

**IN THE SUPREME COURT OF FLORIDA
CASE NO: SC03-2204**

LORAN COLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

**LESLIE ANNE SCALLEY
FLORIDA BAR NO. 0174981
ASSISTANT CCC**

**MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584
Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
813-740-3544
813-740-3554 (Facsimile)
Attorneys for Defendant**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 10

ARGUMENT I
THE CIRCUIT COURT ERRED IN DENYING MR. COLE’S 3.853 MOTION
FOR POSTCONVICTION DNA TESTING.
..... 12

ARGUMENT II
THE CIRCUIT COURT’S DENIAL OF MR. COLE’S MOTION FOR
POSTCONVICTION DNA TESTING VIOLATED HIS RIGHTS TO HABEAS
CORPUS RELIEF UNDER BOTH THE FLORIDA AND UNITED STATES
CONSTITUTIONS 24

CONCLUSION 26

CERTIFICATE OF SERVICE 27

CERTIFICATE OF COMPLIANCE 28

TABLE OF AUTHORITIES

CASES

Archer v. State, 613 So.2d 446, 448 (Fla.1993)	22
Bertoletti V. Dugger, 883 F.2d 1503, 1519 n.12 (11 th Cir. 1989)	23
Brookings v. State, 495 So.2d 135 (Fla.1986)	24
Cole v. Florida, 523 U.S. 105 (1998)	2
Cole v. State, 701 So.2d 845 (Fla. 1997)	2
Cole v. State, 841 So.2d 409, 419 (Fla.2003)	3, 25
Demps v. Dugger, 874 F.2d 1385 (11 th Cir. 1989)	24
Eddings v. Oklahoma, 455 U.S. 104 (1982)	21
Enmund v. Florida, 458 U.S. 782 (1982)	10, 22
Gregg v. Georgia, 428 U.S. 153, 183 (1976)	20
Guzman v. State, 644 So.2d 966, 1000 (Fla.1996)	26
Hannon v. State, 638 So.2d 39 (Fla.1994)	8
Harvey v. Horan, 285 F.3d 298 (4 th Cir. 2002)	25
Hazen v. State, 700 So.2d 1207, 1207-8 (Fla. 1997)	24
Hitchcock v. Dugger, 481 U.S. 393 (1987)	21
Kearse v. State, 20 Fla. L. Weekly S300 (Fla. June 22, 1995)	8
Kyles v. Whitley, 514 U.S. 419, 434-435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)	

.....	19
Locket v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d 973, 990 (1978)	21
Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d Dist.Ct.App. 1982)	26
Omelus v. State, 584 So.2d 563, 566-67 (Fla.1991)	21
Puccio v. State, 701 So.2d 858, 862 (Fla. 1997)	24
Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992)	24
Scott v. State, 657 So.2d 1129, 1132 (Fla.1995)	24
Skipper v. So. Carolina, 476 U.S. 1 (1986)	21
Slater v. State, 316 So.2d 539, 542 (Fla. 1975)	24
State v. Winters, 346 So.2d 991, 993 (Fla.1977)	25
Stephens v. State, 748 So.2d 1028, 1033-34 (Fla.1999)	12, 24
Strickland v. Washington, 466 U.S. 668 at 695, 104 S.Ct. 2052 at 2068(1984) ...	23
Strickler v. Greene, 119 S.Ct. 1936, 1956 (1999)	19, 20, 22
United States v. Bagley, 473 U.S. 667, 682 (1985)	19

OTHER SOURCES

Amendment To Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633, 636-37 (Fla. 2001)	24
--	----

PRELIMINARY STATEMENT

This is an appeal from the Circuit Court of the Fifth Judicial Circuit in and for Marion County's denial of Loran Cole's 3.853 Motion for Postconviction DNA Testing. The record on appeal is comprised of one volume, successively paginated, and beginning with page one. References to the current record on appeal are referenced by DNA, followed by the page number. References to the 3.850 record on appeal record are referenced PCR, followed by the appropriate volume and page number. References to the 1995 trial and sentencing proceedings are referenced TR, followed by the appropriate volume and page number.

STATEMENT OF THE CASE

Mr. Cole was indicted on March 10, 1994, on one count of first degree premeditated murder, two counts of kidnapping while armed, two counts of robbery with a deadly weapon, and two counts of sexual battery while armed (TR V1 104-7). He 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 (TRV5 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 (TRV5 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 (TR V6 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. He 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. Cole v. Florida, 523 U.S. 105 (1998).

Mr. Cole filed a shell post-conviction motion on June 5, 1998, before his one-year date, and an amended motion on September 27, 1999. After an evidentiary hearing on claims regarding Mr. Cole's rights to the effective assistance of counsel and

the state's failure to disclose exculpatory evidence, the circuit court denied relief on May 24, 2000 (PCR V9 1189-99). On January 16, 2003, this Court affirmed the circuit court's order and denied habeas relief. Cole v. State, 841 So.2d 409, 419 (Fla.2003)

Thereafter, on September 29, 2003, Mr. Cole filed a 3.853 Motion for Postconviction DNA Testing (DNA 1-34). The state responded, with a memorandum of law, and Mr. Cole filed a reply and memorandum of law (DNA 41-52). After a hearing on October 30, 2003, the circuit court denied the motion (DNA 107-114). This appeal follows.

STATEMENT OF THE FACTS

Mr. Cole was charged by indictment dated March 10, 1994, with one count of first degree premeditated murder, two counts of kidnapping while armed, two counts of robbery with a deadly weapon, and two counts of sexual battery while armed (RV1 104). He plead not guilty to all charges, and he was tried by a jury September 25-28, 1995.

Prior to trial, the state performed tests on blood samples from John Edwards (the murder victim), Pamela Edwards (the sexual assault victim), Mr. Cole, William Paul, and the physical evidence. Blood taken from John Edwards gave reactions characteristic of blood group "A". Blood taken from Pamela Edwards gave reactions characteristic of blood group "A". Blood taken from William Paul gave reactions

characteristic of blood group “O”. Blood taken from Loran Cole gave reactions characteristic of blood group “O”. Semen was identified on the vaginal smears and vaginal swabs contained in the sexual assault kit taken from Pamela Edwards. A grouping test on the swabs indicated the presence of blood group factors “A” and “O”. Semen was identified on Pamela Edwards’ underpants. A grouping test was inconclusive. Semen was identified on Pamela Edwards’ sweat pants. A grouping test indicated the presence of blood group factors “A” and “O” (DNA 9-34).

The murder case against Loran Cole was entirely circumstantial. William Paul did not testify, but Pamela Edwards did. In the first statement Pamela Edwards made, she indicated that both Mr. Cole and the co-defendant, William Paul, raped her (TR V11 568). During the trial however, Pamela Edwards testified that Mr. Cole sexually assaulted her on two separate occasions and that she did not have sexual contact with any other person during that time, specifically, William Paul (TR V14 1170-71, 1140-42, 1151-54). Pamela Edwards also testified that, during the time she spent with Mr. Cole and Paul, she was struck over the head with a hard object causing her to be stunned and dizzy (TR V14 1188); she smoked marijuana and was “pretty well stoned” (TR V14 1186-87); and that she lost consciousness at one point (TRV14 1189). Lillian Pollice testified that she was present during the medical examination of Pamela Edwards and that she collected a sexual assault kit (TR V11 709-19). John

Dune testified that he collected the sexual assault kit and put it in the evidence section at the Sheriff's department. The sexual assault kit was shown to the jury as State's Exhibit 30 (TR V12 763-64).

The state used the testimony of Pamela Edwards to argue that Mr. Cole, and not William Paul, actually killed John Edwards.

But if you also recall the testimony, Pam Edwards told you that it was Loran Cole that kept saying to John Edwards, on several occasions, "You hurt my brother. You hurt my brother."

Keep in mind that from the time that John Edwards retaliates against William Paul with a stick and beats him to where his hand is swollen and his head is cut, he is for all intents and purposes crippled.

And what they would have you believe is that this cripple who – if you remember the testimony – at the time Pam was hit, after that John is brought to her and they talk. And he apologizes for getting her in that situation. So it's clear beyond any question that his throat is not cut at this point.

So it could not have happened while Mr. Paul and Mr. Edwards were up the trail away from Pam. It just simply couldn't have. From there on it's Loran Cole that moves Pam Edwards down the trail and that Paul goes with them. It's Loran Cole that goes back to John Edwards, on two occasions.

And, yes, he does take Pam, what she described as three feet from where she was, so that she could go

to the bathroom. She described it for you that when that happened she was gone for about a minute or so. And that when she left, Paul was in a position, leaning on an elbow; and when she was back, he was in the same position.

And I think from the evidence its clear that he didn't have time in his crippled state to get up, go kill John Edwards and get back.

(TR V15 1269-70)(emphasis added). The jury rendered a verdict of guilty as charged on all counts (TRV12 763-69).

The penalty phase occurred September 28-29, 1995. To establish the heinous, atrocious, or cruel aggravating element, the state again used Pamela Edwards' testimony to argue that William Paul could not have committed the murder.

We talked for some period of time in the guilt phase about who the murderer really was. And only you, in the secrecy of your jury room, know what your feeling is about that.

But there are some things that I didn't even bother to mention in that regard. Because, as I expressed to you then, as far as the guilt, his guilt goes, it doesn't matter who pulled the knife across his throat.

But in this instance, it does. Because this circumstance applies, if you believe Loran Cole committed the murder.

* * *

Cole goes back and you hear (Mr. King strikes the podium three times). And you hear John groan. You know that what was happening, from the evidence, is he was being hit in the head with this camera.

You also know that that wasn't the last time that John was aware. Because you remember Pam telling you that Mr. Cole came back and said, "we're going to wait until he passes out." And he would call back to John, and John would moan in response to that.

And then he went back up, came back and said, "I've moved him off the trail, he's tied up." And at a later time said, "I've done something to his neck to paralyze him."

Not only does the time frame tell you who committed the murder, but something else does. And for all to have handled this kind of knife, you know what it is. The knife has a lock on it.

How 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 that he had to have done all of that.

And what Pam said is the less – or about a minute, that she was three feet away. That he would have had to get up, with his head busted to the point he could barely get back to Pam, go and cut John's throat, and get back in the same position when she came back.

(TR V17 1554-56)(emphasis added). The jury unanimously recommended a death sentence for the first degree murder conviction (TR V5 793).

Thereafter, the circuit court sentenced Mr. Cole to death, basing its finding of the heinous, atrocious or cruel aggravator on Pamela Edwards' testimony. The court's order stated:

In determining whether to apply the heinous, atrocious and cruel aggravator, a murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. *Kearse v. State*, 20 Fla. L. Weekly S300 (Fla. June 22, 1995). When evaluating the evidence, the trial court may consider the victim's fear and emotional strain as contributing to the heinous nature of the murder. *Preston*, 607 So.2d at 409-10; *Hannon v. State*, 638 So.2d 39 (Fla.1994).

After John Edwards was forcibly subdued and restrained, the Defendant left him on the ground next to his sister Pamela. John's concern and understanding of the developing events was evidenced by his statement of regret for getting them into the situation. Although faced with personal danger and physical harm, John's only comment was "I'm sorry, Pam."

After robbing the victims, the Defendant moved Pamela further down the trail and away from John. The Defendant returned to where John was laying and beat him severely in the head while repeating over and over, "Why did you hurt my brother?" (referring to the Co-Defendant although they are actually unrelated) Pamela testified that she could hear her brother's grunts and moans. The Defendant left John Edwards

and re-joined Pamela and the Co-Defendant, stating they would wait until John passed out before moving down the trail. Eventually, when John quit moaning, the Defendant returned to [the] area where John lay to "move and tie him off the trail."

From the evidence and testimony presented, John was still alive at this time. The Medical Examiner, Dr. Janet Pillow, testified that the Defendant's death was caused by blunt trauma wounds to the head and by a throat cut through the thyroid cartilage (Adam's apple) and epiglottis. John sustained at least three severe blows to the head caused by a blunt instrument with a sharp edge. Based on the bruising and bleeding, the [doctor] concluded that John was alive when the blows were inflicted.

The throat wound consisted of one small laceration above the large cut. The Medical Examiner testified that the small cut indicates that John was alive and consciously reacted to the knife or jerked causing a small laceration above the main cut. When his throat was cut, John bled both externally and internally. The wound bled directly into his airway preventing him from breathing. Dr. Pillow testified that John lived for several minutes while suffering from air hunger or the inability to breath [sic]. **Pamela Edwards testified that while the Defendant was with her brother, she heard gagging sounds. When the Defendant returned from moving John, he commented on the gagging by stating John was having "trouble with his dinner," insinuating that he might be vomiting. During the course of the night while they wandered in the woods, the Defendant, Co-Defendant and Pamela passed John several times. Pamela testified that John lay on his stomach with his feet tied behind him. He did not move or speak.**

By the testimony and evidence, the State has proved

beyond a reasonable [doubt] that the Defendant subjected John Edwards to a slow, tortu [r]ous death. John was conscious for several minutes while he gasped [for] air from a severed windpipe slow[ly] filling with blood. Death finally resulted from the head wounds and loss of blood from the severed throat. The beatings and the manner in which the Defendant killed John Edwards evidences a total indifference on the part of the Defendant to the victim's suffering. The Defendant knew the victim died a slow, choking death and reacted with a joke. The Court finds that the testimony and evidence establishes that the Defendant committed the murder of John Edwards in a manner that was especially heinous, atrocious or cruel.

(TR V12 915-17)(emphasis added).

SUMMARY OF THE ARGUMENT

ARGUMENT I

No physical evidence connected Mr. Cole to the murder of John Edwards. The State's case consisted of a carefully constructed web of circumstantial evidence and relied upon Pamela Edwards' testimony to establish that Mr. Cole , and not William Paul, had the opportunity and premeditated design to kill John Edwards. Any impeachment of Pamela Edwards' testimony would establish a reasonable doubt that Mr. Cole actually killed the victim and that he premeditated the murder. Such impeachment would provide mitigation regarding his culpability for the first degree murder. There is a reasonable probability that the jury would have sentenced Mr. Cole to life if evidence revealed Pamela Edwards' memory was not entirely accurate and

they could not believe, beyond a reasonable doubt, that Mr. Cole was the person who actually killed Mr. Edwards. Furthermore, such evidence would establish that Mr. Cole is innocent of the death penalty under Enmund v. Florida, 458 U.S. 782 (1982).

ARGUMENT II

The circuit court's denial of Mr. Cole's 3.853 motion violated his rights to habeas corpus, executive clemency, Due Process, Equal Protection and access to the courts under the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. COLE'S 3.853 MOTION FOR POSTCONVICTION DNA TESTING.

Because this issue involves questions of law, this Court should apply a standard of de novo review, giving discretion to the circuit court's findings of fact. Stephens v. State, 748 So.2d 1028, 1033-34 (Fla.1999).

Relying on both its own and this Court's recitations of Pamela Edwards' trial testimony, the circuit court denied Mr. Cole's 3.853 motion for post conviction DNA testing, holding "the Defendant would not have been acquitted or received a lesser sentence if the Defendant offered the DNA results at trial." (DNA 108). In support of that legal conclusion, the circuit court wrote:

The DNA evidence from the sexual assaults would not exonerate the Defendant of John Edwards' murder.

Nor would the DNA evidence affect the Defendant's sentence because DNA evidence would not affect the Court's findings regarding the statutory aggravators or proportionality analysis. The prior violent felony aggravator would still be applicable because the Defendant does not contest the robbery, assault and kidnapping he himself committed. Similarly, the DNA test results would not affect the Court's finding that the murder was especially heinous, atrocious, and cruel because the sexual assaults were not considered by the Court in its analysis regarding whether the murder was especially heinous, atrocious and cruel.

The sexual assaults were committed well after the Defendant murdered John Edwards and were not committed against Mr. Edwards. Finally, the DNA would have no impact on a proportionality analysis because the Defendant remains the criminal participant who was primarily responsible for the death of John Edwards.

(DNA 112). The circuit court's order and its reliance on Pamela Edwards' testimony illustrate the court's legal error in determining that there was not a reasonable probability that the penalty phase outcome would have differed.

In its order denying the motion for DNA testing, the circuit court supported its conclusion on the following factual findings that are based solely upon Pamela Edward's trial testimony:

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

4. The four walked for a while but never found the pond. Instead, Cole jumped on Pam and knocked her to the ground. She got up and tried to run; however, Cole caught her, hit her on the back of the head, handcuffed her, and threw her down on the ground.

5. Meanwhile, John had taken Paul's walking stick and was hitting him with it.

6. Cole then helped Paul subdue John and moved John on the ground next to Pam. While they lay close to each other on the ground, John apologized to Pam for having exposed them to the dangers of these two strangers.

7. Cole told the Edwards that he wanted to take their cars, and he went through their pockets and took their personal property, including their jewelry.

8. Paul took Pam up the trail, and he was complaining about his hand and head, which were injured in the altercation with John.

9. Pam could hear Cole asking John why he hurt Cole's brother and could hear John grunt a few times.

10. Cole then came to where Pam and Paul were sitting and told them that they were going to wait until John passed out.

11. Cole called back to John several times, and John responded by moaning.

12. Eventually, Cole told Pam he was going to move John off the trail and tie him up.

13. Pam then heard something that resembled a gagging sound.

14. When Cole returned, he said that John must be having trouble with his dinner, hinting that John was vomiting.

15. Pam, Paul, and Cole then started walking back to Cole's campsite. On the way, they walked past John, and he was not moving.

16. At the campsite, Cole forced Pam to sleep naked by threatening her that unless she cooperated, she and John would be killed. Cole then forced her to have sexual intercourse with him.

17. The next morning, Cole went to check on John and told Pam that John was fine.

18. Cole left the campsite to purchase marijuana. When he returned, the three smoked marijuana, and Cole again forced Pam to have intercourse with him.

19. After eating dinner, they packed up as much of the camp as would fit into the backpacks carried by Cole and Paul.

20. Cole then gagged Pam and tied her to two trees.

21. By the early morning on Sunday, Pam was able to free herself of the ropes. She did not move because she was afraid that if Cole and Paul returned and she was not there, they would hurt John. She stayed in that spot until daylight and tried to find John. When she was unable to find him, she flagged down a motorist, who took her to call the police.

See (DNA 109-10). The circuit court also based the following findings supporting its

conclusion that DNA evidence impeaching Pamela Edwards' testimony would not affect its finding of the heinous, atrocious or cruel aggravating element solely upon Pamela Edward's trial testimony:

1. After John Edwards was forcibly subdued and restrained, the Defendant left him on the ground next to his sister Pamela. John's concern and understanding of the developing events was evidenced by his statement of regret for getting them into the situation. Although faced with personal danger and physical harm, John's only comment was "I'm sorry, Pam."
2. After robbing the victims, the Defendant moved Pamela further down the trail and away from John.
3. The Defendant returned to where John was laying and beat him severely in the head while repeating over and over, "Why did you hurt my brother?" (referring to the Co-Defendant although they are actually unrelated)
4. Pamela testified that she could hear her brother's grunts and moans.
5. The Defendant left John Edwards and re-joined Pamela and the Co-Defendant, stating they would wait until John passed out before moving down the trail.
6. Eventually, when John quit moaning, the Defendant returned to [the] area where John lay to "move and tie him off the trail."
7. Pamela Edwards testified that while the Defendant was with her brother, she heard gagging sounds.
8. When the Defendant returned from moving John, he

commented on the gagging by stating John was having "trouble with his dinner," insinuating that he might be vomiting.

9. During the course of the night while they wandered in the woods, the Defendant, Co-Defendant and Pamela passed John several times. Pamela testified that John lay on his stomach with his feet tied behind him. He did not move or speak.

See (DNA 110-11). Thus, it is clear that the state's death-eligible murder case against Mr. Cole depended on Pamela Edwards' testimony to establish that Mr. Cole had an opportunity to kill John Edwards, premeditation, and the heinous, atrocious or cruel aggravator. For that reason, the clarity of Pamela Edwards' memory and the accuracy of her recollection were critical factors in the state's case.

Based on the testimony of Dan Jackson, Mr. Cole has reason to believe that Pamela Edwards' memory was not accurate and her testimony at Mr. Cole's trial was false. In the first statement Pamela Edwards made, she indicated that both Mr. Cole and William Paul raped her several times:

Q. Let me ask you if you remember making this statement:

"So at the time that she said that they had taken her over to the tent, which was the opposite direction to where they were heading at the time. She said they raped her several times. At one time she said one of them went out."

Do you recall making that statement?

A. Yes.

Q. Okay. And also on page six, line 12, ask if you recall this question and answer. The question was:

“Did she indicate to you that both of them sexually assaulted her?” And your answer: “uh-huh.”

Do you recall that question and answer?

A. Yes.

(TR V11 568). At trial however, Pamela Edwards testified that Mr. Cole sexually assaulted her on two separate occasions, and that she did not have sexual contact with any other person during that time, specifically the co-defendant, William Paul (TRV14 1140-42, 1151-54, 1170-71).

Mr. Cole’s reasonable belief that Pamela Edwards’ trial testimony was false is further supported by her own testimony that, during the time she spent with Mr. Cole and Paul, she was struck over the head with a hard object causing her to be stunned and dizzy (TRV14 1188); she smoked marijuana and was “pretty well stoned” (TRV14 1186-87); and that she lost consciousness during a sexual assault (TRV14 1189). It is entirely possible that Pamela Edwards’ recollection that she did not have sexual contact with William Paul was affected by her trauma and drug use.

DNA testing would reveal whether, in fact, Paul had sexual relations with Pamela Edwards during the incident. If DNA evidence revealed that Paul also had sexual

relations with Pamela Edwards, the clarity of her recollection, which is the only evidence that Mr. Cole and not William Paul committed the murder, would be impeached. Because Pamela Edwards' testimony was crucial to the state's theories of both guilt and death-eligibility, DNA evidence showing that William Paul had sexual relations with Pamela Edwards would discredit her testimony and would exonerate Mr. Cole under the state's theory of guilt and mitigate his death sentence.

The circuit court erred in holding that there is not a reasonable probability that the requested DNA testing would either exonerate Mr. Cole or mitigate his sentence. A reasonable probability is a probability sufficient to undermine confidence in the outcome. United States v. Bagley, 473 U.S. 667, 682 (1985). In a different context, Justice Souter explained the legal standard of a reasonable probability:

The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed. **The Court rightly cautions that the standard intended by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached.** See ante, at 1952-1953; *Kyles v. Whitley*, 514 U.S. 419, 434-435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Instead, the Court restates the question (as I have done elsewhere) as whether "the favorable evidence could **reasonably be taken to put the whole case in such a different light as to**

undermine confidence' " in the outcome. Ante, at 1952-1953 (quoting Kyles, supra, at 435, 115 S.Ct. 1555).

Strickler v. Greene, 119 S.Ct. 1936, 1956 (1999)(SOUTER, J. concurring in part and dissenting in part)(emphasis added). The facts of the crime itself and other available evidence indicates that DNA testing could “could reasonably be taken to put the whole case in such a different light as to undermine confidence' " in the outcome”. Id.

There is substantial evidence indicating that William Paul, not Loran Cole, killed John Edwards. Paul had a motive (Edwards hurt him), Paul cursed John Edwards, Paul possessed the knife with John Edwards’ blood on it, and only Paul’s fibers were found on John Edwards (TR V13 966; V14 1147; V15 1247, 1259, 1261). In contrast, no physical evidence connected Mr. Cole to the murder. The state relied on Pamela Edwards’ testimony to establish that only Mr. Cole had the opportunity to commit the premeditated first degree murder of John Edwards. Any impeachment of Pamela Edwards’ testimony, including her testimony that only Mr. Cole sexually assaulted her, would establish a reasonable doubt that only Mr. Cole had the opportunity to commit the premeditated murder. Such impeachment would mitigate Mr. Cole’s death sentence.

In Gregg v. Georgia, the United States Supreme Court noted that “[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of

capital crimes by prospective offenders”. Gregg v. Georgia, 428 U.S. 153, 183 (1976). To justify imposition of the death sentence, the prosecution must prove that certain characteristics of an offender will serve those purposes. Id. For that reason, the United States Supreme Court has mandated that, in a capital case, “the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d 973, 990 (1978); See also Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. So. Carolina, 476 U.S. 1 (1986). Impeachment of Pamela Edwards’ testimony that *only* Mr. Cole sexually assaulted her and *only* Mr. Cole had the opportunity to commit the premeditated murder are circumstances of the offense which would establish a reasonable doubt that Mr. Cole was the killer and that he premeditated the murder. Such impeachment mitigates Mr. Cole’s culpability for the first degree murder. There is a reasonable probability that the jury would have sentenced Mr. Cole to life if evidence revealed Pamela Edwards’ memory was not entirely accurate and they could not believe, beyond a reasonable doubt, that Mr. Cole was the person who actually killed John Edwards.

Additionally, evidence that William Paul had sexual contact with Pamela

Edwards would legally eliminate the heinous, atrocious and cruel aggravator. In Omelus v. State, 584 So.2d 563, 566-67 (Fla.1991), this Court held that the aggravating element of heinous, atrocious, or cruel cannot be applied vicariously to a defendant who arranges for a killing but who is not present and does not know how the murder will be accomplished. In Archer v. State, 613 So.2d 446, 448 (Fla.1993), this Court held that heinous, atrocious, or cruel could not apply vicariously to a codefendant who knew that the victim would be killed with a handgun but “did not know, however, that the victim would be shot four times or that he would die begging for his life”. If DNA testing reveals that Pamela Edwards’ testimony cannot be credible to establish, beyond a reasonable doubt, that William Paul did not kill John Edwards during the time he spent away from Mr. Cole and Pamela Edwards, this aggravator cannot be proven beyond a reasonable doubt and legally apply in Mr. Cole’s case.¹

The circuit court erred in conducting the reasonable probability analysis from its viewpoint rather than considering how the DNA evidence could affect the jury. In determining whether DNA evidence could probably produce a life sentence at retrial, the circuit court should have considered the evidence adduced at the penalty phase

¹Furthermore, such evidence would establish that Mr. Cole is innocent of the death penalty under Enmund v. Florida, 458 U.S. 782 (1982).

and whether there is a probability that the cumulative effect of it with the new evidence, from the point of view of its possible effect on the jury, might “reasonably be taken to put the whole case in such a different light as to undermine confidence’ ” in the outcome.” Strickler v. Greene, 119 S.Ct. at 1956. “[I]f there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that the jury would change its recommendation.” Bertoletti V. Dugger, 883 F.2d 1503, 1519 n.12 (11th Cir. 1989). “The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency.” Strickland v. Washington, 466 U.S. 668 at 695, 104 S.Ct. 2052 at 2068(1984). **No physical evidence connects Mr. Cole to the murder of John Edwards, there were no witnesses to the murder, William Paul had a motive to commit the murder, William Paul carried the murder weapon, and only William Paul’s fibers were found on John Edwards.** The jury was aware of this and clearly considered it when deliberating the sentencing recommendation. During deliberations, the jury submitted a written question asking, “Can we see...[Pamela’s] testimony regarding John & having difficulty with dinner?” (TR V12 789; V17 1574-75). The court reporter ultimately read back six pages of Pamela

Edwards' guilt phase testimony (TR V17 1586-92). Minutes after the testimony was read, the jury returned a unanimous recommendation that Mr. Cole be executed (TR V17 1592). DNA testing could impeach that crucial testimony and establish a reasonable doubt in reasonable jurors that the death sentence is appropriate. That reasonable doubt would mitigate Mr. Cole's death sentence, especially considering the fact that William Paul was able to plead guilty in exchange for a life sentence. See Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989); Brookings v. State, 495 So.2d 135 (Fla.1986); Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992); Hazen v. State, 700 So.2d 1207, 1207-8 (Fla. 1997); Puccio v. State, 701 So.2d 858, 862 (Fla. 1997); Scott v. State, 657 So.2d 1129, 1132 (Fla.1995); Slater v. State, 316 So.2d 539, 542 (Fla. 1975). DNA evidence would undermine confidence in the outcome.

ARGUMENT II

THE CIRCUIT COURT'S DENIAL OF MR. COLE'S MOTION FOR POSTCONVICTION DNA TESTING VIOLATED HIS RIGHTS TO HABEAS CORPUS RELIEF UNDER BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS

Because this issue involves questions of law, this Court should apply a standard of de novo review. Stephens v. State, 748 So.2d 1028, 1033-34 (Fla.1999).

Both the Florida Constitution and the United States Constitution provide a right

to access evidence for the purposes of DNA testing if it could be used to prove one's innocence or to appeal for executive clemency. See Amendment To Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633, 636-37 (Fla. 2001), Anstead, J. (concurring in part and dissenting in part) ("At its core, access to DNA testing is simply a unique means of establishing a claim... under the constitutional writ of habeas corpus.... Entitlement to access to the courts for relief under the writ of habeas corpus is provided for expressly in Florida's Constitution.... The salient issue in such proceedings is whether there is a credible claim that a fundamental injustice has occurred."). See also Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) Luttig, J. (concurring) (arguing that the U.S. Constitution provides a right to access evidence for the purposes of postconviction DNA testing if such testing could prove one's actual innocence.); Cole v. State, 841 So.2d 409, 419 (Fla.2003)("We do not address Cole's request for relief at this time except to state that our decision should not be read to prohibit Cole from seeking such testing pursuant to the mandates of section 925.11 and rule 3.853.").

Given the fundamental nature of the rights at issue in the 3.853 proceedings, the circuit court should have construed Section 925.11 and Rule 3.853 in Mr. Cole's favor and afforded him his constitutional rights. See State v. Winters, 346 So.2d 991, 993 (Fla.1977)("Penal statutes must be strictly construed in favor of the accused where

there is doubt as to their meaning”). As the Third Circuit Court of Appeals noted:

Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. [Citations omitted.] Where evidence tends, in any way, even indirectly, to prove a defendant’s innocence, it is error to deny its admission.

Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d Dist.Ct.App. 1982). This is particularly relevant in death penalty cases like Mr. Cole’s, as this Court has noted:

[T]rial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.

Guzman v. State, 644 So.2d 966, 1000 (Fla.1996). When DNA testing could prove a man innocent in fact or of the death penalty, denying him such tests and executing him would deny Due Process, Equal Protection, rights against cruel and unusual punishment, and access to the courts under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CONCLUSION

This Court should reverse the circuit court’s denial of Mr. Cole’s Motion for Postconviction DNA Testing. Mr. Cole filed a properly pled motion following the law

of this State and demonstrated a reasonable probability of acquittal as to guilt and the death penalty. He should be allowed to test the evidence used against him. Accordingly, he asks this Court to vacate the circuit court's order and remand the case for DNA testing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of March, 2004.

Leslie Anne Scalley
Florida Bar No. 0174981
Assistant CCC

MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584
Assistant CCRC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
813-740-3544
813-740-3554 (Facsimile)
Attorneys for Defendant

Copies furnished to:

The Honorable William T. Swigert,
Sr.

Chief Circuit Court Judge
110 NW First Avenue

Ocala, Florida 34475

Ken Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., Fifth Floor
Daytona, Florida 32118-3951

Rock Hooker
Assistant State Attorney
Office of the State Attorney
19 NW Pine Avenue
Ocala, Florida 34475

Loran Cole
DOC# 335421; P5207S
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

Leslie Anne Scalley
Florida Bar No. 0174981
Assistant CCC

MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584
Assistant CCC

Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
813-740-3544
813-740-3554 (Facsimile)
Attorneys for Defendant