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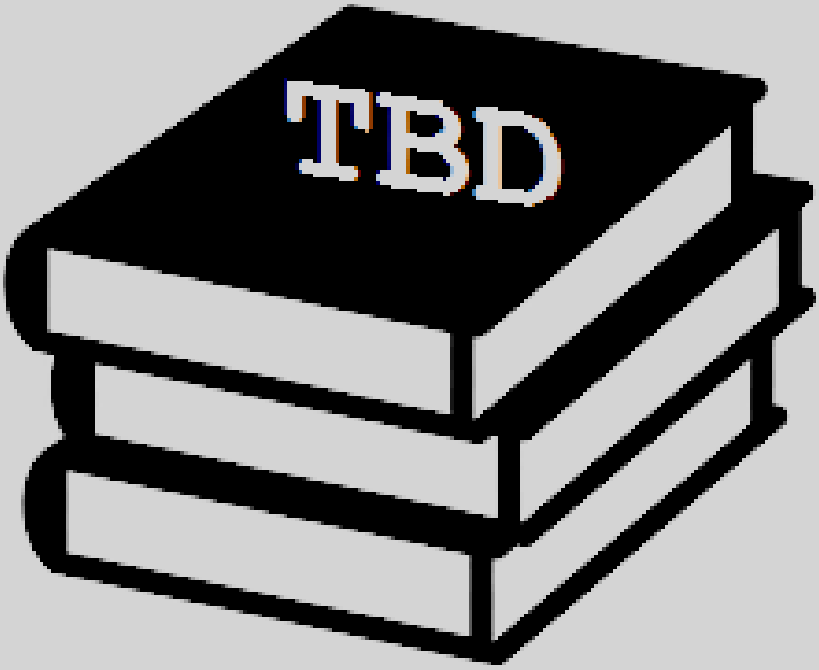

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IN THE SUPREME COURT OF FLORIDA
CASE NOs. SC13-819 & SC14-22

RODERICK MICHAEL ORME,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

and

JULIE L. JONES, etc.

Appellee/Respondents.

_____/

APPELLANT/PETITIONER'S MOTION FOR REHEARING

COMES NOW, Appellant/Petitioner, **RODERICK MICHAEL ORME**, by and through his undersigned counsel, pursuant to Fla. R. App. P. 9.330, and respectfully moves this Court to reconsider its opinion denying Mr. Orme's Rule 3.851 appeal and petition for writ of habeas corpus. As the following discussion indicates, Mr. Orme submits that this Court has overlooked or misapprehended points of law and fact. All other claims for relief previously presented to the Court are specifically argued again; no claim previously raised is hereby abandoned.

1. In Argument I of his Rule 3.851 appeal, Mr. Orme asserted numerous instances of ineffective assistance of counsel during the resentencing proceeding. In addressing Mr. Orme's claim, this Court noted that in order to prevail, a defendant

must satisfy both prongs of the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Orme v. State, Nos. SC13-819 & SC14-22, Slip Op. at 8 (Fla. December 10, 2015). This Court further explained that because both prongs must be demonstrated, once a defendant has failed to meet one prong, there is no need to discuss the other prong. Orme, Slip Op. at 8.

2. After dividing Mr. Orme's issue into seven subclaims, this Court proceeded to deny subclaims one through five on the basis that Mr. Orme failed to demonstrate prejudice. Id. at 10, 12, 13. As to subclaim six, which itself comprised several different components, this Court found both a lack of deficient performance and prejudice. Id. at 14-15.

3. With regard to subclaim seven, this Court denied Mr. Orme's assertion that the postconviction court erred in not considering the cumulative prejudice resulting from the deficiencies outlined in the first six subclaims:

> Orme has not demonstrated ineffective assistance as to this first claim. Therefore, we affirm the postconviction court's denial of relief. Because none of Orme's subclaims entitle him to relief, his claim of cumulative prejudice must also fail. Suggs v. State, 923 So. 2d 419, 433-34 (Fla. 2005)("Because he failed to prove a deficiency in any one of the above alleged instances of ineffective assistance of counsel, Suggs' cumulative claim of prejudicial error also fails.").

Id. at 16.

4. Mr. Orme submits that this Court's analysis is flawed given that there was no determination as to deficient performance in all but one portion of one subclaim. Indeed, rather than

considering whether Mr. Orme "prove[d] a deficiency" as to the vast majority of the subclaims, this Court instead chose to end the discussion once it determined that Mr. Orme failed to meet the prejudice prong.

5. As this Court has previously stated, "Where multiple errors are found, even if deemed harmless individually, 'the cumulative effect of such errors' may 'deny to defendant the fair and impartial trial that is the inalienable right of all litigants.'" Hurst v. State, 18 So. 3d 975, 1015 (Fla. 2009), quoting Brooks v. State, 918 So. 2d 181, 202 (Fla. 2005) and Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). Moreover, as the United States Supreme Court has repeatedly held, a reviewing court considering a penalty phase ineffective assistance of counsel claim 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 v. McCollum, 130 S.Ct. 447, 453-54 (2009).

6. A proper analysis here 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. Such an analysis didn't occur in Mr. Orme's case, as the circuit court addressed each claim of ineffective assistance individually against the aggravation. And, given this Court's truncated analysis, it likewise failed to conduct a proper cumulative analysis. Mr. Orme submits that under a proper Strickland analysis, it is clear that confidence is undermined in the outcome.[1]

7. Mr. Orme further submits that this Court erred both factually and/or legally in its discussion of each of his penalty phase ineffective assistance of counsel subclaims. For instance, with regard to subclaims one to four, which were grouped together,[2] this Court stated the following:

> Any loss of credibility resulting from a residual doubt argument has not "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined," Walker, 88 So. 3d at 134 (quoting Bolin, 41 So. 3d at 155), especially given the trial court's finding and assigning of great weight to three aggravators, including HAC - which is one of the weightiest in Florida's statutory scheme[7] - and the "relatively weak"[8] mitigation presented in this case. Because Orme has failed to demonstrate prejudice, we find that he is not entitled to relief as to these

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[1]Moreover, the errors that this Court found found on appeal yet dismissed as harmless in light of the "relatively weak mitigation", Orme v. State, 25 So. 3d 536, 544, 545, 548, 549 (Fla. 2009), would no longer be harmless.

[2]This Court identified subclaims one to four as follows: Counsel rendered ineffective assistance by "(1) attempting to use lingering doubt to affect the jury; (2) making false promises as to the DNA evidence in the case; (3) presenting inconsistent theories of the case; (4) attempting to convince the jury that Orme had consensual sex with the victim". Id. at 10, fn 6.

submclaims.

Orme, Slip. Op. at 12 (fns omitted).

8. Mr. Orme submits that this Court's analysis overlooks the fact that his argument encompassed much more than that of lingering doubt. Indeed, resentencing counsel told the jury things that were simply not true, such as the notion that Mr. Orme's DNA was not under the victim's fingernails.[3] Further, the arguments by Mr. Orme's attorneys to the jury were at odds with each other. For instance, while counsel Russ Ramey was unsuccessfully attempting to "plant the seed" of doubt, counsel Mike 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).

9. Moreover, this Court's description of the mitigation as "relatively weak" was made in its direct appeal opinion in reference to the mitigation presented by resentencing counsel. See Orme, 25 So. 3d at 544. Thus, overlooked by this Court here is the fact that the description preceded the mitigation presented at the postconviction evidentiary hearing and therefore could not have taken it into account. Unlike at the

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[3]According to resentencing counsel, "There are doctors who will come into this courtroom and say that **the fingernail scrapings under her nails was not Mike Orme, it was somebody else, a third party DNA.** She had scratched somebody but **we know without any question it wasn't Michael Orme.**" (R2. 40)(emphasis added).

resentencing, during Mr. Orme's subsequent postconviction evidentiary hearing two statutory mitigating factors were found by Dr. Herkov instead of none; there was support from at least five mental health experts that Mr. Orme is bipolar instead of three; there was testimony that two additional doctors renewed Mr. Orme's prescription to treat bipolar, thus demonstrating that these doctors had in effect confirmed the diagnosis (PC-R2. 2920); there was a thorough explanation as to why the DOC incorrectly labeled Mr. Orme as having ADD (PC-R2. 3035-36); and there was testimony explaining that because Mr. Orme had at least one manic or hypomanic episode, he could no longer be diagnosed with major depression and instead would either be Bipolar I or II (PC-R2. 2967, 3034-35). Further, the testimony from the postconviction evidentiary hearing established that the medication which was given to Mr. Orme at DOC is consistent with treating bipolars (PC-R2. 2996), and in fact a DOC psychological specialist indicated that Mr. Orme had hypomanic symptoms (PC-R2. 2964-65). There was also testimony explaining that a structured prison environment generally has the effect of tending to make a person more depressed and normal and less manic (PC-R2. 2917), and that "it is very common that an individual will experience predominantly manic episodes in their early life and subsequently depressive episodes" (PC-R2. 2954). And there was testimony that while psychological training is necessary to identify a manic episode, Mr. Orme discontinued any psychological treatment in

1995 (PC-R2. 2954).[4]

10. With regard to subclaim five,[5] this Court again found a lack of prejudice:

> Whether or not resentencing counsel received what they desired from the testimony of these two experts, Orme has not shown that he was prejudiced by it. The State produced sufficient evidence for the finding of the HAC and sexual battery aggravators even without the testimony from Drs. Harmor and Riddick. See Orme III, 25 So. 3d at 551-52. Accordingly, Orme cannot establish that any deficiency in calling these experts affected his resentencing in such a way that this Court's confidence in his sentence is undermined. Walker, 88 So. 3d at 134.

Id. at 13.

11. Mr. Orme submits that this Court's opinion overlooks the fact that the prejudice extends beyond the mere finding of the aforementioned aggravators. Rather, Mr. Orme was prejudiced by the fact that his own attorneys, by introducing evidence against him, deprived him of an adequate adversarial testing. The testimony of Dr. Harmor, the defense's DNA expert, was so favorable to the State that the prosecutor made a chart of his findings and submitted it as an exhibit to the jury (T2. 873, 884). Similarly, Dr. Riddick's overall testimony was so

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[4]Moreover, overlooked by this Court is the fact that when similar mitigation was presented during Mr. Orme's postconviction proceeding following his original death sentence, this Court determined that confidence was undermined as a result of this mitigation, and it remanded the case for a new penalty phase proceeding. Orme v. State, 896 So. 2d 725, 736 (Fla. 2005).

[5]This Court identified subclaim five as ineffective assistance on the basis of counsel presenting the testimony of Drs. Harmor and Riddick. Orme, Slip Op. at 10, fn 6.

unfavorable to Mr. Orme that the prosecution on cross examination utilized it to enhance the HAC aggravator (RT. 636-38).[6]

12. As to subclaim six, this Court found both a lack of deficient performance and prejudice. Initially, describing the statements of Drs. McClane and Warriner regarding a possible bipolar diagnosis as "tentative and hypothetical, not an actual diagnosis" Orme, Slip Op. at 14, this Court determined that "any attempt by resentencing counsel, on redirect, to correct the testimony that only three doctors diagnosed Orme as bipolar would have been useless or even detrimental since Drs. Maher and Herkov obviously did not consider the statements by Drs. Warriner and McClane to constitute actual diagnoses." Id. This Court concluded that under the circumstances, prejudice had not been established. Id.

13. Mr. Orme submits that this Court's determination is contradicted by the record in this case. Drs. Maher and Herkov's omissions of Drs. Warriner and McClane's statements as to bipolar had nothing to do with the lack of a diagnosis.[7] Rather, it was

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[6]As Sarah Butters, Mr. Orme's pro bono counsel, testified, Dr. Riddick's testimony was a colossal disaster (PC-R2. 2877).

[7]In a prior opinion granting Mr. Orme a new resentencing, this Court in no way characterized the testimony of Drs. Warriner and McClane as "tentative and hypothetical." Rather, this Court stated as to Dr. Warriner's testimony that "had he been asked to provide a diagnosis, he would likely have diagnosed Orme with 'bipolar disorder, mixed type.'" Orme, 896 So. 2d at 734. And this Court stated as to Dr. McClane's testimony that "if he had received this type of information prior to trial, he would have diagnosed Orme as probable bipolar in a depressed phase." Id. Indeed, this Court relied in part on their testimony in finding

due to a lack of preparation by counsel.[8] Dr. Maher testified at the postconviction evidentiary hearing that he mistakenly had not recalled that Drs. McClane and Warriner had confirmed or made the diagnosis (PC-R2. 2920).[9] Similarly, Dr. Herkov testified that he answered the question at the resentencing incorrectly (PC-R2. 2988). 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 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).

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that confidence was undermined in the result of Mr. Orme's original penalty phase. Id. at 736.

[8]Dr. Maher testified that he spoke to counsel 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 Drs. Warriner or McClane's diagnoses, and he was quite sure that they didn't talk about anticipating cross examination questions (PC-R2. 2921). Dr. Herkov likewise 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). Dr. Herkov also testified that he thought he had never seen the testimony of Drs. Warriner or McClane from the 2001 trial (PC-R2. 2988-89)

[9]Dr. Maher further noted that the doctors who renewed the prescription had in effect confirmed the diagnosis (PC-R2. 2920).

14. As a further matter, this Court determined that Mr. Orme received the benefit of Drs. Warriner and McClane's statements when the State's expert, Dr. Prichard, testified that both doctors had diagnosed Mr. Orme with bipolar. Orme, Slip Op. at 14. However, this Court's reliance on Dr. Prichard's statement[10] overlooks the fact that during the resentencing proceeding, the prosecutor asserted, Drs. Herkov and Maher conceded, and the trial court determined that, aside from Dr. Walker, only Drs. Herkov and Maher found a diagnosis of bipolar (RT. 582-85; 954; R2. 3013-14).[11] Even Dr. Prichard during his direct examination testified that after Mr. Orme was arrested, neither Dr. Warriner nor Dr. McClain diagnosed Mr. Orme with bipolar (R2. 1025). Dr. Prichard further stated, "So we have a lot of information that's starting to emerge that people are seeing him, or not seeing him, as bipolar disorder except this one occasion that Dr. Walker said it and it's a little bit unreliable to me." (R2. 1025). And subsequently, Dr. Prichard added, "When he went to the Department of Corrections I saw that he was assessed between 1993 and 1995 seven different times by five different psychiatrists, none of whom said he was bipolar."

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[10]Dr. Prichard during cross examination made one fleeting statement as to Drs. Warriner and McClain that "[t]heir diagnosis of bipolar disorder was generated after they discovered Walker had diagnosed him with bipolar disorder but not based on their own evaluation of Mr. Orme absent that information." (R2. 1041).

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

(R2. 1025).

15. This Court in its opinion also found that Mr. Orme did not demonstrate deficient performance as to trial counsel's failure to present the testimony of Drs. McClane and Warriner. Orme, Slip Op. at 14. This Court relied on resentencing counsel's testimony that Dr. McClane refused to cooperate, and it found reasonable trial counsel's stated strategy of relying on live testimony rather than reading Dr. Warriner's postconviction testimony into evidence. Id. at 14-15.

16. Mr. Orme submits that in arriving at its determination, this Court overlooks the fact that 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 Sarah 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 counsel Stone or Ramey (PC-R2. 2892).

17. Additionally, overlooked by this Court is the fact that counsel 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). 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).

18. This Court further determined as to subclaim six that "Orme cannot demonstrate prejudice for counsel's failure to have Dr. Herkov testify concerning the statutory mitigating factors because the other defense expert, Dr. Maher, testified as to the mitigating circumstances, and the trial court found the existence of both statutory mental health mitigators and a third statutory mitigator." Orme, Slip Op. at 15.

19. Mr. Orme submits that this Court's opinion overlooks the fact that Dr. Maher did not testify to the statutory mitigating factors as they specifically related to Mr. Orme.[12] And, overlooked by this Court is the fact that while the trial court found the statutory mitigating factors, it gave them little weight (R2. 3013-16). Based on the foregoing, Mr. Orme submits that rehearing is warranted.

20. In Argument II of his Rule 3.851 appeal, Mr. Orme asserted that he was denied a reliable and individualized sentencing determination because the prosecutor's argument

[12]Rather, Dr. Maher testified as a general matter that when a cocaine binger reaches the height of the binge, the ability to control his behavior in any sensible way is very significantly impaired (RT. 547-48). Dr. Maher further agreed that a cocaine binge itself is an extreme mental or emotional disturbance (RT. 548).

presented impermissible considerations to the jury, misstated the law and facts, and was inflammatory and improper. Mr. Orme argued that resentencing counsel's failure to raise proper objections constituted ineffective assistance.

21. In addressing Argument II, this Court found improper the prosecutor's golden rule argument as well as two comments that constituted imaginary scripts. Orme, Slip Op. at 16-17.[13] However, this Court found no prejudice:

> Although the prosecutor in this case made impermissible golden rule and imaginary script arguments, these arguments do not rise to the level of prejudice required by Walls. The statements constituted a brief portion of an argument that otherwise focused on the facts of the case and the evidence against the defendant. None of the statements were so harmful or inflammatory as to influence the jury to reach a more severe verdict than it would have otherwise, especially in light of the evidence presented. Id. As such, we find that Orme has failed to demonstrate prejudice and, therefore, cannot establish a claim of ineffective assistance for resentencing counsel's failure to object to these improper prosecutorial comments.

Id. at 18-19.

22. Mr. Orme submits that in arriving at its determination, this Court failed to conduct a proper prejudice analysis. This Court has recognized that where several errors are identified, it "considers the cumulative effect of evidentiary errors and ineffective assistance claims together." Suggs v. State, 923 So. 2d 419, 441 (Fla. 2005). See also State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). Yet

[13]This Court found the remaining prosecutorial comments to not be improper. Id. at 16.

here, despite finding several instance of error on direct appeal,[14] this Court failed to conduct the requisite cumulative analysis. Mr. Orme submits that when those errors are considered in conjunction with the errors and omissions committed by resentencing counsel, it is clear that he did not receive the fundamentally fair proceeding to which he was entitled under the Eighth and Fourteenth Amendments. Rehearing is warranted.

23. In Argument III of his Rule 3.851 appeal, Mr. Orme asserted that 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.

24. In addressing Argument III, this Court found that counsel's performance was not deficient:

> Furthermore, counsel's decision not to continue questioning prospective jurors about remorse and mercy does not fall below the range of reasonably competent performance because Orme is not entitled to have prospective jurors questioned about the specific topics of remorse and mercy. Orme cannot overcome the highly deferential judicial scrutiny to which counsel's behavior is entitled.

Orme, Slip Op. at 21.

25. Mr. Orme submits that this Court's opinion overlooks the fact that on direct appeal, this Court actually found error as to the remorse issue, but it denied relief on the basis of

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[14]Based on the weight of the aggravators in comparison to the "relatively weak mitigation", this Court found the errors to be harmless. Orme, 25 So. 3d at 544, 545, 548, 549.

counsel's failure to preserve the issue, i.e., his deficient performance:

> We agree with Orme 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. However, we find that the claim is not preserved 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. To preserve the claim for appeal, counsel had to question the prospective jurors about whether they could consider remorse as a mitigator and then attempt to challenge the juror for cause if the juror answered that he or she could not consider remorse as a mitigator. Therefore, relief is not warranted on this claim.

Orme, 25 So. 3d at 543. Here, rehearing is warranted.

26. In Claim I of his state habeas petition, Mr. Orme asserted that appellate counsel was ineffective for failing to raise the constitutional issue that he was forced, without any justification or concern specific to him, to wear a stun belt during the resentencing proceeding.

27. In its opinion addressing Claim I, this Court determined that prejudice has not been demonstrated:

> In this case, resentencing counsel was concerned with the fact that a stun belt could alter the defendant's demeanor in the courtroom. No argument was made that the use of the stun belt would interfere with his right to counsel or would prevent him from fully participating or communicating with counsel. Additionally, there is nothing in the record indicating that the stun belt was ever visible to the jury. See Weaver, 894 So. 2d at 195. Under these circumstances, we find the defendant is not entitled to relief on the merits of his claim. Therefore, it has not been demonstrated that appellate counsel was ineffective for failing to raise this issue on appeal.

Orme, Slip Op. at 23-24.

28. Mr. Orme submits that this Court's determination overlooks the fact that the use of a stun belt poses different constitutional concerns than the use of shackles. Indeed, visibility to the jury of the stun belt is not a major concern. Rather, it is precisely the effect on the defendant's demeanor that implicates his constitutional rights. In United States v. Durham, 287 F.3d 1297, 1306 (2002), the Eleventh Circuit Court of Appeals recognized that "stun belts are less visible than many other restraining devices, and may be less likely to interfere with a defendant's entitlement to the presumption of innocence." However, the Court explained that "[w]e are more concerned about the possibility that a stun belt could disrupt a different set of a defendant's constitutionally guaranteed rights." Durham, 287 F.3d at 1305. These constitutional rights include the defendant's Sixth Amendment right to confer with counsel. Id. As the Eleventh Circuit explained, "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial – including those movements necessary for effective communication with counsel." Id.

29. Another constitutional concern expressed by the Eleventh Circuit involved a defendant's Sixth Amendment and due process right to be present at trial and to participate in his defense. Id. at 1306. According to the Court's analysis:

> Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. We have noted that the presence of shackles may "significantly affect the trial strategy [the defendant] chooses to follow." *Id.* A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense.

Id.

30. As the record in this case demonstrates, there was no indication whatsoever that Mr. Orme would act in any way but in a proper manner. Under these circumstances, Mr. Orme's due process and Sixth Amendment rights were violated as a result of him being forced to wear a stun belt during the resentencing proceeding. Mr. Orme submits that appellate counsel was ineffective for failing to raise this issue on direct appeal. Rehearing is warranted.

WHEREFORE, Mr. Orme respectfully requests this Court to grant rehearing and reconsider the opinion of December 10, 2015, denying Mr. Orme's appeal and his petition for habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been furnished by electronic service to Patrick Delaney, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 24th day of December, 2015.

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

COUNSEL FOR MR. ORME

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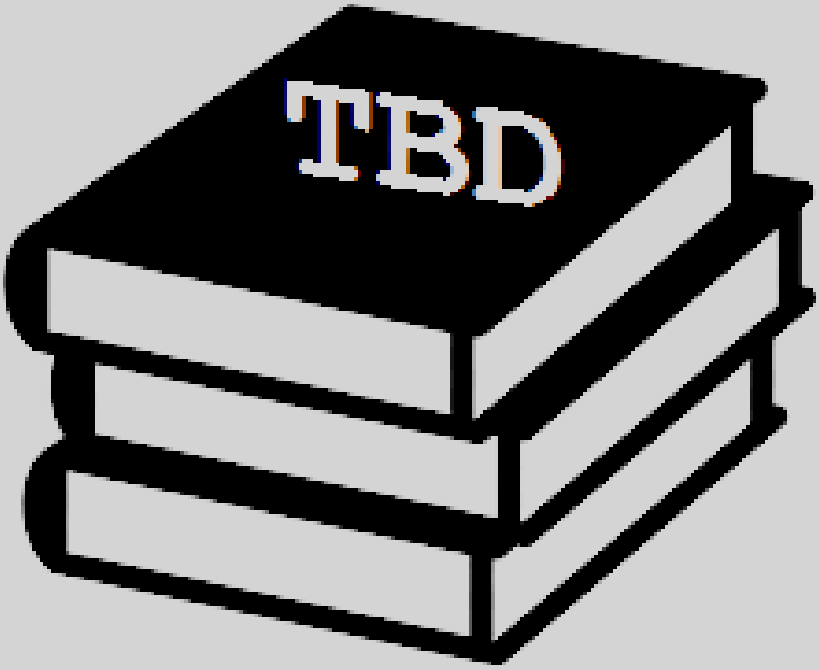

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