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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-819

LOWER COURT CASE NO. 92-442-CFMA

RODERICK MICHAEL ORME,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd
Suite 118-61
Estero, FL 33928
(850) 322-2172

COUNSEL FOR APPELLANT

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ARGUMENT I

COUNSEL WAS INEFFECTIVE AT THE RESENTENCING PHASE OF MR. ORME'S CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Orme asserted in the proceedings below numerous instances of ineffective assistance of counsel during the resentencing proceeding. One of those instances included the assertion that counsel Ramey in his opening statement argued lingering doubt to the jury, despite the fact that it does not constitute valid mitigation in a penalty phase proceeding. See, e.g., Merck v. State, 124 So. 3d 785, 796 (Fla. 2013); Darling v. State, 808 So. 2d 145 (Fla 2002); Hildwin v. State, 84 So. 3d 180, 190 fn7 (Fla. 2011); Duest v. State, 855 So. 2d 33 (Fla. 2003). Moreover, Mr. Orme claimed that trial counsel exacerbated the error by not presenting the evidence of lingering doubt which he had promised the jury would hear, and that the evidence which was presented actually benefitted the State and was adverse to Mr. Orme. Further, Mr. Orme asserted that the defense made matters even worse when co-counsel Stone presented a contradictory argument during the closing, in which he acknowledged that Mr. Orme committed the crime and the defense wasn't suggesting otherwise (See RT. 1226-27; 1264-65).

In its written closing argument subsequent to the postconviction evidentiary hearing, the State disagreed with Mr. Orme's contentions, asserting that trial counsel did not contest that Mr. Orme committed the murder, but that counsel was instead

challenging the weight of the sexual battery and pecuniary gain aggravators (PC-R2. 335-36). Similarly, in its order denying postconviction relief, the circuit court concluded that it was clear that counsel was neither arguing that Mr. Orme was not guilty of sexual battery nor arguing residual doubt as a mitigating circumstance (PC-R2. 368-69). Rather, according to the circuit court, counsel was attempting to properly challenge the State's burden to prove beyond a reasonable doubt that the murder was committed during the course of a sexual battery (PC-R2. 369).

In his Initial Brief before this Court, Mr. Orme asserted that the circuit court's determination was erroneous on the basis of instances in the record where trial counsel was in fact arguing lingering doubt (See e.g., RT. 38-40). And Mr. Orme pointed to instances during the postconviction evidentiary hearing where resentencing counsel readily admitted to attempting to advance a lingering doubt argument (See e.g., PC-R2. 3095-97). Moreover, Mr. Orme noted, contrary to the circuit court's order and the basis for which resentencing counsel claimed strategy, that he had already been convicted of sexual battery and robbery, thus the State had proven these circumstances beyond a reasonable doubt, and it was not required to do so again. Thus, according to Mr. Orme, any supposed strategic decision by counsel was unreasonable. See e.g., Hinton v. Alabama, 571 U.S. __, slip op. No. 13-6440 at *11 (2014)("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example

of unreasonable performance under *Strickland.*"). See also Lawhorn v. Allen, 519 F.3d 1272, 1295 (11th Cir. 2008)(Trial counsel's "decision was not made after a thorough investigation of the law but was made based on a gross misunderstanding of a clear rule of Alabama criminal procedure.").

Despite its previous position, and contrary to the circuit court's determination, Appellee concedes that "[i]n the present case, the defense argued lingering doubt during the second penalty phase." (Answer at 26). According to Appellee, "[t]he defense's position that the sex between Orme and Ms. Redd was consensual was impermissible because Orme was previously convicted of sexual battery on Ms. Redd." (Answer at 26). Appellee further acknowledges that "Orme was convicted of sexual battery as well as robbery, therefore any attempt to argue the sex was consensual or there was no robbery, was in fact an attempt to relitigate guilt on those convictions." (Answer at 26).

Yet, despite this newfound concession and apparent disagreement with the circuit court's determination, Appellee avers that there was no deficient performance since trial counsel was aware that he was making an impermissible argument, yet strategically chose to do so with the endorsement of Mr. Orme (Answer at 27). Relying on this Court's decision in Hannon v. State, 941 So. 2d 1109, 1125-30 (Fla. 2006), Appellee also asserts that there was no prejudice since the trial court allowed the argument, and therefore Mr. Orme obtained a benefit from the impermissible action (Answer at 27, 29).

Mr. Orme submits that Appellee's arguments have no basis in law or fact. Indeed, Appellee offers no case law supporting the notion that if an attorney consciously does something impermissible in court, then his actions constitute a reasonable trial strategy. Here, counsel's strategy was unreasonable because he was advancing an argument that the jury, the trial court and this Court on appeal were unable to consider in determining whether Mr. Orme's life should be spared. See e.g., Lukehart v. State, 70 So. 3d 503, 513 (Fla. 2011)("Florida does not recognize residual doubt, much less residual doubt as to the aggravators."). Appellee also ignores the numerous other instances presented by Mr. Orme in his Initial Brief establishing that, even if a lingering doubt argument was permissible, it was unreasonable in this case.[1]

With regard to Mr. Orme's supposed endorsement of resentencing counsel's strategy, Appellee cites to the following cases for the proposition that if a defendant consents to defense counsel's trial strategy after it has been explained to him, it will be difficult to establish a claim of ineffective assistance of counsel: Stein v. State, 995 So. 2d 329 (Fla. 2008), Gamble v.

[1]For instance, while Ramey told the jury that experts would testify that the DNA present under the victim's fingernails did not belong to Mr. Orme, but to a third party (T2. 39-40), the defense DNA expert testified that Mr. Orme's DNA, in addition to a weak unidentified profile, was in fact under the victim's fingernails (T2. 884-85). Additionally, while Ramey attempted to plant the seed of residual doubt (PC-R2. 3096), co-counsel Stone told the jury in his closing that Mr. Orme accepted responsibility for the victim's death and stated, "We are not contending for a moment that Mike Orme did not kill Lisa Redd." (RT. 1226-27).

State, 877 So. 2d 706 (Fla. 2004), and Nixon v. Singletary 758 So. 2d 618 (Fla. 2000) (Answer at 28). However, a review of these cases demonstrates that they are readily distinguishable from Mr. Orme's case as they concern trial counsel's concession of guilt to various charges and whether the defendant consented to this concession. In Nixon, which was at the time the seminal case as to this issue, this Court held that if the defendant could establish that he did not consent to trial counsel's strategy to concede guilt, then counsel would be per se ineffective under the standard set forth in United States v. Cronic, 466 U.S. 648 (1984). Nixon, 758 So. 2d at 624. This Court did so on the basis that while an attorney has the right to make tactical decisions regarding strategy, the determination to plead guilty or not guilty is a matter left completely to the defendant. Id. at 623.[2]

Unlike the cases relied upon by Appellee, Mr. Orme's case does not concern whether he consented to trial counsel's admission of guilt. Other than certain fundamental decisions regarding a case, including whether to plead guilty, it is within counsel's professional judgment to determine how to proceed in a case. See e.g., Jones v. Barnes, 463 U.S. 745 (1983). These particular decisions must be directly assessed for reasonableness in light of all the circumstances. Strickland v. Washington, 466

[2]This Court's reasoning in Nixon was subsequently rejected by the United States Supreme Court, which determined that claims of ineffective assistance of counsel based on counsel's concession of guilt to the crime charged, even without the defendant's consent, are to be analyzed in accordance with the Strickland standard. Florida v. Nixon, 543 U.S. 175 (2004).

U.S. 668, 691 (1984). Here, the argument advanced by counsel was improper, it could not be considered in mitigation, and it was harmful to Mr. Orme. In short, the argument was an unreasonable one, regardless of whether Mr. Orme endorsed it.

In any event, Mr. Orme submits, contrary to Appellee's assertion, that the record does not establish that he endorsed the lingering doubt argument advanced by counsel. On the pages cited by Appellee (3094-95), it only states that according to trial counsel Ramey, one of the things Mr. Orme was insistent on bringing across was that the sex was consensual and that he did not forcibly have sexual relations with the jury (PC-R2. 3094). There is nothing indicating that Mr. Orme endorsed the "planting the seed" of doubt argument as to Mr. Orme's guilt which was advanced by counsel, nor that he would have endorsed it had he known that co-counsel was going to admit his guilt during the closing argument.[3] And as to the sexual battery, there is no evidence that counsel informed Mr. Orme that any challenge to this aggravator would have been fruitless because it had previously been established during the guilt phase.[4]

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[3]Other than Ramey, it appears as though no one else on the defense team was aware of the content of his opening argument. Sarah Butters testified at the postconviction evidentiary hearing that there was no discussion as to the substance of what was going to be in it (PC-R2. 2862). "[W]e never heard it, we never saw an outline of it, we never, we didn't know what Russ was going to say." (PC-R2. 2862). Stone similarly testified that he didn't remember being told what Ramey was going to argue in the opening before it happened (PC-R2. 3074).

[4]Of course, counsel could not have informed Mr. Orme of this fact given that they were ignorant as to this point of law. As Ramey stated when discussing strategy with co-counsel Stone: "And

Moreover, Mr. Ormes submits that Appellee's reliance on this Court's decision in Hannon is misplaced. Hannon does not stand for the proposition that an impermissible argument is acceptable so long as the trial court permits it and thus the defendant benefits. In Hannon, trial counsel's strategy at the guilt phase was to focus on obtaining an acquittal based on Hannon's total innocence and lack of presence at the crime scene. Hannon, 941 So. 2d at 1126. Presenting a consistent and continuing theme, trial counsel at both the guilt and penalty phase argued that Hannon was not the type of person who could have committed the murders. Id. at 1127-28.[5] As this Court observed in its opinion, "The record supports trial counsel's postconviction testimony that a defense based on the notions that Hannon did not commit the murders and was not even the type of person who could have committed the murders was developed from the beginning of trial." Id. at 1128.

Under these circumstances, this Court in Hannon found that it was permissible for defense counsel to focus on the character evidence of the defendant as being someone who was unlikely to

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one of the things Mike [Stone] and I felt was necessary was that we tried to inject as much as we could some doubt in the juror's mind as to the actual guilt of some of the underlying offenses." (PC-R2. 3094).

[5]According to this Court's opinion, "[T]rial counsel in this case testified that his primary goal was to convince the jury that Hannon was not at the crime scene and that he was not the type of person to commit these murders, and that counsel intentionally sought to avoid contradicting that defense by presenting witnesses to testify that Hannon had used illegal drugs, was unstable, failed at school, or was abused." Id. at 1131.

commit such a crime. Citing to the United States Supreme Court's decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), which concluded that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character that the defendant proffers as a basis for a sentence less than death, this Court observed that trial counsel's strategy of presenting evidence to demonstrate that Hannon did not have the type of *character* to commit the murders was a tactical method used by counsel in an attempt to sway the jury's recommendation in favor of life over death. Id. at 1129 (emphasis in original). As this Court further noted, "We reiterate that counsel's strategy was to demonstrate to the jury that Hannon in no way possessed the type of *character* to commit the crimes." Id. at 1127, fn 11. Thus, this Court's decision in Hannon is readily distinguishable from Mr. Orme's case, wherein resentencing counsel raised an improper lingering doubt argument that had no relation to whether Mr. Orme possessed the character to commit the crime.

Even if this Court's decision in Hannon did apply, Mr. Orme did not receive any benefit from trial counsel's impermissible argument. Unlike in Hannon, there was no concern over maintaining a continuing theme from the guilt phase to the penalty phase, as this was a resentencing proceeding before a new jury. Instead, without any reasonable explanation, resentencing counsel invented a poorly thought out lingering doubt argument that had no basis in fact and that was subsequently contradicted

by defense witnesses and co-counsel.[6] The confusing and contradictory nature of the defense case was aptly described in the prosecutor's closing argument, "Are we now trying to say, no, he didn't attack her. What's the position? He attacked her in a rage, he attacked her because he was depressed, he attacked her because he was manic, he attacked her because he was on drugs, or he didn't attack her, which one is it?" (RT. 1176-77). Contrary to Appellee's assertion, Mr. Orme submits that rather than receiving a benefit, he was actually harmed by resentencing counsel's incredulous lingering doubt argument in that it resulted in a loss of credibility with the jury and also aggravated his crimes.[7]

In its Answer Brief, Appellee also disputes Mr. Orme's claim that trial counsel Ramey told the jury during his opening statement that Mr. Orme's DNA was not under the victim's fingernails, but there was DNA from an unknown third party. Appellee, like the circuit court, maintains that "[c]ontrary to Orme's assertion, Mr. Ramey was not telling the jury that Orme's DNA was not under Ms. Redd's fingernails. Instead, Mr. Ramey told the jury that there was DNA under Ms. Redd's fingernails

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[6]And as noted previously, even if this argument had some merit, the jury, judge and this Court on appeal were precluded from considering it in mitigation.

[7]The testimony of Gary Harmor, the defense's DNA expert, was so favorable to the State that the prosecutor made a chart of his findings and submitted it as an exhibit to the jury (T2. 873, 884). Moreover, Harmor's testimony was so favorable to the State that the trial court actually relied on it as supportive of finding the aggravating circumstance that Mr. Orme murdered the victim during the course of a sexual battery (R2. 3010-11).

which did not belong to Orme - evidence which did come out at re-sentencing." (Answer at 30).

In his Initial Brief, Mr. Orme included the following statement from Ramey during his opening argument that directly refutes Appellee's assertion: "There are doctors who will come into this courtroom and say that **the fingernail scrapings under her nails was not Mike Orme, it was somebody else, a third party DNA.** She had scratched somebody but **we know without any question it wasn't Michael Orme.**" (R2. 40)(emphasis added). Appellee does not address this statement, which clearly and unambiguously establishes that Ramey asserted that Mr. Orme's DNA was not under the victim's fingernails.

With regard to Mr. Orme's claim that his counsel presented inconsistent theories during opening and closing argument, Appellee argues that "[t]he record refutes any notion that Mr. Ramey and Mr. Stone's opening and closing arguments were inconsistent with each other or that Mr. Ramey contested the murder while Mr. Stone conceded it." (Answer at 31-32). According to Appellee, trial counsel Ramey did not contest the fact that Mr. Orme killed the victim (Answer at 31).

Appellee's argument is contradicted by the record in this case, which clearly establishes that while Ramey was unsuccessfully attempting to "plant the seed" of doubt, Stone told the jury in his closing that Mr. Orme accepted responsibility for the victim's death and stated, "We are not contending for a moment that Mike Orme did not kill Lisa Redd." (RT. 1226-27). Appellee's statement that Ramey did not contest

the fact that Mr. Orme killed the victim is likewise a distortion of the record. On the page referenced by Appellee for this statement (1429), Ramey informed the jury that Mr. Orme had been convicted, not that he killed the victim:

> Now, there is no question and there is no reasonable doubt that my client, Mike Orme, has been found guilty of murder in the first-degree. The verdict of the jury on the guilt phase found him guilty of sexual battery during the course of the evening. They found that he was guilty of robbing her sometime during the course of that evening. Those are the facts that have been established.

(RT. 1429). As Appellee is presumably aware, Ramey proceeded to argue the presence of an unknown party's DNA under the victim's fingernails, the absence of Mr. Orme's DNA under the victim's fingernails, the presence of unknown DNA on a towel in the motel room, and the lack of scratches and bruises on Mr. Orme. Clearly, Ramey was raising lingering doubt of guilt.

As to Mr. Orme's claim that resentencing counsel's presentation of Dr. Riddick constituted ineffective assistance of counsel, Appellee's argument in opposition mirrors that of the circuit court's order denying relief. While Mr. Orme set forth facts and argument demonstrating the erroneousness of the circuit court's order, Appellee makes no attempt to refute, address or even acknowledge any of these points. Rather than repeat his previous unrebutted arguments, Mr. Orme relies on the facts and arguments set forth in his Initial Brief.

With regard to the mental health mitigating evidence, Appellee asserts that "any alleged deficiency for failing to ask Dr. Maher or Dr. Herkov whether the statutory mitigators applies

had no effect on the findings in mitigation because the trial judge found these mitigators to exist." (Answer at 37). Appellee's argument, however, ignores the fact that the jury was never apprised of the existence of these statutory mitigators. In a capital penalty phase proceeding, the jury is a co-sentencer, and its sentencing recommendation is entitled to "great weight." See Snelgrove v. State, 921 So. 2d 560, 571 (Fla. 2005) ("[I]n Florida, the judge and jury are considered cosentencers, and a recommendation of life must be accorded great weight by the sentencing judge.")(Citation omitted).

Additionally, Appellee asserts that simply because Mr. Orme has now secured the testimony of a more favorable mental health expert does not render counsel ineffective (Answer at 37-38). Appellee's argument here ignores the fact that all of the mental health experts, as well as their favorable testimony, should already have been known to counsel as they had testified in previous proceedings. Thus, contrary to Appellee's argument, Mr. Orme is not basing an ineffective assistance of counsel claim on the testimony of a newly obtained expert. Rather, his complaint is that despite being in the unique position of having transcripts of the prior proceedings which contained mitigating evidence that this Court had already determined undermined confidence in the outcome of the original penalty phase proceeding, resentencing counsel inexplicably failed to adequately present this mitigating evidence to the jury.

With regard to the issue of Mr. Orme's bipolar disorder, Appellee asserts that there was no prejudice because the jury

heard the diagnosis of bipolar from Drs. Warriner and McClane through the cross-examination testimony of Dr. Prichard (Answer at 42). Thus, according to Appellee, "the jury was made aware that four mental health professionals diagnosed Orme as bipolar." (Answer at 46). Appellee's argument is based on one fleeting statement by Dr. Prichard during cross examination in which he stated as to Drs. Warriner and McClain that "[t]heir diagnosis of bipolar disorder was generated after they discovered Walker had diagnosed him with bipolar disorder but not based on their own evaluation of Mr. Orme absent that information." (R2. 1041).

Appellee's argument here is suspect given the fact that during the resentencing proceeding, the prosecutor asserted, Drs. Herkov and Maher conceded, and the trial court determined that, aside from Dr. Walker, only Drs. Herkov and Maher found a diagnosis of bipolar (RT. 582-85; 954; R2. 3013-14).[8] Even Dr. Prichard during his direct examination testified that after Mr. Orme was arrested, neither Dr. Warriner nor Dr. McClain diagnosed Mr. Orme with bipolar (R2. 1025). Dr. Prichard further stated, "So we have a lot of information that's starting to emerge that people are seeing him, or not seeing him, as bipolar disorder except this one occasion that Dr. Walker said it and it's a little bit unreliable to me." (R2. 1025). And subsequently, Dr. Prichard added, "When he went to the Department of Corrections I saw that he was assessed between 1993 and 1995 seven different

[8]Notably, in its sentencing order the trial court included Dr. Warriner as one of four experts who did not find bipolar disorder (R2. 3013-14).

times by five different psychiatrists, none of whom said he was bipolar." (R2. 1025). Contrary to Appellee's assertion, the overwhelming weight of the testimony and argument was that aside from Dr. Walker, Drs. Herkov and Maher were alone in their diagnosis of Mr. Orme as bipolar.

Mr. Orme submits that relief is warranted for the reasons set forth herein and in his Initial Brief.

ARGUMENT II

MR. ORME WAS DENIED A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PROSECUTOR'S ARGUMENT AT THE RESENTENCING PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WAS INFLAMMATORY AND IMPROPER. RESENTENCING COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS CONSTITUTES INEFFECTIVE ASSISTANCE.

In addressing the prosecutor's Golden Rule violations, which the trial court found to be improper but not prejudicial, Appellee claims that there was no prejudice based on the strong aggravators and minimal mitigation (Answer at 57-58).

While this Court on appeal did in fact determine that the mitigation presented by resentencing counsel was "relatively weak", Orme v. State, 25 So. 3d 536, 544 (Fla. 2009), Appellee's argument fails to account for the mitigation presented at the postconviction evidentiary hearing.[9] When similar mitigation was

[9]Unlike at the resentencing, during Mr. Orme's subsequent postconviction evidentiary hearing, two statutory mitigating factors were found by Dr. Herkov instead of none; there was support from at least five mental health experts that Mr. Orme is bipolar instead of three; there was testimony that two additional doctors renewed Mr. Orme's prescription to treat bipolar, thus demonstrating that these doctors had in effect confirmed the diagnosis (PC-R2. 2920); there was a thorough explanation as to

presented during Mr. Orme's postconviction proceeding following his original death sentence, this Court determined that confidence was undermined as a result of this mitigation, and it remanded the case for a new penalty phase proceeding. Orme v. State, 896 So. 2d 725, 736 (Fla. 2005). Mr. Orme submits that had trial counsel rendered effective assistance, his mitigation would not have been considered minimal. Relief is warranted.

ARGUMENT III

RESENTENCING COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO PRESERVE THE ISSUE THAT THE TRIAL COURT ERRED IN HOLDING THAT A JUROR'S REFUSAL TO CONSIDER REMORSE AS A MITIGATOR COULD ONLY BE A BASIS FOR A PEREMPTORY CHALLENGE.

One of the arguments Appellee advances in addressing this issue is that "defense counsel's failure to object must be viewed in light of the overall strategy for the penalty phase, which was to inject as much doubt into the aggravators as possible." (Answer at 62). According to Appellee, "an argument which was predicated on remorse, which would include admissions of wrong

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why the DOC incorrectly labeled Mr. Orme as having ADD (PC-R2. 3035-36); and there was testimony explaining that because Mr. Orme had at least one manic or hypomanic episode, he could no longer be diagnosed with major depression and instead would either be Bipolar I or II (PC-R2. 2967, 3034-35). Further, the testimony from the postconviction evidentiary hearing established that the medication which was given to Mr. Orme at DOC is consistent with treating bipolars (PC-R2. 2996), and in fact a DOC psychological specialist indicated that Mr. Orme had hypomanic symptoms (PC-R2. 2964-65). There was also testimony explaining that a structured prison environment generally has the effect of tending to make a person more depressed and normal and less manic (PC-R2. 2917), and that "it is very common that an individual will experience predominantly manic episodes in their early life and subsequently depressive episodes" (PC-R2. 2954). And there was testimony that while psychological training is necessary to identify a manic episode, Mr. Orme discontinued any psychological treatment in 1995 (PC-R2. 2954).

doing, would cut against the {sic} defenses decided strategy to create doubt within the jury's mind as to the aggravators." (Answer at 62).

Appellee's argument is erroneous for several reasons. First, Appellee ignores the fact that it was resentencing counsel who began to ask prospective jurors about the issue of remorse as possibly mitigating a death sentence (R2. 4441), thus contradicting the notion that counsel didn't want to bring remorse into the case. Second, Appellee ignores the fact that resentencing counsel during closing argument acknowledged Mr. Orme's wrongdoing when he stated, " . . . he knows as well as any of us can that he was the one that killed her. He's not trying to evade the responsibility." (RT. 1264-65). Finally, Appellee ignores the fact that trial counsel's strategic decision to create doubt in the jury's mind as to the aggravators was an unreasonable one, since Mr. Orme was convicted of sexual battery and robbery at the guilt phase, thus they had already been proven beyond a reasonable doubt.

Mr. Orme submits that relief is warranted for the reasons set forth herein and in his Initial Brief.

ARGUMENT IV

RESENTENCING COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO PRESERVE THE ISSUE REGARDING THE JURORS' CONSIDERATION OF THE ROLE OF MERCY IN ITS SENTENCING RECOMMENDATION.

As with Argument III, one of the points made by Appellee is that given the strategy of the defense to attack the aggravators and inject as much doubt into the instructed

aggravators as possible, an argument which was predicated on mercy[10] would cut against the defense's decided strategy (Answer at 68).

Again, as with the previous issue, Appellee ignores the fact that it was resentencing counsel who attempted to explore the issue of mercy with potential jurors during voir dire. Orme, 25 So. 3d at 544. Further, as with the previous argument, Appellee ignores the fact that resentencing counsel during closing argument acknowledged Mr. Orme's guilt and responsibility, thus there was no reasonable strategy to not argue mercy (RT. 1264-65). Finally, Appellee ignores the fact that trial counsel's strategic decision to create doubt in the jury's mind as to the aggravators was an unreasonable one, since Mr. Orme was convicted of sexual battery and robbery at the guilt phase, thus they had already been proven beyond a reasonable doubt.

Mr. Orme submits that relief is warranted for the reasons set forth herein and in his Initial Brief.

ARGUMENT V

MR. ORME WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS POSTCONVICTION PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Relying on Gore v. State, 91 So. 3d 769 (Fla. 2012), Appellee asserts that "This Court has rejected the assertion that a reading of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) creates a

[10]In its Answer Brief, Appellee used the word "remorse" as opposed to "mercy". Presumably, Appellee intended to use the word "mercy", as this issue concerns "mercy" while the previous issue concerned "remorse".

substantive right to the effective assistance of collateral counsel." (Answer at 71).

Mr. Orme recognizes this Court's determination in Martinez and its subsequent decisions rejecting the claim that Martinez can be used in state proceedings. See e.g. Howell v. State, No. SC13-136 (Fla. February 19, 2013). Mr. Orme respectfully requests that this Court reconsider its prior rulings and grant the appropriate relief for the reasons asserted in his Initial Brief.

CONCLUSION

Mr. Orme submits that relief is warranted in the form of a new sentencing proceeding or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by electronic service to Patrick Delaney, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 2nd day of June, 2014.

/s/ Linda McDermott
LINDA MCDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd
Suite 118-61
Estero, FL 33928
(850) 322-2172

COUNSEL FOR APPELLANT

CERTIFICATION OF TYPE SIZE AND STYLE

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