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IN THE SUPREME COURT OF FLORIDA

RODERICK MICHAEL ORME,

Appellant/Petitioner,

v. Case No. SC13-819 & SC14-22
Death Penalty Case

STATE OF FLORIDA, and

Julie L. Jones, etc.

Appellee/Respondents./

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

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

Appellant is entitled to no relief based on the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Hurst* is not retroactive. The United States Supreme court, Eleventh Circuit Court of Appeals, and this Court have all held that *Ring v. Arizona* is not retroactive. *Hurst* is progeny of *Ring* and as the seminal case is not retroactive, neither is *Hurst*. This is not a pipeline case. Orme's sentence was final in 2010, well before *Hurst* was decided.

Even if *Hurst* was retroactive, *Hurst* was satisfied in this case by the jury's findings of the contemporaneous felonies for robbery and sexual battery during the guilt phase of the trial.

Appellant's claim of structural error which can never be harmless is easily refuted by United States Supreme Court caselaw. In this case, any potential Sixth Amendment error would be harmless beyond a reasonable doubt. A rational jury would have found the HAC aggravator the trial court found based on the facts of the victim's death, and a rational jury would have found both the pecuniary gain and sexual battery aggravators because the jury convicted Orme of both robbery and sexual battery. Accordingly, Appellant's death sentence should be affirmed.

ARGUMENT I

SUPPLEMENTAL BRIEFING ISSUE

ORME'S CLAIM THAT HE IS ENTITLED TO RELIEF BASED ON *HURST V. FLORIDA*, 136 S. CT. 616 (JAN. 12, 2016), IS WITHOUT MERIT. (RESTATED)

HURST V. FLORIDA

Orme has filed a Supplemental Brief, asserting that his death sentence should be stricken, and he should be resentenced to life in prison, due to the recent opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). For the following reasons, Appellant's argument must be rejected and the death sentence imposed in this case must be affirmed.

In *Hurst*, the United States Supreme Court held that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." *Hurst*, 136 S. Ct. at 624. The Court noted that, under Florida law, although the judge must give the jury recommendation greater weight, the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Id.* at 620.

The *Hurst* Court first explained that the Sixth Amendment and due process "requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S. Ct. at 621 (quoting *Alleyne v. United States*, 570 U.S. _, _, 133 S. Ct. 2151, 2156 (2013). The Court then discussed *Apprendi v. New*

Jersey, 530 U.S. 466, 494, 120 S. Ct. 2348 (2000), noting its holding that, "any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element that must be submitted to a jury." *Id*. at 621. The *Hurst* Court then noted its application of *Apprendi* in numerous contexts, including capital punishment with *Ring v. Arizona*, 536 U.S. 584, 608, n. 6, 122 S. Ct. 2428 (2002). The Court noted it had concluded in *Ring* that, "the required finding of an aggravated circumstance exposed *Ring* to a greater punishment than that authorized by the jury's guilty verdict." *Id*. at 621. *Ring's* death sentence therefore violated his right to have a jury find the facts behind his punishment. *Id*.

Then the Court concluded this analysis applied equally to Florida. *Id*. at 621-2. The problem the Court identified in *Hurst* was the "central and singular role the judge plays under Florida law" because under Florida's statute a defendant was not "eligible for death" until there were "findings by the court." *Id*. at 622 (emphasis in original). The "jury's function under the Florida death penalty statue was advisory only." *Id*.

The Court then overruled *Spaziano v. Florida*, 468 U.S. 447, 457-465, 104 S. Ct. 3154 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055 (1989). The *Hurst* Court concluded that those cases' conclusion that the Sixth Amendment does not require that the specific findings authorizing the imposition of

the sentence of death be made by the jury, "was wrong, and irreconcilable with *Apprendi*." *Id*. at 623.

The *Hurst* Court did not determine capital sentencing to be unconstitutional; *Hurst* only invalidated Florida's procedures for implementation, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict.

RETROACTIVITY

Hurst is not retroactive. This is not a pipeline case. Orme's conviction became final on January 13, 1997, when the United States Supreme Court denied the petition for writ of certiorari. *Orme v. Florida*, 519 U.S. 1079, 117 S. Ct. 742 (1997). Orme's sentence became final on June 7, 2010, when the United States Supreme Court denied the petition for writ of certiorari. *Orme v. Florida*, 560 U.S. 956, 130 S. Ct. 3391 (2010). Orme's sentence was final years before the United States Supreme Court decided *Hurst* in 2016.

Hurst was based on *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 48 (2000). The United States Supreme Court; the Eleventh Circuit; and this Court have all held that *Ring* is not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 2526 (2004)(holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases

already final on direct review."); *Turner v. Crosby*, 339 F.3d 1247, 1282-1286 (11th Cir. 2003); *Johnson v. State*, 904 So. 2d 400, 405 (Fla. 2005)(applying *Witt v. State*, 387 So. 2d 922(Fla. 1980) and holding *Ring* would not be applied retroactively in Florida).

Furthermore, both the Eleventh Circuit and this Court have held that *Apprendi* is not retroactive either. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001)(holding that *Apprendi* does not apply retroactively); *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005)(holding that *Apprendi* does not apply retroactively in Florida). Because *Apprendi* and *Ring* are not retroactive under controlling precedent, then *Hurst*, which was an extension of *Apprendi* and *Ring* to Florida, is not retroactive either and for the same reasons. *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014)(observing "if Apprendi's rule is not retroactive on collateral review, then neither is a decision applying its rule" citing *In re Anderson*, 396 F.3d 1336, 1340(11th Cir. 2005)). If the seminal case is not retroactive, then none of its progeny is either.

The distinction between substantive versus procedural for purposes of retroactivity are limited to matters such as the correct interpretation of the underlying substantive criminal statute. *Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604(1998)(explaining that retroactivity is inapplicable to the

situation in which this Court decided the meaning of a criminal statute enacted by Congress); *See Welch v. United States*, 578 U.S. -, -, 15-6418, 2016 WL 1551144, at *6 (U.S. 2016)(explaining that under *Teague*, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"); *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)(holding that *Miller v. Alabama*, 567 U.S. -, 132 S. Ct. 2455 (2012) was retroactive because the new rule of *Miller* was substantive); *Cf. Witt v. State*, 387 So. 2d 922, 929, 931 (Fla. 1980)(explaining that most law changes of "fundamental significance" that will warrant retroactive application "will fall within the two broad categories" of: 1) changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties or 2)changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter)*.

Only those types of substantive new rules are retroactive. *Hurst* did not interpret a criminal statute nor did it hold murder to be legal or that the death penalty was a forbidden punishment. Therefore, *Hurst* is not substantive for purposes of retroactivity.

Additionally, this Court has controlling precedent holding *Ring* is not retroactive. *Johnson v. State*, 904 So. 2d 400, 405-

412 (Fla. 2005). The *Johnson* Court did not reach the merits of the *Ring* claim. Instead, its holding was that *Ring* was not retroactive. *Johnson*, 904 So. 2d at 405 (Fla. 2005)("we hold that *Ring* does not apply retroactively in Florida to defendants whose convictions already were final when that decision was rendered"). In *Johnson,* this Court extensively discussed the retroactivity of *Ring* and did a *Witt* analysis. This Court also noted that new penalty phases conducted decades after the murder were likely to be less accurate. Conducting new penalty phases decades later would consume "immense" prosecutorial and judicial resources "without any corresponding benefit to the accuracy or reliability" of the penalty phase. *Johnson*, 904 So. 2d at 412.

This Court should follow the precedent of *Johnson*. See *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014)(stating that the "presumption in favor of stare decisis is strong" and the decision to depart from the principles of stare decisis "cannot be taken lightly" and reaffirming the prior precedent).

Opposing counsel, quoting *Witt* but ignoring its actual holding, speaks of fairness and uniformity. (IB at 10). But the retroactivity doctrine is really about finality, not uniformity. Finality is the polestar of the retroactivity doctrine. As this court stated in *Witt* and has repeated on several occasions, the "importance of finality in any justice system, cannot be understated" and at some point, litigation must "come to an

end." *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). Opposing counsel totally ignores the value of finality in the plea for fairness. Courts simply must have retroactivity doctrines to ensure the finality of convictions and sentences.

Courts already balance the competing interests of finality and fairness by extending the benefits of the new rule to all pipeline cases rather than more locally limiting the benefit of the new rule to cases where the trial occurs after the decision. *Griffith v. Kentucky*, 479 U.S. 413, 107 S. Ct. 708 (1987)(creating the pipeline rule). Cases where the trial occurred two or three years ago but are still open in this Court or the United States Supreme Court on direct appeal will get the benefit of *Hurst*, if the *Hurst* claim has any merit. Including pipeline cases is the proper balance between fairness and finality.

Applying a new rule that does not "seriously enhance accuracy" only to new cases is quite fair. *Hurst* should only apply to new cases.

HARMLESS ERROR

Petitioner claims that Sixth Amendment error occurred in his case and alleges that such error was necessarily "structural," and not amenable to a harmless error analysis. This argument must be rejected. The United States Supreme Court itself remanded *Hurst* to this Court for determination of

harmlessness, noting that, "this Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." *Hurst*, 136 S. Ct. at 624. This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be, and often is, harmless beyond any reasonable doubt. *Galindez v. State*, 955 So. 2d 517, 521-23 (Fla. 2007); *Johnson v. State*, 994 So. 2d 960, 964-65 (Fla. 2008). *See also Pena v. State*, 901 So. 2d 781, 783 (Fla. 2005)(failure to instruct jury on age requirement was not fundamental error).

The United States Supreme Court has held that violations of the right-to-a-jury-trial are not structural error. *Washington v. Recueno*, 548 U.S. 212, 222, 126 S. Ct. 2546, 2553 (2006)(relying on *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827 (1999), and holding that the "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"). The *Neder* Court explains the difference between structural error not subject to harmless error review and an omission of an element of a crime subject to harmless error review. The *Neder* Court noted that a flawed beyond-a-reasonable-doubt jury instruction has the effect of vitiating "all the jury's findings," but, "in contrast" an omission of an element does not have the effect of vitiating "all the jury's findings." *Neder*, 527 U.S. at 11, 119 S. Ct. at

1834.

This case is no different than the many cases in which this court has applied the harmless error analysis in determining whether the finding of an aggravator by the trial court was supported by evidence. *See Smith v. State*, 28 So. 2d 838 (Fla. 2009)(applying the harmless error analysis in determining whether competent, substantial evidence supported the trial court's finding of the avoid arrest and CCP aggravators); *See Williams v. State*, 967 So. 2d 735 (Fla. 2007)(applying harmless error in finding competent substantial evidence supported finding of heinous, atrocious and cruel aggravator). Opposing counsel has failed to distinguish, much less address these situations, in arguing that this case is not amenable to harmless error analysis.

Furthermore, opposing counsel's logic applies to every other type of error and would be the end of the harmless error doctrine. *Goodwin v. State*, 751 So.2d 537, 539-41 (Fla. 1999) (detailing the history of the harmless error doctrine and explaining that before the doctrine, appellate courts routinely reversed convictions for almost every error committed during trial resulting in appellate courts being described as "impregnable citadels of technicality" and resulting in harmless error statutes being enacted). The harmless error doctrine, by its very nature, requires an appellate court to "guess" what the

jury would have done. Roger J. Traynor, THE RIDDLE OF HARMLESS ERROR (1970). Florida has a harmless error statute that requires appellate courts to affirm, if possible. § 924.33, Fla. Stat. (2015) (providing that no judgment shall be reversed unless the appellate court is of the opinion, "that error was committed that injuriously affected the substantial rights of the Petitioner" and that it "shall not be presumed that error injuriously affected the substantial rights of the Petitioner"). This Court can, and should, conduct a harmless error analysis in this case, as it has done for numerous other errors in the penalty phase in hundreds of capital cases, including for the improper finding of an aggravator.

HAC AND PECUNIARY GAIN AGGRAVATORS

In Florida, a sentence of death is authorized upon the finding of the existence of one aggravating factor. *Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010)("To obtain a death sentence, the State *must* prove beyond a reasonable doubt at least one aggravating circumstance"). If there is one aggravating circumstance, death is presumptively the appropriate sentence. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973).

In this case, the jury unanimously convicted Orme of the contemporaneous felonies of robbery and sexual battery. *Hurst* was in a distinctly different position from Orme. *Hurst* was convicted of first-degree murder and did not have a prior

criminal history or a contemporaneous felony conviction on the murder. *Hurst v. State*, 147 So. 3d 435, 440-41 (Fla. 2014). Accordingly, *Hurst* presented the United States Supreme Court with a 'pure' claim under *Ring*, where the jury neither gave a unanimous recommendation nor were any of the established aggravating circumstances identifiable as having been found by the jury.

Here, the jury found the robbery and sexual battery. The trial court found three aggravating circumstances after the second penalty phase held in 2007. The court found: the offense was committed for pecuniary gain; 2) the offense was committed during the commission of or attempt to commit sexual battery; and 3) the offense was especially heinous, atrocious, or cruel (HAC). Any rational jury would have found the existence of the HAC aggravator and the offense was committed for pecuniary gain aggravator had the jury been given a special verdict form asking that they make the finding.

The evidence supporting the HAC aggravator included the fact that the body of the victim Lisa Redd, had been badly beaten and the cause of death was strangulation. *Orme v. State*, 677 So. 2d 258, 260-61 (Fla. 1996). She was found with extensive bruising and hemorrhaging on the face, skull, chest, arms, left leg, and abdomen. *Id*. Redd had also been beaten so badly across the front of the abdomen that the abdominal hemorrhaging extended all the

way to the back of the abdomen around the kidney. (R56 471-72). The forensic pathologist explained that all of the injuries to Redd were inflicted while she was alive and would have been painful injuries. (R56 473-476). Any rational jury would have found the HAC aggravator under those circumstances.[1]

The jury convicted Orme of robbery and he admitted that he argued with and robbed the victim. *Orme v. State*, 677 So. 2d 258, 262 (Fla. 1996). The jury would have also found the murder for pecuniary gain aggravator if asked to make the finding. *See Davis v. State*, 928 So. 2d 1089, 1131 (Fla. 2005)(explaining that evidence in capital murder prosecution establishing basis for contemporaneous robbery conviction was also sufficient to support pecuniary gain aggravating factor).

Orme then argues that this Court cannot give any weight to the jury's advisory recommendation because the jury had been instructed the recommendation was merely advisory. However, the

[1] The rational jury test is the harmless error test the Court utilized in *Neder* which dealt with this exact type of error. The Court stated that the harmless-error inquiry is whether it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18, 119 S. Ct. at 1838. The *Neder* Court explained to "set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Id*. quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970).

jury was instructed that, it was their duty to follow the law and determine if there was sufficient aggravating circumstances to justify a death sentence and whether sufficient mitigating circumstances existed to outweigh the aggravating circumstances. (R61 1270). They were also admonished as to the gravity of the proceedings and the fact that a human life is at stake and should be considered as they reach their advisory sentence. (R61 1277). Clearly the jury was made aware of the impact of its recommendation.[2]

The jury recommended death by a vote of 11-1. Thereafter, the trial court found three aggravators and assigned them great weight before sentencing Orme to death.[3] *Orme v. State*, 25 So.3d

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[2] Petitioner cites to *Caldwell v. Mississippi*, 473 U.S. 320 (1985), in the initial brief footnote 10, for the proposition that it is impermissible to rest a death sentence on the determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the sentence rests elsewhere. This Court addressed *Caldwell* in deciding *Foster v. State*, 518 So.2d 901 (1987) and found it inapplicable to Foster's claim that the jury was told its role was only advisory in nature, thereby diminishing its sense of responsibility because "unlike *Caldwell*, in Florida the judge rather than the jury is the ultimate sentencing authority." *Id*. at 901-02. In short, Petitioner's reliance on *Caldwell* is erroneous.

[3] It should be noted that Orme's initial death sentence was vacated after a postconviction appeal. The jury at his first 1993 penalty phase was presented with the same evidence supporting HAC, committed for pecuniary gain, and sexual battery. That jury recommended death by a vote of 7-5. *Orme v. State*, 677 So. 2d 258, 261 (Fla. 1996). The second penalty phase, which occurred in 2007, and is at issue now, also resulted in a

536, 542-43 (Fla. 2009).

In short, the evidence supporting the aggravators is overwhelming. *Neder* provides that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder*, 527 U.S. at 17. Applying the harmless error test addressed above, it is apparent that, based on the evidence presented to support the aggravation, a rational jury would have reached the same sentencing recommendation and any error was harmless.

IF THIS COURT REMANDS THIS MATTER FOR RESENTENCING PURSUANT TO HURST V. FLORIDA, 136 S. CT. 616 (JAN. 12, 2016), THE PROVISIONS SET FORTH IN CHAPTER 2016-13, LAWS OF FLORIDA SHOULD GOVERN (RESTATED)

The State does not concede that Petitioner is entitled to relief pursuant to *Hurst*. Nevertheless, if this Court were to order that Petitioner be resentenced, Chapter 2016-13, Laws of Florida would govern.

If this Court orders resentencing based on *Hurst*, such a proceeding would be *de novo*. *See, e.g., State v. Fleming*, 61 So. 3d 399, 406 (Fla. 2011)("[T]his Court has long held that where a sentence has been reversed or vacated, the resentencings in all

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recommendation of death but with a higher vote of 11-1. Simply stated, the evidence supporting the aggravators was overwhelming and should this case be remanded again, Orme would again be sentenced to death.

criminal proceedings, including death penalty cases, are *de novo* in nature.”). Because resentencing is *de novo*, “both parties may present new evidence bearing on the sentence.” *Id*.

There should be no impediment to the imposition of a sentence in accordance with the new legislation that amended § 921.141, Florida Statutes. Any capital murder committed before the enactment of the new death penalty statute may be tried under the new statute without *ex post facto* concerns under the United States Supreme Court precedent of *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct 2290 (1977). *See State v. Perry*, 2016 WL 1061859, 5D16-516(Fla. 5th DCA March 16, 2016)(review granted)(concluding that based on *Dobbert* trying a defendant under the new statute does not violate the ex post facto clause).

CHAPTER 2016-13, laws of Florida does not provide an Eighth Amendment concern as the law does not change Florida’s adopted list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty and satisfies the “narrowing function” requirement. *See Lowenfield v. Phelps*, 484 U.S. 231, 245, 108 S. Ct. 546 (1988)(finding that the narrowing function required may be provided by the legislature narrowing the definition of capital offenses so that the jury finding of guilt responds to this concern or the legislature may broadly define capital offenses and narrowing is by jury findings of aggravating circumstances at penalty phase).

Orme asserts that he is entitled to a life sentence. But *Dobbert* also makes it clear that such a defendant cannot claim he is automatically entitled to a life sentence because the statute in effect at the time was held unconstitutional. *See Knapp v. Cardwell*, 667 F. 2d 1253, 1262-63 (9th Cir. 1982)(describing the facts, arguments made, and holding of, *Dobbert)*. *See Hameen v. State of Delaware*, 212 F.3d 226 (3rd Cir. 2000)(rejecting any ex post facto violation attack on applying a new statute when Delaware changed its statute in the wake of *Ring* based on the holding in *Dobbert*).

ARGUMENT II

CHAPTER 2016-13, LAWS OF FLORIDA, DO NOT ESTABLISH THAT ORME SHOULD RECEIVE A LIFE SENTENCE. (RESTATED).

Petitioner submits that his 7 to 5 death recommendation constitutes a life sentence under Chapter 2016-13, Laws of Florida because it is less than the 10 to 2 vote required under the new statute. He also argues that he cannot be subjected to a resentencing proceeding because of double jeopardy. Orme is not entitled to an automatic commutation of his death sentence to one of life imprisonment.

Orme was granted post conviction relief and received a resentencing. His second penalty phase jury in 2007 returned a recommendation of 11-1 for death. That recommendation is above the vote required under the new statute, and Orme cannot now

argue that any relief should be based on the 1993 jury recommendation which was already vacated.

Additionally there is no double jeopardy implication. Any problem in the prior recommendation was caused by the subsequent change in law under *Hurst*, not from any insufficiency of aggravating circumstances. *United States v. Robison*, 505 F.3d 1208, 1225 (11th Cir. 2007) (explaining that a remand for a new trial is the appropriate remedy where any insufficiency of evidence is accompanied by trial court error whose effect may have been to deprive the Government of an opportunity or incentive to present evidence that might have supplied the deficiency" citing *United States v. Sanchez-Corcino*, 85 F.3d 549, 554 n. 4 (11th Cir.1996)); *United States v. Weems*, 49 F.3d 528, 530-31 (9th Cir. 1995) (rejecting a double jeopardy challenge to a retrial after the law changed regarding an element of the crime because a retrial was "not oppressive" as it "merely permits the government to prove its case in accordance with the recent change in law" relying on *Lockhart v. Nelson*, 488 U.S. 33, 42, 109 S.Ct. 285, 291, 102 L.Ed.2d 265 (1988)); *United States v. Ford*, 703 F.3d 708, (4th Cir. 2013)(holding double jeopardy did not prohibit retrial following reversal based on a post-trial change in law because any insufficiency in the proof was caused by the subsequent change in law, not the government's failure to muster evidence citing

United States v. Ellyson, 326 F.3d 522 (4th Cir. 2003), as well as other circuit cases); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (double jeopardy did not bar imposition of death penalty on retrial, because no fact-finder had acquitted defendant of death penalty for victim's murder); *Walls v. State*, 926 So.2d 1156, 1173 (Fla. 2006) (finding that double jeopardy did not bar imposition of the death penalty on retrial because no fact-finder had acquitted Walls of the death penalty for Peterson's murder).

Accordingly, Orme is not entitled to relief in the form of a life sentence.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of postconviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-Portal/E-MAIL on April 25th, 2016: Linda McDermott, Esq. at - McClain & Mcdermott, P.A. 20301 Grande Oak Blvd. Suite 118-61, Estero, FL 33928, lindammcdermott@msn.com.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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