

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1388

LORAN COLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

**JULIUS J. AULISIO
Assistant CCRC
Florida Bar No. 0561304**

**LESLIE A. SCALLEY
STAFF ATTORNEY
FLORIDA BAR NO. 0174981**

**CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park, Suite 210
Tampa, Florida 33619**

(813) 740-3544

PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Loran Cole's motion for post conviction relief which was brought pursuant to the Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as "R ____" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Loran Cole has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Loran Cole, through counsel, accordingly urges this Court to permit oral argument.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	i
REQUEST FOR ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORTIES	viii
STATEMENT OF CASE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	7

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MERITORIOUS CLAIMS REGARDING COUNSEL’S INEFFECTIVE ASSISTANCE WITHOUT AN EVIDENTIARY HEARING. THE TRIAL COURT ERRED IN DENYING LORAN COLE’S CLAIMS THAT COUNSEL WAS INEFFECTIVE DURING THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. 11

- A. Counsel was ineffective during the penalty phase of Mr. Cole’s trial in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.
 - 1. Counsel failed to present evidence of Mr. Cole’s seventeen year history of drug and alcohol abuse. 13
 - 2. Counsel failed to present evidence of nonstatutory mitigating circumstances of childhood abuse. 16
 - 3. Counsel performed deficiently by failing to object to the

prosecutor’s misconduct during closing argument.	21
4. Counsel failed to request the heinous, atrocious, or cruel limiting construction to which Mr. Cole was constitutionally entitled.	24
5. Failure to introduce Paul’s life sentence to the jury as mitigation.	28.
6. Failure to request assistance of co-counsel.	31
B. Counsel was ineffective during the guilt portion of Mr. Cole’s trial because he did not object to improper hearsay statements. This ineffective assistance violated Mr. Cole’s Fifth, Sixth, Eighth, and Fourteenth Amendment rights.	32
C. Conclusion	35

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING LORAN COLE’S CLAIM THAT COUNSEL’S FAILURE TO ASK FOR AND ARGUE THE INSTRUCTIONS REGARDING THE MENTAL HEALTH STATUTORY MITIGATORS WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL WHICH VIOLATED LORAN COLE’S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.	36
---	----

ARGUMENT III

THE TRIAL COURT ERRED IN HOLDING THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO HAVE A COMPETENT NEUROPSYCHOLOGICAL EVALUATION PERFORMED ON LORAN COLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.	41
---	----

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING RELIEF BECAUSE MR. COLE COULD ESTABLISH HE WAS DENIED HIS RIGHT TO EFFECTIVE MENTAL HEALTH ASSISTANCE BECAUSE THE NEUROPSYCHOLOGIST WHO EVALUATED MR. COLE DID NOT RENDER ADEQUATE MENTAL HEALTH ASSISTANCE AS REQUIRED BY AKE V. OKLAHOMA, IN VIOLATION OF MR. COLE’S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL’S FAILURE TO ENSURE THAT MR. COLE RECEIVED A COMPETENT MENTAL HEALTH EVALUATION VIOLATED MR. COLE’S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS RIGHTS.

..... 48

ARGUMENT V

MR. COLE WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

..... 50

ARGUMENT VI

THE TRIAL COURT ERRED IN HOLDING COUNSEL WAS NOT INEFFECTIVE DURING THE GUILT PORTION OF MR. COLE’S TRIAL IN VIOLATION OF MR. COLE’S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. 53

- 1. Individual voir dire. 53
- 2. Counsel failed to use a peremptory challenge to remove juror Cutts.56

3.	Counsel performed deficiently by not presenting William Paul’s testimony.	58
4.	Counsel failed to contemporaneously object to the prosecutor’s improper opening statement.	60
5.	John Thompson	62
6.	Conclusion	64

ARGUMENT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION TO RELEASE SEMEN SAMPLES TO BE TESTED FOR DNA IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.	65
---	----

ARGUMENT VIII

LORAN COLE WAS DENIED A FAIR PENALTY PHASE AND EVIDENTIARY HEARING IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND FLORIDA LAW BECAUSE THE COURT PERMITTED NONSTATUTORY AGGRAVATORS TO BE PRESENTED AND CONSIDERED THEM WHEN DENYING POSTCONVICTION RELIEF	69
--	----

ARGUMENT IX

THE TRIAL COURT ERRED IN HOLDING THAT THE STATE DID NOT WITHHOLD EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND MR. COLE’S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.	72
---	----

ARGUMENT X

THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING SO MR. COLE COULD PROVE THE RULES PROHIBITING HIS LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. COLE ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

..... 76

ARGUMENT XI

THE TRIAL COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING SO MR. COLE COULD ESTABLISH FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. COLE’S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE. 78

ARGUMENT XII

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. COLE OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

..... 80

CONCLUSION AND RELIEF SOUGHT 81
CERTIFICATE OF SERVICE 82

TABLE OF AUTHORTIES

	<u>Page</u>
<u>Ake v. Oklahoma,</u> 470 U.S. 68 (1985)	65, 81
<u>Allison v. State,</u> 162 So.2d 922 (Fla. 1 st DCA 1964)	65, 81
<u>Amendments To Florida Rules Of Criminal Procedure 3.851, 3.852, and 3.993, No. SC96646 (April 14, 2000)</u>	12, 35
<u>Brady v. Maryland,</u> 373 U.S. 83, 87 (1963)	73
<u>Brown v. State,</u> 344 So.2d 641 (Fla. 2d DCA 1977)	33
<u>Bryant v. State,</u> 601 So.2d 529, 533 (Fla. 1992)	37
<u>Campbell v. State,</u> 679 So.2d 720 (Fla. 1996)	68
<u>Chapman v. California,</u> 386 U.S. 18 (1967)	27
<u>Cole v. Florida,</u> 523 U.S. 105 (1998)	1
<u>Cole v. State,</u> 701 So.2d 845 (Fla. 1997)	1
<u>Cooper v. State,</u> 492 So.2d 1059 (Fla. 1986)	37

<u>Dedge v. State,</u> 723 So.2d 322, 324 (Fla. 5 th DCA, 1998)	69
<u>Derden v. McNeel,</u> 938 F.2d 605 (5th Cir. 1991)	81
<u>Enmund v. Florida,</u> 458 U.S. 782 (1982)	74
<u>Espinosa,</u> 112 S. Ct. 2926, 2928 (1992)	26
<u>Eutzy v. Dugger,</u> 746 F.Supp. 1492 (N.D. Fla. 1989)	21
<u>Furman v. Georgia,</u> 408 U. S. 238, 310 (1972)	71
<u>Gaskin v. State,</u> 737 So. 2d 509, 519 (1999)	12, 16, 21, 24, 31, 32, 35
<u>Geralds v. State,</u> 601 So.2d 1157 (Fla.1992)	70
<u>Goode v. Wainwright,</u> 464 U.S. 78, 82-85 (1983)	71
<u>Heath v. Jones,</u> 941 F.2d 1126 (11th Cir. 1991)	80
<u>Heiney v. State,</u> 620 So.2d 171 (Fla. 1993)	14
<u>Hildwin v. Dugger,</u> 654 So.2d 107 (Fla.1995)	21

<u>Hitchcock v. Dugger,</u> 481 U.S. 393 (1987)	79, 80
<u>In re McDonald,</u> 819 F.2d 1020 (11 th Cir. 1987)	31
<u>Jackson v. Dugger,</u> 837 F.2d 1469 (11th Cir. 1988)	79
<u>Jackson v. State,</u> 451 So. 2d 458, 463 (Fla. 1984)	26
<u>Landry v. State,</u> 620 So. 2d 1099 (Fla. 4th DCA 1993)	81
<u>Lemon v. State,</u> 498 So. 2d 923 (Fla. 1986).	12, 35
<u>Loyd v. Whitley,</u> 977 F.2d 149, 160 (5 th Cir. 1992)	48
<u>Mason v. State,</u> 489 So. 2d 734 (Fla. 1986)	11
<u>Meeks v. State,</u> 418 So.2d 987, 988 (Fla. 1982)	54
<u>Miller v. State,</u> 373 So.2d 882 (Fla. 1979)	70
<u>Mills v. Maryland,</u> 108 S. Ct. 1860 (1988)	79
<u>Moore v. Kemp,</u> 809 F.2d 702, 712 (11 th Cir. 1987)	44

<u>Mordenti v. State</u> , 711 So. 2d 30, 33 (Fla. 1998).	12
<u>Napue v. Illinois</u> , 360 U.S. 264, 269 (1959)	23
<u>O'Callaghan v. State</u> , 461 So. 2d 1354 (Fla. 1984)	11
<u>People v. Wright</u> , 488 N.E.2d 973 (Ill. 1986)	14
<u>Perez v. State</u> , 371 So.2d 714 (Fla. 2 nd DCA 1979)	33
<u>Perry v. State</u> , 395 So.2d 170 (Fla.1981)	70
<u>Provence v. State</u> , 337 So.2d 783 (Fla.1976)	70
<u>Provenzano v. State</u> , 751 So.2d 37, 40 (Fla. 1999)	53
<u>Ray v. State</u> , 403 So. 2d 956 (Fla. 1981)	81
<u>Riley v. State</u> , 366 So.2d 12 (Fla.1978)	70
<u>Rodriguez v. State</u> , 609 So.2d 493, 500 (Fla. 1992)	33
<u>Ross v. State</u> , 474 So.2d 1170, 1174 (Fla. 1985)	14

<u>Sandstrom v. Montana,</u> 442 U.S. 510 (1979)	79
<u>Sawyer v. State,</u> 313 So.2d 680 (Fla.1975)	70
<u>Smith v. State,</u> 492 So.2d 1063, 1067 (1986)	37
<u>Smith v. State,</u> 515 So.2d 182 (Fla. 1987)	68
<u>Songer v. State,</u> 544 So.2d 1010, 1011 (Fla. 1989)	14
<u>Stewart v. State,</u> 558 So.2d 416, 420 (Fla. 1990)	37
<u>Stewart v. State,</u> 622 So. 2d 51 (Fla. 5th DCA 1993)	81
<u>Strickland v. Washington,</u> 466 U.S. 668 (1984)	53
<u>Taylor v. State,</u> 640 So. 2d 1127 (Fla. 1st DCA 1994)	81
<u>Tison v. Arizona,</u> 481 U.S. 137 (1987)	74
<u>Van Gallon v. State,</u> 50 So.2d 882 (Fla. 1951)	33
<u>Way v. State,</u> 760 So.2d 903, 910 (Fla. 2000)	74, 75

Zant v. Stephens.
462 U.S. 862 (1983) 80

STATEMENT OF CASE

Mr. Cole was indicted on March 10, 1994, of one count of first degree murder, two counts of kidnapping while armed, two counts of robbery with a deadly weapon, and two counts of sexual battery while armed (RV 1 104-7). Mr. Cole was tried by a jury September 25-28, 1995, in the Circuit Court of the Fifth Judicial Circuit, Marion County. The jury found him guilty as charged on all counts (RV 5 763-69). After a penalty phase conducted on September 28-29, 1995, the jury unanimously recommended a death sentence for the first degree murder conviction (RV 5 793). On December 21, 1995, the trial court imposed a death sentence for the first degree murder and life sentences for each of the remaining counts (RV 6 928-40). Mr. Cole's co-defendant, William Paul, plead nolo contendere to first degree murder, two counts of kidnapping while armed, and two counts of robbery with a deadly weapon and received life sentences.

This Court affirmed Mr. Cole's convictions and sentences on direct appeal. Cole v. State, 701 So.2d 845 (Fla. 1997). The United States Supreme Court denied certiorari in 1998. Cole v. Florida, 523 U.S. 105 (1998).

Mr. Cole filed his shell post-conviction motion on June 5, 1998, before his one-year date, and an amended motion on September 27, 1999. After a Huff hearing on February 14, 2000, the court granted an evidentiary hearing on the

following issues: whether counsel was ineffective during voir dire for failing to individually question each prospective juror and his failure to strike juror Cutts, whether counsel's failure to call Paul as a witness was ineffective assistance of counsel, whether counsel's failure to contemporaneously object to the state's improper opening statement or request a curative instruction was ineffective assistance of counsel, whether calling John Thompson as the sole defense witness and giving up first and last closing argument was ineffective assistance of counsel, whether counsel's failure to present a brain damage expert was ineffective assistance of counsel, whether counsel's failure to request instructions on the statutory mitigators of extreme mental or emotional disturbance and impaired capacity to conform conduct was ineffective assistance of counsel, and whether there was a Brady violation (V6, 936). The Court denied all other claims (V6, 936).

STATEMENT OF FACTS

The court limited the evidentiary hearing witness list to trial counsel Don Gleason, state attorney Brad King, and Eleanor Simpson (V7, 1010-11). The evidentiary hearing was held May 15, 2000.

Trial counsel, Don Gleason, testified that he was very busy during the course of Mr. Cole's case (V11, 1405-6). He handled other felony cases which required

extensive preparation (V11, 1406). Mr. Gleason tried one previous capital guilt phase, but he had never prepared or tried a capital penalty phase before Mr. Cole's (V11, 1406-7). Mr. Gleason did not ask for co-counsel because he had an investigator (V11, 1410).

Mr. Gleason had no recollection of the voir dire in Mr. Cole's trial, except that he listened to the jurors answer both the court's and the state's questions (V11, 1413, 1454). However, he testified his voir dire policy was to learn as much as he could about prospective jurors (V11, 1414). Mr. Gleason did not peremptorily strike juror Cutts, who was a correctional officer, after the court refused to strike him for cause because Mr. Cole wanted him to be a juror (V11, 1419-20, 1455).

Mr. Gleason chose not to call William Paul as a witness because Mr. Gleason did not believe Paul's testimony could help Mr. Cole (V11, 1457). Also, Paul refused to testify, and Mr. Cole did not want Paul to testify (V11, 1459-60).

Mr. Gleason did not request a curative instruction after the prosecutor's improper opening statement that the Edwards found "mankind at its worst" when they entered Ocala National Forrest because Mr. Gleason felt the jury would not understand a curative instruction, and he did not want to emphasize the comment (V11, 1462-63)(RV 11, 547).

The public defender retained Dr. Berland, a psychologist, to work on Mr. Cole's case shortly after he was arrested and before Mr. Gleason took the case (V11, 1467-68). Mr. Gleason sent him 44 pounds of documents (V11, 1470-71).

Mr. Gleason called John Thompson as a witness even though he knew he would lose the right to first and last closing argument (V11, 1427). Mr. Gleason chose to call Mr. Thompson, who was first called as a state witness, because he believed the rules of evidence prevented him from eliciting the information he wanted when he cross-examined Mr. Thompson during the state's evidence (V11, 1424).

On a to-do list dated June 15, 1995, Mr. Gleason wrote that he needed to have Mr. Cole evaluated for brain damage (V11, 1432). Though he now remembers no dealings with Dr. Bortnik, Mr. Gleason eventually hired Dr. Bortnik to evaluate Loran Cole for brain damage (V11, 1433-34, 1438). Mr. Gleason sent Dr. Bortnik some materials (V11, 1475). Mr. Gleason did not know what Dr. Bortnik did during the evaluation, but he had a note indicating a phone conversation with Dr. Bortnik which stated "neuropsychologically sound" (V11, 1435, 1478, 1501-2).

Regarding his failure to request the mental health statutory mental mitigation instructions, Mr. Gleason stated, "Well if the evidence established something that

would allow us and entitle us to a statutory mitigator, then that should have been done.” (V11, 1514). “Well if the evidence didn’t establish it, I can see an opportunity where I might want it, anyway. But the Court is not going to allow it, if the evidence doesn’t establish it.” (V11, 1514-15).

Dr. Berland was at the courthouse and prepared to testify to Loran Cole’s brain damage at the evidentiary hearing, but the court refused to allow even proffered testimony (V11, 1520-24).

Though he was not on the limited witness list, the court allowed Mr. Cole to proffer Dr. Dee’s testimony to address the claim regarding counsel’s failure to have an adequate neuropsychological evaluation of Mr. Cole (V11, 1523). The court accepted Dr. Dee, who is a neuropsychologist, as an expert (V11, 1529). Dr. Dee testified that a neuropsychological evaluation requires a battery of tests and an extensive interview (V11, 1529). Three of the tests consist of a number of smaller tests which are examined on comparable scales (V11, 1530-32). The Wechsler test alone takes at least one hour (V11, 1530-32). The battery of tests usually takes six to seven hours (V11, 1530-32). The interview part of the evaluation, during which Dr. Dee obtains medical and biographical information, takes at least an hour (V11, 1532). It is impossible to determine a person is neuropsychologically sound in only one hour (V11, 1532-33, 1541).

Dr. Dee tested Mr. Cole and found brain damage (V11, 1534-38). Mr. Cole was not malingering (V11, 1534-38). The brain damage resulted in cognitive impairment which caused Mr. Cole extreme mental disturbance at the time of the crime (V11, 1540). The brain damage caused impulse control problems which impaired Mr. Cole's ability to appreciate the criminality of his conduct at the time of the crime (V11, 1541). Had Dr. Dee worked on Mr. Cole's case before trial, he would have testified the same way at trial (V11, 1541).

Regarding the Brady violation claim, Eleanor Simpson testified that she was interested in Mr. Cole's trial because she knew both the victim's family and Mr. Cole's family (V11, 1543). Mrs. Simpson went to the direct appeal oral argument and, while there, she spoke to state attorney Brad King (V11, 1544-45). Mr. King explained that Paul did not testify because, "we were afraid that Mr. Paul would admit and take the blame for the whole incident" (V11, 1545, 1556). Mrs. Simpson wrote an affidavit describing what King told her and sent a copy to the Florida Supreme Court (V11, 1545). Mr. Cole's mother, Ann Cole, typed the affidavit and included some mistakes and some false information (V11, 1547-48, 1552-54). However, the portion of the affidavit transcribing the statement Mr. King made to her was absolutely true (V11, 1555-58). Mrs. Simpson also testified that she knows some juries are rigged and that she is disgruntled with the court

system's treatment of a military ex-wives statute (V11, 1548-50, 1568).

Brad King testified that when he spoke to Mrs. Simpson, he told her Paul did not testify because, "we had a good case without him; he was there and could have been called, but I chose not to call him; and, in part, I chose not to call him because I could never tell for a certainty what he would say if he testified" (V12, 1576). He described Mrs. Simpson's statement as an inaccurate reflection of what he said (V12, 1577). Mr. King believes Mr. Cole, not Mr. Paul, was the actual killer (V12, 1578).

The court allowed Mr. Cole to proffer some of Mr. King's testimony to the prosecutorial misconduct claim, which was outside the scope of the limited evidentiary hearing (V11, 1581). Mr. King testified that, although Paul's hand was not actually broken, he based his closing argument that it was broken and that Paul could not open the murder weapon because his hand was broken on Pam Edwards' testimony that Paul said his hand was broken (V12, 1581-85).

The court denied Mr. Cole's 3.850 motion on May 24, 2000 (V9, V10).

This appeal follows.

SUMMARY OF ARGUMENT

1. The lower court erred in summarily denying the following claims without an evidentiary hearing because they were properly pled and presented facts

upon which relief could be granted:

A. Counsel's failure to investigate and present evidence of Loran Cole's seventeen year history of drug and alcohol abuse was ineffective assistance of counsel.

B. Counsel's failure to investigate nonstatutory mitigation including physical an sexual abuse was ineffective assistance of counsel.

C. Counsel's failure to object to and refute the prosecutor's improper closing argument was ineffective assistance of counsel.

D. Counsel's failure to request the proper limiting construction for the heinous, atrocious, or cruel aggravating factor was ineffective assistance of counsel.

E. Counsel's failure to introduce co-defendant Paul's life sentence as mitigation was ineffective assistance of counsel.

F. Counsel's failure to request co-counsel was deficient performance which prejudicially impacted his representation of Mr. Cole.

G. Counsel was ineffective during the guilt phase because he failed to object to improper hearsay statements which prejudicially bolstered the state's evidence.

2. The trial court erred in holding that counsel's failure to request the

statutory mental health mitigator instructions was not ineffective assistance of counsel.

3. The trial court erred in holding that counsel's failure to have a competent neuropsychological examination performed on Mr. Cole was not ineffective assistance of counsel.

4. The trial court erred in not addressing and granting relief because Mr. Cole did not receive a competent mental health evaluation to determine brain damage.

5. The trial court denied Mr. Cole a full and fair evidentiary hearing because the court refused Mr. Cole the opportunity to present the witness he need to establish that he did not receive a competent mental health evaluation and his right to effective assistance of counsel.

6. The trial court erred in concluding that counsel was effective on the following claims:

A. Counsel was ineffective because he failed to individually voir dire two seated jurors.

B. Counsel was ineffective because he failed to use a peremptory challenge to remove juror Cutts from the jury.

C. Counsel was ineffective because he failed to present the co-

defendant's testimony to establish that the co-defendant was likely the actual killer.

D. Counsel was ineffective because he failed to contemporaneously object to the prosecutor's improper opening statement and failing to move for a curative instruction .

E. Counsel was ineffective because he needlessly called a witness and lost Mr. Cole's right to first and last closing arguments.

7. The trial court erred in denying Mr. Cole's motion to release and test semen samples. The court's error denied Mr. Cole's rights to a full and fair evidentiary hearing.

8. Mr. Cole was denied a fair evidentiary hearing and penalty phase because the court allowed nonstatutory aggravating circumstances to be presented during Mr. Cole's penalty phase and relied on those nonstatutory aggravating circumstances when denying Mr. Cole postconviction relief.

9. The trial court erred in holding that the prosecution did not withhold exculpatory information in violation of Brady v. Maryland.

10. Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar unconstitutionally prevents Mr. Cole from investigating claims of juror bias and misconduct. The trial court erred in not granting an evidentiary hearing on this claim.

11. The penalty phase jury instructions denied Mr. Cole's Fifth, Eighth, and Fourteenth Amendment rights because they shifted to him the burden to prove death was not the appropriate sentence. The trial court erred in not granting an evidentiary hearing on this issue.

12. Cumulative error deprived Loran Cole of his right to a fair trial and resulted in his death sentence.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MERITORIOUS CLAIMS REGARDING COUNSEL'S INEFFECTIVE ASSISTANCE WITHOUT AN EVIDENTIARY HEARING. THE TRIAL COURT ERRED IN DENYING LORAN COLE'S CLAIMS THAT COUNSEL WAS INEFFECTIVE DURING THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Although the lower court granted an evidentiary hearing on some claims, the court erroneously summarily denied the others. Fla. R. Crim. P. 3.850; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual matters. A post-

conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986).

This Court has clearly indicated the need for mandatory evidentiary hearings on initial rule 3.850 motions. In his concurring opinion in Mordenti v. State, 711 So. 2d 30, 33 (Fla. 1998), Justice Wells stated "the rule should be amended to require that an evidentiary hearing is mandated on initial motions which assert ineffective assistance of counsel, Brady, or other legally cognizable claims which allege an ultimate factual basis." Subsequently, Justice Pariente, in a special concurring opinion in Gaskin v. State, 737 So. 2d 509, 519 (Fla. 1999), reiterated her agreement with Justice Wells that "the better practice would be to require trial courts to hold evidentiary hearings on the initial 3.850 motion in death penalty cases...".

More recently, this Court issued proposed amendments to rule 3.851, which include the requirement of an evidentiary hearing on the initial motion for postconviction relief. Amendments To Florida Rules Of Criminal Procedure 3.851, 3.852, and 3.993, No. SC96646 (April 14, 2000).

Mr. Cole pled substantial serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. An

evidentiary hearing is warranted on several of his claims.

The court below summarily denied Mr. Cole relief on Claims IV, V, VI, VII, VIII, IX, X, and XI (V6, 915-936). The Court partially summarily denied Claims I, II, and III (V6, 915-936). These claims, on which Mr. Cole is entitled to an evidentiary hearing, are addressed below.

A. Counsel was ineffective during the penalty phase of Mr. Cole’s trial in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

1. Counsel failed to present evidence of Mr. Cole’s seventeen year history of drug and alcohol abuse.

Mr. Cole’s 3.850 motion stated that counsel performed deficiently by failing to investigate and present evidence of Loran Cole’s seventeen year history of drug and alcohol abuse. Had counsel investigated, he would have found that Ann Cole first caught Mr. Cole drinking alcohol when he was only ten years old (V3, 422-23). Donald Tincher, Mr. Cole’s friend and Ryan Cole’s stepfather, stated that he saw Mr. Cole use drugs on over one hundred occasions (V3, 422-23, 425). He observed Mr. Cole abusing dangerous drugs such as speed balls, and he saw Mr. Cole abuse alcohol daily (V3, 422-23, 425). Mr. Tincher also knows of Mr. Cole’s mental instability, and the way drugs affect his behavior (V3, 422-23, 425). Counsel failed to uncover this information and present it as mitigation. Counsel also failed to investigate and present evidence of Mr. Cole’s drug and alcohol

abuse which was documented in his Ohio and Florida prison records. The prison records reveal that Mr. Cole abused homemade crank, cocaine, LSD, mushrooms, marijuana, and that Mr. Cole sniffed paint thinner and glue (V3, 422-23, 425). Though this information was available if counsel investigated, counsel failed to do so.

This Court has held that failure to prepare and present evidence of chronic substance abuse can constitute ineffective assistance of counsel. Heiney v. State, 620 So.2d 171 (Fla. 1993); *See also*, People v. Wright, 488 N.E.2d 973 (Ill. 1986). In Ross v. State, the Court held that the defendant's past drinking problems, among other things, were "collectively a significant mitigating factor". Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). In Songer v. State, the Court found un rebutted evidence that the defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs" "significantly compelling" mitigation. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

Counsel had reason to know that Mr. Cole abused lethal drugs for the seventeen years preceding this crime and should have known long-term substance abuse is a mitigating circumstance. Counsel performed deficiently by not investigating and presenting this evidence alone or in conjunction with evidence of Mr. Cole's brain damage. Counsel's deficient performance prejudiced Mr. Cole.

Had counsel presented this mitigating evidence, the balance of aggravators and mitigators would weigh differently, and Mr. Cole probably would have received a life sentence.

The court denied an evidentiary hearing on this issue, holding that evidence of Mr. Cole's history of substance abuse was presented at trial (V6, 922-24). The court cited to testimony of two witnesses who testified at the penalty phase, as well as Pamela Edward's testimony regarding possible alcohol and marijuana consumption at the time of the crime (V6, 923).

At trial, Ann Marie Powers testified that Loran Cole told her he had problems with marijuana (RV 16, 1382). However, in its order denying an evidentiary hearing on this issue, the court overlooked the fact that Powers also testified that she did not believe Mr. Cole when he told her of this problem (V6, 922-24);(RV 16, 1387). Mr. Cole's foster mother, Mrs. Helm, testified at trial that Mr. Cole used marijuana and beer a couple of times when he lived with her, and that he appeared to still use marijuana when he later visited her (RV 16, 1405-7). This meager evidence did not demonstrate Mr. Cole's extensive use and addiction to drugs and alcohol which counsel ineffectively failed to investigate and present as mitigation.

Had counsel investigated and presented the available evidence of Mr. Cole's seventeen year history of drug and alcohol abuse, he would have established a

mitigating circumstance that the jury and court would have considered when weighing the aggravating and mitigating circumstances. Because the aggravators and mitigators would have weighed differently, there is a reasonable probability that Mr. Cole would have received a life sentence.

This claim alleged specific facts which were not conclusively rebutted by the record and which demonstrate a deficiency in performance which prejudiced Mr. Cole. Mr. Cole was entitled to an evidentiary hearing. Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999). The court erred.

2. Counsel failed to present evidence of nonstatutory mitigating circumstances of childhood abuse.

Mr. Cole's 3.850 motion alleged that substantial nonstatutory mitigation never reached the judge or jury, both of whom are sentencers in Florida (V3, 23-26). Counsel failed to adequately investigate and present substantial nonstatutory mitigation that could have outweighed the aggravating circumstances and resulted in a life sentence.

Counsel performed deficiently by failing to investigate and present mitigation. Though trial counsel knew both Ann Cole, Mr. Cole's mother, and Charlie McCue, Mr. Cole's closest sister, counsel did not have them testify at Mr. Cole's penalty phase. The compelling evidence they can offer regarding the emotional

abuse Mr. Cole suffered as a child did not reach the jury or the court.

Counsel failed to investigate and present evidence to establish the extremely disturbed circumstances in which Mr. Cole was raised. Despite the overwhelming evidence to the contrary, trial counsel presented evidence that Mr. Cole grew up under “fairly normal” circumstances (RV 920). Counsel had numerous contacts with Ann Cole, as well as with her family, from which he should have known to investigate and present evidence of how her bizarre behavior affected Mr. Cole. Ann Maire Powers testified that Ann Cole “acted crazy a lot” and that Charly McCue developed some of Ann Cole’s bad habits such as “going out with older men and the like” and going “to bars and that sort of thing” (RV 16, 1388-89). Additionally, Don Cole testified that Ann Cole “would just fly off the handle in the middle of nothing” and was “off, you know, all of the time” (RV 16, 1391). Don Cole testified that he believed Ann Cole had “some type of mental problems” (RV 16, 1396). Counsel also knew Ann Cole had served at least two jail sentences (RV 16, 1364-99). However, counsel failed to investigate the way Mr. Cole was affected by Ann Cole’s deranged behavior. Instead, counsel merely presented the superficial fact that those who knew Ann Cole believed she had mental problems. Counsel’s failure to investigate and present evidence of Ann Cole’s bizarre behavior and disturbed circumstances in which Mr. Cole was raised and their

effects on Loran Cole was unreasonable deficient performance.

Additionally, had counsel made a genuine effort to contact Charlie McCue, Mr. Cole's sister, he would have learned that she remembered Loran Cole's uncle, who lived next to the Cole family for nearly three years, lit Mr. Cole's hands on fire as punishment. Trial counsel did not investigate this and other abuse Mr. Cole suffered at an early age.

Counsel failed to contact Mr. Cole's extended family, former friends, and former neighbors, all of whom could have offered crucial information regarding Mr. Cole's past drug use, family history of mental illness, and head injuries. Donald Tincher, Mr. Cole's friend and Ryan Cole's stepfather, stated Mr. Cole told him about physical and sexual abuse Mr. Cole suffered at an early age. Counsel made no effort to discover this information which could have substantially affected the outcome of Mr. Cole's sentencing. For that reason, counsel's performance was deficient.

Although counsel presented brief family member testimony during penalty phase, this testimony in no way forms a coherent picture of Mr. Cole's years of life as a child growing up in an unstable and abusive environment. Mr. Cole was first placed in foster care before he was one year old because Ann Cole was incarcerated. When Mr. Cole was eight years old, he was placed in a group home

with approximately forty other children for another 6-8 months while Ann Cole was again incarcerated. This group home separated the boys from the girls so that Loran Cole was separated from his sister Andrea. While there, Loran Cole would cry because he missed Andrea. Loran Cole tried to see her and was hit with a stick until he had welts as punishment. Shortly after that foster care term ended, Mr. Cole was sent to live with his sister for another 6-8 months while his mother was incarcerated yet again.

From 1974 to 1977, the Cole family lived in four states and moved more than five times while Ann Cole looked for work and spent time in jail. Mr. Cole and his sister moved two additional times: to and from the group care facility, and to and from their sister's home in Iowa. Each of Mr. Cole's three older sisters left home before they finished high school. Mr. Cole's sister closest in age moved out at 15, shortly after being returned to Ann Cole's care after Ann was last released from jail. Loran Cole waited two years and ran away from Ann Cole when he was only thirteen years old.

The aforementioned evidence is mitigating and should have been considered by the judge and jury which sentenced Mr. Cole to death. Counsel's failure to present this mitigation denied Mr. Cole a reliable sentencing determination in violation of the Eighth and Fourteenth Amendments to the United States

Constitution. Had the jury heard this mitigating evidence, the aggravators and mitigators would have weighed differently, and the jury probably would have recommended a life sentence.

The court denied this claim without an evidentiary hearing, holding it was refuted by the record and that any evidence would be cumulative to that presented (V6, 926). The court erred.

Mr. Cole's 3.850 motion alleged physical and sexual abuse, suicidal drug abuse, a transient lifestyle and mental torture that caused Mr. Cole to run away from home when he was thirteen years old (V3, 423-26). None of this evidence was presented at Mr. Cole's trial, so the allegations were not refuted by the record and they could not be cumulative. In fact, in its sentencing order, the court gave Mr. Cole's background mitigation that counsel presented at trial only slight weight, noting:

However, there is no evidence that the Defendant was physically or sexually abused as a child, or that the circumstances of his childhood substantially affected his adult behavior.

(RV 921). The court denied Mr. Cole the opportunity to present the very evidence it needed to accord Mr. Cole's childhood more than slight weight in mitigation.

Had the court given Mr. Cole the opportunity to present this evidence at an

evidentiary hearing, Mr. Cole would have proved counsel performed deficiently by failing to investigate and present this evidence. See Hildwin v. Dugger, 654 So.2d 107 (Fla.1995)(Counsel's failure to investigate and present mitigation evidence which would have supported two statutory mitigators was ineffective assistance of counsel); Eutzy v. Dugger, 746 F.Supp. 1492 (N.D. Fla. 1989)(Trial counsel was ineffective for failing to prepare and present mitigation even when client said he did not want his mother involved.). This claim alleged specific facts which were not conclusively rebutted by the record and which demonstrate a deficiency in performance which prejudiced Mr. Cole, and he was entitled to an evidentiary hearing. Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999). The court erred.

3. Counsel performed deficiently by failing to object to the prosecutor's misconduct during closing argument.

Mr. Cole's 3.850 motion alleged that counsel performed deficiently by not objecting to the State Attorney's improper comments to the jury. During his closing argument in the penalty phase of Mr. Cole's trial, the State Attorney tried to negate the possibility that Mr. Paul actually stabbed the victim by stating:

Now is a guy with a broken hand 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? Because all the evidence is he had to have done all that.

(RV 16, 1555). The State Attorney told the jury Mr. Paul could not have stabbed John Edwards because Mr. Paul's hand was broken. In fact, Mr. Paul's hand was not broken, it was merely hurt. Mr. Paul's left hand was diagnosed at the Munroe Regional Medical Center Emergency Department: "The left hand reveals mild edema and slight ecchymosis over the dorsal and palmer aspect of the hand. There is full strength, sensation and range of motion distally. There is good two-point discrimination and good capillary filling noted." Even if Mr. Paul's hurt left hand prevented him from using it to cut John Edwards, Mr. Paul still could have used his right hand. In fact, when Mr. Paul was arrested, he was carrying an open knife in his **right** boot, in a position to be reached with his right hand (Paul's 7/24/95 deposition 73). By telling the jury Mr. Paul's hand was broken, the State Attorney suggested Mr. Paul's injury was far more severe than it actually was. "Broken" has a considerably more severe connotation than the real state of Mr. Paul's hand--hurt.

The State Attorney mislead the jury, arguing facts that not only were not in evidence, the facts were not true. Trial counsel should have known it is well established that a conviction obtained through use of false evidence, known to be false by representatives of the state, must fall under the Fourteenth Amendment to the United States Constitution. Napue v. Illinois, 360 U.S. 264, 269 (1959) Counsel failed to object to this improper argument, and counsel's failure was deficient

performance.

Counsel again performed was deficiently by not refuting this argument in the defense closing statement. Effective counsel would have pointed out to the jury that Mr. Paul is right handed. Thus, an injured left hand would not have affected Mr. Paul's ability to cut John Edwards with his dominant right hand.

(V3, 428-29).

The trial court denied Mr. Cole an evidentiary hearing on this claim, holding:

Therefore, even though the prosecutor's statement that Paul's hand was broken was technically incorrect, it was not prejudicial to the outcome. Therefore, trial counsel's failure to object to the broken hand comment was not prejudicial. Claims of ineffective assistance of counsel are insufficient [sic.] pleaded when they fail to allege facts to demonstrate deficient performance and prejudice. Since the evidence shows a lack of prejudice, Defendant's motion as to this issue is denied.

(V6, 928). The court erred, the evidence shows prejudice. When the prosecutor told the jury that Paul could not have been the actual murderer because his hand was broken, he misrepresented the facts. The jury likely believed the prosecutor, eliminated Paul as the actual murderer, and sentenced Mr. Cole to death. Counsel's failure to object and clarify the prosecutor's misleading statement was deficient performance which prejudiced Mr. Cole.

This claim alleged specific facts which were not conclusively rebutted by the

record and which demonstrate a deficiency in performance which prejudiced Mr. Cole. Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999). Loran Cole was entitled to an evidentiary hearing. The court erred.

4. Counsel failed to request the heinous, atrocious, or cruel limiting construction to which Mr. Cole was constitutionally entitled.

Mr. Cole's jury was given the following instruction on the heinous atrocious and cruel aggravating factor:

The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked and shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of the other. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

The aggravating circumstances that the capital felony was especially heinous, atrocious or cruel applies only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies. It's a conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Acts committed after the death of the victim are not relevant in considering whether the crime was especially

heinous atrocious or cruel.

(RV 16, 1569-70). Counsel performed deficiently by failing to request the limiting construction that actions taken after the victim is unconscious cannot be considered when considering this aggravating circumstance.

At trial, the medical examiner, Janet Pillow, testified that John Edwards received at least three separate blows to the head which broke his skull (RV 6, 741, 745). His skull was fractured at the base and near the left eye socket (RV 6, 741-42). The medical examiner could not determine whether the throat or head injuries occurred first (RV 6, 742-43). She concluded that John Edwards was alive during all of the injuries, but could not determine whether he was conscious during any of them (RV 6, 743, 747). Pam Edwards testified that Mr. Cole was alone with John Edwards and then joined Paul and Pam Edwards (RV 8, 1129-1130). Pam Edwards did not testify that John Edwards made any sounds indicating he was conscious while Mr. Cole was with him (RV 8, 1129-30). After Mr. Cole left John Edwards, Edwards did not speak; he only moaned and made a gurgling noise which could have been blood from the throat injury in his trachea (RV 8, 1130, V 6, 760). There was absolutely no evidence that John Edwards was conscious during and after the time Mr. Cole was alone with him.

This Court has held that “[a]ctions taken after the death of the victim are

irrelevant in determining this aggravating circumstance. Also, when the victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness.” Jackson v. State 451 So. 2d 458, 463 (Fla. 1984). Inexplicably, counsel failed to request the limiting construction regarding unconsciousness, and the court did not read it to the jury.

Loran Cole's sentencing jury is presumed to have found this aggravator established. Jackson, 451 So.2d 458 (Fla. 1984); Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). Under these circumstances, the erroneous instruction presumably tainted the jury's recommendation and, in turn, the judge's death sentence in violation of the Eighth and Fourteenth Amendments. Espinosa, 112 S.Ct. 2926. Loran Cole's jury was inadequately guided and channeled in its sentencing discretion.

Because counsel deficiently failed to litigate this issue and the jury is presumed to have found this aggravator, the error cannot be harmless in this case. Stringer v. Black, 112 S. Ct. at 1137. In light of the weight given the automatic felony murder aggravator, the unconstitutional shifting of the burden of proof, and the evidence of mitigation, the consideration of this unconstitutional aggravating factor cannot be held harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). If the constitutional instruction with the unconscious limiting

construction had been given, the jury probably would have recommended life.

Loran Cole is entitled to a new penalty phase hearing.

In summarily denying this claim, the circuit court stated:

The Defendant's claim that the HAC aggravating factor is unconstitutionally vague should have been raised on appeal. Therefore it is procedurally barred. Claims that the HAC instruction is constitutionally vague are procedurally barred unless a specific objection is made at trial on that ground and pursued on appeal. This claim is also barred because the Florida Supreme Court addressed the propriety of the HAC factor in this case and found the aggravator was proven beyond a reasonable doubt. Defendant cannot now seek to re-litigate this issue by casting it as ineffective assistance of counsel.

(V16, 1415). The trial court erred. Mr. Cole could not raise this specific issue on appeal because counsel failed to raise it at trial. This Court upheld the trial court's finding of this aggravator but did not address counsel's failure to request the unconscious limiting construction as ineffective assistance of counsel. Had the unconscious limiting instruction been given to the jury, the jury probably would not have found this aggravating factor. Because the state offered no evidence which proved the victim was conscious during the assault, the jury could have determined the victim was unconscious during the attack and concluded the state did not prove this aggravating circumstance beyond a reasonable doubt. The balance of

aggravating and mitigating circumstances would weigh differently, and the jury probably would have recommended a life sentence. The court erred in summarily denying this claim.

5. Failure to introduce Paul's life sentence to the jury as mitigation.

The record clearly shows that counsel performed deficiently by allowing Mr. Cole to make the legal decision not to present the co-defendant's life sentence to the jury as mitigation:

MR. GLEASON: I have discussed that with Mr. Cole, and Mr. Cole has indicated that he does not wish to do that [enter the co-defendant's life sentence as mitigation evidence]. And he wanted me to put that on the record, that he does not wish to do that.

THE COURT: Is that right, Mr. Cole?

THE DEFENDANT: Yes, sir. The first time that I was asked the question, this morning, I had made a hasty decision because I was under the impression that I had just a few minutes to make my statement. After I went out to lunch, I had time to think this whole thing out.

MR. KING: Your honor, so the record is clear. Mr. Gleason is aware of the case of Paul versus State, that says if he puts that on, I have the right to rebut it and explain why Mr. Paul's sentence was different than Mr. Cole's. And I expect that may well have something to do with that.

MR. GLEASON: I so advised Mr. Cole that, also, Your Honor.

THE COURT: In other words, Mr. Paul is going to testify?

MR. GLEASON: He is not.

THE COURT: He is not going to testify.

MR. GLEASON [sic.]: They are not going to put in his judgment and sentence, which shows a different sentence. And by them doing that, I am not going to call either Mr. Paul or Miss Edwards back to the stand to explain the difference.

THE COURT: And is that why, Mr. Cole, you think that's a fair trade-off to your advantage?

THE DEFENDANT: **I just – I never knew nothing about that. But, yes, that's correct.**

THE COURT: Now that you know that – I assume your lawyer advised you and he agrees with this decision on your part?

THE DEFENDANT: No offense, Your Honor, but whether he agrees or not, it's in –

THE COURT: The decision is completely yours. But you agree with it though?

MR. GLEASON: **Judge, I left that decision up to him.**

(RV 16, 1505-7)(emphasis added). The record shows that Mr. Gleason and the court allowed Loran Cole, who they knew suffered from mental illness and brain

damage, to make a legal decision about introducing penalty phase evidence (RV 17, 1489-90). This was deficient performance which prejudiced Mr. Cole. Had the jury known that Paul received a life sentence, the jury probably would have sentenced Mr. Cole to life as well.

The trial court summarily denied an evidentiary hearing on this issue, holding:

it was Defendant who decided not to present evidence of Paul's life sentence to the jury after consultation with counsel. (R. 1505-1507). Defendant cannot be heard to complain that trial counsel failed to present evidence of Paul's life sentence to the jury when it was Defendant himself who made the decision not to inform the jury of Paul's life sentence. Therefore, Defendant has failed to present facts sufficient to demonstrate prejudice.

(V6, 928).

Thus, the trial court denied this issue without actually addressing it. Mr. Cole's mentally ill and brain damaged thoughts are not relevant to determine whether counsel performed deficiently in abandoning his role as counsel and allowing his mentally ill and brain damaged client to make legal decisions (RV 17, 1489-90). In In re McDonald, the Eleventh Circuit court of appeals noted that a client's recommendation should not be a basis for counsel's strategic legal decisions. In re McDonald, 819 F.2d 1020 (11th Cir. 1987). Likewise, Mr. Cole's recommendation not to enter Paul's life sentence as mitigation was a legal decision

which Mr. Gleason was obligated to make, and the record shows no strategic reason for leaving that decision to Mr. Cole.

This claim alleged specific facts which were not conclusively rebutted by the record and which demonstrate a deficiency in performance which prejudiced Mr. Cole. Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999). An evidentiary hearing is needed to determine what Mr. Gleason told Mr. Cole about this decision, and whether it was reasonable. The court erred.

6. Failure to request assistance of co-counsel.

Mr. Cole's 3.850 motion alleged that counsel was ineffective for not requesting co-counsel (V3, 429-30). Though Mr. Gleason had never prepared or tried a capital penalty phase before Mr. Cole's, he leapt into Mr. Cole's case without requesting assistance from co-counsel (V11, 1406-7). Had Mr. Gleason requested and received co-counsel, he could have hired co-counsel with capital penalty phase experience or spent more time preparing for the penalty phase of Mr. Cole's trial. With more time, counsel could have done the legal research regarding the statutory mitigators and investigated Mr. Cole's background in the manner necessary to perform effectively during the penalty phase. The trial court erred in denying this claim without an evidentiary hearing and considering it when determining the cumulative impact of counsel's ineffective assistance (V3, 431).

Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999).

B. Counsel was ineffective during the guilt portion of Mr. Cole’s trial because he did not object to improper hearsay statements. This ineffective assistance violated Mr. Cole’s Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Counsel performed deficiently by failing to object to improper hearsay statements (V3, 413). During the guilt portion of Mr. Cole’s trial, two witnesses bolstered Pam Edwards’, the state’s crucial witness, testimony. Mr. Jackson, who testified that he drove Pam Edwards from the forest to a telephone, testified that “she (Pam Edwards) said that she had been tied up and raped” (RV 11, 559) . Counsel did not object to this as hearsay.

This error was compounded moments later when counsel failed to object and move for a mistrial after Officer Jicha, the Lake County sheriff deputy who initially interviewed Pam Edwards, bolstered Pam Edwards’ credibility (RV 11, 571, 573-75). Officer Jicha testified that during her interview with Pam Edwards, Pam Edwards told her that two men attacked her and her brother, beat up her brother, tied them up, left her brother, one man raped her at least twice, and both left her tied to a tree in the woods (RV 11, 579-80). Jicha testified, “I felt like she was telling the truth, because everything just added up, right down the line.” (RV 11, 575). This statement was clearly objectionable improper bolstering of a state

witness by a law enforcement officer, and counsel performed deficiently by not objecting to this testimony (RV 11, 578-580). Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992).

Both Jackson's and Jicha's testimony improperly bolstered Pam Edwards' testimony. A witness' testimony may not be corroborated by her own prior consistent statement. Van Gallon v. State, 50 So.2d 882 (Fla. 1951). Pam Edwards' testimony did not indicate recent fabrication which would allow another witness to provide her prior consistent statements to vouch for her credibility. In Allison v. State, the court held that it was reversible error to allow a police sergeant to testify to a sexual assault victim's prior consistent statement. Allison v. State, 162 So.2d 922 (Fla. 1st DCA 1964); Brown v. State, 344 So.2d 641 (Fla. 2^d DCA 1977). When a police officer, who the jury generally regards as disinterested, objective, and therefore, highly credible, corroborates witness testimony, the danger of improperly influencing the jury becomes particularly grave. Perez v. State, 371 So.2d 714 (Fla. 2nd DCA 1979). In Perez, the court reversed a murder conviction and remanded it for a new trial when a deputy testified that a witness told him that Mr. Perez shot the witness and his companions. Perez, 371 So.2d at 716. Had Mr. Cole's counsel objected, Jackson and Jicha's highly prejudicial statements which bolstered Pam Edwards' testimony would have been excluded

from the trial, and the outcome likely would have been different.

Both of counsel's failures to object to the improper hearsay and the improper bolstering of Pam Edwards' testimony prejudiced Mr. Cole. No physical evidence connected Mr. Cole to John Edward's death. Therefore, Pam Edwards' testimony was the strongest basis for Mr. Cole's conviction. Because both Jackson and Jicha bolstered Pam Edward's testimony, the jury likely found it more credible and gave it extra weight in their deliberations and, as a result, convicted Mr. Cole of first degree murder and sentenced him to death.

The court denied this claim, holding that it was improperly plead (V6, 919-20). Though this was presented as one claim in the 3.850 motion, the court separated it into two claims in its order (V6, 919-20). The court denied the claim regarding Jackson's hearsay statement, holding that Mr. Cole failed to allege prejudice (V6, 919). The court denied the part about Jicha's testimony, holding that the prejudice was speculative (V6, 919-20).

In fact, Mr. Cole alleged specific prejudice, "the extra weight the jury likely gave Pam Edwards' testimony", as well as cumulative prejudice at the end of Claim I, "The adversarial process broke down This breakdown led to a jury that likely was not impartial, and this jury sentenced Mr. Cole to death. The evidence presented in this claim demonstrates that the result of Mr. Cole's trial is unreliable"

(V3, 413, 417-18). Thus, the court erred. The motion alleged specific facts which were not conclusively rebutted by the record and which demonstrate a deficiency in performance which prejudiced Mr. Cole. Loran Cole was entitled to question his trial attorney about this deficient performance and have the court consider it as part of the cumulative prejudice caused by counsel's deficient performance. Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999). The court erred.

C. Conclusion

The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where claims are factual matters. As a result, a post-conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). This Court has clearly indicated that evidentiary hearings are necessary on initial rule 3.850 motions. Amendments To Florida Rules Of Criminal Procedure 3.851, 3.852, and 3.993, No. SC96646 (April 14, 2000). Even so, the trial court erroneously denied Loran Cole an evidentiary hearing on many of his most crucial claims of ineffective assistance of counsel for which he plead factual bases which were not refuted by the record and entitled him to relief. The trial court erred.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING LORAN COLE’S CLAIM THAT COUNSEL’S FAILURE TO ASK FOR AND ARGUE THE INSTRUCTIONS REGARDING THE MENTAL HEALTH STATUTORY MITIGATORS WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL WHICH VIOLATED LORAN COLE’S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

Counsel was ineffective for not requesting instructions on and arguing to the jury the following mitigating circumstances: 1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, 2. The defendant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. § 921.141(6)(b), (f) Fla. Stat. (1995). During the penalty phase, Dr. Berland, a forensic psychologist, testified that Loran Cole has “some kind of biologically determined mental illness that involves original paranoid thinking”, a “psychotic mood disturbance” caused by a biological defect in the brain functioning, and delusional paranoid thinking (RV 16, 1452, 1456, 1462; *see also* 1459, 1462, 1471, 1472). Dr. Berland’s testimony entitled Loran Cole to the instructions on the statutory mental health mitigators.

This Court has held “an instruction is required on all mitigating circumstances “for which evidence has been presented” and a request is made”. Stewart v. State, 558 So.2d 416, 420 (Fla. 1990) *citing* Cooper v. State, 492 So.2d 1059 (Fla. 1986). Also, “Where a defendant has produced **any** evidence to support giving instructions on such mitigating factors, the trial judge should read the applicable instructions to the jury.” Bryant v. State, 601 So.2d 529, 533 (Fla. 1992)(emphasis added). Because counsel presented evidence of Mr. Cole’s brain damage, psychotic mood disturbance, and delusional paranoid thinking, Mr. Cole would have been entitled to the instructions if counsel requested them (RV 16, 1452, 1456, 1462, 1471, 1472). Bryant v. State, 601 So.2d at 533; Stewart v. State, 558 So.2d at 420; Smith v. State, 492 So.2d 1063, 1067 (1986).

However, rather than requesting the statutory mitigator instructions, defense counsel allowed the prosecutor, Mr. King, to speak for him. During the jury instruction conference, Mr. King stated:

Your Honor, I offer a compromise. Your Honor, the case law is clear that he doesn’t get any of the non-statutory mitigator instructions, other than that in the standard. And if that’s what he intends to offer, the Court can clearly deny those because they’re not appropriate. And the case law says, the only thing he gets is number eight, which says you can consider any aspect of the defendant’s background, or the crime, or anything else.

(RV 16 1512). Defense counsel offered no response. At the evidentiary hearing, when asked about his failure to request the instructions, Mr. Gleason stated, “Well if the evidence established something that would allow us and entitle us to a statutory mitigator, then that should have been done.” (V11, 1514). “Well if the evidence didn’t establish it, I can see an opportunity where I might want it, anyway. But the Court is not going to allow it, if the evidence doesn’t establish it.” (V11, 1514-15). Thus, either counsel did not know the law, or he simply failed to act. Mr. Cole was entitled to the mental health statutory mitigator instructions. Because counsel was deficient and did not know the relevant caselaw or request the instructions, the jury was merely instructed: “The mitigating circumstances you may consider, if established by the evidence, are any aspects of the defendant’s character or record, and any circumstances of the offense, including everything that was mentioned by the witness on behalf of the defendant.” (RV 17, 1571).

The trial court denied this claim holding:

Based upon relevant caselaw, it appears that if Defendant’s trial counsel had requested jury instructions on the following statutory mitigating circumstances: 1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; and 2) the defendant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was

substantially impaired; this Court would arguably have been legally obligated to give the instructions (*footnotes omitted*). Accordingly, Defendant has at least arguably demonstrated that trial counsel was deficient in this instance. . . . Extensive statutory and non-statutory aggravating circumstances were prevented [sic]. Therefore, even assuming that 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. Accordingly, he has failed to demonstrate ineffective assistance of counsel.

(V9, 1195-97). The trial court erred.

Counsel's failure to know the law and request the instructions prejudiced Mr. Cole. In Stewart, the trial judge refused to give the impaired capacity instruction, and this Court reversed the death sentence and remanded the case for a new penalty phase holding, "We are unable to say beyond a reasonable doubt that the failure to give the requested instruction had no effect on the jury's recommended sentence. . . This error mandates a new sentencing proceeding." Stewart v. State, 558 So.2d at 421. *See also* Smith v. State, 492 So.2d at 1067 (This Court found error in the trial court's refusal to give the requested instruction on the statutory mitigating factor of age. "Even though the trial judge in this case found Smith's age and other factors did not outweigh the aggravating circumstances, Smith should

have had the benefit of the standard instruction on age as a mitigating circumstance.”); Bryant v. State, 601 So.2d 532-33. Likewise, the prejudice from counsel’s failure to request the instructions that the capital felony was committed while Mr. Cole was under the influence of extreme mental or emotional disturbance and Mr. Cole’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired can not be said to have no effect of the jury’s recommended sentence. If the jury had found the statutory mental health mitigators, they likely would have given less weight to the aggravating circumstances because of Mr. Cole’s diminished mental state. Had counsel requested the instructions and the court given them, the aggravating and mitigating circumstances would have weighed differently, and Mr. Cole probably would have received a life sentence. The trial court erred in denying this subclaim.

ARGUMENT III

THE TRIAL COURT ERRED IN HOLDING THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO HAVE A COMPETENT NEUROPSYCHOLOGICAL EVALUATION PERFORMED ON LORAN COLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Counsel retained Dr. Berland, who was initially hired by the Public Defender, to examine Mr. Cole for mental illness (V11, 1467-68). Though the results of Dr. Berland's tests were somewhat muddled because Mr. Cole did not answer the questions honestly, the results indicated mental illness and brain damage (RV 11 1452-53). Dr. Berland testified at trial, "I can tell you from this MMPI that the problem appears to exist in spite of his efforts to fake his problems. But I cannot tell you how serious a disturbance it is. It's there, but I have no way of telling you whether it's a very severe problem or a mild problem." (RV 11 1452-53). Dr. Berland made other references to the fact that Mr. Cole had brain damage. (RV 11 1456, 1459, 1462, 1471, 1472). Dr. Berland was not a neuropsychologist, and counsel should have hired a neuropsychologist who was trained to and would have competently determined the extent of organic brain injury and the way it impacted

Mr. Cole during this incident.

Counsel knew as early as June 15, 1995, that Mr. Cole needed to be evaluated for brain damage (V11, 1432). Two and a half months later, one week before the trial, counsel filed a motion for costs to hire a neuropsychologist, Dr. Bortnik (V8, 1157-59; V11, 1471). The same day, counsel sent Bortnik a copy of Mr. Cole's indictment, Dr. Berland's MMPI, Donald Cole's deposition, Mr. Cole's statement the day he was arrested, DOC psychological screening reports from 1992, and a copy of the order appointing him to the case (V8, 1168; V11, 1472-75). Bortnik's bill, dated September 11, 1995, stated he spent one hour reviewing records, one hour performing an examination at the jail, and one-half hour traveling (V8, 1162). Evidently, Bortnik told counsel that Mr. Cole was "neuropsychologically sound" (V11, 1435). Though Bortnik's opinion was exactly the opposite of Dr. Berland's, counsel failed to resolve the conflict. Counsel did not know what Bortnik did during the hour examination to arrive at his conclusion, whether he gave Mr. Cole any tests during the hour, or whether he contacted Dr. Berland (V11, 1435).

Counsel did know that Dr. Berland reviewed over 44 pounds of records (V11, 1471). He also knew that Dr. Berland gave Mr. Cole both the MMPI and the Wechsler Adult Intelligence Scale tests, completed a diagnostic interview, and

interviewed witnesses (RV 16, 1427). From this extensive evaluation, Dr. Berland knew that Mr. Cole's brain is damaged (RV 16, 1456, 1459, 1462, 1471, 1472). However, counsel failed to resolve the conflict on opinions by having Mr. Cole evaluated by a competent neuropsychologist who could perform the tests and evaluation necessary to determine the extent of Mr. Cole's brain damage.

Dr. Dee, a neuropsychologist, was qualified as an expert and proffered testimony at the evidentiary hearing (V11, 1529). Dr. Dee testified that a neuropsychological evaluation consists of a battery of tests and an interview (V11, 1529). The tests are the Wechsler, Halsted-Reitan battery, Wisconsin Card Sorting test and the Denman Neuropsychology Memory Scale (V11, 1530-31). The Wechsler, Halsted-Reitan, and Denman consist of smaller individual tests, and the Wechsler test alone takes longer than an hour (V11, 1530-32). The testing usually takes six to seven hours (V11, 1530-32). The interview part of the evaluation, during which Dr. Dee obtains medical and biographical information, takes at least an hour (V11, 1532). It is absolutely impossible to determine that a person is neuropsychologically sound in only one hour (V11, 1532-33, 1541).

Dr. Dee examined Mr. Cole and determined that he has brain damage and that he was not malingering (V11, 1534-38). Dr. Dee testified that the brain damage resulted in cognitive impairment and, because of it, Mr. Cole was under an extreme

mental disturbance at the time of the crime (V11, 1540). Mr. Cole's brain damage caused him impulse control problems which substantially impaired his ability to appreciate the criminality of his conduct at the time of his crime (V11, 1541). Had Dr. Dee worked on Mr. Cole's case, he would have testified the same way at trial (V11, 1541).

Even though counsel knew that Dr. Berland's extensive examination revealed that Mr. Cole's brain was damaged, counsel failed to ask Bortnik why he concluded, after only a one hour examination, that Mr. Cole was neuropsychologically sound. Counsel failed to learn the basic requirements of a neuropsychological examination so he could determine whether Bortnik's opinion was competent. The Eleventh Circuit Court of Appeals held that defense attorneys have an obligation to inform themselves of the assistance a needed expert witness may provide:

We recognize that defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide. We do believe, however, that defense counsel is obligated to inform himself about the specific scientific area in question

Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987).

Though the issue in Moore was the denial of Moore's request for expert

funds, the logic applies to Mr. Cole's case. When faced with conflicting opinions, counsel was obligated to know what a neuropsychological examination entailed so that he could determine whether Dr. Berland's or Bortnik's diagnosis was correct. Had counsel familiarized himself with neuropsychological examination requirements, counsel could have questioned Dr. Bortnik about his one hour examination and determined that because it is impossible to determine whether a person is neuropsychologically sound in one hour, it was the functional equivalent of no examination (V11, 1532-33, 1541).

Counsel's failure to familiarize himself with neuropsychological examinations and ensure that he relied on a competent neuropsychological examination prejudiced Mr. Cole. During the penalty phase, Dr. Berland could only testify that the tests he gave Mr. Cole indicated mental illness and brain damage, but that he could not determine the extent of the mental illness and brain damage because Mr. Cole malingered during the first examination (RV 16, 1486-87). When given Dr. Berland's vague diagnosis, competent counsel would have procured a competent neuropsychological evaluation to confirm and strengthen that diagnosis. When the state attorney asked Dr. Berland whether anyone had confirmed his diagnosis of mental illness and brain damage, Dr. Berland was forced to answer no (RV 16, 1495). Additionally, Dr. Berland testified on cross-examination that he didn't "even

begin to have enough information to try to directly connect the influence of mental illness on those specific actions (the crimes)” (RV 16, 1498). Dr. Berland’s testimony alone was weak because the malingering affected the depth of his diagnosis and he could not specifically state that he found both statutory mental health mitigators. Minimally competent counsel would have learned the requisites of a neuropsychological examination to ensure that his client received one. Had counsel ensured that Mr. Cole received a competent neuropsychological examination such as Dr. Dee’s, the neuropsychologist would have testified that Loran Cole’s brain was damaged and that the damage resulted in his extreme mental disturbance at the time of the crime and his inability to conform his actions to the requirements of the law at the time of the crime (V11, 1540-41). Thus, trial counsel was ineffective. Strickland.

The trial court denied this claim holding:

3. Dr. Berland, a forensic psychologist, was hired by Defendant’s trial counsel and testified extensively during the sentencing hearing in this cause. Dr. Berland testified that Defendant had a mental illness and probably had some indeterminate brain damage.
4. This Court found that Defendant suffered from organic brain damage and mental illness and accorded this mitigating factor slight to moderate weight in its written order in support of the death

sentence.

5. Defendant's trial counsel hired a neuropsychologist, Dr. Bortnik, as a confidential defense expert. Dr. Bortnik informed Defendant's trial counsel that Defendant was "neurologically sound".
6. Defendant's trial counsel reasonably relied upon Dr. Bortnik's opinion. Defendant's trial counsel made a tactical decision not to request a written opinion from Dr. Bortnik-a written opinion which would not have been beneficial to his client.

Therefore, Defendant has failed to demonstrate that his trial counsel's performance was deficient as it relates to this issue. Accordingly, he has failed to demonstrate ineffective assistance of counsel.

(V9, 1194). The trial court erred.

Counsel did not reasonably rely upon Bortnik's opinion. Counsel did not make a tactical decision not to inquire what Bortnick did to determine Mr. Cole was "neuropsychologically sound", not to resolve that opinion with Dr. Berland's, and not have a competent examination performed. Counsel was simply ignorant of the requirements of a neuropsychological examination and failed to determine whether Mr. Cole received a neuropsychological examination. Counsel's failure to provide Mr. Cole with a competent neuropsychological evaluation was deficient performance which prejudiced Mr. Cole. The jury's duty was to weigh Mr. Cole's

mental conditions against the aggravating circumstances. “[B]ecause of counsel’s inadequacy, the jury could not perform this function.” Loyd v. Whitley, 977 F.2d 149, 160 (5th Cir. 1992). Had counsel procured a competent neuropsychological examination such as Dr. Dee’s, the balance of aggravating and mitigating circumstances would have been different, and Mr. Cole probably would have received a life sentence.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING RELIEF BECAUSE MR. COLE COULD ESTABLISH HE WAS DENIED HIS RIGHT TO EFFECTIVE MENTAL HEALTH ASSISTANCE BECAUSE THE NEUROPSYCHOLOGIST WHO EVALUATED MR. COLE DID NOT RENDER ADEQUATE MENTAL HEALTH ASSISTANCE AS REQUIRED BY AKE V. OKLAHOMA, IN VIOLATION OF MR. COLE’S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL’S FAILURE TO ENSURE THAT MR. COLE RECEIVED A COMPETENT MENTAL HEALTH EVALUATION VIOLATED MR. COLE’S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS RIGHTS.

Due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Ake v. Oklahoma, 470 U.S. 68 (1985). Loran Cole did not receive a professionally adequate mental

health evaluation and hence, a fundamentally fair sentencing, in light of the mitigation which should have been presented. “The State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an **appropriate** examination and assist in evaluation, preparation, and presentation of the defense.” Ake v. Oklahoma, 470 U.S. at 83(emphasis added). Dr. Bortnik, the neuropsychologist hired to assist Mr. Cole, did not give Mr. Cole competent mental health assistance because he did not perform a competent neuropsychological evaluation.

Bortnik’s bill states that he spent one hour reviewing Mr. Cole’s records and one hour with him at the jail. In those two hours, Bortnik determined that Mr. Cole was “neuropsychologically sound” (V11, 1435). At the evidentiary hearing, the court allowed Dr. Dee, who was qualified as an expert in neuropsychology, to proffer testimony. Dr. Dee testified that a neuropsychological evaluation consists of a lengthy interview and tests that take six to seven hours (V11, 1530-32). Dr. Dee also testified that it is absolutely impossible to determine whether a person is “neuropsychologically sound” in one hour because it is impossible to perform the required tests and interview in only one hour (V11, 1532-33, 1541). Thus, whatever Bortnik did during the one hour he spent with Mr. Cole, it is certain that he did not conduct a competent neuropsychological evaluation.

Bortnik's failure to give a professionally adequate mental health evaluation prejudiced Mr. Cole. Had Bortnik performed an adequate evaluation, as Dr. Dee did, he would have been able to testify that, at the time of the crime, Loran Cole was extremely mentally disturbed and unable to conform his conduct to the requirements of the law (V11, 1540-41). With this evidence, the balance of aggravating and mitigating circumstances would weigh differently and Loran Cole probably would have received a life sentence.

Loran Cole did not receive appropriate and competent mental health assistance. Dr. Bortnik's one hour evaluation utterly failed to uncover Loran Cole's brain damage and connect it to the circumstances of this crime. Bortnik's one hour evaluation was so ineffectual that it was the functional equivalent of no evaluation, and Loran Cole's due process right to a fundamentally fair adversarial testing was denied. The trial court erred in not granting relief.

ARGUMENT V

MR. COLE WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court denied Loran Cole the opportunity to present his case

during the postconviction evidentiary hearing by refusing to allow Dr. Dee to testify. The court granted an evidentiary hearing on Claim 2, Issue 1, whether counsel's failure to have an expert determine the extent of Mr. Cole's brain damage and present the evidence as mitigation was ineffective assistance of counsel (V3, 420; V7, 1010-11). However, the court limited the evidentiary hearing witness list to Mr. Gleason, Mr. King, and Eleanor Simpson (V7, 1011). The order limiting the witnesses contained the following caveat:

This Court will reconsider Defendant's request to present expert testimony on mental illness/brain damage after trial counsel is questioned on that issue. Similarly, this Court will reconsider Defendant's request to present Co-defendant Paul as a witness after trial counsel is questioned as to his failure to call Paul as a witness.

(V7, 1011).

Mr. Cole's counsel subsequently deposed Mr. Gleason. Because Mr. Gleason could remember very little about representing Mr. Cole, expert testimony was necessary to establish this claim, and Mr. Cole's counsel filed a motion to expand the witness list (V7, 1141-43). At a telephonic hearing on the motion, the court denied it without prejudice (V7, 1149-50).

Mr. Gleason testified at the evidentiary hearing that he did not know whether Mr. Cole had a competent neuropsychological evaluation (V11, 1434-39). Mr.

Cole then asked the court to permit Dr. Dee and to testify. The court allowed Mr. Cole to proffer Dr. Dee's testimony (V11, 1524-25).

The court denied Mr. Cole a full and fair evidentiary hearing by limiting Dr. Dee's testimony to a proffer. A full and fair evidentiary hearing required the court to consider Dr. Dee's testimony on its merits so Mr. Cole could prove that counsel performed deficiently by failing to have Mr. Cole competently evaluated for brain damage (V11, 1532-33, 1541). Dr. Dee's testimony was also necessary to establish prejudice; he found Mr. Cole's brain damage resulted in the two statutory mental health mitigators (V11, 1540-41).

The court's refusal to allow Dr. Dee to testify denied Mr. Cole a full and fair evidentiary hearing because the court denied him the opportunity to present evidence needed to establish Claim 2. Dr. Dee's proffered testimony established that trial counsel performed deficiently by not having a complete neuropsychological evaluation performed on Mr. Cole and presenting powerful mitigation that would have resulted from a complete evaluation. Since Dr. Dee testified by proffer that he would have testified the same way if hired at the time of the trial, claim 2 was established, and Mr. Cole should receive a new penalty phase trial. In the alternative, this Court should remand the case for a full and fair evidentiary hearing or consider Dr. Dee's testimony on its merits when granting relief. *See e.g.*

Provenzano v. State, 751 So.2d 37, 40 (Fla. 1999)(“the goal of this proceeding is to seek the truth. The mere potential for delay should not divert us from this goal, especially in light of the severity of the punishment in this case.”).

ARGUMENT VI

THE TRIAL COURT ERRED IN HOLDING COUNSEL WAS NOT INEFFECTIVE DURING THE GUILT PORTION OF MR. COLE’S TRIAL IN VIOLATION OF MR. COLE’S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688. Accordingly, ineffective assistance consists of: (1) unreasonable attorney performance, and (2) prejudice. Strickland 466 U.S. at 688.

1. Individual voir dire.

Counsel performed deficiently by failing to conduct any individual voir dire on five of the eleven eligible jurors during the second round of voir dire. The court chose to finish the voir dire in one day so that the jury would be less likely to be

influenced by outside sources before the jury was empaneled (RV 8, 294). Trial counsel objected to continuing voir dire that evening because “I do have other things” (RV 8, 294). However, the court and State Attorneys agreed, and voir dire continued. In what can be construed only as trial counsel’s attempt to expedite the proceedings so he could get to his “other things”, counsel chose not to ask those five potential jurors any questions during individual voir dire (RV 8, 294). Of the five not questioned, two were jurors and one was an alternate juror.

This Court has not defined a standard for voir dire examinations, “[t]he views of what constitute the best tactical approach are divergent, and the manner of the examination varies from community to community”. Meeks v. State, 418 So.2d 987, 988 (Fla. 1982). However, the complete absence of individual voir dire should clearly constitute deficient performance. The prejudice is also clear; the two jurors who were not individually questioned found Mr. Cole guilty of first degree murder and ultimately sentenced him to death.

The court denied this claim, holding:

1. Individual voir dire was initiated by a motion filed by defendant’s trial counsel.
2. Every prospective juror was questioned during individual voir dire by either the Court, the State, or by Defendant’s trial counsel.

3. A thorough voir dire of the prospective jurors took place both during general and individual voir dire with Defendant's trial counsel an active participant.
4. Defendant's decision not to question each individual prospective juror personally during individual voir dire was a tactical decision.

Therefore, Defendant has failed to demonstrate that his trial counsel's performance was deficient as it relates to this issue. Accordingly, he has failed to demonstrate ineffective assistance of counsel.

(V9, 1190). The trial court erred.

At the evidentiary hearing, counsel never testified that his failure to individually question five potential jurors was a tactical decision. Counsel could not recall what occurred during voir dire, but his general strategy was to learn as much as possible about the prospective jurors (V11, 1413-14). Counsel testified that he was present during all of the voir dire, and he listened to the juror's answers to the state's individual questioning (V11, 1453). Counsel did not testify that he made a tactical decision not to ask individual jurors questions. Counsel's failure to individually voir dire those five jurors prejudiced Mr. Cole. Two of the jurors who were not individually questioned found Mr. Cole guilty of first degree murder and ultimately sentenced Mr. Cole to death. The court erred in denying this claim.

- 2. Counsel failed to use a peremptory challenge to remove juror Cutts.**

Juror Cutts worked in the recreation department at the Florida State Penitentiary (RV 7, 152). Counsel attempted to challenge juror Cutts for cause, but the court held juror Cutts' employment was not cause (RV 8, 231). The court stated that the court would resolve any potential prejudice that would result if Mr. Cole were sent to the Florida State Penitentiary by transferring Mr. Cole or keeping him in Marion County (RV 8, 231). Though counsel had available peremptory challenges, and in fact did not use all peremptory challenges allotted Mr. Cole, counsel failed to strike juror Cutts.

The court denied this claim holding:

- (1) Trial counsel moved to strike Cutts for cause, and this motion was denied.
- (2) Trial counsel advised Defendant that, as a general rule, it was his preference to exclude law enforcement employees from juries. Accordingly, Defendant's trial counsel discussed with Defendant the advisability of using a peremptory challenge to remove Cutts from the venire. Defendant, however, advised his trial counsel that he wished Cutts to remain on the jury and asked him not to use one of the challenges on this juror.
- (3) Since trial counsel had no specific reason to exclude Cutts-other than the fact that he was employed by the Department of Corrections, and since Defendant asked him not to exclude Cutts from the jury, Defendant's trial counsel made a tactical decision not to exclude Cutts from the jury

pool.

Therefore, Defendant has failed to demonstrate that his trial counsel's performance was deficient as it relates to this issue. Accordingly, he has failed to demonstrate ineffective assistance of counsel.

(V9, 1190-91). The trial court erred.

A tactical decision must be reasonable. Strickland 466 U.S. at 688. At the evidentiary hearing, counsel first testified that he did not have an independent recollection of Cutts (V11, 1420). On cross-examination, counsel remembered that Mr. Cole wanted Cutts to remain on the jury, and he could think of no good reason to strike Cutts against Mr. Cole's wishes (V11, 1455). Counsel also testified that voir dire was his responsibility, not Mr. Cole's (V11, 1487). Counsel testified that he knew that Dr. Berland determined that Mr. Cole is mentally ill and has brain damage (V11, 1489-90).

Thus, counsel's decision not to use a peremptory challenge to remove Cutts was not reasonable. Counsel thought Cutts would be so affected by his job with the Department of Corrections, he attempted to use a cause challenge (RV2, 231). However, counsel disregarded his usual strategy because his mentally ill and brain damaged client, for some unknown reason, wanted Cutts on the jury. This unreasonable decision prejudiced Mr. Cole because Cutts voted to find Mr. Cole

guilty of first degree murder and voted for the death penalty. Had counsel struck Cutts, 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. The trial court erred.

3. Counsel performed deficiently by not presenting William Paul's testimony.

Trial counsel was ineffective for not calling co-defendant William Christopher Paul to testify. The only knife found with the victim's blood on it was found on Paul (RV 13, 966; 15, 1247, 1259). Counsel should have called Paul to testify so that he could 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 (RV 14, 1147; 15, 1261). Because most of the evidence tending to establish Mr. Cole as the actual killer was circumstantial, counsel was ineffective for not calling the only other person who could have killed John Edwards, especially when that person possessed the murder weapon.

The trial court denied this claim, holding:

1. William Paul testified at deposition - wherein he was actively questioned by Defendant's trial counsel - that Defendant was the individual who killed John Edwards and raped Pam Edwards.

William Paul's deposition testimony was consistent with his statement to law enforcement immediately after his arrest.

2. Pam Edwards testified at trial that the Defendant - not William Paul - killed John Edwards and raped Pam Edwards. Pam Edwards' trial testimony was consistent with William Paul's deposition testimony and his statement to law enforcement.
3. William Paul wrote a letter to both Defendant's trial counsel and counsel for the State and informed them he would not willingly testify for either party.
4. Defendant's trial counsel 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 William Paul as a witness. Defendant, who had been supplied with a copy of Paul's deposition by his trial counsel, concurred with counsel's decision.

Therefore, Defendant has failed to demonstrate that his trial counsel's performance was deficient as it relates to this issue. Accordingly, he has failed to demonstrate ineffective assistance of counsel.

(V9, 1192).

At the evidentiary hearing, counsel testified that he read Paul's statements and deposition, considered the physical evidence, and determined that Paul's testimony would not help Mr. Cole (V11, 1456-57). Paul wrote counsel a letter stating that he refused to testify (V11, 1460-61). Mr. Cole told counsel that he did

not want Paul to testify (V11, 1460).

Counsel's decision was not reasonable. Strickland 466 U.S. at 688. The physical evidence connected Paul to the victim; no physical evidence connected Mr. Cole to the victim (RV 14, 1147; 15, 1261). If counsel called Paul as a witness, counsel could have established that Paul's dominant hand was his right, his left hand was not, as the prosecutor argued, broken, so he could have killed Edwards (RV17, 1555). Because Paul refused to testify, counsel could have called him as a hostile witness and used leading questions to elicit the testimony beneficial to Mr. Cole. Again, counsel unreasonably and deficiently relied on his mentally ill and brain damaged client to make legal decisions (V11, 1489-90).

Counsel's unreasonable decision not to call Paul prejudiced Mr. Cole. Had counsel presented this testimony, there is a reasonable possibility that the jury would not have found Mr. Cole guilty of first degree murder or sentenced him death. The trial court erred.

4. Counsel failed to contemporaneously object to the prosecutor's improper opening statement.

The prosecutor began his opening statement by telling the jury that the Edwards found "mankind at its worst" when they entered Ocala National Forrest (RV 11, 547). Trial counsel did not contemporaneously object to this improper

statement, but did object to it and move for a mistrial when the state attorney concluded his statement (RV 11, 552). See Tucker v. Kemp, 762 F.2d 1449 (“[O]f all the murder cases I have seen this is the worst” was an improper comment to the jury). Counsel performed deficiently by not making a timely objection. The court denied the motion for a mistrial but did offer to give a curative instruction, which counsel declined (RV 11, 552). Counsel again performed deficiently in declining the curative instruction. This prejudiced Loran Cole because the jury’s first and continuing impression of Mr. Cole was “mankind at its worst” (RV 11, 547). Without this impression, the jury probably would have found Mr. Cole not guilty of first degree murder, guilty of a lesser included offense, or sentenced him to life.

The court denied this claim, holding:

1. Trial counsel moved to strike and for a mistrial at the close of the State’s opening statement. The trial court denied the motion for a mistrial, but offered a curative instruction. Trial counsel refused the curative instruction.
2. Trial counsel made a tactical decision not to call attention to the improper statement by making a contemporaneous objection.
3. Trial counsel testified that - based upon his experience - curative instructions are not often helpful. He also testified that the effect of said instruction would be to repeat the offensive comment to the jury. Counsel made a tactical decision not to request a curative instruction to the

jury.

(V9, 1192). The court erred.

At the evidentiary hearing, counsel testified that he decided not to have the court give a curative instruction because he generally felt that curative instructions are “totally meaningless to the jury”, other than to reemphasize to the jury what its about”, and he did not want the jurors to think he was trying to hide something (V11, 1462-63). Given the prejudice resulting from the juror’s first impression of Loran Cole as “mankind at its worst”, this was not a reasonable decision.

Strickland 466 U.S. at 688. The trial court erred (RV 11, 547).

5. John Thomson

Counsel performed deficiently by calling John Thomson as the only defense witness for the sole purpose of asking Mr. Thomson if Mary Gamble had ever told him that Mr. Cole confessed to cutting John Edwards’ throat (Rv 8, 1012-13). The state called John Thomson to testify earlier in the proceedings, and defense counsel had the opportunity to ask Mr. Thomson that question on cross-examination.

During the state’s previous direct examination of Mr. Thomson, state attorney King asked Mr. Thomson whether he had driven Mary Gamble to the Marion County Jail to visit Mr. Cole and about the purpose of the visit (RV 6, 828). Counsel could have asked John Thomson whether Mary Gamble told him that Mr. Cole confessed

to the crime during cross examination, but he did not.

That question was likely within the scope of cross examination, and should have been asked at that time to preserve Mr. Cole's right to the first and last closing argument. In fact, the court questioned counsel's decision to waive that right and his decision not to ask Mr. Thomson the specific question on cross examination (RV 8, 1064). After counsel stated "I couldn't have (asked the question), properly", this Court responded, "I may have let you though" (RV 8, 1064).

At the evidentiary hearing, Mr. Gleason testified he chose to call Mr. Thompson, who was first called as a state witness, because he believed the rules of evidence prevented him from eliciting the information he wanted on cross-examination (V11, 1424). Mr. Gleason realized that he forfeited Mr. Cole's right to first and last closing argument, but he wanted to use Thompson to establish that Mary Gamble never told him that Mr. Cole confessed to her and discredit her prior testimony (V11, 1424, 1463-64). However, even though John Thompson testified for the state that he drove Gamble to and from the jail when she claimed Mr. Cole confessed to her, Gleason failed to ask on cross examination whether she mentioned a confession.

Counsel's failure to make even the slightest effort to ask the question during cross examination cannot be considered a tactical decision because counsel was

obviously unaware of the Florida Rules of Evidence. Florida Statute § 90.612 states, “Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court, in its discretion, may permit inquiry into other matters.” §90.612 Fla. Stat. Mr. King asked Mr. Thomson about driving Mary Gamble to visit Mr. Cole (RV 7, 828). Thus, defense counsel probably could have cross-examined Mr. Thomson about any conversation that occurred while he was driving Mary Gamble. At a minimum, defense counsel should have realized it was permissible for him to ask the question and within the Court’s discretion to allow the question.

Counsel’s failure to know the Florida Rules of Evidence prejudiced Mr. Cole because he lost his right to the first and last closing argument. Had counsel not lost that right, he could have effectively refuted the prosecutor’s closing argument, including his false statement that Paul could not have committed the murder because his hand was broken, and the jury likely would not have found Mr. Cole guilty of first degree murder or recommended a death sentence (RV 17, 1555).

6. Conclusion

Cumulatively, counsel’s deficient performance deprived Mr. Cole of effective assistance of counsel and was not harmless error because the prejudicial impact of counsel’s deficient performance probably caused the jury to return a

verdict of first degree murder and a death sentence rather than a verdict of not guilty or guilty of a lesser offense or a life sentence. State v. DiGuilio 491 So. 2d at 1129 (Fla. 1986). Mr. Cole is entitled to relief; the court erred in denying these claims.

ARGUMENT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO RELEASE SEMEN SAMPLES TO BE TESTED FOR DNA IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

At the Huff hearing on February 14, 2000, Mr. Cole's counsel moved to have semen samples released for DNA testing. Judge Swigert denied the motion without an explanation. (V6- 900 V8- 994) A sexual assault kit was performed on Pamela Edwards and semen was found on vaginal smears and vaginal swabs. (RV8-1074) At the time of the original trial, FDLE did not test mixed stains made up of male and female components unless there were larger samples. (RV8-1075, 1076) The semen should still be available for testing because the samples were admitted into evidence. (RV8-1224) The motion was presented in sufficient time that such testing could have been completed and the claim presented by amending

the 3.850 motion prior to the evidentiary hearing, which was scheduled for May 15, 2000.

Judge Swigert presided over the original trial at which Pam Edwards testified that co-defendant Paul did not have sex with her. If the semen samples were tested and Paul's DNA was found, Edwards trial testimony of not having sex with Paul would have been impeached and reasonable doubt cast on her testimony that Paul did not have the opportunity to kill the victim. Due 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. To insure Mr. Cole's constitutional rights to a fair trial are upheld, corroboration with scientific evidence such as DNA, when it is available, is necessary. Pam Edwards did not see who actually cut John's throat. (V8-1191) Because the murder evidence in this case was mostly circumstantial, DNA testing could impeach the state's critical witness and support the defense theory of the case that Paul, and not Mr. Cole, was the actual killer.

During the hearing on the motion to have semen samples released, Mr. Cole's counsel argued that there is a documented theory called the Stockholm effect where victims of rape and incest might fall in love with their attackers or at least develop an affinity toward them. Paul and Edwards were left alone in the tent for several hours while Cole left on two occasions. (V8-1146, 1148, 1149) Edwards

could have succumbed to the Stockholm effect and was trying to protect Paul by placing more blame on Mr. Cole. Edwards denied ever having sex with Paul, which if proven inaccurate by the DNA testing, would diminish her credibility and call into question the accuracy of her recall for all of the events during the entire episode.

All of the physical evidence is much more inculpatory to Paul being the actual killer rather than Mr. Cole. Paul is the one who had the initial confrontation with John Edwards and motive to retaliate because he was hurt by John Edwards. (RV8-1121, 1122, 1124) Fibers from Paul's jeans were found on John Edwards' sweatshirt and no fibers from Cole's clothes were found on John Edwards sweatshirt. (V7-1057, 1058) Paul was found in possession of the knife with blood on it that was consistent with John Edwards' blood. (V8-966, 1082, 1086) When arrested, Cole possessed a knife and flashlight, while Paul possessed Pam and John Edwards' check books, John Edwards' drivers's license, Oakley sunglasses, a Sony Walkman radio, Timex watch, Scripto lighter, Zippo lighter, black leather bag containing a gold necklace, a gold necklace with a pendant attached, and a gold bracelet with a gold ring with a flower on it (V7-964-965). The jewelry that Paul possessed was identified as belonging to the Edwards. (V8-1181)

In capital cases, where human error cannot be corrected once the punishment is imposed, all available means to insure the accuracy of a conviction

should be utilized. The prosecutor's job is to seek justice not merely win a conviction. Campbell v. State, 679 So.2d 720 (Fla. 1996) Therefore, the prosecutor, whose job it is to seek justice, should encourage DNA testing. In their role of seeking justice, the prosecutor should want results from DNA testing which would either help confirm the accuracy of this conviction or relieve them from the dreaded consequence of executing a person who is legally innocent.

Mistakes that can be avoided by DNA testing occur in cases where a defendant supposedly receives a fair trial, is convicted with eyewitness identification, receives a unanimous jury death recommendation, and the conviction and sentence are unanimously affirmed on appeal. *See*, Smith v. State, 515 So.2d 182 (Fla. 1987). It is a tragedy that Frank Lee Smith, who died on death row, was only posthumously exonerated of his crimes by DNA testing. Sidney P. Freedberg, He didn't do it, St. Pete. Times January 7, 2001. The tragedy would have been compounded had our government actually executed Mr. Smith. It likewise is a grave injustice to deny DNA testing where results from such testing can diminish a person's responsibility and lessen his involvement in a crime.

It is a denial of due process and guarantee against cruel and unusual punishment to deny a person access to DNA testing when it very well may save him from execution. Judge Sharp stated in his dissenting opinion that one of his “

worst nightmares as a judge, is and has been, that persons convicted and imprisoned in a “legal” proceeding, are in fact innocent. ” Dedge v. State, 723 So.2d 322, 324 (Fla. 5th DCA, 1998). Mr. Cole is entitled to use this highly accurate objective scientific test to help establish his innocence or, at the very least, weighty mitigation that would change his sentence from death to life.

ARGUMENT VIII

LORAN COLE WAS DENIED A FAIR PENALTY PHASE AND EVIDENTIARY HEARING IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND FLORIDA LAW BECAUSE THE COURT PERMITTED NONSTATUTORY AGGRAVATORS TO BE PRESENTED AND CONSIDERED THEM WHEN DENYING POSTCONVICTION RELIEF .

In its Final Order Denying Defendant’s Motion To Vacate Judgments Of Conviction and Sentence, the court held that trial counsel’s failure to request jury instructions on the two mental health statutory mitigators was not ineffective assistance of counsel (V9, 1197). As part of its explanation that counsel’s failure to request the instructions did not prejudice Loran Cole, the court held:

Extensive statutory and non-statutory aggravating circumstances were prevented [sic]. Therefore, even assuming 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. Accordingly, he has failed to demonstrate ineffective assistance of counsel.

(V9, 1197)(emphasis added). The logical reading of the court's order is that extensive statutory and non-statutory aggravating circumstances were presented. The trial court violated Loran Cole's Fifth, Sixth, Eighth, and Fourteenth Amendment rights and his rights under Florida law, rendering Loran Cole's death sentence fundamentally unfair and unreliable, by permitting the presentation and consideration of non-statutory aggravators .

This Court has repeatedly held that the consideration of non-statutory aggravators is improper. § 921.141 (5) Fla. Stat.; Sawyer v. State, 313 So.2d 680 (Fla.1975); Provence v. State, 337 So.2d 783 (Fla.1976); Perry v. State, 395 So.2d 170 (Fla.1981); Riley v. State, 366 So.2d 12 (Fla.1978); Miller v. State, 373 So.2d 882 (Fla. 1979); Geralds v. State, 601 So.2d 1157 (Fla.1992). The presentation of non-statutory aggravators is illegal. § 921.141(5) Fla. Stat. (2000). Even so, the trial court admitted that he allowed non-statutory aggravating circumstances to be presented and considered during the penalty phase ("Extensive statutory and non-statutory aggravating circumstances were prevented [sic]. . . . Defendant has failed

to demonstrate that said deficiency was so prejudicial that without it the outcome at sentencing would have been different”) and that the trial court considered those aggravating circumstances when denying Mr. Cole 3.850 relief (“Accordingly, he has failed to demonstrate ineffective assistance of counsel.”) (V9, 1197).

Because the trial court failed to specifically state the non-statutory aggravating circumstances that it allowed to be presented, considered, and relied on to deny post-conviction relief, it is impossible to determine whether the consideration of those non-statutory aggravating circumstances violated the Eighth Amendment as well as Florida law. Goode v. Wainwright, 464 U.S. 78, 82-85 (1983). If the trial court relied on non-statutory aggravating circumstances which would result in a freakish and wanton imposition of the death penalty, Mr. Cole’s death sentence violates both Florida law and the Eighth Amendment. Goode v. Wainwright, 464 U.S. 78, 82-85 (1983); Furman v. Georgia, 408 U. S. 238, 310 (1972). Without knowledge of the non-statutory aggravating circumstances that the court used, Mr. Cole’s death sentence is arbitrary and capricious. This Court should remand Mr. Cole’s case to the trial court for clarification of the non-statutory aggravating circumstances the court allowed to be presented and considered during the course of Mr. Cole’s trial and post-conviction proceedings and, if necessary, a new penalty phase or reweighing .

ARGUMENT IX

THE TRIAL COURT ERRED IN HOLDING THAT THE STATE DID NOT WITHHOLD EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND MR. COLE'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

At the evidentiary hearing, Eleanor Simpson testified that she was interested in Mr. Cole's trial because she knew both the victim's family and Mr. Cole's family (V11, 1543). Mrs. Simpson went to the direct appeal oral argument and, while there, she spoke to state attorney Brad King (V11, 1544-45). Mr. King told Mrs. Simpson that he did not have Paul testify because, "we were afraid that Mr. Paul would admit and take the blame for the whole incident" (V11, 1545, 1556). Mrs. Simpson had this statement transcribed in an affidavit the day after the oral argument and sent a copy to the Florida Supreme Court (V11, 1545, 1555). When Mr. King told Mrs. Simpson that "we were afraid that Mr. Paul would admit and take the blame for the whole incident," she stood only two feet away from King and heard his statement clearly (V12, 1557). Mr. Cole's mother, Ann Cole, typed the affidavit and included some mistakes and some false information. However, the portion of the affidavit transcribing Mr. King's statement that the state did not call Mr. Paul as a witness because, "we were afraid that Mr. Paul would admit and take

the blame for the whole incident ” was absolutely true (V11, 1547-48, 1552-54, 1555-58).

Brad King testified at the evidentiary hearing that he had only a general recollection of the oral argument (V12, 1575). King recalled speaking to a lady after the oral argument concluded (V12, 1575). Though, unlike Mrs. Simpson, he did not memorialize the conversation, he testified that in 1997, he told Mrs. Simpson, “we had a good case without him; he was there and could have been called, but I chose not to call him; and, in part, I chose not to call him because I could never tell for a certainty what he would say if he testified” (V12, 1576). He described Mrs. Simpson’s statement as an inaccurate reflection of what he said (V12, 1577).

Under Brady v. Maryland, 373 U.S. 83, 87 (1963), the prosecution is required to inform a defendant of all evidence which is material to guilt and punishment. Id. To prove a Brady violation, a person must prove:

1. Evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; 2. Evidence must have been suppressed by the state, either willfully or inadvertently; and 3. Prejudice must have ensued.

Way v. State, 760 So.2d 903, 910 (Fla. 2000). Mr. King’s information, which led him to believe that Mr. Paul would admit that he killed John Edwards, was

favorable both to Mr. Cole's guilt and punishment, and he did not disclose it to Mr. Cole. See §921.141 6(d) Fla. Stat.; Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987). This prejudiced Loran Cole because, had the jury known that Paul, who received a life sentence for the murder, actually killed the victim, the jury probably would have found Mr. Cole not guilty of first degree murder, guilty of a lesser included offense, or recommended a life sentence.

The trial court denied this claim holding:

7. The State did not have any information on Mr. Paul - favorable to the Defendant or otherwise - which it did not provide to the defense.
8. Due to Mrs. Simpson's relationship with the Defendant's mother - Ann Cole, Mrs. Simpson's credibility is in doubt.
9. Even taking Mrs. Simpson's affidavit and testimony as true, it fails to demonstrate that the State possessed evidence favorable to the Defendant's case which it failed to provide to the defense.

(V9, 1198). The trial court erred. King had only a general recollection of this incident and did not immediately transcribe his conversation with Mrs. Simpson (V12, 1575). Mrs. Simpson was shocked by King's statement, memorialized it the following day, and testified that it is true (V11, 1547-48, 1552-54, 1555-58). Mrs. Simpson knows the victim's family and Mr. Cole's family (V11, 1543). While

King's failure to reveal information that led him to believe Paul committed the actual murder or that he would admit to it while testifying, is prosecutorial misconduct which should cause Mr. Cole's conviction and sentence to be reversed and remanded for a new trial, Mrs. Simpson had no motive to lie. Way v. State, 760 So.2d 903, 910 (Fla. 2000). Though her affidavit contained extraneous and false information Ann Cole told her, the paragraph regarding her conversation with King was absolutely true (V11, 1547-48, 1552-54, 1555-58). The trial court erred in denying this claim.

ARGUMENT X

THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING SO MR. COLE COULD PROVE THE RULES PROHIBITING HIS LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. COLE ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

The Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21 of the Florida Constitution, require that Loran Cole receive a fair trial. However, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar¹ prevents Mr. Cole from determining whether he received a fair trial. Mr. Cole can

¹The rule expressly prohibits counsel from directly or indirectly rule states that

A lawyer shall not ... after dismissal of the jury in a case, a lawyer is connected, initiate communication with or cause to initiate communication with any juror regarding the trial to determine whether the verdict is subject to legal challenge. A lawyer may not interview jurors for this purpose unless there is a reasonable reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

only discover jury misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional. Because this rule denies Loran Cole the opportunity to investigate and present a claim of juror misconduct, the rule denied his rights to due process and access to the courts. Given the extensive publicity during the 19 months before Mr. Cole's case was tried, it is unlikely that any of the jurors empaneled did not read or hear of details of this case as well as suspicions regarding Mr. Cole's connections to murders in Georgia. During voir dire ten of the twelve sentencing jurors admitted they had read or heard about the case before it came to trial. Furthermore, the jurors were not sequestered during the trial and were available to any illegal influences. Without the ability to question the jurors, the reliability and integrity of Loran Cole's capital sentence is questionable.

ARGUMENT XI

THE TRIAL COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING SO MR. COLE COULD ESTABLISH FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. COLE'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.

Under Florida law, a capital sentencing jury must be:

[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

[S]uch a sentence could be given *if the state showed the aggravating circumstances outweighed the mitigating circumstances.*

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). However, Mr. Cole's jury was instructed, "[t]o define [sic.] sufficient aggravating circumstances do exist, it will then be **your duty to determine whether mitigating circumstances exist that out-weigh the aggravating circumstances**" (RV 17, 1570-

71)(emphasis added).

Because Loran Cole's sentencing jury was instructed that it could consider Florida's felony murder aggravating circumstance, and he had been convicted of robbery, Loran Cole was eligible for death upon conviction. Thus, Loran Cole entered the penalty phase of his capital trial with the burden of proving that death was not the appropriate penalty.

The instructions violated Florida law and the Fifth, Eighth, and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Cole on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Cole's Due Process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon. Second, the instruction essentially told the jury that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987).

This error was not harmless. Loran Cole entered the penalty phase with an unconstitutional automatic aggravating factor that applies to every felony murder

and fails to "genuinely narrow the class of persons eligible for the death penalty," and therefore, the sentencing process was rendered unreliable. Zant v. Stephens, 462 U.S. 862, 876 (1983). Because counsel was ineffective in the penalty phase, Loran Cole's sentencing jury heard a small fraction of the available mitigation. The unconstitutional instructions precluded the jurors from considering the mitigating evidence that was presented, in violation of Hitchcock, and from evaluating the "totality of the circumstances." State v. Dixon, 283 So.2d at 10; Hitchcock v. Dugger, 481 U.S. 393 (1987). The jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Loran Cole is entitled to relief in the form of a new sentencing hearing in front of a jury because his sentencing was tainted by improper jury instructions.

ARGUMENT XII

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. COLE OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

Loran Cole did not receive the fundamentally fair trial to which he was

entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Loran Cole's penalty phase, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this brief, Loran Cole's 3.850 motion, and in his direct appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court's numerous errors significantly tainted Loran Cole's penalty phase. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Loran Cole his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993).

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Cole's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the cases for a new trial, penalty phase, an evidentiary hearing, or for

such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that the foregoing **INITIAL BRIEF OF APPELLANT**, which has been typed in Font Times New Roman, size 14, has been furnished by either United States Mail, first-class/federal express/facsimile transmission/hand delivery this _____ day of January, 2001.

Julius J. Aulisio
Florida Bar No. 0561304
Assistant CCRC

Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellant

Copies furnished to:

The Honorable William T.Swigert
Chief Circuit Court Judge
110 NW First Avenue
Ocala, Florida 34475

Judy Taylor Rush
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., Fifth Floor
Daytona, Florida 32118-3951

Jim McCune
Assistant State Attorney
Office of the State Attorney
19 NW Pine Avenue
Ocala, Florida 34475

Loran Cole
DOC# 335421; P5207S
Union Correctional Institution
Post Office Box 221
Raiford, Florida 32083