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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-819

LOWER COURT CASE NO. 92-442-CFMA

RODERICK MICHAEL ORME,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Orme has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Orme, through counsel, urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASELAW

INTRODUCTION

In Mr. Orme's case, resentencing counsel was in the unique position of having been provided a roadmap as to the mitigation to present on behalf of their client. During Mr. Orme's original penalty phase proceedings, he received a 7-5 jury recommendation. Mr. Orme presented two mental health experts, Dr. Clell Warriner, a clinical psychologist, and Dr. Thomas McClane, a psychiatrist/ pharmacologist. Both experts testified to Mr. Orme's longstanding substance abuse and their opinion that he met both statutory mental health mitigating circumstances.

Additionally, lay mitigation witnesses testified to Mr. Orme's drug problems, his depression, and to his difficult childhood, including the mental abuse he endured at the hands of his father (R. 1126-31, 1134-41). Further, a medical supervisor at the Bay County Jail Annex testified that after Mr. Orme was arrested, he was distraught and suicidal; Mr. Orme was also very respectful to the nurses and was a role model at the jail (R. 1146-48, 1152, 1155).

During postconviction proceedings, collateral counsel asserted that trial counsel was ineffective for failing to present evidence of Mr. Orme's bipolar disorder. Collateral counsel presented four mental health experts at the postconviction evidentiary hearing who testified to Mr. Orme's bipolar disorder,[1] and counsel also presented the findings of a

[1]In addition to Drs. Warriner and McClane, collateral counsel presented the testimony of Drs. John Herkov and Michael Maher.

fifth expert that Mr. Orme was being treated for bipolar disorder.[2] Collateral counsel asserted that in light of the 7-5 jury recommendation, the additional evidence would have likely resulted in a life sentence. During Mr. Orme's collateral appeal, this Court agreed, stating that "the fact that the jury did not hear the evidence of Orme's bipolar disorder combined with the jury's penalty phase vote of seven to five undermines our confidence in the result of the penalty phase. Therefore we remand this case for a new penalty phase proceeding." Orme v. State, 896 So. 2d 725, 736 (Fla. 2005).

Mr. Orme's resentencing attorneys were in a unique and beneficial position. They had transcripts of the prior proceedings which contained mitigating evidence that this Court had already determined undermined confidence in the result of the original penalty phase proceedings. Thus, resentencing counsel had a precise road map laid out for them: Present the same type of lay mitigation from the original penalty phase in conjunction with similar evidence from the mental health experts and the supporting data they relied on at the postconviction proceedings. Yet, as will be demonstrated herein, resentencing counsel not only failed to present a significant portion of the aforementioned evidence, they also minimized and obfuscated it with wild, speculative and conflicting theories as well as self-defeating testimony and argument. Mr. Orme was prejudiced as a result of resentencing counsel's deficient performance.

[2]This expert was Dr. Ralph W. Walker, a psychiatrist. Dr. Walker was deceased at the time of the evidentiary hearing.

STATEMENT OF THE CASE[3]

An indictment filed on March 26, 1992 in the Circuit Court for Bay County charged Roderick Michael Orme with one count of first degree murder, robbery, and sexual battery (R. 3-4). Mr. Orme pled not guilty to these offenses (R. 170). Mr. Orme proceeded to trial and was found guilty as charged on all counts (R. 619-20). Thereafter, the jury recommended death by a vote of 7-5 and the trial court sentenced Mr. Orme to death (R. 632). On appeal, this Court affirmed. Orme v. State, 677 So. 2d 258 (Fla. 1996), rehearing denied on July 23, 1996. Mr. Orme's certiorari petition was denied on January 13, 1997. Orme v. Florida, 117 S.Ct. 742 (1997).

Mr. Orme filed a Rule 3.850 motion on December 17, 1997, and he amended it on July 19, 2001. Following an evidentiary hearing in December 2001, the trial court denied relief on March 8, 2002. Mr. Orme appealed, and on February 24, 2005, this Court reversed and remanded on the basis of trial counsel's ineffective assistance. Orme v. State, 896 So. 2d 725 (Fla. 2005).

In May, 2007, a new penalty phase was conducted. By a vote of 11-1, the jury recommended a sentence of death. The trial court followed the jury's recommendation and sentenced Mr. Orme

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[3]Citations in this brief are as follows: References to the direct appeal record of Mr. Orme's trial are designated as "R. ____". References to the record of Mr. Orme's original postconviction appeal are designated as "PCR. ____". References to the direct appeal record of Mr. Orme's resentencing are designated as "R2. ____". References to the transcript of Mr. Orme's resentencing are designated as "RT. ____". References to the record of Mr. Orme's postconviction appeal regarding the resentencing are designated as "PC-R2. ____".

to death. On November 19, 2009, this Court issued an opinion affirming Mr. Orme's sentence of death. Orme v. State, 25 So. 3d 536 (Fla. 2009), rehearing denied January 8, 2010. Mr. Orme's certiorari petition was denied on June 7, 2010. Orme v. Florida, 130 S.Ct. 3392 (2010).

On June 1, 2011, Mr. Orme filed a Rule 3.850 motion as to the resentencing proceedings (PC-R2. 73-169). An evidentiary hearing was held beginning on April 30, 2012. Thereafter, on March 1, 2013, the trial court denied relief (PC-R2. 366-83). Mr. Orme's motion for rehearing was denied by the trial court on April 1, 2013 (PC-R2. 2786). This appeal follows.

STATEMENT OF THE FACTS

TRIAL PROCEEDINGS

The facts as set forth by this Court in it opinion on direct appeal are as follows:

> Roderick Michael Orme had an extensive history of substance abuse for which he previously had sought treatment at a recovery center in Panama City. On the morning of March 4, 1992, Orme suddenly appeared at the center again, despite a lapse of about a year since his prior treatment. He was disoriented and unable to respond to questions, but he did manage to write a message. It was "LEE'S MOT RM15."
>
> While a breathalyzer returned negative results, Orme's blood tested positive for cocaine and he was showing signs of acute cocaine withdrawal. He was cold, his face was flushed, and he was exhibiting symptoms like delirium tremens. An attending physician placed Orme in intensive care for thirty hours. Illegal barbiturates were found in Orme's possession.
>
> Lee's Motel was located only a few blocks from the recovery center. Someone at the center telephoned the motel and said that a man who sounded hysterical had said to check room 15. The owner did so and found the body of a woman who had been badly beaten.

Semen was found in the victim's orifices, but DNA testing could not identify a DNA match. One sample taken from the victim's panties, however, held material that matched the pattern of Orme's DNA. Orme's underpants also had a mixed blood stain matching both Orme and the victim's genotype. Orme's fingerprints were found in the motel room, and his checkbook and identification card were found in the victim's car, which was parked outside.

The cause of death was strangulation. There were extensive bruising and hemorrhaging on the face, skull, chest, arms, left leg, and abdomen, indicating a severe beating. The abdominal hemorrhaging extended completely through the body to the back and involved the right kidney. Jewelry the victim always wore was missing and was never found. Police later identified the body as that of Lisa Redd, a nurse.

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

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

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

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

At trial, Orme testified that Redd had arrived at his motel room at 7, 8, or possibly 8:30 p.m. He again

> said he returned to the motel room at some point. At this time he realized Redd's body was cold and that something was wrong. But he said the next thing he remembered was being in the hospital.
>
> Robert Pegg, a cab driver, testified at trial that he had picked up Orme at Lee's Motel around 8 p.m.
>
> A man who lived across from the motel, Joseph Lee, also testified. He said that he generally kept track of what was happening at the motel and had first noticed the victim's automobile there around 9:30 or 10 p.m. Lee said he saw Orme leave and return several times. Before going to bed around 2 a.m., Lee said he saw Orme leave in the victim's car once more.
>
> Another witness, Ann Thicklin, saw someone slowly drive the victim's car into Lee's Motel around 6:15 a.m.

Orme, 677 So. 2d at 270-71.

ORIGINAL POSTCONVICTION PROCEEDINGS

During his original postconviction proceedings, Mr. Orme asserted that trial counsel was ineffective for failing to thoroughly investigate and present evidence of his bipolar disorder. The relevant facts of the postconviction evidentiary hearing as set forth by this Court are as follows:

> In this case, there was substantial mental mitigation available to trial counsel. Orme had been diagnosed with bipolar disorder, and counsel was aware of the diagnosis. Orme's initial defense team, Michael Stone and Pamela Sutton, feared that Orme was suicidal, and they contacted Dr. Clell Warriner, a psychologist, to evaluate Orme. Dr. Warriner then helped to arrange for Dr. Ralph W. Walker, II, a psychiatrist, to evaluate Orme and prescribe medication. Dr. Walker diagnosed Orme with bipolar disorder, prescribed Lithium, Xanax, and Prozac, and informed Stone of this diagnosis in a letter. Dr. Walker was gravely ill with cancer and during the months before trial was on medical leave. During this time, another prison physician renewed Orme's prescriptions. In October 1992, after conducting initial interviews with Orme's family and friends, Stone and Sutton abruptly left their jobs at the public defender's office. Trial was set for the following February.

Attorney Walter Smith, who had met Orme during the initial intake process, took over the case. Smith received the entire file on this case, including the letter from Dr. Walker indicating his bipolar diagnosis. Smith was aware of the diagnosis and admitted that it would have had a significant effect on Orme's case. Smith testified that he did not present evidence of Orme's bipolar diagnosis because he had no other information to corroborate it. As he put it, he did not want his expert to stick his neck out and get his head cut off. However, he did not conduct follow-up interviews with Orme's family and friends to determine if Orme had exhibited behavior in accord with a bipolar diagnosis. The medical experts testified at the postconviction hearing that corroborating data from family, friends, and others observing any mood swings, hypomania, or mania in any form would have supported a bipolar diagnosis.

Also important in this analysis is the fact that Smith did not inform his trial experts that Orme had been diagnosed with bipolar disorder and the fact that he did not provide the experts with the prison medical records that would have shown the medications prescribed to Orme indicating such a diagnosis. Orme's experts never knew that such a diagnosis had been made. Smith testified that he thought he would have provided the information to his experts. He stated that he did not know why he did not provide the information.

Dr. Thomas McClane and Dr. Warriner testified at Orme's trial and at the postconviction hearing. Dr. McClane stated that in preparation for trial he reviewed Orme's hospital records from the 1980s, tapes and transcripts of interviews, records from drug treatment, psychological testing records, and the autopsy report of the victim. He conducted one examination of Orme on the evening before the penalty phase was to begin. At trial, he testified that Orme suffered from "mixed personality disorder with chronic intermittent depression and addiction to cocaine." At the postconviction hearing, Dr. McClane testified that he would normally see a patient more than one time. He also stated that evaluating the patient once, on the eve of trial, was not the normal procedure. Orme told Dr. McClane that he had been prescribed Lithium. Lithium is prescribed to treat bipolar disorder. Dr. McClane testified that patients often mistake the medications they are taking. He stated that he made a notation to check the prison medical records to confirm whether Orme was, in fact, taking Lithium. There is no evidence that Dr. McClane checked the prison medical records before or during Orme's trial. In preparation

for the postconviction proceeding, however, Dr. McClane was given Orme's prison medical records and a copy of the letter from Dr. Walker indicating the diagnosis of bipolar disorder. Dr. McClane was also given affidavits prepared by Orme's friends and family which provide anecdotal information about Orme's past behavior indicative of someone with bipolar disorder.[1] Dr. McClane stated that if he had received this type of information prior to trial, he would have diagnosed Orme as probable bipolar in a depressed phase. Dr. McClane stated that if he had made this diagnosis, he would then have been able to link Orme's major mental illness to his drug addiction because statistically bipolars are significantly more likely to abuse drugs.

Likewise, Dr. Warriner does not remember receiving any information indicating that Orme was bipolar. Dr. Warriner testified at trial that Orme was a depressed cocaine addict and anxious about his situation. At the postconviction hearing, Dr. Warriner stated that he was not asked to provide a diagnosis at trial; he was merely asked to describe Orme's symptoms. Dr. Warriner testified that had he been asked to provide a diagnosis, he would likely have diagnosed Orme with "bipolar disorder, mixed type."

In addition to Dr. Warriner and Dr. McClane, Orme called two additional medical experts to testify at the postconviction hearing that Orme was indeed bipolar, and to explain the significance this diagnosis would have had for his intoxication defense. Dr. John Herkov, a psychologist specializing in addiction, evaluated Orme in 2001. He diagnosed Orme with "bipolar disorder, not otherwise specified." He stated that given the nature of the illness, it was not unusual for a person to be diagnosed with bipolar at thirty years of age. He stated that a person with bipolar has periods of relatively normal behavior, but there are also manic phases and depressive phases, and a person can cycle through these phases rapidly or slowly. He noted a history of mood swings and other behaviors indicative of bipolar disorder. In addition to the anecdotal history, Dr. Herkov considered Dr. Walker's diagnosis and the prescriptions for Lithium, Xanax, and Prozac, and Orme's description of certain sexual compulsions indicative of manic behavior. He also supported his diagnosis by post-trial medical records showing Orme had seen mental health providers in prison for grandiose manic behavior, auditory hallucinations, depression, irritability, compulsiveness, and mood instability, all symptoms consistent with bipolar disorder. Dr. Herkov additionally testified that there is a link between bipolar disorder and drug abuse,

> stating that persons suffering from bipolar disorder have a higher incidence of substance abuse than anyone else.
>
> Dr. Michael Maher, a forensic psychiatrist, also testified. He saw Orme in 2001 and reviewed Orme's medical records. He stated he would diagnose Orme with polysubstance abuse and bipolar disorder. When asked why, after all the drug treatment and counseling Orme had received prior to committing this murder, no one before Dr. Walker had made this diagnosis, Dr. Maher stated that substance abuse treatment gives little focus to the underlying psychiatric disorders. He opined that Orme's relative stability since being in prison is attributed to the fact that he is confined for twenty-three hours a day and there is a lack of stimuli. The prison medical records do show, however, that Orme suffers insomnia and has been prescribed the psychotropic drug Mellaril, which is indicative of bipolar disorder.
>
> The State's expert medical witness at the postconviction hearing was Dr. Harry McClaren. Dr. McClaren testified that Orme suffered from "depressive disorder, not otherwise specified." Dr. McClaren surmised that other than Dr. Walker's diagnosis, the most common diagnosis by all the medical experts who saw Orme was major depression, and that nothing in Orme's history warranted treatment for bipolar disorder. He stated that Orme had had successes in his life, he had not been hindered by mental illness, and that any mood swings could be attributed to Orme's drug abuse. However, Dr. McClaren did not meet with or personally examine Orme.

Orme, 896 So. 2d at 734-35 (footnote omitted). In finding that trial counsel's deficient performance prejudiced Mr. Orme, this Court explained:

> During the penalty phase, evidence of Orme's intoxication was presented as mitigation. The intoxication evidence involved the consumption of cocaine, pills, and alcohol. The State repeatedly told the jury that it should not let Orme "stand behind his crack pipe" or not be responsible for his crime because he was high on drugs. Although the trial court found as mitigating factors that Orme's capacity was substantially impaired and that he was under the influence of extreme mental or emotional disturbance, the trial court only gave them "some weight."

> Orme argues that testimony linking his drug use to his bipolar disorder would undermine the State's argument that he "hid" behind his crack pipe, because it would explain to the jury that he was ill and that the mental illness made his addiction even greater. We agree. There is no dispute that bipolar disorder is a serious and significant diagnosis. Additional testimony in support of the intoxication and its causes and effects may have warranted greater weight, and the resulting weighing of mitigation and aggravation would have been different. Thus, the fact that the jury did not hear the evidence of Orme's bipolar disorder combined with the jury's penalty phase vote of seven to five undermines our confidence in the result of the penalty phase. Therefore we remand this case for a new penalty phase proceeding.[2]

Id. at 736 (footnote omitted).

RESENTENCING PROCEEDINGS

During the resentencing proceedings, a significant portion of counsel's strategy was to argue some form of lingering doubt and/or that the aggravators of pecuniary gain, sexual battery and heinous, atrocious and cruel had not been proven beyond a reasonable doubt.[4] Resentencing counsel presented a medical examiner, Dr. Riddick, in support of their assertion that Mr. Orme and the victim engaged in consensual sex and that the victim quickly achieved unconsciousness during the strangulation. Additionally, resentencing counsel presented a DNA expert, Gary Harmor, in support of their assertion that a third party could have committed the murder and/or the robbery.

In its sentencing order, the trial court found that all three aggravators had been established (R2. 3009-12). With regard to the sexual battery aggravator, the trial court stated

[4]Resentencing counsel challenged the applicability of the pecuniary gain and sexual battery aggravators despite the fact that Mr. Orme had been convicted of robbery and sexual battery.

that "[t]here is absolutely no evidence of consensual sexual relations at the crime scene." (R2. 3010-11). The trial court relied in part on defense witness Harmor's testimony to support this finding: "It is abundantly clear from the photographs in evidence, the forensic evidence, the new DNA testing and the testimony of Dr. James Lauridson, the medical examiner and Gary Harmor and other DNA analysts that the defendant violently committed sexual battery on Lisa Redd." (R2. 3010). And in finding the HAC aggravator, the trial court relied in part on defense witness Dr. Riddick's testimony: "Dr. Leroy Reddick agrees that the victim did not go peacefully to her death. He further agrees strangulation could have been from the front and back of victim's neck." (R2. 3012).

Additionally, at the resentencing, Mr. Orme's counsel presented evidence of his background (RT. 722, 811-23, 829-30), drug abuse (RT. 537, 542, 547, 550, 690-91, 694, 726, 894, 1013), and bipolar disorder (RT. 539, 542, 543, 549, 900-01, 920-21). However, in its sentencing order, the trial court rejected the bipolar diagnosis after noting that only two experts, Drs. Maher and Herkov, diagnosed Mr. Orme as bipolar, while four mental health experts, Drs. Hord, Warriner, McClarin and Prichard did not find bipolar disorder (R2. 3013-14).[5] The trial court as a result gave little weight to the statutory mental health mitigators based on Mr. Orme's drug dependency (R2. 3014-16).

[5]The trial court also stated that "[a]ll the mental health professionals in the state prison system who saw the defendant over the last 15 years of his imprisonment did not treat or diagnose the defendant with a bipolar disorder." (R2. 3014).

The trial court gave no weight to Mr. Orme's difficult childhood, his age, his prison conduct or his potential for rehabilitation (R2. 3016-17).

On direct appeal, this Court found that that the trial court failed to expressly evaluate remorse in its sentencing order even though Mr. Orme proposed remorse as a mitigating circumstance and expressed his remorse at the Spencer hearing. Orme, 25 So. 3d at 544. This Court also found error based on the prosecutor's comments during voir dire that the trial judge could not consider mercy in his decision and the governor was the only person who could exercise mercy by way of a clemency hearing. Id. at 545. And this Court found error based on the trial court's improper analysis of Mr. Orme's background:

> Thus, the record demonstrates that there was an abundance of evidence about Orme's father's violent temper and verbal abuse as well as his diagnosis for depression and anxiety. However, the trial court failed to discuss any of this evidence in its sentencing order. The trial court's statement that Orme's parents were divorced but that he had a loving stepmother was an insufficient analysis of this mitigator.

Id. at 549. However, based on the weight of the aggravators in comparison to the "relatively weak mitigation", this Court found the errors to be harmless. Id. at 544, 545, 548, 549.

POSTCONVICTION PROCEEDINGS REGARDING THE RESENTENCING

During his postconviction evidentiary hearing regarding the resentencing, Mr. Orme presented evidence as to the ineffective assistance of counsel. Mr. Orme asserted, among other things, that counsel was ineffective in presenting a lingering doubt/consensual sex defense. Additionally, Mr. Orme asserted

that counsel's preparation and presentation of the mental health mitigation was inadequate.

Sarah Butters, an attorney at Holland and Knight, testified that she became involved in the Orme case through a friend from law school who had been Mr. Orme's appellate attorney at some point (PC-R2. 2845-46). The friend was concerned that Mr. Orme's court appointed lawyer, Russ Ramey, had never met with him and was doing nothing (PC-R2. 2846-47). The friend asked if there was anything Holland and Knight could do to help (PC-R2. 2846).

Butters testified that Holland and Knight does a lot of pro bono work, and she inquired as to whether the firm could help (PC-R2. 2846). After talking to Mr. Orme, the firm agreed to take the case on pro bono (PC-R2. 2846). Buddy Schulz, a trial lawyer in the firm who heads up their pro bono efforts, agreed to co-counsel the case with Butters, who is not a trial lawyer (PC-R2. 2847).[6] They filed a Notice of Appearance and moved to intervene and kick Russ Ramey off the case (PC-R2. 2847).

There was a hearing, the end result of which was that the judge said Holland and Knight couldn't do the case because they were not death qualified (PC-R2. 2847). The judge appointed attorney Mike Stone to co-counsel with Ramey; Holland and Knight could assist but could not try the case (PC-R2. 2847).[7]

Regarding communication between the lawyers, Butters

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[6]Butters is a tax lawyer and this was the first criminal trial she had participated in (PC-R2. 2848, 2870-71).

[7]Butters wanted Stone involved because he was Mr. Orme's original attorney and knew the case pretty well (PC-R2. 2870-71).

testified that she and Stone had regular contact (PC-R2. 2849). Stone was responsive and Butters worked well with him (PC-R2. 2872). Ramey, however, would go long periods of time when he wouldn't answer e-mails, phone calls, or communicate about anything (PC-R2. 2840, 2850). The concern about the communication started from day one; Holland and Knight got involved because Ramey wasn't working or meeting with his client (PC-R2. 2849). Ramey no-showed a lot for meetings and for court (PC-R2. 2850). He was never present (PC-R2. 2857).

As for the division of labor, Butters testified that from very early on it was clear that Ramey wasn't going to respond or do much (PC-R2. 2851). So Butters ghost wrote a lot for Stone and he filed and argued a lot (PC-R2. 2852). With regard to who would handle various witnesses, Butters called a meeting to discuss it, but Ramey didn't show up (PC-R2. 2855). Butters and Stone went though the witness list and divided them up between Stone and Ramey (PC-R2. 2855). The lay witnesses were for the most part delegated to Ramey (PC-R2. 2859).

The defense had an investigator, Mike Glantz (PC-R2. 2857). The investigation became a problem because, as it turned out, Glantz wasn't working when he said he was and he kind of quit on the eve of trial (PC-R2. 2857). He wouldn't return Butters' calls or give them his files (PC-R2. 2857). Another investigator, Monica Jordan, was appointed to take Glantz's place and she tracked down and served subpoenas on a bunch of lay witnesses (PC-R2. 2859). After Glantz was removed, the defense didn't ask for a continuance; they weren't ready, but Butters

didn't know why they didn't ask for one (PC-R2. 2859).

On the eve of trial, Butters called a meeting with Jordan, Stone and Ramey (PC-R2. 2861). They hashed through the witnesses and what they had lined up (PC-R2. 2861). The meeting was probably at least a half a day long (PC-R2. 2861). Ramey showed up for the last hour kind of expecting them to spoon feed him, which they did (PC-R2. 2861). Butters gave him witness files for every witness he would be responsible for (PC-R2. 2862).[8]

As for Ramey's opening statement, there was no discussion as to the substance of what was going to be in it (PC-R2. 2862).[9] "[W]e never heard it, we never saw an outline of it, we never, we didn't know what Russ was going to say." (PC-R2. 2862). Thus, Butters didn't know that Ramey was going to state that doctors would testify that there was no evidence that the sex wasn't consensual between Mr. Orme and the victim (PC-R2. 2862-63).

With regard to the DNA, Butters had drafted a motion for DNA testing and the court appointed an expert from California (PC-R2. 2880). The defense wanted a DNA expert because there was DNA that hadn't been tested (PC-R2. 2880). After the DNA was tested, Butters testified that she didn't know why the defense called the

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[8]Butters testified that she knew Ramey hadn't done anything with the witnesses because she had their contact information and Ramey never asked for it (PC-R2. 2856).

[9]In his postconviction motion, Mr. Orme asserted that trial counsel rendered ineffective assistance for asserting a lingering doubt/mystery killer argument during the opening statement. Mr. Orme submitted that the error was exacerbated by the fact that this argument was directly contradicted during the closing by Mr. Orme's co-counsel, who emphatically argued that Mr. Orme committed the crime and the defense wasn't suggesting otherwise.

DNA expert as his testimony didn't contradict the testimony from FDLE (PC-R2. 2864). According to Butters,

> I don't know that there was a strategy. I don't -- I would be speculating as to why we called him. Part of me thinks we probably called him because Russ told the jury we were going to. I don't think, I don't think that anybody thought that through, why are we calling this guy. I don't know. He didn't, certainly didn't have anything helpful to say.

(PC-R2. 2865).[10] Butters testified that there was no game plan:

> These guys didn't have a game plan, they didn't, the right hand was talked {sic} go to the left. They - - Mike Stone was handling the science because we didn't trust Russ with the science. And Russ was handling the lay witnesses because we thought he would do the limited amount of damage that way and they didn't have a coordinated strategy of what they were doing.

(PC-R2. 2882).

With regard to Dr. Riddick, Butters testified that Stone met with him, and she didn't recall being present for those meetings (PC-R2. 2865-66). Butters recalled Dr. Riddick testifying that the victim could have passed out in as little as ten to 15 seconds after the strangulation started (PC-R2. 2875). Butters didn't know why he was called, and he certainly didn't help the defense (PC-R2. 2866). As Butters explained:

> [T]hat was sort of the problem with Dr. Riddick's testimony is that the overwhelming sense that I believed that the jury was left with is that this woman was pummeled and that, you know, hypothetically unconscious within 15 seconds was certainly not the lingering message that the jury was left with. It was a colossal disaster.

(PC-R2. 2876-77).

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[10]Butters testified that Ramey wouldn't have participated in any discussion regarding the DNA expert because "we didn't trust him with anything scientific substantive and so he would not have participated in any discussion" (PC-R2. 2864).

Regarding the mental health aspect of the case, Butters was responsible for sending Drs. Herkov and Maher the background information (PC-R2. 2866). She got them the information they needed in order to reach an opinion in this case (PC-R2. 2867, 2885). Butters recalled that Dr. Maher met with the defense team on the night before his testimony (PC-R2. 2867). Further, Butters testified that she recalled a Dr. Thomas McClane being involved at some point in Mr. Orme's case (PC-R2. 2891). She didn't recall ever contacting him or sending him any materials (PC-R2. 2892). And she didn't recall ever discussing Dr. McClane with either Stone or Ramey (PC-R2. 2892).

Butters testified that there was no strategy not to raise on redirect that Drs. Warriner and McClane had also diagnosed Mr. Orme as bipolar (PC-R2. 2869).[11] There was also no strategy in not asking Dr. Herkov about the statutory mitigators applying in Mr. Orme's case (PC-R2. 2870). "There was no reason we should not have asked him, there was no strategy called not to ask him. We just, for whatever reason, didn't ask him." (PC-R2. 2870).

Dr. Michael Maher testified at the postconviction evidentiary hearing that he evaluated Mr. Orme in 2001 and in 2006 or 2007 (PC-R2. 2896). He reviewed legal and police records, medical records and information about Mr. Orme's family background (PC-R2. 2896). Dr. Maher diagnosed Mr. Orme with a major affective disorder, bipolar disorder, polysubstance abuse

[11]In his postconviction motion, Mr. Orme asserted that trial counsel rendered ineffective assistance for failing to rebut the assertion that Drs. Herkov and Maher were the only two experts who concurred in Dr. Walker's finding that Mr. Orme was bipolar.

disorder, and a personality disorder, not otherwise specified (PC-R2. 2897). Dr Maher described the symptoms of a person suffering from bipolar disorder:

> A Bipolar disorder is a disorder of, that is characterized as a disorder of mood. It involves emotion, thought and behavior. And the mood part of this disorder includes periods of depression which are significant enough to interfere with functioning and impair a person's ability to behave and function in a normal societal and occupational context. So it is not simply feeling sad or down but something that is considerably worse than that. In addition, in bipolar disorder there is at least one episode in the person's background of a period of highly energized, excitable condition involving their state of mind, to some extent their mood and their emotions and their behavior, which is characterized as a manic disorder.

(PC-R2. 2897-98). Dr. Maher testified that people who suffer from bipolar disorder are at a very high risk of both short term and long term substance abuse (PC-R2. 2901). Thus, it didn't surprise him that someone suffering from bipolar would abuse cocaine (PC-R2. 2902).

Dr. Maher testified that it is not unusual for bipolars to be able to work and hold down a responsible position (PC-R2. 2904). Many people with bipolar are identified as exceptionally good workers because they have periods of time when they're not manic, but instead are hypomanic (PC-R2. 2904). They're not energized to the point that it is over the edge and problematic but they are energized and they're interested in acting, moving, doing things (PC-R2. 2904). Dr. Maher also recalled a statement from a Ms. Wetzel (PC-R2. 2904). The general information he reviewed from her was consistent with the description of an individual with bipolar disorder and particularly hypomanic

episodes (PC-R2. 2904-05).[12] "[T]he description of his behavior, in particular just before the offense, is a description of behavior which is very consistent with an individual who is in the midst of a manic episode, it is not in the early stages of it where it is positive and it is relatively controlled, it is in the later stages of it where he is irritable, he's agitated, he's distressed, he's calling out, if you will, for help but in a way that is very difficult for anybody to respond to" (PC-R2. 2905).

Dr. Maher previously reviewed an affidavit by a Brenda Reed (PC-R2. 2906). He found the following significant in his consideration of whether Mr. Orme was bipolar:

> [O]ne of the things she says very clearly is that from her point of view he would go from a pretty definite identifiable, I wouldn't say extreme, but strong state of being positive, optimistic, energized, feeling competent to a state of feeling discouraged, giving up, negativistic, it would be relatively quickly and it wasn't because something bad had happened in his environment. All of that very strongly suggests that there is an internal process which is what the illness of affective disease and bipolar disorder, in particular is, it is an internal illness that turns, that cycles from energized to depressed and discouraged.

(PC-R2. 2907). Dr. Maher also reviewed the affidavit from a Grover Stamps (PC-R2. 2907). The statement in the affidavit that Mr. Orme goes through dramatic mood swings was consistent with statements from other people (PC-R2. 2907).

Dr. Maher reviewed Dr. Walker's letter to Stone in which he confirmed the diagnosis of bipolar disorder (PC-R2. 2908, 2913).

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[12]Dr. Maher identified manic disorder as a major part of Mr. Orme's clinical history and he believed it existed; but he couldn't identify a specific time period that he believed Mr. Orme was manic (PC-R2. 2950-51).

It was significant in that it was the first time that Mr. Orme was diagnosed with bipolar disorder and was given medications prescribed specifically to treat bipolar disorder, those being Lithium, Xanax and Pamelor (PC-R2. 2908). "So it was a strong indicator that a treating physician had reached this diagnosis and felt confident enough about the diagnosis to prescribe a very significant and potentially dangerous regime of medications for the purpose of treatment" (PC-R2. 2908).[13] Dr. Maher testified that the prescriptions for all three drugs were renewed by two subsequent doctors at the jail (PC-R2. 2910). "And where you have a regime of medications which is particularly powerful and potentially dangerous, the fact that the medications were renewed is a strong indicator that both of these doctors who renewed the medications believed that it was a proper treatment for this individual" (PC-R2. 2910-11).

Dr. Maher testified that it is not uncommon for people suffering from bipolar to want to discontinue treatment with Lithium (PC-R2. 2914). It reduces their energy level and their sense of optimism (PC-R2. 2914). Dr. Maher further testified that stress, drugs, lack of sleep, or extreme grief can trigger manic episodes for bipolars (PC-R2. 2916). According to Dr. Maher, a structured prison environment generally has the effect

[13]However, Dr. Maher testified that his diagnosis wouldn't change if he didn't have Dr. Walker's diagnosis (PC-R2. 2932). "Because while Dr. Walker's diagnosis is significant because he was a treating physician and he saw Mr. Orme very close to the time of the offense, if the other information other than that was just the same I'm confident I would reach the same diagnostic conclusion." (PC-R2. 2932).

of tending to make a person more depressed and normal and less manic (PC-R2. 2917).

Dr. Maher also testified that there is not any specific length of time that a person has to be in a manic phase in order to be diagnosed as bipolar (PC-R2. 2917). According to the DSM-IV, someone has to suffer from a manic episode for a week to be diagnosed as bipolar (PC-R2. 2918). Dr. Maher considers the DSM-IV to be a good authoritative guideline for clinicians, but it is often wrong and periodically edited and changed (PC-R2. 2918). "So it is a guideline diagnostic compendum. I do not believe that most clinicians follow it word for word, criteria for criteria, letter for letter. I certainly don't." (PC-R2. 2919).

Dr. Maher recalled that at the resentencing he was asked whether anyone besides he or Dr. Walker had diagnosed Mr. Orme as being bipolar other than Dr. Walker (PC-R2. 2919). He recalled saying that there wasn't anybody else (PC-R2. 2919). Dr. Maher mistakenly had not recalled that Dr. McClane and Dr. Warriner had confirmed or made the diagnosis (PC-R2. 2920). And the doctors who renewed the prescription had in effect confirmed the diagnosis (PC-R2. 2920).[14]

Additionally, Dr. Maher stated that Mr. Orme had never been diagnosed with bipolar disorder or being manic in DOC (PC-R2. 2948-49). However, there was a notation by a DOC psychological

[14]Dr. Maher testified that he spoke to Stone in preparation for his testimony, once on the phone and once in person just before he testified (PC-R2. 2920). He didn't recall that they went over Dr. Warriner or Dr. McClane's diagnosis, and he was quite sure that they didn't talk about anticipating cross examination questions (PC-R2. 2921).

specialist as to Mr. Orme being hypomanic (PC-R2. 2953). Dr. Maher stated:

> This is exactly the kind of thing that I'm familiar with in clinical environments where an individual has a bipolar disorder and it has been difficult to really nail down where they had manic symptoms that were not confused by some other issue, drug abuse or sleep deprivation or something else. This is a qualified medical professional, limited qualifications, but qualified medical professional who makes a very specific note of very specific symptoms and it has some clinical weight.

(PC-R2. 2953). Further, Dr. Maher noted that while at the DOC, Mr. Orme was prescribed Mellaril, which is an antipsychotic medication (PC-R2. 2923). It was given to treat insomnia (PC-R2. 2924). "To treat insomnia with Mellaril strongly suggests that the doctor felt there was some serious underlying biological process driving the insomnia. One of the things that would fit in that description would be a developing manic episode." (PC-R2. 2924). Dr. Maher noted that this was not diagnosed, and stated that that it would fit the pattern and that a drug such as Mellaril generally wouldn't be prescribed simply to treat an insomnia problem (PC-R2. 2924).[15]

Dr. Maher further explained that the general pattern of bipolar is that "manic episodes are more prominent in the early years of the illness so it is more likely that an individual in their teens, twenties or thirties will have manic episodes and few depressive episodes. And then later in their life will have

[15]Dr. Maher also stated that you would need some kind of psychological training to identify a manic episode (PC-R2. 2954). In reviewing the DOC records, Dr. Maher recalled that Mr. Orme discontinued any psychological treatment in 1995 (PC-R2. 2954).

depressive episodes . . . So it is very common that an individual will experience predominantly manic episodes in their early life and subsequently depressive episodes" (PC-R2. 2954).

With regard to Mr. Orme's intoxication in the time period surrounding the murder, Dr. Maher stated that a bipolar individual is much more likely to have severe, intense and to some extent, unpredictable reactions to drugs (PC-R2. 2925). Dr. Maher testified that drug abuse exacerbates bipolar:

> In the long term it tends to make the underlying biological substrate, if you will, of the brain, of the person's experience more volatile. So if a person has bipolar disorder and they use drugs it tends to make their mental state even less stable. And in the short term while they're actually intoxicated or withdrawing from a drug binge it tends to trigger reactions which are associated with either the manic cycle or the depressive cycle.

(PC-R2. 2926).

Dr. Maher considered the possibility of other diagnoses, such as major depression with psychotic features, that Mr. Orme suffered from adult attention deficit disorder, or that he suffered from an intermittent explosive disorder (PC-R2. 2927). He explained his reasons for not selecting these as his diagnosis:

> My effort in reaching a diagnosis is to attempt to identify a diagnosis which best explains the full range of symptoms that the patient develops. This is a standard technique in medicine. Some doctors tend to do it more, they group under one diagnosis, some doctors tend to do it a bit less and they separate it into many different diagnoses. In this instance the symptoms of intermittent explosive disorder, the symptoms of attention deficit disorder are all things that fit under the general heading of manic type symptoms. So if the diagnosis is bipolar disorder and there are manic episodes and there are hypomanic episodes, periods that may not quite cross the clinical

> threshold into a manic episode but periods of high energy, distractability, intermittent high levels of intense behavior, possibly even angry or explosive behavior, that touches on the attention deficit disorder, the intermittent explosive disorder and puts it under the heading of a manic phenomenon. Under those circumstances then it would become unnecessary and redundant to list a whole lot of other diagnoses that simply reexplains something that has already been explained with the primary diagnosis.

(PC-R2. 2927-28). The fact that Mr. Orme is bipolar means that he suffers from major depressive episodes (PC-R2. 2928). Those are subcategories of major affective disorder and the depressive elements are all included in the bipolar disorder (PC-R2. 2928).

Dr. Maher testified that it is proper to consider the bipolar and the substance abuse as separate diagnoses (PC-R2. 2929). But the effects of them are not considered separately (PC-R2. 2930). "Generally what we're looking at is an individual who is responding to the totality of their circumstances and if they have bipolar disorder and a substance abuse disorder they are merged together." (PC-R2. 2930). In Mr. Orme's case, one has to consider both the bipolar and the substance abuse (PC-R2. 2930). The drugs were working not on some random neutral brain but on a particular brain of an individual who has a major brain illness, a major mental disorder (PC-R2. 2930).

Based on the totality of his work performed in this case, Dr. Maher believed that Mr. Orme was acting under an extreme emotional disturbance at the time of the crime, and he was substantially unable to conform his conduct to the requirements

of the law (PC-R2. 2931).[16] His opinion that the two statutory mental health mitigators apply hasn't changed (PC-R2. 2951).

Dr. Michael Herkov testified at the postconviction evidentiary hearing to the extensive background information he reviewed in this case (PC-R2. 2961-62). Based on those records and the work he had done over the years, Dr. Herkov diagnosed Mr. Orme as having bipolar disorder, not otherwise specified, and polysubstance abuse (PC-R2. 2962, 2997).[17]

Dr. Herkov diagnosed Mr. Orme as bipolar based on a number of factors: Mr. Orme has depression, which is a component of bipolar (PC-R2. 2963). There is also evidence of a manic or hypomanic component, such as Mr. Orme's mood swings, euphoria and distractability (PC-R2. 2963-64). Bipolar disorder also has a strong genetic link, and there is a history of bipolar disorder in Mr. Orme's family (PC-R2. 2964). Additionally, Mr. Orme has a history of substance abuse, and bipolar disorder is the mental illness with the highest rate of substance abuse (PC-R2. 2964). Further, there is a history of Mr. Orme being diagnosed with bipolar disorder:

> And that, as you know, was in the Bay County Jail in June following the event in which he was placed on

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[16]Dr. Maher believed that more likely than not Mr. Orme was experiencing a manic episode on the day of the murder (PC-R2. 2938). However, Dr. Maher stated that bipolar disorder can substantially impair an individual's ability to substantially conform his behavior to the requirements of law when he is either in a depressive or manic state (PC-R2. 2924).

[17]Bipolar not otherwise specified includes disorders with bipolar features that do not meet the criteria for any specific bipolar disorder (PC-R2. 3038-39).

> Lithium by Dr. Walker. The medication was maintained by several other doctors. That order was written and continued by doctors other than Dr. Walker, who I'm assuming would have seen that and determined that he needed the medication. Mr. Orme, when he gets to the Department of Corrections in October of 1994 is evaluated by a psychological specialist, Ms. Wiley, who you know of, who clearly indicates hypomanic symptoms. In fact, she even uses the word "hypomania." So we have that now, you know, two years out. We then have another record in the spring of 2005 by Dr. Bradley where he doesn't diagnose bipolar disorder but he diagnoses major depressive disorder and he notes psychotic features, at which time he places Mr. Orme on a neuroleptic, an antipsychotic medication which is a very powerful and dangerous medication. So when you add all of those things together I think it clearly shows that he has a bipolar disorder.

(PC-R2. 2964-65). Dr. Herkov explained that once you have one manic or hypomanic episode, you can no longer be diagnosed with major depression (PC-R2. 2967). The diagnosis becomes either Bipolar I or Bipolar II depending on whether you have full blown mania or hypomania (PC-R2. 2967).

With regard to Dr. Walker's diagnosis, Dr. Herkov found it significant that he diagnosed the substance disorder independent from the bipolar disorder:

> Well, because if you look at the criteria I guess in bipolar it is criteria Number F, but just about every diagnosis in this book cannot be made if the effects, if the symptoms you are seeing are due to the direct effects of a substance, direct physiological effects of a substance. Just can't do it. Depression, ADHD, schizophrenia, every diagnosis has that caveat. And so the fact that he diagnosed both tells me that he was aware of Mr. Orme's history of susbtantial abuse, that he took that into consideration, that he made the bipolar diagnosis in addition to that. So it would make me believe that he knew that and distinguished.

(PC-R2. 2969). Dr. Herkov found that Dr. Walker prescribing Lithium signified that "he believed that Mr. Orme was suffering from a bipolar disorder of sufficient severity to prescribe him a

powerful medication with significant side effects." (PC-R2. 2969-70). Further, it was significant that two other doctors agreed with the diagnosis enough to continue giving Mr. Orme Lithium (PC-R2. 2970).[18]

Dr. Herkov stated that cocaine is the drug of choice for bipolars (PC-R2. 2973). If a bipolar is depressed, the cocaine can lift them out of the depression (PC-R2. 2973). Further, if you are manic or hypomanic, cocaine prolongs that manic or hypomanic feeling (PC-R2. 2973-74).[19] This is a form of self-medicating, which was present in Mr. Orme's case (PC-R2. 2975). "If you look at the record, his own report that he talks about when he was depressed that the cocaine would make him feel better." (PC-R2. 2975).

Dr. Herkov testified that all of the different episodes throughout Mr. Orme's life cannot be attributed to cocaine use:

> Well, I mean, his family talks about this going back as far back as they can remember. He really didn't start using cocaine until his early twenties, at least by the records that I reviewed. And the family traces it back much, much earlier than that. We also have episodes of manic or hypomanic behavior when he presumably doesn't have access to substances. Now I know the people in jail can get drugs but, you know,

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[18]Dr. Herkov gave significant weight to Dr. Walker's letter to Mike Stone (PC-R2. 2998). "He is a licensed psychiatrist in the State of Florida who is aware of what is going on, diagnoses a person with bipolar disorder and puts him on a mood stabilizer" (PC-R2. 2998-99). However, Dr. Herkov would maintain the bipolar diagnosis even without Dr. Walker's diagnosis; this was based on talking to Mr. Orme, the statements of various people, the records from DOC, and the history of cocaine (PC-R2. 2997).

[19]Dr. Herkov testified that a person's underlying mental state affects how they react to the drug (PC-R2. 2974). Adding cocaine to someone who is manic or hypomanic is like throwing gasoline onto a fire (PC-R2. 2974-75).

> Dr. Walker's observations and Ms. Wiley's observations while he is in DOC suggest to me that these, that he probably wasn't on cocaine or it is a reduced likelihood and that you're seeing the real psychiatric illness independent of drug use.

(PC-R2. 2977).

In addition, Dr. Herkov testified that it is not uncommon for people diagnosed with bipolar to discontinue medication which they are prescribed (PC-R2. 2982). So it didn't surprise Dr. Herkov that Mr. Orme refused to continue taking Lithoum in late 1992 (PC-R2. 2982). Lithium has some negative side effects and it keeps the hypomania from happening (PC-R2. 2982).

With regard to the night and early morning of the crime, Dr. Herkov testified that when you take the bipolar disorder and you put the amount of cocaine that Mr. Orme was doing, it can result in a person who has a severe emotional disturbance (PC-R2. 2982-83). Mr. Orme was suffering from extreme mental disturbance the night of the crime and his capacity to appreciate or conform his conduct to the law was substantially impaired (PC-R2. 2983). This impairment was the result of the bipolar combined with the cocaine use (PC-R2. 2983).

Dr. Herkov testified to the statutory mitigators at the postconviction evidentiary hearing in 2001 (PC-R2. 2984-85).[20] He was prepared to testify to them in 2007; however, he recalled that the attorneys didn't ask him whether the statutory mitigators applied to Mr. Orme's case (PC-R2. 2984). He was

[20]Like Dr. Maher, Dr. Herkov testified that when someone suffers from bipolar, their ability to conform their behavior to the requirements of law can occur in either a depressive state or a manic state (PC-R2. 3000).

surprised by this (PC-R2. 2984). Dr. Herkov remembered getting off the stand and remarking about this later to Butters (PC-R2. 2985). "I'm not an attorney but that would seem to me that would have been something that we wanted to get out there in the case since we had done it in 2001." (PC-R2. 2985).[21]

Dr. Herkov recalled being asked at the resentencing whether any other doctors besides he, Drs. Walker or Maher had diagnosed Mr. Orme as bipolar (PC-R2. 2987). Dr. Herkov responded in the negative (PC-R2. 2987-88). Dr. Herkov answered the question incorrectly (PC-R2. 2988). When asked why, he stated:

> You know, that's a good question. I think there are three possibilities. One possibility is that I was sent those 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

[21]Unlike in 2001, Dr. Herkov didn't have a clear recollection of going over his testimony with the attorneys in 2007 (PC-R2. 2985-86). Dr. Herkov reviewed his billing in this case, and it was consistent with his recollection (PC-R2. 2986). There was an attorney conference that he billed for one hour in August, 2006, but there was no record of an attorney conference for around the time of the resentencing (PC-R2. 2986).

> 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 so I don't - - 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 McClane's testimony.

(PC-R2. 2988-89).[22]

Dr. Herkov didn't recall discussing the opinions of different doctors with Mr. Orme's attorneys before the resentencing (PC-R2. 2989-90). And he didn't recall discussing any areas of possible cross examination by the State (PC-R2. 2990). He specifically recalled doing this prior to the evidentiary hearing in 2001 (PC-R2. 2990). Dr. Herkov stated that in almost every case they go over possible areas of cross examination (PC-R2. 2990).

As to the correct answer regarding how many doctors had diagnosed Mr. Orme as bipolar, Dr. Herkov stated:

> Well, I think there is Dr. Walker, there is, if you read Dr. Warriner's, his idea was that he thought that Mr. Orme showed some bipolar stuff, that Walker's stuff definitely were consistent with that and I think the statement he said is he probably would have testified that he had a probable bipolar disorder. And

[22]During his deposition prior to the resentencing, Dr. Herkov indicated that he had read the testimony and reviewed the reports of Drs. McClane and Warriner (PC-R2. 3007, 3023). But what he was referring to was: "I had read the testimony and my notes from 1990, from '92 or '93 at the original trial. I didn't know the other testimony existed, I couldn't be referring to that." (PC-R2. 3023). Dr. Herkov explained that at the original trial, Drs. McClane and Warriner didn't diagnose anything about bipolar (PC-R2. 3009).

> the same for Dr. McClane. So that's now three. Dr. Maher is four. Myself is number five. As I said before Ms. Wiley notes, she doesn't make the diagnosis but she notes a hypomanic episode in prison two years later and we know that two other doctors at the Bay County Jail continued the medication. So that could be as many as six or seven.

(PC-R2. 2990-91).

Dr. Herkov testified that according to the research, the average number of manic episodes in ten years is four (PC-R2. 2993). If you're not a mental health person, you might not be able to know that someone is in a manic episode (PC-R2. 2994).

With regard to the DOC records, Dr. Herkov found two things to be significant (PC-R2. 2995). The first was that Ms. Wiley used the term "hypomanic". (PC-R2. 2995). The second was:

> I think if you look at Dr. Bradley's records with the psychosis that he puts him on, the neuroleptic, that is significant for me too. Because, okay, so what is causing that. Well, we don't have any history of any schizophrenia, nobody ever said he is schizophrenic. We don't have any history of any psychotic depression, nobody has ever said he has had a psychotic depression. So how do we, what's the most parsimonious. Well, to me, that could very well be signs of the bipolar.

(PC-R2. 2995-96). Dr. Bradley prescribed Mellaril, Xanax and Pamelor (PC-R2. 2996). As to the significance of those prescriptions, Dr. Herkov stated:

> Well, I mean, they obviously have the depressive medication on there, the Pamelor. Melaril is not typically a mood stabilizer but it is used in manic people when they are high and when they are acting psychotic. So it is consistent.

(PC-R2. 2996).[23]

Additionally, Dr Herkov explained that the DOC psychologist

[23]Dr. Herkov testified that Lithium is not a treatment for substance abuse; nor is Mellaril, Xanax or Pamelor (PC-R2. 2979).

gave a diagnosis of major depression, single episode, which would mean that Mr. Orme never had a previous depressive episode (PC-R2. 3035). However, the records indicate that Mr. Orme had depression previously (PC-R2. 3035). Moreover, as Dr. Herkov explained, if the DOC psychologist had seen Dr. Walker's note and had believed it, he could not have made the depression diagnosis because he would have had the manic episode, which was laid out by Lisa Wiley five days earlier (PC-R2. 3034-35). Further, the DOC psychologist also gave Mr. Orme a diagnosis of ADD (PC-R2. 3035-36). Dr. Herkov explained the significance of this:

> This is where we see the ADD diagnosis, okay, and if you look at the criteria for ADD, and keep in mind no history of ADD in this person prior to this, nothing in the school records. If you look at the criteria for ADD, pull out my DSM here, you're looking at things like distractability, you're looking at things like difficulty concentrating. And in my opinion I think what actually is probably happening there is you're seeing a person who is coming out of a hypomanic episode and what you're seeing is the residual on that. Because we know that 70 to 80 percent of people who have a hypomanic episode that will be immediately proceeded by or immediately followed by a depressive episode. And so that, for me is, you know, moderate attention deficit disorder. So he is seeing something there, because that is not in the records, that say this guy is having a hard time concentrating, the distractability. That's what you're, that's consistent with the hypomanic episode.

(PC-R2. 3035-36).[24] Dr. Herkov didn't testify to this at trial.

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[24]Dr. Herkov considered the adult attention deficit disorder, but he didn't diagnose it because:

> ADHD, ADD, you know what it is, it is an issue of distractability, impulsivity. The DSM requires that there is evidence of that - - it is an early onset disorder. You don't have ADHD emerging at age 25. You can't. In fact, if you look at the DSM the symptoms have to be present before age seven. And so I looked

He's not sure why ("I mean, I can't go back and say why did you say this or why didn't you say that.") (PC-R2. 3038).

Mike Stone testified as a State witness at the postconviction evidentiary hearing that he joined the Public Defender's Office in 1982 and that he tried about two dozen murder cases (PC-R2. 3048-49). Stone was originally appointed to represent Mr. Orme at trial, but he resigned from the Public Defender's Office in 1992 (PC-R2. 3048, 3050).

From 1992 until 2005, Stone practiced in criminal defense and personal injury law (PC-R2. 3051). With regard to whether he stayed abreast of the changes or updates in criminal law during this time, Stone stated, "As best I could. I was not plugged into death penalty work as I had been before, but on the other hand I don't think there was a whole lot of progress made in the juris prudence either." (PC-R2. 3051).

When he was appointed to Mr. Orme's case in 2005, Stone was aware that Russ Ramey would either be co-counsel or lead counsel (PC-R2. 3051). As far as his working relationship with Ramey, Stone testified that they didn't have as much communication early on as he would have liked, but they did have a good working relationship (PC-R2. 3052). Stone recalled in the early going a

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> at the school records and I didn't see anything in there that would have suggested an ADD or ADHD. His grades are actually okay. Most of the way he is in the average range on his national percentile testings, especially when he is younger. Kids with ADHD tend to have a difficult time doing that so I didn't see any evidence to support ADHD.

(PC-R2. 3001-02).

lot more meetings with Butters than Ramey (PC-R2. 3079). But he thought they had a lot more meetings closer to trial (PC-R2. 3079). Stone didn't recall having discussions with Butters about trying to remove Ramey from the case (PC-R2. 3079-80). They did have concerns that they weren't getting a lot of meetings and a lot of progress (PC-R2. 3080).

Stone testified that the work was divided up so that Ramey took the lay witnesses and Stone did the more technical witnesses (PC-R2. 3052). Stone also testified that Ramey did the opening statement and he did the closing argument (PC-R2. 3052). Stone acknowledged that there was little coordination in preparing for these arguments:

> As far as the opening statement and the closing statement did you have, did you have any kind of meeting where you went over, okay, these are the things that we're going to talk about in opening and we're going to integrate the closing together with it?
>
> A I don't think we did much of that, no.
>
> Q Had you ever really heard or been told what Mr. Ramey was going to testify to in the opening before it happened?
>
> A I don't remember much, no.
>
> Q Do you remember whether that happened or not?
>
> A I just said I don't remember much of that, no. That's not to say it didn't happen, I just, it does not jump out of the black hole.

(PC-R2. 3074).[25] However, when Stone was asked if he thought that his closing conformed to Ramey's opening as well as to the

[25]Stone didn't recall a lot of conversation with Ramey about the DNA expert's findings and the way to coordinate that presentation between opening and closing (PC-R2. 3078).

evidence that was presented, Stone recently looked at them again, and stated that "they look better to me now than I felt about them then. I really could not identify any glaring contradictions between the two" (PC-R2. 3060-61).

Stone testified that the defense theory of the case was that there were no proven aggravators and there were several statutory and nonstatutory mitigators (PC-R2. 3066). Stone was not impressed with the proof that there had been a rape or the theory that there had been a robbery (PC-R2. 3053). According to Stone:

> So there is two of the three aggravating factors right there. I knew, of course, that we couldn't relitigate the things that he had been convicted of but I wanted to believe that we could still bring them up in the sentencing phase because they are things that the jury has to find beyond a reasonable doubt in the sentencing phase. And I didn't see anyway that that could be legally taken away from them.

(PC-R2. 3053). While Stone was familiar with the Florida Supreme Court's repeated caselaw that lingering doubt is not an issue, he stated: "Well, they can say it is not an issue but it is still an issue to the jury, I think. It's got to be if you take, if you take this seriously and I think jurors do." (PC-R2. 3074-75).

Regarding the sexual battery, it was Stone's idea to call Dr. Riddick (PC-R2. 3053). Stone wanted to use that kind of expert to show that it wasn't a sexual battery (PC-R2. 3054). According to Stone, Dr. Riddick testified about the lack of injuries to Lisa Redd's mouth, vagina and the minimum amount of tearing to her rectum (PC-R2. 3054). This fit into Stone's trial strategy that this could have been a consensual act (PC-R2. 3054-55, 3068). Stone disagreed with the notion that the victim had

been beaten severely:

> Q But you knew that she had been, she had been beaten pretty severely, right?
>
> A Well, I knew that she had received 24 blows. I don't know if beaten severely, I mean, I'm not trying to play games with you but I don't know that, I don't know that I would say that.

(PC-R2. 3068).[26] Stone later elaborated:

> You have to remember that these, both of these people were very athletic, very strong and you know, I don't know what their preferences in sex were but I expect that was part of his analysis, as well. You know, we're not talking about old people or something like that.

(PC-R2. 3068). Stone further testified that probably the most important part of Dr. Riddick's testimony was the length of time that Redd would have been conscious after Mr. Orme began to strangle her (PC-R2. 3055). Stone thought that Dr. Riddick testified that in about ten seconds you would go unconscious (PC-R2. 3055). Stone thought this was very important to knocking out the HAC aggravator (PC-R2. 3056). Additionally, according to Stone, Dr. Riddick's testimony was crucial in that he stated there was one continuous application of force around Ms. Redd's neck rather than the repeated application of strangling and letting go as Dr. Lauridson had testified to (PC-R2. 3056-57).

Stone also testified that he anticipated eliciting information based on prior conversations with Dr. Riddick that he could shorten the time of the attack to perhaps less than a

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[26]After making this statement, Stone acknowledged that the victim had been beaten about the head, face, chin, neck, abdomen, legs and arms (PC-R2. 3067-68). Stone also acknowledged that there was anal tearing and no indication that there was any kind of lubricant used as far as the anal sex (PC-R2. 3068).

minute or two rather than being drawn out over the course of an evening (PC-R2. 3057). However, as Stone explained:

> Yeah, that was, that was not successful. And, you know, I've had a recollection of this case ever since that I was very disappointed in Riddick's performance. And when I read the testimony the other day I couldn't figure out why I felt that way because it looked pretty damn good for the defense except on this one thing, which I what I think was getting me. I had him count the blows. Nobody else asked the doctor to count the blows and to try to actually, you know, put it out there for us to look at. And it was, you know, I realize it was sort of risky to dwell on the individual blows but I think he determined that there were about 24 of them. And again, from my vast experience of watching MMA and stuff like that I knew that, you know, you can, you can inflict that many blows in seconds, you know. And then his answer was a surprise to me on direct and he stuck with it on cross that I think he said three or four minutes for the whole struggle. And I just didn't understand where he was getting it from.

(PC-R2. 3057-58). Stone remembered recently reading in Dr. Riddick's testimony that his only disagreement with the medical examiner was that he felt the cause of death needed to be expanded to include the multiple blunt force injuries (PC-R2. 3071). Stone wasn't sure what to make of that (PC-R2. 3071). He thought Dr. Riddick was with him on the scenario that the blows had been struck after the intercourse (PC-R2. 3071).

With regard to the DNA expert, Stone testified that there were indications that some of the stuff hadn't been tested at the time of trial (PC-R2. 58). According to Stone:

> We knew we couldn't again reopen guilt or innocence but it just seemed I think to Russ and me, both, that the judge couldn't stop us from doing this DNA thing because, you know, everybody is going to want it to at least appear that a thorough job was done.

(PC-R2. 58). As to how it fit into the defense, Stone testified, "[W]e couldn't do a whole lot with it other than we had some

indication that there was a third person who wasn't Redd and wasn't Orme in that motel room and that person's DNA was found on a towel and also under her fingernail, I think on the left hand." (PC-R2. 3059).

Stone didn't know when they made the decision to call the DNA expert (PC-R2. 3077). He was aware that the DNA expert's findings would essentially confirm the findings of FDLE (PC-R2. 3077). But the defense also knew that it would support the idea that there was some third person out there and they didn't see how it could hurt them (PC-R2. 3077). Stone acknowledged that they had the sexual battery conviction, and the female's DNA wasn't going to cast doubt on that (PC-R2. 3077).[27] Stone didn't rule out arguing that the person with the female DNA was the one who beat the victim to death and strangled her:

> I don't know. You know, you throw it out there and use it the way you can. I just didn't see how it could hurt us. I mean, there were vague accounts of Mike leaving the motel room, going somewhere else, coming back, now she looks different, now she's cold. The crime scene was very strange in terms of her, the degree of her dress and the lack of much evident violence in the room. Who knows? The prosecution kept arguing about all this robbery, all this jewelry that supposedly went missing. That could have been somebody coming along later and saying, oh, look at all this stuff, let's just take this while the lady of the house is out or something like that. I mean, I don't think we thought very specifically, as you are, about this. I think we were, we just saw it as evidence that can't hurt us so why not put it out there for whatever value it has.

(PC-R2. 3078).

With regard to Drs. Warriner and McClane, Stone didn't see

[27]But according to Stone, "we didn't think it was a sexual battery, we thought they had sex." (PC-R2. 3077).

it that they diagnosed Mr. Orme as bipolar in their 3.850 testimony (PC-R2. 3062). He thought the points they were making were that if they had the information that was being "vouchsafed" to them at the hearing, that would have made a difference in their diagnosis (PC-R2. 3063-63). According to Stone, "That information wasn't available to them then but I'm not sure it was ever made available to them later." (PC-R2. 3063). When asked if he didn't recall them testifying that Dr. Walker's diagnosis and the other things provided actually changed what their testimony was at the original trial, Stone stated that he didn't have a very precise recollection of all of this (PC-R2. 3063). Stone later elaborated that, "But to me it was just sort of a - - let me say, one of the problems that you have, I think, on a trial, especially a retrial like this, mental defense are persuasive to me and they seem to be persuasive to the Florida Supreme Court and they don't seem to be persuasive to anybody else, like juries. So, I mean, they can be, but, you know, sometimes you can hurt yourself with too much of that kind of stuff." (PC-R2. 3064).

Additionally, Stone stated that as best as he could recall, the defense tried to enlist Dr. McClane, but it just never came about (PC-R2. 3059). Stone thought he either had difficulty visiting Mr. Orme in prison, or he had difficulty with his schedule (PC-R2. 3059-60). Stone also thought that Dr. McClane didn't have a firm opinion that would help the defense on the bipolar issue (PC-R2. 3060). Stone added that perhaps Butters or Ramey would remember better than him, but he thought that Dr.

McClane may have told them that he couldn't help (PC-R2. 3060). Stone thought this would have been by phone, because he didn't recall meeting Dr. McClane (PC-R2. 3060).

Subsequently, Stone testified that he wasn't sure if Dr. McClane saw Mr. Orme during the time he represented Mr. Orme from 2005 to 2007 (PC-R2. 3064). Stone wanted to say that he did finally see him (PC-R2. 3064). Stone didn't know if he had any records of Dr. McClane seeing Mr. Orme, but his pretty strong impression is that he did see him (PC-R2. 3064). Stone didn't know who arranged the meeting (PC-R2. 3065).

Stone testified that the defense didn't call Dr. Warriner because he had died (PC-R2. 3060). Stone testified that he never made an attempt to see if he could have Dr. Warriner's testimony read back to the jury due to his death (PC-R2. 3065). Stone also didn't remember any evaluation of that testimony, whether he thought it was too weak or hurtful (PC-R2. 3065).

With regard to Drs. Maher and Herkov, Stone didn't recall rehabilitating them with the fact that at the 2001 hearing, Drs. Warriner and McClane said that they had diagnosed Mr. Orme as bipolar (PC-R2. 3082). Stone speculated that if he didn't attempt to rehabilitate them, it was because he wasn't confident they would have rehabilitated; he didn't want to make it worse (PC-R2. 3082). He couldn't remember if he knew that either one of them had a different opinion than the one the prosecutor had just gotten them to state (PC-R2. 3083). Assuming that he had a diagnosis by Drs. McClane and Warriner of bipolar, there would be no reason not to object to that question (PC-R2. 3084).

With regard to the issue of Dr. Herkov not testifying to the two statutory mitigators, Stone was asked if that was a strategic choice (PC-R2. 3085). Stone responded: "I don't know that I didn't have him testify to that. I don't remember asking the question in that straightforward way but it seems to me we went through a lot of, a lot of factors in Mike's history that, by using his answers, I was able to make the closing argument I wanted to make." (PC-R2. 3085). Stone had no strategic reason for Dr. Herkov not to testify to the two statutory mitigators (PC-R2. 3085). He thought he was doing it (PC-R2. 3085). "I don't know if I succeeded or not but I certainly would want to get those in." (PC-R2. 3085).

Russell Ramey testified as a State witness at the evidentiary hearing that he worked as a prosecutor in the 19th Circuit for approximately 11 years (PC-R2. 3090). Starting in 1994, he worked for a period of time in the public defender's office in the 14th Circuit, and he handled capital litigation (PC-R2. 3091). He currently practices criminal defense, matrimonial law and civil litigation (PC-R2. 3092). He has tried six or seven hundred criminal jury trials (PC-R2. 3092).

With regard to the defense strategy, Ramey testified that he and Stone felt it was necessary to try to inject as much as they could some doubt in the jurors' mind as to the actual guilt of some of the underlying offenses (PC-R2. 3094). Ramey knew they couldn't argue lingering doubt as something before the jury (PC-R2. 3095). Ramey stated, however:

What I tried to do and what I think Mike tried to do

> following up with after I did my opening and what we tried to do throughout the witness phase is we tried to plant the seed in the jurors' mind and then let it harvest itself based on the evidence and the facts that came out. And, you know, the state still has the burden during the course of the trial to prove the aggravating circumstances. So if we could put some type of reason in their mind that they may feel that, well, I'm not so sure, what about this, what about that, then that helped us gain some momentum towards diminishing the state's ability to do that.

(PC-R2. 3095). According to Ramey, the defense wanted to plant the seed that there was some residual doubt (PC-R2. 3096).[28]

Ramey further testified that there were issues about whether the sexual battery was a forcible rape "because of the lack of injuries or wounds to Mr. Orme, and the lack of any tearing or other evidence that you would see in an aggressive sexual battery that just wasn't part of this case." (PC-R2. 3096). Ramey stated that if they could plant the issues of some residual doubt in the mind of the jury it would not only go to the issue of whether there was a forcible rape but whether there was a theft or robbery of the victim before she was dead (PC-R2. 3096-97). The planting of the seed for some residual doubt was there on purpose and was strategic in nature (PC-R2. 3097).

Ramey thought it was extremely important for Dr. Riddick to testify about how quickly the victim could have lost consciousness (PC-R2. 3098). This would mitigate the HAC aggravator (PC-R2. 3098). Also, the continuous force would have made the victim more than likely based on Dr. Riddick's testimony

[28]Ramey saw nothing inconsistent with the opening he gave and Stone's closing (PC-R2. 3101). He thought they went pretty much hand in hand (PC-R2. 3101).

to pass out quicker (PC-R2. 3099). Ramey thought it was a very good strategy to present Dr. Riddick's testimony, and he thought it was very believable (PC-R2. 3113).

As for the DNA expert, Ramey testified that what the defense felt was important was that there was foreign DNA in the case that couldn't be identified (PC-R2. 3099). One of the first things Ramey told the jury in his opening was that there was DNA evidence under the fingernails of the victim and it was not Mr. Orme (PC-R2. 3099-3100). Mr. Orme had no scratches or abrasions on him that could have caused that scratch (PC-R2. 3100). There was also a towel in the room that had a mixture of DNA that excluded both Mr. Orme and the victim as possible contributors (PC-R2. 3100). Mr. Orme's DNA was under the victim's fingernails but not the DNA that Ramey talked about in his opening statement (PC-R2. 3101). That could have gotten there by shaking hands or something of that nature (PC-R2. 3101).[29]

The defense's contention was that no one sexually battered the victim (PC-R2. 3115). As for the relevance of the unknown DNA, Ramey testified to the following:

> Q And was it going to be your contention that this unknown female came in and perpetrated all the blows upon Ms. Redd and strangled her?
>
> A Our contention was that there was unknown DNA under her fingernails, there was unknown DNA in a towel that was in the room where she met her death and we felt it our responsibility to make sure the jury knew that for whatever value they would assign to it.

[29]Ramey disagreed that the unknown DNA was faint female DNA (PC-R2. 3115). Ramey believed that the YSTR test said it was potentially a female but they couldn't be positive (PC-R2. 3115).

(PC-R2. 3116).

Ramey testified that he didn't go to every hearing in this case (PC-R2. 3104). In October of 2006 he had surgery, so Stone would have covered anything that happened in October (PC-R2. 3105). Ramey stated that he was at the vast majority of any hearings that had any substantive motions or evidence that went forward (PC-R2. 3105). According to Ramey, the docket sheets reflect that he was at about half of the hearings (PC-R2. 3105). Ramey didn't think it was necessary for him to be at all of the hearings as they were under a strict budget crunch with JAC (PC-R2. 3105-06). Also, Ramey was of the opinion that even when there is no JAC payment problem, there is really no reason for both lawyers to be present during the course of a pretrial conference (PC-R2. 3106).

With regard to Dr. McClane, Ramey claimed that they tried their best to get him to go to the prison to see Mr. Orme, but he wouldn't cooperate with them (PC-R2. 3106). It was to the point of almost harassment trying to get him involved (PC-R2. 3106). To the best of Ramey's recollection, the last contact they had with Dr. McClane was a phone call in which he said that he couldn't help and to leave him alone (PC-R2. 3107).

Ramey thought that Stone was able to get out the information he wanted during the direct examination of the mental health experts (PC-R2. 3107). In retrospect, Ramey wished they had ten experts but they didn't have the money for that from JAC (PC-R2. 3108). They looked at Dr. Warriner's prior statements and didn't feel that what he had opined was sufficient to bring to the jury

as a solid opinion (PC-R2. 3108). They made a strategic decision to present two live witnesses who were qualified to make this opinion as opposed to bringing in someone whose opinion was not so strong and no longer alive (PC-R2. 3108).

According to Ramey's opinion, they didn't try to rehabilitate their experts with additional bipolar diagnoses because Drs. Warriner and McClane never actually diagnosed Mr. Orme as being bipolar (PC-R2. 31117).

> Yeah, and from what I read neither one of them were able to give a clinical diagnosis from what I read that he was bipolar, just that Dr. Warriner said that he probably would and the other doctor indicating that he probably would, as well. But I didn't feel that Dr. Warriner ever got to the point where he gave such a definitive diagnosis that any prior testimony he gave would be helpful, paticularly since he is dead and it would just be reading of a transcript when you have two live witnesses who, or who in my opinion and Mike Stone's opinion were solid.

(PC-R2. 31118). Ramey didn't recall having a conversation with Drs. Herkov and Maher to discuss the strategy of presenting the opinions of Drs. Warriner and McClane as part of the presentation of the case in chief (PC-R2. 3118). According to Ramey, that would have been Stone's job (PC-R2. 31118). Ramey likely participated but he didn't have a specific recollection (PC-R2. 3118). Ramey testified that he wouldn't have been responsible for sending them the materials they received (PC-R2. 3119). That would have been Stone (PC-R2. 3119). Butters also assisted in sending information out on occasions (PC-R2. 3119). Ramey didn't know if she was involved in this, but she was helpful in communication with different witnesses (PC-R2. 3119).

Ramey didn't recall whether Dr. Herkov was asked about the

statutory mental health mitigating circumstances (PC-R2. 3119). That was Stone's witness, but if he thought Stone had not asked a question he should have, he would have mentioned it to Stone (PC-R2. 3119-20).

Ramey further testified that he and Stone decided that since it was Mr. Orme's life he should have at least have a say in everything they did (PC-R2. 3121). Mr. Orme didn't disagree with any of the ways that they wanted to proceed, and he was quite emphatic about the sexual battery not having occurred (PC-R2. 3121). Mr. Orme agreed with their strategy (PC-R2. 3121).

SUMMARY OF THE ARGUMENT

1. Mr. Orme was deprived of the effective assistance of counsel at his resentencing proceeding. Counsel failed to establish readily available mitigation and instead focused on testimony and argument that was either irrelevant, impermissible or prejudicial to Mr. Orme. Mr. Orme was prejudiced as a result of resentencing counsel's deficient performance.

2. Mr. Orme was denied a reliable and individualized capital sentencing determination because the prosecutor presented impermissible considerations to the jury, misstated the law and facts, and made arguments that were inflammatory and improper. Resentencing counsel's failure to raise proper objections constitutes ineffective assistance of counsel.

3. Resentencing counsel rendered ineffective assistance in failing to preserve the issue that the trial court erred in holding that a juror's refusal to consider remorse as a mitigator could only be a basis for a peremptory challenge.

4. Resentencing counsel rendered ineffective assistance in failing to preserve the issue regarding the jurors' consideration of the role of mercy in its sentencing recommendation.

5. Mr. Orme was denied the effective assistance of counsel during his postconviction proceedings. Collateral counsel failed to adequately investigate, prepare and present evidence on Mr. Orme's behalf. In light of collateral counsel's deficiencies and Martinez v. Ryan, the circuit court erred in denying Mr. Orme's request to re-open his postconviction evidentiary hearing.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

ARGUMENT I

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

A. INTRODUCTION

The United States Supreme Court has explained that an ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair

trial, a trial whose result is reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Supreme Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

B. MR. ORME'S CASE

Mr. Orme's resentencing legal team was ultimately comprised of two appointed attorneys as well as one inexperienced and unqualified pro bono attorney (R2. 2128, 2130-31, 2220). What followed was a disconnected, convoluted and unprepared defense that ignored the roadmap set forth in prior proceedings which this Court had found undermined confidence in the outcome.

Initially, Mr. Orme moved, with the help of two attorneys from Holland and Knight, Butters and Schulz, to remove Ramey and replace him with the attorneys from Holland and Knight (See R2. 2165-84; PC-R2. 2847)("We agreed to do the whole case and get the court appointed lawyer sort of kicked off."). However, the circuit court indicated that with *pro bono* counsel Mr. Orme was not entitled to court appointed counsel. The Holland and Knight attorneys then announced that they were not qualified to represent Mr. Orme (See R2. 3102-54). The circuit court

appointed Stone to assist Ramey and shortly thereafter Schulz inexplicably disappeared from Mr. Orme's case (R2. 2220).

The rift between Ramey and Butters was evident at the postconviction evidentiary hearing. Indeed, Schulz and Butters had wanted Ramey to be removed from the case (PC-R2. 2847). Thus, from the outset, Mr. Orme's defense team was not cohesive. At the evidentiary hearing, Stone conceded that the communication between counsel early on was lacking (PC-R2. 3052, 3079). Stone stated that even later in the case "it is true that Sarah and I had some concerns that we weren't getting a lot of meetings and a lot of progress." (PC-R2. 3080).

And, in addition to the contentious relationship between the attorneys, the defense investigator, Mike Glantz, abruptly quit just prior to the resentencing (PC-R2. 2857). It was soon learned that Glantz had not been working on Mr. Orme's case, though he had said he was (PC-R2. 2857). Glantz had not spoken to witnesses he said he had interviewed and failed to turn over the investigative file (PC-R2. 2857-58).

The problems plaguing Mr. Orme's resentencing team made it clear that the defense was not ready to proceed (PC-R2. 2859). And, as Mr. Orme's case unfolded, the lack of cohesiveness and preparation became evident.

At the evidentiary hearing, Ramey explained that in defending Mr. Orme he wanted to inject doubt into the jury's mind – doubt as to Mr. Orme's guilt, doubt as to whether or not Mr. Orme had consensual sex with Lisa Redd, doubt as to whether Mr. Orme committed the crime for pecuniary gain (PC-R2. 3095-97).[30]

[30]Stone also testified that he was not impressed with the proof that there had been a rape or the theory that there had been a robbery (PC-R2. 3053).

"...[W]e tried to plant the seed in the jurors' mind and then let it harvest itself based on the evidence and the facts that came out." (PC-R2. 3095). However, resentencing counsel's theory was deficient and unreasonable because counsel failed to account for the evidence in the case, the law and the actual mitigation that had previously caused this Court to reverse Mr. Orme's death sentence.

Ramey presented the opening statement on behalf of Mr. Orme. While addressing Mr. Orme's background and drug abuse, as well as making reference to his bipolar disorder, Ramey then veered into a lingering doubt/mystery killer argument:

> When they did the autopsy on Lisa Redd she had bruises on her knuckles. Doctors will say it is consistent with hitting somebody very hard. She had human DNA under her fingernails. She had bruises on her body, as Mr. Meadows indicated. She had sex with Mr. Orme, there is no question about that. The evidence will show you that she was a very strong, muscular large lady. Not fat. Healthy. **You will find out from the people who are going to be in this courtroom, in this illumination on that witness stand, under oath swearing to tell the truth, there wasn't a single mark on Mr. Orme at the hospital, not a single mark.** Mr. Meadows said that one nurse will suggest that he had some red abrasion on his left arm. Police officers will tell you they looked him over, they actually took samples from his body, didn't see those scratches. I suggest to you from the evidence you're going to determine those weren't scratches at all. What they were is what happened when Jim Zahn assisted him over from the detox or from the Reliance House over to detox, 'cause he will tell you he could walk but I had to, I held him up under his arm, his left arm. And Mike had his other arm around my neck. And when the nurses saw him coming into the center that's how they're going to say they saw him being brought in, not carried like he couldn't walk on his own at all, but being assisted, being held up under the arm, the left arm where the red abrasion was. **Nurse never said a scratch, she said a red abrasion of some sort, didn't need any treatment. It is in the triage notes, you're going to get to see those.**
>
> The thing is that those were marks from someone having him up under the arm assisting him and walking

> from Reliance House to the Detox Center, those would appear as red surface marks which is exactly how they're detailed in the triage notes. **Not scratches. And guess what, by the time the policemen get there, which is only an hour or so at the most later, and when other officers see him later that day and when other officers see him the next day there are no scratches on his arm. And guess what? We have DNA evidence on the fingernail scrapings from Ms. Redd. There is human DNA under her fingernails. It is not Roderick Michael Orme's DNA under her fingernails. That's what the experts will say that did the DNA testing in this case.**
>
> The officer will tell you that they looked at his knuckles, see if there was bruising to see if it would compare with all the harsh bruising they found on her bruising. **Not a single bruise on his fingers. Not a bruise on his knuckles. Not a bruise on his feet. If he hit someone that hard there is going to be marks on you. If someone is being, against their will, sexually battered it is going to be some marks on you.**

(RT. 38-40)(emphasis added).

Resentencing counsel's opening argument was deficient on several different levels. At the evidentiary hearing, Ramey unabashedly testified that he wanted to inject doubt into the jury's mind regarding Mr. Orme's guilt (PC-R2. 3094). However, lingering doubt does not constitute valid mitigation in a penalty phase proceeding. See, e.g., Darling v. State, 808 So. 2d 145 (Fla 2002)("We have repeatedly observed that residual doubt is not an appropriate mitigating circumstance."); see also Duest v. State, 855 So. 2d 33 (Fla. 2003).

Moreover, while arguing an impermissible and irrelevant fact to the jury, lingering doubt, resentencing counsel exacerbated the error by not presenting that which he had promised. Stone presented the testimony of forensic serologist Gary Harmor. Unfortunately, Harmor's testimony reaffirmed that Mr. Orme was the source of the critical DNA in this case (T2. 875-83).

Harmor's testimony was so favorable to the State that the prosecutor made a chart of his findings and submitted it as an exhibit to the jury (T2. 873, 884)[31]; and in its sentencing memorandum, the State argued for the sexual battery aggravator based in part on Harmor's testimony:

> The defendant unlawfully committed sexual battery upon Lisa Diane Redd by oral, vaginal and anal penetration by the penis of the defendant without her consent and in the process used force or violence likely to cause serious personal injury to Lisa Diane Redd. This was established through the photographs, forensic evidence and testimony of Dr. James Lauridson, **Gary Harmar** and the other DNA analysts.

(RT. 2961)(emphasis added). Moreover, Harmor's testimony was so favorable to the State that the trial court actually relied on it as supportive of finding the aggravating circumstance that Mr. Orme murdered the victim during the course of a sexual battery:

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

(R2. 3010-11)(emphasis added).

As to the supposedly startling evidence which resentencing

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[31]On cross examination by the State, Harmor testified that none of his test results contradicted the prior tests of FDLE; and in fact, his results on Mr. Orme's underwear and the victim's panties corroborated FDLE's results (T2. 887).

counsel promised would show that Mr. Orme's DNA was not under the victim's fingernails, this never came to fruition. Rather, Harmor's testimony was that both the victim's and Mr. Orme's DNA were under the fingernails (T2. 884). And while there was a third DNA profile that was too weak to determine, Harmor testified on cross that it most likely came from a female and could have become present through something as simple as shaking someone's hands (RT. 884-85).[32] Thus, contrary to resentencing counsel's opening statement, Mr. Orme's DNA was present under the victim's fingernails. And while there was a weak DNA sample present that likely came from a female, it strains all credibility to expect the jury to believe that the victim in this case was beaten and sexually battered by a female. At best, resentencing counsel's statements regarding the DNA amounted to utter incompetence and resulted in Mr. Orme losing credibility with the jury. The "seed" that resentencing counsel attempted to plant was not supported by any evidence and was totally offensive to any reasonable juror. Mr. Orme was prejudiced as a result of resentencing counsel's deficient performance.

In a similar vein, as the prosecutor indicated in his closing argument, resentencing counsel's arguments and presentation of testimony regarding the lack of scratches on Mr. Orme was confusing:

> We heard from Julie, she's now Weaver, was Hughes, the nurse who now lives in Union, Kentucky. You know, **I was a little bit confused with all of this talk about**

[32]According to Harmor's testimony, the major DNA belonged to the victim followed by Mr. Orme (RT. 884-85).

> **whether, you know, that night, if there was scratches on the arm** when they noted that in the records before the police were ever involved, before anybody knew anything about Lisa Redd, when he first goes into the hospital, the nurses made notes of that in the record. **Were they trying to suggest that he had not attacked her.** Is it unreasonable to think that there may be scratches, superficial scratches, occurred during an attack. **Are we now trying to say, no, he didn't attack her. What's the position? He attacked her in a rage, he attacked her because he was depressed, he attacked her because he was manic, he attacked her because he was on drugs, or he didn't attack her, which one is it?** You know, you know who caused those injuries to Lisa Redd. These weren't police nurses. These were people whose job it was to document what they observed. It's in black and white. And 15 years and 15 psychologists and five defense lawyers won't change that.
>
> Christina Durkac, same thing. She saw scratches on another forearm, one on one, one on the other. They weren't significant. You know, they weren't bleeding or anything, but they were scratch marks. The only reason to deny those is if you are denying that you were the one doing the attack.

(RT. 1176-77)(emphasis added). As the prosecutor insinuated, resentencing counsel's presentation of testimony and argument appeared to be completely haphazard and devoid of any reasonable trial strategy.

Finally, what made Ramey's opening statement even more troubling was that he was directly contradicted by co-counsel Stone, who emphatically argued in closing that Mr. Orme committed the crime and the defense wasn't suggesting otherwise:

> **We are not contending for a moment that Mike Orme did not kill Lisa Redd.** He stands convicted of that, that's a given.

(RT. 1226-27)(emphasis added).

* * * *

> **He accepts responsibility for her death. Of course, he does.** Even in the fragmented statements that he has given and the fragmented memories, which apparently will never permit him to remember what happened here,

> for sure, all of it. He blames himself if for no other reason, for calling her there that night because he knows that that led to her death and **he knows as well as any of us can that he was the one that killed her. He's not trying to evade the responsibility. I hope we have not said or done anything in this trial that made it look like we, as his lawyers, were trying to evade that responsibility**. It's mitigating, I don't think there's anything that he wouldn't do if he could make this better for the family of the victim.

(RT. 1264-65)(emphasis added).

Aside from the ill-fated lingering doubt approach, resentencing counsel compounded the problem when attempting to convince the jury that Mr. Orme had consensual sex with the victim. During his opening statement, Ramey informed the jury that doctors would testify that there was no evidence that the sex between Orme and the victim was anything but consensual:

> The state is asking you to rely on sexual battery as an aggravating circumstance in this case because it was perpetrated in the course of a first-degree murder. They have asked you to say or find as an aggravating factor that pecuniary gain was a motivating force for this homicide. They have asked you to consider again one last aggravating factor, and that is this is especially heinous, cruel and atrocious because it took the time period that Mr. Meadows indicated to strangle someone to the point where they would die. The doctors in this case are not all in agreement. **There will be doctors who are qualified, who will come before this court and testify to you that there is no evidence that this sexual act was anything other than consensual.**

(RT. 40)(emphasis added).

Again, as with the DNA evidence, counsel's statements to the jury never came to fruition. During the defense's case, resentencing counsel called Dr. Riddick, a forensic pathologist. It was Stone's idea to use Dr. Riddick "to knock down the HAC" and to establish that the sexual contact was consensual (PC-R2. 3054-55). And, while Dr. Riddick initially opined that the

victim's injuries were consistent with consensual intercourse (RT. 611-12), he later opined that it was a "toss up":

> Q. Assuming then those facts that you have to assume and those that you found, **let me ask you if you have an opinion as to whether the sexual intercourse in this case was consensual or not?**
>
> MR. MEADOWS: Objection, Your Honor, that is the ultimate fact for the jury to determine.
>
> THE COURT: Objection overruled.
>
> THE WITNESS: Well, a pathologist can't really decide whether something is consensual or nonconsensual in a sense that a person has to verbally or some way consent and the decedent in this case is dead and is obviously not going to be able to tell whether it was consensual or nonconsensual.
>
> BY MR. STONE
>
> Q. Right.
>
> A. **So I can't tell, it could have been either way.**
>
> Q. All right, it is a toss up?
>
> A. **Well, from a pathologist's opinion it is a toss up.** She could have - - the mucosa of the anus and the rectum is very thin and delicate and very easy to cause superficial injury to it with some bleeding, particularly if you're not using a lubricant it can happen that way. **But I don't examine very many, any people who, that I could say have done it consensually. So it's an opinion that I can't definitively offer.**

(RT. 613)(emphasis added). On cross examination, Dr. Riddick's testimony was completely discredited:

> Q. Now, we talked a moment about life's experience. I want to go back to what you said about, that you felt the anal intercourse was consensual or consistent with being consensual in this case. In your life's experience, as well, is it more consistent it being nonconsensual where you have the recipient of that anal intercourse having been beaten on her head and face, her chin, her neck, her abdomen, her legs, her arms and there being no evidence at all of any lubricant at all being used and that it being of such a

degree of force that the hemorrhage bled out, drained down from her anus and rectum onto clothing. Which is more consistent in your view, consensual or nonconsensual?

A. Given that hypothetical situation it's more nonconsensual.

(RT. 638-39). In fact, Dr. Riddick's overall testimony was so unfavorable to Mr. Orme that the prosecution on cross examination utilized it to enhance the HAC aggravator:

Q. **The only disagreement I think you had with Dr. Sybers' conclusions in this case was that you felt the cause of death needed to be expanded, is that correct?**

A. **That's correct.**

Q. Tell the jury what you meant by that?

A. **Well, in my deposition I said, you know, cause of death was manual strangulation but what I thought was contributory was multiple blunt force injuries. She had injuries to her abdomen and to her kidney and she had injuries to her chest and her head.**

Q. **So you would have added blunt force injury to that, as well?**

A. **As contributory, yes.**

Q. **And the injury to her kidneys or to her kidney, the hemorrhaging in the kidney and the connecting tissues to the kidney?**

A. **Well, that's when I said with the abdomen, I just didn't go internally.**

Q. Now, that's a significant injury, isn't it? You may see it in a motor vehicle accident where someone has been in a significant collision to cause that type of injury, is that correct?

A. Either that or a football type situation.

Q. **Somebody with a great deal of force applied in a very narrow area?**

A. **That's correct.**

Q. For example, like a knee? Is that, would that be the type of instrument you can imagine?

A. A knee or a fist.

Q. You think just a punch to the stomach is going to cause that type of hemorrhage?

A. It can if you're strong enough, yes.

(RT. 636-38)(emphasis added).

Both the trial court and this Court relied upon Dr. Riddick's testimony to support the finding of the HAC aggravator. In its sentencing order, the trial court stated, "Dr. Leroy Reddick agrees that the victim did not go peacefully to her death. He further agrees strangulation could have been from the front and back of victim's neck." (R2. 3012). And in its opinion on direct appeal, this Court stated:

> 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.

Orme, 25 So. 3d at 551. As with Harmor, resentencing counsel's presentation of Dr. Riddick constitutes deficient performance, resulting in a loss of credibility with the jury, and providing additional support for an aggravating circumstance.[33]

While severely damaging Mr. Orme's case through a

[33]Upon reflection Stone was "very disappointed in Riddick's performance." (PC-R2. 3057). Even before presenting Dr. Riddick's testimony Stone believed it was "risky" to count and recount the blows to the victim (PC-R2. 3057-58). And, Stone was surprised by Dr. Riddick's testimony that the blows likely took 3 to 4 minutes (PC-R2. 3058). Stone also acknowledged that adding to the cause of death didn't make Mr. Orme's case for a life sentence "better" (PC-R2. 3076).

poorly coordinated defense, Mr. Orme's resentencing counsel exacerbated the matter by failing to present a significant portion of the testimony and evidence which this Court had found undermined confidence in the outcome of the prior sentencing proceeding. Resentencing counsel called two mental health experts, Drs. Herkov and Maher, who had testified for the defense at Mr. Orme's original postconviction evidentiary hearing and testified to Mr. Orme's bipolar disorder. Because the jury was informed that no other experts other than Dr. Walker found Mr. Orme to be bipolar, this omission contributed to the defense being unable to establish the critical mitigating circumstance that Mr. Orme suffered from bipolar disorder.

Resentencing counsel, along with the two mental health experts they presented, were seemingly unaware of Drs. Warriner and McClane's postconviction testimony. During the State's cross examination of Dr. Maher, the prosecutor incorrectly established that other than Dr. Walker, Drs. Maher and Herkov were the only two experts to find that Mr. Orme is bipolar:

> Q. After Dr. Walker saw him over there, sir, there were other psychologists that had an opportunity to interview him early on in this case, would you agree?
>
> A. I don't know the specifics.
>
> Q. Specifically Dr. Warriner evaluated him, didn't he, sir, Clell Warriner?
>
> A. I need a moment to try to remember the name. Maybe if you could put that in context for me.
>
> Q. Dr. Clell Warriner, I believe that would have been - -
>
> A. Do you know when you saw him or where?

Q. It would have been ‘92, ‘93, sir, over at the Bay County Jail?

A. If that was the Bay Medical Records I have reviewed those. I’m sorry, I don’t remember that name.

Q. **Fair enough. What about Dr. McClain, do you remember that name?**

A. **Yes.**

Q. **He evaluated the defendant in this case?**

A. **Yes, I’m aware of that.**

Q. **And he did not diagnose him as having bipolar disorder, did he, sir?**

A. **No, he did not.**

* * * *

Q. And would you agree with me, sir, that between 1993, May of 1993 and March of 1995 he saw five different doctors on a total of seven times?

A. I don’t recall the numbers but I do know that there were a number of medical screenings or contacts, yes.

Q. If I throw out some of these names do you think you would recognize them or not?

A. I don’t know.

Q. You will agree that there was a number of doctors, as many as five and on seven different occasions, seven different visits or evaluations?

A. I certainly wouldn’t dispute that. I know that when he first went into prison system he was evaluated to some degree in some manner by a number of medical professionals.

Q. And they diagnosed him with things running from, running from like major depression to - - well, looks like he is pretty consistent there, major depression, Attention Deficit Disorder, cocaine dependence. You recall those?

A. Yes.

Q. But not a single diagnosis for bipolar

disorder among those psychologists or psychiatrists?

A. That's, I recall that, yes.

Q. So if I've got it correctly then, sir, before the murder in this case he was not treated or diagnosed for this bipolar disorder?

A. That's correct. He was, his depression was identified but the bipolar disorder was not.

Q. A few months after this, either, I believe it was June of '92, Dr. Walker saw him and prescribed, diagnosed it as bipolar and prescribed Lithium?

A. Yes.

Q. He took the Lithium for about four months?

A. I don't recall how long he took it for, I knew it was long enough to have an idea of how it was affecting him but not a long period of time.

Q. And the, sir, after that those other doctors, as well as Dr. McClaren and Dr. Prichard, you've had a chance to review their reports?

A. I also reviewed Dr. Prichard's report, yes.

Q. **And other than Dr. Walker only you and Dr. Herkov have opined that he had this bipolar disorder?**

A. **That's the best of my understanding, yes.**

(RT. 582-85)(emphasis added). Similarly, during Dr. Herkov's testimony, the following was elicited on cross examination:

Q. Okay, fine, thank you. **After Dr. Walker saw him Dr. Clell Warriner, a local psychologist saw him also, didn't he?**

A. **I think that may be correct, yes.**

Q. **Okay. And he didn't diagnose the defendant as having bipolar disorder, did he, sir?**

A. **No.**

Q. And after that Dr. McClain another psychiatrist had the opportunity to evaluate the defendant, is that correct?

A. Yes, I believe so.

Q. **And Dr. McClain did not diagnose him as having a bipolar disorder, did he?**

A. **That's correct.**

(RT. 954)(emphasis added). Of course, this was not accurate in the least.[34] But resentencing counsel failed to present anything to rebut this. There was no reasonable strategy for failing to apprise the jury of Drs. Warriner and McClane's diagnosis of bipolar. As a result of resentencing counsel's deficient performance, the jury was left unaware that in actuality, five doctors, including Drs. Warriner and McClane, had found that Mr. Orme suffered from a bipolar disorder.[35] And because of

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[34]Dr. Warriner testified at the original postconviction evidentiary hearing that he was not asked to provide a diagnosis at trial; he was merely asked to describe Mr. Orme's symptoms (PC-R. 1765, 1767). Dr. Warriner testified that had he been asked to provide a diagnosis, he would likely have diagnosed Mr. Orme with "bipolar disorder, mixed type." Orme, 896 So. 2d at 734. Dr. McClane testified at the original postconconviction evidentiary hearing that had he been provided with relevant background information, he would have diagnosed Mr. Orme as probable bipolar in a depressed phase. Id.

[35]Additionally, the jury was left unaware of the fact that following Dr. Walker's issuance of medication to Mr. Orme specifically to treat bipolar disorder, the prescriptions for the medication were renewed by two subsequent doctors at the jail (PC-R2. 2908, 2910). As Dr. Maher testified at the postconviction evidentiary hearing, "And where you have a regime of medications which is particularly powerful and potentially dangerous, the fact that the medications were renewed is a strong indicator that both of these doctors who renewed the medications believed that it was a proper treatment for this individual" (PC-R2. 2910-11).

resentencing counsel's ineffective assistance, this inaccurate notion was relied upon in the trial court's sentencing order. With regard to whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, the court found:

> The defendant's mental health experts, Dr. Michael Maher and Dr. Michael Herkov diagnosed the defendant with bipolar disorder and poly substance abuse dependency. The State presented the following mental health testimony from before this murder to present: Dr. Hord, **Dr. Warriner**, Dr. Harry McClarin, Dr. Pritchard. They did not find a bipolar disorder as a diagnosis for the defendant.

(R2. 3013-14)(emphasis added). Thus, as a result of resentencing counsel's deficient performance, the trial court found that Mr. Orme didn't suffer from a bipolar disorder:

> Again, after reviewing all the expert testimony of the mental health professionals, the Court finds **the defendant did not suffer from a bipolar disorder. Therefore, this mitigating circumstance does not exist and the Court gives it no weight.**

(R2. 3016)(emphasis added). Given that this Court had previously found the combined testimony of the four experts as to Mr. Orme's bipolar disorder had undermined confidence in the outcome of the original sentencing proceeding, resentencing counsel's failure to even establish the existence of this mitigating factor constitutes deficient performance which prejudiced Mr. Orme.

Additionally, resentencing counsel appeared to be unprepared when presenting the testimony of Drs. Herkov and Maher. For instance, with regard to Dr. Herkov, the State noted that he never testified to the statutory mitigators (RT. 1201). A review of Dr. Herkov's testimony confirms the State's assertion.

However, the fact of the matter is that Dr. Herkov did testify at the postconviction evidentiary hearing as to the existence of both statutory mental health mitigating factors (PCR. 1816-17). Yet, as a result of resentencing counsel's incompetence, these statutory mitigators were not established through Dr. Herkov. Again, resentencing counsel's deficient performance prejudiced Mr. Orme.

Further, a review of Drs. Herkov and Maher's testimony from the postconviction evidentiary hearing demonstrates that their testimony was much more detailed, cohesive and informative than at the resentencing.[36] Had their testimony been presented in a

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[36]Unlike at the resentencing, the testimony of Drs. Herkov and Maher at the postconviction evidentiary hearing was persuasive and well-supported. As this Court noted in its postconviction opinion:

> Dr. John Herkov, a psychologist specializing in addiction, evaluated Orme in 2001. He diagnosed Orme with "bipolar disorder, not otherwise specified." He stated that given the nature of the illness, it was not unusual for a person to be diagnosed with bipolar at thirty years of age. He stated that a person with bipolar has periods of relatively normal behavior, but there are also manic phases and depressive phases, and a person can cycle through these phases rapidly or slowly. He noted a history of mood swings and other behaviors indicative of bipolar disorder. In addition to the anecdotal history, Dr. Herkov considered Dr. Walker's diagnosis and the prescriptions for Lithium, Xanax, and Prozac, and Orme's description of certain sexual compulsions indicative of manic behavior. He also supported his diagnosis by post-trial medical records showing Orme had seen mental health providers in prison for grandiose manic behavior, auditory hallucinations, depression, irritability, compulsiveness, and mood instability, all symptoms consistent with bipolar disorder. Dr. Herkov additionally testified that there is a link between bipolar disorder and drug abuse, stating that persons suffering from bipolar disorder have a higher incidence

similar manner at the resentencing, they would have had more credibility with the jury and there is a reasonable probability that Mr. Orme's bipolar disorder would have been established.

At the time of Mr. Orme's resentencing proceedings, counsel had an absolute obligation to investigate and prepare mitigation for his client. Wiggins v. Smith, 123 S.Ct. 2527 (2003); Rompilla v. Beard, 125 S.Ct. 2456, 2465-6 (2005); Porter v. McCollum, 130 S.Ct. 447 (2009); Sears v. Upton, 130 S.Ct. 3529 (2010). The posture that Mr. Orme's case is in, namely that the 2007 resentencing proceedings in contrast with the 2001 postconviction evidentiary hearing produced diametrically opposite results, is a product of resentencing counsel's ineffective assistance. Resentencing counsel failed to provide pertinent evidence and testimony to the jury which this Court had found undermined

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of substance abuse than anyone else.

> Dr. Michael Maher, a forensic psychiatrist, also testified. He saw Orme in 2001 and reviewed Orme's medical records. He stated he would diagnose Orme with polysubstance abuse and bipolar disorder. When asked why, after all the drug treatment and counseling Orme had received prior to committing this murder, no one before Dr. Walker had made this diagnosis, Dr. Maher stated that substance abuse treatment gives little focus to the underlying psychiatric disorders. He opined that Orme's relative stability since being in prison is attributed to the fact that he is confined for twenty-three hours a day and there is a lack of stimuli. The prison medical records do show, however, that Orme suffers insomnia and has been prescribed the psychotropic drug Mellaril, which is indicative of bipolar disorder.

Orme, 896 So. 2d at 734-35. While this Court determined that confidence was undermined as a result of this mitigation, it subsequently found the mitigation presented by resentencing counsel to be "relatively weak." Orme, 25 So. 3d at 544.

confidence in the outcome of the original proceedings. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Orme's sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the resentencing would have been different if the evidence discussed herein had been presented. Strickland, 466 U.S. at 694.

Additionally, resentencing counsel infused the proceedings with wild, speculative theories and self-defeating testimony and argument. "'Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories.'" Hill v. Lockhart, 28 F.3d 832, 837 (8th Cir. 1994) (quoting Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993)). To be effective, counsel must present "an intelligent and knowledgeable defense." Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). Here, "[C]ounsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the resentencing]." Coss v. Lackwanna County District Attorney, 204 F.3d 453, 463 (3rd Cir. 2000). Mr. Orme was prejudiced as a result of counsel's deficient performance.

C. THE CIRCUIT COURT'S ORDER

In its order addressing Mr. Orme's allegations of ineffective assistance of counsel, the circuit court separated

Mr. Orme's claim into numerous sub-claims. With regard to resentencing counsel's residual doubt argument, the circuit court stated:

> Mr. Ramey and co-counsel, Mike Stone, understood that the Defendant had already been convicted of sexual battery and they could not argue residual doubt. (Id. at 262-63.) However, they knew the State had to prove the statutory aggravators (including that the murder was committed in the course of a sexual battery) beyond a reasonable doubt, so their plan was to 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. (Id. at 262-64.) Their plan was to do this in three ways: (1) show that the Defendant did not have any injuries; (2) show a lack of evidence on the victim that one would normally see in a violent sexual battery, and; (3) provide a simple explanation for the Defendant's DNA being under the victim's fingernail. (Id. at 264, 69.)[4]

(PC-R2. 368)(footnote omitted). The circuit court found that this strategic decision was not unreasonable (PC-R2. 368). While recognizing that residual doubt is not a mitigating circumstance, the circuit court stated that it was clear that counsel was neither arguing that Mr. Orme was not guilty of sexual battery nor arguing residual doubt as a mitigating circumstance (PC-R2. 368-69). Instead, according to the circuit court, counsel was attempting to properly challenge the State's burden to prove beyond a reasonable doubt that the murder was committed during the course of a sexual battery (PC-R2. 369).

Mr. Orme submits that the circuit court's order is erroneous. Contrary to the circuit court's determination, trial counsel's opening statement demonstrates that he was attempting to raise doubt about Mr. Orme's guilt. Yet a defendant's right to present evidence challenging an aggravating circumstance in a

resentencing proceeding does not allow the defendant to re-litigate a jury's previous finding of guilt. See Duest v. State, 855 So. 2d 33, 40 (Fla. 2005).

More obvious is the fact that throughout the proceedings, resentencing counsel asserted that Mr. Orme engaged in consensual sex with the victim, thus there was no battery. Indeed, during the postconviction evidentiary hearing, Stone testified to his trial strategy that the sex could have been consensual (See e.g., PC-R2. 3054-55, 3068). While Stone was familiar with this Court's repeated caselaw that lingering doubt is not an issue, he stated: "Well, they can say it is not an issue but it is still an issue to the jury, I think. It's got to be if you take, if you take this seriously and I think jurors do." (PC-R2. 3074-75). Moreover, Ramey testified that in defending Mr. Orme he wanted to inject doubt into the jury's mind – doubt as to Mr. Orme's guilt, doubt as to whether Mr. Orme had consensual sex with Lisa Redd, doubt as to whether Mr. Orme committed the crime for pecuniary gain (PC-R2. 3095-97). "...[W]e tried to plant the seed in the jurors' mind and then let it harvest itself based on the evidence and the facts that came out." (PC-R2. 3095). Thus, despite the circuit court's opinion to the contrary, trial counsel admittedly attempted to present lingering doubt, which does not constitute permissible mitigation in Florida. See King v. State, 514 So. 2d 354, 358 (Fla. 1987). Presenting impermissible evidence in the hope that the jury might disregard the law does not constitute a reasonable strategic decision. See e.g., Hardwick v. Crosby, 320 F.3d 1127, 1185-86 (11th Cir. 2003).

Additionally, both resentencing counsel and the circuit court were under the assumption that the State had to again prove the sexual battery aggravating circumstance beyond a reasonable doubt. Based on this notion, resentencing counsel claimed to have made a strategic decision and the circuit court found counsel's actions to be reasonable. Overlooked in this rationale is the fact that since Mr. Orme was convicted of sexual battery at the guilt phase, it had already been proven beyond a reasonable doubt. This point has been made by this Court in response to claims brought pursuant to Ring v. Arizona, 536 U.S. 584 (2002), in instances where the defendant had a prior violent felony conviction or the guilt phase jury convicted the defendant of sexual battery or some other contemporaneous crime. In Robinson v. State, 865 So. 1259, 1265-66 (Fla. 2004), for example, this Court stated:

> In cases involving two of the aggravating factors found in the case at bar (prior violent felony and that the murder was committed during the course of a sexual battery and kidnapping), **this Court has also relied on the existence of those factors when denying *Ring* claims. This Court has held that the aggravators of murder committed "during the course of a felony" and prior violent felony involve facts that were already submitted to a jury during trial and, hence, are in compliance with *Ring*.** *See Owen v. Crosby*, 854 So.2d 182, 193 (Fla.2003) (rejecting the defendant's *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), claim in light of *Ring* on the basis of *Bottoson*, but noting that the "during the course of a felony" and the prior violent felony aggravators "involve[d] circumstances that were submitted to the jury and found to exist beyond a reasonable doubt"); *Banks v. State*, 842 So.2d 788, 793 (Fla.2003) (denying *Ring* claim pursuant to *Bottoson*, but pointing out that the "during the course of a felony" and the prior violent felony aggravators also justified denying the claim); *see also Anderson v. State*, 863 So.2d 169 (Fla.2003) (denying *Apprendi/Ring* claim consistent with

> similar Florida cases, also because the jury unanimously recommended death and the trial judge found the aggravator of prior violent felony), *petition for cert. filed,* No. 03-8065, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (U.S. Dec. 18, 2003); *Rivera v. State,* 859 So.2d 495, 508 (Fla.2003) (finding that Rivera was not entitled to relief based on *Bottoson,* the fact that he had a unanimous jury death recommendation, and the existence of the two aggravators prior violent felony and murder committed "during the course of a felony").
>
> In short, **this Court has rejected similar *Ring* claims and has held that the aggravators of prior violent felony and "murder committed during the course of a felony" are exceptions to a *Ring* analysis because they involve facts already submitted to and found by a jury.**

(Emphasis added).[37] Thus, contrary to the circuit court's order and the basis for which resentencing counsel claimed strategy, the State was not required to again prove the sexual battery aggravator beyond a reasonable doubt. Resentencing counsel's performance was deficient and their ignorance of the law is no defense. Brewer v. Aiken, 935 F. 2d 850 (7th Cir. 1991). See also Hardwick v. Crosby, 320 F.3d 1127, 1185-86 (11th Cir. 2003) "[S]o called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." (citation omitted)(note omitted).

As to prejudice, the circuit court found that even if counsel's decision was unreasonable, Mr. Orme has not established that but for counsel's errors he wouldn't have been sentenced to

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[37]Indeed, in Mr. Orme's postconviction appeal, this Court rejected his Ring claim in part on the basis that "a prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury clearly satisfies the mandates of the United States and Florida Constitutions." Orme, 896 So. 2d at 737.

death (PC-R2. 369). The court reasoned that had counsel not tried to diminish the State's ability to meet its 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 (PC-R2. 369).

The court's analysis, premised upon the erroneous assumption that the sexual battery aggravator needed to again be proven beyond a reasonable doubt, wholly misses the point. By arguing that the sex was consensual or inferring that Mr. Orme was not guilty, the defense lost all credibility in front of the jury. It is no coincidence that the jury's recommendation went from 7-5 at the original sentencing to 11-1 at the resentencing. Counsel's incongruous, incredulous and offensive argument gave more weight to the aggravation in support of a death sentence.

Moreover, as it has done throughout its order in addressing Mr. Orme's ineffective assistance of counsel claims, the circuit court conducted no cumulative analysis and instead only considered whether Mr. Orme's individual assertion could eliminate an aggravating factor. This is not the proper Strickland analysis. Rather, as the United States Supreme Court has repeatedly stated, a reviewing court must "consider the totality of the available mitigation evidence both that adduced at trial, and the evidence adduced in the habeas proceeding and reweig[h] it against the evidence in aggravation." Porter, 130 S. Ct. at 453-54. This analysis didn't occur in Mr. Orme's case, as the circuit court here addressed each claim of ineffective

assistance individually against the the aggravation. Mr. Orme submits that under a proper Strickland analysis, it is clear that confidence is undermined in the outcome.

The circuit court next considered trial counsel's statements regarding the DNA during his opening argument (PC-R2. 369). The circuit court found that "[a]lthough 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 (i.e., there was DNA from someone other than the Defendant)- not that none of the DNA found belonged to the Defendant." (PC-R2. 369). Thus, according to the circuit court, this foreign DNA cast doubt on the State's sexual battery aggravator by showing that the DNA could have gotten under the victim's fingernails for reasons wholly unrelated to a sexual battery (PC-R2. 369). The court concluded that it was not unreasonable for counsel to make these statements to the jury (PC-R2. 370). The court found no prejudice on the basis that "the only explanation and evidence regarding how the DNA got underneath the victim's fingernails would have been from the State's DNA expert." (PC-R2. 370).

Mr. Orme submits that the circuit court's determination is erroneous. The circuit court's suggestion that the evidence was presented in order to demonstrate that Mr. Orme's DNA could have gotten beneath Ms. Redd's fingernails by some mundane act is wholly unsupported by the record. As with the first sub-claim, it is clear that resentencing counsel was improperly attempting to raise lingering doubt, see See King v. State, 514 So. 2d 354,

358 (Fla. 1987), or was under the misguided notion that the State had to again prove the valid conviction beyond a reasonable doubt. Further, Ramey's argument was based on a third party's DNA under the victim's fingernails, a lack of Mr. Orme's DNA under the victim's fingernails,[38] as well as a lack of scratches and bruises on Mr. Orme. Nowhere in his opening statement did Ramey mention other DNA under the victim's fingernails matching Mr. Orme. The circuit court overlooked or ignored the actual statements Ramey made to the jury and instead its determination resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of his deliberations. Wiggins, 539 U.S. at 526-27.[39]

As a result of its erroneous factual determination, the circuit court's prejudice analysis ignored the fact that Ramey's opening statement was directly refuted by the defense's own DNA analyst who testified that Mr. Orme's DNA was in fact present under the victim's fingernails. Harmor's testimony was so

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[38]Ramey told the jury: "We have DNA evidence on the fingernail scrapings from Ms. Redd. There is human DNA under her fingernails. It is not Roderick Michael Orme's DNA under her fingernails. That's what the experts will say that did the DNA testing in this case." (T2. 39). Ramey later added, "There are doctors who will come into this courtroom and say that the fingernail scrapings under her nails was not Mike Orme, it was somebody else, a third party DNA. She had scratched somebody but we know without any question it wasn't Michael Orme." (R2. 40).

[39]A review of Ramey's opening statement makes clear that he likely had no idea what the DNA evidence actually showed. This is not surprising give the fact that Stone, who presented Harmor's testimony, testified at the evidentiary hearing that he didn't recall a lot of conversation with Ramey about the DNA expert's findings and the way to coordinate that presentation between opening and closing (PC-R2. 3078).

favorable to the State that the prosecutor made a chart of his findings and submitted it as an exhibit to the jury (T2. 873, 884). Moreover, Harmor's testimony was so favorable to the State that the trial court actually relied on it as supportive of finding the aggravating circumstance that Mr. Orme murdered the victim during the course of a sexual battery (R2. 3010-11). Thus, in addition to losing credibility with the jury on the basis of making such an inept argument, counsel actually aggravated Mr. Orme's crimes.

With regard to resentencing counsel's alleged inconsistent theories which were presented to the jury during the opening statement and then during the closing argument, the circuit court determined that "[a] review of the opening and closing statements conclusively refute this allegation by establishing there was no inconsistency between the two concerning the Defendant's guilt." (PC-R2. 370). This is so, according to the circuit court, because Ramey acknowledged to the jury that his client had been found guilty of first degree murder, sexual battery and robbery (PC-R2. 370).

Mr. Orme submits that the circuit court's determination is erroneous. First, while Ramey acknowledged that his client had been found guilty of these crimes, as he had to do, this does not change the fact that Ramey continually attempted to "plant the seed" that his client didn't commit the crimes. Indeed the circuit court ignored the remainder of Ramey's opening where he stated, "You will find out from the people who are going to be in this courtroom, in this illumination on that witness stand, under

oath swearing to tell the truth, there wasn't a single mark on Mr. Orme at the hospital, not a single mark." (RT. 38). The circuit court likewise ignored Ramey's statements that there was not a single bruise on Mr. Orme's fingers or knuckles, that there was DNA not matching Mr. Orme under the victim's fingernails, and that Mr. Orme didn't have scratches on his body (RT. 39-40). Additionally, the circuit court ignored the State's closing argument expressing confusion over the defense's strategy:

> Are we now trying to say, no, he didn't attack her. What's the position? He attacked her in a rage, he attacked her because he was depressed, he attacked her because he was manic, he attacked her because he was on drugs, or he didn't attack her, which one is it?

(RT. 1176-77). As the prosecutor observed, "The only reason to deny those is if you are denying that you were the one doing the attack." (RT. 1177).

While Ramey was unsuccessfully attempting to "plant the seed" of doubt, Stone told the jury in his closing that Mr. Orme accepted responsibility for the victim's death and stated, "We are not contending for a moment that Mike Orme did not kill Lisa Redd." (RT. 1226-27). Contrary to the circuit court's determination, Ramey and Stone's arguments contradicted each other. The fact is that there was a lack of communication and cohesion amongst the defense team. There was no discussion as to the substance of what was going to be in Ramey's opening statement (PC-R2. 2862). According to Butters, "[W]e never heard it, we never saw an outline of it, we never, we didn't know what Russ was going to say." (PC-R2. 2862). There was no coordinated

strategy (PC-R2. 2882).[40]

As to resentencing counsel's theory that Mr. Orme and the victim had consensual sex, the circuit court found that "[b]ased on Mr. Ramey's testimony at the evidentiary hearing, it is clear that the decision to pursue the theory that the sex was consensual was part of the larger defense plan to inject as much doubt into the juries mind to diminish the State's ability to prove beyond a reasonable doubt the existence of the sexual battery aggravator." (PC-R2. 371). According to the circuit court, had counsel not presented this theory in an attempt to diminish the State's ability to prove the sexual battery aggravator, 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 (PC-R2. 371).

Mr. Orme submits that the circuit court's determination is erroneous. As previously stated, both the circuit court and resentencing counsel were under the erroneous assumption that the State had to again prove the sexual battery aggravating circumstance beyond a reasonable doubt at the resentencing. Based on this notion, resentencing counsel claimed to have made a strategic decision and the circuit court found resentencing counsel's actions to be proper. Yet, the law is clear that since Mr. Orme was convicted of sexual battery at the guilt phase, it

[40]Stone similarly testified that as far as the opening statement and the closing statement, there wasn't much of a meeting or discussion about what issues they would discuss or integrate with each other (PC-R2. 3074).

had already been proven beyond a reasonable doubt. See e.g., Robinson v. State, 865 So. 1259, 1265-66 (Fla. 2004).

Moreover, the circuit court's factual determination overlooked Ramey's actual language to the jury which demonstrates that he was simply unprepared and/or had no idea what the evidence would show. Indeed, Ramey told the jury: "There will be doctors who are qualified, who will come before this court and testify to you that there is no evidence that this sexual act was anything other than consensual." (T2. 40). Most obviously, and uncontrovertedly, Ramey used the plural of doctor, meaning more than one would tell the jury that the sexual act was consensual. This was incorrect. Further, Ramey left no room for the possibility of the consensual issue being a "toss up", as the defense's own witness testified, because he said that there was no evidence to suggest that the sexual act was not consensual.

Additionally, as Mr. Orme has previously explained, the circuit court's prejudice analysis was erroneous in that its consideration was based on whether Mr. Orme could eliminate an aggravating factor. A proper analysis would have considered the credibility that resentencing counsel would have had with the jury in the absence of their incredulous arguments and theories; the aggravating factors without the added weight that resentencing counsel contributed to them; the mitigation that was presented at the resentencing; and the mitigation that should have been presented had resentencing counsel been adequately prepared. Under these circumstances, Mr. Orme submits that there is a reasonable probability that the outcome of the proceedings

would have been different.[41]

In addressing trial counsel's decision to call Dr. Riddick as a witness, the circuit court determined that the use of such testimony was a reasonable strategy designed to weaken the State's theory for the HAC aggravator (PC-R2. 372). While acknowledging that portions of Dr. Riddick's testimony on cross examination were unfavorable to the defense, the circuit court stated that it would be unrealistic to find defense counsel ineffective simply on the grounds that part of a witness's testimony on cross examination was not beneficial to the defense (PC-R2. 372). Additionally, the court determined that any negative impact Dr. Riddick's testimony may have had was greatly outweighed by its value in rebutting the State's expert, weakening evidence put on by the State in support of the HAC aggravator, and furthering the defense's theories (PC-R2. 372).

Mr. Orme submits that the circuit court's determination is erroneous. The circuit court in its own order stated that there was no prejudice in any event because the evidence presented by the State, specifically Dr. Lauridson's testimony, proved the HAC and sexual battery aggravators beyond a reasonable doubt (PC-R2. 373). Thus, the only thing that Dr. Riddick's testimony could do was further aggravate the crime and alienate the jury.[42] Indeed,

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[41]Moreover, the errors that this Court found found on appeal yet dismissed as harmless in light of the "relatively weak mitigation", Orme, 25 So. 3d at 544, 545, 548, 549, would no longer be harmless.

[42]Again, with regard to the sexual battery, Mr. Orme had already been convicted of this crime.

Dr. Riddick's overall testimony was so unfavorable to Mr. Orme that the prosecution on cross examination utilized it to enhance the HAC aggravator (RT. 636-38). Further, both the trial court and this Court relied upon Dr. Riddick's testimony to support the finding of the HAC aggravator (See R2. 3012; Orme, 25 So. 3d at 551). As Butters testified, Riddick's testimony was a colossal disaster (PC-R2. 2877).

Clearly, the defense had no game plan (PC-R2. 2882). Butters didn't know why Dr. Riddick was called, other than perhaps Ramey told the jury that they were going to call him (PC-R2. 2865). According to Butters, Riddick 'certainly didn't have anything helpful to say." (PC-R2. 2865). Stone, meanwhile, testified at the evidentiary hearing that in his opinion "there were no sexual injuries" to the victim and that "both of these people were very athletic, very strong and, you know, I don't know what their preferences in sex were but I expect that was part of [Dr. Riddick's] analysis, as well. You know we're not talking about old people or something like that." (PC-R2. 3068). Thus, without a shred of evidence, resentencing counsel determined that because Mr. Orme and the victim weren't old and were strong, it was reasonable to suggest that the sexual activity, including the anal penetration without lubrication and semen in Redd's mouth, vagina and anus, and in the context of Redd's injuries, was consensual. Resentencing counsel's belief and suggestion was totally unreasonable and highly offensive.

The presentation of Dr. Riddick constitutes deficient performance, resulting in a loss of credibility with the jury,

and providing additional support for an aggravating circumstance. Contrary to the circuit court's determination, the reasonable course of action, which was sufficient to prove the difficult standard of prejudice in Mr. Orme's postconviction proceedings, was to present strong, well-supported mitigation that would have established statutory and non-statutory mitigation and diminished the weight of the aggravation.

With regard to resentencing counsel's presentation of mental health mitigation, the circuit court found the decision to not call Dr. McClane or read Dr. Warriner's testimony was a reasonable trial strategy (PC-R2. 374). According to the circuit court, there was not a reasonable likelihood that the inclusion of two additional experts who believed that Mr. Orme was bipolar would have strengthened the mitigators to such a level that they would have outweighed the cumulative weight of the aggravators (PC-R2. 374). Additionally, the circuit court found that "[w]hile counsel may not have explicitly asked either expert whether the Defendant met the definition of the statutory mitigators, a review of {sic} record indicates that the gravamen of both experts' testimony was that the statutory mitigators did apply in this case." (PC-R2. 375). Finally, with regard to the differences between Drs. Herkov and Maher's testimony at the resentencing in comparison to the postconviction evidentiary hearing, the circuit court deemed these to be stylistic differences, thus counsel couldn't be unreasonable (PC-R2. 376).

Mr. Orme submits that the circuit court's determination is erroneous. With regard to Drs. Warriner and McClane, the circuit

court ignored Butters' testimony that there was no strategy not to raise on redirect that they had also diagnosed Mr. Orme as bipolar (PC-R2. 2869). Even Stone acknowledged that assuming that he had a diagnosis by Drs. McClane and Warriner of bipolar, there would be no reason not to object to the State's question (PC-R2. 3084).

Further, the circuit court ignored the faulty premise on which Stone supposedly based his strategy in not apprising the jury that these experts found Mr. Orme to be bipolar. Stone thought for some reason that Drs. Warriner and McClane testified at the 3.850 hearing that the information that was being "vouchsafed" to them would have made a difference in their diagnosis, but that it may not actually have been made available to them (PC-R2. 3062-63). Thus, Stone didn't see it that they diagnosed Mr. Orme as bipolar in their 3.850 testimony (PC-R2. 3062).

Yet, Stone's belief is refuted by the record in this case. Dr. Warriner testified at the original postconviction evidentiary hearing that had he been asked to provide a diagnosis, he would likely have diagnosed Mr. Orme with "bipolar disorder, mixed type." Orme, 896 So. 2d at 734. Similarly, Dr. McClane testified that had he been provided with relevant background information, he would have diagnosed Mr. Orme as probable bipolar in a depressed phase. Id. Indeed, this Court relied in part on their testimony in finding that confidence was undermined in the result of Mr. Orme's original penalty phase. Id. at 736. Contrary to the circuit court's determination, resentencing counsel's

decision was unreasonable.

Moreover, as Dr. Warriner was deceased, his original penalty phase testimony and his testimony from the 2007 postconviction evidentiary hearing could have been read to the jury at the penalty phase, just as the prosecution had several witnesses' testimony read to the jury from the original trial and penalty phase proceedings. Yet Stone testified that he never made an attempt to see if he could have Dr. Warriner's testimony read back to the jury due to his death (PC-R2. 3065). Again, this omission doesn't constitute a reasonable strategic decision.

Additionally, despite resentencing counsel's statements to the contrary, there is no indication that Dr. McClane was even contacted in this case. The record reflects that resentencing counsel did not request funds for Dr. McClane or request a continuance in order to cure any problems with scheduling. And Butters, who provided all of the documents to Drs. Maher and Herkov, testified that she didn't recall ever contacting Dr. McClane or sending him any materials (PC-R2. 2892). Moreover, she didn't recall ever discussing Dr. McClane with either Stone or Ramey (PC-R2. 2892).

Resentencing counsel should have presented the testimony of Drs. Warriner and McClane. At a minimum, they should have rehabilitated Drs. Maher and Herkov on redirect with their diagnoses of bipolar disorder. As a result of resentencing counsel's deficient performance, the jury was left unaware that in actuality, five doctors, including Drs. Warriner and McClane,

had found that Mr. Orme suffered from a bipolar disorder.[43] And because of resentencing counsel's ineffective assistance, this inaccurate notion was relied upon in the trial court's sentencing order. Given that this Court had previously found the combined testimony of the experts as to Mr. Orme's bipolar disorder had undermined confidence in the outcome of the original sentencing proceeding, resentencing counsel's failure to even establish the existence of this mitigating factor constitutes deficient performance which prejudiced Mr. Orme.

With regard to the statutory mitigators, while the circuit court was of the opinion that their existence could be somehow inferred from the testimony, the individuals on the jury never actually heard that Dr. Herkov found them. This point was driven home by the prosecutor when he stated on several occasions that Dr. Herkov never testified to the statutory mitigators. It is unreasonable to believe that the jury took it upon themselves to infer that the statutory mitigators existed under these circumstances. Further, as Butters testified, there was no strategy in not asking Dr. Herkov about the statutory mitigators applying in Mr. Orme's case (PC-R2. 2870). And as Stone acknowledged, he had no strategic reason for Dr. Herkov not to testify to the two statutory mitigators (PC-R2. 3085). "I don't know if I succeeded or not but I certainly would want to get

[43]Further, the jury was left unaware of the fact that following Dr. Walker's issuance of medication to Mr. Orme specifically to treat bipolar disorder, the prescriptions for the medication were renewed by two subsequent doctors at the jail (PC-R2. 2908, 2910).

those in." (PC-R2. 3085).

Additionally, the circuit court failed to recognize that what it deemed to be stylistic differences in actuality are pertinent reasons as to why the mitigation that caused this Court to determine undermined prejudice in the outcome later resulted in this Court finding the mitigation to be relatively weak. Contrary to the circuit court's determination, the difference in testimony by the mental health experts from the postconviction proceedings in comparison to the resentencing is significant. For instance, two statutory mitigating factors were found by Dr. Herkov instead of none; there was support from at least five mental health experts that Mr. Orme is bipolar instead of three; there was testimony that two additional doctors renewed Mr. Orme's prescription to treat bipolar, thus demonstrating that these doctors had in effect confirmed the diagnosis (PC-R2. 2920); there was a thorough explanation as to why the DOC incorrectly labeled Mr. Orme as having ADD (PC-R2. 3035-36); and there was testimony explaining that because Mr. Orme had at least one manic or hypomanic episode, he could no longer be diagnosed with major depression and instead would either be Bipolar I or II (PC-R2. 2967, 3034-35). Further, the testimony from the postconviction evidentiary hearings established that the medication which was given to Mr. Orme at DOC is consistent with treating bipolars (PC-R2. 2996), and in fact a DOC psychological specialist indicated that Mr. Orme had hypomanic symptoms (PC-R2. 2964-65). There was also testimony explaining that a structured prison environment generally has the effect of tending to make a

person more depressed and normal and less manic (PC-R2. 2917), and that "it is very common that an individual will experience predominantly manic episodes in their early life and subsequently depressive episodes" (PC-R2. 2954). And there was testimony that while psychological training is necessary to identify a manic episode, Mr. Orme discontinued any psychological treatment in 1995 (PC-R2. 2954).

It was resentencing counsel's obligation to ensure that valid, reliable mitigation was presented. Yet here, counsel failed to adequately prepare the experts and correct the inaccurate testimony before the jury. Mr. Orme submits that when a proper analysis of prejudice under Strickland is conducted, it is clear that there is a reasonable probability that he would have received a life sentence. Relief is warranted.

ARGUMENT II

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

This Court has held that when improper conduct by a prosecutor "permeates" a case, relief is proper. Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Garcia v. State, 622 So. 2d 1324 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla.1990). Mr. Orme submits that the State's presentation of improper, inflammatory argument denied him his fundamental right to a fair sentencing proceeding and that resentencing counsel's failure to object

prejudiced their client.

During closing argument, the State urged the jurors to sentence Mr. Orme to death on the basis of numerous impermissible and improper factors. Specifically, the prosecutor attempted to paint a horrifying image of the victim's last moment based on facts not in evidence. Moreover, the prosecutor also violated the Golden Rule by asking the jury to place themselves in the victim's shoes:

> Josh Lee, what did we learn from Josh Lee? Sound proof rooms, **no one, no one, but this Defendant heard 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.

(RT. 1177)(emphasis added).

* * * *

> 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.

(RT. 1184)(emphasis added).

* * * *

> 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 had 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 breathe, 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 never let up, that's assuming he never

> relented, that's assuming he had complte 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.
>
> **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 and endorphins, was she feeling a sense of calm, or was she feeling deep sadness, fear, pain, cruelty, what does our common sense tell us?**

(RT. 1187-88)(emphasis added).

* * * *

> **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.**

(RT. 1211)(emphasis added). Arguments that invite the jury to put themselves in the victim's place are generally characterized as "Golden Rule" arguments and are improper. See e.g., Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). A prosecutor is prohibited from inviting the jurors to imagine the victim's final pain. Bertolotti, 476 So. 2d at 133. Here, the prosecutor not only invited the jury to imagine the victim's final moments, he also instructed them to imagine them during deliberations. Such arguments were condemned by this Court in Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998).

In addition, the prosecutor urged a sentence of death based on the notion that Mr. Orme is inherently evil:

> 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 just sometimes be a crack head, can you just sometimes be a pot head, is it possible and reasonable that normal people go out and decide to become addicts and they take drugs, not intentionally become 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, 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 a 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.

(RT. 1190-91)(emphasis added).

In its order addressing this issue, the circuit court agreed that the prosecutor made an impermissible Golden Rule argument when he asked the jurors to imagine how the victim felt (PC-R2. 379). The circuit court also found that the prosecutor strayed beyond the evidence and any reasonable inferences when arguing that the victim begged Mr. Orme to stop (PC-R2. 379).[44] Yet, the court determined that Mr. Orme failed to establish prejudice as none of the comments, either individually or collectively, rose to the level that would require a mistrial or were so inflammatory that they might have influenced the jury to reach a more severe verdict than it otherwise would have (PC-R2. 379-80).

Mr. Orme submits that the circuit court's determination is

[44]The circuit court found the remainder of the prosecutor's comments to be proper in that they were reasonable inferences based on the testimony, they were relevant to the HAC aggravating factor, or they were in support of argument that the aggravators outweighed the mitigators (PC-R2. 378-80).

erroneous as a matter of law. "When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). Here, the cumulative effect of the State's closing argument was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant, as they did here, when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974). "When core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Wilson v. Kemp, 777 F.2d 621, 627 (11th Cir. 1985). Thus, while singular incidents of impropriety may sometimes not result in a denial of due process, when, as in Mr. Orme's case a certain critical mass of misconduct is reached, due process is thwarted. The prosecutor's numerous improper and inflammatory arguments fatally infected Mr. Orme's sentencing phase and rendered his death sentence unreliable. Resentencing counsel's failure to object prejudiced Mr. Orme. Strickland. Relief is warranted.

ARGUMENT III

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

This Court has repeatedly held that a defendant's remorse

constitutes mitigating evidence. See e.g., Campbell v. State, 571 So. 2d 415, 419 f.n. 4 (Fla. 1990); Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983); France v. State, 970 So. 2d 806 (Fla. 2007); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

In Mr. Orme's case, during voir dire, resentencing counsel began to ask prospective jurors about the issue of remorse as possibly mitigating a death sentence. The State objected to questions about remorse (R2. 4441). The trial court asked if "remorse is non-statutory mitigator?" Resentencing counsel responded by stating, "I think it's certainly something - -". The court, however, refused to allow any inquiry on the basis that questions about remorse were not appropriate during voire dire (R2. 4443).

Subsequently, the prosecutor and the court acknowledged that remorse could be considered as a mitigator in sentencing, and the court held that defense counsel could inquire into remorse. In doing so, however, the court also ruled that if a juror couldn't consider remorse as mitigating, it could only be a basis for a peremptory challenge, not a challenge for cause (R2. 4476).

On direct appeal, appellate counsel asserted that the trial court erred in refusing to allow Mr. Orme to challenge for cause prospective jurors who could not consider remorse as mitigating a death sentence. In addressing the issue, while this Court agreed with appellate counsel's argument, it found that resentencing counsel failed to preserve the issue for appeal "because defense counsel failed to question any of the

prospective jurors about their consideration of remorse as mitigation for the remainder of voir dire after the trial court ruled on the issue." Orme, 25 So. 3d at 543.

Mr. Orme submits that resentencing counsel's failure to preserve this issue resulted in prejudice.[45] In deciding Mr. Orme's appeal, this Court found several instances of error, but it found them to be harmless.[46] When those errors are considered in conjunction with the errors and omissions committed by resentencing counsel, it is clear that Mr. Orme did not receive the fundamentally fair proceeding to which he was entitled under the Eighth and Fourteenth Amendments. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). Relief is warranted.

ARGUMENT IV

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

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of defendant's

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[45]In its order addressing this issue, the circuit court determined that Mr. Orme was required, and failed, to show that an actually biased juror served on the jury, and that evidence of bias was plain on the face of the record (PC-R2. 381). However, the circuit court's determination overlooked the fact that because of trial counsel's deficient performance, there is no record to demonstrate actual bias. Moreover, because of the rules prohibiting counsel from contacting jurors, see Florida Rule of Professional Conduct 4-3.5(d)(4), neither Mr. Orme nor any other capital defendant could meet the unreasonable burden set forth by the circuit court.

[46]See, e.g., Orme, 25 So. 3d at 544, 45, 48, 49.

character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987). Furthermore, the Eighth Amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Thus, consideration of mercy and sympathy in the penalty phase of a capital trial is appropriate. Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985).

In Mr. Orme's case, resentencing counsel attempted to explore the issue of mercy with potential jurors during voir dire:

> 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, 25 So. 3d at 544.

On direct appeal, appellate counsel asserted that the

trial court erred in refusing to allow Mr. Orme to inquire of the prospective jurors as to whether they could consider recommending a life sentence as a matter of mercy even though the aggravating factors outweighed the mitigation. This Court denied the issue, finding that it was not preserved for appeal:

> Orme concedes that the trial court allowed him to question prospective jurors about mercy and he did, in fact, ask 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.[5] **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 of voir dire. Accordingly, relief is not warranted.**

Orme, 25 So. 3d at 544-45(footnote omitted)(emphasis added).

Mr. Orme submits that resentencing counsel's failure to preserve this issue resulted in prejudice.[47] In deciding Mr. Orme's appeal, this Court found several instances of error, but

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it found them to be harmless.[48] When those errors are considered in conjunction with the errors and omissions committed by resentencing counsel, it is clear that Mr. Orme did not receive the fundamentally fair proceeding to which he was entitled under the Eighth and Fourteenth Amendments. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

ARGUMENT V

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

A. INTRODUCTION

Mr. Orme has been denied the effective assistance of counsel in postconviction. Mr. Orme submits that his right to effective assistance is a bedrock principle stemming from the United States Constitution and Florida Constitution. In addition, Mr. Orme submits that he is guaranteed a statutory right and state due process right to effective assistance of counsel in postconviction. Finally, as in Martinez v. Ryan, 132 S.Ct. 1309 (2012), Mr. Orme submits that he is entitled to an equitable right to effective assistance of postconviction counsel.

B. MARTINEZ v. RYAN

In Martinez v. Ryan, the United States Supreme Court specifically recognized as an exception to its earlier ruling in Coleman v. Thompson, 501 U.S. 722 (1991), that there is a right to adequate representation at initial-review collateral

[48] See, e.g., Orme, 25 So. 3d at 544, 45, 48, 49.

proceedings as to an ineffective assistance of trial counsel claim that could not be raised on direct appeal. While the Supreme Court didn't answer whether this right to adequate representation is constitutionally based, it did recognize that the right to adequate representation by collateral counsel arose "for equitable reasons" as to ineffective assistance of trial counsel claims. See Martinez, 132 S.Ct. at 1321 (Scalia, J., dissenting) ("Instead of taking that radical step [of finding the right constitutionally mandated], the Court holds that, *for equitable reasons,* in a case such as the one before us, failing to provide assistance of counsel, or providing assistance of counsel that falls below the *Strickland* standard, constitutes cause for excusing procedural default. The result, of course, is precisely the same.") (emphasis in original).

After finding the right to adequate representation when collateral counsel raises a claim that trial counsel was ineffective in an initial-review collateral proceeding "as an equitable matter" in Martinez, the Supreme Court held that the adequacy of collateral counsel's performance is to be measured by "the standards of Strickland v. Washington". Id. at 1318. In other words, collateral counsel when raising an ineffective assistance of counsel claim in an initial-review collateral proceeding is obligated under Martinez to provide effective representation within the meaning of Strickland in investigating, presenting and litigating the ineffectiveness of trial counsel.

C. FLORIDA'S STATUTORY AND DUE PROCESS RIGHT

Over two decades ago, this Court recognized in Spalding v.

Dugger, 526 So. 2d 71, 72 (1988), that Florida capital postconviction defendants are entitled to a statutory right to effective legal representation. And, just over ten years later, in Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999), this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner...". In a special concurrence, two Justices discussed the right to counsel in capital postconviction in terms of State due process. Counsel was characterized as an "essential requirement" in capital postconviction proceedings. Id. at 329.

As noted in Arbelaez, all capital litigation is particularly unique, complex and difficult. The basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). The special degree of reliability in capital cases, which can only be provided by competent and effective representation in postconviction proceedings, is necessary to ensure that capital punishment is not imposed in an arbitrary and capricious manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed. Arbelaez, 738 So. 2d 331 at n. 12.[49]

[49]In subsequent cases, this Court didn't hesitate to remand proceedings where a capital defendant received ineffective representation by collateral counsel. See e.g., Peede v. State, 748 So. 2d 253 (Fla. 1999); Fotopoulos v. State, 741 So. 2d 1135 (Fla. 1999); Happ v. State, Case No. SC93121 (Sept. 13, 2000).

D. ANALYSIS

At the time of the filing of his postconviction motion, Mr. Orme was represented by attorney D. Todd Doss. The circuit court granted an evidentiary hearing on a single claim from the motion: whether or not trial counsel had been ineffective at Mr. Orme's resentencing proceeding. The hearing was held on May 30-April 1, 2012. Doss called only 3 witnesses.

In late July, 2012, Doss moved to withdraw based upon his acceptance of a position with the Federal Defender. Undersigned counsel was appointed to represent Mr. Orme. In preparing Mr. Orme's post-evidentiary hearing closing argument, undersigned identified numerous errors and omissions made by Doss which deprived Mr. Orme of the effective assistance of counsel as to his initial-review collateral proceedings. Mr. Orme requested an opportunity to amend his 3.851 motion and reopen his evidentiary hearing on the basis of Doss' ineffective assistance, but the circuit court denied the motion (PC-R2. 273-80; 315-16).

Mr. Orme submits that the circuit court's denial was erroneous. Doss failed to adequately investigate, prepare and present evidence on his behalf. Specifically, Doss failed to present the following claims in Mr. Orme's Rule 3.851 motion:

> - At the time of Mr. Orme's original trial, Dr. Lauridson testified falsely. Dr. Lauridson found that Dr. Sybers had made a "mistake" as to the time of death of the victim. Dr. Sybers' error favored the prosecution's theory of the case and hurt the defense's. During Dr. Lauridson's deposition with Mr. Orme's attorney he intentionally did not inform trial counsel about Dr. Syber's error.
>
> Indeed, in a letter to the prosecutor, Dr. Lauridson informed the prosecution that he had concealed Dr.

Syber's error so as not to lend the defense's theory any support and to defeat any credibility it may have had. At Mr. Orme's trial, the prosecutor allowed Dr. Lauridson to testify falsely and failed to correct the false testimony.

At Mr. Orme's resentencing, Dr. Laurdison testified and was relied upon by the State to establish statutory aggravators. Again, the State failed to reveal that Dr. Laurdison had previously testified falsely.

- Resentencing counsel retained Dr. Leroy Riddick to review Mr. Orme's case.

During the resentencing proceedings, counsel explained to the Court that Dr. Riddick was no longer available because he had a conflict, i.e., Dr. Laurdison is Dr. Riddick's supervisor. Later, inexplicably, Dr. Riddick testified on behalf of the defense. However, Dr. Riddick's testimony was not favorable to Mr. Orme and actually harmed him. Dr. Riddick added to the cause of death and corroborated much of Dr. Lauridson's testimony. The trial court relied on Dr. Riddick's testimony to establish statutory aggravators.

Mr. Orme never waived the conflict with Dr. Riddick. This conflict violated Mr. Orme's constitutional right to obtain effective expert assistance. Resentencing counsel was ineffective in failing to ensure that Mr. Orme's experts were not operating under a conflict and could offer opinions independently and competently.

- In 2001, Dr. Clell Warriner, Dr. Thomas McClane, Dr. Michael Maher and Dr. Michael Herkov testified. All of the experts agreed that Mr. Orme suffered from bipolar disorder. None of the experts equivocated and this Court relied on the experts to find that Mr. Orme's death sentence had been undermined.

In 2007, the prosecutor misrepresented Drs. Warriner and McClane's testimony. The prosecutor specifically questioned Drs. Maher and Herkov about the fact that no other expert had diagnosed Mr. Orme with bipolar disorder. The prosecutor then argued that misrepresentation to the jury.

- Resentencing counsel failed to preclude Dr. Laurdison's testimony as being hearsay. The State did not establish the unavailability of Dr. William Sybers. As such, Dr. Laurdison's testimony violated Mr. Orme's right to confrontation.

In addition, Doss was ineffective in preparing for and

presenting Mr. Orme's claim at the evidentiary hearing. Mr. Orme has learned that Doss failed to obtain the trial attorney files from Ramey and Stone and failed to interview them or Holland and Knight counsel Schulz prior to the hearing. Likewise, Doss failed to obtain the investigative files from Glantz and Jordan and failed to interview them prior to the hearing. And, Doss interviewed a single lay witness and the interview occurred the morning of the first day of the hearing. Further, Doss failed to review any of the records or introduce a single exhibit, though undersigned has found memorandum and e-mail to support Mr. Orme's claim that his counsel were ineffective.

Also, Doss provided the mental health experts with voluminous background material a mere week before the evidentiary hearing. His contact with the mental health experts was extremely limited. He failed to arrange for Dr. McClane's presence at the evidentiary hearing. Likewise, Doss failed to interview Dr. Riddick or Gary Harmor.

Mr. Orme's claim was based on the factual allegations that resentencing counsel failed to adequately investigate and prepare their experts and present critical mitigation, yet Doss seemingly did the same thing. Doss failed to adequately challenge Ramey and Stone though there were documents and evidence that existed that support Mr. Orme's claim. Mr. Orme submits that in light of postconviction counsel's deficiencies and Martinez v. Ryan, the circuit court erred in denying his request to re-open the postconviction evidentiary hearing. Relief is warranted.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic service to Carolyn Snurkowski, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 8th day of January, 2014.

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CERTIFICATION OF TYPE SIZE AND STYLE

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