

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC01-192
LOWER TRIBUNAL NO. 94-498-CF**

LORAN COLE,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary,

Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,

Attorney General,

Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Cole's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Cole was deprived of the right to a fair, reliable, and individualized trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court 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.

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INTRODUCTION

Significant errors which occurred at Mr. Cole's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Cole. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on in direct appeal, but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Cole is entitled to habeas relief.

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. Loren Cole, through counsel, accordingly urges this Court to permit oral argument.

PROCEDURAL HISTORY

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. 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 9 1316). After a penalty phase conducted on September 28-29, 1995, the jury unanimously recommended a death sentence for the first degree murder conviction.(RV 17 1592). 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 1 98). 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. 1051 (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 a limited evidentiary hearing on the following issues: Claim I, Category 1, Issue 1; Claim I, Category 1, Issue 2; Claim I, Category 2, Issue 1; Claim I, Category 2, Issue 2; Claim I, Category 2, Issue 5; Claim II, Issue 1; Claim II, Issue 10; and Claim III, Issue II (V6, 936). The Court denied all other claims (V6, 936).

The evidentiary hearing was held May 15, 2000. The court denied Mr. Cole's 3.850 motion on May 24, 2000 (V9, V10). His appeal shall be filed contemporaneously with this petition.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla.R.App.P. 9.100(a). See Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Cole's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Cole's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A

petition for a writ of habeas corpus is the proper means for Mr. Cole to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmer v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Cole's claims.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Cole asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT'S CORRESPONDING ERRORS ON APPEAL.

- A. The Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Florida law.**

In Jones v. United States, the United States Supreme Court held, “under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. “[T]he relevant inquiry here is not one of form, but of effect—does the required finding expose the defendant to a greater

punishment than that authorized by the jury's guilty verdict?" Appendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

At the time of Loran Cole's penalty phase, Florida statute 775.082 provided:

A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment.

§ 775.082 Fla. Stat. (1994). Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding **before** a person convicted of first degree murder is eligible for the death penalty. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1994); § 921.141(2)(a), (3)(a) Fla. Stat. (1994). Thus, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. § 775.082 Fla. Stat. (1994). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Appendi, because it increases the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

Under the Florida death penalty scheme there are essentially two levels of

murder. The first, conviction of first degree premeditated murder or felony murder permits a life sentence. The second, if aggravating circumstances are proved beyond a reasonable doubt, renders a first level conviction of murder a murder for which a person may be punished by death. Thus, the Florida death penalty system divides murders into two categories, analogous to felony battery and aggravated battery. Felony battery, which is punished as a third degree felony, becomes aggravated battery, punished as a second degree battery, upon proof of certain aggravating circumstances. §§784.041, 784.045 Fla. Stat. (1999). These circumstances, which increase felony battery from a third degree felony to a second degree felony of aggravated battery, are elements of the crime which must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt by a unanimous verdict. Likewise, the florida death penalty aggravating circumstances, which elevate a murder punishable by a life sentence to a murder punishable by death, must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt. No other crimes in Florida allow increased punishments based on additional findings (other than prior conviction) made by a judge; Apprendi disallows this practice.

In Apprendi, the hate crime sentencing enhancement was applied after the defendant was found guilty and increased the statutory maximum penalty by up to ten years. Apprendi 120 S.Ct. At 2351. The Apprendi Court clearly dispensed with the fiction that such an enhancement was not an element which received Sixth Amendment

protections. The Court wrote, “[b]ut it can hardly be said that the potential doubling of one’s sentence from 10 years to 20—has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance”. Appendi 120 S.Ct. at 2365. As in Appendi, in Loran Cole’s case, the aggravators were applied only after he was found guilty. The aggravators increased the statutory maximum penalty based on the guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than nominal effect and is of constitutional significance. “[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” Woodson v. North Carolina, 428 U.S. 280, 305 (1975). *See* Gardner v. Florida, 430 U.S. 349, 357 (1976).

Though Appendi involved two separate statutes and the Florida death penalty involves only one, the issue is substance over form. Appendi 120 S.Ct. at 2350, 2365; § 921.141 Fla. Stat. (1999). The effect of the Florida death penalty statute is similar to the effect of the federal carjacking statute the United States Supreme Court addressed in Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Three subsections of the Jones statute appeared, superficially, to be sentencing factors. However, the superficial impression lost clarity when the Court examined the effects of the sentencing factors.

But the superficial impression loses clarity when one looks at the penalty subsections (2) and (3). These not only

provide for steeply higher penalties, but they condition them on further acts (injury, death) that seem quite as important as the elements in the principle paragraph (e.g. force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range from 15 years to life, was meant to carry none of the process safeguards that elements of the offense bring with them for a defendant's benefit.

Jones, 526 U.S. at 233. Because the carjacking sentencing factors increased the maximum penalty for the crime from 15 years to 25 years or life imprisonment, the Court interpreted them as elements of the crime which receive Sixth Amendment protection. Jones, 526 U.S. at 230, 242-43.

Although the majority of the Court stated in dicta that Apprendi did not overrule Walton v. Arizona, 497 U.S. 639 (1990), the Apprendi Court was not addressing a death case in which constitutional protections are more rigorously applied, and Apprendi did not specifically address the Florida sentencing scheme. Apprendi 120 S.Ct. at 2366. Moreover, the majority dicta did not carry the force of an opinion of the full court. See Apprendi 120 S. Ct. at 2380 (Thomas, J., concurring) (“Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.”); Apprendi, 120 S. Ct. at 2387-88 (O’Connor, J., dissenting) (“If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.”) Apprendi, 120 S. Ct. 2388.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury’s guilty verdict, the aggravator must be

charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Appendi, at 2365. This did not occur in Loran Cole's case. Thus, the Florida death penalty scheme is unconstitutional as applied.

B. Appellate counsel was ineffective for failing to raise on appeal the trial court's erroneous denial of Loran Cole's Motion For Statement of Particulars.

Loran Cole's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment (RV 1, 104-7). Trial counsel filed a Motion For Statement of Particulars Re: Aggravating Circumstances, The Reasons The Death Penalty Is Sought And The Theory Of Prosecution Underlying Murder In The First Degree (RV 3,473-76). The motion alleged that the indictment violated the Sixth Amendment of the United States Constitution because Mr. Cole could not properly prepare his defense because the aggravating circumstances were not listed in the indictment (RV 3,473-76). However, the trial court refused to correct these constitutional violations by erroneously denying the Motion (RV 10, 502-505). Appellate counsel performed deficiently by failing to raise this error on appeal.

Under the principles of common law, aggravators must be charged in the indictment.

Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with

certainty and precision. [2 M. Hale, Pleas of the Crown *170].

Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000) *quoting* Archbold, Pleading and Evidence in Criminal Cases, at 51. Because aggravators are essentially circumstances of the crime and the defendant's mental state, they are essential elements of a crime for which the death penalty may be imposed, and they must be charged in the indictment.

In Apprendi, the Court addressed the adequacy of New Jersey's procedure in applying their hate crime statute. The Court concluded that because the hate crime statute increased the penalty beyond the statutory maximum, it was an element of that crime which required Sixth Amendment protection. *See In re: Winship*, 397 U.S. 358 (1970); McMillan v. Pennsylvania, 477 U.S. 79 (1986); Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979).

The Florida death penalty procedure is similarly flawed. Loran Cole's indictment violated the Sixth Amendment because it did not allege the aggravators that the state sought to prove to make Loran Cole eligible for the death penalty. Had appellate counsel raised this issue on appeal, this Court probably would have, at the very least, remanded his case for a new penalty phase proceeding.

C. Appellate counsel was ineffective for failing to raise on appeal the trial court's erroneous denial of Loran Cole's Motion To Declare Section 921.141, Florida Statutes Unconstitutional Because Only A Bare Majority Of Jurors Is Sufficient To Recommend A Death Sentence and instruction that the jurors must decide unanimously that an aggravating circumstance was established beyond a reasonable doubt.

Because aggravators are essentially elements of the crime for which the death

penalty can be imposed, Loran Cole's death recommendation violates Florida law because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. The verdict also violates the fundamental principles of constitutional common law. Appellate counsel was ineffective for failing to raise the court's erroneous denial of Loran Cole's Motion To Declare Section 921.141, Florida Statutes Unconstitutional Because Only A Bare Majority Of Jurors Is Sufficient To Recommend A Death Sentence and his instruction that the jurors must decide unanimously that an aggravating circumstance was established beyond a reasonable doubt (RV 4, 627-28; 16, 1525-26).¹

Under Apprendi's reasoning, aggravating factors in the Florida death penalty scheme are elements of a capital crime which must be decided by a unanimous jury before a death sentence may be imposed. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating

¹Appellate counsel did challenge the constitutionality of Florida Statute 921.141 for various reasons, including majority verdicts violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution, lack of specific verdicts in the penalty phase may violate the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution (Cole brief 82-95).

factors. See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). In light of the fact that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase must receive the protections required under Florida law and require a unanimous verdict. § 921.141(1),(2) Fla. Stat. (1999).

Loran Cole’s death recommendation may have violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.² “We think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.” Burch v. Louisiana, 441 U.S. 130, 138 (1979)(reversing a non-unanimous six person jury verdict in a non-capital case). The federal government requires unanimous twelve person jury verdicts. “[T]he jury’s decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian

²Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. §16-32-202; Cal. Const. Art. 1, §16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R.Super.Ct.C.R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann. § 913.10(1); Ga. Const. Art. 1, §1, P XI; Idaho. Const. Art. 1, §7; Ill. Const. Art. 1, §13; Ind. Const. Art. 1, §13; Kan. Const. Bill of Rights §5; Ky. Const. §7, Admin.Pro.Ct.Jus. A.P. 11 §27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5 ; Miss. Const. Art. 3, §31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §6; Nev. Rev. Stat. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 §12; N.Y. Const. Art. 1, §2; N.C. Gen. Stat. Ann. §15A-1201; Ohio Const. Art. 1, §5; Okla. Const. Art. 2, §19; Or. Const. Art. 1, §11, Or. Rev. Stat. §136.210; Pa. Stat. Ann. 42 Pa.C.S.A. §5104; S.C. Const. Art. V, §22; S.D. ST §23A-267; Tenn. Const. Art.1, §6; Tex. Const. Art.1, §5; Utah Const. Art. 1 §10; Va. Const. Art. 1, §8; Wash. Const. Art. 1, §21; Wyo. Const. Art. 1, §9.

purpose of the Anglo-American jury system.” Andres v. United States, 333 U.S. 740, 749 (1948).

Implicit in the states’ and federal government’s requirements that a capital conviction must be obtained through a unanimous twelve person jury, is the idea that “death is qualitatively different from a sentence of imprisonment, however long”. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. *See* Johnson v. Louisiana, 406 U.S. at 364. Only a twelve juror unanimous verdict can support the imposition of the death penalty. “In capital cases, for example, it appears that no state provides for less than 12 jurors—a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society’s decision to impose the death penalty.” Williams v. Florida, 399 U.S. at 103.

The death recommendation probably violated Loran Cole’s Sixth, Eighth, and Fourteenth Amendment rights as well as his rights under Florida law because it is impossible to determine whether twelve jurors unanimously found any one aggravating circumstance. Because the effect of finding an aggravator exposed Loran Cole to a greater punishment than the life sentence authorized by the jury’s guilty verdict, the aggravator must have been charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt to a unanimous jury. Apprendi, at 2365. Appellate counsel rendered prejudicially ineffective assistance for failing to raise on direct appeal

the court's errors in denying Loran Cole's Motion To Declare Section 921.141, Florida Statutes Unconstitutional Because Only A Bare Majority Of Jurors Is Sufficient To Recommend A Death Sentence and his instruction that the jurors must decide unanimously that an aggravating circumstance was established beyond a reasonable doubt (RV 4, 627-28; 16, 1525-26). Had counsel raised this error on appeal, Loran Cole probably would have received a new penalty phase.

D. Conclusion

The Florida death penalty sentencing statute was unconstitutional as applied in Loran Cole's case. The trial court erred in denying the motions which could have corrected the constitutional errors. Appellate counsel was ineffective for failing to raise on appeal that the Statute as applied violated Loran Cole's Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and that the trial court erred in refusing to grant motions which could correct those errors. Neither the constitutional errors, nor appellate counsel's errors are harmless. The denial of a jury verdict beyond a reasonable doubt has unquantifiable consequences and is a "structural defect in the constitution of the trial mechanism, which defies analysis by 'harmless error' standards". Sullivan v. Louisiana, 508 U.S. 275, 2081-83 (1993) *quoting* Arizona v. Fulminante, 499 U.S. 279, 308-312 (1991).

CLAIM II

THE PROSECUTOR’S IMPROPER PENALTY PHASE CLOSING ARGUMENT RENDERED LORAN COLE’S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

Appellate counsel performed deficiently by failing to raise the prosecutor’s improper penalty phase closing argument on direct appeal. This misconduct was fundamental error which “reach[es] down into the validity of the trial itself to the extent that a verdict could not have been obtained without the assistance of the alleged error”. Cochran v. State, 711 So.2d 1159, 1162 (Fla. 1998) *quoting* Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996). Had counsel raised this fundamentally erroneous prosecutorial misconduct on direct appeal, this court probably would have remanded the case for a new penalty phase.

The prosecutor’s closing argument destroyed Loran Cole’s most important right under our legal system, the right to the “essential fairness of his criminal trial.” Cochran v. State, 711 So.2d 1159, 1163 (Fla. 1998) *quoting* Knight v. State, 672 So.2d 590, 591 (Fla. 4th DCA 1996). Trial counsel failed to contemporaneously object to preserve this misconduct for appeal, and appellate counsel failed to raise the misconduct as fundamental error so this Court could consider the substantive impact

of the misconduct on direct appeal. Gutierrez v. State, 731 So.2d 94 (4th DCA 1999). When this Court considers whether prosecutorial misconduct was prejudicial, this court considers whether the cumulative impact of all misconduct deprives a person of a fair trial. Garron v. State, 528 So.2d 353, 359 (Fla. 1988). Counsel's failure to raise the prosecutorial misconduct as fundamental error was deficient performance which prejudiced Mr. Cole. Strickland. Had counsel raised the totality of the prosecutorial misconduct on appeal, this Court probably would have remanded the case for a new penalty phase.

During his closing argument in the penalty phase of Mr. Cole's trial, the State Attorney tried to negate the possibility that 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 17, 1555). The State Attorney told the jury Paul could not have stabbed John Edwards because Paul's hand was broken. In fact, Mr. Paul's hand was not broken, it was merely hurt. 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." (V3, 428-30). By telling the jury Paul's hand was broken, the State Attorney suggested Paul's injury was far more severe than it actually was. "Broken" has a considerably more severe connotation than the real state of

Paul's hand--hurt. Even if 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(V3, 428-30).

This improper, untrue, and misleading comment, most likely induced the jury to return a death recommendation on the false belief that Paul could not have physically committed the murder. Effective counsel would have raised this misconduct on appeal.

The prosecutor also used the clearly prohibited argument that, when deciding whether they would recommend life or death, the jurors should show Mr. Cole the same amount of mercy that he showed his victims.

Each and every one of us for the most part have this innate thing in us that is called "mercy." We want to be nice. Most of us do. Probably the only thing that holds this world together is us, at some point, wanting to be nice to each other.

There is every bit of room in this world for mercy. No question. But I submit to you that, in these facts, **the time for mercy was as Loran Cole and William Paul planned to rob these two young people. That was the time for mercy.**

When they sat by the campfire and talked them into going into the woods at night, to rob them. That was the time for mercy. As they walked down the trail and talked about "the third in line always getting it," that was the time for mercy.

Even as the plan went into action and they were both subdued and they were both willing to give up

everything they had – “Take whatever you want from me. I’ve got a thousand dollars in my checkbook. I will tell you where the keys to my car are. Have my gold, have my car, have everything I have. Have my Dorito coupon, if it means something to you. But leave us with our lives.”

That was the time for mercy. When he picked up the camera to hit him in the head, he could have chosen mercy. When he pulled the knife out of his pocket to cut his throat, he could have chosen mercy. He never chose mercy. Never.

The time for mercy has passed. It’s time now for justice. When mercy is taken to an extreme, it ends in indulgence. Justice is a fair and measured response to the wrong done.

Pam and John didn’t have a jury. They didn’t have a lawyer. They didn’t have a judge. Except for one. That man right there was their judge. He didn’t choose mercy.

It is not fair. It is not just for him to seek mercy where he should be showed no mercy.

(RV 17, 1558-60)(emphasis added).

This argument, essentially asking the jury to show Mr. Cole as much mercy as he showed the victims, was an unnecessary appeal to the jury’s sympathies which this Court has repeatedly condemned. Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989); Richardson v. State, 604 So.2d 1107, 1108 (Fla. 1992); Urbin v. State, 714 So.2d 411, 421 (Fla. 1998); Brooks v. State, 762 So.2d 879, 900-1 (Fla. 2000); Kearse v. State, 770 So.2d 1119, 1129-30 (Fla. 2000).

In Rhodes, the prosecutor “concluded his argument by urging the jury to show

Rhodes the same mercy shown to the victim on the day of her death.” Rhodes, 547 So.2d at 1206. This Court held that similar argument was “an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation” and that the “cumulative effect of the improper remarks in the absence of curative instructions was to prejudice the jury in the eyes of the jury and could have played a role in the jury’s decision to recommend the death penalty”. Rhodes, 547 So.2d at 1206. In Kearse, this Court found error when the prosecutor “urged the jury to show “this Defendant the same mercy he showed Officer Parrish.”” Kearse, 770 So.2d at 1129. Noting, “[a]gain, long before the issuance of Urbin, this precise line of argument was specifically denounced by this Court.”, this Court held the prosecutor’s closing argument in Brooks was error. Brooks, 762 So.2d at 900-1. In Brooks, the prosecutor concluded his closing argument: “I’m going to ask you not to show mercy or pity to these defendants. What mercy or pity did they show Darryl Jenkins that night? But if you are tempted to show the defendants mercy or pity, I’m going to ask you to show them the same mercy, the same pity that they showed Darryl Jenkins on August 28, 1996, and that is none.” Brooks, 762 So.2d at 900-1. Likewise, in Loran Cole’s case, these comments, when considered with the other misconduct, probably caused the jury to recommend the death penalty. However, appellate counsel failed to raise this error on appeal.

The prosecutor’s improper argument violated Loran Cole’s fundamental rights to a fair penalty phase. Both trial and appellate counsel failed to preserve, litigate, and

correct the prosecutor's misconduct. Both were ineffective, and Loran Cole will suffer the ultimate prejudice caused by the unconstitutional penalty phase. Had counsel raised the prosecutor's misconduct on appeal, there is a reasonable probability that this Court would have remanded the case for a new penalty phase. Brooks v. State, 25 Fla. L. Weekly S417 (Fla. 2000). Counsel was deficient, and the prejudice is Loran Cole's death sentence.

CLAIM III

MR. COLE'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. COLE MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

Loran Cole acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Loran Cole acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this

claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals stated:

Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]
Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a

claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion

This claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, Loran Cole raises this claim now.

Loran Cole has been incarcerated since 1994. Statistics show that incarceration over a long period of time will diminish an individual's mental capacity. Because Loran Cole may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

Loran Cole suffers from mental illness and brain damage (RV 17, 1489-90). For the last five and a half years, Loran Cole has lived on Florida's death row, in a cell approximately 6 feet wide, 9 feet long, and 9.5 feet high. Union Correctional Institution is located in central Florida and is not air conditioned, even during dangerously hot weather. Roaches often reach the food served to death row inmates before it is delivered to the inmates. Loran Cole is allowed yard time only twice a week and showers every other day. The majority of Loran Cole's fellow death row inmates, the people with whom he can routinely talk and associate, also suffer various forms of mental illness and personality disorders. Loran Cole's already fragile mental condition could only deteriorate under these circumstances. His mental condition may well decline to the point that he is incompetent to be executed.

CLAIM IV

EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES MR. COLE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER OF THE FLORIDA CONSTITUTION.

The trial court erred in not granting an evidentiary hearing so Loran Cole could prove that death by electrocution is cruel and/or unusual punishment which violates his rights under the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

A. The Death Penalty Reform Act of 2000 is unconstitutional, so electrocution remains the mandated form of execution.

Though the Death Penalty Reform Act of 2000 purports to change all death sentences to death by lethal injection, that act violates ex post facto laws, the Eighth and Fourteenth Amendments of the United States Constitution, and this Court's decision in Washington v. Dowling. Washington v. Dowling, 109 So. 588 (Fla. 1926). In Sims v. Florida, this Court held that Washington v. Dowling is distinguishable from the current legislation because the new legislation retains the option of death by electrocution. In fact, the Florida legislation is significantly different from the legislation this Court used to support its holding. The statutes in the Montana, Mississippi, Delaware, and Arizona cases that this Court cited changed the method of execution from one that was arguably unconstitutional to one that the courts found constitutional, but preserved the old method of execution unless the person sentenced

to die affirmatively chose the new method of execution. *See Vickers v. Stewart*, 144 F3d 613, 617 (9th Cir. 1988); *DeShields v. State*, 534 A.2d 630, 639 n.7 (Del. 1987); *Wetzel v. Wiggins*, 85 So.2d 469, 471 (Miss. 1956); *State v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984). The Florida statute however, changes all executions to lethal injection, the new method of execution, unless the person sentenced to die affirmatively chooses to have the State use the electric chair to kill him.

Thus, when it enacted the Death Penalty Reform Act of 2000, the legislature affirmatively took the choice other states left to people sentenced to die, and chose for them death by lethal injection. That action violated Loran Cole's Eighth and Fourteenth Amendment rights under the United States Constitution. In *Boykin v. Alabama*, the United States Supreme Court held that an effective waiver of the federal constitutional privilege against self incrimination, right to a jury trial, and the right to confront one's accusers require an affirmative showing that the waiver was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969). In *Carnley v. Cochran*, the United States Supreme Court stated that the waiver of the Sixth Amendment right to counsel must be an affirmative waiver. *Carnley v. Cochran*, 369 U.S. 506 "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506, 516. Likewise, this Court held that an accused may waive a jury recommendation during the penalty phase only if the record supports a

knowing and voluntary waiver. State v. Hernandez, 645 So.2d 432 (Fla. 1994); Lamadline v. State, 303 So.2d 17 (Fla. 1990). Accordingly, a person's decision regarding the means of death imposed by the state is protected by the Eighth Amendment and the Fourteenth Amendment. The legislature cannot waive a person's choice to die by the means to which they were sentenced. Such a waiver must be made by the person sentenced to die, and it must be supported by a record that indicates an intelligent and voluntary choice. The Death Penalty Reform Act violates ex post facto law, Washington v. Dowling, and the Eighth and Fourteenth Amendments. An evidentiary hearing and 3.850 relief are necessary.

Execution by judicial electrocution was mandated by Florida Statute § 922.10. Hence, the sentence imposed by this Court is unconstitutional because it subjects Loran Cole to judicial electrocution which constitutes cruel and unusual punishment.

B. Death by electrocution is cruel and/or unusual punishment which violates Loran Cole's rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section Seventeen of the Florida Constitution.

The Constitution of the United States prohibits punishment that is cruel and unusual. U.S. Const. Amend VIII. The Florida Constitution bars any punishment that is either cruel or unusual. Fl. Const. Art.I, § 17. Judicial electrocution is constitutionally cruel under Florida and Federal Constitutional standards because it involves the unnecessary and wanton infliction of pain and is an affront to human dignity. Loran Cole can demonstrate that judicial electrocution violates both the state and federal standards.

Experts can clearly establish by scientifically reliable evidence that judicial electrocution results in extreme pain and suffering. The electrocuted person remains conscious for a significant period of time, during which his brain continues to process pain signals. The pain results from burning flesh, massive muscle contractions, and heat related distension of internal organs.

Loran Cole challenges the assumption that judicial electrocution, if carried out properly, results in instantaneous and painless death. His experts would have testified that judicial electrocution always involves extreme pain and suffering because the condemned person remains conscious for a variable amount of time.

New circumstances have diminished the Eighth Amendment stature of electrocution as a means of judicial execution. The nation's evolving standards of decency have made death by electrocution an increasingly rare punishment. Legislative acceptance or rejection of a particular practice is the standard judicial measure of unusualness. Death by judicial electrocution is constitutionally unusual under Florida and Federal Constitutional standards because only four of the thirty eight states that authorize executions mandate execution by judicial electrocution. In the past years five states have rejected the practice (Connecticut, Indiana, New York, Pennsylvania, South Carolina), and four states abolished electrocution as a means of execution in the last decade (Virginia 1994, Ohio 1993, Louisiana 1991, Pennsylvania 1990). Thus, electrocution has become an unusual means of judicial execution.

The violation of Loran Cole's constitutional rights which results from

prospective death by electrocution is not harmless error. An evidentiary hearing was warranted. The trial court erred in denying this claim without an evidentiary hearing.

CLAIM V

EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES MR. COLE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER OF THE FLORIDA CONSTITUTION.

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments," and bars "infliction of unnecessary pain in the execution of the death sentence," Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 91 L. Ed. 422, 67 S. Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death . . ." In re Kemmler, 136 U.S. 436, 447, 34 L.Ed. 519, 10 S. Ct. 930 (1890).

Despite the perception that lethal injection is a painless and swift death, negligent or intentional errors have caused persons executed intense suffering. Even when persons executed by lethal injection are first paralyzed, no evidence clearly demonstrates that they become unconscious to their pain and impending death. Indeed, a significant number of the persons executed by lethal injection in other states have suffered extremely painful and prolonged deaths resulting in wanton and unnecessary pain.

The Eighth Amendment "proscribes more than physically barbarous punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits punishments

that “involve the unnecessary and wanton infliction of pain,” Gregg v. Georgia, 428 U.S. 153, 173 (1976). “Among the ‘unnecessary and wanton’ inflictions of pain are those that are ‘totally without penological justification.’” Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Gregg, 428 U.S. at 183; citing Gamble, 429 U.S. at 103). The Eighth Amendment reaches “exercises of cruelty by laws other than those which inflict bodily pain or mutilation.” Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to “circumstance[s] of degradation,” *id.* at 366, or to “circumstances of *terror, pain, or disgrace*” “superadded” to a sentence of death. *Id.* at 370 (emphasis supplied). See In re Medley, 134 U.S. 160, 171, 172 (1890) (seclusion in solitary confinement and prohibition on telling condemned prisoner date and time of his execution are increased punishments, in violation of *ex post facto* clause, because solitary confinement induces “further terror,” while “secrecy [about the time of execution] must be accompanied by an immense mental anxiety amounting to a great increase in punishment.” See also Trop v. Dulles, 356 U.S. 86, 101 (1958).³ A penalty must also accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’” Gregg, 428 U.S. at 173 (citing Trop , 356 U.S. at 100). The court must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks

³See Hudson v. McMillian, 503 U.S. 1, 16-17 (1992) Blackmun, J., concurring) (“As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of ‘pain,’ not ‘injury.’ . . . ‘Pain’ in its ordinary meaning surely includes a notion of psychological harm. . . . I have no doubt that to read a ‘physical pain’ or ‘physical injury’ requirement into the Eighth Amendment would be no less pernicious and without foundation than the ‘significant injury’ requirement we reject today.”).

of inflicting inhumane punishments. *Compare* Maynard v. Cartwright, 486 U.S. 356 (1988), *with* Lewis v. Jeffers, 497 U.S. 764 (1990).⁴

Even if Loran Cole is killed by lethal injection without suffering severe pain, any mutilation that occurs such as multiple, crude, excessive, unnecessary, gaping wounds, offends notions of basic human dignity underlying the Eighth Amendment. See Weems v. United States, 217 U.S. 349, 372 (1910) (noting that Eighth Amendment prohibition on cruel and unusual punishment bars punishments that “inflict [] bodily pain or mutilation”); Wilkerson v. Utah, 99 U.S. 130, 135 (1879) (noting constitutional bar on draw and quartering and on beheading). See also Jones v. McAndrew, No. 4:97-CV-103-RH at 34-35 (N.D. Fla. February 20, 1998) (holding that fire about head of judicially electrocuted person implicates Eighth Amendment). Cf. Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan and Marshall, JJ., dissenting from denial of certiorari); Furman v. Georgia, 408 U.S. 238, 266 (1972) (Brennan, J., concurring); Jones v. State, 701 So.2d at 84, 88 (Kogan, C.J., Shaw and Anstead, JJ. dissenting). Human dignity “is the basic concept underlying the Eighth Amendment.” Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

Studies show that lethal injection often results in terror, pain and disgrace because the procedure required to kill by lethal injection quickly and painlessly is often too technical for the executioners to follow or willingly ignored. Professor Radelet concluded, “Lethal injections are far more likely to be botched than any other modern

⁴Farmer v. Brennan, 511 U.S. 825, 846 (1994) (the focus of the inquiry is whether there exists an “objectively intolerable risk of harm”).

method of execution.”⁵ DOC has already bungled one execution, resulting in unconstitutional pain and mutilation.

Finally, Florida’s lethal injection procedure violates the Supremacy Clause of the United States Constitution as the State has not received an exemption from the Controlled Substances Act, 21 U.S.C. §§ 812, 829, 353, and 21 C.F.R. § 329 & 1328, for the prescription, possession, or administration of the drugs used in the lethal injection.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Cole respectfully urges this Honorable Court to grant habeas relief.

⁵Professor Michael Radelet has testified that there have been at least sixteen executions by lethal injection that have been botched.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing *Petition for Writ of Habeas Corpus*, which has been typed in Font Times New Roman, size 14, has been furnished by U.S. Mail to all counsel of record on this _____ *day of January, 2001*.

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