

IN THE SUPREME COURT OF FLORIDA

LORAN COLE,
Appellant,
v.
STATE OF FLORIDA,
Appellee.
_____ /

CASE NO. SC00-1388

**ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA**

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

TRIAL

This Court summarized the facts of the crimes on direct appeal as follows:

On February 18, 1994, Pam Edwards, a senior at Eckerd College in St. Petersburg, Florida, drove to the Ocala National Forest, where she met her brother, John Edwards, a freshman at Florida State University in Tallahassee, Florida. The two planned on camping in the forest for the weekend and eventually decided to camp in Hopkins Prairie. They were setting up camp when Loran Cole briefly stopped by their campsite. Cole soon returned to the campsite, introduced himself as "Kevin," and helped them set up camp. After John and Pam ate dinner, Cole and William Paul came to the Edwards' campsite. Paul was carrying a walking stick and was introduced to the Edwards as Cole's brother. The four sat around the campfire, and at about 10:45 p.m., they decided to walk to a pond.

The four walked for a while but never found the pond. Instead, Cole jumped on Pam and knocked her to the ground. She got up and tried to run; however, Cole caught her, hit her on the back of the head, handcuffed her, and threw her down on the ground. Meanwhile, John had taken Paul's walking stick and was hitting him with it. Cole then helped Paul subdue John and moved John on the ground next to Pam. While they lay close to each other on the ground, John apologized to Pam for having exposed them to the dangers of these two strangers. Cole told the Edwards that he wanted to take their cars, and he went through their pockets and took their personal property, including their jewelry.

Paul took Pam up the trail, and he was complaining about his hand and head, which were injured in the altercation with John. Pam could hear Cole asking John why he hurt Cole's brother and could hear John grunt a few times. Cole then came to where Pam and Paul were sitting and told them that they were going to wait until John passed out. Cole called back to John several times, and John responded by moaning. Eventually, Cole

told Pam he was going to move John off the trail and tie him up. Pam then heard something that resembled a gagging sound. When Cole returned, he said that John must be having trouble with his dinner, hinting that John was vomiting. John died that night from a slashed throat and three blows to the head, which fractured his skull. The injury to the throat caused a loss of blood externally and internally into John's lungs.

Pam, Paul, and Cole then started walking back to Cole's campsite. On the way, they walked past John, and he was not moving. At the campsite, Cole forced Pam to sleep naked by threatening her that unless she cooperated, she and John would be killed. Cole then forced her to have sexual intercourse with him.

The next morning, Cole went to check on John and told Pam that John was fine. Cole left the campsite to purchase marijuana. When he returned, the three smoked marijuana, and Cole again forced Pam to have intercourse with him. After eating dinner, they packed up as much of the camp as would fit into the backpacks carried by Cole and Paul. Cole then gagged Pam and tied her to two trees. Cole and Paul left in Pam's car and went to a friend's trailer, where they spent the night. The two left several items of John Edwards' personal property at the trailer. Thereafter, Cole and Paul returned Pam's car to the Ocala National Forest and took John's car, a Geo Metro.

By the early morning on Sunday, Pam was able to free herself of the ropes. She did not move because she was afraid that if Cole and Paul returned and she was not there, they would hurt John. She stayed in that spot until daylight and tried to find John. When she was unable to find him, she flagged down a motorist, who took her to call the police. The police returned with Pam to the scene, and the police located John's body. The body was face down and was covered with pine needles, sand, debris, and small, freshly cut palm fronds. Both of his hands were in an upward fetal position; there was a shoestring ligature around his left wrist and a shoestring partially wrapped around his right wrist.

Police thereafter arrested Paul and Cole in Ocala on Monday, February 21, 1994. Paul and Cole were indicted on charges of

first-degree murder, two counts of kidnapping (sic) with a weapon, and two counts of robbery with a weapon. Cole was also indicted on two counts of sexual battery. Paul pleaded nolo contendere to the charges and was sentenced to life in prison without possibility of parole for twenty-five years on the murder charge and concurrent terms on the remaining charges. After a jury trial, Cole was found guilty on all counts of the indictment. A penalty-phase hearing was held, after which the jury unanimously recommended death. Finding four aggravators, [footnote omitted], no statutory mitigators, and two nonstatutory mitigators, [footnote omitted] the trial court followed the jury's recommendation and sentenced Cole to death.

Cole v. State 701 So. 2d 845, 848-850 (Fla. 1997).

On direct appeal, Cole raised fourteen issues. They were:

(1) Whether the trial court abused its discretion in allowing a portion of Pam Edwards' testimony to be read back to the jury; (2) whether the trial court erred in conducting portions of the trial in the defendant's absence; (3) whether the jury's sentencing recommendation was tainted by improper victim-impact testimony; (4) whether the death penalty is proportionate; (5) whether the trial court erred in denying Cole's motion for mistrial after a witness referred to Cole's "history"; (6) whether the trial court erred in denying Cole's motion for change of venue; (7) whether the trial court erred in overruling Cole's objection to the introduction of several photographs; (8) whether the trial court erred in denying Cole's motion to suppress; (9) whether the trial court erred in admitting a stick purported to be the one carried by Paul; (10) whether the trial court erred in failing to adequately instruct the jury; (11) whether the trial court erred in denying Cole's pretrial motions not to allow the State to proceed on both premeditated and felony murder; (12) whether the trial court erred in imposing an order of restitution which included travel expenses for a State witness; (13) whether Cole's sentences on the noncapital offenses are illegal; and (14) whether section 921.141, Florida Statutes (1993), is constitutional.

Cole v. State, 701 So. 2d at 850 n.3. All relief was denied. *Id.* at 856.

Cole filed his instant Rule 3.850 motion in the lower court on September 27, 1999. (R 408-457). On February 18, 2000, after a *Huff* hearing, the Honorable William Swigert denied most of those claims summarily. (R 915-937).¹ An evidentiary hearing was held on May 15, 2000, after which Judge Swigert denied the remainder of Cole's claims.

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This order appears in the record twice - at pages 915-937, and, again, as an appendix to the Final Order Denying Defendant's Amended Motion to Vacate Judgements of Conviction and Sentence issued on May 24, 2000, at pages 1202-24.

POINT ONE: The trial court did not err when it summarily denied Cole's specified claims of ineffective assistance of counsel. Cole has not carried his burden to show deficient performance or prejudice in regard to any of the seven subclaims he raises herein.

Subclaim 1. Trial counsel presented extensive evidence of Cole's history of drug and alcohol abuse, both past and at the time of the crimes. Any additional evidence of such would have been merely cumulative. Counsel is not ineffective for failing to present cumulative evidence even where it provides more detail. Cole was not entitled to an evidentiary hearing on this claim of ineffective assistance of counsel which was clearly refuted by the record.

Subclaim 2. Trial counsel presented extensive evidence of Cole's childhood and upbringing. He did not call Cole's mother to testify on these issues because Cole directed him not, and he had evidence sufficient, if believed by the jury, to establish these matters. Moreover, this evidence was merely cumulative. Cole was not entitled to an evidentiary hearing on this claim of ineffective trial

counsel which was refuted by the record.

Subclaim 3. Cole's claim that his attorney was ineffective in not correcting the prosecutor's argument to the jury that the co-defendant's hand was broken making it unlikely he would use it to kill the victim. This is procedurally barred as prosecutorial misconduct issues should be raised on direct appeal. Neither is there merit to the claim for the comment was legitimate comment on the evidence adduced at trial. Moreover, any error was harmless due to the overwhelming evidence of Cole's guilt.

Subclaim 4. Cole's trial attorney did not render ineffective assistance in failing to ask that the heinous, atrocious, or cruel jury instruction include a limitation that only the actions occurring while the victim is conscious can be considered in regard to this aggravator. This claim is procedurally barred because it was raised on direct appeal and will not be relitigated under the guise of ineffective assistance. It is also without merit as the record shows that the victim was conscious and suffered a horrible, painful death. In any event,

Cole cannot show prejudice as the three remaining aggravators overwhelm the comparatively minuscule mitigation.

Subclaim 5. Trial counsel was not ineffective in failing to place the life sentence given Co-defendant Paul before the jury. Counsel was following Cole's directive in this regard, and thus, did not render deficient performance. Moreover, Paul's culpability was much less than Cole's, and so, the life sentence would not mitigate Cole's actions. Cole can show no prejudice sufficient to meet the *Strickland* standard due to the overwhelming evidence of his greater role in these horrible crimes, as well as comparison of the four strong aggravators to the relatively insignificant mitigation. Thus, the record conclusively defeats this claim, and it was properly summarily denied.

Subclaim 6. Cole has not carried his burden to show that his trial counsel rendered deficient performance by not asking for another attorney to assist him in Cole's case. Cole's 3.850 claim is conclusory and insufficient on which to base any relief. Cole has not adequately

alleged how a second attorney would have benefitted him so significantly as to have changed the outcome of the proceedings in his favor. The claim is also without merit in that as trial counsel admitted below, Cole's case is not complex. Having failed to sufficiently allege either deficient performance or prejudice, much less both as is required by *Strickland*, he is entitled to no relief.

Subclaim 7. The record conclusively refutes Cole's claim that his trial counsel was ineffective in failing to object to two hearsay statements at trial. Mr. Jackson's statement was not one bolstering Pam Edwards' credibility and was cumulative to other properly admitted evidence. Officer Jicha's statement was made as she explained why she was investigating an incident which occurred out of her jurisdiction. The jury had ample opportunity to assess Ms. Edwards' credibility. Any complaint about these statements should have been made on appeal and is procedurally barred.

POINT TWO: The trial court did not err in denying the claim that trial counsel's failure to request jury instructions on the mental health statutory

mitigators rendered him ineffective. Cole conceded at trial that no statutory mitigators applied, and he has presented no authority holding that in the face of such a concession, it is error for a trial judge not to give instructions on the statutory mitigators. This issue is procedurally barred because it could have been raised on direct appeal, and couching it in the guise of ineffective assistance of counsel does not avoid that bar. The claim is also without merit. Cole's expert did not testify that whatever brain damage and possible mental illness Cole had was of such a nature and severity to prevent him from appreciating the criminality of his conduct, or to conform his conduct to the law, or that he was under extreme emotional and mental distress at the time of the crime. Cole's malingering with this expert affected the expert opinion testimony available to him at trial. Thus, there was no evidence to support such instructions. Moreover, Cole cannot demonstrate prejudice in regard to this matter as the overwhelming aggravation far exceeds the relatively weak mitigation.

POINT THREE: The trial court did not err in denying the claim that trial counsel

was ineffective for failing to hire a neuropsychologist to examine Cole and testify at trial. Cole has not demonstrated that a neuropsychologist was necessary to determine the extent of his mental illness and brain damage. Nonetheless, trial counsel hired one. Counsel had no reason to believe that expert was in any manner ineffective. Cole has not shown that his counsel's performance in regard to this expert was deficient. Neither has he demonstrated prejudice. The four strong aggravators so far outweigh the mental health mitigation, even were it classified as statutory rather than nonstatutory as found by the trial court.

POINT FOUR: Cole received a competent neuropsychological evaluation. That the expert reviewed and relied upon tests performed by other experts does not render his evaluation deficient. Moreover, Cole has not demonstrated that a neuropsychologist was necessary to determine the extent of his mental illness and brain damage. Nonetheless, trial counsel hired one. Certainly, Cole's malingering contributed to an inability to make this type of diagnosis. In any event, Cole can demonstrate no prejudice. The four strong

aggravators so far outweigh the mental health mitigation, even were it classified as statutory rather than nonstatutory as found by the trial court, that there is no possibility that a life sentence would have been imposed.

POINT FIVE: The trial court correctly excluded the testimony of proposed defense expert Dr. Dees, allowing it to be proffered. There is no requirement that additional testimony must be accepted merely because it differs from that of the expert trial counsel used. Any difference was in the degree of impairment - a factor which Cole's malingering made difficult to determine at the time of his evaluation by Dr. Berland. Moreover, Cole cannot show prejudice. Given the unanimous death recommendation and that four strong aggravators were weighed against little mitigation, had the two mental state statutory mitigators been found, there would have been no reasonable possibility that the sentence would have been life.

POINT SIX: The trial court did not err when it denied Cole's specified claims

of ineffective assistance of counsel after an evidentiary hearing. Cole has not carried his burden to show deficient performance or prejudice in regard to any of the five subclaims he raises herein.

Subclaim 1._____ The trial court correctly denied Cole's claim that his attorney was ineffective because he did not personally individually question five eligible jurors during the second round of jury selection. All of the prospective jurors were thoroughly questioned. That the prosecutor and the judge asked the questions of the subject five does not render defense counsel's performance deficient in not also inquiring of them. In the absence of a specific omitted question which prejudiced Cole, his claim is insufficient. Moreover, he has utterly failed to show prejudice, and there is none.

Subclaim 2. The trial court did not err when it denied Cole's claim that his attorney was ineffective when he acquiesced to Cole's directive not to use a peremptory challenge to remove a particular juror. Cole was well aware of his attorney's objection to Juror Cutts, and

the reason for it, i.e., the jurors occupation. Counsel's tactical decision, comporting with his client's directive, was not deficient performance. Neither has Cole demonstrated prejudice.

Subclaim 3. Trial counsel was not ineffective for failing to call the co-defendant at trial. The matters Cole claims the co-defendant could have testified to were introduced at trial through other witnesses and/or evidence. Counsel's tactical determination that based on the deposition taken of the co-defendant, it was too risky to call him was not deficient performance. Moreover, Cole did not want his attorney to call the co-defendant. Cole has not shown any prejudice from the tactical decision not to call the co-defendant.

Subclaim 4. The trial court correctly denied Cole's claim that his attorney rendered prejudicially deficient assistance in failing to object to a phrase used in the prosecutor's opening statement. Counsel made a tactical decision not to object to this in order to avoid calling more attention to it. Moreover, at the end of the opening statement, counsel moved for a mistrial, but rejected the curative

offered to avoid emphasizing the statement. Cole has demonstrated neither deficient performance nor prejudice. Further, the issue is procedurally barred as prosecutorial misconduct issues are properly raised on direct appeal.

Subclaim 5. Trial counsel's decision to call a State witness as a Defense witness was not deficient performance. The rules of evidence precluded presentation of the testimony the defense wanted placed before the jury on cross examination of the State's witness. Trial counsel made a reasonable, tactical decision to call the witness for the defense even though it cost him opening and rebuttal closing argument. Cole has shown no prejudice.

POINT VII: The trial court did not err in denying Cole's motion to release semen samples to be tested for a DNA match with the co-defendant. This issue is procedurally barred for failure to raise it at trial or on appeal. The evidence presented at trial clearly shows that Cole, not the co-defendant, raped Ms. Edwards. Indeed, Cole's confession to that crime was admitted in evidence at trial.

Further, Cole has shown no prejudice in regard to the murder because even if the co-defendant also raped Ms. Edwards, same would not mean that she was confused about who killed her brother at an earlier time. Moreover, the evidence overwhelmingly establishes Cole's guilt.

POINT VIII: Cole did not carry his burden to prove that the penalty phase or postconviction courts permitted nonstatutory aggravators to be presented and considered. The issue is procedurally barred as to the penalty phase because it could have been raised on appeal. It is procedurally barred as to both the trial and postconviction courts because the issue was not properly raised in those courts. Moreover, Cole has shown no prejudice.

POINT IX: The trial court correctly denied Cole's *Brady* claim. Prosecutor King did not state that he did not call the co-defendant at trial because he thought the co-defendant would take the blame for the crimes. The evidence to the contrary was not credible. The prosecutor never felt that it was possible that the co-defendant slit

Mr. Edwards' throat. This Court should uphold the credibility determination made by the postconviction court. The trial evidence established that Cole killed Mr. Edwards by slitting his throat, and there is no credible reason to believe that the co-defendant would have testified favorably to Cole. He has not met any of the three *Brady* prongs.

POINT X: The trial court correctly denied Cole's claim that he should be permitted to interview his jurors. He raises no specific allegations of juror misconduct. The due process claim is procedurally barred because it was not raised on appeal. It is also legally insufficient.

POINT XI: Cole's claim that Florida Statute 921.141(5) is vague and overbroad because it does not adequately instruct the jury in the consideration of aggravators and mitigators was correctly denied. Jury instruction issues are barred on postconviction motion because they should have been raised on direct appeal. Counsel is not ineffective for failing to object to the standard instructions. Neither is Cole's automatic aggravator claim properly before this

Court in a postconviction proceeding; it is also without merit. Likewise, Cole's burden-shifting and weighing complaints are procedurally barred and meritless.

POINT XII: Cole has demonstrated no harmful error, and so, there is no cumulative error. Even if some errors occurred, they do not cumulatively entitle Cole to relief. To the extent that the alleged errors could have been raised on appeal, this claim is procedurally barred.

Cole is entitled to no relief.

POINT I

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING COLE'S SPECIFIED CLAIMS OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL.

The standard of review of Rule 3.850 summary denial is competent, substantial

evidence. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998). The subject subclaims were denied without holding an evidentiary hearing. Thus, the competent, substantial evidence standard applies.

To show ineffective assistance of trial counsel, the defendant must show that his counsel's performance, including both acts and omissions, fell outside the wide range of reasonable professional assistance. *See Robinson v. State*, 707 So. 2d 688, 695 (Fla. 1998); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). There is a strong presumption that counsel rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* The distorting effects of hindsight must be eliminated, and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id.* *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). Even if the defendant shows deficient performance, he must also prove that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id.*; *Gorham v. State*, 521 So. 2d 1067, 1069 (Fla. 1988)(citing *Strickland*, 466 U.S. at 687).

Reasonable strategic decisions of trial counsel will not be second-guessed. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997). "Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected." *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998), quoting, *State v.*

Bolender, 503 So. 2d 1247, 1250 (Fla. 1987), *cert. denied*, 484 U.S. 873 (1987). “To hold that counsel was not ineffective[,] we need not find that he made the best possible choice, but that he made a reasonable one.” *Byrd v. Armontrout*, 880 F.2d 1, 6 (8th Cir. 1989). Trial counsel “cannot be faulted simply because he did not succeed.” *Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984). A defendant is “not entitled to perfect or error-free counsel, only to reasonably effective counsel.” *Waterhouse v. State*, 522 So. 2d 341, 343 (Fla. 1988), *cert. denied*, 488 U.S. 846 (1988).

In reviewing claims of ineffective assistance of counsel, this Court “defer[s] to the trial court in respect to findings of fact . . .” *Cherry v. State*, 25 Fla. L. Weekly S719, S721 (Fla. Sept. 28, 2000). Review of “whether counsel was ineffective and whether the defendant was prejudiced by any ineffective assistance of counsel are questions of mixed law and fact.” *Id.* This standard of review is applicable to Cole’s ineffective assistance of counsel issues. *See id.*

1. COLE’S CLAIM THAT TRIAL COUNSEL FAILED TO PRESENT EVIDENCE OF COLE’S HISTORY OF DRUG AND ALCOHOL ABUSE WAS CORRECTLY DENIED WITHOUT AN EVIDENTIARY HEARING.

Cole complains that the trial judge should have held an evidentiary hearing on his 3.850 claim that his trial attorney, Don Gleason, failed to investigate and present

evidence of Cole's history of drug and alcohol abuse. (IB 13). He proceeds to recount that Cole's mother, Ann, first caught him drinking alcohol at age 10, that a friend of Cole's saw him "use drugs on over one hundred occasions," including "drugs such as speed balls," and that this friend knew of "Cole's mental instability, and the way drugs affect his behavior." (IB 13). He also complains that Mr. Gleason did not present documents referencing "drug and alcohol abuse" in "his Ohio and Florida prison records." (IB 14). He claims "this information was available if counsel investigated," (IB 14), but fails to give any record citation or allege that any such document was attached to his motion.

As the trial judge, the Honorable William T. Swigert, explained in his detailed order denying an evidentiary hearing on this claim, Mr. Gleason presented "extensive evidence" of Cole's history of drug and alcohol abuse, past abuse, "as well as evidence of alcohol and drug use at the time of the crime" (R 922, 923). That evidence included the testimony of Cole's sister that Cole had a drug problem dating back to age 12, and testimony from his foster mother that Cole had alcohol and drug problems when he lived with her and that Cole had a long-term problem which continued after he left her home. (R 923). Moreover, at trial, Allen Detwiler testified that he took Cole to a store shortly before the subject crimes, and Cole bought a case of beer. Victim Pam Edwards testified that Cole told her that he had a lot to drink and

added that his campsite was strewn with empty beer cans. Ms. Edwards also related that she saw Cole smoke marijuana during her captivity by him, and Danielle Zimmerman testified that she saw Cole smoking the drug after the murder. (R 923). In addition, Defense Expert, Dr. Berland, testified to Cole's mental illness and the effects of drugs and alcohol on someone with Cole's problems. (R 923). Thus, as Judge Swigert held, "[a]ny additional evidence of drug and alcohol use would have been cumulative." (R 923). *See Jennings v. State*, 583 So. 2d 316, 320-21 (Fla. 1991).

It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position. . . . The appropriate legal standard is not error-free representation, but 'reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' . . .

583 So. 2d at 321. At Jennings penalty phase, evidence from one witness indicated that Jennings "staggered" and said "something like, oh, I am so drunk," and another claimed to have seen Jennings consume "about a gallon and a half of beer" within a few hours of the crime. *Id.* Finding this evidence sufficient to establish the intoxication point if believed by the jury, this Court agreed that trial counsel's performance was not deficient for failure to present the additional evidence of intoxication about which Jennings complained in his postconviction motion. *Id.*

The alleged additional evidence of alcohol and drug use and abuse in Cole's

case does not add anything of substance to the evidence presented in mitigation at trial. The most that can be said for it is that it may provide a bit more detail. Thus, it is merely cumulative and does not establish ineffective assistance of counsel. *Jennings*. See *Clisby v. State*, 26 F.3d 1054 (11th Cir. 1994).

Moreover, it is clear that Cole was not entitled to an evidentiary hearing on this claim.² In *Hill v. Dugger*, 556 So. 2d 1385, 1387-88 (Fla. 1990), the defendant claimed his counsel was ineffective because he failed to present “critical mitigating evidence” of intoxication and mental condition. Hill had affidavits from additional family members and friends who would have given more details of “his family background and drug use.” *Id.* He also sought to buttress the intoxication claims with reports from two mental health professionals stating that Hill’s conduct “was the result of cocaine ingestion, his below average intelligence, and Jackson’s domination.” *Id.* Hill even submitted an affidavit from the mental health professional who testified at trial to the effect that given the additional information, he would “now testify that Hill

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Further, at penalty phase Cole “unequivocally” said that he did not want his mother, who is now alleged to have been one from whom such evidence should have been obtained, to testify. (R 926). A defendant has the right to refuse to call potential mitigation witnesses. Cole has not carried his burden to allege facts that, if proven, would show that no reasonable trial counsel would have complied with his client’s firmly expressed instruction not to call his mother at the proceeding. Thus, he is entitled to no relief. See *Strickland*.

suffered from extreme mental disturbance at the time of the offense and that his poor mental ability impaired his judgment sufficiently to impair his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.” *Id.* Finally, trial counsel submitted an affidavit admitting his ineffectiveness. *Id.*

This Court upheld the trial court’s conclusion that counsel’s performance was not deficient. *Id.* Indeed, the issue did not warrant an evidentiary hearing! *Id.* The additional details relating to substance abuse supplied in Cole’s pleading pale in comparison to the details - supported by affidavits and professional reports - found legally insufficient to require an evidentiary hearing in *Hill*. As in *Hill*, the evidence at issue, even if proved, “is nothing more than cumulative to the evidence already presented to the jury.” *Id.* at 1389. Cole is entitled to no relief both because the alleged additional evidence is merely cumulative and the allegations alleging failure to find and/or present the additional evidence support neither a determination of deficient performance nor prejudicial impact, much less both as required by *Strickland*. See *Hill*, 556 So. 2d at 1389.

2. COLE’S CLAIM THAT TRIAL COUNSEL FAILED TO PRESENT EVIDENCE OF COLE’S CHILDHOOD ABUSE AND POOR UPBRINGING WAS CORRECTLY DENIED WITHOUT AN EVIDENTIARY HEARING.

Cole complains that trial counsel did not present his mother, Ann Cole, and his “closest sister,” Charlie McCue, to testify of “emotional abuse” Cole claims to have suffered as a child. (IB 16-17). He claims that his attorney presented evidence showing that “Cole grew up under ‘fairly normal’ circumstances.” (IB 17). He says his attorney should have investigated and presented evidence of “how her [Ann Cole’s] bizarre behavior affected Mr. Cole.” (IB 17).

Cole admits that at trial, his attorney presented substantial evidence of Ann Cole’s bad habits, crazy actions, and the “fact that those who knew Ann Cole believed she had mental problems,” but complains that he failed to investigate how her “deranged behavior” affected Cole. (IB 17). He also claims that had counsel “made a genuine effort” to contact Ms. McCue, “he would have learned that . . . Cole’s uncle . . . lit Mr. Cole’s hands on fire as punishment.” (IB 18). He also complains that other unidentified family members, former friends, and former neighbors could have offered information about “Cole’s past drug use, family history of mental illness, and head injuries.” (IB 18).

Cole adds that one friend said that **Cole said** that he had suffered physical and sexual abuse at an early age. (IB 18). Obviously, since Cole told this friend about such abuse, he could have told his own attorney about it, and any failure to fully and completely disclose all information relevant to this claim undercuts any claim that his

attorney's performance was deficient for failing to uncover this information. Moreover, in the 3.850 motion, the only statement regarding alleged sexual abuse is that Cole said he was abused. This is no different than the claim presented at trial and rejected at that time and provides no basis for relief in this postconviction proceeding.

As the postconviction court wrote in his order, "extensive evidence of defendant's childhood abuse and poor upbringing" were presented during the penalty phase of Cole's trial. (R 924). Cole's sisters and father testified, and Cole himself specifically and adamantly stated that he did not want his mother to testify. (R 925-26). The testimony covered physical abuse, transient and unstable lifestyle, and substance abuse by both Cole and his parents. (R 925-26).

"It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position." *Jennings v. State*, 583 So. 2d 316, 320-21 (Fla. 1991). Finding the evidence presented sufficient to establish the defense's point if believed by the jury, this Court refused to declare trial counsel's performance deficient for failure to present the additional evidence on the issue. *Id.*

The alleged additional evidence of abuse and lifestyle in Cole's case adds nothing of significance to the evidence presented in mitigation at trial. The best view

of it for the defense is that it may provide a bit more detail in those areas. Thus, it is merely cumulative and does not establish ineffective assistance of counsel. *Jennings*. See *Clisby v. State*, 26 F.3d 1054 (11th Cir. 1994). Cole is entitled to no relief as the facts he has alleged, even if true, do not establish deficient performance or prejudice in this case.

3. COLE’S CLAIM THAT TRIAL COUNSEL PERFORMED DEFICIENTLY BY FAILING TO OBJECT TO THE PROSECUTOR’S COMMENTS DURING CLOSING ARGUMENT WAS CORRECTLY DENIED WITHOUT AN EVIDENTIARY HEARING.

Cole complains that his trial counsel did not object to the prosecutor’s closing argument submitting that the Co-Defendant did not stab the victim because his hand was broken. (IB 21-22). He says the Co-Defendant’s hand injury was not as severe as the prosecutor suggested. (IB 22). Cole claims that this argument was not only misleading, but was based on facts “not in evidence” and “not true.” (IB 22). According to Cole, his attorney should have refuted this claim in his own closing argument and should have pointed out that the Co-Defendant could have stabbed the victim with his other, dominant hand. (IB 23).

The postconviction court wrote:

. . . Paul’s hand was not broken. However, it is also clear that Paul’s

hand was badly injured . . . [and] Pam Edwards testified that Paul was moaning and said he thought his hand was broken. . . . She also testified that Defendant had her roll a joint for Paul because his hand was cut and swollen. . . . John Tomson (sic) testified that . . . Paul was in pain and that his hand was swollen and ‘quite large.’ . . . Mary Gamble testified that . . . his hand was ‘very swollen up’ and ‘he could barely move it.’ . . . The evidence demonstrates that even though Paul’s hand was not broken, it was injured to the point that he may have had difficulty using it. Therefore, even though the prosecutor’s statement that Paul’s hand was broken was technically incorrect, it was not prejudicial to the outcome. . . . Claims of ineffective assistance of counsel are insufficient[ly] pleaded when they fail to allege facts to demonstrate deficient performance and prejudice.

(R 1214-15). Cole argues with this finding of the postconviction court, claiming that “the evidence shows prejudice” because the prosecutor “misrepresented the facts.” (IB 23-24).

The prosecutorial statement at issue is: “Now this guy with a broken hand is going to get this knife out of his pocket, get it open, go back, cut John Edwards’ throat, and then get it back in his pocket, with a broken hand?” (R 1214). This issue is procedurally barred because it could have been raised on direct appeal. *Brown v. State*, 755 So. 2d 616, 621 n.7 (Fla. 2000). See *Garcia v. State*, 644 So. 2d 59, 62-63 (Fla. 1994)[issue raised on direct appeal even in absence of contemporaneous objection in trial court]. Couching a direct appeal issue in terms of ineffective assistance is an improper attempt to “have a second appeal on the merits,” and is “properly summarily denied.” *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000).

Moreover, even if not barred, the claim merits no relief. In *Monlyn v. State*, 705 So. 2d 1, 4 (Fla. 1997), the defendant objected to a closing argument statement that the defendant would have done the victim “a big favor if he had shot him. It would certainly have been a less painful death.” This Court noted evidence that “there were shotguns available” and held the argument to be a proper comment on the evidence relating to “Monlyn’s choice of method in committing the murder.” 705 So. 2d at 5.

The State submits that the Cole prosecutor’s statement during closing argument was a fair comment on the evidence admitted at trial. Pam Edwards testified that Paul repeatedly complained that his hand was broken, and Cole had her do things for Paul - such as roll a joint for him - because of Paul’s inability to use his hand due to the injury. Thus, the prosecutor’s statement that Paul’s hand was broken was based on Paul’s own statements to Ms. Edwards made at the time of the crimes. (*See* R 1582). Moreover, the thrust of the prosecutor’s argument was not that the hand was actually broken, and thus, it was physically impossible for Paul to use it, but was that Paul believed that it was broken, was treating it as if it was, and therefore, would not even attempt the things that he would have had to have done with that hand in order to slit the throat of John Edwards. There was no prosecutorial misconduct, and therefore, no error.

Assuming *arguendo* that the comment was improper, there was no prejudice because the comment clearly did not affect the outcome of the proceeding. The evidence that Cole, not Paul, slit John's throat is overwhelming. *See Cole v. State*, 701 So. 2d 845, 848-49 (Fla. 1997). Thus, any error was harmless beyond a reasonable doubt. Cole is entitled to no relief.

4. COLE'S CLAIM THAT TRIAL COUNSEL PERFORMED DEFICIENTLY BY FAILING TO REQUEST A LIMITING CONSTRUCTION OF THE INSTRUCTION ON HEINOUS, ATROCIOUS, OR CRUEL WAS CORRECTLY DENIED WITHOUT AN EVIDENTIARY HEARING.

Cole complains that his trial counsel was ineffective because he failed to request that the heinous, atrocious, or cruel jury instruction include a limitation that "actions taken after the victim is unconscious cannot be considered when considering this aggravating circumstance." (IB 25). He claims "[t]here was absolutely no evidence that John Edwards was conscious during and after the time Mr. Cole was along with him." (IB 26). This issue is procedurally barred because it was raised and rejected on direct appeal. *See Cole v. State*, 701 So. 2d 845, 852 (Fla. 1997).

In *Cole*, this Court stated the issue as: "Cole claims that the trial court erred in instructing and finding the aggravating circumstance . . . heinous, atrocious, or cruel." *Id.* at 851. This Court proceeded to quote at great length the factual findings of the

trial court relevant to this issue. *Id.* at 851-52. The facts found included that “John was conscious for several minutes while he gasped [for] air from a severed windpipe slow[ly] filling with blood.” *Id.* at 852. This Court affirmed “the trial court’s finding that this aggravator was established beyond a reasonable doubt in this murder.” *Id.* Thus, not only was the issue raised and decided adversely to Cole on direct appeal, it was, and is, utterly without merit as the record facts are that the victim was conscious and suffered a horrible, painful death.³ *See Cole*, 701 So. 2d at 851-52.

In *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000), the defendant raised claims of improper prosecutorial remarks in closing argument. This court held the claim procedurally barred because it “was raised on direct appeal and cannot be relitigated under the guise of ineffective assistance of counsel.” *Id.* at 1067. Cole’s claim that although “[t]his Court upheld the trial court’s finding of this aggravator,” it “did not address counsel’s failure to request the unconscious limiting construction as ineffective assistance of counsel” is nothing more than an attempt to relitigate the HAC issue under the guise of ineffective assistance of counsel. Cole is entitled to no relief. *See Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990) (*citing, Blanco v.*

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Cole’s reaction to the victim’s “slow, choking death” was “a joke.” *Id.*

Wainwright, 507 So. 2d 1377 (Fla. 1987)).

Finally, Cole can not show prejudice as the three remaining aggravators are more than sufficient to outweigh the comparatively minuscule mitigation.

5. COLE’S CLAIM THAT TRIAL COUNSEL PERFORMED DEFICIENTLY BY ALLOWING HIM TO MAKE THE DECISION NOT TO OFFER THE CO-DEFENDANT’S LIFE SENTENCE TO THE JURY AS MITIGATION WAS CORRECTLY DENIED WITHOUT AN EVIDENTIARY HEARING.

Cole complains that his trial counsel was ineffective because he let Cole “make the legal decision not to present the co-defendant’s life sentence to the jury as mitigation.” (IB 28). This issue is procedurally barred because it could, and should, have been raised on direct appeal. *See McDonald v. State*, 743 So. 2d 501, 506 (Fla. 1999). It is also barred because the issue of the proportionality of Cole's death sentence was raised on direct appeal, *Cole v. State*, 701 So. 2d at 853; the fact that he now bases it in a different ground does not entitle him to relief from the procedural bar. *See Medina*, 573 So. 2d at 295.

Moreover, it is without merit. In *McDonald v. State*, the defendant claimed that the jury should have been told that McDonald’s co-defendant received a life sentence. 743 So. 2d at 506. This Court flatly rejected that claim and denied relief. *Id.* Neither is Cole entitled to any relief on this claim.

Finally, the State submits that any error in not placing the lesser sentence before the jury is harmless because the Co-defendant Paul was a much less culpable actor than was Cole. Not only did Cole conceive of the plan, direct it, perform in it as the dominant actor, and actually slit the throat of the victim he had rendered helpless, he was also the only one who raped (twice) the female victim. Additionally, Pam Edwards testified that Paul was instrumental in convincing Cole not to kill Pam. The far lesser degree of culpability of Paul would render any error in not presenting his lesser sentence to the jury harmless beyond a reasonable doubt. Moreover the overwhelming evidence of Cole's role in these horrible crimes, as well as comparison of the four strong aggravators to the relatively minuscule mitigation, preclude any showing of prejudice sufficient to merit relief on this claim.

6. COLE'S CLAIM THAT TRIAL COUNSEL PERFORMED DEFICIENTLY IN FAILING TO REQUEST THE ASSISTANCE OF CO-COUNSEL WAS CORRECTLY DENIED WITHOUT AN EVIDENTIARY HEARING.

Cole complains that his trial attorney should have asked the court to appoint an attorney to assist him. (IB 31). He claims that co-counsel would have given Attorney Gleason more time to do legal research and investigation. (IB 31-32).

In *Armstrong v. State*, 642 So. 2d 730, 737 (Fla. 1994), the defendant claimed that the trial judge should have granted his attorney's request for appointment of

co-counsel “because of the complicated nature of this case.” *Armstrong* involved a robbery, murder, and attempted murder of a second victim. *Id.* at 730. Armstrong felt additional counsel was needed to ensure proper investigation and preparation for both phases of the case. *Id.* This Court held that “[a]ppointment of multiple counsel . . . is a matter within the discretion of the trial judge and is based on . . . the complexity of a given case and the attorney’s effectiveness therein.” *Id.* The trial judge’s denial of the defense request was upheld by this Court. *Id.*

Relying on *Armstrong* in *Ferrell v. State*, 653 So. 2d 367 (Fla. 1995), this Court affirmed the trial court’s denial of a request for co-counsel. Noting that Ferrell’s counsel admitted that the case was “not complicated,” this Court specifically rejected “Ferrell’s invitation to adopt a rule that would require the appointment of two attorneys in all capital cases.” *Id.* at 370.

In the instant case, Cole’s collateral counsel framed a barebones, conclusory claim which “fail[ed] to allege facts to demonstrate deficient performance and prejudice.” (R 1215). Clearly, to avoid a summary denial, the Rule 3.850 motion must “allege ‘a brief statement of facts (and other conditions) relied on in support of the motion.’” *Asay v. State*, 769 So. 2d 974, 989 (Fla. 2000). At a minimum, Cole was required to state whether the case was complex, and if so, how counsel’s effectiveness was hampered by that complexity in order to state a legally sufficient

claim. A bare allegation that a second attorney would have meant more time and that the guilt phase and penalty phase segments could have been divided between the attorneys is woefully insufficient to meet the *Asay* standard. *See generally Roberts v. State*, 568 So. 2d 1255, 1260 (Fla. 1990) [mere reference to 3.850 motion arguments not sufficient].

Moreover, as in *Asay*, there was no error in not considering this matter in “determining the cumulative impact of counsel’s ineffective assistance,” (IB 32), because there are no individual, harmful errors to cumulate. 769 So. 2d at 989. *See Rose v. State*, 774 So. 2d 629, 635 (Fla. 2000). However even if some error occurred, it does not rise to the level necessary to merit relief. Finally, Cole’s case is comparable to *Armstrong* in degree of complexity, involving a robbery, murder, and kidnaping and rape of a second victim. Thus, even if Attorney Gleason had requested a second attorney, it is doubtful that one would have been appointed. Certainly, the trial judge would not have erred in exercising his discretion and denying any such request. Thus, Attorney Gleason did not render deficient performance in failing to request another attorney be appointed to assist him.

Moreover, Cole has not alleged facts indicating that, or how, additional legal research regarding the statutory mitigators or additional background investigation would have resulted in a life sentence. Attorney Gleason reasonably stipulated that the

statutory mental health mitigator instructions not be given because there was no evidence establishing them. *See* Point II, *infra*, at 40. Further, the additional background information which Cole claimed should have been presented at the penalty phase was merely cumulative to that presented. *See* Point I, Subclaim 2, *infra*, at 24. Thus, Cole has not shown, and can not show that he was prejudiced by any failure to request a second attorney. He is entitled to no relief.

7. COLE’S CLAIM THAT COUNSEL PERFORMED DEFICIENTLY DURING THE GUILT PHASE BY FAILING TO OBJECT TO HEARSAY STATEMENTS WAS CORRECTLY DENIED WITHOUT AN EVIDENTIARY HEARING.

Cole complains that his trial attorney failed to object to “improper hearsay statements.” (IB 32). They are:

A. Mr. Jackson: “[S]he [Pam Edwards] said she had been tied up and raped;” (R 1206); and,

B. Officer Jicha: “I felt like she was telling the truth, because everything just added up, right down the line.” (R 1206). The postconviction judge denied both claims, holding that Cole “fail[ed] to allege how he was prejudiced by counsel’s failure to object” to Mr. Jackson’s statement, and his allegation of prejudice in regard to Officer Jicha’s testimony “is entirely speculative . . .” (R 1206).

In *Kormondy v. State*, 703 So. 2d 454, 458 (Fla. 1997), the defendant complained of improper bolstering of testimony where a “Deputy was allowed to introduce a critical piece of factual evidence to the jury even though Long was unable to remember that fact...” Long had told deputy Cotton of Kormondy’s confession to the subject murder. *Id.* However, at trial, Long “could not remember the exact details that he conveyed to the detectives.” *Id.* Deputy Cotton proceeded to testify that Long said that Kormondy said that he used the victim’s own gun to kill him. *Id.*

This Court agreed that Deputy Cotton’s testimony was hearsay for which no exception existed. *Id.* However, this Court concluded that the admission of the evidence was harmless because other testimony also established that the victim’s gun killed him, and the testimony did little to identify the triggerman. *Id.* at 458-59. Importantly, the declarant, Long, testified at trial and “was subjected to extensive cross-examination;” thus, “[t]he jury was given ample opportunity to assess Long’s credibility.” *Id.* This Court concluded that “in light of the totality of the evidence presented, Cotton’s testimony cannot reasonably be said to have bolstered Long’s credibility.” *Id.*

In the instant case, Mr. Jackson’s statement summarily repeating what victim Pam Edwards told him upon encountering her by the roadside did not establish any facts of the crimes themselves, except that Pam had been tied up in connection with

the crime of rape. This was not a critical issue at trial; there was no contention that Pam had not been tied or that she had engaged in consensual sex with her brother's murderer. Moreover, Pam's own testimony established both that she was tied up and that she was raped and went into great detail regarding both. (RDA 1134-1171). In addition, there was physical evidence corroborating that she had been tied between two trees. (RDA 625-26, 681). Photos of this evidence was admitted into evidence at trial, as were the nails removed from the pine trees, with twine still tied on one. (RDA 682, 685). Cole's friend, Mary Gamble, testified that when she asked Cole who raped Pam, he replied that he did. (RDA 89). Pam's trial testimony was lengthy, and Cole had every opportunity to thoroughly cross examine her. Thus, the jury had ample opportunity to assess Pam's credibility, and admission of the hearsay statement of Mr. Jackson was harmless. *Kormondy*.

Deputy Jicha made the complained-of statements in the context of explaining why she, a Lake County officer, questioned Pam Edwards about a crime which occurred in Marion County. (RDA 573-575). Deputy Jicha said that she initially thought the crime had occurred in her jurisdiction because where she went to meet with Ms. Edwards was in her jurisdiction. (RDA 575). "[F]ive or ten minutes into my conversation with her, I found out that it happened in Marion County." (RDA 575-76). She continued to talk to Pam in an effort to determine whether Pam was reporting real

events or was making a false crime report. (RDA 575). At this point, the complained-of statement occurred as the deputy explained that she believed it was a report of an actual crime because “everything just added up . . .” (RDA 575).

Defense Counsel did not object to this statement, and at no point did the witness repeat it. A procedural bar claim cannot be avoided by raising otherwise barred claims as ineffective assistance of counsel. *Knight v. Dugger*, 574 So. 2d 1066, 1072 (Fla. 1990).

To prevail on this issue, Cole must demonstrate that his 3.850 allegations adequately alleged that his trial attorney rendered deficient performance which prejudiced him within the meaning of *Strickland*. The State submits that he has not done so. Cole’s allegation was that the jury “likely gave Pam Edwards’ testimony . . . extra weight.” As the postconviction judge said, Cole’s prejudice allegation is mere speculation. Such is insufficient to warrant an evidentiary hearing. *See Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991). *See also, Roberts*, 568 So. 2d at 1260 [barebones pleading insufficient to raise issue for consideration].

However, assuming that trial counsel’s performance was deficient in failing to object and that the jury may have given some “extra weight” to Pam’s testimony based on the officer’s statement, Cole is still not entitled to relief. The overwhelming evidence of his guilt is such that there is no reasonable possibility, much less

probability, that absent any “extra weight” given Pam’s testimony the jury would have found Cole not guilty or recommended a life sentence. Moreover, it is clear from the record that Pam Edwards was regarded as a highly credible witness independently of any testimony of Deputy Jicha. Pam’s testimony was corroborated by physical evidence, timing, and Cole’s admissions to others. There is no reasonable possibility that the jury gave Pam’s testimony extra weight because of Deputy Jicha’s complained-of statement; and, more importantly, there is no reasonable possibility that Cole would not have been convicted or that the jury recommendation for death would have been different had the jury not given Pam’s testimony the alleged extra weight due to the complained-of statement of the deputy. Cole’s instant claim was properly denied without an evidentiary hearing; he is entitled to no relief.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING COLE’S CLAIM THAT COUNSEL’S FAILURE TO ASK FOR AND ARGUE THE INSTRUCTIONS REGARDING THE MENTAL HEALTH STATUTORY MITIGATORS WAS INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL.

Cole claims that his trial counsel was ineffective because he failed to ask for jury instruction on the two mental state statutory mitigators. (IB 36). Since Dr. Berland testified that Cole has some mental illness and may have some brain damage, collateral counsel concludes that Cole was entitled to the statutory mitigation instructions. (IB 37).

The standard of review of ineffective assistance of counsel claims is *de novo*. See *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999). However, the factual findings of the postconviction court are controlling. *Id.* In Cole’s case, the postconviction court found as a fact that Defense Counsel and the prosecutor “conceded that no statutory mitigators applied.” (R 1195). Cole’s collateral counsel has cited no case holding that in the face of a concession, it is error for a trial court to fail to give jury instructions on the statutory mitigators even if there is arguable evidence which might support the giving of those instructions when properly requested. The State has found none and submits that this issue is procedurally barred as jury instruction issues could, and should, have been raised on direct appeal.

Occhicone v. State, 768 So. 2d 1037, 1050 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 665 (Fla. 2000). Cole's attempt to couch this claim in the guise of an ineffective assistance issue does not avoid the procedural bar. *Asay v. State*, 769 So. 2d 974, 989 (Fla. 2000).

Assuming *arguendo* that the claim is not procedurally barred, it is without merit. In *Geralds v. State*, 674 So. 2d 96 (Fla. 1996), the defense presented expert testimony that Geralds had anti-social personality disorder, bipolar manic disorder, an explosive temper and an aggressive acting out profile. Where the doctor did not testify that these conditions were present and affecting Geralds in a significant manner at the time of the murder, there was insufficient evidence to support the giving of the statutory mental mitigation instructions. *Id.* at 101.

Dr. Berland did not testify that whatever brain damage and possible mental illness he suspected Cole had was of such a nature and severity that it prevented him from appreciating the criminality of his conduct, was unable to conform his conduct to the essential requirements of the law, or was under extreme emotional and mental distress at the time of the crime. Thus, even had the trial judge been asked to give those instructions, there would have been no error in a refusal to do so. *Geralds*. Neither was trial counsel ineffective for stipulating that the instructions not be given where the judge could have refused a request to give them.

Finally, as the postconviction judge held, even if “trial counsel was deficient for failing to request statutory mitigation instructions, Defendant has failed to demonstrate that said deficiency was so prejudicial that without it the outcome at sentencing would have been different.” (R 1197). The overwhelming aggravation far exceeds the relatively weak mitigation. Cole is entitled to no relief.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING COLE'S CLAIM THAT COUNSEL FAILED TO HAVE A COMPETENT NEUROPSYCHOLOGICAL EVALUATION PERFORMED, RENDERING HIM INEFFECTIVE.

As with the previous ineffective assistance of counsel claim, the standard of review is *de novo*. See *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999). However, all factual findings of the postconviction court are controlling. *Id.*

Cole complains that his trial counsel did not hire a neuropsychologist to completely determine “the extent of organic brain injury and the way it impacted Mr. Cole during this incident.” (IB 41-42). However, the record is clear that trial counsel did, in fact, hire and consult with a neuropsychologist, Dr. David Bortnik, to evaluate Cole for potential mitigation purposes. (R 1467). On August 31, 1995, Attorney Gleason wrote Dr. Bortnik and forwarded select records on Cole to him for his review and use in evaluating Cole. (R 1473). That letter reflects that Attorney Gleason had previously spoken with Dr. Bortnik about Cole’s case. (R 1474). Moreover, therein, he advised Dr. Bortnik “how he can get a hold of Dr. Berland to discuss the particulars of Dr. Berland’s involvement in this case,” including providing “a phone number.” (R 1475).

Thereafter, on September 19, 1995, Attorney Gleason telephoned Dr. Bortnik.

(R 1476). Again, on September 11, 1995, trial counsel called Dr. Bortnik.⁴ (R 1477). During this latter conversation with the doctor, Attorney Gleason learned that Dr. Bortnik had concluded that Cole was neuropsychologically sound.⁵ (R 1478).

At the evidentiary hearing, Attorney Gleason said that he could not remember “at this point” whether he discussed the specifics of Dr. Bortnik’s examination and evaluation of Cole with the doctor.⁶ (R 1502). Neither did trial counsel have independent recollection of the note he wrote in the file regarding Dr. Bortnik’s conclusion of neuropsychological soundness. (R 1508). Attorney Gleason testified

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Apparently, counsel’s phone call did not put him in contact with the doctor, but Dr. Bortnik returned the call later that same day, and the two professionals spoke about Cole’s case. (R 1477-78).

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The defense trial file indicated that Attorney Gleason had also spoken with “a neuropsychiatrist or psychologist from Gainesville,” Dr. Bordini, about Cole’s case. (R 1515-16). Attorney Gleason could not independently recall any specifics of his consultation with Dr. Bordini. (R 1516).

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In his initial brief, Cole claims that “[m]inimally competent counsel would have learned the requisites of a neuropsychological examination to ensure that his client received one.” (IB 46). However, Cole did not carry his burden to prove that Attorney Gleason did not do so muchless show that Attorney Gleason had any reason to believe that Dr. Bortnik had no followed any such “requisities.” In fact, when asked about informing himself about neuropsychology, Attorney Gleason replied that he did inform himself, relying on an expert, “such as a forensic psychologist,” to assist him. (R 1507).

that “today,” he did not know what Dr. Bortnik did to arrive at his diagnosis of neuropsychological soundness, but “may have been advised by him back then.” (R 1510).

On appeal, he complains that Dr. Bortnik spent “one hour reviewing records, one hour performing an examination at the jail, and one-half hour traveling.” (IB 42). However, it is clear from the record that Dr. Bortnik spent additional time on Cole’s case which was not reflected in the filing dated September 11, 1995. Attorney Gleason testified to at least three telephone conferences he had with Dr. Bortnik. Since these were not included on the billing, it is logical to assume that the doctor might have also omitted telephone conferences with Dr. Berland. In any event, the time Dr. Bortnik spent on Cole’s case far exceeds the “just one hour” that Cole claimed at the evidentiary hearing. (R 1532-33. See 1541).

At that hearing, Cole proffered the testimony of “Dr. Dee, a neuropsychologist” who “testified that a neuropsychological evaluation consists of a battery of tests and an interview.” (IB 43). The “battery of tests” include the Wechsler and the MMPI. Dr. Berland had already given Cole both of these tests, (R 1429), and the results were made available to Dr. Bortnik. The State submits that there is no requirement that the subsequent expert read minister these same tests, especially not where, as here, only a brief time had passed between the completion of same.

Moreover, according to the initial brief on collateral appeal, Dr. Dee concluded that Cole “has brain damage,” resulting in “cognitive impairment” and “impulse control problems.” (I 43, 44). Dr. Borland also concluded that Cole had brain damage and testified to it at trial. (RDA 1459, 1469, 1471). Additionally, Dr. Borland testified that Cole probably suffered from some mental illness. (RDA 1452, 1463, 1473).

The State submits that it is apparent from the record that the reason Dr. Borland could not “determine the extent of the mental illness and brain damage” was, as Cole admits in his initial brief, “because Mr. Cole malingered . . .” (I 45). There was no evidence presented at the evidentiary hearing that Dr. Borland could not have made the more in-depth diagnosis had Cole been truthful. Neither was there any testimony that a neuropsychologist was needed to determine the extent of the mental illness and brain damage. Thus, Cole did not carry **his** burden to demonstrate that a neuropsychologist was necessary in order to determine the extent of the mental illness and brain damage. As a result, he cannot show that his trial counsel was ineffective for failing to hire one. Moreover, the record is clear that Attorney Gleason did hire a neuropsychologist, and consulted with at least two of them about Cole’s case. Thus, he has not met, and cannot meet his burden to establish deficient performance under *Strickland*.

Further, Cole has not carried **his** burden to establish that trial counsel’s performance was deficient because he did not conclude that Dr. Bortnik’s examination

and evaluation were inadequate and hire another neuropsychologist. While Dr. Dees' proffered testimony was that he could not complete neuropsychological testing on a person in one hour, he did not testify that Dr. Bortnik could not have done so, but said generically "I don't think it can be done." (R 1541). Moreover, Cole did not present evidence that Dr. Bortnik spent only one hour on Cole's case. In fact, the bill that was introduced into evidence at the hearing showed, as appellate collateral counsel admits, that Dr. Bortnik spent at least 2 ½ hours on Cole's case.⁷ (I 42). Further, the record shows that he had the tests done by Dr. Borland and there was no evidence admitted to show that he did not rely, or should not have relied on those in making his determination. Finally, Cole has not shown that trial counsel had any reason to believe that Dr. Bortnik's examination and evaluation was deficient, and nothing in the record indicates that it was.⁸ Thus, he has utterly failed to carry his burden to show deficient

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Moreover, it is clear from the record that Dr. Bortnik did more work on Cole's case than is reflected in the billing.

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Cole's claim that Dr. Bortnik's conclusion was "exactly the opposite of Dr. Berland's" is incorrect. Dr. Berland's belief that although Cole's malingering made it impossible to discern the extent of any mental illness and/or brain damage, there was probably something there establishes - at the most - that the physical condition of brain damage (and possibly mental illness of some type) existed. However, Dr. Bortnik's conclusion that Cole was neuropsychologically sound indicated there was no functional brain damage. Since only functional brain damage should be considered as mitigation, there was no real conflict between the two professionals' conclusions. However, if there

performance under *Strickland*, much less prejudice. After all, the trial court found and weighed the mitigation relating to his brain damage and mental illness. The little additional weight, if any, that might have been given to this mitigation had it been labeled "statutory" would not be sufficient to outweigh the four strong aggravators. Cole is entitled to no relief.

were, Cole claims that a neuropsychologist is the best qualified to make the determination of the extent of brain damage. If that is so, his claim that trial counsel rendered deficient performance in accepting the opinion of the neuropsychologist over that of Dr. Berland is specious.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING COLE’S CLAIM THAT THE NEUROPSYCHOLOGIST WHO EVALUATED COLE DID NOT RENDER HIM ADEQUATE MENTAL HEALTH ASSISTANCE AS REQUIRED BY *AKE V. OKLAHOMA*.

The standard of review of Rule 3.850 denial after an evidentiary hearing is competent, substantial evidence. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). “[T]his Court will not substitute its judgment for that of the trial court on questions of fact . . . credibility of the witnesses . . . [and] the weight to be given to the evidence . . .” *Id.* This claim was denied after an evidentiary hearing, and therefore, the competent, substantial evidence standard applies.

Cole complains that he “did not receive a professionally adequate mental health evaluation” as required by *Ake v. Oklahoma*, 470 U.S. 68 (1985). (I 48-49). He claims that Dr. Bortnik did not do an adequate job “because he did not perform a competent neuropsychological evaluation.” (I 49). He says that the time Dr. Bortnik spent reviewing Cole’s records and with Cole was too short and made a determination regarding Cole’s neuropsychological soundness “absolutely impossible.”⁹ (I 49).

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Cole claims that Dr. Bortnik spent one hour reviewing Cole’s records and another hour interviewing Cole. He claims that those were the only two hours Dr. Bortnik spent on his evaluation of Cole. However, he points to no evidence in the record which indicates that the total time Dr. Bortnik spent on Cole’s case

“[T]he claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal.” *Cherry v. State*, 25 Fla. L. Weekly S719, S721 (Fla. Sept. 28, 2000). Claims which could have been raised on direct appeal are not cognizable in a Rule 3.850 motion for postconviction relief. *Johnson v. State*, 593 So. 2d 206 (Fla. 1992).

Moreover, the claim is without merit. In *Mann v. State*, the defendant claimed that he should have been extended an evidentiary hearing on his claim that he did not receive effective mental health assistance under *Ake*. 770 So. 2d 1158, 1164 (Fla. 2000). This Court noted that “*Ake* requires that a defendant have access to a ‘competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.’” *Id.* Rejecting Mann’s claim of an *Ake* violation, this Court said:

was two hours. There is no such evidence at the record citation specified in the initial brief. Indeed, at page 1435, Mr. Gleason was asked if he asked Dr. Bordnik how long it took him to arrive at the conclusion that Cole was neuropsychologically sound, and the attorney responded that he did not recall. (R 1435). It is Cole’s burden to establish his claims. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). Moreover, the record indicates that Dr. Bortnik evaluated Cole after Dr. Borland did, and therefore, it is logical to assume that Dr. Bortnik had Dr. Borland’s test results and did not need to repeat those in order to evaluate Cole. (See R 1434-37). The tests that Dr. Borland administered were some of the same ones that Dr. Dee later claimed Dr. Bortnik should have administered and considered in reaching a neuropsychological determination. (See R 1530-34).

The record reveals that [Dr.] Carbonel performed an extensive evaluation of Mann that included neuropsychological testing based on his history of serious alcohol and substance abuse and his history of head injury. Carbonel testified that, in addition to interviewing Mann, she reviewed numerous documents including affidavits from family members, Mann's childhood health records, records from correctional institutions, hospital records, and expert testimony from prior proceedings. Carbonel also testified that she did a lengthy psychological evaluation of Mann and conducted various tests including a Minnesota Multi phasic Personality Inventory (MMPI) and a Wechsler Adult Intelligence Scale test, among others. Based on this evaluation, Carbine was able to testify to the existence of the two statutory mental mitigators.

The record demonstrates that Mann's expert performed all the essential tasks required by *Age*. Thus, Mann's request for an evidentiary hearing was properly denied.

Id.

Dr. Robert Borland, a forensic psychologist, performed an extensive evaluation of Cole and testified at trial.¹⁰ (RDA 1415 - 1504). He administered two MMPI's to Cole, the first being in February, 1994, and the second in September, 1995. (RDA 1453). Cole was dishonest and malingered during the first MMPI. (RDA 1451). Cole's dishonesty included responses which indicated problems which Cole did not have. (RDA 1451).

After administering the second MMPI, Dr. Borland determined that Cole had

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Some "44 pounds" of information on Cole was sent to Dr. Berland by trial counsel. (R 1471).

some psychotic mood disturbance and delusional paranoid thinking, but could not say how serious it was because of the lies Cole told in performing the earlier test. (RDA 1452-53, 1455). In fact, Dr. Borland had to admit that he had doubts about the truthfulness of most of the second test. (RDA 1454, 1455). Moreover, when Dr. Borland confronted Cole about his dishonesty on the tests, Cole admitted that he had not been entirely truthful in the interview with the doctor either. (RDA 1459-60). As a result of his dishonesty, Dr. Borland had to admit that he did not know whether Cole had faked the WAIS test which was also administered.¹¹

Dr. Borland reviewed the large packet of information on Cole sent from the Ohio State Prison and saw no indication of mental illness there. (RDA 1484-85). He also administered the Scale Four of the psychopathic deviant scale; Cole scored in the top two percent of the country for anti-social thinking and criminal activity. (RDA 1495). Moreover, Cole's history showed a great deal of sociopathic activity. (RDA 1497). Dr. Borland concluded that nonetheless, Cole did suffer from some form of mental illness or psychosis and "probably had some indeterminate brain damage." (R 1194; RDA 1498).

The trial court found that Cole had "organic brain damage and mental illness."

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Cole's score was almost dead average; Cole is of normal intelligence all the time. (RDA 1493-94).

(R 1194). Slight to moderate weight was given to this mitigating factor. (R 1194).

At the evidentiary hearing, it was established that Attorney Gleason spoke with Dr. Bordnik about Cole's case two or three times and sent him voluminous documents including the MMPI done by Dr. Borland, psychological screening reports from DOC, Cole's arrest statement, and Cole's father's deposition. (R 1475, 1479, 1480). In addition, Attorney Gleason put Dr. Bordnik "in contact with Dr. Borland."¹² (R 1480).

Thus, the record demonstrates that Cole's experts, Dr. Berland and Dr. Bordnik, performed all the essential tasks required by *Ake. See Mann*. Certainly, Cole has not carried his burden to establish otherwise. He is entitled to no relief.

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Moreover, the record indicates that Attorney Glisten also talked with another neuropsychologist about Cole - a Dr. Bordini from Gainesville who then had an office in Ocala as well. (R 1515-16).

POINT V

THE TRIAL COURT DID NOT DENY COLE A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS WHEN HE REFUSED TO CONSIDER THE TESTIMONY OF DR. DEES WHICH HE ALLOWED COLE TO PROFFER FOR THE RECORD.

The standard of review of the denial of a Rule 3.850 claim after an evidentiary hearing is competent, substantial evidence. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). The trial court’s judgment on “questions of fact . . . credibility of the witnesses . . . [and] the weight to be given to the evidence . . .” prevail. *Id.* This claim was denied after an evidentiary hearing at which the mental state expert’s testimony was proffered. Thus, the competent, substantial evidence standard applies to this claim.

Cole complains that he should have been permitted to present the testimony of Dr. Dee at the postconviction evidentiary hearing. (IB 50-51). He claims that the doctor’s testimony was relevant to Claim 2, Issue 1, on which the court granted a hearing. (IB 51). The postconviction court specified three witnesses from which it would hear at the hearing and reserved ruling on two other potential defense witnesses, Dr. Dee and Co-defendant Paul. (IB 51). At the hearing, the court declined to permit Dr. Dee to testify except in proffer form.

Cole claims that Attorney Gleason testified at the evidentiary hearing that “he did

not know whether Mr. Cole had a competent neuropsychological evaluation (VII, 1434-39)).” (IB 51). However, Attorney Gleason’s testimony at the citation offered was that he did not remember his discussions with Dr. Bordnik, (R 1436. *See* R 1434, 1435, 1437, 1438), not that the doctor did not render Cole a competent neuropsychological exam. Further, Attorney Gleason testified that he did not remember whether Cole was evaluated by a doctor other than Dr. Bordnik, although his file indicated that at least one other neuropsychologist, Dr. Bordini, was consulted. (R 1434, 1515-16).

Moreover, at the evidentiary hearing, postconviction counsel told the judge to “rely on what he [Dr. Berland] testified to at trial,”¹³ and asked to be “allowed . . . [to] proffer the testimony of Dr. Dee.” (R 1518). On appeal, he claims that Dr. Dee “found Mr. Cole’s brain damage resulted in the two statutory mental health mitigators.” (IB 52).

Dr. Berland did not find either statutory mitigator. Neither did Dr. Bordnik. Therefore, even if Dr. Dee found both mental state mitigators and testified to same at trial, there is no reason to believe that the jury, or the judge, would have credited his

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The trial court agreed not to hear from Dr. Berland “because he testified at trial,” only to have postconviction counsel claim to object to the court not allowing them put Dr. Berland on the stand. (R 1523).

testimony over that of Dr. Berland. Dr. Berland said Cole is a malingerer, and the jury and judge may well have rejected the findings of Dr. Dee on that basis alone.

Moreover, the State contends that in his proffer, Dr. Dee did not make a firm finding of either statutory mitigator. When asked about extreme mental or emotional disturbance, Dr. Dee said “I tried to distinguish between mental and emotional, . . . I don’t know if that’s the intent of the statute . . . , but I try to. And I interpret the mental as meaning cognitive impairment. And . . . [h]e does show that. He shows impairment in memory functioning . . .” (R 1540). Regarding the other mental state statutory mitigator, Dr. Dees said that Cole “showed difficulties in conforming his conduct to the dictates of the law,” but he did not see “any evidence that he wouldn’t have been able to appreciate the wrongfulness of his conduct.” (R 1541). The State submits that Dr. Dee made no firm finding of either statutory mental state mitigator.

Assuming arguendo that both statutory mitigators were found and presented at the penalty phase, the State contends that Cole has not carried his burden to show that the finding of same would have affected his sentence. The jury recommended death for him unanimously, and there were four strong aggravators to be weighed against miniscule nonstatutory mitigation and the two mental state mitigators (had they been found). Under the horrible facts and circumstances of the instant case, there is no reasonable possibility that the jury recommendation would have been for life, even had

both statutory mitigators been found. Cole is entitled to no relief.

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING COLE'S CLAIM THAT TRIAL COUNSEL'S PERFORMANCE WAS INEFFECTIVE DURING THE GUILT PHASE OF THE TRIAL.

The standard of review for ineffective assistance of counsel claims is *de novo*. See *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999). However, all factual findings of the postconviction court are controlling. *Id.*

To show ineffective assistance of trial counsel, the defendant must show that his counsel's performance, including both acts and omissions, fell outside the wide range of reasonable professional assistance. See *Robinson v. State*, 707 So. 2d 688, 695 (Fla. 1998); *Kennedy v. State*, 546 So. 2d 912 (Fla. 1989). There is a strong presumption that counsel rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* The distorting effects of hindsight must be eliminated, and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id.* See *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Even if the defendant shows deficient performance, he must also prove that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id.*; *Gorham v. State*, 521 So. 2d 1067, 1069 (Fla. 1988)(citing *Strickland*, 466 U.S. at 687).

Reasonable strategic decisions of trial counsel will not be second-guessed.

Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997). “Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.” *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998), quoting, *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987), *cert. denied*, 484 U.S. 873 (1987). “To hold that counsel was not ineffective[,] we need not find that he made the best possible choice, but that he made a reasonable one.” *Byrd v. Armontrout*, 880 F.2d 1, 6 (8th Cir. 1989). Trial counsel “cannot be faulted simply because he did not succeed.” *Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984). A defendant is “not entitled to perfect or error-free counsel, only to reasonably effective counsel.” *Waterhouse v. State*, 522 So. 2d 341, 343 (Fla. 1988), *cert. denied*, 488 U.S. 846 (1988).

In reviewing claims of ineffective assistance of counsel, this Court “defer[s] to the trial court in respect to findings of fact . . .” *Cherry v. State*, 25 Fla. L. Weekly S719, S721 (Fla. Sept. 28, 2000). Review of “whether counsel was ineffective and whether the defendant was prejudiced by any ineffective assistance of counsel are questions of mixed law and fact. *Id.* This standard of review is applicable to Cole’s ineffective assistance of counsel issues. *See id.*

1. COLE’S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT

INDIVIDUAL VOIR DIRE OF FIVE ELIGIBLE JURORS DURING THE SECOND ROUND OF JURY SELECTION WAS CORRECTLY DENIED AFTER AN EVIDENTIARY HEARING.

Cole complains that his trial counsel should have conducted individual *voir dire* “on five of the eleven eligible jurors during the second round of voir dire. (IB 53). He charges that his attorney “chose not to ask those five potential jurors any questions” in order to “get to his ‘other things.’” (IB 54). Cole claims that “the complete absence of individual voir dire should clearly constitute deficient performance.” (IB 54). He complains he was prejudiced in that two of these five found him guilty and recommended the death penalty. (IB 54).

The postconviction court denied this claim, finding that thorough *voir dire* questioning of all prospective jurors occurred. (R 1190). He further found that the decision of defense trial counsel “not to question each individual prospective juror personally . . . was a tactical decision.” (R 1190). The judge ruled that Cole had not demonstrated deficient performance in regard to this claim, and therefore, had not proved his ineffective assistance claim. (R 1190).

On appeal, Cole complains that trial counsel did not testify at the evidentiary hearing that his failure to testify was a tactical decision. (IB 55). However, it is the defendant who bears the burden to prove his allegations. He should have asked trial

counsel if the decision was a tactical one. It is clear that the postconviction judge, who was also the trial judge, believed that trial counsel had indicated his decision not to question a few of the jurors was a tactical one. Cole has not demonstrated otherwise. He is entitled to no relief.

Moreover, more importantly, the finding that a “thorough *voir dire* . . . with Defendant’s trial counsel an active participant” soundly defeats Cole’s instant claim. There is no requirement that in order to render reasonable performance, a defense counsel must individually question each prospective juror during *voir dire*. See *Johnston v. Dugger*, 583 So. 2d 657, 662 (Fla. 1991). In fact, Cole's failure to specifically identify what question(s) his counsel failed to ask and how the omission prejudiced him renders this claim legally insufficient. Moreover, where the judge questioned the jurors, a complaint that Defense Counsel did not do so lacked merit. See *Teffeteller v. Dugger*, 734 So. 2d 1009, 1020 (Fla. 1999).

Finally, Cole has shown no prejudice. The fact that two of these jurors ultimately sat on the jury that unanimously recommended a death sentence does not establish the prejudice prong of *Strickland*. To establish prejudice, at a minimum, Cole must prove that had these jurors been asked certain specific questions, their truthful answers would have caused them to be dismissed from service on Cole’s jury, and that subsequently chosen jurors would not have voted with the other 10 members

of the jury to recommend the death penalty. The State submits that Cole could not meet the prejudice showing because even had two other jurors been selected and had they voted for a life sentence, the 10 remaining votes for a death recommendation would still have resulted in a death recommendation. Finally, there is no reasonable possibility, much less probability, that had the jury vote been 10 to 2 instead of 12 to 0, the trial judge (who was also the postconviction judge) would have imposed a life sentence. Indeed, the record indicates to the contrary. On the evidence before the Court, there is no reasonable possibility that Cole would have received a sentence other than death. He is entitled to no relief.

2. COLE’S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO USE A PEREMPTORY CHALLENGE TO REMOVE A JUROR WHICH COLE INSISTED BE SEATED WAS CORRECTLY DENIED AFTER AN EVIDENTIARY HEARING.

Cole complains that his trial attorney should have used a peremptory challenge to remove Juror Cutts. (IB 55-56). He claims that this juror’s status as an employee at the Florida State Penitentiary required removal. (IB 56). He acknowledges that the trial court offered to “resolve any potential prejudice that would result if Mr. Cole were sent to” FSP “by transferring Mr. Cole or keeping him in Marion County.” (IB 56). He says, however, that his attorney should still have used one of the available

peremptory challenges to remove Juror Cutts. (IB 56).

The postconviction court denied this claim, finding factually that trial counsel had a general rule to exclude law enforcement employees from a jury and had discussed “the advisability of using a peremptory challenge to remove Cutts” with Cole. (R 1190-91). However, Cole “advised his trial counsel that he wished Cutts to remain on the jury and asked him not to” peremptorily challenge Juror Cutts. (IB 56). As a result of having only the prospective juror’s occupation in favor of removal balanced with Cole’s adamant request that Cutts be retained, defense “counsel made a tactical decision not to exclude Cutts . . .” (IB 57). Cole claims this was an unreasonable decision and rendered counsel’s performance deficient. (IB 57).

On appeal, collateral counsel claims that trial counsel should have gone against his client’s adamantly expressed wishes because “he knew that Dr. Berland determined that Mr. Cole is mentally ill and has brain damage.” (IB 57). He claims prejudice in that had Juror Cutts been stricken, “there is a reasonable possibility that the juror who served would have found Mr. Cole not guilty of first degree murder, guilty of a lesser included offense, or recommended a life sentence.” (IB 58). This prejudice component is nothing but sheer speculation - speculation which the State submits is wholly unreasonable under the clear and overwhelming facts of the instant case. Moreover, the other 11 jurors all voted to recommend the death penalty, and there is

no reason to believe that the result would not have been the same had a different juror filled Mr. Cutts' seat.

The record supports a conclusion that the decision to retain Mr. Cutts may have been a strategic decision. Such decisions regarding unused peremptory challenges do not provide a basis for relief. *See United States v. Simmons*, 961 F.2d 183, 186 (11th Cir. 1992). It is Cole's burden to prove otherwise, and he has not done so. Having failed to establish ineffective assistance in regard to the decision to proceed to trial with Juror Cutts, Cole is entitled to no relief.

3. COLE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THE TESTIMONY OF COLE'S CO-DEFENDANT WILLIAM PAUL WAS CORRECTLY DENIED AFTER AN EVIDENTIARY HEARING.

Cole complains that his trial attorney rendered deficient performance by "not calling co-defendant . . . Paul to testify." (IB 58). Collateral counsel complains that trial counsel should have called Paul to "establish Paul kept the incriminating weapon in his pocket, had a motive to kill John Edwards (Edwards hurt him), had the opportunity, and only fibers from Mr. Paul were found on Edwards."¹⁴ (IB 58). He

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These facts were established at trial through evidence other than testimony from the codefendant. (See RDA 946, 966, 1190, 1191, 1055).

says that Attorney Gleason was ineffective for not calling Paul “[b]ecause most of the evidence tending to establish Mr. Cole as the actual killer was circumstantial . . .” (IB 58).

The postconviction judge denied this claim pointing out that Attorney Gleason took Paul’s deposition pre-trial and learned that Paul identified Cole as John’s killer and raped Pam. (IB 59). Moreover, Paul’s testimony at deposition was consistent with his immediate post-arrest statement to police. (IB 59). Subsequently to the deposition and before the trial, Paul wrote Attorney Gleason and said “he would not willingly testify . . .” (IB 59).

Further, the testimony of Pam Edwards corroborated Paul’s testimony regarding the identity of John’s killer and the person who twice raped her. (IB 59). Her testimony was consistent with the statement Paul gave police and his deposition testimony. (IB 59). Attorney Gleason “had no reason to believe that William Paul’s testimony would be helpful to his client. Therefore, he made a tactical decision not to call” him. (IB 59). Moreover, Cole, after having been given a copy of Paul’s deposition, “concurred with counsel’s decision.” (IB 59).

Despite all of the above, collateral counsel contends that Attorney Gleason’s decision regarding calling Paul to testify “was not reasonable.” (IB 60). Collateral counsel contends on appeal that had Paul been called, “counsel could have established

that Paul's dominant hand was his right, his left hand was not . . . broken, so he could have killed Edwards." (IB 60). Again, collateral counsel claims that Cole's agreement with counsel's tactical decision not to call Paul should be disregarded because Cole is "mentally ill and brain damaged." (IB 60).

He adds that the rather significant barrier to obtaining Paul's testimony in the face of his adamant refusal to testify could have been overcome by calling Paul "as a hostile witness" and using "leading questions to elicit the testimony." (IB 60). However, no citation is offered to establish that the use of leading questions will rip testimony from the mouth of a witness who adamantly refuses to testify. The State contends that there is none, and any claim to the contrary is sheer speculation which does not support Cole's claim for relief. Having utterly failed to establish that Paul would have testified had he been called, much less that his testimony would have been favorable to him, Cole has not carried his burden to establish deficient performance or prejudice.

Neither has he established that the tactical decision was unreasonable in light of all of the facts and circumstances. The postconviction judge found sufficient facts to support this tactical decision independently of Cole's concession to the strategy. Cole has failed to carry his burden to establish that the tactical decision made by trial counsel was unreasonable, and therefore, he has not shown deficient performance.

Finally, the claim that there is a reasonable possibility that the jury would not have found Cole guilty or recommended death had Paul testified that he is right-handed and his left hand was not broken is absurd. The clear evidence adduced at trial was that Loren Cole sliced the throat of John Edwards, and neither the fact of Paul's right-handedness, nor that his left hand was not broken, would have lessened the import of that evidence one whit. Cole has utterly failed to carry his burden to establish that he was prejudiced by his attorney's decision not to call Paul. He is entitled to no relief.

4. COLE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S OPENING STATEMENT IS PROCEDURALLY BARRED AND WAS CORRECTLY DENIED AFTER AN EVIDENTIARY HEARING.

Cole complains that his trial attorney rendered ineffective assistance when he failed to object to the prosecutor's opening statement wherein he told the jury that the victims found "mankind at its worst" in the Ocala National Forrest. (IB 60). Trial counsel did not object at the time of the statement because he did not want to emphasize it. (R 1192). This is a reasonable, tactical decision, and whether to object under such circumstances cannot be ineffective assistance of counsel. *See Rutherford*, 727 So. 2d 216, 223 (Fla. 1998).

Instead of objecting, counsel waited until the conclusion of the opening statement and moved for a mistrial. The trial court denied the motion, but offered a curative instruction. However, counsel's experience having taught him that such instructions are not often helpful, together with his desire to avoid emphasizing the offensive comment, resulted in his tactical decision not to accept the offered curative. (R 1192). The decision to object or not, is a matter of trial tactics which is left to the reasonable discretion of trial counsel. *Muhammad v. State*, 426 So. 2d 533, 538 (Fla. 1982), *cert. denied*, 464 U.S. 865 (1983). Cole complains that this was an unreasonable tactical decision. (IB 62). That collateral counsel disagrees with the strategic decision made by trial counsel is not the test for ineffective assistance. *Card v. Dugger*, 911 F.2d 1494, 1507 (11th Cir. 1990) [Although collateral counsel might have chosen to raise the issue in terms of a comment on the right to remain silent, that current counsel would have done so is not the test for ineffective assistance.]. This court has recognized that "defense counsel may conclude that a curative instruction will not cure the error and choose not to request one." *Kearse v. State*, 770 So. 2d 1119, 1129 (Fla. 2000).

Moreover, to the extent that the issue should have been raised on direct appeal, but was not, it is procedurally barred in this proceeding. *Rutherford*, 727 So. 2d at 218-19; *Johnson v. State*, 593 So. 2d 206, 208 (Fla. 1992), *cert. denied*, 113 S.Ct. 119

(1992). Cole cannot avoid this bar by couching the claim as an ineffective assistance claim. *Rutherford*, 727 So. 2d at 218-19 n.2.

Further, the attempt to raise a prosecutorial misconduct issue grounded on *Strickland* “for failure to raise an appropriate objection . . . must fail under this Court’s decision in *Gaskin v. State*, 737 So. 2d 509, 520 n.6,7 (Fla. 1999). In *Gaskin*, the prosecutorial misconduct allegations were “legally and facially insufficient to warrant relief under the requirements of *Strickland* . . .” because Gaskin did not allege “how the outcome of his trial would have been different had counsel properly objected” to the comments. *Id.* Cole’s claim likewise fails because he did not state how the outcome of his case would have been different had Attorney Gleason objected to the prosecutor’s “mankind at its worst” comment.

Cole has not met his burden of proof and is entitled to no relief. *Gaskin*. See *Taylor v. Wainwright*, 1989 WL 126490 (MD Fla. 1989) [Counsel moved for mistrial at end of opening statement; Defendant has burden to establish that counsel’s failure to make contemporaneous objection “was objectively unreasonable and rose to the level of deficient performance.”].

5. COLE’S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR CALLING JOHN THOMPSON AS THE SOLE DEFENSE WITNESS WAS CORRECTLY DENIED WITHOUT AN EVIDENTIARY HEARING.

Cole complains that trial counsel Gleason should not have called John Thompson to ask whether Mary Gamble ever told him that Cole had confessed to cutting John's throat. (IB 62). He claims that since the State had earlier called Mr. Thompson, the defense could have asked its question on cross and preserved the right to opening and rebuttal closing argument. (IB 62-63). He does not argue that the evidence impeaching Ms. Gamble's confession testimony should have been omitted altogether if it was not admissible on cross exam.

Attorney Gleason chose to call Mr. Thompson "to establish that Mary Gamble never told him that Mr. Cole confessed to her" in order to "discredit her prior testimony" regarding Cole's confession. (IB 63). He "believed the rules of evidence prevented him from eliciting the information he wanted on cross . . .," and so, he called Thompson as a defense witness. (IB 63). Thus, Cole claims that the failure to ask the question on cross cannot be a tactical decision. (IB 64). He further asserts that had the question been asked on cross, he "probably could have" been permitted to ask the question and have it answered, and therefore, counsel's performance was deficient.

In *Gudinas v. State*, this court said: "[T]he rules of evidence are not suspended because Gudinas chose to present only one witness in his guilt phase defense and forfeited his final closing argument." 693 So. 2d 953, 965 (Fla. 1997). At trial, the

State called John Thompson before calling Mary Gamble. (RDA 809, 874). As Mr. King pointed out at the evidentiary hearing: “[T]he rules of evidence would require the other witness be put on, and when the witness with impeaching information called to impeach after the witness had testified, and not before. And the case law and the code are pretty clear about that.” (R 1590). Thus, contrary to Cole’s contention on appeal, in order to elicit testimony from Mr. Thompson which would impeach Ms. Gamble, Mr. Thompson would have to testify after Ms. Gamble. As a result, Attorney Gleason was forced to make Mr. Thompson his witness in order to solicit the subject testimony. That the trial judge indicated that he might have disregarded the rules of evidence had Attorney Gleason tried to circumvent the rule and get the testimony in on cross does not make Attorney Gleason ineffective for calling Mr. Thompson in accordance with the rules of evidence. Cole has not shown that Attorney Gleason rendered deficient performance in this regard.

Neither has he shown prejudice. Cole alleges prejudice in that the right to opening and rebuttal closing argument was forfeited, and had that not occurred, Attorney Gleason could have corrected the statement that Paul’s hand was broken and otherwise refuted the State’s closing argument. (IB 64). He makes the further leap that had this been done, the jury “likely” would not have returned a guilty verdict or recommended death. (IB 64).

The State contends that there is no reasonable possibility that had Cole had both the opening and rebuttal closing argument, he would have prevented either a conviction or a death recommendation. The overwhelming evidence of both the commission of a first degree murder and more than sufficient aggravators to compel a death sentence soundly defeat this claim.

Moreover, correcting the statement to reflect that Paul only thought his hand was broken would do little, if anything, to further Cole's defense. Obviously, if Paul thought his hand was broken, he would be much less likely to try to use it to kill a healthy, athletic victim such as John Edwards. Clearly, Attorney Gleason could have corrected this statement with an objection rather than it requiring a rebuttal closing argument had he thought the point worth making.

Cole has failed to establish that any of the foregoing five claims show deficient performance or prejudice on the part of trial counsel Gleason. There being no instances of deficient performance or prejudice proved, there is nothing to cumulate, and Cole is entitled to no relief. *See Rose v. State*, 774 So. 2d 629, 635 (Fla. 2000).

POINT VII

THE TRIAL COURT DID NOT ERR IN DENYING COLE'S MOTION TO RELEASE SEMEN SAMPLES TO BE TESTED FOR DNA.

The standard of review of Rule 3.850 claims which are denied without an evidentiary hearing is competent, substantial evidence. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998). This claim was denied at the *Huff* hearing on February 14, 2000. (R 900). Thus, the competent, substantial evidence standard applies.

Cole complains that at the *Huff* hearing, he asked “to have semen samples released for DNA testing,” and the postconviction judge denied the motion. (IB 65). He claims that if semen found in victim Pam Edwards’ vagina proved to be Co-defendant Paul’s, it would have “impeached” Pam’s testimony and have cast reasonable doubt “on her testimony that Paul did not have the opportunity to kill” her brother. (IB at 66). He further makes the absurd claim that “[d]ue to the obvious stress the victim was under, it is reasonable to assume that she was confused which co-defendant committed the sexual battery and the killing.” (IB 66).

This claim is procedurally barred for failure to raise it in the trial court at the time of trial (or on appeal). Clearly, DNA testing of the type Cole now seeks was available in 1995 when the trial was held, as well as in 1994 when the crime occurred. *See Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995). Such a claim is clearly subject

to a procedural bar, *id*, and therefore, Cole's claim is barred.

Moreover, Pam Edwards' testimony is not confused! It is clear that she well knows that Cole twice raped her and that he was the one who had the opportunity to, and did, cut her brother's throat. There is not one scrap of evidence to support the absurd claim that she was confused due to stress and did not know who raped her.¹⁵ Neither is there any evidence to support the "Stockholm effect" claim made for the first time on appeal from the denial of the postconviction motion. Any such issues could and should have been raised at trial or on direct appeal and are procedurally barred. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982), *cert. denied*, 522 U.S. 1022 (1997).

These claims are also barred because they were not timely raised in the postconviction motion. "This was not an instance where the Defendant was rushed to meet the one-year deadline to get a petition filed. He had plenty of time, and only last September finally got a pleading filed." (R 900). The postconviction judge denied the motion. (R 900).

Moreover, even if Paul had sex with Pam, that does not mean that Pam was

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Not only did Pam Edwards tell Deputy Jicha that Cole was the only one of the two perpetrators who raped her, **Cole** told his close friend, Mary Gamble, that he was the one that raped Pam.

confused as to who had the opportunity to kill her brother. The evidence at trial established that the two perpetrators and the victim ingested marijuana at the campsite at the time of the rapes well after the murder, (RDA 1150, 1186), but no evidence was presented to indicate that Pam Edwards' had a significantly diminished ability to perceive events at the time her brother was killed. Thus, even if Pam was confused about Cole being the one who raped her - which the State strongly contends that she was not - such does not support the conclusion that she was also confused about which perpetrator had the opportunity to cut her brother's throat.

Moreover, the evidence of Cole's guilt of the murder and the rapes of Ms. Edwards is overwhelming, and even if Paul also raped Ms. Edwards, Cole's conviction for the murder and the rapes is not called into question. This claim is utterly without merit, and Cole is entitled to no relief.

POINT VIII

COLE HAS NOT SHOWN THAT THE PENALTY PHASE OR POSTCONVICTION COURTS PERMITTED NONSTATUTORY AGGRAVATORS TO BE PRESENTED AND CONSIDERED.

The standard of review for this claim of improper jury instruction is abuse of discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997). Cole has not met that standard.

Cole's claim is procedurally barred as to penalty phase presentation of nonstatutory aggravators because the issue could and should have been raised on direct appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1029 (Fla. 1999); *Lopez v. Singletary*, 634 So. 2d 1054, 1058-59 (Fla. 1993). Moreover, it is procedurally barred on postconviction because the issue was not raised below. Postconviction counsel did not file a motion for rehearing, or otherwise object or call the matter to the attention of the postconviction court, and the issue may not be raised for the first time in this Honorable Court. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982), *cert. denied*, 522 U.S. 1022 (1997); *Jennings v. State*, 26 Fla. L. Weekly S178, S181 (Fla. Mar. 22, 2001).

Assuming that the claim is not procedurally barred, it is without merit. It seems clear that the postconviction court's use of non-statutory in the context of aggravating

circumstances was a slip of the tongue. Certainly, it was not intended as a finding by the postconviction court that the sentencing court found non-statutory aggravators and weighed them in making its sentencing determination.

Moreover, the postconviction court's statement was not that non-statutory aggravating circumstances were **considered** by any court, but only that they were "prevented" [presumably presented]. (R 1197). Most likely, what the postconviction court referred to as non-statutory aggravating circumstances was merely the egregious facts. *See generally, Parker v. State*, 641 So. 2d 369, 377 (Fla. 1994)[what defendant saw as nonstatutory aggravators were "simply facts."]. Clearly, the facts in Cole's case well support each of the four statutory aggravators found, and Cole has demonstrated no prejudice from the postconviction court's reference to "non-statutory aggravating circumstances." Cole has not demonstrated, and can not demonstrate, any prejudice, and therefore, any error was harmless beyond a reasonable doubt. He is entitled to no relief.

POINT IX

THE TRIAL COURT DID NOT ERR IN DENYING COLE'S CLAIM THAT THE STATE WITHHELD EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND*.

The standard of review of *Brady v. Maryland*, 373 U.S. 83 (1963) issues is competent, substantial evidence supporting the trial judge's determinations. *Way v. State*, 760 So. 2d 903, 911 (Fla. 2000). A trial court's factual findings on conflicting evidence must be upheld where such evidence is present. *Id.*

Under *Brady* and its progeny, a defendant must prove three elements to prevail. They are: (1) The evidence is favorable to the defendant; (2) it was suppressed by the State; and, (3) the defendant was prejudiced by same. *Rose v. State*, 774 So. 2d 629, 634 (Fla. 2000). “[T]o show prejudice . . . , the defendant must establish that ‘there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed’” *Id.*(quoting, *Strickler v. Greene*, 527 U.S. 263, 289 (1999)). Thus, to establish sufficient prejudice, the defendant must show the evidence is “sufficient to undermine confidence in the outcome.” *Id.*(quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Cole complains that the State withheld valuable evidence exculpatory to his defense to the effect that the trial prosecutor was afraid that if Codefendant Paul were to testify, he would “admit and take the blame for the whole incident.” (IB 72). He

bases this claim on a brief conversation State Attorney and trial prosecutor, Bradley King, had with Cole's mother's friend, Eleanor Simpson, after the oral argument held in Cole's direct appeal. (IB 72). Mrs. Simpson's affidavit relating her version of this conversation was typed by Cole's mother, Ann, "and included some mistakes and some false information." (IB 73).

Indeed, the record shows that Mrs. Simpson's affidavit contained information which was rank hearsay and untrue which she had represented as a matter of fact.¹⁶ (R 1552-54, 1556). She falsely identified the Assistant Attorney General at the oral argument as one of the prosecutors at Cole's trial, which Mrs. Simpson said she attended. (R 1544, 1551-52). Mrs. Simpson described herself as "a court watcher," and said she has been victimized by Florida's judicial system to the tune of "over 400,000 dollars" (R 1548, 1549). Mrs. Simpson admitted that she had a hearing impairment - which was obvious at the hearing - but said it was of recent onset. (R 1552, 1561). Mrs. Simpson said that "Ann [Cole] wasn't anywhere around" when she talked to Mr. King, but later admitted that Ann Cole was with her at the oral argument

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Most of the hearsay statements in her affidavit "was hearsay from Ann Cole," who typed the document. (R 1553). However, Mrs. Simpson testified that she read it carefully before executing it and "wouldn't have sent it out if I hadn't read it." (R 1555-56).

before this Court, and that she and Cole's mother had a long standing relationship. (R 1547, 1555, 1566).

State Attorney Brad King also testified before the postconviction judge. He said that the Assistant Attorney General had nothing to do with the prosecution of Loran Cole "until the appellate process." (R 1576). He recalled the conversation with Mrs. Simpson and intentionally kept it brief "because of some things that she said caused me . . . to be leery of her and what I said to her." (R 1577). He "answered her questions as politely . . ., but as briefly as I could." (R 1577).

Mr. King testified that when Mrs. Simpson "asked me why didn't I put William Paul on the stand," he told her he "didn't need to . . ." (R 1576). He explained to her "that we had a good case without him; he was there and he could have been called, but I chose not to call him; and, in part, . . . because I could never tell for a certainty what he would say if he testified." (R 1576). He said that Mrs. Simpson's report that he said he was afraid Paul would take the blame for the murder was "not . . . an accurate reflection of what I said." (R 1576-77).

Mr. King further testified that there has never been a time when he had any indication that Paul was the one who slit John's throat. (R 1578). It has always been his opinion that Cole was the actual killer. (R 1578). Mr. King "understood that there was some possibility" that Paul would testify differently at trial than he had in his

previous statements, but “had no indication at any point during the entire process of the trial that he would, in fact, do that.” (R 1597).

It boiled down to a tactical decision by the seasoned prosecutor. “[W]e had a strong case without William Paul; . . . he wasn’t necessary . . . there was no reason for me to call him and there was no reason . . . to take any risk that he would get on the stand and change his testimony . . .” (R 1597-98).

The credibility determination was for the postconviction trial judge, not this Honorable Court. That judge found that “Mrs. Simpson’s credibility is in doubt.” (R 1198). Moreover, Cole’s position that Mrs. Simpson was the more credible is belied by the record, as set-out above. Further, Mr. King’s statement that Paul was not called because the State had a strong case against Cole without him is borne out by the overwhelming evidence of Cole’s guilt of John Edwards’ murder and his qualification for the death penalty under the laws of this State. In the unlikely event that this Court would ignore settled caselaw to the contrary and indulge Cole by making a credibility determination of its own, the record from the hearing would compel the same conclusion reached by the lower court, i.e., Mr. King’s testimony was the most credible and defeats the instant claim.

Cole has presented no evidence of a *Brady* violation. There simply was no information favorable to Cole in regard to Mr. Paul, much less any that was withheld

by the State. Moreover, Cole has made absolutely no showing of any prejudice. In his post-arrest statements and in his deposition, Mr. Paul maintained that Loran Cole slit John's throat. Pam Edwards' trial testimony verified Mr. Paul's claims in that regard. Cole has not alleged any credible reason to believe that Paul would have testified favorably to Cole. Clearly, Cole has not met any prong, much less all three required prongs, of the standard for *Brady* relief.

POINT X

THE TRIAL COURT DID NOT ERR IN DENYING COLE'S CLAIM THAT HE SHOULD HAVE BEEN PERMITTED TO INTERVIEW JURORS TO DETERMINE IF ANY JUROR MISCONDUCT OCCURRED.

The standard of review of Rule 3.850 claims which are denied without an evidentiary hearing is competent, substantial evidence. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998). This claim was denied at the Huff hearing on February 14, 2000 as factually insufficient. (R 1221). Since there are no specific allegations of any type of juror misconduct, no hearing was appropriate. Thus, the record supports the trial judge's decision not to hold an evidentiary hearing on this claim.

Moreover, Cole complains that the rules preventing him from interviewing jurors to determine "jury bias and misconduct" deny him due process and access to the courts. (IB 76-77). This issue is procedurally barred because it was not raised on direct appeal, it is also legally insufficient. *Arbelaez v. State*, 775 So. 2d 909, 912 (Fla. 2000). In *Arbelaez*, this Court said:

The trial court did not address Arbelaez's claim that he was prohibited from interviewing the jurors. While we would normally send an unaddressed claim back for the trial court to rule upon, we conclude that remand on this issue is unnecessary because the claim is both procedurally barred and legally insufficient. Any claims relating to Arbelaez's inability to interview jurors should and could have been raised on direct appeal. See Smith. Furthermore, Arbelaez did not make a prima facie showing of any juror misconduct in his postconviction

motion below. Instead, he appears to be complaining about a defendant's inability to conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned. Thus, even if the claim were not procedurally barred, Arbelaez would not be entitled to relief on the grounds he asserted and no evidentiary hearing was required on this claim.

(footnotes omitted) *Id.* Cole's claim is likewise barred.

He is entitled to no relief.

POINT XI

THE TRIAL COURT DID NOT ERR IN DENYING COLE’S CLAIM THAT FLORIDA STATUTE §921.141(5) IS FACIALLY VAGUE AND OVERBROAD AND DID NOT GIVE THE JURY ADEQUATE GUIDANCE ON THE ISSUE OF WEIGHING MITIGATING AND AGGRAVATING CIRCUMSTANCES.

Cole complains that Florida Statute §921.141(5) is facially vague and overbroad and does not adequately instruct the jury in the consideration of mitigating and aggravating circumstances. (IB 78). He claims that the jury instructions shifted the burden of proof that death is not the appropriate sentence to him because he began the penalty phase with an automatic aggravator by virtue of his conviction of felony murder. (IB 79-80). He adds that the jury was “essentially told” that if an aggravating circumstance was established, “it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances.” (IB 79).

The State submits that the standard of review of the constitutionality of Florida’s jury instructions it appears to be *de novo*. See *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000)[proposed constitutional amendment]. Pure questions of law are reviewed under the *de novo* standard. *Id.*; *Demps v. State*, 761 So. 2d 302, 306 (Fla. 2000).

However, jury instruction issues are barred on postconviction motion because they could and should have been raised on direct appeal. See *Asay v. State*, 769 So. 2d 974, 989 (Fla. 2000). Moreover, the burden-shifting jury instruction issue in the context of ineffective assistance of counsel for failure to object has been considered and rejected in *Shellito v. State*, 701 So. 2d 837, 842-43 (Fla. 1997). Indeed, the standard instruction approved in *Shellito* was used in the instant case, and trial counsel is not ineffective for failing to object to it. See *Downs v. State*, 740 So. 2d 506, 518 (Fla. 1999).

Moreover, Cole's claim that he began the penalty phase with an automatic aggravator "has been repeatedly rejected by state and federal courts." *Johnson v. State*, 660 So. 2d 637, 647 (Fla. 1995), *cert. denied*, 116 S.Ct. 1550 (1996). To the extent Cole implies that Attorney Gleason was ineffective for failing to raise this meritless claim, he is incorrect.

In any event, the "automatic aggravator" claim has been held procedurally barred in a 3.850 proceeding where it was not raised on direct appeal. *Mills v. State*, No. SC01-775 at 7-8 (Fla. April 25, 2001); *Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000). See *Lopez v. Singletary*, 634 So. 2d at 1056). Ineffective assistance claims cannot be used to obtain a second appeal. *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998); *Medina v. State*, 573 So. 2d 293 (Fla. 1990).

Finally, Cole's claim that the jury was told "it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances" is procedurally barred. The issue could and should have been raised on direct appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1029 (Fla. 1999). Cole is entitled to no relief.

POINT XII

THE TRIAL COURT DID NOT ERR IN DENYING AN EVIDENTIARY HEARING ON THE CLAIM THAT THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS CUMULATIVELY DEPRIVED COLE OF A FUNDAMENTALLY FAIR TRIAL.

The State submits that the standard of review of claims of cumulative error is *de novo*. See *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). Pure questions of law are reviewed under the *de novo* standard. *Id.*; *Demps v. State*, 761 So. 2d 302, 306 (Fla. 2000).

Cole claims that the numerous errors in his penalty phase proceeding “when considered as a whole, virtually dictated the sentence of death.” (IB 81). He alleges that “[r]epeated instances of ineffective assistance of counsel and the trial court’s numerous errors” cumulated to “taint” his penalty phase proceeding. (IB 81).

In *Rose v. State*, 774 So. 2d 629, 635 (Fla. 2000), this Court rejected such a cumulative error claim. This Court said: “[C]laims of cumulative error are properly denied where the Court has considered each individual claim and found the claims to be without merit.” 774 So. 2d 629, 635. Where each point lack merits, there is no cumulative error. *Id.*; *Sireci v. State*, 773 So. 2d 34, 41 (Fla. 2000).

Moreover, even assuming arguendo that some errors occurred, same - when cumulated - do not result in a finding of prejudice in the sense of being significant

enough to have made a difference in the outcome of the guilt or penalty phase. The evidence of both guilt of first degree murder in the death of John Edwards and the four strong aggravators is overwhelming! The mitigation, including all of that urged by Cole in this proceeding, pales in comparison to the aggravators. Loran Cole is entitled to no relief. *See Rose*, 774 So. 2d 629, 635.

Finally, to the extent that the alleged errors could have been raised on direct appeal, this claim is procedurally barred.

CONCLUSION

Based upon the foregoing arguments and authorities, the 3.850 trial court's denial of relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Julius J. Aulisio, Assistant CCRC - Middle, 3801 Corprex Park, Suite 210, Tampa, FL 33619, on this _ day of April, 2001.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL