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IN THE SUPREME COURT OF FLORIDA

RODERICK ORME,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-819

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as "Orme." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as the State. References to the record will be as follows: "R" will refer to the record from Orme's direct appeal to the Florida Supreme Court; "PCR #:##" with a corresponding volume and page number, will refer to the record in Orme's original post-conviction appeal to the Florida Supreme Court; and "PCR2 Vol. #: ##" with the corresponding volume and page number will refer to the record in Orme's second post-conviction appeal to the Florida Supreme Court. The record in Orme's second post-conviction appeal is divided between twenty volumes which a numbered consecutively by beta stamps at the bottom of each page.

STATEMENT OF THE CASE AND FACTS

The relevant facts concerning the March 3, 1992, murder of Lisa Redd are recited in the Florida Supreme Court's opinion on direct appeal:

> …Roderick Michael Orme had an extensive history of substance abuse for which he previously had sought treatment at a recovery center in Panama City. On the morning of March 4, 1992, Orme suddenly appeared at the center again, despite a lapse of about a year since his prior treatment. He was disoriented an unable to respond to questions, but he did manage to write a message. It was "LEE'S MOT RM15."
>
> While a breathalyzer returned negative results, Orme's blood tested positive for cocaine and he was showing signs of acute cocaine withdrawal. He was cold, his face was flushed, and he was exhibiting symptoms like delirium tremens. An attending physician placed Orme in intensive care for thirty hours. Illegal barbiturates were found in Orme's possession.
>
> Lee's Motel was located only a few blocks from the recovery center. Someone at the center telephoned the motel and said that a man who sounded hysterical had said to check room 15. The owner did so and found the body of a woman who had been badly beaten.
>
> Semen was found in the victim's orifices, but DNA testing could not identify a DNA match. One sample taken from the victim's panties, however, held material that matched the pattern of Orme's DNA. Orme's underpants also had a mixed blood stain matching both Orme and the victim's genotype. Orme's fingerprints were found in the motel room, and his checkbook and identification card were found in the victim's car, which was parked outside.
>
> The cause of death was strangulation. There were extensive bruising and hemorrhaging on the face, skull, chest, arms, left leg, and abdomen, indicating a severe beating. The abdominal hemorrhaging extended completely through the body to the back and involved the right kidney. Jewelry the victim always wore was missing and was never found. Police later identified the body as that of Lisa Redd, a

nurse.

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

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

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

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

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

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

A man who lived across from the motel, Joseph Lee, also testified. He said that he generally kept track of what was happening at the motel and had first noticed the victim’s automobile there around 9:30 or 10 p.m. Lee said he saw Orme leave and return several times.

> Before going to bed around 2 a.m., Lee said he saw Orme leave in the victim's car once more. Another witness, Ann Thicklin, saw someone slowly drive the victim's car into Lee's Motel around 6:15 a.m.

Orme v. State, 677 So. 2d 258, 260 – 261 (Fla. 1996).

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

On appeal, Orme raised eight issues: (1) the trial court erred in denying his motion for judgment of acquittal when the case against him was purely circumstantial and the State failed to disprove all reasonable hypotheses of innocence; (2) the trial court erred in denying the motion to suppress his statement to officers on the grounds that he was too intoxicated with drugs to knowingly and voluntarily waive his right to remain silent; (3) the death penalty was disproportionate because Orme was overborne by drug abuse, and because any fight between his mental state and the time of the murder was such that he could not form a "design" to inflict a high degree of suffering on the victim; (4) the trial court erred in instructing the jury regarding, and later finding, the aggravating factor of heinous, atrocious, or cruel; (5) the trial court erred when it failed to weigh in mitigation the fact that Orme had no significant prior criminal history; (6) the trial court erred in declining to give a special instruction that acts perpetrated on the victim after her death are not relevant to the aggravator of heinous, atrocious

or cruel; (7) the instruction on heinous, atrocious, or cruel violated the dictates of *Espinosa v. Florida*, 505 U.S. 1079 (1992); and (8) Orme was incapable of forming the specific intent necessary for first-degree murder and accordingly he cannot be sentenced to death. The Florida Supreme Court rejected each of Orme's claims of error and affirmed his conviction and sentence. Orme then filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied. *Orme v. Florida*, 519 U.S. 1079 (1997).

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

The trial court summarily denied most of Orme's twenty-five claims. The collateral court granted an evidentiary hearing on the claim trial counsel was ineffective for failing to challenge the general jury qualification procedure employed in Bay County. In its order, the trial court concluded the gravamen of Orme's claim was that counsel was ineffective for not attending the general qualification of the jury pool and the State Attorney improperly influenced the general qualification. The court noted, however, that any claim concerning Orme's absence from that proceeding was procedurally barred because it could have been raised on direct appeal. Additionally the court ruled this proceeding was not a

critical stage of the trial at which a defendant must be present. (PCR 6: 902).

The court also granted an evidentiary hearing on the claim counsel was ineffective for failing to seek a continuance because he was unprepared for trial, failing to discover the defendant was mentally ill, and failing to provide information concerning Orme's mental illness to defense mental health experts and to the jury. (PCR 6: 905–906). Finally, the court granted an evidentiary hearing on the allegation his counsel was ineffective for failing to develop and present more evidence in mitigation. (PCR 6: 906). The evidentiary hearing was held on December 12 – 14, 2001, after which the collateral court entered an order denying Orme's Amended Motion for Post-Conviction Relief. (PCR 7: 1217–1219).

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

Orme also filed a petition for habeas corpus, raising eight issues. In his petition, Orme claimed: (1) appellate counsel was ineffective for failing to raise on appeal his absence from critical stages of his trial; (2) appellate counsel was ineffective for failing to argue that the prosecutor engaged in misconduct rendering his conviction and sentence fundamentally unfair; (3) appellate counsel was

ineffective because he should have argued on appeal that certain crime scene photos allowed into evidence were gruesome and unfairly prejudicial; (4) he is innocent of first-degree murder and of the death penalty; (5) the jury instructions were incorrect and erroneously shifted the burden of proof; (6) the jury was given inadequate guidance concerning the aggravating circumstances, rendering his sentence of death fundamentally erroneous; (7) the prosecutor unconstitutionally introduced and relied upon non-statutory aggravating circumstances; and (8) the jury's sense of responsibility toward its sentencing obligations was unconstitutionally diluted.

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

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

A new penalty phase commenced on May 7, 2007. (PCR2 Vol. 3: 427). The State presented twenty-one witnesses in its case in chief and two witnesses in rebuttal, Dr. Greg Prichard and Dr. Harry McClaren. The defense presented

twelve witnesses in mitigation including two experts to testify to a diagnosis of bipolar disorder.

The trial judge instructed the jury on three aggravators: (1) the murder was committed in the court of a sexual battery; (2) the murder was committed for pecuniary gain; and (3) the murder was especially heinous, atrocious, or cruel. (PCR2 Vol. 14: 2671–2673). The trial judge instructed the jury on both mental mitigators and the age statutory mitigator and the catch-all mitigators and the age statutory mitigator and the catch-all mitigator. (PCR2 Vol. 14: 2673–2675).

The jury recommended a death sentence for Orme by a vote of eleven to one (11 – 1). (PCR2 Vol. 14: 2686). The trial court held a *Spencer* hearing to allow each side to present additional evidence or arguments to the trial court. (PCR2 Vol. 15: 2691–2723).

The trial court followed the jury's recommendation and sentenced Orme to death for the murder of Lisa Redd. (PCR2 Vol. 15: 2724–2754). In its corrected sentencing order, the trial court found three aggravators: (1) the murder was committed for pecuniary gain, (2) the murder was committed in the course of a sexual battery, and (3) the murder was especially heinous, atrocious, or cruel. (PCR2 Vol. 3: 384–388). The trial court gave these aggravators great weight. (PCR2 Vol. 3: 384–388). The court also found that any of these aggravators, standing alone, would outweigh all the mitigating circumstances. (PCR2 Vol. 3:

394).

The trial court also found three statutory mitigators: (1) Orme had no significant criminal history; (2) at the time of the murder Orme was under the influence of an extreme mental or emotional disturbance due to his drug dependency; and (3) at the time of the murder, Orme's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired due to his impairment from cocaine and alcohol. (PCR2 Vol. 3: 389–393). The trial court gave each statutory mitigator little weight. (PCR2 Vol. 3: 389–393).

The court also considered but rejected age in statutory mitigation. (PCR2 Vol. 3: 392). The court noted Orme was 30 years old at the time of the murder and was a mature adult in his professional and social endeavors. (PCR2 Vol. 3: 392).

The trial court also considered five non-statutory mitigators: (1) bipolar disorder contributed significantly to the defendant's substance abuse; (2) the defendant had a difficult childhood; (3) the defendant has exhibited model behavior while in prison; (4) Orme's potential for rehabilitation; and (5) Orme tried to get the victim help. (PCR2 Vol. 3: 392 – 393). The trial judge found the other non-statutory mitigators had either not been established or were not mitigating in nature. (PCR2 Vol. 3: 392 – 393).

On appeal, Orme raised nine claims: (1) the trial court erred in refusing to

allow him to challenge for cause prospective jurors who could not consider remorse as a mitigator; (2) the trial court erred in refusing to allow Orme to inquire of prospective jurors whether they could consider recommending a life sentence as a matter of mercy even if the aggravators outweighed the mitigation; (3) the trial court erred in failing to dismiss the venire after one prospective juror indicated he was opposed to a life sentence without the possibility of parole for twenty-five years because Orme had been convicted fifteen years ago; (4) the trial court erred in refusing to allow him to waive his right to the sentencing option of life in prison without the possibility of parole for twenty-five years in favor of a harsher punishment of life in prison without the possibility of parole; (5) the trial court erred by failing to give weight to Orme's difficult childhood, to the fact that he was a model prisoner, to Orme's potential for rehabilitation, and to Orme's attempt to get the victim help; (6) the trial court erred in finding that Orme committed the murder for pecuniary gain; (7) the trial court erred in finding the murder was especially heinous, atrocious, or cruel; (8) whether the trial court erred in finding that Orme's committed the murder in the course of a sexual battery; and (9) Orme's sentence to death violated the dictates of *Ring v. Arizona*. *Orme v. State*, 25 So. 3d 536 (Fla. 2009). This Court affirmed Orme's re-sentence to death. *Orme*, 25 So. 3d at 553. Although this Court rejected the majority of the claims on appeal, it did find the trial court committed some errors during re-sentencing. All,

however, were deemed to be harmless. *Orme*, 25 So. 3d at 553.

First, this Court found the trial court erred in concluding that a juror's refusal to consider remorse as a mitigator could give rise to a challenge for cause (as opposed to a peremptory challenge only). The Court determined, however, Orme did not preserve this claim because defense counsel failed to question any of the prospective jurors about their consideration of remorse as mitigation after trial counsel had first broached the issue and the trial court had ruled. The Court noted that "[t]o preserve the claim for appeal, counsel had to question the prospective jurors about whether they could consider remorse as a mitigator and then attempt to challenge the juror for cause if the juror answered that he or she could not consider remorse as a mitigator." *Orme*, 25 So. 3d at 543.

This Court also found the trial court erred in failing to consider Orme's proffered remorse for the murder. The Court also found this error harmless. *Orme*, 25 So. 3d at 544.

This Court next ruled the trial court erred in overruling Orme's objection to the prosecutor's comments during voir dire that the trial court could not consider mercy in his decision and the governor was the only person who could exercise mercy by way of a clemency hearing. Although, the Court found these statements to be improper and misleading, the Court also found this error to be harmless. The Court noted that "none of the prospective jurors indicated they could not consider

mercy, the jury recommended a death sentence by a vote of eleven to one, and the trial court found the three aggravators outweighed the relatively weak mitigation." *Orme*, 25 So. 3d at 545.

Finally, this Court found the trial court erred when it failed to give weight to Orme's difficult childhood on the grounds that it was not relevant to the murder. *Orme*, 25 So. 3d at 547 – 548. Even though this Court found the trial court erred in its treatment of the evidence concerning Orme's difficult childhood, the error was deemed to be harmless. The Court ruled that "[e]ven if we consider the difficult childhood with the other mitigation, it does not change the balance of the aggravating and mitigating circumstances." *Orme v. State*, 25 So. 3d at 549.

This Court rejected the claim that the trial court erred in refusing to allow Orme to inquire of prospective jurors whether they could consider recommending a life sentence as a matter of mercy even if the aggravators outweighed the mitigation. This Court agreed with the State's position that the trial court did not commit error, because although the trial court initially denied defense counsel the opportunity to question prospective jurors about mercy during the first stage of jury selection, it later allowed counsel to question jurors about their willingness to consider mercy during the second stage of jury selection. *Orme*, 25 So. 3d at 544.

Even though this Court denied the actual claim that Orme brought on appeal, it construed Orme's claim as also including an allegation the trial court erred by

revoking its permission, *de facto*, to discuss mercy with the jurors when it ruled the defense counsel brought it up again. Orme claimed this precluded him form asking remaining prospective jurors about mercy because he feared the prosecutor would argue the jury had no role in granting mercy. *Orme*, 25 So. 3d at 544 – 545. This Court found only this part of Orme's claim was not to be preserved, because trial counsel did not attempt to question jurors about mercy after that particular ruling. *Id.*

Orme filed a petition for a writ of certiorari in the United States Supreme Court. On June 7, 2010, Orme's conviction became final when the United States Supreme Court denied his petition. *Orme v. Florida*, 130 S.Ct. 3391 (2010).

Orme then filed his initial motion for post-conviction relief from his re-sentencing proceedings raising six claims. The State filed a response, addressing in full all of the claims that did not warrant an evidentiary hearing. The trial court granted an evidentiary hearing on only Claim I of Orme's motion and determined the remainder of the claims could be decided as a matter of law from the record.

On April 30 and May 1, 2012, the trial court held an evidentiary hearing on Claim I. (PCR2 Vol. 19: 2842; Vol. 20: 2960). At the evidentiary hearing the following people testified: Michael Stone – counsel for the defendant; Russell Ramey – counsel for the defendant; Sarah Butters – pro bono counsel for the defendant; Dr. Michael Maher – mental health expert; and, Dr. Michael Herkov –

mental health expert. (PCR2 Vol. 19: 2834). On March 1, 2013, the trial court issued an order denying all of Orme's post-conviction claims. (PCR2 Vol. 3: 366 – 383). This appeal followed.

SUMMARY OF THE ARGUMENT

I – Orme cannot establish he was prejudiced by any of the alleged errors. There is no case or written requirement which dictates to a defense attorney as to how a case should be tried. The suggestion that trial counsel should have followed the "roadmap" set by the original appeal is simply the position of Orme's current attorney and in no way a basis for relief. The testimony of Mr. Stone and Mr. Ramey demonstrate a thought processes which went into each witnesses and what a witness could add to their case.

As to lingering doubt, by his own admission, trial counsel was aware that an argument of lingering doubt was not permissible, but chose a strategy which was endorsed by the defendant, and attempted to stay within the rule. Because trial counsel was reasonable in trying to advantage Orme by pursuing lingering doubt and Orme consented to the defense strategy, trial counsel cannot be deemed deficient in its performance.

In examining Mr. Ramey's opening statement, Mr. Ramey did not mislead the jury. Mr. Ramey was indicating to the jury that DNA was found under the victim's fingernails that did not belong to the Defendant – not that none of the DNA found belonged to the Defendant. A complete review of both the opening and closing statements shows the defense did not present inconsistent theories to the jury. The 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.

Regarding the presentation of Dr. Riddick as a witness, Dr. Riddick provided support for the argument that Ms. Redd was unconscious within 10 seconds. This evidence was directly contrary to Dr. Lauridson's testimony that it was possible Ms. Redd remained conscious for anywhere between 45 seconds to a minute and 30 seconds to possibly 2 minutes. Given that Dr. Riddick's testimony provided a significantly contrary view as to the length of time Ms. Redd was conscious and the cruelty inherent in applying, releasing, and reapplying pressure to a fighting victim, Orme cannot show trial counsel was ineffective for calling Dr. Riddick on Orme's behalf.

Finally, as to the mental health mitigation evidence, simply because a defendant is able to present more favorable mental health testimony at an evidentiary hearing than he did at trial does not render counsel ineffective. The theory underlying the Defendant's argument is that had counsel presented evidence that two additional experts had diagnosed the Defendant with bipolar disorder, it would have swayed the jury into recommending life. Contrary to the Defendant's belief that the jury was left with the impression that only three experts diagnosed the Defendant with bipolar disorder, Dr. Prichard (the State's expert) testified on cross-examination

that Dr. Warriner and Dr. McClane had diagnosed the Defendant as bipolar. As such, Orme cannot demonstrate deficient performance or prejudice.

II – Trial counsel was not ineffective for failing to object to the prosecutor's closing argument because the alleged statements were either proper comments on the evidence or did not rise to a level which caused the jury to render a more severe verdict. It is perfectly proper for the prosecutor to present argument as to why the jury should not put a great deal of weight on certain evidence presented in mitigation. Although the prosecution did commit an impermissible golden rule violation, Orme cannot show that these comments went so far as to influence to jury toward a more severe sentence.

III – Orme cannot establish that an actually biased juror served as a member of the jury. The record in the instant case is devoid of any evidence that an actually biased juror served. Therefore, Orme's claim is speculative and mere speculation into a juror's potential bias is not sufficient to rise to the level of ineffectiveness as required by *Strickland*.

IV – Orme cannot prove he was prejudiced by having an actually biased juror who would not consider mercy serve as a member of the jury. While the trial court did commit an initial error, that error was corrected and subsequently defense counsel abandoned the argument of mercy. Trial counsel cannot be deemed ineffective without proof of prejudice. The record is silent as to whether a juror

who would not consider mercy ever served as a member of the jury. Orme has not identified any prospective juror trial counsel could have challenged. Furthermore, Orme's argument does not identify a specific juror as being biased against him, but simply alleges that he was prejudiced as a result of his counsel's failure to preserve this issue for appeal.

V – This Court has rejected the assertion that a reading of *Martinez v. Ryan* creates a substantive right to the effective assistance of collateral counsel. While Florida does provide a statutory right to counsel in capital post conviction cases, that statute is a funding and monitoring statute enacted by the legislature. This claim is meritless and this Court has repeatedly rejected this argument.

ARGUMENT

I. TRIAL COUNSEL WAS NOT INEFFECTIVE DURING THE SECOND PENALTY PHASE BECAUSE ORME WAS NOT PREJUDICED BY ANY OF THE ALLEGED ERRORS.

Orme first asserts his counsel was ineffective during the second penalty phase. Although Orme has not formerly divided this issue, he has presented six separate claims of ineffectiveness for which trial counsel was ineffective and unprepared. The State will address each distinct claim in turn. Regardless of a specific individual claim or a theory of cumulative error, Orme cannot carry his burden to show his trial counsel was ineffective during his second penalty phase.

Standard of Review

To establish ineffective assistance of counsel, a defendant must satisfy a two prong test, establishing both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a defendant must show that counsel made specific errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 668; *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Judicial scrutiny of counsel's performance must be highly deferential and must be conducted in a

manner that eliminates the "distorting effects of hindsight" and considers the conduct in light of the circumstances facing the attorney at the time." *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2000) (internal citations omitted) (citing *Strickland*, 466 U.S. at 689 – 690). " . . . . [T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Rutherford v. State*, 727 So. 2d 216, 219 (Fla. 1998). In the present case, Orme must show that but for counsel's alleged errors, he probably would have received a life sentence. *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002). Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687.

The Defense Team

Orme first criticizes the makeup and working relationship of his defense team during the investigation, preparation, and presentation of his defense during the

second penalty phase. (IB at 48 – 49). Orme was represented by three attorneys: (1) Mike Stone, Orme's original trial attorney – appointed by the court; (2) Russ Ramey – appointed by the court; and (3) Sarah Butters, Holland & Knight – pro bono counsel.

Mr. Ramey has been a lawyer since 1984. (PCR2 Vol. 20: 3089). While he was initially admitted to practice in Alabama, Mr. Ramey was admitted to practice in Florida in 1985. (PCR2 Vol. 20: 3089). Mr. Ramey specializes in criminal law and has been both a prosecutor and a defense attorney. (PCR2 Vol. 20: 3089 – 3090). Mr. Ramey is qualified as a capital attorney and regularly attends the Florida Public Defender's Association death penalty seminar. (PCR2 Vol. 20: 3092). Mr. Ramey testified to having tried more than 600 jury trials. (PCR2 Vol. 20: 3092).

Mr. Mike Stone was appointed as co-counsel for Orme. (PCR2 Vol. 20: 3050 – 51). Mr. Stone was part of the original defense trial team for Orme, and was therefore aware of the background of the case. (PCR2 Vol. 20: 3050 – 51). Mr. Stone has been a lawyer since 1977, and practices mostly criminal defense and plaintiff's personal injury law. (PCR2 Vol. 20: 3047 – 48). Mr. Stone held positions with the Public Defender's Office and specialized in murder cases from 1982 until 1992. (PCR2 Vol. 20: 3048). Mr. Stone was involved in more than 50 murder cases in his career and had taken more than two-dozen murder cases to

trial. (PCR2 Vol. 20: 3049). Mr. Stone has also lectured the Judge Advocate General Corps. regarding death penalty practice. (PCR2 Vol. 20: 3049).

Ms. Sarah Butters was pro bono counsel for Orme. (PCR2 Vol. 19: 2845 – 47). Ms. Butters is a tax lawyer for Holland & Knight. (PCR2 Vol. 19: 2845 – 48). Ms. Butters is not a trial lawyer, and at the time of the resentencing proceeding had not participated in a criminal jury trial. (PCR2 Vol. 19: 2871). Because Ms. Butters was not qualified the trial court was explicit that she was not to try the case, but she could remain on to assist with the defense. (PCR2 Vol. 19: 2847). As a result, Ms. Butters ghost wrote motions for Mr. Stone to review, coordinated communication between the defense by scheduling meetings and circulating agendas, and coordinated and sent background information to the defense mental health experts. (PCR2 Vol. 19: 2849, 2851 – 52, 2857, 2866 – 68).

Orme now asserts that because his defense team did not follow "the roadmap set forth in the prior proceedings" that his attorneys working relationship was disconnected and resulted in an unprepared defense. (IB at 48). First, there is no case or written requirement which dictates to a defense attorney as to how a case should be tried. The suggestion that trial counsel should have followed the "roadmap" set by the original appeal is simply the position of Orme's current attorney and in no way a basis for relief.

Second, this entire claim rests with the testimony of Ms. Butters, whom Orme

himself describes as "inexperienced and unqualified." (IB at 48). Indeed, as Orme points out, there was an apparent rift between Ms. Butters and Mr. Ramey, which is evident when looking at Ms. Butters' testimony; however, no such rift or disagreement occurred between Mr. Ramey and Mr. Stone, who were Orme's actual attorneys. Despite the fact of Ms. Butters' complete lack of experience with criminal trials, her testimony seems to have issues with the entire defense approach voicing her displeasure with how Mr. Ramey prepared as well as how Mr. Stone prepared. (PCR2 Vol. 19: 2849 – 52, 2872, 2877, 2879). But, Mr. Stone and Mr. Ramey describe a markedly different situation where they had a good division of labor and a good working relationship, with the added help of Ms. Butters. (PCR2 Vol. 20: 3052, 3095 – 3098). Both the testimony of Mr. Stone and Mr. Ramey demonstrate a thought processes which went into each witnesses and what a witness could add to their case. *Id.* What is most telling is that while Ms. Butters' testimony focuses on the work of Mr. Ramey and Mr. Stone, her name is but a fleeting reference in both of the testimonies of Mr. Ramey and Mr. Stone. (PCR2 Vol. 20: 3052).

There is simply no basis or prevailing case law to grant relief based on Orme's perception that his defense counsels did not have a good working relationship with one another. In fact, the record indicates otherwise. Mr. Ramey and Mr. Stone's testimony showcases a thorough and carefully planned defense with a division of

labor designed to maximize time. Therefore, any claim for relief based on the interpersonal relationships of trial counsel's should be summarily denied.

Defense Argument of Lingering Doubt

Orme next attacks the strategy used by his defense team for his second penalty phase. (IB at 49). Orme asserts trial counsel was ineffective for using a defense of lingering doubt, because such a defense is not permissible as mitigation. (IB at 49). Although Orme is correct that lingering doubt is not permissible as a valid defense, he cannot show he was prejudiced by its use.

The defense team's strategy during Orme's re-sentencing was to inject as much doubt into the aggravators as possible. (PCR2 Vol. 20: 3094). The defense team felt they had a difficult case because the jury was not going to hear the same evidence as it would if they were hearing both phases of Orme's capital trial. (PCR2 Vol. 20: 3094). Therefore, because the State had to prove each aggravator beyond a reasonable doubt, the defense decided to attack each aggravator and "inject as much doubt into the juries' mind to diminish the State's ability to prove beyond a reasonable doubt the existence of an aggravator." (PCR2 Vol. 20: 3094; Vol. 3: 368).

Although the defense was aware that arguing lingering doubt was impermissible; they were attempting to challenge the State's ability to prove the aggravators. (PCR2 Vol. 20: 3095). The trial court determined this was a

reasonable trial strategy under the circumstances:

> …it is clear that counsel was neither arguing that the Defendant was not guilty of sexual battery nor arguing residual doubt as a mitigating circumstance. Instead, counsel was attempting to use the unique nature of the proceedings 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. . . Had counsel not tired to diminish the State's ability to meet this burden by arguing as he did then the State's evidence establishing the aggravator would have gone unchallenged, the aggravator would have easily been proven, and ultimately the outcome would have been the same.

(PCR2 Vol. 3: 368 – 369).

Ineffective Assistance of Counsel and Lingering Doubt

"This Court has held that a defendant's right to present evidence challenging an aggravating circumstance may not be used to relitigate the guilt determination through the introduction of evidence suggesting lingering or residual doubt." *Duest v. State*, 855 So. 2d 33, 40 (Fla. 2003) (citing *Way v. State*, 760 So. 2d 903, 916 (Fla. 2000); *Waterhouse v. State*, 596 So. 2d 1008, 1015 (Fla. 1992). This is because "residual or lingering doubt is not an appropriate nonstatutory mitigating circumstance." *King v. State*, 514 So. 2d 354 (Fla. 1987) (abrogated on other grounds) (citing *Aldridge v. State*, 503 So. 2d 1257 (Fla. 1987); *Burr v. State*, 466 So. 2d 1051 (Fla. 1985); *Buford v. State*, 403 So. 2d 943 (Fla. 1981).

"While the State is not allowed to relitigate guilt during resentencing proceedings, it may introduce evidence concerning the facts and circumstances of the crime in order to prove the aggravating circumstances beyond a reasonable

doubt." *Way*, 760 So. 2d at 917 (citing *Valle v. State*, 581 So. 2d 40, 45 (Fla. 1991). Likewise, "a defendant has a right to present evidence that is relevant to the nature and circumstances of the crime." *Way*, 760 So. 2d at 719 (citing *Downs v. State*, 572 So. 2d 895, 899 (Fla. 1990). However, a defendant's right to present evidence only extends so far, and this Court has repeatedly "rejected claims that the trial court abused its discretion in precluding the admission of evidence that was only relevant to rebut the defendant's guilt of the underlying crime." *Way*, 760 So. 2d at 917 (citing *Waterhouse*, 596 So. 2d at 1015).

In the present case, the defense argued lingering doubt during the second penalty phase. The 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. In *Waterhouse v. State*, the defense was allow to present evidence to challenge the State's aggravator that the capital murder was committed in the course of a sexual battery. *Waterhouse*, 596 So. 2d at 1015. However, this was permissible because the defendant had not been previously convicted of sexual battery. *Id*. In contrast, 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.

The proper question this Court should consider is whether or not trial counsel was ineffective for presenting an argument of lingering doubt during Orme's

second penalty phase. In order to establish ineffective assistance of counsel Orme must satisfy the two-prong test in *Strickland*.

Orme must establish deficient performance by showing that trial counsel's strategy to argue lingering doubt was not the result of reasonable professional judgment. *See Pietri v. State*, 885, So. 2d 245, 252 (Fla. 2004) (quoting *Strickland*, 466 U.S. at 690). Orme cannot meet this burden. By his own admission, trial counsel was aware that an argument of lingering doubt was not permissible, but they choose a strategy which was endorsed by the defendant, and attempted to stay within the rule. (PCR2 Vol. 20: 3094 – 3095). Nevertheless, even if trial counsel blatantly pursued a defense of lingering doubt, his performance would not be deficient if the trial court allowed such a tactic.

A defense of lingering doubt is akin to a defense of jury nullification or a jury pardon. The arguments are not permissible; however, if defense counsel is permitted to use such an argument, they cannot be deemed ineffective because the defendant has received the benefit of an impermissible argument. *See Hannon v. State*, 941 So. 2d 1109, 1125 – 130 (Fla. 2006)(finding "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 trial counsel in an attempt to sway the jury's recommendation in favor of life over death. It is certainly logical that a jury of laypersons is less likely to recommend death if they have some

lingering concerns about guilt than if there is absolute certainty on the issue of guilt." (internal citations omitted)); *Stein*, 995 So. 2d at 335 (finding trial counsel not ineffective for pursuing a defense of a jury pardon knowing such a defense was not permitted).

It was Orme who insisted on challenging the conviction of sexual battery and proving the sex between him and Ms. Redd was consensual. (PCR2 Vol. 20: 3094). "[I]t it axiomatic that if a defendant consents to defense counsel's trial strategy after it had been explained to him, it will be difficult to establish a claim of ineffective assistance of counsel." *Stein*, 995 So. 2d at 337 (citing *Gamble v. State*, 887 So. 2d 706, 714 (Fla. 2004) ("[I]f the defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel"; *see Nixon v. Singletary*, 758 So. 2d 618, 623 (Fla. 2003). This Court has even acknowledged that consent to counsel's strategy is "almost always fatal to an ineffective assistance of counsel claim." *Stein*, 995 So. 2d at 337. Therefore, because trial counsel was reasonable in trying to advantage Orme by pursuing lingering doubt and Orme consented to the defense strategy, trial counsel cannot be deemed deficient in its performance.

To establish prejudice, Orme must show there is a reasonable probability that but for the use of a lingering doubt defense he would have received a life sentence. *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002). Once again, Orme cannot meet this

burden. A defense of lingering doubt is an attempt to relitigate issues which were already determined at trial. By presenting the argument of lingering doubt, Orme had a second chance to assert his innocence before a new jury who did not convict him of the underlying offenses. Orme actually benefited from the opportunity to present this defense because without it, the State's evidence on the aggravators of murder in the course of sexual battery and murder in the course of a robbery would have gone unchallenged. Orme has not presented any evidence that had the defense taken a different position he would have received a life sentence. Orme received the benefit of being able to present an impermissible argument and because he was able to argue lingering doubt he cannot show he was prejudiced. Therefore, this claim should be denied.

Mr. Ramey's Opening Statement Regarding DNA Evidence

Orme claims that Mr. Ramey misled the jury by promising evidence that was not ultimately heard. (IB at 51). Orme looks directly at the comments made during the opening statement in relation to the DNA evidence under the victim's fingernails. (IB at 51). Orme claims that by making these statements, and presenting the testimony of Gary Harmor, the defense actually helped to prove the State's case. (IB at 52 – 54).

During opening statements, in order to explain the lack of any injuries on Orme, "Mr. Ramey stated that there was human DNA under the victim's

fingernails, but that the DNA found was not from the Defendant." (PCR2 Vol. 3: 369; Vol. 8: 1440). Contrary 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 which did not belong to Orme – evidence which did come out at re-sentencing. (PCR2 Vol. 3: 369). The foreign DNA underneath Ms. Redd's fingernails (and also on a towel) coupled with the fact that Orme had no visible injuries after the murder, supported the defense's argument that Lisa Redd did not fight or scratch Orme.

The trial court determined "it is clear, when examining the entirety of his opening statement, Mr. Ramey was not misleading the jury into believing the Defendant's DNA was not found under the victim's fingernails." (PCR2 Vol. 3: 369). "Although inartfully worded, it is clear Mr. Ramey was indicating to the jury that there was DNA found under the victim's fingernails that did not belong to the Defendant – not that none of the DNA found belonged to the Defendant." (PCR2 Vol. 3: 369). Defense counsel was not ineffective because Mr. Ramey did not mislead the jury with his opening statement.

In addition, Orme has failed to show prejudice based on the defense actions. Orme suggests that but for a different opening statement he would have received a life sentence. Such a position does not present this Court with a reasonable probability sufficient to undermine the outcome when viewing the strong

aggravation against relatively weak mitigation. Therefore, Orme cannot show counsel was ineffective and this sub-claim should be denied.

Inconsistent Theories During Opening Statement and Closing Statement.

Orme next asserts that Mr. Ramey was ineffective because his opening statement was inconsistent with Mr. Stone's closing argument. (IB at 54). Orme only attacks the opening statement in reference to the closing statement alleging the opening did not present a cohesive strategy and theory and the defense therefore lost credibility with the jury. (IB at 54 – 55). First, this argument presents a backward view of the court proceedings, because a closing statement can be modified to fit an opening statement. Second, a complete review of both the opening and closing statements shows the defense did not present inconsistent theories to the jury.

At the beginning of his opening statement, Mr. Ramey explained they would not ask the jury to find any defenses or excuses to Ms. Redd's murder. (PCR2 Vol. 8: 1428). Mr. Ramey went on to discuss, among other things, Orme's drug use, history of mental illness, troubled childhood, strong feelings for Ms. Redd, and his bipolar diagnosis. (PCR Vol. 8: 1428 – 1450). Mr. Ramey did not contest the fact Orme killed Ms. Redd. (PCR2 Vol. 1429). Instead, Mr. Ramey pointed to the evidence the defense intended to present that would support a life sentence.

The 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. In both the opening and closing statements trial counsels contested the sexual battery. (PCR2 Vol. 8: 1439 – 1442; Vol. 14: 2631). Mr. Ramey, however, did not discuss the murder of Ms. Redd at all. The defense thought it best to allow Mr. Stone to talk about the murder itself during the closing statement because they did not know what would come out on the witness stand. (PCR2 Vol. 20: 3101 – 3102).

Orme cannot show either deficient performance or prejudice in reference to Mr. Ramey's opening statement. The statements made by Mr. Ramey during the opening were "clearly consistent with those made by Mr. Stone during his closing argument. . . ." (PCR2 Vol. 20: 370). An opening statement is not evidence, and Orme has not presented any evidence to support the contention that there is a reasonable probability of a different outcome if the opening statement had been different. Therefore, this claim should be denied.

Presentation of Dr. Riddick as Expert Witness

Orme next contends that Mr. Ramey promised evidence which never was presented to the jury and was deficient in presenting Dr. Riddick as a defense expert because Dr. Riddick's testimony bolstered rather than diminished the State's case. (IB at 55). While it is not clear from the initial brief, Orme has not presented an argument for a different defense expert, and instead premises his claim of

ineffective assistance of counsel by arguing that Dr. Riddick should not have been called, because he harmed rather than helped the defense case. (IB at 55 – 58).

The decision to call Dr. Riddick as a defense witness was made by Mr. Stone. (PCR2 Vol. 20: 3053). Mr. Stone thought of using Dr. Riddick for a variety of reasons. Dr. Riddick was a former State employee who had previously testified for the prosecution in other cases. (PCR2 Vol. 20: 3053). In addition, Mr. Stone had used Dr. Riddick before in a case that had an alarming number of autopsy irregularities. (PCR2 Vol. 20: 3053 – 54). Having worked with him in the past, Mr. Stone was impressed with Dr. Riddick's knowledge and assistance and immediately thought of him when he was appointed to Orme's defense. (PCR2 Vol. 20: 3054). Mr. Ramey agreed with the decision to call Dr. Riddick and felt his testimony was extremely important to addressing the HAC aggravator, because the defense was going to present evidence that Ms. Redd was unconscious in as little as 10 seconds. (PCR2 Vol. 20: 3053).

Orme cannot prevail on the assertion the defense should not have presented Dr. Riddick as a witness for two reasons. First, Dr. Riddick provided support for the argument that Ms. Redd was unconscious within 10 seconds. (PCR2 Vol. 11: 2015). This evidence was directly contrary to Dr. Lauridson's testimony that it was possible Ms. Redd remained conscious for anywhere between 45 seconds to a minute and 30 seconds to possibly 2 minutes. (PCR2 Vol. 10: 1928, 1934). Dr.

Riddick also disagreed with Dr. Lauridson's opinion that Orme strangled Ms. Redd multiple times; instead he testified "that based on the injuries to the victim he believed the Defendant strangled her in a single continuous event." (PCR2 Vol. 3: 372).

Given that Dr. Riddick's testimony provided a significantly contrary view as to the length of time Ms. Redd was conscious and the cruelty inherent in applying, releasing, and reapplying pressure to a fighting victim, Orme cannot show trial cousel was ineffective for calling Dr. Riddick on Orme's behalf. Dr. Riddick's testimony was consistent with the trial counsel's argument during closing that the jury should reject the HAC aggravator.

Second, there was competent substantial evidence to support both HAC and murder in the course of sexual battery aggravators. (PCR2 Vol. 10: 1857 – 1934). Dr. Lauridson's testimony alone established both aggravators beyond a reasonable doubt. Not calling Dr. Riddick would have done nothing to challenge the evidence establishing the aggravators.

Dr. Lauridson testified that Ms. Redd was beaten. Ms. Redd suffered multiple hits to the head, scalp, both sides of her face, multiple impacts to the chest, multiple applications of pressure to the neck causing hemorrhage deep in the posterior neck and multiple impacts to the arms and legs. (PCR2 Vol. 10: 1905). Ms. Redd had significant bruising on her arms. (PCR2 Vol. 10: 1917). She also

had an injury to the tissue around her kidney. The force used was enough to cause hemorrhaging in the kidney and connecting tissue. (PCR2 Vol. 10: 1872 – 1874).

Ms. Redd also suffered injuries to her rectum while still alive. The injuries went beyond anal tears. Ms. Redd's injuries were to the lining of her rectum. Those injuries were consistent with unlubricated anal intercourse. (PCR2 Vol. 10: 1875 – 1877). Ms. Redd was then strangled to death. Orme applied sufficient force to cause hemorrhages at all levels of the neck including the back of the neck. (PCR2 Vol. 10: 1882 – 1884). Ms. Redd's injuries were unusual in that she had hemorrhaging on the back of the neck. The injuries were consistent with being strangled from the front and back. (PCR2 Vol. 10: 1882 – 1884). Ms. Redd's neck injuries would have been painful. (PCR2 Vol. 10: 1882 – 1884).

Dr. Lauridson told the jury that most people struggle when they are being strangled. (PCR2 Vol. 10: 1883 – 1886). A person will struggle to escape the attacker's grip. (PCR2 Vol. 10: 1886). They will struggle to stay alive. (PCR2 Vol. 10: 1886). If they move so the attacker's grip loosens, the attacker will then place his grip in a different spot. (PCR2 Vol. 10: 1883 – 1886). If this happens over and over again so the victim's neck injuries are not limited to one spot, the victim will have multiple hemorrhages in multiple spots. (PCR2 Vol. 10: 1883 – 1886). According to Dr. Lauridson, this was what happened to Ms. Redd. (PCR2

Vol. 10: 1884 – 1886). In Dr. Lauridson's opinion, it was possible Ms. Redd was conscious for up to two minutes. (PCR2 Vol. 10: 1927).

Dr. Lauridson's testimony provided competent, substantial evidence that the murder was HAC and committed in the course of a sexual battery; but Dr. Riddick's testimony directly contradicted Dr. Lauridson, and sought to prove the murder was not HAC or committed with a sexual battery .

Therefore, trial counsel is not ineffective for challenging the State's evidence by presenting Dr. Riddick as a witness because otherwise the State's evidence would have been uncontroverted. As such this claim should be denied.

Presentation of Mental Health Mitigation Evidence

Orme asserts that trial counsel's presentation of mental mitigation evidence was deficient. (IB at 59). Orme claims that counsel was deficient for failing to call only two of the four mental health witnesses who testified at the 2001 evidentiary hearing that ultimately resulted in a new penalty phase proceeding. (IB at 59). Orme contends the jury was left the impression that only two experts agreed with a previous doctor's diagnoses that Orme was bipolar. (IB at 59, 62 – 63). Orme also claims that counsel failed to provide the experts who did testify with all of Orme's prior mental health records including the reports and diagnoses from Drs. Warriner and McClane. Finally, Orme claims that counsel was deficient because both mental health experts' testimony was less detailed than it had been at

Orme's previous evidentiary hearing and because trial counsel failed to elicit testimony from either Dr. Herkov or Dr. Maher that the mental mitigators applies in this case. (IB at 64).

There are important facts to consider when reviewing this claim of ineffectiveness. First, the trial judge instructed the jury on both mental mitigators and found both mental mitigators to exist in this case. (PCR2 Vol. 14: 2673–2675). Indeed the trial court found three statutory mitigators: (1) Orme has not significant criminal history; (2) at the time of the murder Orme was under the influence of an extreme mental or emotional disturbance due to his drug dependency; and (3) at the time of the murder, Orme's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired due to his impairment from cocaine and alcohol. (PCR2 Vol. 3: 389 – 393). Accordingly, 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.

Second, simply because a defendant is able to present more favorable mental health testimony at an evidentiary hearing than he did at trial does not render counsel ineffective. *Hoskins v. State*, 75 So. 3d 250 (Fla. 2011) (stating "[C]ounsel's reasonable mental health investigation is not rendered incompetent

‘merely because the defendant has now secured the testimony of a more favorable mental health expert’”).

Third, claims of ineffective assistance of counsel for failing to investigate and offer favorable mental health mitigation evidence generally encompass one or more of the following arguments: (1) trial counsel failed to give all of the available information to the mental health experts; (2) trial counsel should not have called the relied upon experts; (3) trial counsel failed to ask the necessary questions of the experts; and (4) trial counsel should have called additional mental health experts.

The evidence presented at the evidentiary hearing shows that trial counsel gave all the available information to the mental health experts that testified at trial. At the evidentiary hearing, Orme offered no proof that counsel failed to provide Drs. Herkov and Maher with sufficient information upon which to come to their conclusions.

Ms. Sarah Butters testified at the evidentiary hearing that she was the person responsible for sending the available information to the mental health experts. (PCR2 Vol. 19: 2866 – 2868). She had many discussions with Dr. Maher and Dr. Herkov. (PCR2 Vol. 19: 2866 – 2868). They would call her and tell her they needed something and she would provide it. (PCR2 Vol. 19: 2866 – 2868). According to Ms. Butters, she sent “all of, you know, the prior mental health stuff. I gave them all of the prior testimony from trial, from 3.850 hearing, you know, I

gave them everything . . ..” (PCR2 Vol. 19: 2868). Ms. Butters told the trial court that she sent the mental health experts “anything that we had on McClaren, anything we have on McClane, and we had on Warriner, I would have sent them all that.” (PCR2 Vol. 19: 2885 – 2886).

Consistent with Ms. Butter’s testimony, Dr. Maher testified he had all the information he needed to make a diagnosis of Orme:

> **Q:** And do you feel like you had all the information that you needed to make an evaluation or to render an opinion as to whether or not he suffered from a major mental illness in this case?
>
> **A:** Yes.

(PCR2 Vol. 19: 2936). During the evidentiary hearing, Dr. Maher testified the only thing that has changed about the testimony he offered at trial is that he now believes Orme may have been in a manic state at the time of the murder. (PCR2 Vol. 19: 2940). However, this change of opinion was not due to trial counsel’s failure to provide Dr. Maher with sufficient background information. Dr. Maher specifically said:

> I think the only thing that is really different is that my understanding of the relationship between stimulant abuse and bipolar disorder has changed over the last five years and my belief now is that these kinds of highly agitated periods of behavior are much more likely to be driven by the underlying illness than they are the substance abuse.

(PCR2 Vol. 19: 2940). Trial counsel cannot be ineffective, if an expert's opinion changes from one proceeding to another because of developments in the study of mental disorders after the trial.

Only Dr. Herkov testified that he may not have received all of Orme's records before the new penalty phase. (PCR2 Vol. 20: 2987 – 2989). This information was limited to the records of Dr. McClane and Dr. Warriner's opinions about Orme being bipolar, because Dr. Herkov testified in detail about Orme's mental health issues.

When questioned about why he did not recall, at Orme's resentencing, that Dr. McClane and Dr. Warriner had opined that Orme was bipolar, Dr. Herkov explained:

> I think there are three possibilities. One possibility is that I was sent the records and I just didn't read them, I just, either by mistake or it went to the wrong pile, I didn't read them. That strikes me as being unusual because I'm known for, as a person who takes pretty seriously the reviewing of records. In fact, Your Honor, this is a, these 25 pages, these are my notes that I take from the records because there is no way I can remember this. So when you send me a record I'm reading, I'm reading, I'm dictating, oh you know, he went to detox but wasn't able to talk, just so I can do that. And this is 25 pages of that. In fact, if you look in here I do have testimony of Dr. Warriner that I took notes from and I have notes from testimony of Dr. McClane on there. But that's from the first trial. I don't have those from the 2001 trial. So that's one possibility that I didn't, that I did it but I just didn't review it. The second possibility is I reviewed them but I don't remember. I think if I reviewed them I would have made a note here and, number two, in going back and reading Dr. Warriner's testimony, I mean, his testimony was that he was precluded from testifying about diagnoses because he was a psychologist. Being a psychologist that

> would have stuck with me, I can tell you I'm going to remember that five years from now when I'm teaching a class. I mean, that would have stuck in my mind, what do you mean a psychologist can't testify. I mean, I would have been all over that, of course, we can testify. . . . And the third possibility is that I never saw them. And in my opinion what I think happened, you know, that's what I'm thinking happened. I can't be sure of any one of those but obviously when I said that on the stand I was not aware of, or was unable to recall Dr. Warriner's or McClance's testimony.

(PCR2 Vol. 20: 2987 – 2989).

The trial court rejected Orme's argument because all the "evidence shows defense counsel provided Dr. McClane's and Dr. Warriner's testimony to Dr. Herkov in preparation for testifying at resentencing." (PCR2 Vol. 3: 375). Therefore, based on the testimony of Ms. Butters and Dr. Herkov, Orme cannot establish deficient performance.

Orme next contends that counsel was deficient in not presenting the prior testimony of Dr. Warriner and Dr. McClane in addition to Dr. Herkov and Dr. Maher. (IB at 62). This allegation is also refuted by a review of the record. "Mr. Ramey testified that he and Mr. Stone tried numerous times to procure Dr. McClane's services but he refused to cooperate and thus counsel could not call him as an expert witness." (PCR2 Vol. 3: 374; Vol. 20: 3106 – 3107).

Unfortunately, Dr. Warriner had passed away at the time of the second penalty phase and was therefore unavailable. "In deciding to forego reading Dr. Warriner's original testimony to the jury, counsel testified that he felt it would be

more effective to only provide testimony from live witnesses who had solid opinions about the Defendant's bipolar disorder. (PCR2 Vol. 3: 375; Vol. 20: 3108, 3117 – 3118). The trial court determined this to be a sound trial strategy. (PCR2 Vol. 3: 374).

In addition, the trial court found that Orme had proven neither deficient performance nor prejudice within this assertion. "The theory underlying the Defendant's argument is that had counsel presented evidence that two additional experts had diagnosed the Defendant with bipolar disorder, it would have swayed the jury and the [c]ourt into recommending life." (PCR2 Vol. 3: 374). "Given the weight of the aggravating evidence presented at resenting, the Defendant's allegation of prejudice is unavailing." (PCR2 Vol. 3: 374) Furthermore, "contrary to the Defendant's belief that the jury and [c]ourt were left with the impression that only three experts diagnosed the Defendant with bipolar disorder, Dr. Prichard (the State's expert), testified on cross-examination that Dr. Warriner and Dr. McClane had diagnosed the Defendant as bipolar." (PCR2 Vol. 3: 375). As such, there is no prejudice because the jury heard the diagnosis of the additional doctors who did not testify.

"Starting from the point of 'relatively weak' mitigation evidence, there is not a reasonable likelihood that the inclusion of two additional experts who believed the Defendant was bipolar would have strengthened the mitigators to such a level that

they would have outweighed cumulative weight of the aggravators." (PCR2 Vol. 374; *Orme*, 25 So. 3d at 544).

Orme also attacks the overall sufficiency of Dr. Herkov's and Dr. Maher's testimony by claiming his counsel failed to ask all necessary and appropriate questions. (IB at 63 – 64). Orme focuses his assertion on a belief that the mental mitigators were not established through the testimony of Dr. Herkov, and that Drs. Herkov and Maher's prior testimony was more detailed, cohesive and informative at the first penalty phase. (IB at 64). As noted above, trial counsel's failure to ask both experts specifically whether both statutory mental mitigators applied could not have prejudiced Orme because the jury was instructed on both mitigators and the trial court found both mitigators.

During the second penalty phase, both Dr. Herkov and Dr. Maher testified about Orme's bipolar disorder and his polysubstance abuse. (PCR2 Vol. 10 – 11: 1940 – 1950; Vol. 12 – 13: 2293 – 2326). Both explained at length that Orme's mental health condition coupled with polysubstance abuse would have affected his behavior on the day of the murder. (PCR2 Vol. 10 – 11: 1940 – 1950; Vol. 12 – 13: 2293 – 2326).

A review of Dr. Herkov's testimony from re-sentencing shows he was in fact quite detailed in substance and length. (PCR2 Vol. 12 – 13: 2289 – 2319, 2322 – 2404, 2464 – 2471). Dr. Herkov illustrated his testimony with a power point

presentation, complete with brain mapping, that he had prepared prior to this testimony. (PCR2 Vol. 12: 2294 – 2295). Orme's allegation that trial counsel was deficient because he failed to ensure the mental health experts' testimony was not sufficiently detailed, ignores the actual record of the re-sentencing proceedings.

Trial counsel is entitled to rely on the experts they employ. *Valentine v. State*, 98 So. 3d 44 (Fla. 2012). When reviewing the entire record of both the re-sentencing and the evidentiary hearing one is presented with a clear picture of the defense strategy and the expert testimony which was presented to the jury to establish that strategy. Because Orme has not proven that counsel's presentation of either expert's testimony was either deficient or prejudicial this sub-claim should be denied.

Trial Court's Order and Defense Argument of Lingering Doubt

Orme separately challenges the order of the trial court which denied his 3.851 motion for post-conviction relief. (IB at 66). Orme claims the trial court's legal conclusion is erroneous and failed to adequately evaluate his motion and argument for ineffective assistance of counsel. (IB at 66 – 67). This is essentially the nature of the appeal before this Court, but Orme focuses on trial counsel's use of lingering doubt during the second penalty phase. (IB at 67).

Rulings of the trial court are the proper subject of an appeal. Accordingly, this Court maintains the "Tipsy Coachmen" principle that a "trial court's ruling should

be upheld if there is any legal basis in the record which supports the judgment." *State v. Hankerson*, 65 So. 3d 502, 505 – 507 (Fla. 2011); *See also Robertson v. State*, 829 So. 2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010)(stating "whether the record before the trial court can support the alternative principle of law"); *Caso v. State*, 524 So. 2d 422, 424 (Fla. 1988)(affirming the trial court "even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); *Jaworski v. State*, 804 So. 2d 415, 419 (Fla. 4th DCA 2001)(stating "we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); *Ochran v. U.S.*, 273 F.3d 1315, 1316 (11th Cir. 2001)(finding "summary judgment for the defendant was appropriate, but for a different reason"). As the state has addressed this issue above, no further discussion is required.

Orme cannot establish he was prejudiced by any of the above alleged errors. There is no case or written requirement which dictates to a defense attorney as to how a case should be tried. By his own admission, trial counsel was aware that an argument of lingering doubt was not permissible, but chose a strategy which was endorsed by the defendant, and attempted to stay within the rule. Mr. Ramey did not mislead the jury with his opening statement, but was indicating to the jury that DNA was found under the victim's fingernails that did not belong to the

Defendant. Dr. Riddick was strategically chosen by the defense, and provided support for the argument that Ms. Redd was unconscious within 10 seconds, which sought to challenge the HAC aggravator. Finally, Orme's theory that had counsel presented evidence that two additional experts had diagnosed the Defendant with bipolar disorder, it would have swayed the jury into recommending life is baseless. Dr. Prichard, the State's expert, testified on cross-examination that Dr. Warriner and Dr. McClane had diagnosed the Defendant as bipolar. Therefore, the jury was made aware that four mental health professionals diagnosed Orme as bipolar. As such, Orme cannot demonstrate deficient performance or prejudice for any of the above stated individual claims of ineffectiveness, and this issue should be denied.

II. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S CLOSING STATEMENT BECAUSE THE COMPLAINED OF STATEMENTS WERE EITHER PROPER COMMENTS ON THE EVIDENCE OR DID NOT RISE TO A LEVEL WHICH WOULD REQUIRE A MISTRAL.

Orme asserts his trial counsel was ineffective during resentencing for failing to object to multiple instances of prosecutorial misconduct. (IB at 85). All of the complained of comments occurred during closing arguments and were either proper comments on the evidence or did not rise to a level which would require a mistral. Orme cannot show that any of the comments made to the jury might have influenced them to reach a more severe verdict.

Standard of Review

To establish ineffective assistance of counsel, a defendant must satisfy a two prong test, establishing both deficient performance and prejudice. *Strickland*, 466 U.S. 668. To establish deficient performance, a defendant must show that counsel made specific errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. 668 (1984); *Pietri*, 885, So. 2d at 252. To establish prejudice for counsel's failure to object to improper prosecutorial comments, the prosecutor's comments must "either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe

verdict that it would have otherwise." *Walls v. State*, 926 So. 2d 1156, 1167 (Fla. 2006)(quoting *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994)).

Deficient Performance

Orme first looks at a series of comments made during the closing argument of his resentencing, asserting the prosecutor made impermissible references and attempted to paint a horrifying picture of the victim's death. (IB at 86). "Closing argument is an opportunity for counsel to review the evidence and explicate those inferences which may reasonably be drawn from the evidence." *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007). Attorneys are permitted wide latitude in closing argument in order to present their summation of the evidence. *See Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 2000). "In determining the propriety of closing arguments, the [c]ourt must consider each statement 'not in isolation but in the context in which statements were made.'" (PCR2 Vol. 3: 378; *Merck*, 975 So. 2d at 1062). "Trial counsel cannot be deemed ineffective for failing to object to a fair comment which is based on the evidence presented during the trial." *Spann v. State*, 985 So. 2d 1059, 1068 (Fla. 2008).

The first comment Orme challenges on appeal was in reference to the testimony of Mr. Josh Lee. The argument from the prosecutor was as follows:

> Josh Lee, what did we learn from Josh Lee? Sound proof rooms, no one, no one, but this Defendant head the screams of Lisa in the last minute of her life. A sound he will hear but no one else will hear for the rest of their life.

(PCR2 Vol.14: 2578). This comment by the prosecutor was not improper as it was based on the evidence presented to the jury. During the resentencing the State elicited testimony from Dr. James Lauridson. Dr. Lauridson testified that Lisa Redd "did not die gently, or quietly or peacefully." (PCR2 Vol. 10: 1932). In addition to highlighting the multitude of blunt force injuries suffered by Ms. Redd while she was still alive, Dr. Lauridson testified that the actual strangling of Ms. Redd would have been quite painful. There were signs of repeated application of pressure to the neck in a strangulation that occurred over some time. (PCR2 Vol. 10: 1934). Indeed, Dr. Lauridson testified that Ms. Redd could have survived for anywhere between 45 seconds to 2 minutes. (PCR2 Vol. 10: 1934). In addition, Josh Lee testified that the motel room where the murder occurred was built to be soundproof. (PCR2 Vol. 8: 1429 – 1430). As such, the trial court determined the testimony of both Josh Lee and Dr. Lauridson provided a reasonable basis for the comment by the prosecutor. (PCR2 Vol. 3: 378). The only person who heard the last screams of Ms. Redd was in fact Orme. Therefore this comment was not improper.

The next statement Orme challenges is:

> I submit she was not unconscious, she was awake every second, knowing there were things she would never say to her son, knowing that death was imminent. She truly had her head in the hands of a lion, a lion that showed no mercy as he savaged her a lion built, forceful, unrelenting and merciless.

(PCR2 Vol. 14: 2585). The trial court found this comment was not improper because that it was supported by the evidence presented to the jury and was relevant to the aggravator of heinous, atrocious, and cruel. (PCR2 Vol. 3: 378).

Dr. Lauridson, the State's medical examiner, testified Ms. Redd did not die peacefully. Orme has to repeatedly apply force to her neck because Ms. Redd fought him and resisted his efforts to kill her. (PCR2 Vol. 10: 1905). The medical examiner's testimony supported the prosecutor's argument that Ms. Redd was conscious and fighting during the rape, the beating, and the 45 seconds to 2 minutes of strangling. (PCR2 Vol. 10: 1934).

Additionally, testimony of the victim's consciousness and awareness of her impending death was relevant to the aggravator heinous, atrocious, or cruel. *Owen v. State*, 862 So. 2d 687 (Fla. 2003). Strangling deaths are by their nature HAC. Accordingly, it is appropriate for a prosecutor to argue facts supporting this aggravator. This is especially true in this case, where this Court found there was sufficient evidence to support the aggravator of HAC.

> We find the record supports the trial court's conclusion that this murder was conscienceless and pitiless and was unnecessarily tortuous to Redd, both physically and emotionally. Dr. James Lauridson, a forensic pathologist, testified that Redd has significant bruising all over her body, including her face, neck, arms, legs, and abdominal area, which came from blunt force trauma. He explained that the blunt trauma was of such force that it tore the blood vessels under the skin, which bled out and caused discoloration. The blunt force injury on the abdomen was deep enough to injure the tissue

> surrounding the kidney, causing a significant amount of hemorrhaging. Dr. Lauridson further testified that there was ecchymosis (bleeding on the white of the eye) and petechiae (small pinpoint hemorrahages on eyelids), which are commonly seen in asphyxia deaths when there has been strangulation. There was also a significant amount of hemorrhaging at all levels of the neck including the back of the neck, which was consistent with someone being strangled from the front and back. Dr. Leroy Riddick, the forensic pathologist called by the defense, agreed that the cause of death was manual strangulation. He further stated that there was definitely an altercation and a struggle; Redd did not just sit there and get strangled. He also testified that by looking at the injuries, Orme delivered approximately twenty-four blows to Redd.
>
> Evidence of Redd's struggle indicates that Redd was aware of her impending death. *See Belcher v. State*, 851 So. 2d 678 (Fla. 2003) (finding that the HAC aggravator applied and nothing that although the victim was probably only conscious for sometime between thirty seconds and a minute before her strangulation and drowning death, the evidence of a struggle between the victim and her attacker established that she was likely conscious at the outset of the strangling and was aware of her impending death). Moreover, because strangulation of a conscious victim involved foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC. *See Bowles v. State*, 804 So. 2d 1173, 1178 (Fla. 2001) ("strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture. Accordingly, this Court has consistently upheld the HAC aggravator in cases where a conscious victim was strangled."); *see also Mansfield v. State*, 758 So. 2d 636, 645 (Fla. 2000).

Orme v. State, 25 So. 3d 536 (Fla. 2009). Therefore, there was nothing improper about this comment and Orme cannot show either deficient performance.

The next statement Orme asserts was improper for the prosecutor to make is the following:

> At 10 seconds Lisa Redd is looking up close and personal into the eyes[sic] into eyes of this man she trusted, this man at one time she has had affectionate feelings for, this man who she only came to help, and for 10 seconds with her very life passing before her eyes: (hitting desk) bam, bam, bam, bam, bam, bam, bam, bam, bam, bam, bam, bam, bam, she could not scream, she could not breath, she could not cry, she could not beg, she could not offer please take my car, go ahead, take the purse, you've already beaten me, you have already raped me, I have no dignity, don't take my life, and she looked and he looked back and he made a decision, a decision that he would not stop, he would not stop but he would continue after her body went limp. Two minutes, he could have let go. How long did he have to hold it. Four minutes or longer, that's assuming he lever let up, that's assuming he never relented, that's assuming he had complete occlusion, complete occlusion. As he looked down into her lifeless, limp body, he could have shown mercy. She's unconscious now, I can walk out with the purse, I can drive off with the car, I don't have to keep holding on, I don't have to rob her son of his mother, I can let her live. I can choose life over a brutal death.

(PCR2 Vol. 14: 2588 – 2589). Once again, there is nothing improper about this argument and an objection would not have been sustained. The trial court found that "when read in context that the prosecutor was recalling that the evidence regarding the length of time it took the victim to lose consciousness while the Defendant strangled her varied according to the experts from 10 second to 4 minutes." (PCR2 Vol. 3: 378).

The evidence at trial supported the argument that Orme raped Ms. Redd, beat her, and then strangled her to death. Dr. Lauridson testified that Lisa Redd fought for her life and there was evidence of repeated application of force to Ms. Redd's neck. (PCR2 Vol. 10: 1889 – 1890). After some time, Ms. Redd was rendered

unconscious; however, Orme would have to continue to apply pressure for 3 to 5 minutes in order to kill her. (PCR2 Vol. 10: 1894). As such, the prosecutor's depiction of both Orme's ability to walk away as well as Ms. Redd's fear, pain, and knowledge of her impending death are not only relevant to the conscious and pitiless nature of this crime, but also to the hopelessness and fear that the victim surely felt as Orme strangled her to death. *See Bowles v. State*, 804 So. 2d 1173, 1178 (Fla. 2001) (stating "strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture. Accordingly, this Court has consistently upheld the HAC aggravator in cases where a conscious victim was strangled"). Therefore, this comment was not improper when viewed within the context of the evidence presented at trial, and the reasonable inferences permitted within a closing argument.

Orme also challenges his attorney's failure to object to comments which he claims paint him as inherently evil. (IB at 87 – 88). Orme specifically points to the following:

> We are all into labels, aren't we, we have got all these labels for everything, you know, substance abuse, poly-substance abuse, depressive something or another, can't you sometimes just be a crack head, can't you sometimes be just a pot head, is it possible and reasonable that normal people do go out and decided to become addicts and they take drugs, not intentionally because an addict, but they go out and make the decision to take drugs and they become addicts. But there are also some people who are evil that do that, and

> just because they take drugs does not change them. But now with, gosh, I don't know how many psychologists and psychiatrists we have seen over a dozen, I think , over the last 15 years, now we come up with all these labels to try to, try to put some scientific explanation on behavior. Can it just be that sometimes people are evil, cruel, indifferent to the suffering of others that there's no little fancy label for? Maybe, just maybe it does disservice to those people who really are ill when we try to justify or minimize the cruel actions of one individual by trying to say, well, it's because of his illness.

(PCR2 Vol.14: 2591 – 2592). The trial court determined this statement was not improper in light of the evidence presented to the jury because the prosecution was commenting on the weight to be given to the evidence of mitigation. (PCR2 Vol. 3: 380).

> Because the Defendant presented a significant amount of evidence and testimony to support his theory that bipolar disorder and polysubstance abuse were significant mitigators, it was not improper for the prosecutor to suggest that in light of all the evidence the Defendant's crimes were not the result of mental health problems but were the result of conscious, volitional acts.

(PCR2 Vol. 3: 380). It is perfectly proper for the prosecutor to present argument as to why the jury should not put a great deal of weight on certain evidence presented in mitigation. In this part of the prosecutor's closing argument, the prosecutor discussed Orme's mitigation evidence, and the deficiencies in the testimony the defense presented to the jury. "In essence, the prosecutor was arguing the jury should sentence the Defendant to death because the aggravators far outweighed the mitigators. (PCR2 Vol. 3: 380).

Orme presented a great deal of evidence in support of the notion that he was a

drug addict and mentally ill. As such, it was not improper for the prosecutor to discuss whether the jury should give great weight to that when there was also evidence that Orme could maintain a steady job and relationships with friends. Therefore, because an objection to the above styled comments would not have been sustained, trial counsel's performance cannot be deemed deficient. *Spann v. State*, 985 So. 2d 1059, 1068 (Fla. 2008) (finding "Trial counsel cannot be deemed ineffective for failing to object to a fair comment which is based on the evidence presented during the trial"). Therefore, Defense counsel is not deficient for failing to object to these comments and Orme cannot satisfy either the prejudice prong.

No Prejudice to the Defendant.

Orme cannot show he was prejudiced by the prosecutor's comments if an objection to them would not have been sustained. Each of the above comments has been shown to be a proper comment on the evidence, and as such Orme did not suffer any prejudice as a result of trial counsel's failure to object. Even if an objection should have been sustained, these comments do not rise to the level of fundamental error. *See Walls v. State*, 926 So. 2d 1156 (Fla. 2006)(finding that in order to show prejudice for counsel's failure to object to improper prosecutorial misconduct, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they

might have influenced the jury to reach a more severe verdict that it would have otherwise).

The Golden Rule violations did not influence the jury to reach a more severe verdict.

Orme contends that his attorney was ineffective in failing to object to the prosecutors impermissible comments in violation of the golden rule during closing argument of the re-sentencing. (IB at 88). This Court has determined that an impermissible golden rule argument is an argument in which an attorney "asks the jurors to place themselves in the victim's position, ask the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative." *Williamson v. State*, 994 So. 2d 1000, 1006 (Fla. 2008) (quoting *Hutchinson v. State*, 882 So. 2d 943, 954 (Fla. 2000)). A golden rule argument "extends beyond the evidence and 'unduly create[s], arouse[s] and inflame[s] the sympathy, prejudice and passions of [the] jury to the detriment of the accused.'" *Lugo v. State*, 845 So. 2d 74, 106 (Fla. 2003) (quoting *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998)). Orme points to the following statements as golden rule violations:

> When you go back to deliberate, I pray each of you take some time to think how long four minutes is. Everybody has watches, take some time to really, really, think and nobody say a word, sit around that table and nobody say a word for four minutes, think about the choices that he made. Was she feeling any endorphins, was she feeling a sense of calm or was she feeling deep sadness, fear, pain, cruelty, what does our common sense tell us.

(PCR2 Vol. 14: 2588 – 2589). . . .

> Do you think when Lisa Redd got that blow to the kidney that she was not begging him to stop. Feeling the pain that she felt as her kidney is hemorrhaging, she didn't beg him, please, Mike, let me go, you are hurting me.

(PCR2 Vol. 14: 2611 – 2612).

The trial court found these comments were impermissible, and did in fact constitute a golden rule violation. (PCR2 Vol. 3: 379). Nevertheless, the trial court held although these comments were improper, trial counsel's failure to object was not prejudicial. (PCR2 Vol. 3: 379).

> [L]ike the previous statement[s], when evaluated in light of the totality of the evidence presented and the broader context of the prosecution's closing, the Defendant has not shown that this statement rose to a level that would require a mistrial or was so inflammatory that it might have influenced the jury to reach a more severe verdict that it otherwise would have. The overwhelming evidence presented at trial and recalled by the prosecution during closing arguments showed that the Defendant sexually battered and violently beat and strangled the victim. Accordingly, in light of the evidence presented at trial and the broad context of the prosecution's closing arguments, counsel's failure to object to this brief statement was not prejudicial.

(PCR2 Vol. 3: 379). The golden rule violations must be viewed in light of the totality of the circumstances in order to determine whether or not Orme was prejudiced. In order to establish prejudice, Orme must show the impermissible comments influenced the jury to reach a more severe verdict. The evidence the jury was presented with showed Orme beat Ms. Redd mercilessly before strangling

her for a period of minutes. In addition, the evidence presented established both a sexual battery and a robbery. The aggravators of HAC, murder in the course of a sexual battery and murder for the purposes of pecuniary gain were all proven. Minimal mitigation was presented to the jury, and the statutory mitigation which was presented and found all stemmed from Orme's long standing substance abuse addiction. The jury vote was eleven to one (11 – 1) in recommendation of death. (PCR2 Vol. 14: 2686). As such, although the comments by the prosecution were impermissible, defense counsel is not ineffective for failing to object, because Orme cannot show these comments went so far as to influence the jury toward a more harsh sentence. Therefore, Orme has failed to meet the prejudice prong when looking at the golden rule violations.

III. ORME CANNOT SHOW AN ACTUALLY BIASED JUROR WHO WOULD NOT CONSIDER REMORSE SERVED AS A MEMBER OF THE JURY.

Orme avers his counsel was ineffective for failing to preserve for appeal, the issue that the trial court erred in holding a juror's refusal to consider remorse as a mitigator could only be a basis for a peremptory challenge. (IB at 89 – 90). However, because trial counsel did not question any of the venire concerning remorse following the correction by the trial court, there is no testimony to show an actually biased juror served as a member of the jury. Without proof of an actually biased juror having served, Orme's claim becomes speculative. A speculative claim that a biased juror may have served is not sufficient to establish prejudice under *Strickland*, and as such trial counsel cannot be found ineffective.

Standard of Review

To establish ineffective assistance of counsel, a defendant must satisfy a two prong test, establishing both deficient performance and prejudice. *Strickland*, 466 U.S. 668. To establish deficient performance, a defendant must show that counsel made specific errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. 668 (1984); *Pietri*, 885, So. 2d at 252. To establish prejudice, for failure to preserve an issue regarding jury selection Orme must show that a juror who served on the jury was actually biased against him. *See Carratelli v. State*, 961 So. 2d 312, 324 (Fla.

2007); *Johnston v. State*, 36 So. 3d 730, 744 – 745 (Fla. 2011) (denying Johnston's claim that trial counsel was ineffective because Johnston did not show that the jurors were actually biased. "Actual bias means bias-in-fact that would prevent service as an impartial juror." *Carratelli,* 961 So. 2d at 324 (citing *U.S. v. Wood*, 229 U.S. 123, 133 – 135 (1936)). ". . . . [T]he evidence of bias must be plain on the face of the record. *Johnston*, 63 So. 3d at 744 – 745. Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S., at 687.

Remorse as a Mitigator

The facts of what occurred during the voir dire for Orme's re-sentencing proceeding are recited in this Court's opinion on appeal:

> . . . defense counsel asked one of the prospective jurors whether evidence of Orme's remorse could be significant in considering the case. The prosecutor objected. At first, the trial court sustained the objection and held that such a question about remorse was not appropriate during voir dire. However, after both the prosecutor and the trial judge acknowledged that remorse could be considered as a mitigator in sentencing, the trial judge held that defense counsel could inquire into remorse, but could not ask the jury what weight they would give it. However, in doing so, the trial judge also ruled that if a juror could not consider remorse as mitigating, it could only be a basis for a peremptory challenge, not a challenge for cause.

Orme, 25 So. 3d at 543. Orme asserts this issue should be considered in conjunction with other errors this Court found to be harmless on direct appeal. (IB

at 91). However, this Court simply declined to address this issue because it was not preserved for appeal. *Orme*, 25 So. 3d at 543 – 44. While, this Court did determine the trial court committed harmless error within its sentencing order; these are separate issues, as this Court treated them on direct appeal. One concerns jury selection regarding remorse and the other concerns the sentencing order. Accordingly, the only basis for Orme to qualify for relief on a claim on ineffective assistance of counsel is to satisfy the two prong test under *Strickland*.

Deficient Performance

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Judicial scrutiny of counsel's performance must be highly deferential and must be conducted in a manner that eliminates the "distorting effects of hindsight" and considers the conduct in light of the circumstances facing the attorney at the time." *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2000) (internal citations omitted) (citing *Strickland*, 466 U.S. at 689 – 690). " . . . . [T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

In the present case, 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. This also was the strategy insisted on by Orme. (PCR2 Vol. 20: 3094). Therefore, an argument which was predicated on remorse, which would include admissions of wrong doing, would cut against the defenses decided strategy to create doubt within the jury's mind as to the aggravators.

Prejudice to the Defendant

Orme must also show the failure to preserve this issue resulted in a juror, any juror, with actual biases serving as a member of the jury. *Carratelli*, 961 So. 2d at 323 – 324. While Orme asserts a conclusive proposition that the failure to preserve this error resulted in prejudice, any position is purely speculative. Although the trial court corrected its prior ruling and permitted defense counsel to inquire about remorse, the defense this line of questioning and did not ask any questions to any members of the venire regarding remorse. As such, the record in the instant case is devoid of any evidence that an actually biased juror served.

Mere speculation into a juror's potential bias is not sufficient to rise to the level of ineffectiveness as required by *Strickland*. *See Solozano v. State*, 25 So. 3d 19, 23 (Fla. 2009) (finding claim of ineffectiveness based on speculation legally insufficient and properly denied in post-conviction); *Green v. State*, 975 So. 2d 1090, 1105 (Fla. 2008) (holding trial counsel did not render ineffective assistance

in failing to ask a prospective juror more questions "because an allegation that there would have been a basis for a cause challenge if counsel had followed up during voir dire with more specific questions was speculative") (citing *Johnson v. State*, 903 So. 2d 888, 890 (Fla. 2005); *Reeves v. State*, 826 So. 2d 932, 939 (Fla. 2002)). In the present case, there simply is no evidence which would give rise to a finding that an actually biased juror served.

Orme also cannot show prejudice in the trial court's incorrect in ruling that a juror's refusal to consider remorse as a mitigator could only be the basis for a peremptory challenge. In order for Orme to have suffered prejudice as a result of this ruling, Orme would have to show he exhausted all of his peremptory challenges, and as a result had one less peremptory challenge to use against other objectionable jurors. *Matarranz v. State*, 38 Fla. L. Weekly S687 (Fla. 2013) (finding the defendant was prejudiced because he had one less peremptory to use against all other objectionable jurors after he had exhausted all of his peremptory challenges and requested an additional peremptory challenge. Also quoting "A court errs when it 'force[s] a party to exhaust his peremptory challenges on persons who should have been excused for cause . . . .'" *Leon v. State*, 396 So. 2d 203, 205 (Fla. 3d DCA 1981)); *Carratelli*, 961 So. 2d at 318.

At the end of voir dire, Orme had 3 peremptory challenges remaining and did not request any additional challenges. (2PP Vol. XLVIII 4711). He did not

identify any prospective juror he wished to challenge for cause because the prospective juror would not consider remorse in mitigation. (2PP Vol. XLVIII 4711). Furthermore, Orme's argument does not identify a specific juror as being biased against him, but simply asserts he was prejudiced as a result of his trial counsel's failure to preserve this issue for appeal. Therefore, since Orme's argument is based on speculation and cannot show that he was prejudiced by the trial court's ruling this argument should be summarily denied.

IV. ORME CANNOT SHOW PREJUDICE FOR COUNSEL'S FAILURE TO PRESERVE THE ISSUE OF MERCY DURING JURY SELECTION BECAUSE THE RECORD IS SILENT AS TO WHETHER AN ACUTALLY BIASED JUROR SERVED ON THE JURY.

Orme claims defense counsel was ineffective for failing to preserve the trial court's error regarding the jury's consideration of mercy during its deliberations. While the trial court did commit an initial error, that error was corrected and subsequently defense counsel abandoned the argument of mercy. In order to prevail on this claim Orme must show that an actually biased juror served on the jury. Because trial counsel did not conduct any further inquiry into the issue of mercy the record is silent as to any actual biases by any juror. Therefore, Orme's claim is based on speculation and should be denied.

Standard of Review

To establish ineffective assistance of counsel, a defendant must satisfy a two prong test, establishing both deficient performance and prejudice. *Strickland*, 466 U.S. 668. To establish deficient performance, a defendant must show that counsel made specific errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. 668; *Pietri*, 885, So. 2d at 252. To establish prejudice, for failure to preserve an issue regarding jury selection Orme must show that a juror who served on the jury was actually biased against him. *See Carratelli v. State*, 961 So. 2d 312, 324 (Fla.

2007); *Johnston v. State*, 36 So. 3d 730, 744 – 745 (Fla. 2011) (denying Johnston's claim that trial counsel was ineffective because Johnston did not show that the jurors were actually biased. "Actual bias means bias-in-fact that would prevent service as an impartial juror." *Carratelli,* 961 So. 2d at 324 (citing *U.S. v. Wood*, 229 U.S. 123, 133 – 135 (1936)). ". . . . [T]he evidence of bias must be plain on the face of the record. *Johnston v. State*, 63 So. 3d 730, 744 – 745 (Fla. 2011). Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S., 668, 687 (1984).

Inquiry of Venire on Mercy

> During the first stage of voir dire, defense counsel asked two prospective jurors whether the consideration of mercy had a part in the sentencing proceedings. After the first juror stated that he could not consider mercy, defense counsel challenged him for cause, which the trial court denied. Defense counsel then asked another juror the same question. The prosecutor objected, and the trial court sustained the objection and restricted defense counsel's questions regarding mercy. Later during voir dire, defense counsel asked the trial court to reconsider the ruling restricting his ability to inquire about mercy. The trial court agreed to allow defense counsel to revisit the issue of mercy during the second stage of voir dire. After this ruling, although still during the first stage, defense counsel questioned three more prospective jurors about mercy without objection from the State, and then asked two different groups of prospective jurors during the second stage whether they could consider mercy. None of the prospective jurors indicated that they could not consider mercy in the case.

> Orme concedes that the trial court allowed him to question prospective jurors about mercy and he did, in fact asked the jurors about mercy. However, he argues that because the parties resumed their argument about the role of mercy during the second stage of jury selection, he was never able to raise the issue of mercy afterwards due to the trial court's ruling. The record demonstrates that after defense counsel asked the last set of fourteen jurors about mercy, the parties resumed their argument about the role of mercy. The trial court ended the argument by ruling that the prosecutor could not bring up the issue of mercy unless defense counsel raised the issue. Orme now argues that he was never able to raise the issue of mercy after this decision because he did not want the State to make improper comments about the governor being the only one who could exercise mercy. However, we find the issue is not preserved for appeal because after the trial court's decision, Orme did not attempt to question the jurors about mercy for the rest for voir dire. Accordingly, relief is not warranted.

Orme, 25 So. 3d at 544 – 545. Orme now argues that his trial counsel's failure to preserve this issue is a basis for relief. (IB at 91, 93 – 94).

Deficient Performance

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Judicial scrutiny of counsel's performance must be highly deferential and must be conducted in a manner that eliminates the "distorting effects of hindsight" and considers the conduct in light of the circumstances facing the attorney at the time." *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2000) (internal citations omitted) (citing *Strickland*, 466 U.S. at 689 – 690). " . . . . [T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make

the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

In the present case, defense counsel's failure to preserve this issue for appeal should be viewed in light of the overall strategy for the penalty phase. The strategy of the defense was to attack the aggravators and inject as much doubt into the instructed aggravators as possible, not to rely on mitigation to outweigh the overwhelming evidence against Orme. (PCR2 Vol. 20: 3094). This also was the strategy insisted on by Orme. (PCR2 Vol. 20: 3094). As such, an argument which was predicated on remorse would cut against the defenses decided strategy.

Furthermore, the strategy of lingering doubt was one which Orme insisted on. "[I]t it axiomatic that if a defendant consents to defense counsel's trial strategy after it had been explained to him, it will be difficult to establish a claim of ineffective assistance of counsel." *Stein*, 995 So. 2d at 337 (citing *Gamble v. State*, 887 So. 2d 706, 714 (Fla. 2004) ("[I]f the defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel"; *see Nixon v. Singletary*, 758 So. 2d 618, 623 (Fla. 2003). This Court has even acknowledged that consent to counsel's strategy is "almost always fatal to an ineffective assistance of counsel claim." *Stein*, 995 So. 2d at 337. Therefore, trial counsel was not deficient in his performance because his strategy was endorsed and insisted on by Orme.

Prejudice to the Defendant

Orme must also show that the failure to preserve this issue resulted in a juror, any juror, with actual biases serving as a member of the jury. *Carratelli v. State*, 961 So. 2d 312, 323 – 324 (Fla. 2007). While Orme asserts a conclusive proposition that the failure to preserve this error resulted in prejudice, any position is purely speculative. Although the trial court corrected its prior ruling and permitted defense counsel to inquire about mercy, "[t]he record demonstrates that after defense counsel asked the last set of fourteen jurors about mercy, the parties resumed their argument about the role of mercy." *Orme*, 25 So. 3d at 544 – 545. Once again, the record in the instant case is devoid of any evidence that an actually biased juror served.

Mere speculation into a juror's potential bias is not sufficient to rise to the level of ineffectiveness as required by *Strickland*. *See Solozano v. State*, 25 So. 3d 19, 23 (Fla. 2009) (finding claim of ineffectiveness based on speculation legally insufficient and properly denied in post-conviction); *Green v. State*, 975 So. 2d 1090, 1105 (Fla. 2008) (holding trial counsel did not render ineffective assistance in failing to ask a prospective juror more questions "because an allegation that there would have been a basis for a cause challenge if counsel had followed up during voir dire with more specific questions was speculative") (citing *Johnson v.*

State, 903 So. 2d 888, 890 (Fla. 2005); *Reeves v. State*, 826 So. 2d 932, 939 (Fla. 2002)).

In the present case, there simply is no evidence which would give rise to a finding that an actually biased juror served. Orme did not identify any prospective juror he wished to challenge for cause because the prospective juror would not consider mercy in mitigation. Furthermore, Orme's argument does not identify a specific juror as being biased against him, but simply alleges that he was prejudiced as a result of his trial counsel's failure to preserve this issue for appeal. Therefore, since Orme's argument is based on speculation, he cannot show prejudice, and this argument should be summarily denied.

V. THE FLORIDA SUPREME COURT HAS REPEATEDLY REJECTED INDEPENDENT CLAIMS OF INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL.

Orme avers that his initial post-conviction counsel, Mr. Doss, was ineffective and he is entitled to relief based on the United States Supreme Court ruling in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). (IB at 94). This claim is meritless and this Court has repeatedly rejected this argument. Orme also presents a separate sub-claim on his motion to amend the initial 3.851 motion for post-conviction relief. (IB at 97). This sub-claim should also be summarily denied as it is a direct attack on the effectiveness of post-conviction counsel. Orme is not entitled to relief because his current counsel would have proceeded in a different manner from his initial post-conviction counsel.

Martinez v. Ryan

This Court has rejected the assertion that a reading of *Martinez v. Ryan* creates a substantive right to the effective assistance of collateral counsel. In *Gore v. State*, 91 So. 3d 769, 778 (Fla. 2012), this Court stated:

> a proper analysis reveals that the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists:
>
> > While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

Gore, 91 So. 3d at 778 (citing *Martinez v. Ryan*, 132 S.Ct. 1309, 1313 (2012). This Court has never hinted at an inclination to recede from this position and has repeatedly stated that "claims of ineffective assistance of postconviction counsel are not cognizable." *Howell v. State*, 109 So. 3d 763, 776 (Fla. 2013); *see Mann v. State*, 112 So. 3d 1158, 1163 – 1164 (Fla. 2013); *Kokal v. State*, 901 So. 2d 766, 777 (Fla. 2005); *Foster v. State*, 810 So. 2d 910, 917 (Fla. 2002); *King v. State*, 808 So. 2d 1237, 1245 (Fla. 2002) (rejecting a claim that postconviction counsel was ineffective because a defendant has no constitutional right to effective collateral counsel *citing Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2757 (1989), *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990 (1987)); *Carroll v. State*, 815 So. 2d 601, 609 (Fla. 2002) (rejecting a claim of ineffective assistance of post-conviction counsel due to lack of funding for collateral counsel as "without merit" because claims of ineffective assistance of post-conviction counsel do not present a valid basis for relief); *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996).

Fla. Stat. § 27.711 (2013)

"In a postconviction proceeding, all that due process requires is that the defendant be provided meaningful access to the judicial process." *Kokal*, 901 So. 2d at 778 (citing *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408 (Fla. 1998). While Florida does provide a statutory right to counsel in capital post

conviction cases, that statute is a funding and monitoring statute enacted by the legislature. § 27.711(10) Fla. Stat. provides "[a]n action taken by an attorney who represents a capital defendant in postconviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel." In addition, Orme's reliance on *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999), and *Peede v. State*, 748 So. 2d 253, 256, n.5 (Fla. 1999), is misplaced. This Court's comment in a footnote in *Peede* regarding the poor quality of the initial brief does not create a constitutional right to effective collateral counsel.

Moreover, Orme's assertion that this Court has remanded proceedings where a capital defendant received ineffective representation of collateral counsel is misguided. (IB at 96, n.49). This Court's decision in *Kokal v. State*, plainly refutes Orme's position. In *Kokal*, the defendant claimed the decisions in *Peede* and *Fotopoulos* gave those defendants a second chance at post-conviction because of the ineffectiveness of their post-conviction counsel. *Kokal*, 901 So. 2d at 777. This Court disagreed:

> Neither *Fotopoulos* nor *Peede* involved claims of ineffective assistance of postconviction counsel. Rather, in *Fotopoulos*, this Court recognized that during oral argument of the postconviction appeal, counsel raised claims not raised at the trial level. Therefore, we dismissed the appeal and allowed Fotopoulos to file a successive, although limited, postconviction motion. *See Fotopoulos v. State*, No. 91,227, 741 So. 2d 1135 (Fla. Order filed Aug. 25, 1999). The order entered in *Fotopoulos* did not address the issue of ineffective assistance of counsel during postconviction litigation. Further, although this Court in *Peede*, did briefly address the failures of

> Peede's postconviction representation, *see Peede*, 748 So. 2d at 256 n.5, we remanded the cause to the trial court because that court had failed to hold an evidentiary hearing on many of Peede's claims. We did not allow Peede to file a successive postconviction motion to argue ineffective assistance of his first postconviction counsel, as Kokal has done.

Kokal, 901 So. 2d at 777 – 778. Likewise, this Court's order in *Happ* follows the same reasoning as *Peede*. An important distinction from the cases which Orme cites in footnote 49, is that in each case there had not been an evidentiary hearing on the claim of ineffective assistance of counsel. When this Court remanded for proceedings, the order was to conduct an initial evidentiary hearing into the effectiveness of counsel, not a hearing on the effectiveness of post-conviction counsel.

Motion to Amend 3.851 Pleading

Part of Orme's claim of ineffective assistance of post-conviction counsel centers on the initial 3.851 motion for post-conviction relief. (IB at 97). Following the evidentiary hearing in the present case, Orme's post-conviction counsel withdrew because he took a position with the Federal Public Defender. Orme's current attorney was then appointed. When Orme's counsel filed the defense's post-evidentiary hearing memorandum, a simultaneous motion to amend the 3.851 plead was also filed, which the trial court denied. Orme now asserts that his initial post-conviction counsel was ineffective because his new attorney would have pursued additional claims which were not presented to the trial court. (IB at

97). While the decision of the trial court is reviewed for an abuse of discretion, regardless Orme cannot prevail on a claim of ineffective assistance of post-conviction counsel because no such right exists and is barred by the statute.

Standard of Review

Review of a collateral court judge's determination of whether to allow a defendant to amend a motion for post-conviction relief is subject to an abuse of discretion. *Tanzi v. State*, 94 So. 3d 482 (Fla. 2012).

Trial Court's Order

In the present case, Orme was granted an evidentiary hearing which lasted for two days and the court heard testimony from five witnesses. Following the hearing, post-conviction counsel withdrew because he took a position with the Federal Public Defender. Orme's current attorney was then appointed. When Orme's counsel filed the defense's post-evidentiary hearing memorandum, a simultaneous motion to amend the 3.851 plead was also filed. The trial court denied the motion for two reasons. (PCR2 Vol. 2: 315 – 316). First, the motion to amend was untimely as having been filed some eight months after the evidentiary hearing. Fla. R. App. P. 3.851(f)(4); (PCR2 Vol. 2: 315 – 316). Second, the motion to amend was insufficient because it did not allege a claim based on evidence or information which was previously unavailable. (PCR2 Vol. 2: 315 – 316); *see Lugo v. State*, 2 So. 3d 1, 19 (Fla. 2008); *Tanzi v. State*, 94 So. 3d 482

(Fla. 2012). Every claim Orme sought to include in his motion to amend was based on information that was readily available to Mr. Doss, his initial post-conviction counsel. (PCR2 Vol. 2: 315 – 316). Orme now seeks a re-do of his evidentiary hearing because his current counsel would have proceeded in a manner differently from his previous post-conviction counsel.

This Court has upheld the discretion of a trial court to deny a defendant the opportunity to amend a 3.851 pleading when the defendant has failed to show "good cause." *Tanzi v. State*, 94 So. 3d 482 (Fla. 2012) (no abuse of discretion in denying a motion to amend that was timely filed - more than 30 days before the evidentiary hearing – because the facts upon which one of the claims was based was readily available to post-conviction counsel at the time the original motion was filed); *Lugo v. State*, 2 So. 3d 1, 19 (Fla. 2008) (no abuse of discretion in denying a motion to amend in order to raise four additional claims when the motion was filed 27 days before the evidentiary hearing).

In short, Orme's claim of ineffective assistance of post-conviction counsel should fail because: (1) *Martinez v. Ryan* does not recognize the right to effective assistance of post-conviction counsel; (2) this Court has specifically stated multiple times that claims of ineffective assistance of post-conviction counsel are not cognizable; (3) the Florida statutes specifically prohibit a claim of ineffective assistance of post-conviction counsel; (4) Orme's motion was untimely as having

been filed eight months after the evidentiary hearing; and (5) regardless of the timeliness Orme's motion failed to demonstrate good cause to amend his pleading in accordance with the rules. Therefore, this argument should be denied as lacking any merit.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the ruling of the trial court, Appellant's convictions and sentence of death.

Respectfully submitted and certified,
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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL/E-MAIL on March 19th, 2014: Linda McDermott, Esq. at - McClain & Mcdermott, P.A. 2031 Grande Oak Blvd. Suite 118-61, Estero, FL 33928, lindammcdermott@msn.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
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