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, FLORIDA

# INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

**RODERICK MICHAEL ORME,**

Appellant,

v. **CASE NO. SC08-182**

**STATE OF FLORIDA,**

Appellee.
_____/

## I. PRELIMINARY STATEMENT

RODERICK MICHAEL ORME, was the defendant in the trial court and will be referred to in this brief as either "appellant," "defendant," or by his proper name.

References to the Record on Appeal will be by the volume number in Arabic numbers followed by the appropriate page number, all in parentheses.

## II. STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Bay County on March 26, 1992 charged Roderick Orme with one count of first-degree murder, one count of robbery, and one count of sexual battery (1 R 3-4). He was eventually found guilty of those charges. By a vote of 7-5, the jury recommended the court sentence him to death (4 R 629), which it did (4 R 736-44, 746-49). It imposed a 15-year sentence for the robbery, and a 22-year sentence for the sexual battery. The robbery and sexual battery sentences were to run consecutively to the death sentence but concurrently with each other (4 R 743-44).

On appeal this Court affirmed the trial court's judgments and sentences. Orme v. State, 677 So.2d 258 (Fla. 1996). Subsequently, Orme filed a motion for post-conviction relief under Rule 3.851, Fla. R. Crim. P., which the trial court, after holding an evidentiary hearing, denied. By way of a petition for a writ of habeas corpus he also alleged appellate counsel was ineffective. This court denied the habeas corpus petition, but it granted him relief on his motion for post conviction relief. Orme v State, 896 So.2d 725 (Fla. 2005). Specifically, it found the trial lawyer ineffective because "counsel's decision to conduct no further investigation of Orme's bipolar diagnosis and subsequent decision to forego presenting this defense amounted to deficient performance." Id. at 735. It found this ineffectiveness would have had no impact on the guilty verdict, but it did

undermine this Court's confidence in the death recommendation, so it granted Orme a new penalty phase proceeding. Id. at 736.

Upon remand, the trial court appointed two lawyers, Russell Ramey and Michel Stone, to represent Orme (12 R 2128, 2250). George Schulz of the Holland and Knight Law firm filed a notice of appearance, but after determining that he had not met the death penalty qualifications of Rule 3.112, Fla. R. Crim. P., the court refused to let him represent Orme. It did allow him and Ms. Sarah Butters, another attorney from Holland and Knight, to appear pro bono (21 R 3134).

The State and defense then filed the following motions relevant to this appeal:

1. Motion for appointment of Expert. (12 R 2136-37). Granted (26 R 3259-60).

2. Motion to allow State expert to examine defendant (12 R 2139). Granted (12 R 2142).

3. Defendant's ex parte motion for additional expert assistance (13 R 2252-55). Granted.

4. Defendant's motion for retainers for defense experts (13 R 2290-92). Granted. (13 R 2301).

5. Motion to preclude imposition of the death penalty (15 R 2657-65). Denied. (39 R 3548)

6. Motion for interrogatory penalty phase verdict (15 R 2666-70). Denied (39 R 3556).

7. Motion to declare Section 921.141(5)(f), Florida Statutes, unconstitutional as written and applied (15 R 2673-77). Denied (39 R 3565).

8. Motion to declare Section 921.141(5)(d), Florida Statutes, unconstitutional as written and applied (15 R 2673-77). Denied (39 R 3565).

9. Motion for findings of fact by the jury (15 R 2693-95). Denied (39 R 3556).

10. Motion to preclude the death penalty because the lapse of time has created a heightened standard of persuasion on the defendant to obtain a life sentence and because the 15-year delay in sentencing constitutes cruel and unusual punishment (16 R 2838-2840). Denied (42 R 3681).

11. Motion to preclude argument that a life sentence does not mean life (16 R 2841-42). Granted (42 R 3686).

12. Motion for a unanimous jury sentencing recommendation (16 R 2843-46). Denied (42 R 3706).

13. Motion to include life without eligibility for parole on the verdict form (16 R 2881-83). Denied (43 R 3752).

Orme proceeded to the penalty phase hearing before Judge Judy Pittman.[1] The jury, after it had heard the evidence, argument, and instructions on the law, recommended by a vote of 11-1 that she impose a death sentence (17 R 2946). The court later conducted the hearing mandated by this Court in Spencer v. State, 615 So.2d 688 (Fla. 1993), and at a subsequent hearing, it sentenced Orme to death (17 R 3008-3019). Justifying that sentence, it found in aggravation:

1. The murder was committed for pecuniary gain.

2. The murder was committed was committed during a sexual battery

3. The murder was especially heinous, atrocious, or cruel.

(17 R 3009-3012)

In mitigation, it found:

1. The defendant has no significant criminal history. Little weight

2. The capital felony was committed while the defendant was under the influence of extreme mental or emotion disturbance. Little weight.

3. The capacity of the defendant to appreciate the criminality of his conduct or to confirm his conduct to the requirements of the law was substantially impaired. Little weight.

The court gave no weight to the following mitigation:

1. The age of the defendant.

[1] She was the original trial judge.

2. A bipolar disorder contributed significantly to the defendant's substance abuse.

3. The defendant had a difficult childhood.

4. The defendant is a model prisoner.

5. The defendant's potential for rehabilitation.

6. The defendant tried to get the victim help.

(17 R 3013-17).

The court also found a death sentence proportionally justified and any one of the aggravating factors, by themselves, would outweigh all the mitigation, and justify a death sentence (17 R 3018).

The court also denied Orme's motion for a new trial (17 R 3021-24, 3041).

This appeal follows.

## III. STATEMENT OF THE FACTS

### 1. The murder of Lisa Redd

About 8 o'clock in the morning of March 4, 1992 Jim Zahn was working as an alcohol and drug abuse counselor at the Chemical Addiction Recovery Effort and Reliance House in Panama City when he saw Mike Orme standing in one of the office's doorways (52 R 51-52). Zahn had had contact with him before and knew that he suffered from chronic cocaine abuse, having begun using alcohol when he was 16, marijuana at 18, and cocaine at 21 (52 R 57, 60). It was obvious that morning that his efforts to shake his cocaine habit had failed. Zahn spoke to Orme, but he would not respond or speak (52 R 52, 56). After he and another counselor unsuccessfully tried to talk with his former patient (52 R 56), Orme got a pen and paper and wrote something on it Zahn could not understand. Maybe it was a room (52 R 53). He wrote L-E-E or “something” and Zahn asked if it was "Lee's" and "Room 15" and "Motel" to which Orme only nodded his head (52 R 53).

The police were called, and when they arrived, he had oxygen hooked up and a needle in his arm (53 R 143). They did not see any scratches or bruises on him (53 R 189), but one of the attending nurses noted some superficial scratch marks on his right forearm (52 R 70, 74). When his sister in law saw him the next day, she observed that “Mike was not Mike. He was red faced, his eyes were big. It was very disturbing. He was hallucinating. . . He was seeing things that weren’t

there... He was in distress."[2] (57 R 712) His step mother noted that "He could hardly talk. . . And just in generally bad shape." (58 R 746)

Someone called the owner of Lee's Motel, and he went to room 15, knocked on the door to that room, and when he got no response he opened it. He saw a female body lying on the floor (52 R 100). He backed out, locked the door, and called the police. When they arrived they found the body of Lisa Redd (53 R 142)

She had several bruises on her face, neck, hands, arms, and to "some extent" on her legs (56 R 464-67). She had some damage to a kidney, indicating that she had received a hard blow to her abdomen (56 R 471). She also had some abrasions on the rectum lining (56 R 474-75), but none to her vagina or mouth (57 R 611). She had injuries to her neck consistent with having been strangled from the front and back, although the strangulation could have come from only one direction (56 R 482-84, 513). The cause of death was strangulation (56 R 492).

A gold necklace she "always wore," some rings, a watch and other jewelry were missing and never found (54 R 275-76). Her purse and credit cards, similarly, were never located, but no one ever used the credit cards after the murder (54 R 276-77).

[2] An attending nurse also noted that he was hallucinating (58 R 754). In addition, she recognized the symptoms in Orme of cocaine use (58 R 751).

**2. Orme's and Redd's relationship**

Orme had met Lisa Redd in 1980 but had lost track of her during the intervening years (53 R 1560). He ran into her in 1991, and within a short while they had developed a serious, romantic relationship (53 R 156-57). She had recently divorced her husband although she thought that may have been a mistake and she wanted to try to "work things out with him." (54 R 267) Nonetheless, during 1991 and 1992, Orme and Redd had an "off and on" affair (58 R 733).

Sometime before March he had surgery for a problem associated with his rectum (58 R 732, 61 R 1151), and naturally had medication for the pain (60 R 939).

In the afternoon of March 3, he drove to and checked into Lee's Motel about 3 p.m. (52 R 90). Over the course of the afternoon and into the evening, he came and went several times by taxi and in a white car (52 R 93-95).[3] During this time, the defendant was looking for "dope," and in the next several hours he smoked about five hundred dollars of crack cocaine (52 R 110, 53 R 163).[4] He also had sex with a prostitute (53 R 166). Actually, he may have had sex with more than one woman but he could not recall if he had (53 R 169). At some point he had almost spent all his money because when he wanted to hire another cab he

[3] He drove a Chevrolet pickup truck to the motel when he checked in (52 R 90).
[4] His parents had given him $400 shortly before Lisa's death (58 R 745).

had only two dollars for the fare. When he offered the driver his passport as collateral the latter refused (52 R 119).

During this time and into the evening, Orme had been drinking beer, perhaps "a little too much," taken some "downers," as well as smoking crack (53 R 160). He felt bad, so he called Lisa, who was a nurse, to stop by the motel room on her way to work to look at him (53 R 160). When she arrived and discovered he had been using cocaine, she became angry, slapped the crack pipe from his hand and threw some cocaine chips into the toilet (53 R 162). She apparently thought he was sick enough that she intended to call an ambulance (53 R 162). Instead, he got into her car and "hauled ass." (53 R 162) After that, he had a blackout because at some point he returned to the room, but he did not remember if Lisa was still there by herself until the last time when "I found her sprawled down." (53 R 167) When he saw her body he knew something was wrong because it was cold and one of her legs stiff (53 R 168). Knowing that he was "fucked up" and afraid to admit that Lisa might be dead, he may have tried to dress her and take her with him, but he did not remember "a whole lot." (53 R 171) He grabbed her purse and left, driving her car (53 R 164). He may have returned several times during the remainder of the evening, but that, like everything else, was fuzzy (53 R 174). He recalled the last time he came to the room because the sky was turning gray (53 R 167). He then drove around some more, and the next thing he knew he was at the

drug rehab center, seeking help for Redd (53 R 167). He did not remember having sex with Lisa (53 R 170).

**3. Orme's drug and mental problems**.

Linda Henley married Roger Orme in 1958 when she was 15, and he was 19 and in the Navy (59 R 811). From the start, he was very verbally abusive and domineering, and during their stormy marriage they broke up and got back together several times (59 R 811). Michael Orme was born in 1961, and his mother and father finally divorced in 1963 (59 R 814). Roger had custody of his son with the understanding that Roger's mother would keep the child, and Linda would have visitation rights on the weekend (59 R 815).

After the divorce, Roger would become angry with his son and scream at him if he showed too much affection to his mother (59 R 816), who eventually kidnapped him when she learned that her former husband intended to move out of state, taking Orme with him (59 R 816). Six months later his father came to his school and took his son out of class, punching the school teacher in the mouth when she tried to stop him (59 R 818). Linda did not see her son for 10 years or until he was 18, and she did so only because she had spent time and money trying to find him, which she eventually did (59 R 820). Explaining her absence, his father told him that his mother did not love him and had sold him for a car (59 R

822). Those experiences sucked the life and self esteem out of the child (59 R 819).[5]

Orme's father, who was diagnosed with depression and anxiety (58 R 737), was a tyrant, bully, and domineering (59 R 812-16). He told his son that he was worthless, no good, and just like his mother (59 R 823). As his former wife said, "he had a violent, vile temper . . . . And he screamed at Michael, get in the house, and Michael trembled and shook and started to cry and he went in the house." (59 R 818)

Orme seemed to be a normal child, but by the time he was in fifth grade "he really went down the tubes." (58 R 722). At times he was depressed, while on other occasions he had plans but never seemed to follow up on them. "He would want to rebuild a bicycle or something like that. . . [but] he would never do anything with it." (58 R 722). He seemed to flit between depression and giddiness (58 R 762), and his mother noted that he would go "from being very happy and proud and pleased with himself to being so depressed that he didn't want to do anything." (59 R 829-30). Then as a teenager, he began using alcohol and drugs (58 R 723).

When he was 18 or 19 he had joined a fraternity associated with the local community college in Panama City, and he was either very upbeat or "very

[5] Roger Orme remarried, and his new wife was very loving with her step son (57 R 702).

depressed and down. It seemed like he was either one or the other." (57 R 688). The fraternity had weekly parties that included drinking and drugs, including marijuana, speed, and Quaaludes (57 R 690). Orme drank and took the drugs, but he apparently may not have begun using cocaine until the 1980s, but when he did drugs he either binged or "not at all." (57 R 691).

As his use of drugs increased, he overdosed, not once but several times, and some of these required him to go to the local hospital's emergency room (57 R 694). One prolonged incident epitomized Orme's life as a young man. At some point he decided to join the United States Marine Corps reserves, but about two weeks before he reported to basic training, "he went on a terrible binge. . . He just disappeared absolutely disappeared. We didn't even see him for about two weeks before he left." (58 R 726) Nonetheless, he returned home and then went into the Marines. When he returned from basic training, he was very proud of himself and looked good (57 R 727). Yet when it came time to go to his first drill as a Marine Corps reservist, he got to the building but could not get out of the car and report for duty (59 R 831).

**3. The evidence of the bipolar mood disorder.**

At the resentencing hearing, Orme called two mental health experts who had examined and diagnosed the defendant. The State also called experts who had somewhat different views of the defendant's mental condition.

Dr. Michael Maher, a psychiatrist, and Dr. Michael Herkov, a psychologist, testified for the defense, and both concluded that Orme suffered from a bipolar mood disorder where "he becomes depressed and has other times where he becomes unrealistically or unnaturally energized and sometimes positive, sometimes irritable" (56 R 539). They also diagnosed him, as did all the experts, both state and defense, as a polysubstance abuser (56 R 539, 894, 60 R 1013, 61 R 1121). "He had a pattern of binge use where he would work pretty successfully and apparently without a lot of alcohol or dug intoxication while at sea. That is, he had periods where he "seems to have pulled himself together . . . and done something positive." (56 R 550) And then he came in and went on a binge of particularly rock cocaine." (56 R 542). This "incredibly powerful force" significantly impaired his behavior. It was an acute intoxication, an extreme emotional or mental disturbance (56 R 548).

> And possibly for the first couple of hours they can keep smoking cocaine and feel, in not good, at least excited and energized in a sort of positive way. After that first hour or two there is a pattern of trying to recreate that high which can never be accomplished. And as that continues they become more agitated, more irritable, less logical, less able to coherently understand their surroundings, less able to make good judgments, they do incredibly stupid thins like buying cocaine right in front of a police officer. All kinds of absurd behavior occurs when you get into the mid and the late stages of a cocaine binge, which might occur in a few hours or might occur in a longer period than that.

(56 R 547)

Supporting the bipolar diagnosis, Dr. Maher also said that Orme was a "moody kid and young man would go through periods of excitability and periods of depression. That's a very strong indicator of a mood disorder in later adolescence or early adulthood." (56 R 542)[6] The polysubstance abuse diagnosis fit well with the bipolar disorder because bipolar persons "have a tendency to use ... alcohol, marijuana, other drugs to try to change their mind, to change the way they're thinking and feeling." (56 R 543) Not surprisingly, this self medication only made a bad situation worse (56 R 549). Blackouts, or periods in which the person "would seem to be alert, but in fact, their memory is no longer recording events," were typical during periods of acute intoxication (56 R 546).

Thus, for Dr. Maher there was "no question in my mind that he was suffering from both disorders" and that he had deteriorated to a stage of serious impairment by the time of the murder (56 R 548, 592).

Dr. Herkov echoed Dr. Maher's diagnosis for many of the same reasons. He had talked with Orme's family, which had observed his mood swings for a "major portion" of his life (59 R 90). He noted that "professionals both within and outside the Florida Department of Corrections" had seen the symptoms of bipolar disorder, and that was significant to him (60 R 923-24). This expert also noticed that bipolar

[6] Dr. Maher maintained his conviction that Orme suffered from a bipolar disorder even though he acknowledged that five prison doctors had seen him between May 1993 and March 1995 and never diagnosed him as bipolar (56 R 584-85). Similarly, before going to prison no expert diagnosed him as such (56 R 585).

disorders ran in both sides of Orme's family, and because of that he had a significantly greater likelihood of being afflicted with it (59 R 900-901, 60 922). He said that a person with this mental disability often could live for months or years without having a bipolar episode (60 R 984), but for Orme, his cocaine addiction complicated the picture. He used the drug to self medicate his depression, and more ominously to prolong or recreate the desired manic phase of the bipolar disorder (59 R 917).[7] In short, Orme's mood swings were due to it than his cocaine addiction (60 R 924).

Drs. Gregory Prichard and Harry McClaren testified for the State. Dr. Prichard concluded that in addition to the polysubstance abuse, Orme also suffered from a depressive disorder not otherwise specified and a personality disorder not otherwise specified (60 R 1014). He specifically rejected the bipolar diagnosis because "the expectation would be if somebody has a bipolar disorder what we expect to see during some period, any period during the two weeks that the oil fields followed by a week off for a number of years, we would expect to see is some manifestation of symptoms . . . this is a twelve year period where we see no reference to any kind of work trouble related to any kind of mental illness." (60 R 1022) He acknowledged that Orme had several periods of hyper activity, but attributed them to his drug abuse (60 R 1016-17). He rejected a 1992 bipolar

[7] Dr. Herkov admitted that features of cocaine intoxication "look a lot like" bipolar disorder (60 R 921).

diagnosis, which included a prescription for the strong anti-bipolar medication lithium because between 1993 and 1995 five other psychiatrists had seen him at the prison and had not diagnosed him as such (60 R 1025). He rejected the suggestion that Orme had self medicated a bipolar condition with drugs. Instead, "he's drug dependent. He has a serious, severe drug dependency problem, he has since he was about 1979, 1978, it has been the catalyst for pretty much all of the problems of his life." (60 R 1028) Yet, even though he was "severely addicted . . . . he's fairly smart and didn't get arrested." (60 R 1055) Specifically, though under the grip of acute cocaine intoxication on the night of the murder with a "large assist from alcohol and . . . other drugs," and though impaired by the drugs, he engaged in a "lot of goal oriented activity that evening." (60 R 1059)

Dr. McClaren, echoing Dr. Prichard's evaluation, said that Orme had a polysubstance abuse problem, an anti-social personality disorder and "features" of a borderline personality "which has to do with disturbed interpersonal relationships, unstable mood, and anger, impulsivity." (61 R 1122). Also like Dr. Prichard, he disagreed with Dr. Maher's and Herkov's diagnoses that the defendant was bipolar (61 R 1123), and like Dr. Prichard, he put great weight on the absence of any such diagnosis since 1993 (61 R 1133). While acknowledging Orme's mood swings, and admitting he could not rule out a bipolar diagnosis (61 R 1143) he also "couldn't rule out that these changes in mood were due to the direct physiological

affects of psychoactive substances." (61 R 1130). The symptoms of cocaine intoxication "are largely similar to the leading features of the bipolar illness." (61 R 1150). Nonetheless, for him, that Orme held steady employment for several months and had completed the Marine's boot camp (although he had trouble reporting for reserve duty), refuted the defense expert's diagnosis he was bipolar (61 R 1131). At least five other mental health professionals had seen him since being on death row in 1993, and none of them had diagnosed him as bipolar also had significance (61 R 1133). Nonetheless, even though he admitted he never got a clear description of what Orme did on the night of the murder, and he admitted the defendant was in such bad shape that he had to be hospitalized, he, like Dr. Prichard, found it significant that he could engage in several goal directed activities. "Oh, absolutely." (61 R 1142)

## IV. SUMMARY OF THE ARGUMENT

**ISSUE I**: During voir dire, Orme wanted to ask the prospective jurors if they could consider remorse as mitigation, but the court refused to let him do that. That was error because this Court has found that remorse is a mitigating factor. As such, a defendant has the right to ask jurors, as a general matter, whether they can consider it as mitigation. Refusing to allow him to do that was error.

The court, following the logic of its ruling, then refused to consider remorse as mitigation when it sentenced the defendant to death. This Court has clearly and repeatedly said it can mitigate a death sentence.

**ISSUE II:** The court also refused to let Orme question the prospective jurors about recommending a death sentence out of mercy even though the aggravation may outweigh any mitigating factors. That was a relevant issue, and the court erred when it refused to let him inquire into it.

**ISSUE III**: During voir dire, one of the prospective jurors asked whether Orme would get credit for the time he had already served on death row, almost fifteen years. After some discussion with Orme and the State, the court told him and the rest of the venire that his question about parole was irrelevant. By then, however, the issue had been raised and the jurors had questions about it. Rather than reading this guidance during voir dire, the court should have done so at the

beginning to preclude any speculation by prospective jurors about whether life in prison without the possibility of parole really meant life in prison.

**ISSUE IV**: When Orme was originally sentenced in 1992, the jury and court could consider only two punishments: death or life in prison without the possibility of parole for twenty-five years. In 1994, the legislature changed those choices to death or life in prison without the possibility of parole. Orme sought to have the jury given the option of recommending the latter choice, but the court refused to let him tell the jury that they could recommend death or life in prison without the possibility of parole.

This was a particularly critical ruling because by the 2007 resentencing trial, Orme had already spent almost 15 years on death row and several members of venire were very troubled that if they recommended life without the possibility of parole for twenty-five years, he could be out of prison in ten years. This problem must have bothered several of the jurors who actually sat because in 1992, the jury recommended death by a vote of 7-5,whereas in 2007 they did so 11-1.

This Court has considered and rejected this issue in Bates v. State, 750 So.2d 6 (Fla. 1999), but it did so by the slimmest of margins. The four-member majority's opinion, however, as Justice Anstead said in his dissent, makes little sense. Orme now argues that this Court should revisit Bates, reject what it said in 1999, and hold that a defendant can waive the "milder" sentence of life in prison

without the possibility of parole for twenty-five years in favor of life in prison without the possibility of parole.

**ISSUE V:** The court refused, as a matter of law, to find as mitigation that Orme 1. had a difficult childhood, 2. was a model prisoner, 3. had potential for rehabilitation, and 4. had tried to get help for the victim. As to the first three proposed mitigators, it clearly erred because this Court has explicitly held that they can mitigate a death sentence. As to the last, that he tried to get help for the victim, the court made factual assumptions unsupported by the evidence and a conclusion at odds with what this Court considers mitigation.

**ISSUE VI:** The court found Orme committed the murder for pecuniary gain, but its analysis belies that conclusion. That is, the defendant called Lisa Redd to his motel room because she was a nurse and he needed medical assistance from his use of cocaine and alcohol. He killed, the court found, when she threw his cocaine in the toilet. Significantly, he did not do that because of what she had that he could use to buy cocaine. In short, the murder was not an integral part of his plan to get her jewelry, purse, and car keys as is required for this aggravator to apply to this case.

**ISSUE VII**: The court found, in justifying sentencing Orme to death, that he committed the murder in an especially heinous, atrocious, or cruel manner. In reaching that conclusion, it ignored the evidence of the defendant's cocaine,

alcohol, marijuana, and other drug use at the time of the murder as it reflected on his "enjoyment" or "utter indifference" to Redd's suffering. That is, in finding this aggravator the State had to show he had the mental state to "enjoy" what he was doing. The evidence never showed that, and as significant, the court never discussed Orme's mental condition as it affected the heinous, atrocious, or cruel aggravator.

**ISSUE VIII:** The court found, in aggravation, that Orme killed Lisa Redd while he was sexually battering her. The circumstantial evidence shows, with equal likelihood, that the murder occurred after they had had consensual sexual intercourse.

**ISSUE IX:** This Court wrongly decided Bottoson v. Moore, 863 So.2d 393 (Fla. 2002), and King v. Moore, 831 So.2d 403 (Fla. 2002). Because it has recently and repeatedly rejected arguments challenging the correctness of those decisions, Orme recognizes the futility of repeating those arguments. He raises this issue now simply to preserve it for further review.

## V. ARGUMENT

### ISSUE I

THE COURT ERRED IN REFUSING TO 1) ALLOW ORME TO CHALLENGE FOR CAUSE PROSPECTIVE JURORS WHO COULD NOT CONSIDER REMORSE AS MITIGATING A DEATH SENTENCE, AND 2) CONSIDER IT IN ITS SENTENCING ORDER AS A MITIGATING FACTOR.

During voir dire, Orme began to ask prospective jurors about the issue of remorse as possibly mitigating a death sentence. Before he could do so, however, the State objected to questions about remorse (47 R 4441). The court asked if "remorse is non-statutory mitigator?" The defendant said that "I think it's certainly something - -" The court, however, refused to allow any inquiry: "I have to go on State v. Beasley. I don't, at this point in time, I don't think it's appropriate on voir dire examination." (47 R 4443) The court later modified that ruling to allow inquiry regarding remorse but only for the purpose of using a peremptory challenge (47 R 4476).

The court erred in refusing to allow Orme challenge for cause any prospective juror who could not consider or give some weight to remorse as a mitigating factor. Because the court erred, as a matter of law, this court should review this issue under a de novo standard of review.

**A. The limitation of voir dire**

The defendant has, as a matter of constitutional law, the right to a fair and impartial jury. Voir dire is the vehicle used to ensure that jurors selected to try his guilt, or in this case, whether he should live or die, meet that standard. Impartiality is more than something "nice to have," but is an "absolute prerequisite to our system of justice." Williams v. State, 638 So.2d 976, 978 (Fla. 4th DCA 1994). The purpose of voir dire is to "obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice," Ferreiro v. State, 936 So.2d 1140, 1142 (Fla. 3d DCA 2006) (quoting Pope v. State, 84 Fla. 428, 94 So. 865, 869 (1922)) As such, a prospective juror should be excused for cause if "there is any reasonable doubt about the juror's ability to render an impartial verdict." Singleton v. State, 783 So.2d 970, 973 (Fla. 2001). Thus, counsel can ask questions about issues that will arise in the trial to determine if a prospective juror could impartially consider them. A party cannot, however, mention or use the anticipated evidence "to shock potential jurors or to obtain a preview of their opinions of the evidence." Ferreiro, cited above

For example, in Hoskins v. State, 965 So.2d 1, 12 -13 (Fla., 2007), Hoskins wanted to show potential jurors autopsy pictures during voir dire and then ask "whether it would cause them to vote for the death penalty." The trial court refused to let him do that, but did allow him to tell the jury that they would see

graphic pictures and hear similar testimony and then ask them if they could still be fair and impartial. That abused no discretion because the defendant could inquire about any biases or prejudices regarding the issue without referring to any specific facts of the case.

Accordingly, in this case, Orme sought to ask the prospective jurors, about the issue of remorse generally and not regarding any specific evidence of his anguish over what he had done. "I'm not asking them to give [remorse] weight. I'm merely asking them, . . . is it something they would consider or is it something that they would not consider." (47 R 4443) Hence, the defendant sought to inquire about the issue of remorse generally without reference to any of the facts in this case showing it. The court, therefore, should not only have allowed the inquiry, which it eventually did (47 R 4475-76), but have granted challenges for cause which it refused to do for prospective jurors who could not consider evidence of remorse as mitigating a death sentence.

**B. The refusal to accept remorse as mitigation**.

The court's ruling makes some sense, however, if remorse is not a mitigating factor. After all, if the purpose of voir dire is to insure an impartial jury, it must remain open minded about the issues relevant to the sentencing hearing. A prospective juror might have a deep loathing for those who possess computer pornography, but since this case did not involve that crime, that person's bias

would have no relevance to their impartiality in this case. Thus, the question is whether a defendant's remorse mitigates a death sentence.

This Court has clearly, repeatedly, and for at least the past quarter century, said the defendant's remorse is mitigating evidence. In Campbell v. State, 571 So.2d 415, 419 f.n. 4 (Fla. 1990), this Court said: "Valid nonstatutory mitigating circumstances include but are not limited to the following: . . . . 3) Remorse and potential for rehabilitation." Similarly, in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), it held that "Any convincing evidence of remorse may properly be considered in mitigation of the sentence . . . ." Accordingly, dozens of capital defendants have argued their remorse has mitigated a death sentence, and as many trial courts have acknowledged it as mitigation and given it at least some weight. E.g., Gonzalez v. State, 33 Fla. L. Weekly S451 (Fla. July 3, 2008); Frances v. State, 970 So.2d 806 (Fla. 2007); Patterson v. State, 513 So.2d 1257 (Fla. 1987); Nibert v. State, 574 So.2d 1059 (Fla. 1990). When courts have either refused to find it, or have given it no weight, sound reasons have justified those decisions. Reynolds v. State, 934 So.2d 1128, 1159-1160 (Fla. 2006)

Thus, the defendant's remorse can be mitigation, and in this case, Orme intended to raise it as an issue. He was, therefore, entitled to ask the members of the venire if they could consider this as a legitimate part of his defense. The court,

therefore, simply erred when it refused to let him challenge for cause jurors who could not consider it.

In finding that remorse was not a non-statutory mitigator, the court relied on this Court's opinion in Beasley v. State, 774 So.2d 649, 672 (Fla. 2000). In that case, the defendant claimed his expressions of sorrow for Mrs. Monfort's death and gratitude for her kindness to him mitigated a death sentence. This Court acknowledged that remorse could mitigate a death sentence, but Beasley "has turned this analysis on its head, suggesting that an expression of mere sorrow (rather than remorse) should be considered as a mitigating factor." Id. (Emphasis in opinion.) Thus, Beasley, contrary to the trial court's reading of that case, never said remorse was not mitigation. As significant, this issue focuses on the limits of voir dire, not whether remorse or mere sorrow are mitigation. The trial court, thus, not only misread Beasley it stretched it to cover an issue significantly different from the one this Court addressed in that opinion.

Moreover, Orme has expressed his remorse from the beginning for causing her death. He never said he was merely sorry for it. When questioned by the police, hours after the murder, he said:

> No, I don't think I thought 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 that it's partially my fault

> because she wouldn't have been there in the first place if I hadn't have called her.

(53 R 173).

At the Spencer[8] hearing, Orme expressed his remorse at the murder of Lisa Redd,

> To Lisa's family, I don't really expect them to ever forgive me. But at the same time since this began I have always wanted to express to them my complete sorrow and regret for the actions that occurred, the loss that they suffered. . . .To deal day in and day out in my cell, as it was mentioned, the reality of where I am and reality of why I'm there haunts me more than probably anybody will every know.

(49 R 4740-41). By way of a "Defendant's Supplemental Sentencing Memorandum," Orme pointed out that at the Spencer hearing "Mr. Orme is extremely remorseful." (17 R 2965). The court's sentencing order, while promising to "address each and every statutory mitigating and every non-statutory mitigating circumstance argued by the defendant,"(17 R 3013) made no mention of the defendant's remorse (17 R 3013-17). Perhaps that was an oversight, but whether deliberate or not, the omission was an error that must be corrected. Campbell v, State, 571 So.2d 415 (Fla. 1990); Trease v. State, 768 So.2d 1050 (Fla. 2000)

That error can be easily remedied. Unfortunately, the more serious one, the limitation of voir dire, cannot. Because Orme could not challenge jurors for cause

[8] Spencer v. State, 615 So.2d 688 (Fla. 1993).

based on their attitude towards any remorse he had, this Court must remand for a new sentencing hearing.

## ISSUE II

THE COURT ERRED IN REFUSING TO LET ORME INQUIRE OF THE PROSPECTIVE JURORS WHETHER THEY COULD CONSIDER RECOMMENDING A LIFE SENTENCE AS A MATTER OF MERCY EVEN THOUGH THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATION, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

During voir dire, Orme sought to ask the prospective jurors about recommending a life sentence for no other reason than as an exercise of mercy

> MR. STONE: All right. If the evidence in this case or the argument in this case involved appealing to you at least consider the possibility of mercy, would that plea fall on deaf ears?
> MR. WELCH: I would like to hear the evidence or the statements concerning that mercy before making a decision.
> MR. STONE [defense 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

(45 R 408)

When Orme sought to have Mr. Welch excused for cause, the court denied that request (45 R 4094). Before doing so, it noted:

> THE COURT: Recent case, March 9th, 2006, Supreme Court has ruled, that the Supreme Court had the opportunity to review decisions holding that the jury is never required to recommend a death sentence—this is in a case of Overt v. State,[9] --the defense counsel was prohibited from asking the jury for mercy, asking for a

[9] The court was referring to this Court's decision in Ibar v. State, 938 So.2d 451 (Fla. 2006), in which this court rejected Ibar's contention that Ring v. Arizona, 536 U.S. 584 (2002), allowed him to argue, among other things, that lingering doubt of guilt could mitigate a death sentence. It has no application to this issue.

jury pardon, discussing whether the venire had any lingering doubt or (inaudible) personal opinion about the death penalty from witnesses. Now that's in a context of trial part. Um, also, it also applies to the penalty phase, and Mr. Welch has said that he can listen to all of the evidence and he could vote for life and death, and the Court finds that that's sufficient, the challenge is denied.

(45 R 4094)

Later, Orme again sought to question a prospective juror about considerations of mercy:

MR. STONE: What about, Ms. Melvin, considerations of mercy, do you think they should play any part in these proceedings?

MR. MEADOWS [the prosecutor]: Judge, I think we previously addressed that, Judge.

THE COURT: Objection sustained.

MR. STONE: May I approach, Your Honor?

THE COURT: The same ruling still stands that I previously made and it will be noted on the record at this time. You may go to your next question.

* * *

MR. STONE: I would move at this time for a mistrial, Your Honor, for restricting my questions of these jurors, um, into the area of mercy. Your Honor has completely shut off this line of questioning in violation of the -- . . . well known authority, State v. Poole, 194 So.2d, 903.

THE COURT: Okay, the ruling still stands as previously stated.

(45 R 4109-10)[10]

[10] The court also denied Orme's challenge for cause of a prospective Juror Tallent because he could not consider mercy (46 R 4200-4202)

The court erred in prohibiting Orme from questioning jurors about mercy, and this Court should review this issue as purely a matter of law and thus under a de novo standard of review.

As noted in the previous issue, a party has a right to question prospective jurors about their impartiality regarding the issues that may arise in a particular case. They cannot ask them how they would vote on specific facts, but they can probe their positions on general propositions of the law. Now, some of these issues are case specific, such as how people feel about robberies or child sexual batteries in cases dealing with robberies and child sexual batteries. Others, however, are inherent in the nature of the proceeding. Considerations of mercy are of the latter type in a capital sentencing proceeding. As this Court said in Alvord v. State, 322 So.2d 533, 540 (Fla. 1975):

> Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

See also Gregg v. Georgia, 428 U.S. 153, 203, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976) (A jury can constitutionally dispense mercy in a case deserving of death penalty); Accord, Henyard v. State, 689 So.2d 239, 249-250 (Fla. 1996).

Mercy, thus, is a relevant issue in every capital sentencing proceeding. As such, the court could not, as defense counsel said, "completely shut off this line of questioning." By doing so, this Court can have little confidence that Orme got that fair and impartial jury the constitution requires. That position is different from what this Court has faced in other cases in which the issue of mercy arose. For example, in Cox v. State, 819 So.2d 705 (Fla. 2002), the prosecutor, without objection, repeatedly misstated the law when he told the venire, and later the jury during closing argument, that if they found the aggravation outweighed the mitigation they must recommend death. "It is unmistakable that these statements are improper characterizations of Florida law." Id. at 717. "Despite the lucidity of the law, and the unavoidable conclusion that the prosecution's comments during Cox's trial were error," this Court found them not fundamental and hence harmless.

In Franqui v. State, 804 So.2d 1185 (Fla. 2001), the court and State told the jury during voir dire that "it was required to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances." Id. at 1192. While this Court said that was error, it ruled it harmless because subsequent instructions were "consistent with the standard jury instructions," and the court did not repeat its mistake when it instructed the jury immediately before their deliberations.

Contrary to the situations in Cox and Franqui, what happened here cannot be harmless. That is, the court, by prohibiting Orme's inquiry into the role of mercy in a death recommendation, tainted whatever jury was subsequently chosen. There may very well have been jurors like Mr. Welch, who could not or would not consider mercy as a reason to recommend a life sentence. Hence, this Court simply cannot conclude that this defendant had a fair and impartial jury. The court's error pervaded jury selection, and this Court cannot say that he had a fair and impartial jury. That is, the error in prohibiting the defendant from this legitimate area of inquiry struck at the fundamental fairness of Orme's trial. If he is entitled to a fair and impartial jury, there is no way this Court can say that in this case he had one.

As such, this Court must reverse the trial court's sentence of death and remand for a new sentencing hearing.

## ISSUE III

THE COURT ERRED IN REFUSING TO DISMISS THE VENIRE WHEN AT LEAST ONE OF THE PROSPECTIVE JURORS INQUIRED ABOUT THE POSSIBILITY OF PAROLE FOR ORME WITHIN TWENTY-FIVE YEARS IN LIGHT OF THE FACT THAT HE HAD ALREADY SERVED ALMOST 15 YEARS IN PRISON, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During voir dire, at least one prospective juror, a Mr. Bishop had problems recommending a sentence of life in prison if Orme could be paroled after having served 25 years there.

> JUROR BISHOP: I have difficulty considering the fact that parole is a possibility after twenty-five years considering this crime is already fifteen years ago.
>
> MR. STONE [Defense counsel]; Yeah. And that's the way, I guess, Mr. Tallent and Mr. Colson feel as well. Anyone else feel that way?
>
> JUROR MELVIN: I really do . . . I don't think he should be put back out at any time.

(47 R 4447)

When the court told the venire panel that the only sentences they could recommend were death and life in prison without the possibility of parole for twenty-five years (47 R 4450), prospective juror Tallent returned to Mr. Bishop's problem: "The twenty-five years would start fifteen years ago?" (47 R 4450). The court tried to skirt that issue by telling him that "Okay, in regards to the possibility of parole for twenty-five years, that's not an issue for you to consider and it's not an issue for me to consider. Those are the sentences." (47 R 4450)

Prospective Jury Bishop, when pressed, said, "Oh, I can follow the law and I don't agree with it and I would have difficulty with the choices . . . . I'm predisposed to agree with Mr. Tallent and have been since the beginning." (47 R 4452) Another prospective juror Colson admitted, "I'm not really happy with the twenty-five years but if it's there then it's there." (47 R 4454)

Orme moved to strike the venire panel or to grant a mistrial because Mr. Bishop "in his answer poisoned the entire pool by indicating that this defendant had been convicted years ago and then went on further to talk about why he was opposed to the only sentencing scheme that's available to this court and to this defendant." (47 R 4466). The court, after some discussion, denied the motion (47 R 4472), but it read an instruction that counsel for the state and defense had agreed on (47 R 4480):

> Ladies and gentlemen of the perspective jury, just a few minutes ago a question arose as to the possible sentence 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 upon 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.

(47 R 4481)[11]

The instruction illuminates the fundamental problem with the issue raised by Mr. Bishop specifically and capital resentencings generally.

When a defendant sentenced to death gets a new sentencing hearing, there is a distinct possibility that the resentencing jury may give weight to the fact that an earlier jury had probably recommended death and the sentencing court had certainly imposed that punishment. To minimize that possibility of unfair speculation, this Court developed an instruction trial courts should read to the jury at the beginning of the resentencing proceeding:

> Ladies and gentlemen of the jury, the defendant has been found guilty of Murder in the First Degree. An appellate court has reviewed and affirmed the defendant's conviction. However, the appellate court sent the case back to this court with instructions that the defendant is to have a new sentencing trial to decide what sentence should be imposed. Consequently, you will not concern yourselves with questions of his/her guilt.

Standard Jury Inst (Crim.) 7.11

By giving this instruction at the beginning, potential jurors are immediately told that issues of guilt are irrelevant to their considerations of the appropriate

[11] The instructions were drawn from this Court's opinions in Green v. State, 907 So.2d 489, 496-98 (Fla. 2005) and Thompson v. State, 619 So.2d 261, 265 (Fla. 1993). Defense counsel agreed to the instruction only because the court had denied his motion to strike the jury panel (47 R 4471-72).

sentence. They are, thus, instructed that they can determine only the defendant's sentence.

If so, a new problem arises in situations where the defendant faces the sentencing options of death or life in prison without the possibility of parole for twenty-five years. This is the one Mr. Bishop first mentioned: will the defendant get credit for the time already served? In this case, and others this Court has considered that can be a considerable period. See, Thompson v. State, 619 So.2d 261, 265 (Fla. 1993) (Thompson had already served 13 years.)

Unlike the preliminary instruction just quoted, this court has not crafted any similar guidance to give to prospective jurors to control or eliminate their speculation about when a defendant might be released. Instead, midway through voir dire in this case, Mr. Bishop broached this subject. By then, the court had to put a patch on the problem, but, as defense counsel noted. "Mr. Bishop poisoned the well, all the water is tainted." (47 R 4471) The court should have read the instruction Orme and the prosecutor had crafted at the beginning of the sentencing hearing, just as it did with the one mentioned above. Of course, the parties had not drafted it then, and no one had anticipated this problem. Thus, as much as the court and parties regretted it, the work of several days had to be tossed aside and a new venire empanelled. That was the only course the court could have taken to insure

the defendant would have his constitutionally guaranteed right to a fair trial. Now the only recourse this Court has it to grant Orme yet another sentencing trial.

## ISSUE IV

THE COURT ERRED IN REFUSING TO LET ORME WAIVE HIS RIGHT TO THE SENTENCING OPTION OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE FOR 25 YEARS, IN FAVORING OF THE HARSHER PUNISHMENT OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the outset, Orme must inform the Court that its opinion in Bates v. State, 750 So.2d 6 (Fla. 1999), controls this case. And if it follows the four justice majority he loses. The defendant, however, argues here that this Court should reject that decision and, instead, adopt the dissenting opinion of Justices Anstead, Pariente, and Kogan.

This issue arises because of a change in the law in capital sentencing. Before May 25, 1994, defendants charged with a capital murder faced two sentencing options: death or life in prison without the possibility of parole for twenty-five years. Section 775.082(1), Fla. Stat. (1993). On that date section 775.082(1), Fla. Stat. (Supp. 1994), changed the choices to death or life in prison without the possibility of parole. In other words, if a defendant was sentenced to life in prison, it meant just that: he or she would spend the rest of their lives in prison. Parole was not an option.

Shortly before the 2007 trial, Orme raised this issue in a series of motions that focused on the effect the 14 years he had already spent in prison would have

on the jury's sentencing recommendation (16 R 2838-42).[12] At the hearing on these motions, the State and Orme cited decisions of this Court to support their respective positions, Gore v. State, 706 So.2d 1328 (Fla. 1997); Hitchcock v. State, 673 So.2d 859 (Fla. 1996); Kearse v. State, 770 So.2d 1119 (Fla. 2000) (42 R 3681 et. Seq.). Ultimately, the court refused to let the State argue that a "life sentence does not mean life" as part of its opening and closing statements (42 R 3686), but, relying on Gore and Kearse it also decided that it would tell the jury that "a life sentence included eligibility of parole after twenty-five years, emphasizing eligibility." (42 R 3687)

Troubled by that ruling, Orme sought further clarification, pointing out that the jury would figure out that "now it looks like if we vote for life we're voting for, you know, nine or ten years." (42 R 3688) To support its position that the jury should not know that Orme was eligible for parole after twenty-five years, he voluntarily waived being sentenced under the pre May 25, 1994 sentence in favor of the harsher life without parole change in the law (16 R 2884, 42 R 3690). Unpersuaded, the court stuck with its ruling (42 R 3691).

[12] Orme filed 1) Motion to Preclude the Death Penalty because the Lapse of Time has Created a Heightened Standard or Burden of Persuasion on the Defendant to obtain a Life Sentence and Because the 15 Year Delay in Sentencing Constitutes Cruel and Unusual Punishment (16 R 2838-40); 2) Motion to Precluded Argument that a Life Sentence does not mean Life (16 R 2841-42).

The problem remained, however, of what the court should tell the jury about the sentencing options they faced. Initially, the judge said that it would give the preliminary instruction this court crafted in Hitchcock.[13] An argument then erupted over when the jury should know what "life" meant, during voir dire, or at the end of the sentencing trial (42 R 3695). Orme specifically wanted the court to give the definition as part of the final instructions because "if they hear that from the very beginning they're going to shut down and shut down to the point that they don't listen to mitigation because they know mitigation may mean ten years." (42 R 3697).

On the other hand, the prosecutor noted that if, during voir dire, the court told the prospective jurors that they would be told what life meant at the end of the trial they would be suspicious of the delay (42 R 3699).

The matter rested there, with the promise to revisit it later. At a hearing three days later, Orme raised the issue again, this time by way of his "Motion to Include Life without Eligibility for Parole on the verdict form." (43 R 3745) In this motion the defendant wanted the jury to have three options: death, life without the possibility of parole for twenty-five years, and life without parole (43 R 3746).

[13] "An appellate court has reviewed and affirmed the defendant's conviction. However, the appellate court sent the case back to this Court with instructions that the defendant is to have a new trial to decide what sentence should be imposed. Consequently, you will not concern yourselves with the question of his guilt." Hitchcock, at . See also Fla. Std. Jury Inst. (Crim.) 7.11

The State objected because that option was not provided by law (43 R 3748), and the defendant responded by noting that "it's fundamentally unfair for this case to proceed to a penalty phase where the only two choices that are going to be announced by this Court is life with eligibility of parole at twenty-five or death knowing that the defendant has already served approximately fifteen years of his sentence." (43 R 3749) He also reiterated his willingness to waive any ex post facto application of the 1994 change in the law (43 R 3749).

During voir dire several prospective jurors had problems with the sentencing options being death and life without the possibility of parole for twenty-five years.

> JUROR BISHOP; I have difficulty considering the fact that parole is a possibility after twenty-five years considering this crime is already fifteen years ago.

(47 R 4447).

Moreover, others felt the same way as Mr. Bishop (47 R 4447-48, 4452-54, 4498, 4513, 48 R 4592-93, 4595) although their attitude changed if Orme faced life without the possibility of parole, although Mr. Bishop recognized "that's not possible." (47 R 4448)

The court denied that motion (43 R 3751), but it erred in doing so, and this Court should review this issue under a de novo standard of review.

Although the court, the defense, and the prosecution cited and relied on several decisions by this Court that arguably dealt with this issue, they missed the

key, directly on point, case. Bates v. State, 750 So.2d 6 (Fla. 1999). In that decision, Bates argued that he could waive the ex post facto application of the older section 775.082(1) and be sentenced under the harsher, newer section 775.082(1). A four justice majority rejected that argument:[14]

> In his first and second issues and part of his third issue, appellant contends that the trial court erred in refusing to instruct the jury that if he were sentenced to life in prison for the murder committed in 1982, his sentence would be without any possibility of parole, as section 775.082(1), Florida Statutes (1995), provided at the time of the resentencing in 1995. Appellant claims that 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 under the Eighth and Fourteenth Amendments to the United States Constitution.
>
> In Florida, without clear legislative intent to the contrary, a law is presumed to apply prospectively. See State v. Lavazzoli, 434 So.2d 321, 323 (Fla.1983); McCarthy v. Havis, 23 Fla. 508, 2 So. 819, 821 (1887); Bond v. State, 675 So.2d 184, 185 (Fla. 5th DCA 1996). Retroactive application of the law is generally disfavored, see Herbert Broom, Legal Maxims 24 (8th ed. 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."); and any basis for retroactive application must be unequivocal and leave no doubt as to the legislative intent. See Larson v. Independent Life & Accident Ins. *Co.*, 158 Fla. 623, 29 So.2d 448 (1947); see also Broom, supra at 25 ("It is a general principle of our law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction.").

[14] Appellate counsel apologizes for the extensive quotes from the majority and dissenting opinions in Bates. He did so because that decision is directly on point, and he could not add more to this argument than what was said in the opinions.

In 1994, the Legislature enacted chapter 94-228, Laws of Florida, section 1 of which amended the statute on penalties for crimes to make life without the possibility of parole the alternative punishment to a death sentence for the crime of first-degree murder. See § 775.082(1), Fla. Stat. (Supp.1994). Section three of the session law states that "[t]his act shall take effect upon becoming a law." The act was approved by the Governor and became effective May 25, 1994. Thus, the amended sentencing statute applies to all crimes committed after May 25, 1994. We find no unequivocal language that the Legislature intended this amendment to apply retroactively.

We have previously held that this statute was not applicable to crimes committed before its effective date. Hudson v. State, 708 So.2d 256 (Fla. 1998); Williams v. State, 707 So.2d 683, 684 n. 1 (Fla. 1998); Craig v. State, 685 So.2d 1224, 1230 n. 12 (Fla. 1996). We similarly reject appellant's contention.[FN3]

FN3. See In re Standard Jury Instructions in Criminal Cases, 678 So.2d 1224, 1225 (Fla.1996) ("Note to Judge: For murders committed prior to May 25, 1994, the penalties were somewhat different; therefore, for crimes committed before that date, this instruction should be modified to comply with the statutes in effect at the time the crime was committed.")

Our analysis of this issue causes us to reject appellant's waiver arguments. Because the 1994 amendment can have no effect on appellant's sentencing, we conclude that the waiver of an ex post facto claim in respect to the 1994 amendment to section 775.082 is of no consequence. The waiver of ex post facto rights would only be an issue if the statute could have an effect on appellant's sentence which, as we have stated, it cannot.[FN4]

FN4. Appellant calls our attention to a recently enacted life-without-parole statute in Georgia. The editorial comments to that statute provide in relevant part that "[w]ith express written consent of the state, a defendant whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act." Appellant contends that the Georgia

> statute supports his argument that, absent any legislative intent to limit retroactive application the Florida statute, the defendant has a constitutional entitlement to the amended penal statute. We conclude that such an argument must fail in light of the lack of any indication that the Florida Legislature intended that its amendment to section 775.082(1), Florida Statutes (1993), have retroactive application. Moreover, we point out that the State vehemently objected to appellant's request at trial.
>
> Appellant's alternate contention, that the jury should have been advised that appellant would agree to waive the possibility of parole, is also unavailing under Florida's capital sentencing scheme because, as the trial court ruled, "[a] defendant cannot by agreement confer on the court the authority to impose an illegal sentence." Williams v. State, 500 So.2d 501, 503 (Fla. 1986). At the time appellant committed this murder, the Legislature had not established life without the possibility of parole as punishment for this crime.

Justice Anstead, joined by Justices Pariente and Kogan dissented from the majority's ruling on this issue:

> At issue is whether a defendant convicted of a murder that occurred before 1994, and who has the right to be sentenced under the pre-1994 sentencing scheme that allowed consideration of parole after twenty-five years, but whose sentencing will actually take place after 1994, can waive that right and voluntarily elect to be sentenced under the more severe 1994 sentencing scheme that does away with "consideration of parole." [FN6] I believe the majority's refusal to accept Bates' waiver of his ex post facto rights is unnecessarily harsh and inconsistent with our prior case law on waiver and sentencing. At trial Bates expressly agreed to waive any and all rights to be sentenced under the old law and to waive any and all entitlement to consideration of parole. The trial court rejected the waiver. The resolution of this issue is literally a matter of life and death in this case since the defendant's jury actually recessed its deliberations and came back and asked the trial court if it could recommend life without parole as a sentence for the defendant.

FN6. Sentencing under the old scheme was only marginally more lenient to defendants in any case, since the alternative was still life imprisonment and very few of those sentenced to life without the possibility of parole for twenty-five years may have had any reasonable expectation of actual parole after the twenty-five year term. The guarantee before the new sentencing scheme was only a "consideration of parole." Thus, those convicted of our most serious crime, capital murder, could have reasonably expected to face the most stringent, if not impregnable, obstacles to parole.

Since the only person adversely affected by the waiver of the right to be sentenced under the old sentencing scheme is the defendant, it would seem appropriate to ask why the defendant should not be allowed to waive this right. [FN7] There simply is no plausible answer to that question set out in the majority opinion. Instead, the majority offers a non sequitur: the 1994 law cannot be applied to an earlier crime because it would violate the defendant's ex post facto rights. But it is those rights that the defendant is not only willing, but anxious to waive.[FN8]

FN7. The defendant, of course, under the ex post facto provisions of the federal and state constitutions, cannot be forced to submit to a harsher sentencing scheme. Indeed, that is why there are provisions for waiver of the ex post facto rights in Florida's sentencing guidelines that allow a defendant convicted of a noncapital crime to opt for sentencing under the prevailing guidelines rather than the law in effect at the time of the crime, permitting defendants convicted of crimes prior to October 1, 1983, to elect to be sentenced under sentencing guidelines. *See* § 921.001(4) (6), Fla. Stat. (1997).

FN8. It is also important to note that the State of Florida in its brief filed in this Court in another case involving this same issue has suggested a proper procedure for allowing such a waiver. *See* State of Florida's Answer Brief at 94, Almeida v. State, 748 So.2d 922 (Fla. 1999). That is precisely the procedure the defendant attempted to follow here.

In waiving his right to be sentenced under the older, less restrictive scheme, the defendant will be acting in accordance with the express public policy of the State of Florida as explicitly announced

by the Legislature. Since 1994, the public policy of the State of Florida has been that persons convicted of first-degree murder are to be punished by either death or life imprisonment without the possibility of parole. Prior to that time, the sentencing options were similar, but the life imprisonment alternative was without the possibility of parole for twenty-five years rather than without the possibility of parole at all. Hence, the State of Florida and its prevailing public policy will be enforced and benefited by the defendant's waiver.

In addition to the fact that a waiver would be consistent with prevailing legislative policy, this Court has consistently recognized that a defendant can waive constitutional protections. See Bowles v. Singletary, 698 So.2d 1201 (Fla.1997); Melvin v. State, 645 So.2d 448 (Fla.1994); Cochran v. State, 476 So.2d 207 (Fla.1985). In fact, Florida's extensive sentencing guidelines scheme has always permitted a defendant convicted of a noncapital offense the option of being sentenced under the prevailing sentencing law or sentenced under the law prevailing at the time the crime was committed. See § 921.001(4)(b); Cochran, 476 So.2d at 208. By voluntarily opting to be sentenced under the current scheme a defendant is deemed to have waived his ex post facto rights. Cf. Bowles, 698 So.2d at 1204. That is all the defendant is asking to do here, to be permitted to waive his ex post facto rights and give up any parole considerations. Capital murder cases have been excepted from the sentencing guidelines only because the sentencing options in such cases are fixed, i.e., death or life imprisonment. Florida's sentencing law has hardly been harmed or disrupted by allowing defendants to waive their ex post facto rights in all noncapital cases, and no harm has been advanced to prevent the same waiver here. Under the majority's holding we now have the anomalous situation that the only defendants in Florida who cannot waive their ex post facto rights and elect to be sentenced under the prevailing sentencing law are those charged with first-degree murder.

What then is a possible reason that waiver would not be permitted where the waiver would be perfectly consistent with prevailing public policy and the only one affected by the more severe sentencing option is the defendant? One can only speculate that it would be to deprive the defendant of the benefit of the appeal to be made to sentencing juries and judges under*22 the 1994 sentencing scheme that if they choose a life sentence over death they can be

> assured that life means life and the convicted murderer will not be eligible for parole. In other words, it is apparent that the defendant wishes to waive any speculative entitlement to parole under the old law in exchange for the calculation that the appeal of a defendant to a jury and judge for his life through the imposition of a life sentence might be slightly enhanced. The issue is especially important here where the defendant has been in prison since 1982 and his eligibility for parole would not be delayed for twenty-five years, but for less than half that. That is hardly an attractive sentencing option for a jury in a first-degree murder case. Surely that is why the jury in this case asked for the option of a life sentence without parole, an option the defendant is willing to accept but the majority rejects.
>
> When all is said and done, the truth is that no valid public policy reason has been advanced to deny the defendant the right to waive his ex post facto rights and give a sentencing jury the option of applying Florida's prevailing public policy in capital sentencing to this case. It is done every day in noncapital cases and should be permitted here.

For the reasons argued by the dissenters in Bates, Orme asks this Court to recede from Bates, adopt the dissenter's opinion, and remand with instructions that he receive a new sentencing hearing where the only sentencing options the jury and court have are death or life in prison without the possibility of parole.

## ISSUE V:

THE COURT ERRED IN GIVING NO WEIGHT TO MITIGATION THIS COURT HAS CLEARLY HELD MITIGATED A DEATH SENTENCE, A VIOLATION OF ORME'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The court's sentencing order is 12 pages long. It found the same aggravating factors it originally found in 1992. In discussing the mitigation, it discussed first the statutory mitigators and then the nonstatutory mitigation offered by Orme. It dismissed outright as nonmitigating, several factors or aspects of Orme's character or nature of the crime that this Court has specifically held mitigate a death sentence. This Court should review this issue to determine if competent, substantial evidence supports the court's findings. Brooks v. State, 918 So.2d 181 (Fla. 2005).

### I. The mitigation rejected as mitigation.

The court rejected, as mitigation:

a. The defendant had a difficult childhood.
b. The defendant is a model prisoner
c. The defendant's potential for rehabilitation
d. The defendant tried to get the victim help.

(17 R 3016-17).

### A. The defendant had a difficult childhood.

First, the court simply erred when it said that having a difficult childhood "is not relevant to this murder." (17 R 3016). Years ago this Court clearly held that

childhood traumas such as a "difficult childhood" mitigates a death sentence. Campbell v. State, 571 So.2d 415, 419, f.n. 4 (Fla. 1990); Nibert v. State, 574 So.2d 1059 (Fla. 1990). It has never retreated, or even modified, that holding. Instead, it has repeatedly emphasized the truism that as the twig is bent so grows the tree. Men do not slake off childhood traumas such as verbal physical or emotional abuse like a wet shirt, as they grow older. They linger, and if untreated, become part of the child/adult's persona. If not, why is child sexual battery a capital offense? It is because of the long term, lifelong horrible scar it leaves.

Childhood trauma, as a mitigator, of course presumes there is evidence of the abuse, and that is the court's second problem with this mitigator: it failed to provide all the facts about Orme's childhood. It was far more damaging than his parents divorced and he was not raised by his biological mother (17 R 3016). Without any contradiction or challenge, Orme's father, who was diagnosed with depression and anxiety (58 R 737), was a tyrant, bully, and domineering (59 R 812-16). He told his son that he was worthless, no good, and just like his mother (59 R 823).

As his former wife said, "he had a violent, vile temper . . . . And he screamed at Michael, get in the house, and Michael trembled and shook and started to cry and he went in the house." (59 R 818) Another time, Orme's father punched a teacher in the mouth when he grabbed his son and took him out of her class (59 R

819-20). Orme's mother would not see her son for ten years after that. Explaining her absence, his father told him that his mother did not love him and had sold him for a car (59 R 822). Those experiences just sucked the life and self esteem out of the child (59 R 819).

By the time he was in fifth grade "he really went down the tubes." (58 R 722). At times he was depressed, while on other occasions he had plans but never seemed to follow up on them. "He would want to rebuild a bicycle or something like that. . . [but] he would never do anything with it." (58 R 722). He seemed to flit between depression and giddiness (58 R 762), and then as a teenager, he began using alcohol and drugs (58 R 723).

Thus, for these two reasons the court should have found that the defendant's "difficult" childhood mitigated a death sentence. Moreover, his life after that never showed he had somehow outgrown the trauma of his youth. He became more addicted to drugs, especially cocaine, and would have drug and alcohol binges that lasted for weeks. Before he joined the Marines, "He went on a terrible binge . . . He just disappeared absolutely disappeared. We didn't even see him for about two weeks before he left." (58 R 726) At other times, he would be "up" for days and then "way down here" for days, going from extreme to the other (58 R 762-63). For Orme, there was not much time in the middle (58 R 766) . "If he was on a high, it was a long high. If he was on a low, it was a long low." (58 R 763)

The evidence thus shows that Orme never outgrew the trauma of his childhood, and he carried the scars and open wounds well into adulthood. Phillips v. State, 608 So.2d 778, 782 (Fla. 1992)(Even though Phillips was 36 at the time of the murder, evidence of a bad childhood still mitigated a death sentence.)

**B. The defendant is a model prisoner.**

Orme presented unrefuted testimony that for the past thirteen or fourteen years he has been on death row, he has been a model prisoner. Ron McAndrew, a former warden at Florida State Prison, reviewed the defendant's prison record and said that during the course of Orme's stay there, he had remarkably few disciplinary reports. "Mr. Orme's conduct from 1993 up until today, ..., was absolute model prisoner compared to other prisoners across the board." (57 R 667). He has had only two disciplinary reports, neither of which was for violence (57 R 671). He was a "pussycat" when compared with other inmates (57 R 667). Even among other inmates on maximum custody, he was among the best behaved (57 R 670). Of course, he was isolated from the rest of the prison population by being on death row, but that has not stopped other inmates from continuing their homicidal attacks. Muhammad v. State, 494 So.2d 969 (Fla. 1986)(Death row inmate kills guard). Even though he may have had fewer chances to get in trouble, he still had them, but chose, for the vast majority of temptations that must have

come his way, to ignore them. Indeed, Mr. McAndrew had the firm opinion that if Orme were released into the prison's general population he would be a model prisoner (57 R 674).

Moreover, contrary to court's finding, the defendant's record in prison is or can be mitigating. Campbell v. State, cited above, f.n. 4; Skipper v. South Carolina, 476 U.S. 1, 7-8 (1986).

**C. The defendant's potential for rehabilitation.**

Similarly, the defendant's potential for rehabilitation is mitigation. Campbell v. State, supra, and Mr. McAndrew's testimony and opinion about Orme's behavior if released into the general prison population supports the defendant's potential for rehabilitation.

**D. The defendant tried to get the victim help.**

The court rejected this as mitigation because after Orme had committed the murder and sexual battery he took Lisa Redd's purse and car to buy more cocaine. "Only after he seeks help for himself first, does he write a note about Lee's Motel." (17 R 3017) First, there is no evidence he ever sought help for himself, and certainly none that he did so before seeking help for Redd. The counselor at the rehabilitation center said that Orme showed up on the doorstep of the center

incoherent and unable to speak. He had urinated in his shorts (52 R 52). Despite his obvious need for help, he got a pencil and paper and scribbled "Lee's motel, Rm 15." (52 R 55) There is no evidence he went there for help for himself. If so, why write anything?

More troubling about the court's refusal to find this as mitigation is that, assuming that he sought help for himself first, he still sought help for Redd. How many defendants facing a death sentence before this Court over the past thirty-five years have done what Orme did? Few, if any. More compelling, Orme was virtually on death's door when he showed up at the rehab center (52 R 52), yet he persisted and persisted again in getting the people there to go to "L E E Mot" "Rm 15." For a man who was simply out for himself as the court's finding implies, the defendant did something extraordinarily unusual -- he voluntarily sought help for his victim. This is mitigation because it shows the defendant's compassion, and reduces his moral culpability. He never simply killed Ms. Redd and dumped her body in a forest, along side a road, or in a river, as scores of other death row inmates have done with their victims. As evident from his efforts, he knew something was wrong with her and he sought help.

Of course, if this Court agrees with Orme and remands for resentencing, the court could simply find the mitigation but again give it no weight. That would be error. In Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990), this Court held

"The [sentencing] court must find as a mitigating circumstance each proposed factor that is mitigating in nature. . . .[A] mitigating factor once found cannot be dismissed as having no weight." In Trease v. State, 768 So.2d 1050 (Fla. 2000), it modified the holding in Campbell by noting allowing a trial court to give no weight to a particular mitigator if it provides the "additional reasons or circumstances unique to that case." Id. at 1055. Thus, the lower court in this case could find what Orme has offered as mitigation but give it no weight. Well, not quite. If it intends to say this mitigation deserves no weight it must say why. Simply ignoring it or saying it is entitled to no weight is error. Id.

This court should reverse the trial court's sentence of death and remand for resentencing before the court.

## ISSUE VI

THE COURT ERRED IN FINDING THAT ORME COMMITTED THE MURDER FOR PECUNIARY GAIN.

The court, in justifying sentencing Orme to death, found that he had committed murder for pecuniary gain. Section 921.141(5)(f), Fla. Stat. (1992):

> The evidence establishes that the defendant unlawfully took the victim's purse, car, keys, U.S. currency, necklace and watch by force, violence, assault or putting in fear. On the afternoon of March 3, 1992, the defendant admittedly checked into Lee's Motel for the purpose of buying illegal drugs. He hired a black prostitute to help him purchase crack cocaine and for sexual favors. The defendant explained that because he is white he needed the black female's assistance in purchasing drugs in a predominately black area.
>
> The testimony is clear that the defendant called the victim, Lisa Redd, who was his former girlfriend and a nurse by profession, to medically assist him. Upon her arrival at the motel she determined that the defendant was in need of medical assistance from his use of cocaine and alcohol. The defendant refused to go to the hospital or allow her to call an ambulance. When she threw the remainder of his unused cocaine in the toilet, he became angry and proceeded to brutally, beat, rape and murder her. He took her jewelry, purse, car keys, and car to go buy more drugs and for partying with another woman later that night. The victim's purse and jewelry were never found.
>
> The Court finds that this aggravating circumstance is entitled to great weight.

(17 R 3009-10)

The court erred in finding Orme committed the murder for pecuniary gain because the circumstantial evidence fails to establish this aggravator beyond a reasonable doubt. This Court should review this issue under a competent,

substantial evidence standard of review. Guardado v. State, 965 So.2d 108 (Fla. 2007).

Because aggravating factors justify sentencing a person to death this Court has held that they must be established beyond a reasonable doubt. State v. Dixon, 281 So.2d 1 (Fla. 1973). As it can do with most evidentiary issues the State can use circumstantial evidence to establish it. C.f., Lugo v. State, 845 So.2d 74 (Fla. 2000). Specifically, the circumstances must show beyond a reasonable doubt that "the murder is an integral step in obtaining some sought after gain." Peterka v. State, 640 So.2d 59, 71 (Fla. 1994). Yet, because of the inherent ambiguity of most circumstantial evidence, this Court has also established special rules of review:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.

Darling v. State, 808 So.2d 145, 155 (Fla. 2002); State v. Law, 559 So.2d 187, 189 (Fla. 1989)

Hence, on review this Court must determine if the State has presented evidence that has rebutted every reasonable hypothesis that Orme killed Redd for

reasons unrelated to taking the money, jewelry or other items she may have had. It did not.[15]

Orme's reasonable explanation for taking Redd's property, if indeed he did, is that he grabbed it as an afterthought. The evidence, even from the court's findings, supports that argument. That is, Orme initially had enough money -- $400 -- for his cocaine binge. Later in the evening of March 3, 1992, he had exhausted this supply of cash because he tried to get the cab driver to accept his passport as collateral for cab fare. When he refused, the defendant accepted that fact. If he needed money so badly the logical, most immediately available victim would have been the cab driver not Redd, whom he would have had to call, ask for help, wait for her to show up, and then rob. E.g., Melton v. State, 949 So.2d 994 (Fla. 2006); Smith v. State, 931 So.2d 790 (Fla. 2006); Mills v. State, 786 So.2d 547 (Fla. 2001)(recent cases involving murders of cab drivers)

Likewise, there is no other evidence that at anytime during the evening Orme tried to take anyone else's property by force or simple theft. That just was not the way his cocaine habit drove him. Indeed, the fact that he has no significant criminal history (17 R 3013) though a crack addict for at least 10 years, attests to

[15] Orme recognizes that he was convicted of robbery, but the definition of robbery, section 812.13 Fla. Stats (1992), is broader than the pecuniary gain aggravator with its "integral part of the murder" limitation.

his confining his criminal actions, including robbery and thefts, to possessing drugs, notably cocaine.

This observation resonates with what he did that night. He did not call Redd with the intent to rob or take her property. As the court recognized in its findings, "the defendant called the victim . . . to medically assist him." Thus, if he intended to kill her for what she had, that motive developed later. But, as the court's order also shows, the theft did not occur until after the murder. That is, "The defendant refused to go to the hospital or allow her to call an ambulance. When she threw the remainder of his unused cocaine in the toilet, he became angry and proceeded to brutally beat, rape, and murder her." Thus, he killed Redd, not for what she had, but for what she had done-i.e. she flushed his crack down the toilet. The murder was not an integral part of any intent he may have subsequently developed for her purse and other items.

At trial, the State never presented any evidence rebutting that theory. No witness or confession claimed he admitted luring her to her death so he could take her jewelry. No prior bad acts or Williams Rule[16] evidence showed he had robbed or stolen in the past for any reason, especially for drugs. If he wanted money, he could have robbed the cab driver; instead he tried to barter his passport for cab

[16] Williams v. State, 110 So.2d 654 (Fla. 1959).

fare. Indeed, other death row inmates have used cab drivers as their ready made ATM. Orme did not.

Moreover, what the defendant did after the murder further refutes the pecuniary gain aggravator. That is, he knew something was wrong with Redd, and rather than fleeing, he sought, as much as he could with his cocaine soaked brain, to get help for her. Robbers and thieves do not do that.

Thus, the State never presented any compelling evidence refuting Orme's argument that if he took Redd's jewelry and other items,[17] that theft or robbery was not the reason he killed her. As such, the court erred in instructing the jury they could find pecuniary gain as an aggravator, and it compounded that error when it used it to justify sentencing him to death.[18]

[17] Orme uses "if" because others, notably the black prostitute, had access to the defendant's room, and during one of his forays into the black community for drugs, or even after he left to go to the rehab center, she may have taken Redd's property. Nothing refuted that possibility.

[18] The court gave this aggravator such great weight that said that by itself, it would justify imposing a death sentence (17 R 3018). If so, the lower court's error cannot be harmless beyond a reasonable doubt.

## ISSUE VII

THE COURT ERRED IN FINDING THE MURDER TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, BECAUSE IT FAILED TO CONSIDER, IN ITS ANALYSIS, WHETHER THE DEFENDANT ENJOYED OR WAS INDIFFERENT TO THE SUFFERING OF LISA REDD, AS REQUIRED, IN VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Before trial Orme filed a motion to preclude imposition of the death penalty (15 R 2657-65). In it he argued that the court should not impose death because the especially heinous, atrocious, or cruel (HAC) aggravating factor did not apply. "Because there is no proof whatsoever in this case that the accused intentionally tortured the victim or in any way reveled in or enjoyed her pain, this aggravating factor cannot proven." (15 R 2659)

In sentencing Orme to death, the court rejected that argument and found that he had committed the murder of Lisa Redd in an especially heinous, atrocious, or cruel manner. After claiming he had "lured her to his motel room" he then "brutally beat her . . . .There is no way to determine exactly how long this victim was tortured and beaten before her death but it is clear from the evidence and testimony that this was not an act of instantaneous or painless death. The defendant after having delivered approximately (24) twenty-four blows to the victim then violated her in every way a woman could be violated and then concluded his acts with death by strangulation." (17 R 3011-12)

The court erred in finding the murder to have been committed in an especially heinous, atrocious, or cruel manner because no evidence showed that he enjoyed the suffering his victim, as this Court has required before the HAC can apply. This Court should review this issue under a competent, substantial evidence standard of review.

In Orme v. State, 677 So.2d 258, 263 (Fla. 1996), this Court said:

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

First, Orme acknowledges that strangulation murders almost always qualify as especially heinous, atrocious, or cruel. Orme; Belcher v. State, 851 So.2d 678 (Fla. 2003). On the other hand, in order for this aggravator to apply the State must prove beyond a doubt that he inflicted a high degree of suffering on Lisa Redd with utter indifference to or even enjoyment of her suffering. Smithers v. State, 826 So.2d 916 (Fla. 2002).

Thus, if it must prove that, Orme should be able to rebut it, and the court, in its sentencing order, should be required to say why, despite the evidence rebutting that essential element of this aggravator, it applies. That is, he should be able to

present evidence that specifically negates that element of this aggravator, and the court, in its sentencing order, should consider it in its determination of whether HAC applies or not. Separating Orme's emotional and psychological turmoil into a neat category and calling it a mitigating factor fails to do that. It simply admits or recognizes his substantial mitigation cocaine addiction, use of marijuana and alcohol and other drugs and his bipolar manic depression as a general mental mitigation without in any way analyzing its application to the HAC aggravator. Specifically, the court never considered how those disabilities affected his ability to "enjoy" the suffering of Lisa Redd. Without doing that more specific but difficult analysis the trial court could not have honestly determined whether the HAC aggravator applied. It simply concluded that this murder satisfied the requirements for this circumstance to apply without fully considering this Court's definition of it.

Without doing that, this Court cannot say the trial court correctly found this murder to have been especially heinous, atrocious, or cruel. Moreover, had it included the defendant's deteriorated mind in that analysis it could only have concluded that as horrible as this strangulation killing may have been, it was not especially heinous, atrocious, or cruel, as this Court has defined that aggravator.

This Court should, therefore, reverse the trial court's sentencing order and remand for resentencing.

## ISSUE VIII

THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT ORME KILLED LISA REDD DURING THE COURSE OF A SEXUAL BATTERY, A VIOLATION OF HIS EIGHT AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Orme to death, the court found that he had sexually battered Lisa Redd:

> The defendant unlawfully committed sexual battery upon the victim, Lisa Redd, by oral, vaginal and anal penetration by the penis of the defendant without her consent and in the process used force or violence likely to cause serious personal injury to Lisa Redd. It is abundantly clear from the photographs in evidence, the forensic evidence, the new DNA testing and the testimony of Fr. James Lauridson, the medical examiner and Gary Harmor and other DNA analysts that the defendant violently committed sexual battery on Lisa Redd. There is absolutely no evidence of consensual sexual relations at the crime scene.
>
> The court finds that this aggravating circumstance is entitled to great weight.

(15 R 3010-11)

The court erred in finding this aggravator applied, and this Court should review this issue under a sufficiency of the evidence standard of review.

Without question, Orme had sexual relations with Lisa Redd the night she was murdered. The question is whether she consented to them. The DNA evidence does not answer that question. It only confirms what the defendant admits. So, other, circumstantial, evidence must establish her lack of consent, and for it to withstand appellate scrutiny it must refute his reasonable hypothesis that

they had consensual sexual intercourse before the murder. State v. Law, 559 So.2d 187, 188-89 (Fla. 1989)

Of course, the strongest piece of evidence is her violent murder. Yet, just because her death was a homicide does not necessarily mean that whatever happened before or after it was causally linked. C.f., Moody v. State, 418 So.2d 981 (Fla. 1982); Mahn v. State, 714 So.2d 391 (Fla. 1998) In short, for example, Redd and Orme may have had consensual sex and then afterwards they got into an argument during which he killed her. In that scenario, the murder was not committed while he was "engaged in the commission of . . . a sexual battery." Section 921.141(5)(d) Fla. Stats (1992).

So what evidence shows that Orme killed Redd during a sexual battery? Precious little. Indeed, other than the bruises and contusions that accompanied the beating and strangulation, nothing shows he had forced sexual intercourse with her.

To the contrary, the evidence shows a surprising lack of violence that usually is associated with rapes. None of her clothes were torn, particularly her panties or bra (57 R 307, 309). Similarly, neither her vagina or anus showed any evidence of force or violence. They had no tears or other lacerations (56 R 511-12), and whatever injuries she had to her rectum were consistent with voluntary sexual intercourse (56 R 512). Indeed, as Dr. Lauridson admitted, "there is no

conclusive way to decide whether this is consensual or not other than the circumstances." (56 R 512)

The other circumstantial evidence, moreover, reinforced Orme's argument that he never sexually battered Redd. Interestingly, a tube of lipstick was in a bag next to the bed, and the evidence shows she had had some alcohol to drink before her death (57 R 611). As defense counsel noted, this evidence "suggests there may have been the sharing of a beer, not often done between people who are raping each other. Oh, and there's the lipstick, there's the lipstick, found in the bag next to the bed in the motel room. . . . Why would her lipstick be out and then put in a bag next to the bed, out of her purse obviously. Why did she take it out of her purse? Why? Might that not be what somebody would to after they have a consensual sexual encounter is to refresh their make-up or start to." (61 R 1243-44).

The circumstantial evidence, therefore, is consistent with the theory that Redd and Orme had consensual sex, and only afterwards did he kill her. As such, he did not murder her during the commission of a sexual battery.

This Court should, therefore, reverse the trial court's order sentencing Orme to death and remand for resentencing.

## ISSUE IX

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO.2D 393 (FLA. 2002), and KING V. MOORE, 831 SO.2D 403 (FLA. 2002).

To 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. Bottoson v. Moore, 863 So.2d 393 (Fla. 2002); and King v. Moore, 831 So.2d 403 (Fla. 2002) . Because this argument involves only matters of law, this Court should review it de novo.

Before trial, Orme file a "Motion for findings of fact," citing the United States Supreme Court Opinions in Apprendi v. New Jersey, 530 U.S. 446 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). (15 R 2693-95). The trial court denied it (39 R 3556).

Orme recognizes that this Court has repeatedly and recently rejected arguments that Ring has any application to Florida's death penalty. As mentioned, however, that holding is incorrect. But realizing the futility of making an argument this Court has rejected, he simply raises it now in the hopes that this Court will come to it senses, realize its error, and grant Orme a new sentencing hearing. If that hope is futile, he raises the issue simply to preserve it to argue before another court on another day.

## V. CONCLUSION

Based on the arguments presented here, respectfully requests this Honorable Court reverse the trial court's sentence of death and remand either for a new sentencing hearing with a jury or resentencing without a jury.

## CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to **MEREDITH CHARBULA**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050 and to **RODERICK MICHAEL ORME**, #726848, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of October, 2008. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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