addict" who had "a particular thirst for crack cocaine." R. 327. Incessantly, the State emphatically argued 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. Had trial counsel provided the nexus between Mr. Orme's addiction and his mental illness, Mr. Orme's drug use would have been "seen by the jury as a less blameworthy prospect." PCR at 1708. Not learning of Mr. Orme's bipolar disorder, the jury was not provided an explanation of why Mr. Orme's used drugs, thus, allowing the State to portray Mr. Orme's drug use as villainous, rather than mitigating.

Trial counsel was aware 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. The less volitional an act the less culpable the actor. Both ineffectiveness and 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.

II. MR. ORME'S *RING* CLAIM IS NOT PROCEDURALLY BARRED AND THE HOLDING IN *RING* IS RETROACTIVE

A. *WITT* IS THE CONTROLLING PRECEDENT AS TO RETROACTIVE APPLICATION OF CHANGES IN DECISIONAL LAW IN FLORIDA.

Witt is the controlling precedent in Florida when determining whether a change in decisional law in Florida has retroactive application. The *Witt* Court stated:

> To summarize, we today hold that an alleged change in the law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the U.S. Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. *Witt v. State*, 387 So.2d 922 (Fla. 1980).

The State concedes that the first two parts of the three-part test promulgated in *Witt* are present in Mr. Orme's case regarding his *Ring* claim. *See* A.B. at 67. The third requirement whether the change wrought by *Ring* is of fundamental significance thus manifests itself as the crucial inquiry. Justice Shaw specifically found Bottoson's *Ring* claim was to be applied retroactively, stating as to the third prong of *Witt*, "And third, Ring is of 'fundamental significance,' for its purpose is to safeguard the basic protections guaranteed by the right to trial by jury." *Bottoson v. Moore*, 833 So.2d 693, 717 (Shaw, J. concurring) (Fla. 2002). The State argues Mr. Orme should have raised the issue originally in the trial court or on direct

appeal. The State made similar arguments in *Bottoson* and Justice Shaw observed in his concurring opinion:

> "The state contends that Bottoson cannot obtain relief under Ring because he failed to raise the issue at trial. I find this argument disingenuous in light of the fact that Bottoson was tried nearly twenty years before *Apprendi* was decided and thus had no basis for arguing that a 'death qualifying' aggravator must be treated as an element of the offense. In point of fact, there is no indication that either the Arizona Supreme Court or the U.S. Supreme Court required that *Ring* himself raise the issue at trial, and yet both courts reviewed his claims and the United States Supreme Court granted relief. (citations omitted) *Bottoson* at 718.

While Orme's case was not tried twenty years ago, he was tried over a decade ago well before the U.S. Supreme Court decided *Ring*. Mr. Orme should receive review of his *Ring* claim just as Linroy Bottoson and Timothy Ring received review.

B. ALTHOUGH NOT REQUIRED, A PROPER *TEAGUE* ANALYSIS REVEALS THAT MR. ORME'S *RING* CLAIM IS NOT PROCEDURALLY BARRED AND SHOULD BE APPLIED RETROACTIVELY.

The federal standard for reviewing whether a change in decisional law should be applied retroactively was enunciated in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Recently the Eleventh Circuit Court of Appeals considered *Turner v. Crosby*, 339 F.3d 1247, 2003 U.S. App. LEXIS 15043, 16 Fla.L.Weekly Fed C926 (11th Cir. 2003). In *Turner*, the court held his *Ring* claim was procedurally barred because he never brought a *Ring* claim in state court by

stating: "In his state court proceedings, Turner never claimed that Florida's capital sentencing structure violated his *Sixth Amendment* (emphasis original) right to a trial by jury. Thus, Turner is procedurally barred from bringing a *Sixth Amendment* (emphasis original) claim under Ring in this § 2254 proceeding." *Id.* at **97. Rather, the first time Turner raised a *Ring* claim was in federal court. *Turner* involved a pre-AEDPA writ of habeas corpus filed in federal court in 1993, unlike Mr. Orme's *Ring* claim, which was timely filed in state court. The state's reliance on *Turner* is misplaced. Mr. Orme's case is in an entirely different procedural posture than *Turner*. Additionally, since *Teague* is not the standard used to determine retroactivity in Florida, any *Teague* analysis conducted in *Turner* is irrelevant to Mr. Orme's case.

The State's reliance on the holding of *Turner* for the proposition that *Ring* is not applicable retroactively to Mr. Orme's case is equally unsound. Since the *Turner* Court held that his *Ring* claim was procedurally barred, the *Teague* analysis as to retroactivity is dicta. The procedural bar found in *Turner* renders any analysis on the merits superfluous and not binding on this Court or any other.

The instructive precedent on the retroactivity of *Ring* claims is found within *Summerlin v. Stewart*, 341 F.3d 1082, 2003 U.S. App. LEXIS 18111 (9th Cir. 2003) *cert. granted, Schriro v. Summerlin*, 157 L.Ed.2d 692 (December 1, 2003).

After the Court conducted a *Teague* analysis, Summerlin's *Ring* claim was held to not be procedurally barred and that the holding of *Ring* should be retroactively applied. *Id*. at **118. Interestingly, the court held that *Ring* was substantive in nature and not procedural; therefore, a *Teague* analysis is not even truly necessary to *Ring* claims. *Id.* at **72. Furthermore, the court held that a harmless error analysis was inappropriate when it stated: "In short, allowing a constitutionally disqualified fact-finder to decide the case is a structural error, and *Ring* error is not susceptible to harmless-error analysis." **101.

The Court in *Summerlin* first observed that *Teague* is not controlling when determining whether his *Ring* claim was procedurally barred because the claim is substantive in nature. Before proceeding to a *Teague* analysis, a court must initially determine whether the rule sought to be applied is procedural or substantive. *Id.* at **46.

> "And because *Ring* is a 'substantive' decision with regard to the meaning, structure, and ambit of the relevant provisions of Arizona's criminal law, *Teague* does not bar retroactive application of *Ring* to cases decided under those Arizona provisions, regardless of whether those cases are considered on direct or collateral review." *Id.* at **71.

III. THE STATE'S ARGUMENT REGARDING JURISDICTION IS SOPHISTIC AND UNTIMELY, ALTHOUGH RESTING UPON AN UNDERSTANDABLE, ALBEIT INCORRECT ASSUMPTION

The State's argument regarding jurisdiction is plausible but rests on an incorrect assumption. The State opines that this Court is without jurisdiction because the notice of appeal was filed on December 6, 2002, 36 days after the rendition of the trial court's order denying Mr. Orme's motion for rehearing on October 31, 2002. A.B. at 13-4. The notice of appeal appears to have been filed three days after the time period for filing the notice of appeal expired. The time period would have expired Monday, December 2, 2002. The notice of appeal was filed on December 6, 2002 instead because prior postconviction counsel received the order denying Mr. Orme's motion for rehearing in the mail after the time period to file the notice of appeal had expired. Upon receiving the order, Mr. Orme's prior postconviction counsel filed the notice of appeal without delay.[1] Orme's notice of appeal was filed on Friday when it should have been filed on the Monday of the same week. The State cannot and has not alleged any prejudice from the three-day delay. Mr. Orme's life is directly dependent upon the instant appeal. Unfathomable

[1] If required, Mr. Orme can request his previous postconviction counsel provide an affidavit as to the facts stated above. Additionally, Mr. Orme has no objection to a remand to the trial court to establish the facts stated above.

is the only way to characterize this appeal being dismissed for a lack of jurisdiction for a three-day delay. Dismissal would be a particularly harsh sanction since neither Mr. Orme nor his previous postconviction counsel, through no fault of their own, knew the order was rendered until the time period had passed for the notice of appeal to be filed. Dismissal of an appellate proceeding should be employed sparingly and only after repeated violations or contumacious disregard of a court's orders. *See Krebs v. State*, 588 So.2d 38 (Fla. 5th DCA 1991).

WHEREFORE Roderick Michael Orme requests based upon the foregoing argument, reasoning, citation to legal authority and the record this Court to reverse the trial court's order and remand to the trial court for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to State's Answer Brief has been furnished by hand to the Clerk of Court and by United States Mail, first class postage prepaid to all counsel of record on January 12, 2004.

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