

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**

REPLY BRIEF OF APPELLANT

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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.

- 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.

Appellee argues that the court did not err in denying an evidentiary hearing on this issue because , “the alleged additional evidence is merely cumulative” (RB at 23). In fact, counsel only presented wavering evidence that Mr. Cole used marijuana and alcohol (RV 16, 1382, 1387). Counsel did not present available jail, treatment, and witness evidence that Mr. Cole used crank, cocaine, LSD, psychedelic mushrooms, and sniffed paint thinner and glue. Had counsel presented this evidence of serious drug abuse, it would have established non-statutory mitigation as well as provided a basis for Dr. Berland’s opinion that Mr. Cole has brain damage. Had the jury weighed

this mitigation, the balance of aggravators and mitigators would have weighed differently and the jury probably would have recommended life.

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

Appellee first argues that this claim is procedurally barred because it could have been raised on direct appeal (RB at 27). Appellee is wrong; this claim could not have been raised on direct appeal. This claim alleged that **trial counsel was ineffective** for not objecting to the state's argument of false facts and failing to refute that argument during Mr. Cole's closing argument. This Court has repeatedly held that ineffective assistance of trial counsel issues are properly plead in 3.850 petitions and are not direct appeal issues. Kelley v. State, 486 So.2d 578, 585 (Fla.1986); Perri v. State, 441 So.2d 606 (Fla.1983). Thus, the claim is not procedurally barred.

Appellee also argues that the prosecutor's false argument was a proper comment on the evidence because Pamela Edwards testified that William Paul said his hand was broken (RB at 28). Appellee claims, "the thrust of the prosecutor's argument was not that the hand was actually broken, and thus, it was physically impossible for Paul to use it, but was that Paul believed that it was broken, was treating it as if it was, and therefore, would not even attempt the things that he would have had done with that hand in order to slit the throat of John Edwards" (RB at 28-29).

Appellee's benign interpretation is belied by the prosecutor's very argument.

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 prosecutor did *not* argue, "now is a guy *who believes his hand is broken* 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 *hand he believes is broken?*" The prosecutor falsely argued to the jury that Paul's hand was broken and it prevented him from committing this murder.

Appellee also argues that this comment clearly did not affect the outcome of the proceeding (RB at 29). In Florida, the prosecutor holds a semi-judicial position. Washington v. State, 98 So.2d 605, 609 (Fla.1923). The prosecutor essentially told the jury that it was impossible for Paul to have committed this crime because his hand was broken. Because he is a sworn officer of the state, the jury likely believed the prosecutor and necessarily eliminated Paul as the actual killer even though there was absolutely no direct evidence of who killed the victim. Had trial counsel objected and corrected the prosecution's use of this false argument, the jury probably would have recommended a life sentence because absolutely no direct evidence proved that Mr. Cole rather than Paul, who initially attacked the victim, killed the victim. Confidence

in the outcome is undermined. Strickland v. Washington, 466 U.S. 671, 671 (1984).

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

Appellee argues that this claim is procedurally barred because this issue was raised and rejected on direct appeal (RB at 29-30). In fact, this issue—that trial counsel was ineffective for not requesting this limiting construction— was neither raised nor rejected on direct appeal. In Cole v. State, this Court upheld the trial court’s finding of this aggravating circumstance. Cole v. State, 701 So.2d 845, 852 (Fla.1997). Simply because the trial court found that “John was conscious for several minutes while he gasped [for] air”, even though the medical examiner could not determine whether the victim was conscious during the injuries, does not mean that the jury would not have found this aggravating circumstance if they had been given the proper limiting constructions (RV6, 743, 747). Id. at 852. Had the jury heard this limiting construction, the balance of aggravating and mitigating circumstances would weigh differently, and the jury probably would have recommended a life sentence. Counsel was ineffective for not requesting it, and the court erred in summarily denying this claim.

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.

Appellee gives an benign interpretation to the state's introduction of improper bolstering evidence (RB at 38). Appellee asserts that Officer Jicha's improper bolstering testimony was merely a recount of her "effort to determine whether Pam was reporting real events or was making a false crime report" (RB at 38). Officer Jicha's testimony contradicts such an interpretation. Officer Jicha testified, "**I felt like she was telling the truth**, because everything just added up, right down the line," regarding Pam Edwards' statement 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, 575)(emphasis added). The officer's determination that this was not a false report was not relevant to the crime. This statement, at trial, was clearly an attempt to bolster Pam Edwards' testimony.

C. Conclusion.

The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where claims are factual matters. Accordingly, 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); see Cook v. State, 2001 WL 721070 (Fla.2001); Gaskin v. State, 737 So.2d 509 (Fla.1999). The trial

court erroneously denied Loran Cole an evidentiary hearing on many of his most crucial factual 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 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.

Appellee suggests this issue is procedurally barred because, “jury instruction issues could, and should, have been raised on direct appeal” (RB at 40). Appellee is wrong, the issue is that trial 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. (1993). This Court has repeatedly held that ineffective assistance of trial counsel issues are properly plead in 3.850 petitions and not on direct appeal. Kelley v. State, 486 So.2d 578, 585 ti (Fla.1986); Perri v. State, 441 So.2d 606 (Fla.1983).

Appellee also argues that because Dr. Berland did not specifically testify that Mr. Cole was not able to conform his conduct to the requirements of the law and that he was extremely emotionally disturbed at the time of the crime, the court would have not erred in refusing the instructions. Appellee cites Geralds v. State, 674 So.2d 96 (Fla.1996), for this proposition. Appellee fails to note, however, that Geralds was decided in 1996, one year after Mr. Cole's trial. Bryant v. State, 601 So.2d 529, 533 (Fla. 1992), Stewart v. State, 558 So.2d 416, 420 (Fla. 1990), Smith v. State, 492 So.2d 1063, 1067 (1986), were the precedent existing at the me of Mr. Cole's trial, and each case mandates that, had counsel requested them, Mr. Cole receive the jury instructions regarding the statutory mental health mitigators.

Moreover, Mr. Cole's case is distinguishable from Geralds. In addition to Dr. Berland's testimony 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, Pamela Edwards testified that Mr. Cole used marijuana during the

crime and that she saw empty beer cans at his campsite (RV 16, 1452, 1456, 1462; see also 1459, 1462, 1471, 1472) (V5, 923). Mr. Cole's sister and foster mother testified that he had a history of alcohol and marijuana abuse (V5, 922-93). In Geralds, Geralds presented evidence that he was diagnosed with anti-social personality disorder and bipolar manic disorder. Geralds, 674 So.2d at 101. This Court distinguished Bryant, Stewart, and Smith, from Geralds, holding:

In each of those cases, *some* evidence was presented that the defendant was either under the influence of some drug around the time of the murder, or suffered from a pervasive mental condition that affected him every day.

Id. at n.12.

Mr. Cole's case is more similar to those in which this Court has found error in the courts' refusals to give the statutory mental health mitigator instructions than it is to Geralds. In Bryant, Bryant introduced evidence that he had a history of drug and alcohol problems, he used alcohol the night of the crime, he was mentally retarded, and he was emotionally handicapped as a child. Bryant, 601 So.2d 530. This Court held that, based on that mitigation, the court erred in not giving the requested instructions regarding the statutory mitigators. Id. at 533. In Stewart, because Stewart presented evidence that he was intoxicated at the time of the crime, the trial court erred in not giving the jury instruction on the statutory mental mitigator of impaired capacity.

Stewart, 558 So.2d 416, 420-21. In Smith, this Court held, “[t]here was also evidence, however slight, that Smith had smoked marijuana the night of the murder sufficient to justify giving instructions for reduced capacity and extreme emotional disturbance.” Smith, 492 So.2d 1063, 1066.

“[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raise[ed] a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence.” Williams v. Taylor, 529 U.S. 362, 399 (2000). Had counsel requested the instructions and the court given them, the aggravating and mitigating circumstances would have weighed differently, and the jury probably would have recommended a life sentence. Confidence in the outcome is undermined; counsel was ineffective. Strickland, 466 U.S. at 461. 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.

Appellee makes several misrepresentations regarding this claim. First, Appellee asserts that it is clear from the record that Dr. Bortnik spent additional time on Cole's case which was not reflected in the filing dated September 11, 1995.

Attorney Gleason testified to at least three telephone conferences he had with Dr. Bortnik. Since these were not included on the billing, it is logical to assume that the doctor might have also omitted telephone conferences with Dr. Berland.

(RB at 45).

The "conferences" must not have impacted trial counsel because he could not remember what occurred during any of them (V11, 1502-10). The "conferences", Appellee references can be little more than very brief telephone conversations. The first "conference" was an initial contact to ask Bortnik to work on the case before Bortnik saw Mr. Cole or reviewed any records (V11, 1474). The second "conference", is memorialized by trial counsel's notes: "9/11/95", "RPCT [meaning return phone call to] Dr. Bortnik 629-4350", "Cole", and ""neuropsychologically sound"" (V8, 1166; V11, 1477-78). This clearly does not indicate a lengthy "conference". The third "conference" is memorialized by counsel's notes: "9/15/95", "PCT [meaning phone call to] Dr. Bortnik 629-4350" (V8, 1167; V11, 1476). This conference resulted in absolutely no information, it was most likely merely an

unsuccessful attempt to reach Bortnik. Bortnik's bill reveals that he charged the county sixty dollars to travel, for one-half hour, to and from his office in Ocala to the Marion County Jail (V8, 1160-64). This belies Appellees assertion that Bortnik had a lengthy "conference" with Dr. Berland for which he chose not to bill the state.

Appellee also asserts that Bortnik's one hour of testing was reasonable because:

The "battery of tests" include the Wechsler and the MMPI. Dr. Berland had already given Cole both of these tests, ® 1429), and the results were made available to Dr. Bortnik.

(RB at 45).

The record shows that he had the tests done by Dr. Borland [sic] and there was no evidence admitted to show that he did not rely, or should not have relied on those in making his determination.

(RB at 47).

These statements are misleading. Counsel sent Bortnik the results of Dr. Berland's MMPI, but counsel did not send Bortnik the results of the Wechsler Dr. Berland gave Mr. Cole (V8, 1168). Mr. Cole could not present evidence that Bortnik did not rely on Dr. Berland's Wechsler in making his determination because the court limited Mr. Cole's witnesses to three people and denied him the opportunity to present Dr. Berland's testimony (V7, 1010-11; V11, 1520-24). Thus, the court denied Mr. Cole the opportunity to present the evidence Appellee claims is needed to grant relief.

Appellee, very imaginatively, asserts:

Cole's claim that Dr. Bortnik's conclusion was "exactly the opposite of Dr. Berland's" is incorrect. Dr. Berland's belief that although Cole's malingering made it impossible to determine the extent of any mental illness and/or brain damage, there was probably something there establishes - at the most - that the physical condition of brain damage (and possibly mental illness of some type) existed. However, Dr. Bortnik's conclusion that Cole was neuropsychologically sound indicated there was not functional brain damage. Since only functional brain damage should be considered as mitigation, there was no real conflict between the two professionals' conclusions.

(RB at 47-48, n.8). Appellee cites absolutely no authority, in the record or outside of the record, for its conclusion that "neuropsychologically sound" indicates no functional brain damage. Appellee's conclusion is mere supposition.

Appellee's supposition is refuted by the record. Dr. Dee's proffered testimony proves Dr. Bortnik's conclusion was exactly the opposite of Dr. Berland's and the brain damage was functional. Dr. Dee testified that the brain damage resulted in cognitive impairment and impulse problems which caused an extreme mental disturbance at the time of the crime and substantially impaired Mr. Cole's ability to appreciate the criminality of his conduct at the time of his crime (V11, 1540-41). Bortnik could not have found this functional brain damage in one hour of testing (V11, 1532-33, 1541).

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. Had counsel procured a competent neuropsychological examination such as Dr. Dee's, the balance of aggravating and mitigating circumstances would have been different, and the jury probably would have recommended a life sentence. Confidence in the outcome is undermined. Strickland, 466 U.S. at 461.

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.

Again, Appellee claims that because Dr. Bortnik had the results of Dr. Berland's MMPI, he did not need to conduct testing that takes more than one hour, and

therefore, his mental health evaluation was competent (RB at 50). However, nothing in the record supports Appellee's claim. Bortnik did not have the results of Dr. Berland's Wechsler, which is part of the battery of the neuropsychological tests needed to determine if a person is neuropsychologically sound (V8, 1168). The Wechsler test alone takes at least one hour (V11, 1530-32). A competent neuropsychological evaluation consists of a lengthy interview and tests that take six to seven hours (V11, 1530-32). Additionally, Mr. Cole malingered when taking the MMPI, the one test counsel sent to Dr. Bortnik, making that test unreliable (RV 16, 1486-87). Mr. Cole did not receive a competent neuropsychological evaluation.

Appellee analogizes Bortnik's performance to that this Court discussed in Mann v. State, 770 So.2d 1158 (Fla.2000), in which this court held:

The record reveals that [Dr.] Carbonel performed an extensive neuropsychological evaluation of Mann that included neuropsychological testing. . .and conducted various tests including a Minnesota Multiphasic Personality Inventory and a Wechsler Adult Intelligence Scale test, among others.

Id. at 1164. Bortnik did not do comparable tests in one hour, and Loran Cole was denied his due process rights to a fundamentally fair adversarial testing. 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.

Appellee disingenuously claims that, “Further, Attorney Gleason testified that he did not remember whether Cole was evaluated by a doctor other than Dr. Bortnik, although his file indicated that at least one other neuropsychologist, Dr. Bordidi, was consulted. (R1434, 1515-16).” (RB at 55). In fact, counsel could not remember whether Dr. Bordini was a *neuropsychiatrist* or a *psychologist*; counsel did not indicate he was a neuropsychologist (V11, 1516). Additionally, consultation seems to be a generous term. Counsel could not remember the “consultation”, his notes indicated only a phone call, and there was not a bill for the “consultation” (V11, 1516).

Appellee also claims that because Dr. Berland and Dr. Bortnik did not find the statutory mental health mitigators, the jury would not have credited Dr. Dee’s testimony. As discussed in the preceding claims and the initial brief, Dr. Bortnik did not find the statutory mental health mitigators because he did not conduct a competent mental health evaluation. Dr. Berland could not find the statutory mental health mitigators because, 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). There was absolutely no evidence that the doctors performed the required tests and had all of the information needed to find both statutory mental health mitigators, but determined they did not exist. Rather, the evidence established that counsel and Dr. Bortnik deprived Mr. Cole of his rights to competent evaluations which would have resulted in substantial mitigation.

The trial court denied Mr. Cole a full and fair evidentiary hearing by excluding Dr. Dee’s testimony, which was needed to establish Claim II of Mr. Cole’s 3.850 motion. The court erred.

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.

Appellee seems to think this issue regards an improper jury instruction (RB at 75). However, this issue does not involve jury instructions, it involves the court’s illegal presentation and consideration of non-statutory aggravating circumstances. In denying 3.850 relief, 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).

Appellee claims, “the Postconviction court’s use of non-statutory in the context of aggravating circumstances was a slip of the tongue” (RB at 75). It is clear that this was not a “slip of the tongue”. The court could not have intended to indicate extensive statutory and non-statutory *mitigating* circumstances because no statutory mitigating circumstances were presented to the jury. Moreover, the court stated that “[e]xtensive statutory and non-statutory aggravating circumstances were prevented [sic]” to deny relief based on lack of prejudice regarding Mr. Cole’s claim that counsel was ineffective for not requesting jury instructions on the statutory mental health mitigators (V9, 1197). The court could only have intended to deny relief based on its and the jury’s illegal consideration of non-statutory aggravating circumstances. § 921.141 (5) Fla. Stat. (2000); 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).

This was not a “slip of the tongue”. This statement is contained in the court’s written and documented order (V9, 1197). The court admitted that it considered non-statutory aggravators to deny post conviction relief and allowed non-statutory aggravators to be presented. “[C]onfessions are direct evidence”. Meyers v. State, 704 So.2d 1368, 1370 (Fla.1997).

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 AS TO REMAINING CLAIMS

Mr. Cole relies on argument presented in his initial appeal regarding these issues.

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 case for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been
has been furnished by United States Mail, first class postage prepaid, to all counsel of
record on this 5th day of July, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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