IN THE SUPREME COURT OF FLORIDA

RODERICK MICHAEL ORME,

Appellant,

v. CASE NO. SC08-182

STATE OF FLORIDA,

Appellee.

____________________________/

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

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES.. iii

PRELIMINARY STATEMENT....................................... 1

STATEMENT OF THE CASE AND FACTS............................. 2

SUMMARY OF THE ARGUMENT..................................... 11

ARGUMENT.. 16

ISSUE I 16

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW ORME TO CHALLENGE FOR CAUSE PROSPECTIVE JURORS WHO COULD NOT CONSIDER REMORSE AS MITIGATING A DEATH SENTENCE AND TO CONSIDER ORME'S REMORSE AS A MITIGAING FACTOR IN ITS SENTENCING ORDER (RESTATED)

ISSUE II 32

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW ORME TO INQUIRE OF PROSPECTIVE JURORS WHETHER THEY COULD CONSIDER RECOMMENDING A LIFE SENTENCE AS A MATTER OF MERCY EVEN THOUGH THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATION (RESTATED)

ISSUE III 38

WHETHER THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE VENIRE WHEN ONE PROSPECTIVE JUROR ASKED WHETHER ORME COULD BE ELIGIBLE FOR PAROLE AFTER TWENTY-FIVE YEARS (RESTATED)

ISSUE IV 49

WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO ALLOW ORME TO WAIVE HIS RIGHT TO THE SENTENCING OPTION OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE FOR TWENTY-FIVE YEARS IN FAVOR OF A HARSHER PUNISHMENT OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE (RESTATED)

ISSUE V 50

WHETHER THE TRIAL COURT ERRED IN GIVING NO WEIGHT TO MITIGATION THIS COURT HAS CLEARLY HELD MITIGATES A DEATH SENTENCE (RESTATED)

ISSUE VI 67

WHETHER THE TRIAL COURT ERRED IN FINDING THAT ORME COMMITTED THE MURDER FOR PECUNIARY GAIN (RESTATED)

ISSUE VII 74

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL (RESTATED)

ISSUE VIII 83

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS COMMITTED IN THE COURSE OF A SEXUAL BATTERY (RESTATED)

ISSUE IX 89

WHETHER ORME'S SENTENCE TO DEATH VIOLATED THE DICTATES OF RING V. ARIZONA (RESTATED)

SUPPLEMENTAL ISSUE X 90

WHETHER ORME'S SENTENCE TO DEATH IS PROPORTIONATE

CONCLUSION.. 94

CERTIFICATE OF SERVICE...................................... 95

CERTIFICATE OF COMPLIANCE................................... 95

TABLE OF AUTHORITIES

Cases

Banks v. State,
700 So. 2d 363 (Fla. 1997) 64

Barnhill v. State,
834 So. 2d 836 (Fla. 2002) 90

Bates v. State,
750 So. 2d 6 (Fla. 1999) 31, 48, 49

Beasley v. State,
774 So. 2d 649 (Fla. 2000) 29

Bevel v. State,
983 So. 2d 505 (Fla. 2008) 25

Blackwelder v. State,
851 So. 2d 650 (Fla. 2003) 28

Blackwood v. State,
777 So. 2d 399 (Fla. 2000) 93

Blanco v. State,
706 So. 2d 7 (Fla. 1997) 50

Bogle v. State,
655 So. 2d 1103 (Fla. 1995) 79

Bowles v. State,
804 So. 2d 1173 (Fla. 2001) 50, 71, 80

Brooks v. State,
787 So. 2d 765 (Fla. 2001) 38

Brown v. State,
721 So. 2d 274 (Fla. 1998) 77

Bryant v. State,
656 So. 2d 426 (Fla. 1995) 22

Busby v. State,
894 So. 2d 88 (Fla. 2004) 22, 25

Buzia v. State,
926 So. 2d 1203 (Fla. 2006) 80

Caballero v. State,
851 So. 2d 655 (Fla. 2003) 90

Campbell v. State,
571 So. 2d 415 (Fla. 1990) 50

Carratelli v. State,
961 So. 2d 312 (Fla. 2007) 23, 24, 25, 26

Carter v. State,
980 So. 2d 473 (Fla. 2008) 72

Clark v. State,
609 So. 2d 513 (Fla. 1992) 67

Davis v. State,
859 So. 2d 465 (Fla. 2003) 37

Dennis v. State,
817 So. 2d 741 (Fla. 2002) 79

Deparvine v. State,
33 Fla. L. Weekly S 784 (Fla. Sept. 29, 2008) 31

Douglas v. State,
878 So. 2d 1246 (Fla. 2004) .... passim

Duest v. State,
855 So. 2d 33 (Fla. 2005) 67, 84

England v. State,
940 So. 2d 389 (Fla. 2006) 79

Finney v. State,
660 So. 2d 674 (Fla. 1995) 72

Fitzpatrick v. State,
900 So. 2d 495 (Fla. 2005) 87

Francis v. State,
808 So. 2d 110 (Fla. 2001) 80

Franklin v. State,
965 So. 2d 79 (Fla. 2007) 71

Geralds v. State,
674 So. 2d 96 (Fla. 1996) 93

Globe v. State,
877 So. 2d 663 (Fla. 2004) 51

Green v. State,
907 So. 2d 489 (Fla. 2005) 46, 47

Harris v. State,
843 So. 2d 856 (Fla. 2003) 67

Hill v. State,
477 So. 2d 553 (Fla. 1985) 22

Hurst v. State,
819 So. 2d 689 (Fla. 2002) 59, 62, 64

Ibar v. State,
938 So. 2d 451 (Fla. 2006) 37

Johnson v. State,
903 So. 2d 888 (Fla. 2005) 46

Johnson v. State,
969 So. 2d 938 (Fla. 2007) 85, 89

Johnston v. State,
841 So. 2d 349 (Fla. 2002) 93

Kormondy v. State,
703 So. 2d 454 (Fla. 1997) 51

Lawrence v. State,
691 So. 2d 1068 (Fla. 1997) 71

Lawrence v. State,
698 So. 2d 1219 (Fla. 1997) 79

Lusk v. State,
446 So. 2d 1038 (Fla. 1984) 22, 24

Mansfield v. State,
758 So. 2d 636 (Fla. 2000) 90

Offord v. State,
959 So. 2d 187 (Fla. 2007) 30

Orme v. State,
677 So. 2d 258 (Fla. 1996) 66, 78

Parker v. State,
873 So. 2d 270 (Fla. 2004) 39

Perry v. State,
801 So. 2d 78 (Fla. 2001) 21, 32

Ponticelli v. State,
618 So. 2d 154 (Fla. 1993) 45

Reynolds v. State,
934 So. 2d 1128 (Fla. 2006) 50, 51

Ring v. Arizona,
536 U.S. 584 (2002) 89

Rutherford v. State,
880 So. 2d 1212 (Fla. 2004) 89

Singleton v. State,
783 So. 2d 970 (Fla. 2001) 31

Stephens v. State,
975 So. 2d 405 (Fla. 2007) 73, 77

Thomas v. State,
693 So. 2d 951 (Fla. 1997) 30

Thompson v. State,
619 So. 2d 261 (Fla. 1993) 45

Trease v. State,
768 So. 2d 1050 (Fla. 2000) 50, 51

Wainwright v. State,
33 Fla. L. Weekly S 929 (Fla. November 26, 2008) 80

Washington v. State,
687 So. 2d 279 (Fla. 2d DCA 1997) 39

Williams v. State,
500 So. 2d 501 (Fla. 1986) 49

Williams v. State,
967 So. 2d 735 (Fla. 2007) 45

Wilson v. State,
493 So. 2d 1019 (Fla. 1986) 80

PRELIMINARY STATEMENT

Appellant, RODERICK ORME raises nine issues in his appeal from his sentence to death after a second penalty phase. This Court ordered a new penalty phase after concluding that trial counsel was ineffective during the penalty phase of Orme's original trial when he failed to sufficiently investigate and present evidence of Orme's bipolar diagnosis. Orme v. State, 896 So. 2d 725 (Fla. 2005).

Orme's conviction for first degree murder, sexual battery, and robbery were affirmed by this Court in Orme v. State, 677 So. 2d 258 (Fla. 1996). This Court's decision to order a new penalty phase did not disturb Orme's convictions. Orme v. State, 896 So. 2d 725 (Fla. 2005).

References to the appellant will be to "Orme" or "Appellant". References to the appellee will be to the "State" or "Appellee". The sixty-one (61) volume record on appeal in the instant case will be referenced as "2PP" followed by the appropriate volume number and page number. References to Orme's initial trial proceedings will be referred to as "TR" followed by the appropriate volume and page number. References to Orme's initial post-conviction proceedings will be referred to as "PCR" followed by the appropriate volume and page number. Finally, references to Orme's initial brief will be to "IB" followed by the appropriate page number.

STATMENT OF THE CASE AND FACTS

Roderick Orme, born on November 24, 1961, was 30 years old when he robbed, raped, and murdered Lisa Redd on March 3, 1992.

The relevant facts concerning Lisa Redd's murder are recited in this Court's opinion on direct appeal:

> …Roderick Michael Orme had an extensive history of substance abuse for which he previously had sought treatment at a recovery center in Panama City. On the morning of March 4, 1992, Orme suddenly appeared at the center again, despite a lapse of about a year since his prior treatment. He was disoriented and unable to respond to questions, but he did manage to write a message. It was "LEE'S MOT RM15."
>
> While a breathalyzer returned negative results, Orme's blood tested positive for cocaine and he was showing signs of acute cocaine withdrawal. He was cold, his face was flushed, and he was exhibiting symptoms like delirium tremens. An attending physician placed Orme in intensive care for thirty hours. Illegal barbiturates were found in Orme's possession.
>
> Lee's Motel was located only a few blocks from the recovery center. Someone at the center telephoned the motel and said that a man who sounded hysterical had said to check room 15. The owner did so and found the body of a woman who had been badly beaten.
>
> Semen was found in the victim's orifices, but DNA testing could not identify a DNA match. One sample taken from the victim's panties, however, held material that matched the pattern of Orme's DNA. Orme's underpants also had a mixed blood stain matching both Orme and the victim's genotype. Orme's fingerprints were found in the motel room, and his checkbook and identification card were found in the victim's car, which was parked outside.
>
> The cause of death was strangulation. There were extensive bruising and hemorrhaging on the face, skull, chest, arms, left leg, and abdomen, indicating a severe beating. The abdominal hemorrhaging extended

completely through the body to the back and involved the right kidney. Jewelry the victim always wore was missing and was never found. Police later identified the body as that of Lisa Redd, a nurse.

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

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

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

Orme was arrested on March 6, 1992, after his release from the hospital. On March 26, 1992, he was charged by indictment with premeditated or felony murder, robbery, and sexual battery.

At trial, Orme testified that Redd had arrived at his motel room at 7, 8, or possibly 8:30 p.m. He again said he returned to the motel room at some point. At this time he realized Redd's body was cold and that something was wrong. But he said the next thing he remembered was being in the hospital.

Robert Pegg, a cab driver, testified at trial that he had picked up Orme at Lee's Motel around 8 p.m.

> A man who lived across from the motel, Joseph Lee, also testified. He said that he generally kept track of what was happening at the motel and had first noticed the victim's automobile there around 9:30 or 10 p.m. Lee said he saw Orme leave and return several times. Before going to bed around 2 a.m., Lee said he saw Orme leave in the victim's car once more. Another witness, Ann Thicklin, saw someone slowly drive the victim's car into Lee's Motel around 6:15 a.m.

Orme v. State, 677 So. 2d 258, 260-61 (Fla. 1996).

At the conclusion of the penalty phase, Orme's jury recommended Orme be sentenced to death by a vote of 7-5. The trial judge followed the jury's recommendation, and sentenced Orme to death. Id.

On appeal, Orme raised eight issues: (1) it was error to deny Orme's motion for a judgment of acquittal when the case against him was purely circumstantial and the State failed to disprove all reasonable hypotheses of innocence; (2) it was error to deny Orme's motion to suppress his statements to officers on grounds he was too intoxicated with drugs to knowingly and voluntarily waive his right to remain silent; (3) death is not a proportionate penalty in this case because his will was overborne by drug abuse, and because any fight between the victim and him was a "lover's quarrel"; (4) because his mental state at the time of the murder was such that he could not form a "design" to inflict a high degree of suffering on the victim, the trial court erred in instructing the jury regarding, and in later finding, the aggravating factor of heinous,

atrocious, or cruel; (5) the trial court erred when it failed to weigh in mitigation the fact that Orme had no significant prior criminal history; (6) the trial court erred in declining to give a special instruction that acts perpetrated on the victim after her death are not relevant to the aggravator of heinous, atrocious, or cruel; (7) the instruction on heinous, atrocious, or cruel violated the dictates of Espinosa v. Florida, 505 U.S. 1079 (1992); (8) he was incapable of forming the specific intent necessary for first-degree murder and accordingly he cannot be sentenced to death. On May 2, 1996, this Court rejected each of Orme's claims of error and affirmed Orme's conviction and sentence. Orme's motion for rehearing was denied on July 23, 1996. Orme v. State, 677 So. 2d 258 (Fla. 1996).

Orme filed a Petition for Writ of Certiorari with the United States Supreme Court. The United States Supreme Court denied review on January 13, 1997, in Orme v. Florida, 519 U.S. 1079, 117 S.Ct. 742 (1997).

On December 12, 1997, Orme filed a timely motion to vacate his judgment and sentence with special leave to amend. On July 19, 2001, Orme filed an amended motion to vacate his convictions and sentence. Orme raised twenty-five claims in his amended motion for post-conviction relief.

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

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

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

On March 8, 2002, after an evidentiary hearing, the collateral court entered an order denying Orme's Amended Motion for Post-conviction Relief. (PCR Vol. VII 1217-1219). Orme filed a motion for rehearing on March 21, 2002. (PCR Vol. VII 1228-1229). The collateral court denied Orme's motion for rehearing on October 31, 2002. (PCR Vol. VII 1239).

On appeal, Orme raised three issues. Orme argued: (1) trial counsel was ineffective for failing to present evidence of Orme's diagnosis of bipolar disorder; (2) his death sentence is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), and its progeny; (3) the general jury qualifications procedure in Bay County, where he was tried, was unconstitutional.

Orme also filed a petition for habeas corpus, raising eight issues. In his petition, Orme claimed: (1) appellate counsel was ineffective for failing to raise on appeal his absence from critical stages of his trial; (2) appellate counsel was ineffective for failing to argue that the prosecutor engaged in misconduct rendering his conviction and sentence fundamentally unfair; (3) appellate counsel was ineffective because he should have argued on appeal that certain crime scene photos allowed into evidence were gruesome and unfairly prejudicial; (4) he is innocent of first-degree murder and of the death penalty; (5) the jury instructions were incorrect and erroneously shifted the

burden of proof; (6) the jury was given inadequate guidance concerning the aggravating circumstances, rendering his sentence of death fundamentally erroneous; (7) the prosecutor unconstitutionally introduced and relied upon nonstatutory aggravating circumstances; and (8) the jury's sense of responsibility toward its sentencing obligations was unconstitutionally diluted.

On February 24, 2005, this Court rejected Orme's claim his death sentence is unconstitutional pursuant to Ring v. Arizona. This court also rejected Orme's claim that Bay County's jury qualifications procedure is unconstitutional. Finally, this Court rejected each of Orme's habeas claims. Orme v. State, 896 So. 2d 725 (Fla. 2005).

This Court granted relief, however, on Orme's claim that trial counsel was ineffective for failing to investigate and present evidence of Orme's bipolar diagnosis. Orme v. State, 896 So. 2d at 736 (Fla. 2005). This Court remanded this case for a new penalty phase before a new jury. Id.

Orme's new penalty phase commenced on May 17, 2007. (TR Vol. XVII 2996). The State presented some twenty-one witnesses in its case in chief and one witness in rebuttal. Orme presented twelve witnesses in mitigation.

The jury recommended Orme be sentenced to death by a vote of 11-1. On July 6, 2007, the trial court held a Spencer

hearing to allow each side to present additional evidence or arguments to the trial court. (TR Vol. XVII 2997).

On July 23, 2007, the trial judge followed the jury's recommendation and sentenced Orme to death for the murder of Lisa Redd. (TR Vol. XVII 2996-3007). In her corrected sentencing order, the trial judge found three aggravators to exist beyond a reasonable doubt: (1) the murder was committed for pecuniary gain, (2) the murder was committed in the course of a sexual battery, and (3) the murder was especially heinous, atrocious, or cruel. The trial court gave these aggravators great weight. The court also found that any of these aggravators, standing alone, would outweigh all the mitigating circumstances. (TR Vol. XVII 3009-3012, 3018).

The trial court also found, but gave little weight to three statutory mitigators: (1) Orme had no significant criminal history, (2) at the time of the murder Orme was under the influence of an extreme mental or emotional disturbance due to his drug dependency, and (3) at the time of the murder, Orme's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired due to his impairment from cocaine and alcohol. (TR Vol. XVII 3013-3016).

The court also considered but rejected Orme's age in statutory mitigation. (TR Vol. XVII 3016). The court noted

that Orme was 30 years old at the time of the murder and was a mature adult in his professional and social endeavors. Accordingly, the trial court found Orme's age was not a mitigating circumstance and gave the mitigator no weight. (TR Vol. XVII 3016).

The trial court considered five non-statutory mitigators: (1) bipolar disorder contributed significantly to the defendant's substance abuse, (2) the defendant had a difficult childhood, (3) the defendant has exhibited model behavior while in prison, (4) Orme's potential for rehabilitation, and (5) Orme tried to get the victim help. She found the offered non-statutory mitigators had either not been established or were not mitigating in nature. (TR Vol. XVII 3016-3017).

Orme filed a motion for new trial on August 2, 2007. A hearing was held on the motion on January 11, 2008. The motion was denied on January 11, 2008. (2PP Vol. LI 4787).

Orme filed his notice of appeal on February 6, 2008. Orme filed his initial brief on September 29, 2008. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Orme avers the trial judge erred in precluding him from asking prospective jurors whether they could or would consider remorse in mitigation, denying his challenge for cause against prospective jurors who would not consider remorse as a mitigating factor, and refusing to consider Orme's remorse in her sentencing order. Each of Orme's claims should be denied.

Orme's claim the trial judge erred in refusing to allow him to question prospective jurors about remorse should be denied because Orme was actually permitted to ask prospective jurors whether they would consider Orme's remorse in mitigation. Orme's claim the judge erred in failing to allow him to challenge prospective jurors, for cause, who would not consider Orme's remorse in mitigation can be denied for several reasons.

First, the issue was not preserved for appeal. Second, Orme cannot show reversible error because he failed to exhaust his peremptory challenges and identify an objectionable juror who actually sat on his jury. Last, Orme pointed to no authority, either below or before this Court, that would require a trial judge to grant a challenge for cause against jurors solely on the grounds they would not promise to consider Orme's remorse in mitigation before any evidence of remorse was actually presented.

Finally, Orme’s claim the trial judge erred in failing to address Orme’s remorse in her sentencing order may be denied for three reasons. First, the claim is not preserved for appeal because Orme failed to bring this matter to the court’s attention in his motion for new trial or at the hearing held on his motion for a new trial. Second, Orme failed to present any evidence of genuine remorse. Finally, any error was harmless because there is no reasonable doubt that if the trial judge would have considered Orme’s “evidence” of remorse, Orme still would have been sentenced to death.

ISSUE II: In this claim, Orme avers the trial court erred in allowing Orme to ask potential jurors if they could consider life in prison as a matter of mercy even if they found the aggravators outweighed the mitigation evidence. This claim may be denied because the trial court actually allowed trial counsel to question prospective jurors whether they could consider mercy during their deliberations. A trial judge does not err in refusing to allow trial counsel to ask a question during voir dire when she actually allows trial counsel to ask the question.

ISSUE III: Orme offers no support for his claim the entire venire must be dismissed if a prospective juror asks whether Orme could be paroled after serving twenty-five years in prison. Orme cannot show the trial court abused his discretion in denying his motion to dismiss the venire.

The trial court gave a curative instruction in accord with this Court's decision in Green v. State, 907 So. 2d 489 (Fla. 2005). Additionally, none of the jurors, who expressed any concern that Orme might be released only ten years after his resentencing, actually served on Orme's jury.

ISSUE IV: In this claim, Orme alleges the trial judge erred in refusing to allow him to waive his right to the possibility of parole after 25 years in favor of the harsher punishment of life in prison without the possibility of parole. This murder occurred in March 1992 at a time when the only two possible punishments were death or life without the possibility of parole for 25 years. Accordingly, if the trial court were to sentence Orme to life without the possibility of parole, Orme's sentence would be an illegal sentence. This Court has rejected a similar claim and ruled that a defendant may not agree to an illegal sentence.

ISSUE V: In this claim, Orme avers the trial court erred in giving no weight to four non-statutory mitigating circumstances that this Court has clearly held mitigated a sentence. This claim should be denied because the trial judge considered each non-statutory mitigator offered by the defense in its sentencing memorandum. The court found two non-statutory mitigating circumstances had been established but gave them no weight. The

court found two of the offered non-statutory mitigators had not been established.

The trial judge's determinations are supported by competent, substantial evidence and Orme can show no abuse of discretion. Even if this Court were to find the trial judge erred in some respects any error is harmless.

ISSUE VI: In this claim, Orme alleges the trial court erred in finding Orme murdered Lisa Redd for pecuniary gain. In addition to murder and sexual battery, Orme was convicted of robbery. The evidence was sufficient to prove that the murder was committed for pecuniary gain.

ISSUES VII: Orme alleges the trial court erred in finding the murder was especially heinous, atrocious, or cruel because the court failed to consider whether the defendant enjoyed or was indifferent to Lisa Redd's suffering. This Court has ruled the HAC aggravator does not turn on the intent of the defendant. Rather, this Court has ruled that HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant. The evidence at trial showed that Lisa Redd was strangled and viciously beaten. This Court has repeatedly affirmed a finding the murder was especially heinous, atrocious, or cruel under similar circumstances.

ISSUE VIII: Orme alleges the trial court erred in finding that the murder was committed in the course of a sexual battery. Orme suggests that the evidence showed, with equal likelihood, the murder occurred after consensual sex. Orme was convicted of the sexual battery of Lisa Redd. His conviction was affirmed on appeal. Given that the jury's finding that Orme sexually battered Lisa Redd, there is sufficient evidence to support a finding the murder was committed in the course of a sexual battery.

ISSUE IX: Orme acknowledges his Ring claim has been decided adversely to his claim on appeal. Orme claims he recognizes the futility of repeating the arguments. Nonetheless, he repeats them anyway. In addition to being convicted for first degree murder, Orme was convicted of two contemporaneous felonies, robbery and sexual battery. The trial court found in aggravation, that Orme committed the murder in the course of a sexual battery. This Court has consistently held that Ring is satisfied when the murder is committed in the course of an enumerated felony.

SUPPLEMENTAL ISSUE X: Orme's sentence to death is proportionate when compared similar capital cases in Florida.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW ORME TO CHALLENGE FOR CAUSE PROSPECTIVE JURORS WHO COULD NOT CONSIDER REMORSE AS MITIGATING A DEATH SENTENCE AND TO CONSIDER ORME'S REMORSE AS A MITIGAING FACTOR IN ITS SENTENCING ORDER (RESTATED)

In his first claim, Orme avers the trial judge erred in failing to allow trial counsel to question jurors, initially, whether they could consider remorse as a mitigating factor during their deliberations. Orme also claims the trial court erred in failing to allow Orme to challenge jurors for cause if they would not consider, or give some weight to, remorse in mitigation. (IB 23). Finally, Orme claims the trial judge erred in failing to consider Orme's remorse in mitigation. (IB 25).

Jury selection in Orme's resentencing proceedings spanned four days.[1] The trial judge conducted voir dire in two stages. During the first stage of jury selection, prospective jurors were initially questioned one at a time. (2PP Vol. XLIII 3758). Then, two at a time were questioned. (2PP Vol. XLIV 3866). Eventually, prospective jurors were brought in three, and then four, at a time. (2PP Vol. XLV 4076-4110; 2PP Vol. XLV 4139).

[1] The third and fourth days were necessary because the court ran out of prospective jurors twice and had to issue two groups of emergency summonses. (2PP Vol. XLVIII 4539).

Prospective jurors were questioned about their prior knowledge of the case and their views about the death penalty. This portion of jury selection was designed to allow both sides to exercise challenges for cause against any prospective juror whose prior knowledge of the case or views about the death penalty would substantially impair their ability to serve as fair and impartial jurors.

During the second stage, prospective jurors were questioned in three larger groups. Only those who survived the first stage of jury selection went on to the second stage. (2PP Vol. XLVI 4255; 2PP Vol. XLVII 4380; 2PP Vol. XLVII 4494; 2PP Vol. XLVIII 4652).

During the first two days of jury selection, twenty-one jurors passed through both stages of jury selection. At the end of day two, the trial court put those twenty-one prospective jurors in the box and allowed both sides to exercise challenges. (2PP Vol. XLVI 4255). Ten prospective jurors were challenged from the jury. Eleven remained. (2PP Vol. XLVI 4371).

On the morning of the third day of jury selection, fourteen more jurors, who had also passed through stage one in the first two days of jury selection, were questioned in stage two. The eleven that had survived from the previous day were in the gallery.

Orme alleges that, on this third day of jury selection, the trial court erred in prohibiting him from asking prospective jurors whether they could consider remorse. The alleged error occurred when trial counsel asked prospective juror Ganzy if it would be "significant to your consideration of this case for us to present evidence [] that shows that Mr. Orme feels remorse about [what] happened." (2PP Vol. XLVII 4441).

The State objected on the grounds the question asked prospective jurors to prejudge the expected mitigating factors in this case. The State noted that it was not appropriate during voir dire to ask prospective jurors to prejudge aggravating factors or mitigating factors.

Trial counsel told the court that he should be able to explore whether jurors are willing to consider the type of evidence he will be presenting. (2PP Vol. XLVII 4442). The court asked trial counsel whether remorse is a non-statutory mitigator. Trial counsel told the court that just as jurors may feel sympathy and mercy in the job they have to do with which we cannot interfere, remorse is certainly something that normal human people think is important in a situation like this. (2PP Vol. XLVII 4442).

The court noted that the way the question was asked, it appeared trial counsel was asking jurors to give remorse weight. Trial counsel told the court that was not his intent. His

intent was to ask prospective jurors whether remorse was something they could consider. (2PP Vol. XLVII 4443). The Court noted that, at this point in time, the question was not appropriate. (2PP Vol. XLVII 4443)

Trial counsel told the court that he still needs to exercise his peremptory challenges. Trial counsel told the court that prospective jurors' willingness to consider remorse was crucial information to allow the defense to exercise those challenges. The Court said "sure." (2PP Vol. XLVII 4443). The court sustained the prosecutor's question, "at this time." (2PP Vol. XLVII 4443).

Shortly thereafter, the prosecutor suggested that the court allow trial counsel to inquire about remorse for the purpose of exercising his peremptory challenges. The prosecutor pointed to this Court's decision in Beasley v. State, 774 So. 2d 649 (Fla. 2000) as instructive. (2PP Vol. XLVII 4464). Before any further questioning occurred, the trial judge advised both sides that she would allow inquiry into remorse. She would not permit inquiry into how much weight a prospective juror might give remorse. The court ruled that a juror's unwillingness to consider remorse could be a basis for a peremptory challenge but not a challenge for cause. (2PP Vol. LXVII 4475-4476).

Trial counsel did not ask any of the fourteen prospective jurors in the box whether they would, or could, consider remorse

in mitigation. When the trial court granted trial counsel another opportunity to question the eleven who passed through stage two the afternoon before, trial counsel accepted the offer. (2PP Vol. XLVII 4488). He did not, however, ask any of the remaining eleven venire members whether they would, or could, consider Orme's remorse in mitigation. (2PP Vol. 4477-4506).

By the end of the third day of jury selection, there were still not enough prospective jurors to seat a twelve person jury and two alternates. Of the twenty-five prospective jurors who were present for jury selection on the morning of day three, only eleven remained at the end of the day. (2PP Vol. XLVII 4529). The trial judge directed the clerk of the court to summon more jurors. (2PP Vol. XLVII 4527).

On the fourth day of jury selection, eighteen more prospective jurors appeared for jury duty and were questioned in two stages. Fourteen of the new prospective jurors passed through stage one into stage two. (2PP Vol. XLVIII 4653-4654). During stage two questioning, trial counsel did not ask prospective jurors whether they could, or would consider Orme's remorse during their deliberations. (2PP Vol. XLVIII 4681-4703).

At the end of the fourth day, Orme's jury was finally seated. In selecting Orme's jury, Orme used nine peremptory

challenges and the State used seven. (2PP Vol. XLVII 4526, 2PP Vol. XLVIII 4711). Neither side exhausted all of their peremptory challenges. (2PP Vol. XLVII 4526, 2PP Vol. XLVIII 4711).

The State exercised both of its challenges against prospective alternate jurors and the defense exercised one. (2PP Vol. XLVIII 4710-4711). Orme did not request any additional peremptory challenges nor identify any prospective juror he wished to, but was not permitted to, challenge for cause because the prospective juror would not consider Orme's remorse in mitigation of his death sentence. (2PP Vol. XLVIII 4711).

A. Limitation of voir dire

The standard of review is an abuse of discretion. Perry v. State, 801 So. 2d 78 (Fla. 2001)(scope of voir dire questioning rests in the sound discretion of the court and will not be interfered with unless that discretion is clearly abused). This Court should deny this claim for one reason.

The trial judge did not prohibit trial counsel from asking prospective jurors whether they would, or could, consider Orme's remorse in mitigation. Although the trial court briefly limited trial counsel's questioning on remorse to the extent it would ostensibly support a challenge for cause, the trial court permitted trial counsel the opportunity to ask every member of the venire whether they would, or could, consider Orme's remorse

in mitigation. (2PP Vol. LXVII 4475-4476). The fact trial counsel failed to do so does not create error on the part of the trial court.

It is axiomatic that a trial judge does not err in refusing to allow trial counsel to ask prospective jurors a question, when she actually allows trial counsel to ask the question. This claim should be denied because there is no error.

B. ***Denial of challenge for cause***

The decision whether to excuse a juror for cause is a mixed question of fact and law that falls within the trial court's discretion. Busby v. State, 894 So. 2d 88, 95 (Fla. 2004). A juror is competent to serve if he can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See* Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995); Hill v. State, 477 So. 2d 553, 556 (Fla. 1985) (providing that if "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause").

This claim may be denied for two reasons. First, Orme did not preserve this claim for appeal. Trial counsel did object to

the trial court's ruling that a juror's unwillingness to consider remorse could not be a basis for a challenge for cause. He did not, however, actually attempt to exercise a challenge for cause against any prospective juror on those grounds.

Although permitted to do so by the trial court, Orme did not even ask prospective jurors whether they could not, or would not, consider his remorse in mitigation. Likewise, trial counsel did not renew his objection before the jury was sworn but instead advised the Court that Orme was satisfied with the jury. (2PP Vol. XLVII 4711, 2PP Vol. LII 8-12). As a result, this error is not preserved for appeal. Carratelli v. State, 961 So. 2d 312 (Fla. 2007)(denial of a challenge against a juror must be renewed before the jury is sworn).[2]

This claim may also be denied because even if this Court were to determine Orme preserved this issue for appeal, Orme cannot show reversible error. First, Orme has not cited to a single case that required the trial judge to allow a challenge

---

[2] Although Carratelli involved a denial of a challenge for cause against a specific juror(s), the denial of a challenge for cause against a specific class of jurors may be subject to the same analysis. This is especially true because Orme did not attempt to exercise a challenge for cause against a specific juror because of any issue about remorse. By failing to question jurors on remorse and then attempting to exercise a challenge for cause against a particular prospective juror, Orme made it impossible for this Court to review a specific error. Nor can it analyze whether the trial court's ruling caused Orme any harm.

for cause solely because a prospective juror could not, or would not, consider Orme's remorse as a mitigator.

The law of this state requires that every juror be fair and impartial to the extent he can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984). It does not require jurors to find any particular mitigator has been established nor to give weight to any evidence the defendant may, himself, believe to be mitigating. Instead, a juror is competent to serve if he is open to considering evidence that both sides may present, unfettered from any personal bias or prejudice. Lusk v. State, 446 So. 2d at 1041.

Orme does not point to a single juror that actually sat on Orme's jury who did not meet Florida's juror competency standard or who was unwilling to consider any of the mitigation evidence that Orme actually presented at trial. On this basis alone, Orme's claim should be denied.

Orme can also show no reversible error under this Court's decision in Carratelli v. State, 961 So. 2d 312 (Fla. 2007). To show reversible error in denying a challenge for cause, a defendant must show an objectionable juror actually sat on his jury because of the trial judge's error. Id.

In order to do so, a defendant, who has peremptory challenges remaining, must first use an available peremptory challenge to remove the juror for which the challenge for cause was improperly denied.[3] Next, the defendant must exhaust all his remaining peremptory challenges and request an additional peremptory challenge(s) to replace the one(s) he was forced to use against the objectionable juror(s).

If the trial court grants his request, the defendant can show no reversible error. Busby v. State, 894 So. 2d at 97 (If a defendant is granted the same number of additional peremptories as cause challenges erroneously denied, he cannot demonstrate prejudice). If the trial judge denies his request, the defendant must then identify an objectionable juror that remains, and actually sat, on his jury. Carratelli at 319; Busby v. State, 894 So. 2d 88, 97-98 (Fla. 2004). *See also* Bevel v. State, 983 So. 2d 505, 514 (Fla. 2008)

At the end of jury selection, Orme still had one peremptory strike remaining. Trial counsel told the court that he tendered and accepted the jury. Trial counsel also told the court that

[3] Ordinarily, a defendant will have some or all of his peremptory challenges remaining because most trial judges consider challenges for cause before requiring the parties to exercise peremptory challenges. A defendant may not show any nexus between the trial judge's ruling and the seating of an objectionable juror if he fails to use an available peremptory challenge to remove the juror he claims the trial judge should have stuck for cause.

Orme, personally, was in agreement with his attorney's decision as to the twelve seated jurors and two alternates and did not wish to exercise the defense's remaining challenge. (2PP Vol. XLVIII 4709, 4711). Orme made no claim the trial court improperly denied any particular challenge for cause. Finally, Orme did not identify an objectionable juror that actually sat on his jury. Pursuant to this Court's decision in Carratelli, Orme can show no prejudice and is not entitled to relief.

C. Trial judge's failure to consider remorse in mitigation

In this claim, Orme avers the trial judge erred in failing to find, in non-statutory mitigation, that Orme was remorseful. Orme points to decisions of this Court that have held convincing evidence of remorse may properly be considered in mitigation of the sentence. (IB 26).

Orme points to two places in the record that support a finding that Orme was remorseful. First, Orme claims his statement to the police exhibited remorse. In that statement, Orme told the police "No, I don't think I hurt her… I mean if I got into a drug craze and hurt her or killed her, then I would admit to it and suffer the consequences…. Because I've know her for 12 years. I used to carry her little boy around when he was two years old and that's why I can't sleep… But I still feel it's partially my fault because she would not have been there in the first place if I hadn't called her." (IB 28). Orme also

points to the Spencer hearing when he expressed sorrow and regret for his actions. (IB 28).

This claim may be denied for three reasons. Orme also did not preserve, for appeal, his claim the trial judge failed to address this matter in her sentencing order.[4]

After the jury had recommended Orme be sentenced to death by a vote of 11-1, the defense submitted a sentencing memorandum to the trial judge. (2PP Vol. XVII 2956-2958). Orme did not present remorse as a non-statutory mitigator. Subsequent to the Spencer hearing, however, Orme filed a supplemental sentencing memorandum. In the memo, Orme argued he was remorseful and had accepted responsibility for what he had done. (2PP Vol. XVII 2965-2966).

On July 23, 2007, the trial court sentenced Orme to death. The trial judge addressed each of the mitigators suggested by Orme in his initial sentencing memorandum but made no mention of remorse in her sentencing order. (2PP Vol. XVII 3008-3019).

---

[4] Orme also waived his right to have the jury consider Orme's genuine remorse when he waived his right to testify before the jury. The trial judge questioned Orme about his decision. The court pointed out that in Orme's first trial, he testified on the issue of his remorsefulness. The court told Orme that if he did not testify he was giving up his right to express remorse before the jury. Orme told the trial court that he understood, had consulted with his attorney about the decision, and did not wish to testify. The trial court informed Orme that by not testifying, he was waiving his right to present remorse to the jury as a mitigating factor. Orme told the court he understood and did not wish to testify. (2PP Vol. LXI 1169).

Orme filed a motion for new trial. (2PP Vol. XVII 3021-3022). Orme did not bring to the court's attention that it failed to address Orme's remorse, as a non-statutory mitigator or that it had overlooked the defendant's supplemental sentencing memorandum. (2PP Vol. XVII 3021-3022).

On January 11, 2008, a hearing was held on Orme's motion for new trial. Orme, once again, failed to raise any claim the trial court neglected to address an additional non-statutory aggravator that was presented in Orme's supplemental sentencing memorandum. (2PP Vol. LI). By failing to lodge any objection to the trial court's failure to address the additional mitigation offered in Orme's supplemental sentencing memorandum, Orme has waived this issue on appeal. *See* Blackwelder v. State, 851 So. 2d 650, 652 (Fla. 2003)(error in sentencing order not preserved because Blackwelder failed to object).[5]

This claim may also be denied because neither of Orme's statements, to which he points in his initial brief, rise to the level of genuine remorse so as to require the trial court to consider Orme's remorse in statutory mitigation. As to the former statement, it almost shocks the conscience for Orme to suggest his statement to the police, in particular his

---

[5] Requiring a defendant to point out this type of error in a motion for rehearing or motion for new trial promotes judicial economy and discourages "gotcha" tactics designed to delay the proceedings.

statement, “But I still feel it’s partially my fault because she would not have been there in the first place if I hadn’t called her,” should be considered as remorse. (2PP Vol. LIII 173). Orme certainly did not, and may not still, grasp that it is not “partially [his] fault”. It is entirely his fault. This Court should reject any notion Orme’s statement to the police required the trial court to consider and give weight Orme’s “remorse” in non-statutory mitigation.

As to his statement at the Spencer hearing, this Court has held that a statement of sorrow and regret is entirely different from evidence of genuine remorse. Beasley v. State, 774 So. 2d 649, 672 (Fla. 2000). While Orme expressed some sorrow and regret at the Spencer hearing, he did not ever admit he killed, raped, beat, and robbed Lisa Redd. He described his conduct as “the actions that occurred.” (2PP Vol. XLIX 4740).

Orme did not even direct his first comments to Lisa Redd’s family. Instead, Orme apologized, first, to his own family and apologized to his father who, in Orme’s view, had been “villianized” during the proceedings. (2PP Vol. XLIX 4740). Given his lukewarm statement of regret, the trial judge would have been entitled to find that remorse had not been established or to give Orme’s remorse no weight. Beasley v. State, 774 So. 2d at 672.

Finally, this Court may deny this claim because any error in the trial judge's failure to consider and weigh Orme's remorse is harmless. There is no reasonable doubt that, even if the trial court would have considered and given some weight to Orme's averred remorse, the trial court would have still imposed the death penalty. Thomas v. State, 693 So. 2d 951, 953 (Fla. 1997) (holding that the trial court's failure to evaluate mitigation evidence was error, but harmless because there was no reasonable doubt that the trial court would have imposed the death penalty in light of finding five aggravating circumstances).

In this case, the trial court found three aggravating circumstances, including that the murder was especially heinous, atrocious, or cruel. This Court has repeatedly held that HAC is one of the most serious aggravator in Florida's capital sentencing scheme. Offord v. State, 959 So. 2d 187, 191 (Fla. 2007); Douglas v. State, 878 So. 2d 1246, 1262 (Fla. 2004) (noting that HAC is "one of the most serious aggravators in the statutory sentencing scheme").

Weighed against these three serious aggravators, were three statutory mitigators to which the trial court gave little weight. Although the trial judge considered five non-statutory mitigators, at Orme's request, the court gave no weight to any of them. (2PP Vol. XVII 3005-3019). Given the statements to

which Orme claims show his "remorse" and given the trial court's findings in aggravation and mitigation, there is simply no doubt, let alone reasonable doubt, that even considering Orme's remorse in non-statutory mitigation, the trial judge would have still sentenced Orme to death. Deparvine v. State, 33 Fla. L. Weekly S 784 (Fla. Sept. 29, 2008)(failure to give express consideration to Deparvine's depression in the sentencing order was harmless error in light of four aggravating circumstances, including CCP and prior violent felony, all of which were given great weight and five mitigating factors which were given little weight). *See also* Singleton v. State, 783 So. 2d 970, 977 (Fla. 2001) (holding that trial court's error in failing to address non-statutory mitigation was harmless because the mitigators would not outweigh the aggravation in the case); Bates v. State, 750 So. 2d 6, 13 (Fla. 1999) (holding trial court's failure to consider non-statutory mitigation constituted harmless error). Orme's claim should be denied.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW ORME TO INQUIRE OF PROSPECTIVE JURORS WHETHER THEY COULD CONSIDER RECOMMENDING A LIFE SENTENCE AS A MATTER OF MERCY EVEN THOUGH THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATION (RESTATED)

In this claim, Orme alleges the trial court erred in refusing to allow trial counsel to ask prospective jurors whether they could consider mercy in making their sentencing recommendation to the trial judge.[6] The standard of review is an abuse of discretion. Perry v. State, 801 So. 2d 78 (Fla. 2001)(scope of voir dire questioning rests in the sound discretion of the court and will not be interfered with unless that discretion is clearly abused).[7]

The issue arose during the second day of voir dire when jurors were questioned during the first stage of jury selection.

---

[6] Mercy in this context was not used as a euphemism for a life sentence. Instead, trial counsel used the term mercy in the context of jurors' willingness to factor in sympathy, compassion or forebearance for Orme into their deliberations.

[7] Orme notes in his initial brief that the trial judge refused to grant a challenge for cause against Mr. Welch and Mr. Tallent because they would not consider mercy during his deliberations. (IB 30-31, n.10). Orme has not raised a claim on appeal that the trial judge erred in refusing to grant these two challenges for cause. Neither Mr. Welch nor Mr. Tallent were seated on Orme's jury. (2PP Vol. LII 12). Ms. Melvin, the other juror about whom Orme complains, also did not sit on Orme's jury. (2PP Vol. LII 12).

At the time, prospective jurors Welch, Herzog, and Smith were being questioned. (2PP Vol. XLV 4087, and 4094).[8]

Trial counsel questioned Mr. Welch, without objection from the State, on his views about mercy. Trial counsel engaged in the following colloquy with Mr. Welch:

Trial Counsel: How about your views on the subject, do you feel there is any point to a penalty trial?

Mr. Welch: Yes. There are circumstances that prevail. It's good to hear all the evidence put together and then make a sound decision.

Trial Counsel: Okay, do you feel that a decision like this should be based upon the facts and not have anything to do with mercy.

Mr. Welch: Facts.

Trial Counsel: Facts alone?

Mr. Welch: Facts alone.

Trial Counsel: All right. If the evidence in this case or the argument in this case involved appealing to you to at least consider the possibility of mercy, would that plea fall on deaf ears?

Mr. Welch: I would like to hear the evidence or statements concerning mercy before making a decision.

Trial Counsel: But aside from just the facts, the quality of mercy has no place in this proceeding as far as you are concerned.

Mr. Welch: Basically, yes.

(2PP Vol. XLV 4087-4088).

---

[8] Up to this point in the voir dire process, trial counsel did not attempt to inquire about the concept of mercy although numerous prospective jurors had been questioned.

When the parties finished questioning the three prospective jurors present, trial counsel challenged Mr. Welch for cause solely on the grounds that he would not consider mercy. The trial court denied the challenge. The trial court also sustained the State's objection to trial counsel's attempt to ask another prospective juror from a different group of three, Ms. Margaret Melvin, whether she would consider mercy during her deliberations. (2PP Vol. XLV 4108).[9]

On the afternoon of the same day, trial counsel asked the court to reconsider its ruling restricting counsel's ability to inquire about mercy. (2PP Vol. XLVI 4177) The prosecutor suggested the court permit questions about mercy when the second stage of voir dire began. (2PP Vol. XLVI 4177-4178).

During the second stage, both sides would question jurors with a view toward exercising peremptory challenges. (2PP Vol. XLVI 4177). The court ruled it would revisit the issue during the second part of voir dire when a larger group was questioned. (2PP Vol. XLVI 4178). The court noted that its ruling [prohibiting inquiry] was limited to challenges for cause. (2PP Vol. XLVI 4191).

[9] Trial counsel requested a mistrial on the grounds that the trial judge restricted his questioning about mercy. The trial judge denied the motion. (2PP Vol. XLV 4109).

After the court made its ruling, the first stage of voir dire continued with another three prospective jurors. Despite the trial court's promise to re-visit the issue during the second phase of voir dire, trial counsel questioned these three prospective jurors about the concept of mercy. The State lodged no objection. (2PP Vol. XLVI 4200).

Mr. Stone asked prospective jurors Colson, Tallent, and Neiman whether they could entertain considerations of sympathy or mercy in the penalty phase of Orme's trial. Only prospective juror Tallent said he would not consider mercy. Trial counsel challenged Mr. Tallent for cause because he would not consider mercy. The trial court denied the challenge. (2PP Vol. XLVI 4202).

During the second stage of jury selection, prospective jurors who had passed through stage one were questioned. As promised, the trial judge allowed trial counsel to question prospective jurors about mercy. The first group consisted of twenty-one prospective jurors. (2PP Vol. XLVI 4255). Trial counsel asked, without objection, whether everyone present could exercise mercy if they felt it was appropriate. Every prospective juror raised their hands. (2PP Vol. XLVI 4360).

The second group consisted of fourteen prospective jurors. Among those prospective jurors were Mr. Welch, Mr. Tallent, and Ms. Melvin. (2PP Vol. XLVII 4380).

Mr. Stone asked all fourteen prospective jurors whether any of the prospective jurors could not consider mercy in coming to a decision as to the penalty in this case. A bit later, trial counsel asked prospective jurors whether they believed that mercy is a trait basic to all human beings. All fourteen agreed this was the case. (2PP Vol. XLVII 4487).

Trial counsel followed up by asking prospective jurors if there was anyone that would not be able to consider mercy in this case. No prospective juror said they would not be able to consider mercy. (2PP Vol. XLVII 4488).

On the last day of jury selection, trial counsel questioned the last fourteen prospective jurors during stage two of jury selection. (2PP Vol. XLVIII 4652, 4681-4698). Trial counsel did not inquire whether this group of fourteen would consider mercy during their deliberations. The trial court did not, however, put any limitation on his ability to do so. (2PP Vol. XLVIII 4681-4698).

This claim should be denied. First, and most obvious, is that while the court initially denied trial counsel the opportunity to question prospective jurors about mercy during the first stage of jury selection, the court allowed trial counsel to question jurors about their willingness to consider mercy during the second stage. It is axiomatic that a trial court does not err by refusing to allow a question to be asked

during voir dire if the court actually allows the question to be posed to the venire.

The court did not even err in temporarily denying counsel the opportunity to ask prospective jurors whether they could consider mercy. A juror is not subject to a challenge for cause because he is unwilling to consider mercy during his deliberations. As such, restricting trial counsel's ability to ask about the concept of mercy, during the first stage of jury selection, did not interfere with trial counsel's ability to exercise any valid challenge for cause. Davis v. State, 859 So. 2d 465, 473-474 (Fla. 2003)(a trial judge does not abuse his discretion in refusing to grant a challenge for cause against a juror solely on the grounds he would not consider mercy during his deliberations). *See also* Ibar v. State, 938 So. 2d 451, 473 (Fla. 2006) (rejecting a claim by a capital defendant that the trial court erred in limiting his ability to argue for mercy, a jury pardon, and discussing whether the jury had lingering doubt).

In any event, any error in temporarily restricting trial counsel's ability to inquire about mercy was harmless. Trial counsel was permitted ask prospective jurors whether they believed the death penalty should be reserved for the worst of the worst, to explore their views on the death penalty, and to inquire into their willingness to consider mitigating

circumstances such as drug and alcohol abuse, child abuse and neglect, intoxication at the time of the offense, mental health history, mental diseases and disorders, and a good record since the murder. (2PP Vol. XLIII 3816, 3834, 3860; 2PP Vol. XLIV 3880, 3886, 3901, 3902, 3959, 3977, 3994, 3996, 4040, 4041, 4131, 4152, 4153; 2PP Vol. XLVI 4213, 4234; 2PP Vol. XLVIII 4552-4553, 4612, 4629, 4688, 4690, 4696).

Because the trial court allowed trial counsel to fully explore jurors' willingness to consider all of the mitigation evidence that Orme would eventually present to his jury, any error in temporarily restricting Orme's ability to inquire about the concept of mercy, in the abstract, was harmless. This Court should deny Orme's second claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE VENIRE WHEN ONE PROSPECTIVE JUROR ASKED WHETHER ORME COULD BE ELIGIBLE FOR PAROLE AFTER TWENTY-FIVE YEARS (RESTATED)

In this claim, Orme alleges the trial court should have struck the entire venire when at least one prospective juror, Mr. Bishop, had problems recommending a life sentence if Orme could be paroled after serving twenty-five years in prison. (IB 35). This Court should review this issue under an abuse of discretion standard. Brooks v. State, 787 So. 2d 765, 780 (Fla. 2001)(reviewing Brook's motion to strike the venire and change venue under an abuse of discretion standard). *See also* Parker

v. State, 873 So. 2d 270, 285 (Fla. 2004)(reviewing motion to strike the venire and declare a mistrial under an abuse of discretion standard); Washington v. State, 687 So. 2d 279 (Fla. 2d DCA 1997)(reviewing denial of Washington's motion to strike the venire under an abuse of discretion standard).

This issue arose on the third day of jury selection when defense counsel, Mike Stone, was questioning fourteen prospective jurors about their willingness to consider mercy during their deliberations.[10] Eleven other prospective jurors were in the audience. (2PP Vol. XLVII 4380, 4444, 4480).[11] Eighteen others, who would eventually be pressed into jury service by way of an emergency jury summons were not present.

Prospective juror Tallent told Mr. Stone that he had an issue with the option of parole. Mr. Stone asked Mr. Tallent whether he would not be inclined to consider a sentence that involves the possibility of parole after 25 years. Mr. Tallent replied "Correct." (2PP Vol. XLVII 4445).

Mr. Tallent told Mr. Stone he could consider a sentence of life with no possibility of parole. (2PP Vol. XLVII 4445). When

---

[10] These fourteen were Kimberly Frye, Vernon Welch, Margaret Melvin, Terry Dawson, Matthew Monat, Kim Brown, Beverly Ward, John Bishop, Leland Moulder, Pendorah Ganzy, Sunshine Willis, Robby Tallent, Milton Colson, and Michael Neiman. (2PP Vol. XLVII 4380).

[11] The eleven in the audience were Ms. Underwood, Mr. Graber, Ms. Holzschuh, Mr. McCrary, Ms. Ross, Ms. Petroff, Ms. Ciulla, Ms. Bynum, Mr. Waggoner, Mr. Camper, and Ms Hewett. (2PP Vol. XLVII 4494).

Mr. Stone asked Mr. Tallent again whether he would not be able to consider a sentence of life without the possibility of parole after 25 years, Mr. Tallent reiterated that he could not. (2PP Vol. XLVII 4446).

Mr. Stone then asked prospective jurors Colson and Bishop whether they agreed with Mr. Tallent. They did. (2PP Vol. XLVII 4446).

When pressed, Mr. Bishop told Mr. Stone he would have difficulty considering the fact parole is a possibility after 25 years given that the crime was committed fifteen years ago. (2PP Vol. XLVII 4447). Juror Melvin noted that she agreed with Mr. Bishop. (2PP Vol. XLVII 4447).

At this point, the trial court instructed the jury that Orme's convictions had been affirmed but the Florida Supreme Court sent this case back for resentencing. The court told the venire that the punishment for first degree murder is death or life without the possibility of parole for 25 years. The judge instructed the venire that its job was to recommend what punishment should be imposed. (2PP Vol. XLVII 4450).

Mr. Tallent asked the court whether the 25 years would start fifteen years ago when the crime was committed. The trial judge told the venire that the possibility of parole was a part of a sentence and not an issue for the jury or the judge to consider. (2PP Vol. XLVII 4451).

Although Mr. Bishop and Mr. Tallent persisted in their views that they had an issue with the possibility of parole, Ms. Melvin told the court that she could follow the law even if the only two sentences were life without the possibility of parole for 25 years and death. (2PP Vol. XLVII 4451, 4453). Prospective Juror Colson told the court that while he was not really happy with the twenty-five years, he would not rule out a recommendation for life. (2PP Vol. XLVII 4454).

The trial court instructed the venire members that they were required to follow the law, even if they did not like the laws that must be applied. (2PP Vol. XLVII 4455). Trial counsel made no objection to this instruction.

Subsequently, trial counsel moved to strike the venire. Trial counsel alleged that Mr. Bishop poisoned the entire venire when he indicated that Orme had been convicted fifteen years ago and then indicated why he was opposed to a life sentence without the possibility of parole for 25 years. (2PP Vol. XLVII 4466, 4471).

The State suggested that, if the defense were to request it, the court could instruct the venire there was no guarantee the defendant would be paroled if given a life sentence without the possibility of parole for twenty-five years. The prosecutor cited to this Court's decision in Green v. State, 907 So. 2d 489

(Fla. 2005) and Thompson v. State, 619 So. 2d 261 (Fla. 1993) in support of the instruction. (2PP Vol. XLVII 4471, 4480).

The defense counsel argued the instruction would not cure the error. Defense counsel told the court, however, that if it denied his motion to strike the venire, he would agree to the instruction. (2PP Vol. XLVII 4472-4473). The court denied Orme's motion to strike the venire. (2PP Vol. XLVII 4472).

The court instructed the parties to come up with the instruction that should be given. (2PP Vol. XLVII 4474). A recess was called to allow the parties to craft the instruction. (2PP Vol. XLVII 4477).

After the recess, the State announced it had drafted an instruction. Defense counsel again told the court he did not believe the instruction would cure the error but he agreed with the instruction, as drafted. In light of the court's ruling denying his motion to strike the venire, trial counsel requested the instruction be read. (2PP Vol. XLVII 4478).

The court read the instruction into the record. Defense counsel advised the court the instruction read into the record was the agreed upon instruction. (2PP Vol. XLVII 4479-4480).

The trial judge directed the fourteen prospective jurors, who were in the box at the time the issue arose, be brought back into the courtroom. The eleven other prospective jurors, who

had been in the audience when the issue arose, remained outside the courtroom. (2PP Vol. XLVII 4480).

The trial court instructed the fourteen prospective jurors:

> Ladies and gentleman of the prospective jury, a few minutes ago a question arose as to the possible sentencing options in this case. To clear this up, I would like to instruct you on the law regarding this issue. The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five years. The final decision as to what punishment shall be imposed rests solely with the Judge. However, the law requires that a jury render to the court an advisory sentence as to what punishment should be imposed on the defendant.
>
> There is no guarantee that the defendant would be paroled at or after twenty-five years if given a life sentence without the possibility of parole for twenty-five years. Your questions about parole are not appropriate or relevant to your consideration regarding your sentencing recommendation and should not be considered by you. (2PP Vol. XLVII 4481).

The trial court then allowed the parties to question these fourteen members again on the issue of whether they could consider a sentence of life without the possibility of parole. When queried by the prosecutor, prospective juror Colson told the court he could consider a sentence of life with the possibility of parole after 25 years. (2PP Vol. LXVII 4482). Trial counsel asked no additional questions about the possibility of parole. (2PP Vol. LXVII 4488).

After both sides finished questioning the fourteen prospective jurors, the eleven remaining members of the venire were returned to the courtroom. They were also instructed there

was no guarantee that Orme would be paroled after serving 25 years in prison. (2PP Vol. LXVII 4494-4495).

Only one prospective juror on this eleven member venire panel, Ms. Ross, expressed any concern about the possibility of parole after 25 years. (2PP Vol. XLVII 4497-4498). The remaining ten members of this panel assured the court they would not consider the fact Orme might be paroled within a few years after resentencing. (2PP Vol. LXVII 4504-4505).

None of the prospective jurors who expressed a concern about the possibility of a quick parole were actually seated as jurors. Prospective jurors Melvin, Colson, Tallent, Ross, and Bishop were all excused from Orme's jury. (2PP Vol. LII 12).[12]

Although not entirely clear, Orme's claim on appeal does not appear to be that a venire must be stricken every time a prospective juror, during resentencing proceedings, expresses concern over the possibility of parole or asks the trial judge when the 25 years would begin to run. Instead, Orme argues the venire should have been stricken, in this case, because the trial court did not give a proper instruction to the jury about

[12] Mr. Nelson was also stricken for cause, without objection by the State on the fourth day of jury selection when he indicated he had a problem with Orme being eligible for parole in 25 years. (2PP Vol. XLVIII 4595).

the possibility of parole, at the beginning of voir dire. (IB 38).[13]

Orme did not, however, request the instruction be given at the beginning of voir dire. Orme acknowledges he did not request the instruction. Orme claims he did not do so because "no one had anticipated the problem." (IB 38).[14]

This claim may be denied for two reasons. First, any error in not reading this special instruction at the beginning of voir dire was waived because Orme did not request the instruction be read at the beginning of voir dire. *See* Williams v. State, 967 So. 2d 735, 759 (Fla. 2007) (failure to request special instruction waives a challenge to the instruction given); Ponticelli v. State, 618 So. 2d 154, 155 (Fla. 1993)(defendant waived his objections to jury instructions because he failed to

---

[13] In presenting this argument, Orme acknowledges the instruction given on the third day of jury selection properly instructed prospective jurors on it consideration of parole (IB 38)(noting that the judge should have read the instruction Orme and the prosecutor crafted at the beginning of voir dire).

[14] Trial counsel certainly was on notice this might be a potential issue. Indeed, this was the exact concern that led trial counsel to request that the trial court allow Orme to waive the possibility of parole. Trial counsel claimed his client would be prejudiced because he had already served 15 years of his sentence. The issue arose again on the second day of jury selection when prospective juror Rush mentioned that he really did not like the fact Orme could be paroled after 25 years. Prospective juror Dawson agreed and stated that if Orme did it, he should stay there (in prison). (2PP Vol. XLV 4105). Trial counsel advised this panel of the venire that even though eligible for parole, Orme could stay in prison forever. (2PP Vol. XLV 4106). Neither Mr. Dawson nor Mr. Rush was seated on Orme's jury. (2PP Vol. LII 12).

request a specific instruction or to object to the instructions given). This Court should reject any notion trial counsel could not have reasonably anticipated this "problem" before trial.

This claim may also be denied because the trial court committed no error in failing to strike the venire. Likewise, the trial judge committed no error in instructing the jury as she did. Thompson v. State, 619 So. 2d 261, 265 (Fla. 1993).

First, it is simply not true that Mr. Bishop's statements "tainted" the entire panel. It would be no secret that the crime occurred in 1992. The State introduced evidence, without objection, that Orme murdered Lisa Redd on March 3, 1992.

It would also be no secret that one of the only two legal sentences was life without the possibility of parole. The jury was instructed, at the close of the penalty phase that, the only two sentences for the murder of Lisa Redd, was death or life without the possibility of parole for 25 years.

In order for the statement of one venire member to taint the panel, the venire member must mention facts that would not otherwise be presented to the jury. Mr. Bishop did not mention any fact that would not be otherwise presented to the jury. Johnson v. State, 903 So. 2d 888, 896-97 (Fla. 2005) (noting that a venire member's expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel). This Court should reject any notion

that Mr. Bishop tainted the entire venire when he expressed concerns about the possibility of parole when the murder occurred some 15 years before the second penalty phase commenced.

Moreover, when a juror or prospective juror expresses concern about the possibility of parole or asks when the 25 years would start to run, the proper remedy is not to strike the panel. Instead, the proper remedy is to truthfully answer the question, in this case, to instruct the jury that parole is not guaranteed. This Court's decision in Green v. State, 907 So. 2d 489 (Fla. 2005) is instructive.

In Green, the defendant was sentenced to death after a second penalty phase proceeding. Among Green's claims of error, was a claim the trial judge erred in instructing the jury that Green would be entitled to credit for any time already served in prison and that parole was not guaranteed if Green was sentenced to life without the possibility of parole for 25 years. This Court found no error. This Court noted that the latter portion of the instruction actually benefits the accused because any juror, concerned about the possibility the defendant will be out on the streets shortly after sentencing, is reminded that parole is not guaranteed. Green v. State, 907 So. 2d at 498-499.

This case is similar to Green. Here, several potential jurors, in response to trial counsel's questioning expressed

concern about the possibility of parole. The trial court instructed potential jurors, upon agreement by both sides, that parole was not guaranteed. As in Green, the instruction served to reassure prospective jurors, who might have concerns about imposing a life sentence, that Orme could stay in jail for a long period of time and there was no guarantee that he would ever be paroled.

Subsequent to the instruction, all but one member of the venire, when asked, assured the court they would follow the instruction. Additionally, all of the prospective jurors who expressed any concern were ultimately excused from Orme's jury.[15]

In accord with this Court's decision in Green, the trial judge committed no error in instructing the jury in accord with this Court's decision in Green. This claim should be denied.

[15] Orme actually received an additional benefit that Green did not. In Green the question arose during jury deliberations. In this case, the question arose during jury selection. This allowed Orme to challenge any prospective juror whose concern about the possibility of parole might weigh against a life recommendation.

ISSUE IV

WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO ALLOW ORME TO WAIVE HIS RIGHT TO THE SENTENCING OPTION OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE FOR TWENTY-FIVE YEARS IN FAVOR OF A HARSHER PUNISHMENT OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE (RESTATED)

In his fourth claim, Orme alleges the trial judge erred in refusing to allow Orme to waive his right to the possibility of parole after 25 years. Orme admits this Court's ruling in Bates v. State, 750 So. 2d 6 (Fla. 1999) controls this case. (IB 40). He asks this court to recede from Bates. This Court should decline Orme's invitation.

In Bates, the defendant argued on appeal that the trial court erred in refusing to instruct the sentencing jury that life without the possibility of parole was a sentencing alternative to death. Similar to Orme, at the time of his second penalty phase proceedings, Bates had been on death row some thirteen years. Bates alleged he was willing to waive the possibility of parole at trial and as such, the trial court's refusal to apply section 775.082(1), Florida Statutes (1995), retroactively denied him due process and a fundamentally fair capital sentencing proceeding. Bates v. State, 750 So. 2d 6, 11 (Fla. 1999).

This Court rejected Bates' arguments and ruled that at the time Bates committed the murder "the Legislature had not

established life without the possibility of parole as punishment for this crime." Bates, 750 So. 2d at 11, *citing to* Williams v. State, 500 So. 2d 501, 503 (Fla. 1986). This Court noted that "a defendant cannot by agreement confer on the court the authority to impose an illegal sentence." Id. Orme has presented no good reason for this court to recede from years of precedent. This Court should affirm.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN GIVING NO WEIGHT TO MITIGATION THIS COURT HAS CLEARLY HELD MITIGATES A DEATH SENTENCE (RESTATED)

In this claim, Orme alleges the trial judge erred in failing to find that certain non-statutory mitigating factors had been reasonably established. Orme also claims the trial judge erred in assigning no weight to four of the five non-statutory mitigators that Orme offered in his sentencing memorandum. (IB 50-56).[16]

When addressing mitigating circumstances, the sentencing court must expressly evaluate, in its written order, each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence. The court must then

[16] Orme does not challenge the trial court's rejection of the non-statutory mitigator that a bipolar disorder contributed significantly to his substance abuse. This claim also does not include Orme's allegation the trial court erred in failing to consider his remorse as a non-statutory mitigator. That claim of error has been fully briefed by the parties in Claim One.

determine, in the case of non-statutory factors, whether each offered mitigator is truly of a mitigating nature. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (footnote omitted), receded from on other grounds by Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000).

This Court reviews a trial judge's findings in mitigation under a three-tiered standard of review. Whether a particular circumstance is truly mitigating in nature is a question of law that is subject to *de novo* review by this Court. Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997).

Whether a mitigating circumstance has been established is within the discretion of the trial court. Bowles v. State, 804 So. 2d 1173, 1183 (Fla. 2001). A trial court may reject a defendant's claim a mitigating circumstance has been proved, provided that the record contains competent substantial evidence to support the trial court's rejection of the mitigating circumstance. Reynolds v. State, 934 So. 2d 1128, 1159 (Fla. 2006).

A trial court's decision regarding the weight to be assigned to a mitigating circumstance that it determines has been established is within the trial court's discretion. This Court will review this decision under an abuse-of-discretion standard. Id.

Under the abuse of discretion standard, a trial court's ruling will be upheld unless the judicial action is arbitrary, fanciful, or unreasonable. Discretion is abused only where no reasonable [person] would take the view adopted by the trial court. Reynolds v. State, 934 So. 2d at 1159.

A trial court may properly assign "little or no" weight to mitigating factors offered by the defendant. Trease v. State, 768 So. 2d 1050, 1005 (Fla. 2000). While a proffered mitigating factor may be technically relevant and must be considered by the trial judge because it is generally recognized as a mitigating circumstance, the trial judge in a particular case may decide it is entitled to no weight for additional reasons unique to that case. For instance, while being a drug addict may be considered a mitigating circumstance, the fact the defendant was a drug addict twenty years before the crime for which he was convicted may be sufficient reason to entitle the factor to no weight. Globe v. State, 877 So. 2d 663, 678-679 (Fla. 2004). *See also* Kormondy v. State, 703 So. 2d 454, 457 (Fla. 1997)(The trial judge found that "although the fact of Kormondy's drug addiction is established by the evidence, the Court finds that his addiction is not reasonably established as a non-statutory mitigating factor and gives it no weight".)

A. The defendant had a difficult childhood

During the penalty phase, Orme presented evidence of his upbringing. Carol Orme is Orme's stepmother. She married Orme's father, Roger, when Orme was three years old. (2PP Vol. LVIII 741). Ms. Orme treated Orme as her own son. They are close as a mother and son. (2PP Vol. LVIII 742).

To Carol, Orme seemed depressed as young as three years old. He would zone out in front of the T.V. (2PP Vol. LVIII 720-721). Orme did well in first grade. His first grade teacher took Orme under her wing and he did really well. (2PP Vol. LVIII 721). In fifth grade, Orme's grades went down the tubes. She does not really know why. She thinks it was probably depression. She thought he was depressed because he would not follow through with anything.

Later in his life, she became aware that Orme was drinking and using drugs. When Orme was 15 years old, she let him go on a camping trip with another boy. The boys drank alcohol and were sick as dogs. (2PP Vol. LVIII 724).

When Orme was in college at Gulf Coast community college, Orme joined a fraternity. She thought they were using drugs and alcohol in the fraternity. (2PP Vol. LVIII 724). Carol Orme has never actually seen her son under the influence of drugs. (2PP Vol. LVIII 742).

Orme joined the Marine Corps Reserve and completed boot camp. He really looked good when he came home. (2PP Vol. LVIII 727). Mr. Orme found out later that Orme was not performing his Marine reserve duty. (2PP Vol. LVIII 727).

Eric Orme is Orme's younger brother. He is ten years younger than Orme. (2PP Vol. LVIII 758). As Eric got older he became aware that Orme was using alcohol and drugs. He remembered the camping trip that his mother referred to in her testimony. Eric checked Orme's truck and found pot. He also found crack. Eric would dump it out. (2PP Vol. LVIII 761).

Eric also saw there were problems between Orme and his father. (2PP Vol. LVIII 759). There was a lot of arguing and hollering. Orme's father would use violent and abusive language toward Orme. (2PP Vol. LVIII 760).

Orme was up and down. He would come in from work and blow his money. Then he would kind of go into seclusion and they would not see him. Orme would then go back to work offshore. (2PP Vol. LVIII 762).

Orme had aggressive mood swings. He would be up for days and then down for days. He would go from one extreme to another. (2PP Vol. LVIII 763). Eric saw these same traits in his father. (2PP Vol. LVIII 763). When Orme was up, he was fun to be with. When Orme was down, he was no fun. Eric would ask him to do things, but Orme refused. (2PP Vol. LVIII 765).

Eric thought his childhood was tough because his father was tough. Eric told the jury that his father and mother were loving. Eric thought Orme had it tougher than he did, maybe because of the way he was acting. (2PP Vol. LVIII 775).

Eric does not use drugs. He thinks he is on the verge of being an alcoholic. He attributes it to a lot of different things. He does not violate the law and owns his own construction business. (2PP Vol. LVIII 776-777).

Linda Henley is Orme's biological mother. She told the jury that Roger Orme was abusive. He would lose his temper over anything and scream and holler and throw things. (2PP Vol. LIX 814). It would scare Orme. (2PP Vol. LIX 814). In her view, Roger Orme had a violent and vile temper.

Nonetheless, she chose to give custody of her son to his father. Roger told her that his mother would take care of Orme. Ms. Henley knew that Orme's grandmother loved him so she agreed. (2PP Vol. LIX 815).

She visited with Orme until Orme was eight. Roger Orme would yell at Orme if he and his mother lingered too long during their goodbyes. (2PP Vol. LIX 816). In Ms. Henley's opinion, Roger Orme was demeaning and belittling toward his son. Ms. Henley believed that Roger took Orme's self-esteem away. Orme was shy and withdrawn as a young child. (2PP Vol. LIX 819).

When Orme was eight, she went and took him out of school because her former husband told her he was moving out of state with Orme. She had him for six months. Roger Orme knew where they were but did not try to contact them. (2PP Vol. LIX 817).

Ms. Henley enrolled Orme in a new school. They did things together and were happy. One day, when Orme was nine, Roger went to Orme's new school, went into the classroom and grabbed his son. When the teacher tried to stop him, Roger Orme punched the teacher in the mouth. (2PP Vol. LIX 819). She did not see her son for ten years. (2PP Vol. LIX 820).

When she and Orme finally reunited, it was wonderful. Orme was all grown up. (2PP Vol. LIX 822). Orme told his mother his father told him that Ms. Henley did not want him and did not love him. (2PP Vol. LIX 822). Orme told her that Roger told him that he was just like his mother, worthless. According to his report, Roger Orme would not let Orme participate in sports because Orme had to come home and work for his father. Orme told his mother that Roger Orme was always screaming at him. (2PP Vol. LIX 823). Orme told his mother that Roger would have him stand guard while he had affairs with other women. He really hated that. (2PP Vol. LIX 824).

Ms. Henley did not feel Orme had much self-esteem or confidence. Orme and his mother lived together for a while

after they reunited. She found out he was doing drugs. She found marijuana in his room. (2PP Vol. LIX 825).

Orme moved out after six or seven months. She got him a job. He did not show up for it. When she confronted her son, he said "I don't need this" and moved out. (2PP Vol. LIX 829). Ms. Henley thinks he moved out because she confronted him about his drug use and failure to go to his job. She did not tolerate drug use. (2PP Vol. LIX 829).

She saw him again after he graduated from Marine Corps boot camp. He was so proud of himself and looked great. (2PP Vol. LIX 831). He seemed to have his confidence back. (2PP Vol. LIX 831).

Ms. Henley's husband died in 2004. Her son was her rock and wrote her many encouraging and supportive letters. (2PP Vol. LIX 835).

A family friend, Tracy Duvall, testified on Orme's behalf. She described Carol Orme, Orme's stepmother, as very loving woman. Ms. Duvall described Roger Orme as a violent man who verbally abuses people and belittles them.

Ms. Duvall knows there is a long history of verbal abuse between Orme and his father but does not know of any particular incident. She has witnessed Roger Orme fly off the handle, throw and break things, cuss, and talk down to people. She thought Orme was compassionate, caring, sensitive and funny.

Ms. Duvall told the jury that Orme was real down to earth. (2PP Vol. LVIII 713).

In his sentencing memorandum, Orme asked the judge, to consider in non-statutory mitigation, that Orme had a difficult childhood. He pointed to testimony that established Orme's father was a tyrant and abusive. Trial counsel also pointed out that Orme was in a tug of war between his biological parents until he was seven. (2PP Vol. XVII 2956-2957).

The trial judge found, in her sentencing order, that Orme came from a divorced family and was not raised by his biological mother. She found that Orme was, however, raised by a loving and caring stepmother. The judge found Orme's difficult childhood was not relevant to the murder and she gave it no weight. (2PP Vol. XVII 3016).

Orme has demonstrated no reversible error. First, it is clear the trial judge addressed the "difficult childhood" mitigator that Orme presented in his sentencing memorandum. Accordingly, the trial court fulfilled its duty to expressly evaluate in its written order each mitigating circumstance proposed by the defendant. Douglas v. State, 878 So. 2d 1246, 1257 (Fla. 2004). The trial court also found a difficult childhood is generally mitigating in nature.

However, the trial judge gave it no weight under the circumstances of this case. Orme can show no abuse of discretion.

Orme was 30 years old at the time of the murder. He was raised by a step-mother who loved and cared for him. While it seems clear that Roger Orme was a verbally abusive and belittling father, none of Orme's family members reported that Orme was physically abused, sexually abused, neglected, starved, lived in poverty, or unloved.

Orme held down a job when he wanted to and was, as the court described "a mature adult in his professional and social endeavours." (2PP Vol. XVII 3016). Orme took steps to distance himself from his father's influence. Orme's step-mother and mother reported that Orme joined the Marine Corps and completed boot camp. Orme's mother told the jury that completing boot camp restored Orme's confidence.

At time of the murder, Orme has a steady job offshore. Orme impressed Tracy Duvall as a person who was compassionate, caring, sensitive, funny, and down to earth.

The evidence adduced about Orme's family life was that, at least since he was 15 years old, Orme's difficulties stemmed from his own actions. He went camping with a friend and drank alcohol till he was sick.

Orme went to college. Instead of concentrating on his studies, he joined a fraternity that partied hard.

Orme joined the Marine Corps. He completed the toughest part of the training, and then quit.

Orme voluntarily used drugs, drank alcohol to excess, and did not go to work even when his mother facilitated him getting a job. Orme left his mother's home, not because she was abusive or uncaring, but because she confronted him when he brought drugs into her house and refused to go to work.

Given the actual evidence of Orme's childhood, Orme cannot show the trial judge erred in giving no weight to this mitigator. Even if the trial judge erred in giving Orme's difficult childhood no weight, any error is harmless. Given the seriousness of the aggravators in this case and the less than compelling evidence of a difficult childhood, there can be no reasonable doubt that, had the trial court assigned this mitigator at least some weight, Orme would still be sentenced to death. Hurst v. State, 819 So. 2d 689, 699 (Fla. 2002)(even if trial court erred in assigning no weight to Hurst's "good family background," any error is harmless given the severity of the aggravating circumstances in this case). This Court should affirm.

B. The defendant is a model prisoner

At trial, Orme presented testimony from Ron McAndrew in order to establish that Orme is a model prisoner. Mr. McAndrew was a former warden at Florida State Prison. At the defense's request, Mr. McAndrew reviewed Orme's prison records. Mr. McAndrew has never met Orme.

In his opinion, Orme was a model prisoner when compared to other prisoners across the board. His record of discipline is very low. Orme had only minor discipline in his record and in the past few years his conduct dramatically improved. Orme is a "pussycat" in terms of comparing him to average prisoners across the board. (2PP Vol. LVII 667). Orme has had no violent incidents.

Orme has been in the most restrictive custody. (2PP Vol. LVII 670). There are people who can misbehave even in close custody. Mr. McAndrew views Orme as a prisoner who falls within the best behaved group. (2PP Vol. LVII 671).

Orme did have a couple of disciplinary reports (DRs). On one or two occasions he was found in possession of small amounts of marijuana. There was also an incident of throwing food on the floor. (2PP Vol. LVII 671-672). There also may have been an incident involving verbal disrespect. (2PP Vol. LVII 672).

Orme would not be held in such close custody if he was sentenced to life in prison. He would be in the open

population. (2PP Vol. LVII 674). Mr. McAndrew believes Orme is capable of living in the open population. (2PP Vol. LVII 674). Orme has been DR free in the last 10-11 years. (2PP Vol. LVII 675).

Inmates, like Orme, get privileges such as a TV, radio, visitation, and canteen privileges. Bad behavior results in a loss of privileges. (2PP Vol. LVII 685). A person knows that if he wants to keep his privileges, he better behave. (2PP Vol. LVII 685).

In her sentencing order, the trial judge found that Orme had been a model prisoner. She found that he had only minor disciplinary reports, including possession of marijuana. Judge Pittman gave the mitigator no weight because she did not find it relevant to the murder. (2PP Vol. XVII 3017).

Orme has demonstrated no reversible error. First, it is clear the trial judge addressed the "model prisoner" mitigation that Orme presented in his sentencing memorandum. (2 PP Vol. XVII 2957). Accordingly, the trial court fulfilled its duty to expressly evaluate in its written order each mitigating circumstance proposed by the defendant. Douglas v. State, 878 So. 2d 1246, 1257 (Fla. 2004). The trial court also found, as she was required to do, that being a model prisoner is generally mitigating in nature. (2PP Vol. XVII 3017).

However, the trial judge gave it no weight under the circumstances of this case. She was within her discretion to do so.

Even if this court found the court erred in failing to assign at least some weight to this circumstance, any error is harmless. Mr. McAndrew's testimony was far from compelling. Orme's record was not spotless. He had disciplinary reports for possessing marijuana, being disrespectful to a correctional officer and for throwing his tray on the floor of his cell because he did not think his chicken was prepared properly. Mr. McAndrew's testimony also made clear that prisoners have their own selfish reasons to behave; they do not want to lose their privileges.

Finally, Orme's "model prisoner" evidence pales in comparison to the circumstances of the murder. Given the seriousness of the aggravators in this case and the circumstances of the murder, there can be no reasonable doubt that, had the trial court assigned this mitigator at least some weight, Orme would still be sentenced to death. Hurst v. State, 819 So. 2d 689, 699 (Fla. 2002)(even if trial court erred in assigning no weight to Hurst's "good family background," any error is harmless given the severity of the aggravating circumstances in this case). This Court should affirm.

C. The defendant’s potential for rehabilitation

Orme avers that Mr. McAndrew’s testimony, that Orme would likely do well in the general population, required the trial judge to find Orme has a potential for rehabilitation. (IB 54). Mr. McAndrew offered no opinion on Orme’s capacity to be rehabilitated. (2PP Vol. LVII 667-687). He did believe Orme is capable of exhibiting good behavior if released to the open population. (2PP Vol. LVII 674).

In his sentencing memorandum, Orme suggested that Mr. McAndrew’s testimony, as well as unidentified expert testimony, established that since 1995, Orme lived drug and violence free in prison. (2PP Vol. XVII 2957-2958). Orme asked the court to consider his potential for rehabilitation as mitigation.

In her order, the trial judge found this mitigator had not been established. The court found that Orme was addicted to illegal drugs for over ten years and had received inpatient treatment in the past. She noted that his treatment did not stop this murder. (2PP Vol. XVII 3017).

The trial judge’s rejection of this mitigating circumstance is supported by competent substantial evidence. Mr. McAndrew had never met Orme. Nor had he actually observed him in an open population, which is undisputedly quite different from a life on death row.

Moreover, insofar as other aspects of rehabilitation, the trial court found the evidence demonstrated that Orme had been treated for his drug addiction before. (2PP Vol. LII 57). Despite his treatment, Orme chose to buy and abuse cocaine on the night of the murder. Orme also chose to rape, beat, and strangle Lisa Redd to death.

Even if the trial judge erred in finding this mitigator was not established, any error is harmless. It is clear that if the trial judge would have found that this mitigator had been established, she would have given it minimal weight.

Given the seriousness of the aggravators in this case and the circumstances of the murder, there can be no reasonable doubt that, had the trial court assigned this mitigator at least some weight, Orme would still be sentenced to death. Hurst v. State, 819 So. 2d 689, 699 (Fla. 2002)(even if trial court erred in assigning no weight to Hurst's "good family background," any error is harmless given the severity of the aggravating circumstances in this case); Banks v. State, 700 So. 2d 363, 368 (Fla. 1997)(even if the trial judge erred in failing to find, in non-statutory mitigation that the defendant consumed alcohol on the night of the murder, any error would be harmless because the trial judge would have afforded the factor minimal weight). This Court should affirm.

D. Orme tried to get Lisa Redd help

In this claim, Orme avers that his actions in informing members of the C.A.R.E. center that Lisa Redd was in Room 15 of the Lee hotel required the trial judge to find that Orme tried to get Lisa Redd help. (IB 54-55). The trial judge found this mitigator had not been established. (2PP Vol. XVII 3017).

The trial court's rejection of this mitigator is supported by competent substantial evidence. Orme did not try to get Lisa Redd help. Orme raped her, beat her, strangled her, and then tried to cover up the sexual assault when he "discovered" she was dead. Orme tried, unsuccessfully, to dress Lisa Redd after he found her dead. (2PP Vol. LIII 171). Orme was not attempting to seek help when he took Lisa's jewelry and purse, left the hotel in her car, partied with "another chick", and bought and consumed some $400 worth of cocaine. (2PP Vol. LIII 149, 163).

Long before Orme appeared at the C.A.R.E. center, Orme knew Lisa Redd was beyond help. Orme sought "help" only when his options about what to do with Ms. Redd's body ran out when he locked himself out of the hotel room where Lisa Redd lay dead by his hand. (2PP Vol. LIII 167).

The trial court's finding that this mitigator was not established is supported by competent, substantial evidence. Orme's claim of error should be rejected.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FINDING THAT ORME COMMITTED THE MURDER FOR PECUNIARY GAIN (RESTATED)

In this claim, Orme alleges that the trial judge erred in finding the murder was committed for pecuniary gain. Orme avers the circumstantial evidence failed to establish this aggravator beyond a reasonable doubt.

Orme alleges that the State failed to overcome his reasonable hypothesis of innocence; that he took Ms. Redd's property as an afterthought. Orme points to the trial judge's findings that Orme did not initially lure Ms. Redd to his room to steal her money. Orme also claims the trial judge's findings, that Orme beat, raped, and murdered Ms. Redd, before he took her purse and her jewelry from her body conclusively shows that Orme did not murder Ms. Redd for pecuniary gain. (IB 59).[17]

This claim may be denied for two reasons. First, Orme was convicted of robbery by a unanimous jury beyond a reasonable

[17] Orme claims that it is significant that he did not rob Mr. Pegg when the evidence showed he was out of money before he called Ms. Redd and asked her to come by his motel room on her way to work. Orme avers that if he was desperate for money to buy more cocaine, he would have logically robbed the cab driver. (IB 59). This argument is wholly without merit. It is more logical to conclude, given that Orme apparently had no weapon with which to rob the driver, that Orme believed that Ms. Redd was a much softer target. Any notion Orme would have likely robbed a cab driver if he wanted money for cocaine defies logic and common sense.

doubt. Orme's robbery conviction was affirmed on appeal and was not disturbed when this Court ordered a new penalty phase. Orme v. State, 677 So. 2d 258 (Fla. 1996). Accordingly, both a jury and this Court have rejected any notion that Orme's actions in taking Ms. Redd's purse, jewelry, and automobile was an afterthought.

A defendant's right to present evidence challenging an aggravating circumstance in a new penalty phase does not allow the defendant to re-litigate a jury's previous finding of guilt. See Duest v. State, 855 So. 2d 33, 40 (Fla. 2005). In presenting a claim that he took Ms. Redd's property as an afterthought, Orme impermissibly attempts to do just that.

This claim may also be denied because there is competent substantial evidence to support the trial judge's findings the murder was committed for pecuniary gain. In order to establish this aggravating factor, the State must prove beyond a reasonable doubt the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. Clark v. State, 609 So. 2d 513, 515 (Fla. 1992).

In reviewing aggravating factors, this Court does not reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt. That is the trial court's mission. Rather, this Court's task on appeal is to review the record to determine whether the trial court

applied the correct rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. Harris v. State, 843 So. 2d 856, 866 (Fla. 2003).

At trial, the State presented evidence in support of the pecuniary gain aggravator.[18] First, the State presented evidence that Orme was broke when Lisa Redd came to his motel room. Although Orme's step-mother testified that her husband gave Orme $400 in $100 bills shortly before the murder, Orme had none of it left when Lisa Redd arrived at his motel room about 10:00 p.m. on March 3, 1992. (2PP Vol. LVIII 745).

Orme checked into the Lee Motel at 2:55 on the afternoon of March 3, 1992. He paid $22 for the room. (2PP Vol. LII 91).

At 3:00 p.m., Orme called a cab. He told the cab driver, Mr. John Hall, that he did not have anything but a $100 bill. Orme wanted to go buy some dope. Mr. Hall took Orme to a convenience store first. Orme bought a six pack of beer and got back into the cab. (2PP Vol. LII 111-112). Orme asked Mr. Hall where he could buy some dope. Mr. Hall directed Orme to a group of men standing across the street from the store. Orme went to

[18] Contrary to Orme's argument, this is not a circumstantial evidence case. Orme admitted that he took Lisa Redd's purse and her car. (2PP Vol. LIII 162-165). The State also presented evidence that Lisa Redd habitually wore some jewelry and kept the rest in her purse. Ms. Redd's jewelry and purse were never found.

talk to the men and returned about five minutes later. (2PP Vol. LII 112). Mr. Hall took Orme to another convenience store. Orme bought potato chips and something else. Orme now had change to pay Mr. Hall. (2PP Vol. LII 113).

Orme also hired a hooker. Orme told police she stayed in his room for about an hour and a half. (2PP Vol. LIII 165-166, 169).

By 8:00 p.m., Orme had no more money, save for $2. Mr. Robert Pegg drives a taxi cab. Mr. Pegg testified that at about 8:00 p.m. on March 3, 1992, he responded to the Lee hotel in response to a call for a cab. He honked his horn a couple of times and Orme came out to meet him.

Orme asked Mr. Pegg for a cab ride. He wanted credit. Orme told Mr. Pegg that he only had $2.00. (2PP Vol. LII 119). Mr. Pegg refused to extend him credit. Mr. Pegg took the remainder of Orme's money for coming out to the hotel. (2PP Vol. LII 120).

The State also presented evidence that Lisa Redd had valuables with her when she came to Orme's motel room at his request. By the time Orme was done with her, Orme had taken everything of value from Lisa Redd.

Carol Atwell, Lisa Redd's sister, testified that her sister habitually wore jewelry. One thing Lisa always wore was a solid gold rope diamond cut necklace with a little R.N. pendant. Lisa

never took it off. (2PP Vol. LIV 275). She normally wore a gold wedding band as well. (2PP Vol. LIV 276).

Ms. Redd also wore a white Timex watch with a leather band and several rings, including a little gold band with several little diamond chips that belonged to Lisa's grandmother, a little sliver band that belonged to Lisa's mother and a cluster diamond ring. She wore the rings all the time except when she was working. When she went to work, Ms. Redd would take the rings off, put them in her purse, and then put them on again when she got off. (2PP Vol. LIV 277).

Ms. Redd also owned a double sided stethoscope. She always had it with her. If she wasn't at work, she would put it on the mirror of her car. She wanted it available if she needed to use it. (2PP Vol. LIV 291).

After she was murdered, Ms. Redd's sister, Carol Atwell, searched for all of the jewelry that Lisa normally wore. She never found it. (2PP Vol. LIV 275-276). Ms. Redd's purse and stethoscope were also never found. (2PP Vol. LIV 276).

Ms. Redd was very possessive about her car. She had it only a few months before she was murdered. She loved her car. (2PP Vol. LIV 289). She did not let other people drive her car. She did not even let her sister drive it. (2PP Vol. LIV 290).

Orme admitted to the police that he took Lisa Redd's purse and car. (2PP Vol. LIII 164-165). Orme told the police Lisa

Redd swept his remaining cocaine in the toilet. Orme told her he was going to get some more. (2PP Vol. LIII 162).

Orme took Ms. Redd's purse and car, and "hauled ass." Orme described Ms. Redd's purse. He did not know where it was. (2PP Vol. LIII 164-165). Additionally, while Orme was broke when Lisa Redd came to the room, Orme's statement to the police supported a conclusion that Orme got some $400 from Lisa's purse and for Lisa's jewelry and stethoscope.

Orme told the police that at the time Ms. Redd arrived at his hotel room, he had smoked about $100 worth of crack. By the end of the night, he had partied with "some chick" he picked up and spent $500 on crack cocaine. (2PP Vol. LIII 149, 163).

Competent, substantial evidence supports the trial court's conclusion that Orme murdered Lisa Redd, at least in part, because he was broke and wanted her valuables and car to buy more cocaine. Taking Lisa Redd's purse, jewelry and car was the culmination in a series of events that began when Lisa Redd, in a gesture of compassion, responded to Orme's call for help and ended when Orme raped, beat, robbed and murdered Lisa Redd. This Court should affirm. *See* Franklin v. State, 965 So. 2d 79, 99-100 (Fla. 2007) (pecuniary gain properly found when murder was committed to take victim's vehicle); Bowles v. State, 804 So. 2d 1173 (Fla. 2001) (evidence sufficient to support pecuniary gain aggravator when the State presented evidence that, when the

victim’s body was found, his watch, stereo equipment and car were missing, Bowles was seen two days after the murder driving the victim’s car and wearing the victim’s watch, and Bowles confessed to taking Hinton’s car); Lawrence v. State, 691 So. 2d 1068, 1075 (Fla. 1997) (ruling that even if there was some evidence that Lawrence killed the victim because she angered him, there was sufficient evidence to support the pecuniary gain aggravator when Lawrence admitted going into a convenience store to rob it and there was evidence that money was missing from the open and empty register); Finney v. State, 660 So. 2d 674, 680 (Fla. 1995) (concluding that the evidence supported the robbery/pecuniary gain aggravator where the evidence demonstrated the defendant pawned the victim’s VCR shortly after the murder, the victim’s jewelry box was missing, and the contents of her purse had been dumped on the floor).[19]

---

[19] Any error in finding the pecuniary gain aggravator would be harmless beyond a reasonable doubt given that two weighty aggravators remain, namely HAC and in the course of a sexual battery. This is especially true since the trial court found that any one of the three aggravators standing alone would support Orme’s sentence to death. (2PP Vol. XVII 3006). *See e.g.* Carter v. State, 980 So. 2d 473 (Fla. 2008) (finding that any error in finding either the “in the course of a burglary” or CCP aggravator or both would be harmless beyond a reasonable doubt when the trial court concluded that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation).

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL (RESTATED)

In this claim, Orme alleges the trial court erred in finding the murder was especially heinous, atrocious or cruel (HAC) because there is no evidence that Orme enjoyed the suffering of his victim, "as this Court has required before the HAC can apply." (IB 63). Orme avers his use of marijuana, alcohol, cocaine, and other drugs coupled with his bipolar manic depression may have affected his ability to enjoy Lisa Redd's suffering. (IB 64). The standard of review is competent substantial evidence. Stephens v. State, 975 So. 2d 405, 423 (Fla. 2007).

The testimony at trial provided more than ample evidence the murder was especially heinous, atrocious, or cruel. Two medical examiners provided testimony relevant to this aggravator.

Dr. Lauridson testified, for the State, that he reviewed the autopsy performed by Dr. Williams Sybers in 1992. He reviewed photographs of the murder scene and photos taken during the autopsy. (2PP Vol. LVI 459). He came to an independent judgment based on the facts and objective evidence that Dr. Sybers documented during his autopsy. (2PP Vol. LVI 460).

Dr. Lauridson testified, first that Lisa Redd was beaten. Ms. Redd suffered multiple hits to the head, scalp, both sides of her face, multiple impacts to the chest, multiple applications of pressure to the neck causing hemorrhage deep in the posterior neck and multiple impacts to the arms and legs. (2PP Vol. LVI 504). Ms. Redd had significant bruising on both arms. (2PP Vol. LVI 516). She also had an injury to the tissue around her kidney.

Dr. Lauridson described some of Ms. Redd's injuries. Ms. Redd had a significant contusion or bruise on the left side of her face. Another contusion was seen in her hair line. Dr. Lauridson testified these injuries were consistent with being struck in the face. (2PP Vol. LVI 465). Ms. Redd also suffered bruising to the right side of her face. Dr. Lauridson testified that Ms. Redd was struck on both sides of her face as well as up into the side of her head on both sides. (2PP Vol. LVI 467).

Ms. Redd suffered blunt impacts to her arms, hands, and to some extent her legs. (2PP Vol. LVI 467). There were a number of blunt impacts to her right arm. (2PP Vol. LVI 467). Ms. Redd also suffered a blunt injury to the back of her hand. (2PP Vol. LVI 469).

Ms. Redd had a large contusion on her left arm along with another one by the elbow. (2PP Vol. LVI 470). She had some abrasions (scrapes) on the left elbow. (2PP Vol. LVI 470-471).

The bruises on the back of Ms. Redd's arms were big and confluent enough to be consistent with a blow from Orme's knee. (2PP Vol. LVI 483). Dr. Lauridson could not say for sure the injury to the back of Ms. Redd's arms was actually caused by a knee but the injury was consistent with that scenario. (2PP Vol. LVI 483).

Injuries were also present on her neck and under her chin. (2PP Vol. LVI 477). There were a number of contusions on Ms. Redd's neck and contusions that extended down to her chest area. (2PP Vol. LVI 478).

Ms. Redd suffered an injury to her abdomen. Orme applied force to the front of Ms. Redd's abdomen that went all the way through her body. The force used was enough to cause hemorrhaging in the kidney and connecting tissue. (2PP Vol. LVI 471-472). This injury would have been painful. (2PP Vol. LVI 473). Ms. Redd was alive while Orme was beating her. (2PP Vol. LVI 474).

Ms. Redd also suffered injuries to her rectum while still alive. The injuries went beyond anal tears. Ms. Redd's injuries were to the lining of her rectum. Those injuries were consistent with unlubricated anal intercourse. (2PP Vol. LVI 473). Ms. Redd's rectal injuries would have been painful. (2PP Vol. LVI 476).

Ms. Redd was strangled to death.[20] Orme applied sufficient force to cause hemorrhages at all levels of the neck including the back of the neck. (2PP Vol. LVI 482). Ms. Redd's injuries were unusual in that she had some much hemorrhaging on the back of the neck. The injuries were consistent with being strangled from the front and the back. (2PP Vol. LVI 483-484). It is possible that a man with powerful fingers, such as an able bodied seaman, might be able to inflict all the injuries from one direction only. (2PP Vol. LVI 513). Ms. Redd's neck injuries would have been painful. (2PP Vol. LVI 484).

Most people struggle when they are being strangled. They will struggle to escape the killer's grip. They will struggle to live. If they move so the grip loosens, the killer may then place his grip in a different spot. If this happens over and over again so the victim's neck injuries are not limited to one spot, the victim will have multiple hemorrhages in multiple spots. According to Dr. Lauridson, this was the case here. (2PP Vol. LVI 485).

Ms. Redd's case was a typical manual strangulation where there was an application of force, a struggle and a

[20] Defense witness Dr. Leroy Riddick agreed that Ms. Redd died of manual strangulation. He also felt that a contributory factor was the multiple blunt force injuries to her abdomen, kidney, chest and head. (2PP Vol. LVII 637). The injury to her kidney was significant. (2PP Vol. LVII 638). The injury was consistent with being administered by a knee or fist. (2PP Vol. LVII 638).

reapplication of pressure to the neck. (2PP Vol. LVI 490).[21] In cases where constant pressure is applied, a person would likely be unconscious in 6-15 seconds. With constant pressure, a person would be dead in 3-5 minutes. (2PP Vol. LVI 493).

In Dr. Lauridson's opinion, Ms. Redd did not lose consciousness within 6-15 seconds. It was far longer than 6 or 15 seconds. (2PP Vol. LVI 533). It is possible that Ms. Redd was conscious for a minute and a half to two minutes. (2PP Vol. LVI 526).

Defense expert, Dr. Leroy Riddick opined that Ms. Redd suffered about 24 injuries as the result of the beating that Orme administered, plus or minus several. (2PP Vol. LVII 627). Dr. Riddick also opined Ms. Redd was strangled.

He testified that, in his opinion, Ms. Redd was unconscious within 10 seconds, plus or minus a few seconds. (2PP Vol. LVI 614). He cannot definitely say she was unconscious within 10 seconds. (2PP Vol. LVI 649). Dr. Riddick opined that the beating Ms. Redd sustained lasted more than 24 seconds. In his opinion, the encounter between Orme and Lisa Redd was a violent encounter. Ms. Redd did not go peacefully. (2PP Vol. LVII 656).

---

[21] Dr. Riddick, a defense witness, told the jury that he disagreed with Dr. Lauridson's opinion that there was a release of pressure then a reapplication of pressure. (2PP Vol. LVII 622). He thinks in such a case one would see more finger marks. (2PP Vol. LVII 623).

In presenting his argument to this Court, Orme incorrectly avers that the focus of the HAC aggravator is his intent to inflict or enjoy the torture to which he subjected Lisa Redd. However, this Court has consistently held that HAC aggravator does not focus on the intent and motivation of the defendant, but instead on the "means and manner in which death is inflicted and the immediate circumstances surrounding the death." Brown v. State, 721 So. 2d 274, 277 (Fla. 1998). *See also* Stephens v. State, 975 So. 2d 405, 423 (Fla. 2007). Indeed this Court rejected this same argument on Orme's direct appeal.

On appeal from his conviction and initial sentence to death, Orme contended his mental state at the time of the murder was such that he could not form a "design" to inflict a high degree of suffering on the victim. Orme argued the trial court erred in instructing the jury regarding, and in later finding, the aggravating factor of heinous, atrocious, or cruel. Orme v. State, 677 So. 2d 258, 263 (Fla. 1996).

This Court rejected Orme's claim and noted that "strangulation creates a prima facie case for this aggravating factor". This Court went on to rule that the defendant's mental state then figures into the equation solely as a mitigating factor that may or may not outweigh the total case for aggravation. Id.

Even if this Court had not rejected the same argument on direct appeal, the testimony introduced at trial establishes the murder was especially heinous, atrocious, or cruel. Dr. Lauridson's testimony, as well as Dr. Riddick's testimony, provided competent substantial evidence that Lisa Redd's murder was especially heinous, atrocious, or cruel.

Both Dr. Lauridson and Dr. Riddick opined that Ms. Redd was strangled to death. Both Dr. Lauridson and Dr. Riddick agreed that Ms. Redd was beaten severely. Ms. Redd suffered at least 24 separate blows to her body. Both Dr. Lauridson and Dr. Riddick agree that Lisa Redd died a violent death. Indeed the only major point of contention was whether Orme applied constant pressure to Ms. Redd's neck or applied, released, and reapplied pressure as Ms. Redd struggled to live.

Dr. Riddick, who believed Orme applied constant pressure, opined that Ms. Redd was unconscious within 10 seconds, give or take a few seconds. Dr. Lauridson, who believes Ms. Redd's injuries are consistent with application and reapplication of pressure, believes she was conscious for upward of 90 seconds to two minutes.

In any event, there is competent substantial evidence to support the trial court's finding the murder was especially heinous, atrocious or cruel. This is true for two reasons.

First, Lisa Redd was viciously beaten while she was still alive. This Court has consistently upheld HAC in cases where the victim is brutally beaten before death. England v. State, 940 So. 2d 389, 402 (Fla. 2006); Lawrence v. State, 698 So. 2d 1219, 1222 (Fla. 1997); Dennis v. State, 817 So. 2d 741, 766 (Fla. 2002) (HAC affirmed where both victims suffered skull fractures and were conscious for at least part of the attack as they had defensive wounds to their hands and forearms); Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995) (HAC affirmed where victim was struck seven times on the head, victim was alive during infliction of most of the wounds, and the last blows caused death); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (HAC affirmed where victim was brutally beaten while attempting to fend off the blows before being fatally shot).

Second, Lisa was strangled to death. This Court has consistently upheld the HAC aggravator where a conscious victim is strangled. This is true even if the victim was conscious for only seconds. Buzia v. State, 926 So. 2d 1203 (Fla. 2006)(we have upheld the HAC aggravator where the victim was conscious for merely seconds); Francis v. State, 808 So. 2d 110, 135 (Fla. 2001)(upholding HAC when the medical examiner's testimony was that the victims could have remained conscious for as little as a few seconds and for as long as a few minutes). *See also* Wainwright v. State, 33 Fla. L. Weekly S 929 (Fla. November 26,

2008)(this court has consistently held that strangulation of a conscious victim supports HAC aggravator); Bowles v. State, 804 So. 2d 1173, 1178 (Fla. 2001).

Dr. Lauridson's testimony provides competent, substantial evidence that Lisa Redd was conscious when Orme strangled her to death. She struggled to live. Orme made sure she lost her struggle. This murder was especially heinous, atrocious or cruel and this Court should affirm.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS COMMITTED IN THE COURSE OF A SEXUAL BATTERY (RESTATED)

In this claim, Orme alleges there is no competent substantial evidence to support the "in the course of a sexual battery" aggravator. Orme says there is precious little to suggest that Orme killed Ms. Redd in the course of a sexual battery. Orme suggests that Ms. Redd just as likely engaged in consensual sexual intercourse with Orme and then Orme beat and strangled her during a post-coital argument. (IB 66).

Orme alleges there was a "surprising lack of violence usually associated with rapes," including the fact that none of Ms. Redd's clothing was torn and Ms. Redd's vagina and anus did not show any evidence of force or violence. (IB 66). Orme points as well to the medical examiner's testimony that there is no conclusive way to decide whether this is consensual or not other than the circumstances." (IB 67). Finally, Orme points to evidence that Ms. Redd had some alcohol to drink and a tube of lipstick was found in a bag next to Orme's motel room bed. Orme avers the presence of the lipstick suggests that Ms. Redd may have refreshed her make-up after consensual intercourse. (IB 67).

This claim should be denied for two reasons. First, Orme was convicted of sexual battery by a unanimous jury beyond a

reasonable doubt. Accordingly, a jury already decided, unanimously, that Ms Redd did not consent and that Orme raped and sodomized Ms. Redd. A defendant's right to present evidence challenging an aggravating circumstance in a new penalty phase does not allow the defendant to re-litigate a jury's previous finding of guilt. See Duest v. State, 855 So. 2d 33, 40 (Fla. 2005). In presenting a claim that Ms. Redd may have consented to the intercourse, Orme impermissibly attempts to do just that.

This claim should also be denied because the circumstances of this rape and murder establish Orme murdered Lisa Redd "in the course of a sexual battery." First, it is simply not true that Ms. Redd did not have any evidence of force or violence to her vagina or anus. The medical examiner testified that Ms. Redd suffered injuries to her rectum while still alive. The injuries went beyond anal tears. Ms. Redd's injuries were to the lining of her rectum. Those injuries were consistent with unlubricated sexual intercourse. (2PP Vol. LVI 473). Ms. Redd's rectal injuries would have been painful. (2PP Vol. LVI 476). While the medical examiner could not rule out that the injuries could have been sustained during consensual sex, the injuries, along with the other circumstances, support a finding the murder was committed in the course of a sexual battery.[22]

---

[22] Dr. Lauridson could not conclusively say whether the sexual intercourse that occurred on the night of the murder was

Other evidence, apart from the injuries to her rectum, provides much more than "precious little" to demonstrate the murder was committed in the course of a sexual battery. Lisa Redd was a nurse. She was due to be at work at 11:00 p.m. She habitually reported early, arriving most nights by 10:30. She was very dependable. If she was not going to be at work, she would always call in so someone could cover for her. (2PP Vol. LIII 258). Lisa Redd did not show up for work on March 3, 1992 and she did not call in. (2PP Vol. LIV 260).

Lisa Redd did not go to Orme's room with romance on her mind. Orme called Lisa Redd. He asked her to stop by his room because he was feeling bad from combining alcohol and drugs. Ms. Redd told Orme she would. (2PP Vol. LIII 160). When Ms. Redd arrived at Orme's hotel room, she had only thirty minutes to an hour before she was due to be at work. Orme told the police Ms. Redd arrived at his room between 9:00 and 10:00 p.m.

---

consensual or non-consensual. There is no conclusive way to tell, other than the circumstances surrounding the episode. (2PP Vol. LVI 512). The defense's medical examiner, Dr. Leroy Riddick testified that he could not determine whether the sexual intercourse was consensual because Ms. Redd is dead and unable to report whether the sex was consensual. (2PP Vol. LVII 613). He agreed that in a case where a person who has injuries to her rectum and has been beaten on her head, face, chin, neck, abdomen, legs and arms, the scenario is more consistent with non-consensual intercourse than consensual intercourse. (2PP Vol. LVII 613). If the sex occurred before she was beaten, it would be more consistent with consensual sex. (2PP Vol. LVII 653).

but it may have been closer to 10:00 p.m. (2PP Vol. LIII 160).[23] Ms. Redd was dressed for work. (2PP Vol. LIII 161).

According to Orme's statement to the police, when Lisa Redd arrived, she immediately saw that Orme had been smoking crack. Orme walked into the bathroom to pick up his crack pipe. Ms. Redd slapped the pipe out of his hand and raked the remainder of his crack chips in the toilet. Orme told Redd he was going to get some more. She told him that he needed to go to the hospital. He agreed. He asked her to "pick up [his shit]" and he would go. (TR Vol. LIII 162-164). Orme's own statement to the police belies any notion that Redd would consent to sexual intercourse with a man she perceived needed, immediately, to go to the hospital.

Orme's claim that Ms. Redd may have been drinking alcohol with Orme and refreshing her lipstick after a consensual sexual encounter is refuted by the record as well as a common sense view of the evidence. Upon autopsy, Ms. Redd had only a trace amount of alcohol in her system (.001 mg/ml of alcohol).

Moreover, the tube of lipstick was not found in a make-up bag or small purse in which a lady would normally keep her lipstick. Instead, the tube of lipstick was found in a paper

---

[23] When questioned by police, Orme denied that he had sex with Ms. Redd at all. He did not claim any sex was consensual.

bag along with Orme's underwear and some towels, one of which was dirty.

It defies logic and common sense to suggest the presence of the lipstick in a paper bag is any evidence that Ms. Redd consensually engaged in sexual intercourse with Orme. This is especially true when the lipstick tube was found in a paper bag with Orme's underwear and dirty towel and Orme told the police that he took Ms. Redd's purse within ten minutes of her arrival to his room.

This Court has upheld the legal sufficiency of sexual battery under similar circumstances. In Fitzpatrick v. State, 900 So. 2d 495, 524 (Fla. 2005), this Court found the evidence to support the defendant's conviction for sexual battery and to allow the jury to find sexual battery as an aggravating factor when the evidence demonstrated the victim was found nude with her bloody undergarment wrapped around her waist near her breasts, her breasts were deep purple, there was a penetrating wound in the breast area that was either another stab wound or a bite mark, there was puffiness around her head, there was bruising on her arms, her legs were covered in scratches, and there was a cigarette burn on her leg. *See also* Johnson v. State, 969 So. 2d 938 (Fla. 2007) (the victim's resistance to entering the bedroom, the evidence of manual and ligature strangulation, the request for her children, and the premortem

wounds to her head, including one made by a knife-like object, were sufficient to permit the jury to reject Johnson’s hypothesis of consensual sex).

When Ms. Redd was found dead in Orme’s hotel room, her pants were not fully pulled up and her shirt was unsnapped. (2PP Vol. LIII 180). Her clothes were disheveled. (TR Vol. LIII 223). Ms. Redd’s bra was pulled over her breasts and her feet were not completely in her shoes. (2pp Vol. I 48). Orme told the police he thinks he dressed her after he found her dead. (2PP Vol. LIII 171).

Lisa Redd was also severely beaten. Among her injuries were bruises to the front of her body, including her chest area. One of her most severe injuries was an injury to her abdomen. The blunt force Orme used was sufficient to injure the tissue around Lisa Redd’s kidney and ureter. (2PP Vol. LVI 471-472). Finally, Ms. Redd was strangled to death.

Rather than precious little evidence of sexual battery, there was near overwhelming evidence of sexual battery. This Court should reject this claim.

ISSUE IX

WHETHER ORME'S SENTENCE TO DEATH VIOLATED THE DICTATES OF RING V. ARIZONA (RESTATED)

In this claim, Orme states "[t]o be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme." (IB 68). Orme, nonetheless, recognizes that this Court has repeatedly rejected Ring claims under like circumstances. (IB 68).

This Court need not consider, or even reconsider, whether Ring has any relevance to Florida's capital sentencing scheme. This Court may reject this claim for one reason.

Orme was convicted of first degree murder, sexual battery, and robbery. The trial court found the murder was committed in the course of a sexual battery. This Court has consistently found that Ring is satisfied when a defendant commits a murder in the course of an enumerated felony. Johnson v. State, 969 So. 2d 938, 961 (Fla. 2007)(Johnson is not entitled to relief under Ring because the "murder in the course of a felony aggravator" rests on the separate convictions of kidnapping and sexual battery, which satisfies Sixth Amendment requirements); Rutherford v. State, 880 So. 2d 1212 (Fla. 2004)(Ring satisfied when murder is committed in the course of an enumerated felony

because it involves facts already submitted to and found by a jury); Caballero v. State, 851 So. 2d 655, 663-664 (Fla. 2003) (rejecting Ring claim when one of the aggravating circumstances the judge considered was that Caballero committed the murder during the commission of two enumerated felonies, the crimes were charged in the indictment and found by a unanimous jury beyond a reasonable doubt).

SUPPLEMENTAL ISSUE X

WHETHER ORME'S SENTENCE TO DEATH IS PROPORTIONATE

Orme did not raise a claim that his sentence to death is disproportionate. Nonetheless, this Court reviews every death case for proportionality. Barnhill v. State, 834 So. 2d 836, 854 (Fla. 2002).

This Court performs a proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. In deciding whether death is a proportionate penalty, this Court considers the totality of the circumstances of the case and compares the case with other capital cases in Florida. Douglas v. State, 878 So. 2d 1246, 1262 (Fla. 2004).

In sentencing Orme to death, the trial judge found three aggravators to exist beyond a reasonable doubt: (1) the murder was committed for pecuniary gain, (2) the murder was committed in the course of a sexual battery, and (3) the murder was

especially heinous, atrocious, or cruel. The trial court gave these aggravators great weight. The court also found that any of these aggravators, standing alone, would outweigh all the mitigating circumstances. (TR Vol. XVII 3009-3012, 3018).

The trial court also found, but gave little weight to three statutory mitigators: (1) Orme had no significant criminal history, (2) at the time of the murder Orme was under the influence of an extreme mental or emotional disturbance due to his drug dependency, and (3) at the time of the murder, Orme's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired due to his impairment from cocaine and alcohol. (TR Vol. XVII 3013-3016).

The court considered but rejected Orme's age in statutory mitigation. (TR Vol. XVII 3016). The court noted that Orme was 30 years old at the time of the murder and was a mature adult in his professional and social endeavors. Accordingly, the trial court found Orme's age was not a mitigating circumstance and gave the mitigator no weight. (TR Vol. XVII 3016).

The trial court considered five non-statutory mitigators: (1) bipolar disorder contributed significantly to the defendant's substance abuse, (2) the defendant had a difficult childhood, (3) the defendant has exhibited model behavior while in prison, (4) Orme's potential for rehabilitation, and (5) Orme

tried to get the victim help. Judge Pitmman found that none of the non-statutory mitigators had been established and gave them no weight. (TR Vol. XVII 3016-3017).

This Court has upheld a death sentence in the presence of similar aggravators and mitigators and under similar circumstances. In Mansfield v. State, 758 So. 2d 636, 642, 647 (Fla. 2000), this Court upheld the defendant's sentence to death when the victim was sexually assaulted and strangled, and the trial court weighed two aggravating factors (HAC and the crime was committed during the commission of, or an attempt to commit, a sexual battery) against five nonstatutory mitigators, including that the defendant had a poor upbringing and dysfunctional family.

Similarly, in Douglas v. State, 878 So. 2d 1246 (Fla. 2004), this Court upheld Douglas' sentence to death imposed after Douglas raped and strangled Mary Ann Hobgood. In Douglas, the trial court found two aggravators, HAC and the murder was committed in the course of a sexual battery. The trial court also found, but gave very little weight to one statutory mitigator (no significant prior criminal history) and sixteen non-statutory mitigators including that Douglas was abused by his father both psychologically and physically, Douglas witnessed his father commit acts of domestic violence against his mother, Douglas was diagnosed with learning disabilities in

the second grade, and Douglas can be a productive inmate in prison. Id. at 1262-1263. *See also* Johnston v. State, 841 So. 2d 349 (Fla. 2002) (sentence to death proportionate in a case where Johnston beat, raped, and strangled his victim and the trial court found four aggravators including all three that were found in this case, one statutory mental mitigator and twenty-six non-statutory mitigators); Blackwood v. State, 777 So. 2d 399 (Fla. 2000) (death sentence proportionate when Blackwood strangled his former girlfriend and the trial court weighed HAC against one statutory mitigator [no significant history of prior criminal conduct] and eight non-statutory mitigators which included emotional disturbance at the time of the crime); Geralds v. State, 674 So. 2d 96, 98 (Fla. 1996) (death penalty was proportionate when the victim was beaten, bound, choked, and stabbed when the trial court weighed two aggravators - HAC and murder in the course of a robbery and/or burglary - against one statutory mitigator (age), and three non-statutory aggravators including that Geralds came from a divorced family and was unloved by his mother and Geralds' antisocial behavior and bipolar manic personality).

Orme's death sentence is proportionate. This Court should affirm Orme's second sentence to death.

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court affirm the Orme's sentence to death.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

____

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL—01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Mail to David A. Davis, Assistant Public Defender, 310 S. Monroe Street, Suite 401, Tallahassee, Florida 32301 this 5th day of January 2009.[24]

____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

____
MEREDITH CHARBULA
Assistant Attorney General

[24] The state’s answer brief ordinarily would have been due to be filed in this Court on January 2, 2009. However, because the Court was closed, the State’s answer brief is due to be filed on January 5, 2009. *Rule 9.420 (e)(f), Florida Rules of Appellate Procedure.*