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IN THE SUPREME COURT OF FLORIDA

CASE No. SC13-2245

LOWER TRIBUNAL No. 16-2005-CF-010263D

TIFFANY ANN COLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Michael R. Weatherby
Judge of the Circuit Court, Division CR-E

INITIAL BRIEF OF APPELLANT

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July 1, 2014

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PRELIMINARY STATEMENT

TIFFANY ANN COLE, will be referred to as “Appellant,” "Defendant", or "Cole." The State of Florida will be referred to as “Appellee” or "State." Wayne F. Henderson, who represents Appellant in this matter, will be referred to as “undersigned counsel," or "appellant counsel.” Former trial counsel Quentin Till and Greg Messore will be referred to as trial counsel or individually as "Mr. Till" and "Mr. Messore."

References to the Post Conviction Record on Appeal for this initial brief will be designated “PCR” preceded by the volume number and followed by the page number indicated on the Index to the Record, for instance (3 PCR 1). References to the one-volume Supplement to Post Conviction Record on Appeal for this initial brief will be designated “1 SuppPCR" followed by the page number indicated on the Index to the Supplemental Record, for instance (1 SuppPCR 1).

References to the original trial record on appeal in SCO8-528 shall be consistent with the original brief therein. Volumes 1 through 4 containing the trial record of the lower court will be designated as "R" preceded by the volume number and followed by the page number indicated on the Index to the Record, for instance (3 R 1). Volumes 5 through 15 are the transcripts of the trial and other proceedings and will be similarly designated as "T" preceded by the volume number and

followed by the page number indicated on the Index to the trial record, for instance (5 T 1). Three separately bound and numbered volumes in SCO8-528 include the trial exhibits. Trial exhibits will be identified by their exhibit numbers. References to the two-volume supplemental trial record will be similarly designated as "SuppTR" for instance (2 SuppTR 1).

STATEMENT OF THE CASE AND FACTS

Much of the following facts are as summarized in the trial court's Order Denying Defendant's Motion for Postconviction Relief (4 PCR 462-467). On October 19, 2007, following a jury trial, Ms. Cole was found guilty as charged of two counts of First Degree Murder for the deaths of Reggie and Carol Sumner. In addition, the jury found Ms. Cole guilty of two counts of Kidnapping and two counts of Robbery. On November 29, 2007, the jury recommended the death penalty by a 9-3 vote for the death of Carol Sumner and by a 9-3 vote for the death of Reggie Sumner. On March 6, 2008, the court sentenced Ms. Cole to death for the murders of Reggie and Carol Sumner, to two terms of life imprisonment for the kidnappings of Reggie and Carol Sumner, and to two fifteen-year terms of incarceration for the robberies of Reggie and Carol Sumner. The court ordered all sentences to be concurrent (3 PCR 464).

The trial court found seven statutory aggravators applicable to both murders: (1) Defendant was previously convicted of another capital felony (the contemporaneous murder of the victims); (2) the murders were committed while Defendant was engaged in the commission of the crime of kidnapping; (3) the capital felonies were especially heinous, atrocious, or cruel ("HAC"); (4) the capital felonies were committed in a cold, calculated, and premeditated manner ("CCP"); (5) the

capital felonies were committed for financial gain; (6) the capital felonies were committed to avoid or prevent a lawful arrest; and (7) the victims were particularly vulnerable due to advanced age or disability. The court found all aggravators proven beyond a reasonable doubt (3 PCR 464).

The trial court found four statutory mitigators: (1) no significant history of prior criminal activity; (2) Defendant was an accomplice but the offense was committed by another person and Defendant's participation was relatively minor; (3) age of Defendant; and (4) Defendant acted under substantial domination of another. The court assigned "some weight" to the mitigators of "no significant history of prior criminal activity" and "age." As to the minor participant mitigating factor, the court afforded little weight and stated "[w]hile this defendant might not have turned the spade onto the Sumners, this court cannot say that her participation was relatively minor." Lastly, the Court noted that there was some evidence in the record to support the substantial domination mitigator; however, given the totality of the circumstances, the court could not afford it much weight (3 PCR 464-5).

As to the non-statutory mitigators, the Court organized the thirty proposed mitigators into six groups: (1) minimal involvement in criminal activity (some weight); (2) Defendant suffered from psychological circumstances that included low

self-esteem, lack of self-confidence, and feelings of inadequacy (little weight); (3) Defendant was a model prisoner (some weight); (4) Defendant's family history, which included growing up without a father, being raised by a working mother, caring for her brothers, and caring for her terminally ill father (some weight); (5) Defendant's substance abuse (little weight); and (6) Defendant was of good character (some weight). The court ultimately concluded that the aggravating circumstances far outweighed the mitigating circumstances (3 PCR 465).

On March 11, 2010, the Supreme Court of Florida, affirmed Cole's trial convictions and sentences. Cole v. State, 36 So.3d 597 (Fla. 2010). However, in its opinion, the Supreme Court of Florida found that the trial court erred in instructing the jury on the HAC aggravator because there was "no substantial evidence to support a finding that Cole either directed her codefendants to bury the victims alive or knew that her codefendants would kill the victims by burying them alive." Id. at 609. In its harmless error evaluation, the Supreme Court held,

> Without the HAC aggravating factor, there are six remaining valid aggravators. Moreover, the trial court found minimal mitigation and concluded that 'the aggravating circumstances far outweigh the mitigating circumstances' . . . there is no reasonable probability that the jury's recommendation or the trial court's sentencing decision would have been different if HAC had not been considered. Id. at 610.

The Supreme Court found this error harmless beyond a reasonable doubt and affirmed Ms. Cole's convictions and sentences. Cole v. State, 36 So.3d 597, 608 (Fla. 2010) (3 PCR 465).

On October 4, 2010, the United States Supreme Court denied certiorari, Cole v. Florida, 131 S.Ct. 353 (2010). The facts surrounding this case were also set forth in the trial court's sentencing order and again in the Florida Supreme Court's opinion. Cole v. State, 36 So.3d 597 (Fla. 2010). (3 PCR 466)

On September 22, 2011, Ms. Cole filed a "Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend." (1 PCR 50-81) On March 2, 2012, Ms. Cole filed a Motion to Amend Rule 3.851 Motion, and attached her "First Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," containing five claims for relief." (1 PCR 152-197)

Ms. Cole raised the following grounds for relief in the amended motion: (A) counsel failed to move to suppress fruits of unlawful arrest and seizure; (B) counsel failed to raise issues of jurisdiction or move to dismiss the indictment; (C) undue delay and consequential failure to develop a duress and mitigation defense by counsel; (D) counsel was deficient in failing to identify, call, or prepare witnesses in the penalty phase; and (E) cumulative error. (3 PCR 466 and 1 PCR 152)

The State filed its initial response on November 28, 2011, and a revised response on May 3, 2012 (2 PCR 198 and 3 PCR 467). On May 4, 2012, the court held a case management conference pursuant to Huff v. State, 622 So.2d 982 (Fla.1993), at which time it heard argument (8 PCR 1311-1353). This hearing was not transcribed until January 17, 2014 (8 PCR 1353).

On August 30, 2012, the trial court entered a Huff Order and setting a hearing only as to grounds C and D and stated:

> "[T]he court determined that an evidentiary hearing is needed as to the issues related to defendant's claims of ineffectiveness of trial counsels as to the defendant's mental status, mental stability and those related issues and whether a mitigation specialist was requested or needed as asserted in the initial motion for post-conviction relief." (2 PCR 274).

The 2012 Huff Order was silent as to grounds (A) counsel failed to move to suppress fruits of unlawful arrest and seizure; (B) counsel failed to raise issues of jurisdiction or move to dismiss the indictment; and (E) cumulative error. (2 PCR 274)

On March 18, 2014, upon opening the evidentiary hearing, the trial court inquired as to the status of the suppression, ground (A). The state reminded the court that this claim was not of the basis on which to have an evidentiary hearing (5 PCR 708). Undersigned counsel advised the court that Ms. Cole's claim would rest on the face of the filed motion. The court

agreed and stated that the issue would still need to be covered in the order (5 PCR 709).

The trial court's reasons for declining a hearing for grounds (A), (B), and (E) were not published or announced until October 17, 2013, in its Order Denying Defendant's Motion for Postconviction Relief. The court reporter notes of the May 2012 Huff hearing could not be located, transcribed and filed until January 17, 2014, the last of Volume 8 of the record for this post conviction appeal (8 PCR 1311-1353). In its order denying postconviction relief, the trial court stated:

> "On August 30, 2012, after reviewing the pleadings and hearing argument, the Court entered an Order Granting an Evidentiary Hearing as to the issues related to Defendant's claims of ineffectiveness of trial counsel regarding the presentation of Defendant's mental status and whether a mitigation specialist was requested or needed. Finding that the issues could be resolved from the record or as a matter of law, the Court declined an evidentiary hearing on Claims (A) counsel failed to move to suppress fruits of unlawful arrest and seizure; (B) counsel failed to raise issues of jurisdiction or move to dismiss the indictment; and (E) cumulative error. See Fla.R.Crim.P. 3.851(f)(5)(A)(i)." (3 PCR 465)

The evidentiary hearing on Ms. Cole's amended motion was held March 18-20, 2013, at which Assistant Attorney General Carolyn Snurkowski, Assistant State Attorney Alan Mizrahi, and Ms. Cole were present. Wayne Henderson, undersigned, appeared as counsel, along with Rosalie Bolin, a mitigation specialist, on behalf of Ms. Cole. Appointed trial counsel Quentin Till and Gregory Messore testified. In addition to calling trial

counsel, fourteen witnesses testified in Ms. Cole's behalf. A transcript of the evidentiary hearing may be found in Volumes 5-8, pages 703-1310.

Upon conclusion of the evidentiary hearing the court requested written final summations and arguments which are a part of this record (State: 2PCR 308, Cole: 2 PCR 398).

On March 33, 2013, Cole filed a motion to substitute or disqualify the trial judge (SuppPCR 289). Cole alleged that the trial judge initiated an inquiry concerning Dr. Miller, then deceased, who was retained by trial counsel to conduct a Ms. Cole's mental evaluation for use at the penalty phase and possible mitigation. Undersigned counsel had challenged Dr. Miller's performance in this regard. Counsel also questioned the propriety of Dr. Miller having examined both Ms. Cole and codefendant Jackson. The trial judge stated that that Dr. Miller "was a personal acquaintance of every defense lawyer and every criminal judge in this circuit" and then confirmed that he and Mr. Till both knew Dr. Miller for 30 years and that Dr. Miller had testified "hundreds and hundreds of times before all of us." (5 PCR 131)

Later in the hearing, the trial judge initiated his own inquiry of Mr. Messore and asked whether Mr. Messore would have done anything differently in his mitigation presentation if he had known the additional history and facts about the defendant

that were brought out in the evidentiary hearing. When Mr. Messore gave an uncertain answer, Judge Weatherby pressed the question and Mr. Messore said that he would have done nothing different (7 PCR 469).

Ms. Cole became fearful that court's unexpected inquiry and its tone of admiration for Dr. Miller may unfairly prejudice her at the determination of the pending motion. Ms. Cole respectfully moved Judge Weatherby to recuse himself from her case and that the matter be reassigned. Judge Weatherby denied the motion (SuppPCR 301).

On May 3, 2013, Cole file a Petition for a Writ of Prohibition with the Florida Supreme Court, SC13-834. On June 13, 2014, the Court denied the petition. Cole v. State, 118 So.3d 219 (Fla. 2013)

On October 17, 2013, in a written order, the trial court denied Cole's motion for postconviction relief (3 PCR 462).

On November 16, 2013, Cole filed her notice of appeal in this cause (3 PCR 533). This appeal follows.

STANDARD OF REVIEW

Ms. Cole has presented several Strickland[1] claims which involve mixed questions of law and fact. The issues regarding the application of the law present questions of law and must be reviewed de novo. Sochor v. State, 883 So. 2d 766 (Fla. 2004). In regard to the facts, under Porter v. McCollum, 130 S.Ct. 447 (2009), deference is given only to historical facts. All other facts must be viewed in relation to how Ms. Cole's jury would have viewed those facts under Porter v. McCollum.

[1] Strickland v. Washington, 466 U.S. 668 (1984)

STATEMENT OF THE ISSUES

Issue I TRIAL COUNSEL FAILED TO MOVE TO SUPPRESS STATEMENTS AND EVIDENCE DERIVED FROM UNLAWFUL ARREST AND SEARCH.

Issue II TRIAL COUNSEL WAS DEFICIENT IN FAILING TO IDENTIFY, CALL, OR PREPARE WITNESSES IN THE PENALTY PHASE.

Issue III COUNSEL WAS DEFICIENT IN MITIGATION AND BACKGROUND INVESTIGATION AND CONSEQUENTIAL FAILURE TO DEVELOP A DURESS AND MITIGATION DEFENSE THROUGH WITNESSES AND MENTAL HEALTH EXPERT.

Issue IV THE ERRORS OF TRIAL COUNSEL WHEN COUPLED WITH THE ERROR OF THE TRIAL COURT'S HEINOUS ATROCIOUS AND CRUEL INSTRUCTION CONSTITUTE SUFFICIENT CUMULATIVE ERROR AND PLACES THE JURY'S DEATH RECOMMENDATION IN DOUBT.

SUMMARY OF THE ARGUMENTS

TIFFANY COLE respectfully moves the Court to vacate her judgments of conviction and sentences, including the sentence of death and grant her a new trial and penalty phase.

ARGUMENT I: Cole's appointed counsel was ineffective in failing to move to suppress the fruits of Cole's initial detention wherein Cole was arrested and detained without probable cause and subjected to interrogation. While detained, police searched Cole's motel room and automobile pursuant to a search warrant that was insufficient on its face and without probable cause for believing the existence of the grounds upon which is was based.

ARGUMENT II: Cole was deprived of adequate representation at the penalty hearing due to counsel's delay in initiating the mitigation investigation and inability to measure up to the standards of an experienced mitigation coordinator/investigator. After Cole's conviction, trial counsel filed a well-pled and sufficient motion to appoint a mitigation coordinator (1R187). However, the motion was never argued, set for hearing, or ruled upon. Counsel failed to move for mandamus on the motion, and thereby failed to preserve this issue for appellate review. Significant mitigation that was within reach at time of trial but was not presented to the jury.

ARGUMENT III: Cole's appointed trial counsel was ineffective in both the guilt and penalty phases for failing to adequately investigate her background and psychological deficiency in order to show that she was under extreme duress and effectively under the control of her co-defendants during the time of the offense. In doing so, counsel failed to provide Dr. Ernest Miller, a forensic psychiatric consultant, with sufficient background information in order to obtain a meaningful analysis that Cole was easily controlled by her abusers, a defense that could be used in the guilt phase to show that Cole acted under extreme duress or the substantial domination of another person. As such, trial counsel failed to make an adequate showing in order for the court to instruct the jury on duress.

Had trial counsel sufficiently investigated Cole's psychological makeup and history, they would have discovered that Cole does not interact well with men and is generally fearful, intimidated, and willing to please. Counsel would have discovered or used the mitigating testimony of numerous witnesses, reported herein, whose voices were not considered by Dr. Miller or heard by the jury at penalty phase.

Moreover, this failure resulted in an inadequate, incomplete, and erroneous psychiatric report that was of no help at penalty phase. Dr. Miller did not have the benefit of

witness statements, hospital records, or school records (12 schools in 10 years). If properly prepared, Dr. Miller's report could have been useful and relevant during the guilt phase bearing on the issue of duress.

ARGUMENT V: Cumulative Error - The above stated claims and the omission of mitigation information were made worse by the fact that the trial court erroneously instructed the jury that the HAC aggravator applied to Cole.[2] As such, the validity of the jury's death recommendation is now placed in doubt.

[2] Cole v. State, 36 So.2d 597, 609 (Fla.2010)

GROUNDS FOR POSTCONVICTION RELIEF

ARGUMENT I

TRIAL COUNSEL FAILED TO MOVE TO SUPPRESS STATEMENTS AND EVIDENCE DERIVED FROM UNLAWFUL ARREST AND SEARCH.

There was no evidentiary hearing as to this claim.

Cole's appointed counsel was ineffective in failing to timely move to suppress the fruits of Cole's initial detention wherein Cole was arrested and detained without probable cause and subjected to interrogation. After Cole was taken from her hotel room, the police obtained a warrant based upon an affidavit that was insufficient on its face and without probable cause to support grounds on which the warrant was issued. The affidavit failed to allege that any evidence existed or was located in room 312 or room 302 at any relevant time. The affidavit avers that crimes had occurred in Florida and South Carolina involving ATM cards. The affidavit claimed that an ATM video showed a white male exiting a rented Mazda vehicle and using a stolen card and that Cole was now with someone resembling this person. The affidavit did not allege any reason to search Cole's 1997 Chevrolet. Even so, the affidavit requested authority to search Cole's vehicle simply because she owned it. Beyond that, the affidavit insufficiently speculates "that there **may** be evidence of the aforementioned crimes under

the control of Cole or her accomplices within the locations to be searched." (1 PCR 185)

Trial counsel failed to object to the introduction the seized physical evidence and Cole's statements. Counsel also failed to move to suppress physical evidence, Cole's phone, and personal items seized from her motel room and 1997 Chevrolet. The search was contrary to the protections of the Fourth and Fourteenth Amendments to the Constitution of the United States and Article I Section 9, Constitution of the State of Florida. Cole was unlawfully arrested and taken to jail for interrogation where she made incriminating statements. Cole's statements and the seized evidence resulted from her unlawful detention should be suppressed as being the fruit of unlawful detention. Payton v. New York, 445 U.S. 573 (1980); Wong Sun v. U.S., 371 U.S. 471 (1963).

Failure to seriously raise this motion pretrial or to object in any way falls below an objective standard of reasonableness.

A motel room, like person's home "is accorded the full range of Fourth Amendment protections." Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 3 12 (1966). This protection is afforded because there is an expectation of privacy in one's dwelling that our society recognizes as justified to protect the occupant against an unreasonable entry.

Thus, a nonconsensual entry into a home, a motel room, or other residence constitutes a search. Katz v. United States, 389 U.S. 347, 88 S.Ct.507, 19 L.Ed.2d 576 (1967). Accordingly, "[it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573,586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

The constitutional rights and privileges that apply to those who occupy private permanent dwellings also apply to those who occupy a motel room when the "occupant is there legally, has paid or arranged to pay, and has not been asked to leave." Turner v. State, 645 So.2d 444, 447 (Fla. 1994); Vasquez v. State, 870 So.2d 26 (Fla. 2d DCA 2003); Gilbert v. State, 789 So.2d 426, 428 (Fla. 4th DCA 2001); Holloman v. State, 959 So.2d 403 (Fla. 2d DCA 2007).

Early on and for over two years, trial counsel was aware of the police report of Deputy U.S. Marshal Zayac, which detailed his activity and that of other members of the Marshal's Service and the North Charleston Police. Police were aware that there were two missing persons in Jacksonville, Florida and that the ATM card of the missing persons had been recently used in North Charleston. Surveillance photos showed a white male using ATM machines. At that time, it was only known that Cole had rented a Mazda that fit the description of the vehicle used at the ATMs

in the case. There was no photo of Cole. DUSM Zayac made contact with David Duncan, Cole's brother, who advised that Cole, her boyfriend Jackson and a man named Alan were at the nearby Best Western in North Charleston. Duncan identified the person in the ATM photograph as Cole's boyfriend, "Wise" (Jackson). Duncan directed the police to the Best Western and pointed out Cole's 1997 Chevrolet and advised that Cole was staying in Room 312. DUSM Zayac and NCPD Detectives talked to the hotel management and learned that rooms 312 and 302 were rented under Cole's name. DUSM Zayac obtained keys to both rooms from hotel management. With only suspicion, police approached room 302, knocked on the door and, when asked, announced that they were hotel management. Wade opened his door and was immediately ordered to the floor, handcuffed behind his back and searched. He was wearing boxer shorts and a t-shirt. A "protective sweep" followed but no one else was found in room 302. DUSM Alred later testified that the police knew immediately that Wade was not the person shown in the ATM video.

Similarly, the police knocked at room 312 and arrested Jackson when he opened the door. Jackson was recognized as the ATM man. A "protective sweep" found Cole asleep in bed. Cole was immediately rousted and handcuffed and soon taken to jail along with Wade and Jackson for custodial questioning and

processing. Cole and Wade were both arrested without probable cause and without an arrest warrant.

The police decided to obtain a search warrant for room 302, room 312, and Cole's Chevrolet. If the police observed anything of a suspicious or incriminating nature during their "protective sweeps," it was not mentioned in support of the affidavit for search warrant. The facts, as pled, were totally insufficient for a neutral and detached magistrate to find probable cause that any evidence would be found in the rooms or in Cole's Chevrolet at the time to be searched.

Further, the warrant offered no basis to conclude or speculate that Cole was driving the rental Mazda in Florida or that Cole was ever in Florida. Out of thin air, the affidavit asked to search Chevrolet because it is Cole's.

Cole's trial counsel made no effort to suppress the evidence as alleged herein. On October 12, three days prior to Cole and Wade's trials, Cole's trial counsel merely joined Wade's counsel in simply adopting the inadequate suppression effort of Jackson's defense counsel. Jackson's counsel had conceded the search of the rooms and limited their motion and argument to the search of safes in the rooms (1 PCR 187-189, 3 R 348). Jackson Motion (2 SuppPCR 240-242). Jackson Suppression Hearing (2 SuppPCR 264-269). Cole and Wade's position was doomed in that the trial court had already denied the Jackson

motion (2 SuppPCR 264). There is no tactical reason to adopt a failed suppression motion and ruling.

At Cole's trial, the state called witnesses to testify about the execution of the warrant. Former police officer James Rowan testified as to finding bags of newly purchased merchandise (Exhibit 102), a suitcase with papers belonging to the dead victims (Exhibits 97 and 99), credit cards and jewelry belonging to the victims. Found in Cole's Chevrolet was a strongbox of old coins belonging to the victims (Exhibit 11) (8 T 639-654).

The strongbox found in Ms. Cole's car uniquely connected Cole to the activities of her codefendants in that it shows a transfer of the victim's property taken in Florida into her own automobile in South Carolina.

At the Huff hearing on May 4, 2012, the state argued that the suppression issue had been decided and already appealed and that no evidentiary development was necessary. Undersigned counsel argued that trial counsel merely acquiesced and adopted Michael Jackson's failed motion to suppress the contents of the room safe and did not challenge the basis for issuing the search warrant for the room and Cole's vehicle (8 PCR 1317, 1329).

At the postconviction evidentiary hearing, although the trial court did not grant a hearing on the suppression issue, the court readdressed the suppression issue and stated that the

court had already ruled and that there would not be a hearing on the matter (5 PCR 858). The court acknowledged that the Florida Supreme Court opinion affirmed the search in the Jackson appeal. (5 PCR 860).

The trial court's later order denying postconviction relief held that "contrary to Defendant's allegations, trial counsel filed *numerous* suppression motions throughout the pendency of Defendant's case." The court identified three suppression motions (1 R 62-64, 1 R 80-83, and 1 R 103-112) filed on August 29, 2007, September 21, 2007, and October 12, 2007.

The trial court's assumption is incorrect. Cole's trial counsel merely copied and recopied the suppression motion that codefendant Jackson filed months before, on April 30, 2007 (2 SuppTR 240). Nothing new. Unlike Cole's trial counsel, codefendant Jackson's attorney scheduled a suppression hearing, held May 1, 2007(2 SuppTR 243-269). Cole's trial counsel was not mentioned in the transcript as being present or having an interest in the hearing.

However, Jackson's attorney was only attempting to suppress jail phone calls and evidence seized from Jackson's locked room safe (2 SuppTR 244). Jackson stipulated that the suppression argument was based on an improper search, not an illegal arrest, and conceded that Jackson and Cole were "properly detained." (2 SuppTR 246)

Credit cards and other evidence belonging to victims James and Carol Sumner were found in the safe. In Jackson's suppression hearing, nothing was mentioned about evidence seized from Cole's Chevrolet or attributed to Cole.

On Friday, October 12, 2007, three days before jury selection, the trial court held a joint pretrial motion conference for Cole and codefendant Wade (3 R 328). Jackson's Motion to Suppress was mentioned among the various motions that were being adopted. The court announced that the ruling on all adopted motions would be the same (3 R 348). An order specific to the suppression motion was not located in Cole's file.

During the evidentiary hearing, the trial court briefly inquired as to why Mr. Till chose to forego filing a motion to suppress the statements made during Cole's the interrogation (1 PCR 155-59). Mr. Till acknowledged that he made a tactical decision to use Cole's incriminating statements because they were beneficial and supported the theory that she was a minor participant in the robbery, kidnapping, and murder of Reggie and Carol Sumner. (1 PCR 162-63, 166-67.) The Sumners were friends of Cole's father. Mr. Till did not indicate when he reached this decision in the two years leading up to trial.

Thus, the trial court found this explanation on the part of trial counsel well within the reasonable range of assistance provided for in Strickland. Mr. Till claims to have made a

strategic decision to somehow use Cole's interrogation to benefit her in some way to show that she was a "minor participant."

Mr. Till made no effort to confront the admission of clearly harmful evidence against Ms. Cole.

It cannot be gainsaid that the discovery of the victim's strongbox in Cole's car somehow fits this strategic plan. As shown elsewhere in this brief, Mr. Till did very little of a strategic nature beyond trying the convince Cole to enter a plea. Fighting and losing a motion to suppress may be more instructive to a defendant than pushing for a plea.

Failure to raise this motion pretrial, or to object at all to introduction of Cole's statements and evidence on Fourth and Fourteenth Amendment grounds fell below an objective standard of reasonableness. As a result of these unprofessional errors, Cole's defense was extremely prejudiced. Absent introduction of the evidence found in the room and Cole's Chevrolet, there is a reasonable probability that Cole may have been viewed differently by the jury and would have been found not guilty, guilty of a lesser, or not sentenced to death. Porter v. McCollum, 130 S.Ct. 447 (2009).

ARGUMENT II

TRIAL COUNSEL WAS DEFICIENT IN FAILING TO IDENTIFY, CALL, OR PREPARE WITNESSES IN THE PENALTY PHASE.

AND

ARGUMENT III

COUNSEL WAS DEFICIENT IN MITIGATION AND BACKGROUND INVESTIGATION AND CONSEQUENTIAL FAILURE TO DEVELOP A DURESS AND MITIGATION DEFENSE THROUGH WITNESSES AND MENTAL HEALTH EXPERT.

Arguments II and III are interrelated in that failure of trial counsel to complete a competent background and mitigation investigation resulted in a failed duress defense, inadequate and missed mitigation, and inadequate and misleading information for mental health expert.

Timeline Narrative - Selected Record and Transcript Exhibits

Note: Evidentiary Hearing Exhibits contained in Supplement Volume I will also be identified by Exhibit Number "EH Ex-#."

Attorney Till was appointed as trial counsel on August 11, 2005. (1 R 1, 5 PCR 710) An investigator with no homicide experience assisted Mr. Till. The investigator's efforts were only directed to the circumstances of arrest and search issues. (5 PCR 713-15) Mr. Till relied upon Shirley Duncan, mother of the defendant, for help in South Carolina. Mr. Till did not personally do any mitigation work in South Carolina. (5 PCR 715)

Soon after appointment, Mr. Till learned that Ms. Cole's father, David Duncan, was terminally ill with cancer. On September 23, 2005, Mr. Till prepared a motion to perpetuate Mr. Duncan's testimony in case it might be relevant. (5 PCR 716) However, the motion was never filed and Mr. Duncan was not interviewed. A month later, on October 26, 2005, Mr. Till received word that Mr. Duncan died. On November 01, 2005, the state filed its notice to seek death penalty. (1 R 27)

However, early in the case, Mr. Till determined that the state was amenable to a plea offer for Ms. Cole, in return for her testimony and cooperation. (5 PCR 719) In the spring of 2007, convinced that Ms. Cole should cooperate, Mr. Till assisted Ms. Cole in providing proffers to the state. Mr. Till was confident that a resolution was at hand and made no effort to look into mitigation. (5 PCR 721)

Mr. Till was unable to convince Ms. Cole to enter a plea. Ms. Cole had problems understanding or accepting the principal theory and would not enter a plea because "she didn't kill these two people." Mr. Till felt "sandbagged" and was frustrated. (5 PCR 722-723)

Mr. Till met with Shirley Duncan and detected nothing of real concern in Ms. Cole's history and background. (5 PCR 729) Nevertheless, Mr. Till was aware that there is concurrent obligation to work up the guilt phase along with the penalty

phase but did nothing. (5 PCR 730) By this time, Michael Jackson was awaiting sentence after being convicted at jury trial on May 07, 2007.

On July 16, 2007, Mr. Till filed a motion for appointment of co-counsel for penalty phase. Mitigation was not mentioned. (1 R 45, EH Ex-01, SuppPCR 1, 5 PCR 734-735) On July 25, 2007, Mr. Till announced that he was having difficulty in finding a qualified co-counsel. (4 R 526, EH Ex-02, SuppPCR 4, 5 PCR 738) On August 08, 2007, Mr. Till advised the court that he had found Chuck Fletcher as co-counsel and that Ms. Cole would need a mental evaluation. The court advised that final pretrial was set for September 27, 2007. (4 R 527, EH Ex-02, SuppPCR 4,) On August 13, 2007, the court appointed Mr. Fletcher as co-counsel. (1 R 47, SuppPCR 1, EH Ex-01)

On August 30, 2007, Mr. Fletcher filed a Motion to Withdraw. "Undersigned counsel cannot effectively represent Ms. Cole on a death penalty case with so little time to prepare. Counsel apologizes to the Court and to all parties involved in this case for not realizing the incredible urgency with which this case had to be tried." (1 R 73, EH Ex-03, SuppPCR 7, 5 PCR 738-739)

Also on August 30, 2007, Mr. Till advised the court that he had just received three to four boxes of family information in anticipation of penalty phase, that little has been done and

that Mr. Fletcher had a full calendar until the October trial date. Court asked, "Why the delay in asking for co-counsel?" Mr. Till explained that there had been plea offers and "numerous proffers" by Ms. Cole, that he thought there would be a plea, and that only within the last sixty days did he realize there would be no agreement. Mr. Till explained that he advised the court several times that he beloved that a plea would be forthcoming. Mr. Fletcher asked for a December trial date. The court said nothing and later granted Mr. Fletcher's filed motion to withdraw. (4 R 542, EH Ex-04, SuppPCR 12, 5 PCR 741)

On September 10, 2007, the court entered an order appointing Greg Messore as co-counsel, "as of August 30, 2007." (1 R 76, EH Ex-03, SuppPCR 7, 5 PCR 744) It should be noted that Mr. Messore would not be qualified for a death case appointment until he completed the "Life over Death" seminar set for the first week of September 2007. Trial was scheduled for October 15, 2007.

On September 13, 2007, Mr. Till filed a pleading, Status of Penalty Phase Preparation, informing the court that Mr. Fletcher had reviewed 23 reports and visited Cole once; that Mr. Messore had completed Life Over Death Seminar "last week," that no penalty motions have been filed; and that Ms. Cole had still not been seen or scheduled to see a mental health expert. No effort had been made to contact family members, fellow employees, or

friends who may be potential witnesses. "The Court has informed counsel that a mitigation specialist will not be authorized since the undersigned attorney has co-counsel recently appointed." (1 R 78, EH Ex-05, SuppPCR 16, 5 PCR 747-49, 6 PCR 1094)

NOTE: The term "Mitigation" does not appear in any Cole pleadings or transcript up through September 13, 2007. However, mitigation discussions may have occurred in chambers or off the record.

On September 21, 2007, the court announced that Mr. Messore was making his first appearance in court as second counsel and that the defense will be meeting with Ms. Cole's family over the weekend. (4 R 557, EH Ex-06, SuppPCR 18, 5 PCR 758)

Even so, on September 25, 2007, Mr. Till filed a memorandum voicing his concerns about Ms. Cole's trial then set for October 15, 2007, stating:

> "The prosecution filed their Notice of Intent to seek death penalty in August 2005. ... .Defense counsel for Tiffany Cole voiced concern that penalty phase counsel has just been appointed, no penalty phase motions have been filed, the Defendant has yet to seen by a mental health expert, thus no psychiatric examination and no work has been performed pertaining to the penalty phase. Defense counsel's request for a mitigation specialist was denied even though the court has authorized thousands of dollars for the services of a mitigation specialist for Alan Wade. Defense counsel for Tiffany Cole has been met with comments 'don't worry about it,' 'you'll get extra time to prepare.' When the undersigned attorney informed the court that he was beginning a two (2) week civil rights violation trial in Federal Court in early November, 2007, he was informed

> that counsel could go to his trial and the penalty phase jury would be told that lead counsel could not be here due to his trial in Federal Court. It should be noted that the penalty phase lawyer appointed Greg Messore has just taken the required 'life over death course' and has never tried a death penalty case." (1 R 84-85, EH Ex-07, SuppPCR 21, 5 PCR 759-763)

On September 25, 2007, Mr. Till filed a motion for an Independent Mental Health Professional, Dr. Ernest Miller. (1 R 90, EH Ex-08, SuppPCR 26, 5 PCR 766) On September 26, 2007, the court appointed Dr. Ernest Miller. (1 R 92, EH Ex-09, SuppPCR 28, 5 PCR 769)

On September 26, 2007, the court confirmed Ms. Cole's trial date as October 15, 2007, and Mr. Wade's trial date as October 22, 2007. ASA Mizrahi confirmed that there were pending plea negotiations and that Ms. Cole gave a proffer which would not be admissible at trial. Mr. Till then announced:

> "I'm stating in the beginning of the written objection is absolutely nothing has been done as far as the penalty phase, which may or may not be an issue in this case. But absolutely nothing has been done in that regard. We have got new counsel aboard who is just beginning to begin his preparation. Everything that has been done so far in Ms. Cole's case is absolutely contrary to the required Life Over Death course. It tells you this case should have been prepared, the penalty phase, concurrent with the guilt phase. Here we are a few weeks out from trial and nothing has been done. And a lot of this is my fault because I think we all thought there was going to be a resolution of this case and that fell through. Other counsel was appointed to assist. He withdrew from the case and now we do have -- I do have an attorney aboard to assist. So the first part of the written objection just sort of gives us a status of Tiffany Cole's case. I have not filed a motion to continue her case. I'm not saying -- it depends on what is going to be done, if anything, over the next few weeks.

I'm not going to go to trial if the case is -- you know, I say I'm not going to go." (4 R 598 EH Ex-10, SuppPCR 29, 5 PCR 770-771)

The court later responded,

"And let me make it clear for the record, Mr. Till started off by talking about things that Mr. Messore has not done. Mr. Messore got involved in this because the counsel that got appointed by the Court withdrew. Counsel appointed by the Court wouldn't have been necessary if Ms. Cole had told Mr. Till months ago that she was not going to take the State's offer. So let's not be, you know, having the system blamed for anything.

"I'm not laying any aspersions on anybody, but, please, if there is any delay in this, it is primarily because at this point it seems to me because Ms. Cole hasn't exactly been forthright with Mr. Till about her desires about how to handle this thing. As soon as it became clear to me there might be some need to try the thing, notwithstanding the proffers to the State, notwithstanding the statements to the Sheriff's Office. The moment that I realized that that may be a problem I'm sorry, the moment Mr. Till realized that may be a problem he came to me, we talked about additional counsel and got somebody on board. So it is not Mr. Till's fault that we're in this situation, nor is it Mr. Messore's.

"I just want to make sure it is clear at this point that we have done, I believe, everything appropriate under the circumstances. And we will address what needs to be done when it needs to be done. Things change. You know, at this juncture I recognize that this is a little bit different, but it is not significantly different from what we do on a regular basis. I recognize -- I, of all people, of course, recognize that death cases are different. And that is why when we actually do this the defense and the State will be completely accommodated on all the questions at the time will be appropriate." (4 R 610-611, EH Ex-10, SuppPCR 29, 5 PCR 762-772, 781)

NOTE: Per Dr. Miller's Report, Ms. Cole's evaluation was not completed until after her jury trial.

At the evidentiary hearing, Mr. Till testified that although he requested an examination by Dr. Miller, he wasn't expecting anything, mental health wise. Mr. Till saw nothing in Dr. Miller's later testimony at the penalty hearing that would support any statutory mitigators. (5 PCR 773)

On October 08, 2007, the court authorized appointment of a private investigator. (1 R 99, EH Ex-11, SuppPCR 35, 5 PCR 782)

On October 12, 2007, the court held a joint pre-trial hearing for Ms. Cole and defendant Alan Wade at which time Attorney Sichta moved for additional mitigation fees for Wade. Court stated that it is bothersome that taxpayers' money is being wasted on a mitigation expert that is nothing more than a glorified investigator. Nevertheless, the Court signed the order for Wade. Mr. Messore then stated, "We have not listed -- for Ms. Cole we haven't at this point listed a mental mitigation expert." (3 R 397, EH Ex-12, SuppPCR 36, 5 PCR 782)

On October 15, 2007, at jury selection, the court inquired of any proposals or negotiations. Mr. Till advised that the court was aware for a long time of his belief that the case would be resolved short of trial. Mr. Till announced that Ms. Cole was willing to plead to a number of years but would not plead to murder. (5 R 6, EH Ex-13, SuppPCR 41, 5 PCR 786)

At trial on October 19, 2007, the court denied Ms. Cole's written Duress Instruction and she was convicted of all charges.

(1 R 169, EH Ex-14, SuppPCR 48) The penalty phase was scheduled to begin on November 26, 2007 (12 R. 1445).

During the period between October 19, 2007, and November 26, 2007, Mr. Till would be involved in a federal civil trial scheduled for two and a half weeks. Mr. Till was questioned about this time at the evidentiary hearing (5 PCR 803). Alone, it would be up to Mr. Messore to continue with penalty phase preparation during this time, Mr. Messore's first capital trial. Mr. Till testified that he did not know Mr. Messore before but noticed that Mr. Messore seemed confident and excited (5 PCR 803). Mr. Till was reminded about the trial court having later acknowledged the extra time that Mr. Till spent investigating and instructing Mr. Messore (see below and 5 PCR 806). When asked about teaching Mr. Messore, Mr. Till demurred, stating that Mr. Messore has just finished a three-day course. Mr. Till went on to say,

> "[A] penalty phase is <u>not really that complex</u>. The rules of evidence are -- sort of take a back seat. Hearsay comes in. It's just putting on your show. The state puts on very limited evidence in the -- in the penalty phase and he -- he chose, and I concurred with it, to use a PowerPoint which -- which the state did so he sort of rebutted their PowerPoint with our PowerPoint, so it sort of just getting ready for a presentation of -- of what you have."
> (5 PCR 806)

When asked about meeting with Cole's family for mitigation purposes, Mr. Till stated that he never met with Cole's family,

only her mother Shirley and maybe the grandmother if she came with Shirley (5 PCR 807).

In the interim between trial and penalty phase while Mr. Till was in federal court trial, on November 06, 2007, Mr. Messore filed a post-verdict Motion for Mitigation Coordinator. Although busy in federal court, Mr. Till believed that Mr. Messore was meeting with Ms. Cole's family but did not know any details (5 PCR 0823). When asked about the mitigation motion, Mr. Till said, "where a mitigation specialist may have been some value to him but I can't tell you. It's not my motion." Mr. Messore filed the motion independent of Mr. Till and pled,

> "Co-counsel for Defendant, Quentin Till, has previously orally moved this Court on several occasions for the appointment of a mitigation coordinator. Each of those oral motions have been denied by this Court. The undersigned co-counsel, Greg Messore, also orally informed this Court of the defense team's request for the appointment of a mitigation coordinator after Defendant's jury selection, October 15, 2007, and that request was similarly denied. One of the co-defendant's in this matter, Alan Wade, has also been appointed two attorneys to assist in his defense. However, Mr. Wade's attorneys have also been permitted to retain the services of a mitigation coordinator at taxpayer expense by this same Court." (1 R 187, EH Ex-15, SuppPCR 50)

Whatever the case, Mr. Messore's motion was never ruled upon or set for hearing.

During the interim, Dr. Miller continued with what he was started with Ms. Cole. On November 20, 2007, Dr. Miller completed Ms. Cole's report. Dr. Miller's report is not

specific about the number of time or dates that he met with Ms. Cole between September 27, 2007, and November 20, 2007. (EH Ex-16, SuppPCR 52, 5 PCR 787) What is clear is that Dr. Miller did not have contact with Ms. Cole's family.

Six months after sentencing on September 22, 2008, the trial court entered an Order Approving Mr. Till's Fee. The court praised Mr. Till's performance justifying the fee, curiously stating:

> "Defense counsel began his representation of the defendant in August 2005. It was not until the later part of 2007 that a penalty phase, co-counsel was appointed. All of the penalty phase preparation between 2005 and 2007 was handled by the undersigned. The attorney appointed to assist in the penalty phase had never been involved in a first degree murder case and many hours were expended in instructing said attorney as to procedure and proper investigation." (Attachment B at 7 PCR 456, 5 PCR 806)

Trial Counsel's Mitigation Investigation and Theme

The status of counsel's failed mitigation effort, all within one month before trial, is demonstrated in the above narrative. According to Mr. Till, as late as September 13, 2007, no penalty motions had been filed, no mental health examination was scheduled, no effort was underway to find family members or potential witnesses, and the court had denied all requests for a mitigation specialist. On September 15, 2007, Mr. Till had still not arranged for a mental health expert or began penalty phase work. On September 29, 2007, Mr. Till advised that "absolutely nothing has been done as far as the penalty phase," that "new counsel aboard who is just beginning to begin his preparation," and that everything done so far is contrary to the required Life Over Death course.

At the evidentiary hearing, Mr. Till advised that he and Mr. Messore portrayed Ms. Cole as a pretty good person who led a pretty good life and just had a bad day. The lack of investigation into Cole's background led to Mr. Till's view that Ms. Cole's behavior was "aberrant," out of the norm of how she was raised. (5 PCR 776) Mr. Till's testimony is found at 5 PCR 707-869) The mitigation effort was then handed to Mr. Messore, whose only mitigation experience consisted of just having completed a required three-day capital case seminar the week before.

At the evidentiary hearing, Mr. Messsore testified (6 PCR 1077-1173) that after appointment as co-counsel, he met with Mr. Till and was given boxes of various materials, school annuals, picture books and keepsakes that came from Ms. Cole's mother, Shirley Duncan. (6 PCR 1089) In early discussions, Mr. Messore and Mr. Till agreed that a mitigation investigator was needed. (6 PCR 1092) Based on their limited perception, Mr. Messore and Mr. Till strategized and decided to portray Ms. Cole in the best possible light, that her involvement in this case was just one small piece of her entire life, that she was a good person, and that this was one tragic, terrible event. (6 PCR 1093)

Mr. Messore also testified that as of September 13, 2007, no effort had been made to work up mitigation. (6 PCR 1094) Through Shirley Duncan, Mr. Messore met some of Ms. Cole's family members.

When asked about Ms. Cole's negative history, Mr. Messore advised, "Well, we knew that she had one worthless check if that's negative. The only other negative thing that came up was from Dr. Miller. ..-..Well, I don't know what you mean by negative. She had some, you know, divorced parents and all that and her father had cancer and, you know, there was bad things going on or, you know, not happy things going on." (7 PCR 1113) All of this was included in Mr. Messore's PowerPoint theme.

Mr. Messore did not talk with Dr. Miller about the possibility of anything he might be able to offer during the trial on whether Ms. Cole was a willing participant or under duress or manipulation. Mr. Messore deferred trial issues to Mr. Till and worked only on the guilt phase presentation. (6 PCR 1027)

When asked about Dr. Miller's report, Mr. Messore remembered talking with Dr. Miller and knew that the R-A-I-T test was some type of intelligence test and G-A-F has to do with "functioning". (7 PCR 1135)

Mr. Messore agreed that he was lucky to have Shirley Duncan bring information to him. Mr. Messore was only looking for things consistent with his good girl theme. (7 PCR 1139) Duncan was the conduit and acted as Mr. Messore's guide and assistant. She was usually present during the interviews. Mr. Messore did not talk to anybody that had anything bad to say about Cole's mother, Shirley. (7 PCR 1144)

Mr. Messore advised that both he and Mr. Till had a difficult time getting along with and getting Ms. Cole to be forthcoming. What Mr. Messore learned about Cole's background was developed through Shirley. (7 PCR 1159) Ms. Cole did not tell Mr. Messore anything negative about her home life or mother. (7 PCR 1167-1168)

At the sentencing hearing, Mr. Messore pressed forward with the theme that Ms. Cole was a good person who was caught up in bad circumstances. In doing so, Mr. Messore paid no attention to the validity and meaning of Dr. Miller's report. Dr. Miller's report relied entirely on Ms. Cole self-report, for background and history. Dr. Miller's report made no reference as to any I.Q. test or finding. Even so, based on the Rapid Assessment Intelligence Test, Dr. Miller voiced an I.Q. determination, "**She's high average, 100 to 110**." (14 R 1651) No one was curious about this report. The state did not challenge this conclusion in any way. As will be shown later, Dr. Miller made an incorrect assessment based upon a test tool that does not measure I.Q.

Thus the trial court, Mr. Messore, Mr. Till, and the jury may have formed a strong belief that Ms. Cole had no mental defects and was of above average intelligence. This inaccurate characterization caused the loss of a potential mitigator at penalty hearing.

At the end of Mr. Messore's testimony, the trial court's belief was revealed when the court interjected,

> "During the course of any of that and thinking about Dr. -- what I mean is your experience to date for all of this and specifically at the time of Dr. Miller's exam, did Dr. Miller -- Dr. Miller's examination give you any indication whatsoever that there was any kind of mental health aberrations with Ms. Cole such as mental retardation, low I.Q., low self-esteem, any of those factors that go to make

> any -- was there anything there other than that she was an average I.Q. person with the situations that he put in the report?"
>
> Agreeing with the trial judge, Mr. Messore replied,
>
> "Perhaps low self-esteem, not the others." (7 PCR 1171)

Evidentiary Hearing - Lay Witnesses with New Facts

None of the following witnesses were put in contact with Dr. Miller.

Raymond Phillips, Step-grandfather

Mr. Phillips testified about Ms. Cole growing up in a divided household and having a bad home life. As a child, Ms. Cole was frequently left alone, unsupervised, and exposed to her mother's screaming, cursing and yelling. Ms. Cole rarely received praise and was ashamed of her facial birthmark. As Ms. Cole grew, her mother tried to control her but did not start early enough. Ms. Cole's mother was more interested in men. Ms. Cole was a slow learner and eventually dropped out of school. Mr. Phillips was not previously called to testify or interviewed about Ms. Cole. (5 PCR 870-882)

Donna Phillips, Grandmother

Ms. Phillips read a letter at trial. Before trial, Ms. Phillips came to Jacksonville one time and answered the questions of trial counsel about Ms. Cole. Ms. Phillips was given no instructions and mailed the letter to the court. She

came to court and was allowed to read the letter. No one asked any follow-up questions. Ms. Phillips' letter talked a little bit about Ms. Cole's home life, drug use, taking care of her brother, and getting in the wrong crowd.

At the evidentiary hearing, Phillips testified that Shirley was 14 or 15 years old when she became pregnant with Ms. Cole. Ms. Phillips did not like the Cole's father, David, who was 21 years old at the time. Shirley was sent to Florida to live with her father. The plan was to get an abortion. However, it was too late in the pregnancy to terminate. Shirley moved back to the Phillips home with infant Cole. Although Shirley liked having a baby, she did not like staying at home. A few years later, Shirley again became pregnant and soon began leaving Ms. Cole to care for the new baby. Shirley was very harsh on Ms. Cole and yelled a lot. Shirley became overly strict and controlling. Ms. Phillips described Ms. Cole as a follower and easily influenced by others. (5 PCR 886 to 6 PCR 914)

David Duncan, Brother

David is four years younger than Ms. Cole. While still in grade school, Ms. Cole was left alone to care for David. David described Shirley as being overly strict and rough. When Ms. Cole was twelve years old, she began running away. Shirley was physically and verbally abusive to Ms. Cole. Both the men in Shirley's life were drug users. Both shared drugs with the

children. Eventually, Ms. Cole left home and turned to drugs and prostitution. (6 PCR 915-926)

David remembered meeting co-defendant Michael Jackson. When Jackson stole Cole's money, Cole tried getting it back but ended up getting involved with Jackson. David recalled that when Ms. Cole and the other defendants came back from Jacksonville before being arrested that Ms. Cole was not allowed to leave the group for some reason. David was not called to testify at trial because of a pending felony charge. (6 PCR 926-929)

Shirley Duncan, Mother

Shirley testified at the penalty phase and narrated Mr. Messore's PowerPoint presentation. Shirley also read a letter at the Spencer Hearing[3]. At the evidentiary hearing, Shirley testified that in the months preceding Ms. Cole's arrest, she was attempting to maintain contact with Ms. Cole and threatened to file a missing person report if Ms. Cole did not stay in touch with her. Ms. Cole was age 23 at the time. Shirley attempted to manage her son as well. (6 PCR 943-952)

Shirley periodically visited Ms. Cole at jail while awaiting trial. Once or twice, Shirley met with Mr. Till. Shirley advised that she did not understand that Ms. Cole was facing the death penalty until immediately before trial.

[3] Spencer v. State, 615 So.2d 93 (Fla. 1993)

Shirley was asked to help convince Ms. Cole to enter a plea to a term of years. Shirley, like Ms. Cole, had a difficult time comprehending the charge of being a principal to a murder committed by a co-defendant. Shirley advised that Mr. Till was frustrated because of her lack of understanding. (6 PCR 963)

Shirley testified that Mr. Messore became co-counsel about one month before trial. Mr. Messore came to Charleston and wanted to know about Ms. Cole's upbringing. Mr. Messore was only interested in good things. Mr. Messore left it to Shirley to provide the good information. Shirley described Ms. Cole as having low self-esteem and having a cocaine problem. (6 PCR 964-970)

Shirley stated that her mother's side of the family suffers from schizophrenia and breakdowns. Shirley was aware that Ms. Cole was going to be interviewed by Dr. Miller, but was not asked to contact anyone or provide information. (6 PCR 971)

Shirley described an argumentative home life with Ms. Cole. Shirley confirmed that Ms. Cole alleged that her father had touched her breast on one occasion. Shirley did not deal with the problem and the subject was dropped. (6 PCR 976)

Roseanna Cricks, Cousin

Roseanna came to the trial and read a letter as directed by Mr. Messore. At the evidentiary hearing, Roseanna testified that Ms. Cole was a previous drug user and was related to people

who have mental illnesses. Roseanna remembers Ms. Cole and having low self-esteem, being insecure, and fighting with Shirley, and, as a child, having to take care for her younger brother, David. (6 PCR 984-987)

Deborah Cole, Maternal Aunt

Deborah is Shirley's older sister and is an Air Force civilian employee. Deborah testified that Shirley worked all the time and frequently left her children home alone. Ms. Cole, at age ten, took care of her younger brother. According to Deborah, Ms. Cole and her brother were not given a fair childhood. Deborah tried to intervene and take custody but Shirley would not allow it. Shirley moved a lot and the children had no structure. Deborah testified that Shirley would scream and threaten Ms. Cole as a child. As a child, Ms. Cole had problems with sucking her thumb. (EG 290-295)

Nancy Ward, Maternal Aunt

Nancy is Shirley's younger sister and was around Ms. Cole as a child. According to Nancy, Ms. Cole had a very unstable home life, was yelled at and harshly treated by Shirley. As a result, Ms. Cole had problems wetting the bed and sucking her thumb. Nancy was not contacted by trial counsel. She did, however, come to the sentencing but did not appear as a witness or talk with trial counsel. Nancy described Ms. Cole's childhood as being dysfunctional and without structure. When

Ms. Cole grew older, she began to run away and dropped out of school. According to Nancy, Ms. Cole was very flirtatious and liked attention. (6 PCR 1009-1027)

Dena McConnell, Shirley's Friend

Dena testified that she was Shirley's good friend. Trial counsel asked her to testify at the trial about Ms. Cole's good character and non-violence. Dena advised that Ms. Cole was just a flower girl (age 6) in her wedding and that she had not seen Ms. Cole since 2001. (6 PCR 1030-1037)

Nancy Mairs, Donna Phillips' Friend

Ms. Mairs was asked by trial counsel to read a letter at sentencing. Ms. Mairs stated that she knew Ms. Cole since Cole was a baby and that Ms. Cole would visit her once in a while. (6 PCR 1038-1041)

Hazel Simmons, Shirley's Friend/Co-worker at Medical Clinic

Hazel advised that she was asked to write a character letter for the Judge in Ms. Cole's trial. According to Hazel, Ms. Cole would work from time to time and help out when needed. Hazel clarified that she has not seen Ms. Cole since age 18. (6 PCR 1045-1047)

Comment: The testimony of witnesses McConnell, Mairs, and Simmons would seem marginally relevant to the failed "good girl" theme.

Robert Roush, Shirley's ex-Paramour

Robert testified that he was a stepfather figure for Ms. Cole and had a relationship with Shirley for 17 years, beginning when Cole was 4 years old. Robert testified that Shirley was very strict on Ms. Cole with lots of screaming and yelling. Robert advised that Ms. Cole began to run away at age 15. (6 PCR 1049-1059)

Terri Duncan, Paternal Aunt

Terri conferred with Ms. Cole's trial counsel and was advised to portray Ms. Cole's life in a good way, happy, and healthy, even though it wasn't. Terry said that she "thought that they needed to know that Tiff's life wasn't as happy as the prosecutor and everybody portrayed it, that Tiff suffered some really severe mental injuries as a child because of decisions her parents made. She was forced to take care of her little brother when she was a young age. Always looking for some positive acceptance and only received negative acceptance." (6 PCR 1066)

According to Terri, trial counsel instructed her to just talk about the good things. Terri could have but didn't testify that Ms. Cole's home life was dysfunctional and that she would often run away. Terri could also have testified that she found Ms. Cole crying unbearably and talking about taking her own life

because she did not know where she belonged and did not feel loved. (6 PCR 1069)

Terri stated that she witnessed psychological abuse on Ms. Cole from Shirley and that she was aware of Ms. Cole's drug use at an early age. Terri went on to say that Ms. Cole had unhealthy relationships and was looking for love and acceptance. Terri felt that the pictures of Ms. Cole used at trial portrayed a normal child life that was not true. (6 PCR 1070-1075)

Amber Jones, Cousin

Amber Jones is three years younger than Ms. Cole and was very close to Ms. Cole growing up and was with her when she ran away from Shirley. Amber testified that she knew Ms. Cole's vulnerable side and that Ms. Cole wanted to be accepted. (6 PCR 1175-1183)

According to Amber, Ms. Cole faced psychological abuse from everywhere because Ms. Cole never felt that she was good enough. Ms. Cole would go out of her way to try to make people accept her. (7 PCR 1192) Amber was also aware that Ms. Cole became involved in prostitution. (7 PCR 1195)

The above new facets of Ms. Cole's life do not complement trial counsel's attempt to show Ms. Cole as simply the good person with high average intelligence and worth saving. In fact, Ms. Cole was quite different. She was not close to average intelligence, had problems in all aspects of her life,

and was exposed to psychological abuse and thoughtless cruelty her mother since birth. Ms. Cole had low self-esteem, lived a life of pain and rejection, and could not find her way from her abusers.

Dr. Herkov, Dr. Miller's Forensic Evaluation, and Mitigation

Dr. Michael Herkov is a forensic psychologist and addiction specialist at Shands Hospital, University of Florida. Dr. Herkov was retained to examine Ms. Cole, to examine what underlying mitigating factors existed, to review the previous mental health evaluation by Dr. Miller, and to testify about that in terms of the mitigation. (8 PCR 1230) In addition to reviewing Ms. Cole's records, case file, and trial excerpts, Dr. Herkov, unlike Dr. Miller, interviewed Ms. Cole's family members and spent 10 to 12 hours interviewing and testing Ms. Cole at Lowell CI. (8 PCR 1230-1232)

In evaluating Ms. Cole, Dr. Herkov first wanted to determine if Ms. Cole had any cognitive impairments and any brain issues that could be associated with past trauma, with years of substance abuse. Dr. Herkov did a neuropsychological evaluation using a standard and accepted battery of neuropsychological tests. Neuropsychology is the interface between the brain and behavior. Forensic neuropsychologists bring neuropsychology into the courtroom. (8 PCR 1231)

Dr. Ernest Miller, now deceased, did not complete his psychiatric evaluation and seven-page report until after Ms. Cole's jury conviction. Nothing was found in the record that shows Dr. Miller having any input to guilt phase defenses. Dr. Miller testified only at the penalty hearing on November 29, 2007. (Transcript at 15 R 1641 thru 16 R 1697) Dr. Miller's psychiatric report included some test findings that were relied upon by trial counsel at penalty hearing and then later filed with the court at the Spencer Hearing on January 31, 2008. (2 R 212-291, also EH Ex-16, SuppPCR 52)

Dr. Herkov reviewed the mental health opinions and testimony of Dr. Ernest Miller that were relied upon by trial counsel and testified, "It was my professional opinion overall that that Ms. Cole was prejudiced by inadequate, misleading and at times, incorrect mental health opinions and testimony." (8 PCR 1232-1233)

As to the inadequacy of Dr. Miller's report, Dr. Herkov pointed out,

> "in terms of what happened, one of the things, if you read Dr. Miller's evaluation of Miss Cole, is that there was very little collateral data. Didn't speak to family members. Had records about the crime but didn't have records about her life, i.e., school records. And that -- I mean, there was no interview of family and friends, and that can be critically important. In this case, I think it really led to some of the prejudice that I talk about." (8 PCR 1233)

Dr. Miller's Flawed Report and Testimony
(EH Ex-16, SuppPCR 52)

Dr. Miller's report references the following items prior to examining Ms. Cole: (2 R 212)

1. Arrest and Booking Report and supplemental sections thereof dated July 08, 2005, through October 01, 2007.
2. Information filed.
3. Written historical information provided by your client.
4. Synopsis of D.R. Joseph's investigations dated December 13, 2005, through December 20, 2005.

Dr. Miller did not confer with any family member. Dr. Miller did not review Ms. Cole's school records.

Ms. Cole's seven page self-reported life history and Joseph's synopsis were submitted at the evidentiary hearing as a part of Dr. Miller's report. (EH Ex-16, SuppPCR 52, 8 PCR 1214-1216, 7 PCR 1119-1126)

Page 2 of Dr. Miller's report says that Ms. Cole has a ninth grade education. "Her grades were generally good. She was not suspended or expelled." However, Dr. Herkov pointed out that the school records showed problems began to arise as early as kindergarten, functioning in the 15th percentile at grade five, poor grades thru the ninth grade until dropping out. Contrary to Dr. Miller's assertion, Dr. Herkov found from the

school records that Ms. Cole was disciplined and suspended a number of times for bad behavior. (5 PCR 734-735)

At penalty hearing, Dr. Miller stated that Ms Cole was at least of average intelligence by the Rapid Assessment Intelligence Test. Dr. Miller was concerned that something physical was disturbing Ms. Cole's processing of information and administered a test for dementia. The dementia test is basically a memory test. (14 R 1650)

When asked about an I.Q. test, Dr. Miller stated, "As I mentioned the rapid assessment intelligence test was used." "She's high average, 100 to 110." (14 R 1651) This finding is not mentioned anywhere in Dr. Miller's report. Did trial counsel know?

Dr. Miller testified about the assessment of Axis IV, the stressors that bear on Ms. Cole's general adaptive level, at what level is she functioning compared to the average ordinary person. Dr. Miller explained,

> "Now most of us I hope in this room function at 70 or so which is the highest possible level we can assign to somebody who's doing very well in all dimensions. I assigned her a level of 60, which is not far down, so in terms of her relatedness day to day to me and within the milieu of a jail confinement -- I'm sorry. I'm doing it again. Shall I talk without it? Is that -- can you hear me that way? Is that all right? I think she -- she deserved that relatively high level of good functioning overall despite these several problems." (14 R 1655)

On penalty phase cross-examination, Dr. Miller was asked about Ms. Cole's leader/follower/domination aspects and Dr. Miller generalized,

> "I have no information that in my awareness and knowledge of this lady that indicates to me that she was acting to initiate. She acted as a follower and did follow along. There's no question about that……. But that's what people like this lady get into. They follow along in the wake of somebody who seems that they're going to fulfill her need for taking care of, dependency fulfillment. This person is going to do it. That person is going to do it. Then they get all fouled up in their life with these entangled relationships which are very destructive, and I think that's what's going on here. (14 R 1669)

On cross-examination, Dr. Miller testified that Ms. Cole was sane, indeed. (14 R 1674)

Concerning his lack of contact with Ms. Cole's family, the Dr. Miller had the following dialogue with the state:

Q Dr. Miller, did you speak to any of Ms Cole's family members?
A No.
Q Did you interview her mom at all?
A No.
Q Did you talk to or read anything about Ms. Cole spending time with her family and going to the beach and swimming at her grandma's? Did you talk anything about that?
A No.
Q Did you have any dialogue with anyone about the many family reunions that they had?
A No.
Q And the wonderful times that they spent together as a family?
A No.
Q Is your conclusion that Tiffany Cole was raised in a bad family situation by bad parents?
A What is bad?
Q Well, I guess use your definition.

A I think she turned out poorly for some reason and I don't think it's all genetics. What I'm surprised at is that with a family as reportedly so wholesome why none of them tried to get in touch with me through the attorney and shed some light on their daughter and illuminate to me what it was like in her life.
Q Doctor --
A Parents who are concerned, who are involved, a family who's involved they call me or they call the lawyer and want to get -- and they get my number. Nobody nobody offered to do that.
Q Dr. Miller, obviously being the expert that you are and the many times you've done this you try to do as thorough a job as you can, right?
A Sure.
Q And certainly even if a family doesn't contact you in an effort to be complete you could make an effort to contact them?
A Yes. But if they don't contact me, what are the odds that I'm going to get useful information? People become very defensive, particularly if there has been a problem, particularly if a father was molesting the daughter and the mother did not intercede but only responded you're just mad at him. Come on! (14 R 1674-1676)

Analysis - Argumentative Question: Whose responsibility is it to connect Dr. Miller to the needed people who have historical or mitigating information about Ms. Cole? Cole? Cole's mother? Miller? Till? Messore? Dr. Miller shouldered no interest and can only speculate. Dr. Miller had only Ms. Cole's seven-page autobiography.

Hammering the state's position home in the penalty phase:

Q And so she's on top of what she's doing and what she's saying with you, right?
A That's good. Correct.
Q You said she was actually what, average to above average intelligence?
A Yes, sir. (14 R 1677)

Concerning Ms. Cole's relationship with co-defendant Michael Jackson, came the following dialogue between Dr. Miller and the state: (14 R 1680)

Q You talked to her to some degree about her relationship with the people that she committed these crimes with, right?
A I did.
Q And you talked to her about Michael Jackson?
A I did.
Q Did she discuss with you whether or not she a sexual relationship with Michael Jackson?
A I did not ask her. I assumed she did.
Q You did? I'm sorry. You said you did not ask her?
A I did not ask her that. I assumed she did.
Q Okay. Did she call him her boyfriend?
A No, not that I recall. (14 R 1680)

The prosecution reaffirmed Dr. Miller's limited scope of Ms. Cole's history:

Q And again the only thing you know about her childhood is what she told you?
A That's correct. (14 R 1685)

Dr. Herkov's Assessment of Dr. Miller's Evaluation/Mitigation

Dr. Miller made a limited evaluation of Ms. Cole's drug and alcohol abuse. In Dr. Miller's report, Page 3, Ms. Cole is described as being on her own by age 17. She used Valium, Xanax, Clorazil, ecstasy, powder, LSD, and other forms of "speed." Her last drug use was not long before being arrested. Ms. Cole claimed to be chronically depressed during this time. Her only excuse for using drugs was "because it is here." She saw a physician one time who recommended her to drug treatment. However, Ms. Cole never followed through. She admitted being a

"hard core drinker" and was so at the time of the offense, consuming more than a twelve pack of beer per day. According to Dr. Miller's report, Ms. Cole began using drugs and alcohol at age sixteen to seventeen. (2 R 214, EH Ex-16, SuppPCR 52) Dr. Miller's report was not shared with the jury at penalty phase.

Dr. Miller's drug and alcohol assessment was more limited at the penalty phase. However, Dr. Miller did testify that Ms. Cole reported that she used alcohol and she that was drinking and using drugs all the time that she was involved with the other co-defendants. (14 R 1666)

However, Dr. Herkov found that Dr. Miller's inquiry did not go far enough. At age 16, Ms. Cole was abusing cocaine to the point of developing cardiac symptoms. (8 PCR 1237) Ms. Cole was also using ecstasy (MDMA), LSD, painkillers, opiates, and cannabis. Dr. Herkov explained:

> "The importance of really understanding what she did, how much she did is because of the impact that it has on her brain or cognitive function. At UF, I developed course called neurobiology of addiction. And these drugs achieved their effects. They get their high by affecting neurotransmitters in the brain, how your brain cells communicate. But they don't just affect the reward center of the brain; they affect neurotransmitters throughout the brain.
>
> "What happens over time, especially when you have a young person that's using drugs, you have a developing brain, and the trajectory of how that brain is going to develop changes as a result of that drug use. The human brain probably doesn't mature until age 24 or 25, especially the frontal lobes. And so the jury would really have to understand how this drug use could have played a role in

> her decision-making, her impulsivity, her overall understanding of the role.
>
> "I'm not saying it caused her not to know right from wrong, but what it does is it affects a whole host of behaviors, including her use of substances at the time. We know that she was using -- reporting using significantly around the time of the offense. So understanding the substance abuse needs to be played out much more, in my professional opinion, than it was. In fact, there is no mention of cocaine in the report." (8 PCR 1237-1238)

Dr. Herkov went on to compare his testing and findings with that of Dr. Miller in 2007.

The Rapid Assessment Intelligence Test mentioned by Dr. Miller is actually the Rapid Approximation Intelligence Test (RAIT). According to Dr. Herkov, Dr. Miller's RAIT test was developed in 1967 and is not really in use today. The test at best gives a general approximation of intelligence and takes only two to three minutes to administer and really tests the mathematical aspects of intelligence. A standard intelligence test should have been used. (8 PCR 1241)

Dr. Herkov used two tests to determine if Ms. Cole was malingering or trying to fool the tests. In both cases, Ms. Cole scored a perfect score and showed that she was giving good effort and not malingering. (8 PCR 1243-1244)

As for Ms. Cole's intelligence estimate by Dr. Miller, Dr. Herkov pointed out that Dr. Miller gave two different reports. In his written report, Dr. Miller said that Ms. Cole is of average intelligence; this would be 80 percentile. At the

penalty phase, Dr. Miller testified that Ms. Cole (I.Q. 100 to 110) was in the high-average range; this would be 90 percentile. (8 PCR 1244, EH Ex-19 page 12, SuppPCR 115).

Dr. Herkov explained, "So if you're the jury or the trier of fact and you're looking at that, you have an opinion of this girl that her intelligence is at least as good as everybody else's and probably better than most people because she's in that high-average range." (8 PCR 1245)

Dr. Herkov used the Wechsler Test to evaluate Ms. Cole and found that Ms. Cole scored an I.Q. of 81, which falls in the low-average range (10 percentile). In Dr. Herkov's professional opinion, Dr. Miller made a serious error that was caused by using an inadequate assessment instrument that could have had a profound effect on the jury's view of Ms. Cole and her cognitive capabilities. (8 PCR 1246).

Dr. Miller tested Ms. Cole with the Mini-Mental State test, a memory test normally used on dementia patients. Ms. Cole would be expected to score well on this test but a standard neurological test would show something more reliable. (8 PCR 1247) Using The California Verbal Learning Test, Ms. Cole now scored below the tenth percentile. Dr. Herkov followed up with two more tests to measure executive function which both scored Ms. Cole below the tenth percentile. (8 PCR 1249)

According to Dr. Herkov, these tests show that Ms. Cole has significant learning memory problems that are very consistent for someone with cognitive impairments associated with drug use, especially the drugs Ms. Cole spoke of. MDMA and ecstasy, are known for their neurotoxic effects on the brain. (8 PCR 1248)

Based on this, Dr. Herkov diagnosed Ms. Cole as having a cognitive disorder as opposed to the jury having previously heard that there was no evidence of any organic underlying brain issues. (8 PCR 1250)

At the penalty phase, Dr. Miller made a serious error in his testimony before the jury about Ms. Cole's Global Assessment Function (GAF). Dr. Miller assigned Ms. Cole a GAF score of 60. Dr. Miller explained to the jury that GAF was a scale that runs from 0 to 70 and that 60 would be a good score. However, the GAF scale really runs from 0 to 100. A 60 is not a good score and would reflect someone with flat affect, lack of emotional expression, circumstantial speech and who would have difficulty in social, occupational, or school functioning. (8 PCR 1252-1254)

With that, Dr. Herkov concluded that the jury is being "woefully misled" about where Ms. Cole is at in terms of her intelligence, in terms of her cognitive functioning, and in terms of her overall assessment.

Duress and Domination of Ms. Cole by Co-defendants

Through the post-conviction investigation and review by Dr. Herkov, a picture of Ms. Cole's limitations emerges and sheds light on her inability to separate from her co-defendants, their domination, and her duress.

Although Dr. Miller did identify Ms. Cole as a follower and being extremely dependant on other people and easily led, Dr. Miller only looked at the police reports, Ms. Cole's 7-page history, her interview, and his own flawed testing. Mr. Till and Mr. Messore could have learned more and found if they looked. Dr. Miller initiated no inquiry as to the sexual or interpersonal relationship between Ms. Cole and Michael Jackson. Dr. Miller's position was that it was up to Ms. Cole and her family to take the initiative in providing her background. Dr. Miller mistakenly perceived that he was dealing with someone with above average intelligence.

Ms. Cole was not wanted since before birth and forced too soon to care for her brother. She was yelled at, had low self-esteem, and was psychologically abused. Her facial birthmark only compounded the problem.

As set out in the testimony of Dr. Herkov, Ms. Cole grew up in a chaotic family with father figures who dealt or used drugs that they also shared with her. She used alcohol and every variety of drug. She was exposed to sexual touching by these

fathers. Mom did nothing to parent or protect her from abuse. Ms. Cole then got into abusive and violent relationships and became subservient. She learned to be dominated, controlled, and manipulated. When she left, she turned to the streets as a prostitute. According to testimony during the evidentiary hearing, only her younger cousin, Amber Jones, tried to help her.

Finally, Ms. Cole met Michael Jackson who stole her money and took advantage of her psychological shortcomings. Her predictable reaction, based on her low-functioning executive decision making ability, was to develop a relationship with Michael, spiked by drugs, alcohol, and sex. Michael and his friends continued to exploit Ms. Cole's vulnerability, and to no one's surprise, they all soon became co-defendants. Ms. Cole was dominated by Michael while continuing to be lost in drugs and daily 12-packs of beer.

Ms. Cole scored low on Dr. Herkov's tests, high on immaturity, and lacked adult mental development. Ms. Cole's diminished cognitive ability went unnoticed by Mr. Till, Mr. Messore, and Dr. Miller, and may clarify why Mr. Till was unable to sell the plea deal. All of this supports Dr. Herkov's professional opinion that Ms. Cole was under the significant influence or domination of the co-defendants, especially Mr. Jackson. (8 PCR 1259)

Commenting on Mr. Messore's PowerPoint of Ms. Cole's upbringing, Dr. Herkov described the content was that of a happy family which was inconsistent with the circumstances that Dr. Herkov uncovered in his thorough investigation. (8 PCR 1259). The PowerPoint was a surreal presentation of over 140 happy and smiling family pictures more consistent with a reunion or holiday; in stark and shocking contrast to the photographs used in the state's case of two life partners buried alive and holding one another.

Mitigation Specialist/Investigator

As shown herein, Ms. Cole received an inadequate mitigation effort and investigation.

Ms. Cole's Amended 3.851 Petition included an attachment (D) from Investigator Rosie Bolin as to the proper scope of what is involved in mitigation investigations in death penalty cases. (1 PCR 192)

At the conclusion of the evidentiary hearing, counsel reminded the court about wanting to present testimony of a lawyer as to the proper scope of what is involved in mitigation. In absence of testimony, counsel proffered an affidavit. The court replied, "I'm not interested, but I'll be happy to let you file it. .. . .. I don't think it's appropriate testimony and I'm not going to consider it."

Counsel filed the affidavit of attorney Terence Lenamon as authority pertaining to the mitigation arguments before the court. (EH Ex-20, SuppPCR 118).

These statements were incorporated in the evidentiary summation to the trial court as defining the measure and proper standard of a death case mitigation effort.

Summation and Authority as to Arguments II and III

The facts herein show ineffective assistance of counsel in both the guilt and penalty phases for trial counsel failing to adequately investigate Cole's background for mitigation and psychological deficiencies in order to show that Cole was under extreme duress and effectively under the control of her co-defendants during the time of the offense.

Trial counsel failed to provide Dr. Ernest Miller, their chosen forensic psychiatric consultant, with sufficient background information in order for him to complete a meaningful analysis that Cole was easily controlled by her co-defendants, a defense that should be used in the guilt phase to show that Cole acted under extreme duress or the substantial domination of another person. Dr. Miller compounded the problem by failing to perform an accurate and comprehensive assessment of Ms. Cole, misdiagnosed Ms. Cole, and presented this erroneous testimony at trial. Trial counsel made no effort to check on what Dr. Miller was doing or to help him.

As recently shown at the evidentiary hearing, trial counsel failed to discover that Dr. Miller's findings at trial were flawed and based upon questionable testing followed by the mistaken conclusion that Cole was of above average intelligence and functioning when she was not. (8 PCR 1244-1249, 1262, 1270) Dr. Miller's written report was wrong and the error was compounded at trial by Dr. Miller's testimony and inexplicable finding that Cole's Global Assessment of Functioning. (GAF) score of 60 was that of a well-functioning person when she was not. (8 PCR 1254) Based on Dr. Miller's testimony that Ms. Cole was of above average intelligence, "She's high average, 100 to 110," she could be considered more culpable by the jury.

Thirteen witnesses testified on behalf of Ms. Cole at the evidentiary hearing. Several of these witnesses were not called to testify at the penalty phase or Spencer Hearing. None of these witnesses met or conferred with Dr. Miller at time of trial. The trial court was finally given the true story of Ms. Cole's limitations, dysfunction, abuse, and neglect.

The central issue at the heart of Ms. Cole's argument is that trial counsel's delayed and ineffective mitigation effort prejudiced Ms. Cole in both guilt and penalty phases. If counsel had embarked on a proper mitigation effort early in the case, all of the facts and evidence brought forth above could have been discovered without rush and prior to trial. A much

different trial and penalty hearing would have followed. The jury would have seen a different characterization of Ms. Cole as shown herein. Trial counsel would have been able show Ms. Cole's vulnerability to manipulation and control by her co-defendants and present a duress defense.

The fact that the Florida Supreme Court has reversed the trial court's findings as to HAC is significant. The substantially different mitigation factors presented at the evidentiary hearing puts Ms. Cole in a very different position. Before, the jury was instructed on HAC and Ms. Cole was wrongly presented as a being of above average intelligence and from a good and supportive background.

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the United States Supreme Court held "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." Id. at 2538. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In

any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness ... " Wiggins at 2535.

Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance. See Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare, see Kenley v. Armantrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). A reasonable strategic decision is based on informed judgment. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable." Wiggins at 2536. In making this assessment, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. " Id. at 2538.

In Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the United States Supreme Court held that counsel rendered deficient performance and cited counsel's

failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarcerations, and failure to gather evidence of a history of substance abuse. Id. at 2463. The Rompilla Court found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts." Id. at 2462. However, despite the scope of this mitigation investigation, the Court still found that counsel rendered deficient performance. See also Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007) (Trial counsel rendered deficient performance where they "failed to discover important mitigating information that was reasonably available and suggested by information already within their possession."). The United States Supreme Court reiterated that according to "prevailing professional norms" counsel has an 'obligation to conduct a thorough investigation of the defendant's background.'" Porter v. McCollum, 130 S.Ct. 447 (2009) (citing Williams v. Taylor, 529 U.S. 362, 396 (2000). In Porter, the Court held that a state court unreasonably applies Strickland's prejudice standard when it fails to give weight to mitigating evidence of a capital defendant's abusive childhood, brain damage, and post-traumatic stress disorder. Id.

In Sears v. Upton, 130 S.Ct. 3259 (2010), the United State Supreme Court reversed a death sentence where trial counsel's deficient performance resulted in an inaccurate portrayal of the defendant's childhood. Trial counsel unreasonably relied on information from family members and therefore told the jury Sears' "childhood [w]as stable, loving, [middle class], and essentially without incident." Sears at p. 3261. "The prosecutor ultimately used the evidence of Sears' stable and advantaged upbringing against him during the State's closing argument. In Sears, the prosecutor told the jury, '[w]e don't have a deprived child from an inner city; a person whom society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every opportunity that was afforded him.'", Sears, 3262 (internal citations omitted).

In the instant case, trial counsel's failure to investigate and present mitigation was deficient performance which violated Ms. Coles Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and the corresponding provisions of the Florida Constitution. The prejudice results in Ms. Cole's death sentence. Had the jury been aware of the unique nature of Ms. Cole's personality, her background, her mental health and drug and alcohol abuse, and the full circumstances surrounding the crime and the influence of the

codefendants, there exists a reasonable probability that she would have received a life sentence.

A mental health specialist could have testified about the effects of alcohol and drug abuse on Ms. Cole's ability to conform her conduct to the requirements of the law as well as her ability to control her impulsivity and her ability to think in a rational manner. Failure to ensure a reasonably competent mental health evaluation and to investigate potential mental mitigation and present mental mitigation fell below an objective standard of reasonableness and as a result of these unprofessional errors, there is a reasonable probability that the result of the penalty phase of the trial would have been different.

The Sixth Amendment requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Ragsdale v. State, 798 So.2d 713 (Fla. 2001). Meaningful assistance of counsel in capital cases requires counsel pursue and investigate all reasonably available mitigating evidence, including brain damage and mental illness. Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003). A new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indicators of mental retardation or brain damage. Counsel renders deficient performance when he fails to ensure an

adequate and meaningful mental health examination. Ponticelli v. State, 941 So.2d 1073, 1095 (Fla. 2006); Sochor v. Florida, 833 So.2d 766, 722 (Fla. 2004). Counsel's failure to pursue mental health mitigation despite "red flags" amounts to deficient performance; "a competency and sanity evaluation as superficial as the one [Dr. Miller] performed for [Ms. Cole] obviously cannot substitute for a thorough mitigation evaluation." Arbelaez v. State, 898 So.2d 25, 34 (Fla. 2005). Prejudice is established when counsel fails to investigate and present evidence of brain damage and mental illness. Ragsdale v. State, 798 So.2d 713, 718-19 (Fla. 2001); Rose v. State, 675 So.2d 567, 571 (Fla. 1996)(citing Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)).

Counsel failed to ensure that Ms. Cole received a reasonably competent mental health evaluation designed to uncover mitigation. Furthermore, Dr. Miller was not even utilized to assist the jury in understanding Ms. Cole's biological, social and psychological history, drug and alcohol abuse and other factors that might have a bearing on the jury's understanding of mitigating circumstances. Dr. Miller was never provided school records, birth records, medical records, statements of friends or family members, statements of teachers, detailed family history and other factors relevant to mitigation.

At trial, Dr. Miller did not substantiate any showing of duress because counsel did not provide Dr. Miller with adequate history or information. Dr. Miller did not look for background information on his own. At trial, counsel ignored anything that did not comport with the "Good girl" theme. Counsel's deficient performance in providing Dr. Miller with sufficient and relevant data is further amplified by failing to present mitigation through the witnesses that appeared at the evidentiary hearing, but were also available in 2007 and the two preceding years since the appointment of trial counsel.

Where defendant presents evidence of being under the domination of another person and under duress at the time of the murder, but acknowledges that it was not "extreme" duress or "substantial" domination, the court properly refuses to eliminate those terms from the standard jury instruction. Statutory mitigation is different from non-statutory mitigation, and the court cannot re-write the instructions as they pertain to statutory mitigators. Mental mitigation that is less than "extreme" or "substantial" is handled differently than other statutory mitigation. Barnhill v. State, 834 So.2d 836 (Fla. 2002)

To evaluate the prejudice with respect to a counsel's failure to present mitigation at trial under the standard presented by the US Supreme Court in Porter, any additional

mitigation presented in post-conviction must be considered in concert with that presented and proven at the penalty phase in order to determine whether the confidence in the outcome is undermined. Porter v. McCollum, 130 S. Ct. 447 (2009). Because the jury was improperly instructed as to HAC, the presentation of additional statutory and non-statutory mitigation as shown here would certainly meet the threshold described in Porter.

ARGUMENT IV

THE ERRORS OF TRIAL COUNSEL WHEN COUPLED WITH THE ERROR OF THE TRIAL COURT'S HEINOUS ATROCIOUS AND CRUEL INSTRUCTION CONSTITUTE SUFFICIENT CUMULATIVE ERROR AND PLACES THE JURY'S DEATH RECOMMENDATION IN DOUBT.

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases. A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Larkins v. State, 655 So.2d 95 (Fla. 1995).

In Jones v. State, 569 So.2d 1234 (Fla. 1990) the Florida Supreme Court vacated a capital sentence and remanded the case

for a new sentencing proceeding because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). . See also Ellis v. State, 622 So.2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So.2d 1127 (Fla. 4DCA 1994).

Ms. Cole's above-stated claims and the omission of mitigation information were made worse by the fact that the trial court erroneously instructed the jury that the HAC aggravator applied to Ms. Cole. As such, the validity of the jury's death recommendation is now placed in doubt.

RELIEF SOUGHT

Based upon the foregoing, Ms. Cole respectfully requests this court vacate her Judgments of Conviction and grant her a new guilt phase and a new penalty phase.

Respectfully submitted,

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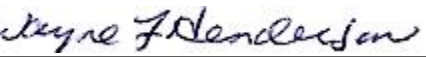
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered via email to the Office of the State Attorney, Jacksonville, Florida and to the Office of the Attorney General, Tallahassee, Florida this 1st day of July 2014. A copy was mailed to Appellant, Tiffany Anne Cole, DOC No. J35212, Lowell Correctional Institute Annex, 11120 Gainesville Road, Ocala, FL 34482-1479.

Wayne Fetzer Henderson, Attorney

CERTIFICATE OF COMPLIANCE AS TO FONT

I certify that the size and style of type used in this brief is 12-point "Courier New," in compliance with Rule 9.210(a)(2).



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