IN THE SUPREME COURT OF FLORIDA

RICHARD EARL SHERE, JR.,

Appellant,

v. CASE NO. 91,614

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State does not accept the argumentative and incomplete statement of the case and facts contained in Shere's brief[1]. Rather, the State relies upon the facts set out below. To the extent that Shere may rely upon Appendices A and B to his Initial Brief, any such reliance is improper. Those documents are unauthenticated, and have no relationship to any issue before this Court.

THE TRIAL EVIDENCE

On direct appeal from his conviction and sentence, this Court summarized the facts of the crime as follows:

> The victim, Drew Snyder, was reported missing in December 1987, and the ensuing investigation led to Shere, whom police contacted three weeks after Snyder's disappearance. Shere waived his *Miranda* (FN2) rights, made a series of statements, and led detectives to various scenes involved in the murder. (FN3)
>
> According to those statements, Shere said Bruce "Brewster" Demo told him on December 24 that Snyder was going to inform the police about Demo's and Snyder's theft of some air conditioners. Demo also advised Shere that Snyder was a "big mouth" who "had ratted out" on Shere as well. Shortly after midnight on the morning of December 25, Shere received a telephone call from Demo advising him that Demo was thinking about killing Snyder, and Demo threatened to kill Shere if he did not help.

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[1]Shere's "Statement of the Facts" does not set out any facts relating to this appeal, nor does it refer to the hearing conducted in the Circuit Court. Instead, that part of his brief is an inaccurate and argumentative version of the facts from Shere's trial. As such, Shere's brief does not comply with *Florida Rules of Appellate Procedure* 9.210(b)(3). ("The initial brief **shall** contain the following, in order: . . . .").

Shere then went to Demo's house where Demo loaded a shovel into Shere's car. They smoked marijuana, drank beer, went to Snyder's house at about 2:30-3:00 a.m., and talked Snyder into going rabbit hunting.

At some point during the hunt in the early morning hours, Shere placed his .22-caliber pump action rifle on the roof of the car so he could relieve himself. Suddenly, Shere said, Demo grabbed the rifle, and Shere heard the weapon discharge. Shere dropped to the ground and heard Snyder say, "Oh, my God, Brewster," followed by several more shots. When the shooting stopped, Shere got up and saw Snyder, still breathing, lying on the back seat of the car. Shere said he wanted to take Snyder to the hospital, but Demo took out his own gun, a .22-caliber pistol, and shot Snyder in the forehead, pulled him out of the car, and shot Snyder again in the chest. After the last shot was fired, they loaded Snyder's body into the trunk and drove to a nearby location where Shere said Demo made him dig a hole and bury the body. Then Shere took Demo home, drove to his own house, cleaned up, and burned the bloodied back seat of his car in the back yard.

At Demo's suggestion, Shere said, he and his girlfriend, Heidi Greulich, (FN4) went to Snyder's house later that day, gathered some of Snyder's belongings, then drove to Clearwater to dump the belongings, hoping to leave the impression that Snyder had suddenly left town. Shere also said he traded the .22-caliber rifle after the murder. Detectives recovered the rifle and Shere identified it as one of the weapons used to shoot Snyder.

Contradicting Shere's account, Demo made a statement to detectives in which he accused Shere of firing the first shots. Detective Alan Arick testified in the defendant's case without objection that Demo said he turned his back to the car to relieve himself when he heard a shot. He turned and saw Shere pointing the rifle at Snyder, then Shere fired at Snyder five or six times through the car's window. Demo said Shere pointed the gun at him and told him to finish off Snyder, Arick testified. Demo said he fired the pistol two times into Snyder's head and one time to the heart, including "the fatal shot." Demo told Arick he made Shere dig the grave because he was upset by what Shere had done to Snyder.

Greulich testified as a court witness about a statement

she made to detectives in January 1988. In her statement she told detectives that she overheard Shere's end of the telephone conversation with Demo in the early hours of December 25. Shere reportedly said to Demo "I can't believe Drew would turn state's evidence against me." When Shere returned home on the morning of December 25, Greulich told detectives, she saw blood on Shere's jeans and on the back seat of Shere's car. Greulich testified that Shere told her he alone killed Snyder, but he said that only to protect her, because "[i]f I knew Brewster was out there, Brewster would have hurt me."

Shere's friend, Ray Pruden, testified that one night after Christmas Shere told him he shot Snyder to death while out rabbit hunting. He said he shot him ten or fifteen times, then buried the body. Shere did not say that Demo was involved, Pruden testified.

Medical testimony established that Snyder was shot to death with ten gunshots. Three shots were fired into his head, one shot was fired through the chest, and other shots were fired into the back, the buttocks, the right thigh, and the right forearm. Death could have been caused by gunshot wounds to the head or chest. The medical examiner testified that any of the shots could have caused pain had Snyder been conscious, but there was no evidence that Snyder was conscious.

Seven projectiles were removed from the body during the autopsy. Ballistics evidence showed that shots fired into Snyder's head came from the pistol, one bullet recovered from Snyder's leg was fired from the rifle, and others could not be clearly identified. Other forensic evidence established that shots had been fired in Shere's car, that human blood was found on Shere's boots, and that a hair from Snyder was found on Shere's jacket.

The jury found Shere guilty and recommended the sentence of death by a vote of seven to five. In its written findings to support the death sentence, the trial court found three aggravating circumstances: 1) the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws by eliminating a witness; (FN5) 2) the murder was especially evil, wicked, atrocious, or cruel; (FN6) and 3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (FN7) In mitigation, the court wrote

that it considered numerous possible mitigating circumstances, rejected some, and found that "the aggravating circumstances far outweighed the mitigating circumstances."

> FN2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
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> FN3. One of the statements was recorded, and that recording was played to the jury. Detective Alan Arick related to the jury the contents of Shere's other statements.
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> FN4. Heidi Greulich said that subsequent to the murder, she and Shere married, and she testified under the name Heidi Greulich Shere.
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> FN5. *See* Sec. 921.141(5)(g), Fla.Stat. (1987).
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> FN6. *See id.* Sec. 921.141(5)(h).
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> FN7. *See id.* Sec. 921.141(5)(I).

Shere v. State, 579 So.2d 86, 88-89 (Fla. 1991).

THE 3.850 PROCEEDINGS

On February 1, 1993, Shere filed his first *Florida Rule of Criminal Procedure* 3.850 motion. A *Huff* hearing was conducted on September 13, 1996, and, on June 4, 1997, an evidentiary hearing was conducted on Shere's ineffective assistance of counsel claims. The evidence presented at that hearing is set out below.

At the hearing on Shere's Rule 3.850 motion, Shere presented the testimony of James Larson, who is a Ph.D. in Clinical Psychology (TR 15-16). Dr. Larson conducted various mental state testing (TR 22-24), and testified that Shere's cognitive function is within the normal, or average, range, and that his personality,

as revealed by the MMPI-II, is "not particularly remarkable." (TR 23-124). Shere is "not very dysfunctional" (TR 29) and displays no indication of significant brain damage. (TR 30). Dr. Larson's ultimate diagnosis of Shere is poly-substance abuse and a personality disorder "not otherwise specified." (TR 80).[2] Shere told Larson that he had lied about his involvement in the murder, and had, in fact, fired some of the shots into the victim. (TR 65). Shere is not mentally retarded (TR 124), even though the initial *Florida Rule of Criminal Procedure* 3.850 motion alleged that he was. Dr. Larson does not know if Shere is brain damaged, or not. (TR 79).

Genie Toner was an Assistant Public Defender at the time of Shere's trial, and represented him at the penalty phase of his murder trial (TR 132-135). Ms. Toner was responsible for the penalty phase of Shere's trial. (TR 136). She attended at least one seminar concerning the representation of defendants facing capital murder charges prior to Shere's trial (TR 137), and met with Shere, explained the penalty phase to him, and asked him to provide the names of potential penalty phase witnesses. (TR 138). A mental state professional was appointed to assist in the defense. (TR 140).

Ms. Toner knew about a head injury sustained by Shere at

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[2]Shere does not have a "dependent personality". (TR 112; 122).

approximately age eleven (TR 141), and knew that he had a history of headaches, but was told that those headaches stopped after Shere moved to Hernando County. His family reported no other changes in his behavior. (TR 146). Ms. Toner discussed potential mental state issues with the appointed mental state expert, and interviewed Shere's family regarding symptoms of mental illness. (TR 146). Shere's headaches were not used as a penalty phase strategy because they had stopped (TR 166), and the assistant public defender believed that the penalty phase case would be detrimentally affected by an attempt to rely on the headaches as some sort of mitigation. (TR 167). As mitigation, the assistant public defender attempted to establish that Shere was a follower, that he had few original thoughts, that he was a good child, that he had emotional problems, that his young age (21) was a mitigator, and that his drug use also mitigated his culpability. (TR 173).

Ms. Toner testified that Shere participated fully in the selection of the jury that tried his case, and that he knew at least one juror from school, and wanted to keep that individual on the jury. (TR 178). Ms. Toner was concerned that that juror might have a negative opinion of Shere because other people whom he had suggested would speak favorably of him in fact held a low opinion of him. (TR 179). Shere was satisfied with the jury that was empaneled to hear his case. (TR 181). At the guilt phase of his trial, Shere made the decision not to testify. (TR 182). During

his penalty phase testimony, Shere testified that alcohol and drugs did not make him do anything that he would not normally do. (TR 200).

Assistant Public Defender Allen Fanter represented Shere during the guilt phase of his capital trial. (TR 205-206). Shere participated in jury selection as much as any client ever did (TR 248), and had the final say over which jurors were actually empaneled. (TR 249). Assistant Public Defender Fanter testified that he was attempting to exhaust his peremptory challenges in order to preserve cause challenge and change of venue issues for direct appeal. (TR 252). Shere gave at least three versions of his "story" (TR 255-256), and, when a mock direct and cross-examination were conducted with Shere, his performance was "terrible." (TR 257).

At the conclusion of the state's case, the evidence was that Shere alone was responsible for the murder, and the only evidence to the contrary was Shere's self-serving statement that co-defendant Demo was involved. (TR 263). Assistant Public Defender Fanter had represented Shere on other cases, and had never observed anything that was indicative of mental state problems. (TR 267). It is not unusual for clients to have difficulty facing reality as to the potential sentence they face, but such does not indicate mental illness. (TR 268). There was no indication that Shere was incompetent, nor was there any basis upon which to pursue a defense

of insanity, a lack of ability to form specific intent, or voluntary intoxication. (TR 269-70). In any event, a defense of voluntary intoxication would have been inconsistent with the theory of defense.

Shere's sister, Julie, testified that when Shere sustained a head injury as the result of a fall, no adults at the scene called for medical help. (TR 304). Shere's school problems came mainly from his parents' divorce. (TR 305). Julie Shere also denied that the assistant public defenders showed them the courtroom prior to trial. (TR 308)[3]

Shere's father testified that the defendant never missed school as a result of the headaches that he claimed to have suffered, and that those headaches were not significant enough to require a trip to the doctor. (TR 324). Shere's father also denied having been shown the courtroom prior to trial. (TR 327). Shere's mother testified that the fact of her son's fall was known at the time of trial. (TR 342).

The defendant testified that he is not sure if he told his defense attorneys about his "fall" in any detail (TR 408), and further testified that there was no discussion of the penalty phase presentation until after the jury had found him guilty of first-degree murder. (TR 413). However, all of the penalty phase

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[3]This is in direct contravention of the testimony of the assistant public defenders. (TR145; 152-53).

witnesses referred to by Shere during his testimony were on the witness list filed by his attorney several months before trial. (TR 415-17). The defendant testified that his attorneys were lying in their testimony regarding his decision not to testify, and, moreover, testified that he thought his mock testimony went quite well. (TR 421).[4] According to the defendant, his taped-recorded statement was misleading because the law enforcement officers "led him." (TR 421-22). People often misunderstand what Shere says, and he has no reason to lie at this time. (TR 425-26). Shere expressly denied telling Dr. Larson that he shot the victim. (TR 424).

Public Defender Investigator David Franklin was involved in the investigation of both the guilt and penalty phases of this case. (TR 441). He was not successful in developing Shere as a follower, and his teachers were of no help in establishing that theory. (TR 443). In fact, one teacher recalled Shere as hostile and "definitely a leader." (TR 443-44). There was no sign whatsoever that Shere was incompetent or psychotic, but he was unrealistic about the sentence he expected to receive. (TR 445). Shere's version of events kept changing over the course of the case. (TR 446). Investigator Franklin made notes of his witness interviews, and, when the public defender's involvement was

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[4]Shere organized what can best be described as "moot court" while in the county jail awaiting trial during which he "went over" his testimony with other inmates. According to Shere, only one inmate voted to convict. (TR387).

concluded, the file was turned over to the Capital Collateral Representative. Items were missing from the file when it was returned from CCR. (TR 449). One of the standard questions asked by Investigator Franklin concerned the existence of any prior head injuries. (TR 450).

Dr. James Fisher is a semi-retired psychologist who evaluated Shere at the request of the defense. (TR 461-63). He felt that Shere's expectation of receiving a three to five-year sentence was unrealistic in light of the facts of the crime. (TR 478). Because of that opinion, Dr. Fisher is certain that Shere must have described at least some of the facts to him. (TR 479). Dr. Fisher inquired about prior head injuries, and, if one had been revealed to him, information about it would have been in his report. (TR 479-80). Dr. Fisher observed no indication of brain damage (TR 481), and found nothing to suggest that Shere is or was psychotic. (TR 488). Dr. Fisher had evaluated several defendants for Assistant Public Defender Fanter as of the time of Shere's trial. (TR 489). The subsequent testing by defense expert Larson is consistent with the results obtained by Dr. Fisher, and, in fact, some of Larson's testing reveals an even more "normal" individual than did Fisher's testing. (TR 435-36).

On August 1, 1997, the Marion County Circuit Court denied relief on all claims. Notice of appeal was given on October 9, 1997, and, on January 16, 1998, the record was certified as

complete and transmitted.

SUMMARY OF THE ARGUMENT[5]

Shere's claim that he is entitled to relief based upon ineffective assistance of his collateral attorney is foreclosed by binding precedent. To the extent that Shere attempts to argue that the trial court erred when it denied relief on his claim of ineffective assistance of trial counsel, that claim fails. The collateral proceeding trial court properly denied relief on all aspects of Shere's ineffective assistance of counsel claims.

Shere's claim concerning the "poisoned well of judicial objectivity" has no legal or factual basis, and is not a ground for relief.

Shere's claim that the Florida Death Penalty Act is unconstitutional is foreclosed by a double layer of procedural bar because this claim has, in part, been litigated and decided adversely to Shere on direct appeal. This claim is also procedurally barred because other components are raised for the first time on appeal from the denial of Rule 3.850 relief.

ARGUMENT

I. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

On pages 12-40 of his brief, Shere argues that he is entitled to relief based upon ineffective assistance of counsel at trial and

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[5]Shere's brief does not contain a summary of the argument as required by *Florida Rule of Appellate Procedure* 9.210(b)(4). See note 1, above.

during the *Florida Rule of Criminal Procedure* 3.850 hearing. The Rule 3.850 trial court correctly denied relief on Shere's ineffective assistance of trial counsel claims after conducting an evidentiary hearing on the allegations contained in Shere's Rule 3.850 motion. That ruling is correct for the reasons set out below. The ineffective assistance of collateral counsel claim is foreclosed by binding precedent, and is not a basis for relief.

THE INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL COMPONENT

Shere's claim that he is entitled to relief (of some unspecified sort) based upon the ineffectiveness of his collateral proceeding counsel is meritless as a matter of law. In *Lambrix v. State,* this Court held **"claims of ineffective assistance of postconviction counsel do not present a valid basis for relief.** *Murray v. Giarratano,* 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)." *Lambrix v. State,* 698 So.2d 247, 248 (Fla. 1996). That decision, which Shere makes no effort to distinguish (and does not even mention in his brief), is controlling.

Shere also argues, on page 26 of his brief, that "ineffective assistance of postconviction counsel may be cause for overcoming procedural bars. *Henderson v. Sargent,* 926 F.2d 706 (8th Cir. 1991); *Toles v. Jones,* 888 F.2d 95 (11th Cir. 1989) (per curiam), *vacated,* 905 F.2d 346 (11th Cir. 1990), *reinstated,* 951 F.2d 1200

(11th Cir.) (*en banc*), *cert. denied*, 506 U.S. 834, 113 S.Ct. 106, 121 L.Ed.2d 65 (1992)." That argument is false. The concept of "cause," as it appears in Shere's brief, is a federal habeas corpus theory which applies in the procedural default context in habeas litigation. There is no State law counterpart to the federal habeas "cause" concept. Second, and most significantly, Shere's argument has been foreclosed by binding precedent (which he does not even mention) since 1991, when the United States Supreme Court decided *Coleman v. Thompson*, 501 U.S. 722 (1991), and **expressly held that ineffective assistance of postconviction counsel cannot and does not constitute "cause" to excuse a procedural default.** The Eighth Circuit vacated the *Henderson* decision after *Coleman* was decided, *Henderson v. Sargent*, 939 F.2d 586 (8th Cir. 1991), and the Eleventh Circuit's final *Toles v. Jones* opinion expressly holds that ineffective assistance of postconviction counsel does not constitute cause to excuse a procedural default.[6] Shere's claim of ineffective assistance of counsel during the collateral proceeding is meritless as a matter of law. *See also, Jones v. Crosby*, 137 F.3d 1279 (11th Cir. 1998).

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[6]*Toles* is cited in Shere's brief as if it supports Shere's position. The true facts are that the **first** *Toles* opinion held that ineffective assistance of collateral counsel did **not** constitute cause for procedural default purposes. That original panel decision was ultimately reinstated, and stands as the law in this Circuit.

THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS

Shere also argues (apparently) that the Rule 3.850 trial court erred when it found the ineffective assistance of trial counsel claim meritless. Despite Shere's hyperbole to the contrary, that determination is correct in all respects, and should be affirmed.

The Legal Standard

The standard by which claims of ineffective assistance of counsel are evaluated is the well-known *Strickland v. Washington,* 466 U.S. 668, 687 (1984), standard, in which the United States Supreme Court held that:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

See also, Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). That standard is in the conjunctive, and, unless the defendant can establish both deficient performance **and** prejudice, he is not entitled to relief. *Maxwell,* supra. In order to establish the deficiency prong of *Strickland,* the defendant must establish that counsel's performance fell outside the wide range of professionally competent assistance. *Strickland, supra,* at 688. The prejudice prong of the standard is established by a showing that there is a reasonable probability that "but-for counsel's unprofessional

errors, the result of the proceeding would have been different." *Id.*, at 694. Moreover, contrary to Shere's suggestion, the *Strickland* standard is not an outcome-determinative one. Instead, that standard evaluates whether or not the proceeding itself was unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364 (1993). As the *Fretwell* Court emphasized, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.*, at 843.

Review of trial counsel's performance is highly deferential, especially where matters of trial strategy are concerned. *Strickland, supra*, at 689-90. Extensive scrutiny and second-guessing of attorney performance are not appropriate, and the analysis of any claim of ineffective assistance of counsel must begin with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, supra*, at 689. A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So.2d 341, 343 (Fla. 1988). Even if the defendant establishes that a more thorough investigation might have been conducted, and even if that investigation might have been fruitful, such a showing does not establish that counsel's performance fell outside of the wide range of reasonably effective assistance. *Burger v. Kemp*, 483 U.S. 776, 794 (1987).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Francis v. State,* 529 So.2d 670, 672 n. 4 (Fla. 1988). The ultimate question is not what the best lawyer would have done, nor is it what most good lawyers would have done -- the question is only whether a competent attorney reasonably **could** have acted as did Shere's attorney given the same circumstances. *See, White v. Singletary,* 972 F.2d 1218, 1220-1221 (11th Cir. 1992). That standard is a high one, with the result that the "cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant,* 13 F.3d 384, 486 (11th Cir. 1994). Shere cannot carry his burden of proof, and the Circuit Court's denial of relief on ineffective assistance of counsel grounds should be affirmed in all respects.

The Individual Claims

In his brief, Shere raises several instances of claimed ineffective assistance on the part of trial counsel. The first discernable claim is Shere's assertion that he is entitled to relief because defense counsel called Detective Alan Arick as a defense witness during the guilt phase of Shere's capital trial. This claim was addressed during the evidentiary hearing, and the

Circuit Court made the following findings of fact regarding it:

> The record of the trial and the testimony presented during the evidentiary hearing clearly establish that the decision to offer evidence of the codefendant's admissions regarding his own involvement in the murder was a tactical judgment on the part of defendant's trial counsel. At the conclusion of the State's case the defendant was in a desperate situation. Although the defendant blamed the murder on his codefendant in his statement to law enforcement, the State also introduced evidence at trial that the defendant gave several inconsistent statements after his arrest (R.336-455). The State also established that the defendant told his girlfriend that he had killed the victim himself (R. 714-717) and that he told a friend, Ray Pruden, that he had shot the victim "ten or fifteen times", that he had buried the victim "where nobody would find him", and that the defendant had made no mention of any involvement by the codefendant (R. 739). The physical evidence, including projectiles removed from the victim's body that came from defendant's gun, was extremely damaging. The state's case-in-chief did not leave any doubt that the defendant played a major role in the murder and subsequent coverup. It is likely that nothing the defendant or his attorneys could have done at that point would have avoided a conviction for first degree murder. They had a choice of resting and reserving their right to opening and closing final arguments, or of mounting some kind of defense, weak as it was. Other than the order of final arguments, defendant did not have anything to lose.
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> If counsel had made a careless or unconcerned decision to [] introduce the evidence, the court would be concerned. [citation omitted]. The court would also be concerned if the decision was made by an uninformed and inexperienced attorney. However, defendant was represented by a highly competent and ethical trial attorney who has dedicated his life to defending people who are charged with crimes. He was assisted in trial by an excellent associate. He had the benefit of advice from a highly experienced investigator and experienced attorneys working in his own office. They had the assistance of a reliable mental health professional that his office uses in many cases. They investigated every avenue of defense and mitigation suggested by the evidence, and all information they were furnished by the defendant, his family, his wife, and the psychologist.

> Counsel made the tactical decision after considering all of the evidence against his client and after considering all other alternatives. [citation omitted]. Although this strategy may appear futile, this court has seen weaker arguments prevail in front of a jury of untrained citizens. Finally, the fact that introducing portions of the codefendant's statement opened the door to other inculpatory evidence was not of much consequence given the fact that the defendant's statements to law enforcement and his friends were already before the jury and those statements portrayed him as a cold and ruthless killer.
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> The court finds that the defense attorney's decision to introduce the codefendant's statements was not "a clear, substantial deficiency" that was "outside the broad range of reasonably competent performance under prevailing professional standards." [citation omitted]. The codefendant's statement confirmed that he fired the fatal shot and that the defendant did not act alone. The defense believed these facts would mitigate against a conviction of first degree murder and more importantly, against a recommendation of death. Also, no matter how the defendant or his attorneys tried to rationalize his involvement in the crime, there was overwhelming evidence that the defendant was guilty of first degree murder. The defendant did not prove that his attorneys' strategy prejudiced the outcome of the trial or that it "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." [citation omitted].

(R2649-2652). Those findings are not clearly erroneous, are in accord with settled law, and should be affirmed in all respects.

On pages 17-20 of his brief, Shere argues that he is entitled to relief based upon "omissions of adversarial examination." However, the "omissions" in connection with this claim took place when Shere did not raise these claims in his Rule 3.850 motion. (R2471). Florida law is long-settled (and it is a basic premise of appellate practice) that claims cannot be raised for the first time

on appeal from the denial of a Rule 3.850 motion. *Doyle v. State,* 526 So.2d 909, 911 (Fla. 1988). The inclusion of these "claims" in Shere's appeal demonstrates clearly that nothing is easier than to be wise after the fact, and, when working with the benefit of time and a made record, "issues" can always be "identified." *Waters v. Thomas,* 46 F.3d 1506, 1517 (11th Cir. 1995). Of course, a defendant is not entitled to a "perfect" trial, and the standard used in evaluating a claim of ineffective assistance of counsel is not what the best lawyer would have done, or even what a good lawyer would have done. *Waters, supra.* Likewise, the standard is not how present counsel would have tried the case, even though Shere's brief leaves no doubt that his present attorney disagrees with trial counsel's approach to this case. *Card v. Dugger,* 911 F.2d 1494, 1520 (11th Cir. 1990). Shere has not demonstrated that counsel's performance was deficient, and, moreover, has not demonstrated that he was prejudiced by counsel's actions. Because that is so, he has failed to carry his burden of proof. The Circuit Court's denial of relief is correct, and should be affirmed.

On pages 20-24 of his brief, Shere alleges, for the first time, that trial counsel "failed to act as an advocate." This claim was not raised in the Rule 3.850 motion, and cannot be raised for the first time on appeal from the denial of relief. *Doyle, supra.* To the extent that Shere suggests, on page 24 of his brief, "that the State's case does not support the conviction of anyone of any

crime using the beyond a reasonable doubt criteria," that argument ignores the direct appeal opinion of this Court which found the evidence sufficient to support the conviction. *Shere, supra,* at 95. Likewise, Shere's claim of trial counsel's "failure to focus on uncontroverted testimony and evidence" is raised for the first time on appeal. Because that is true, this claim is improperly raised. *Doyle, supra.* In any event, the most that claim demonstrates is that present counsel would have tried the case differently. That is not the proper standard, and, in actuality, is the height of second-guessing of the very sort prohibited by *Strickland v. Washington, supra.* This claim does not present a basis for reversal.

On pages 33-35 of his brief, Shere sets out a "summary of facts." The utility of that portion of his brief is unclear, and its purpose is not apparent.[7] To the extent that the "summary" is sufficient to present any issues, such issues are not a basis for relief for the reasons set out above.

On pages 35-40 of his brief, Shere sets out a "summary of law," the purpose of which is, again, unclear. To the extent that that portion of the brief argues for a "presumption of prejudice" based upon an "actual or constructive denial of counsel" (*i.e.,* a *Cronic* violation), that claim is raised for the first time in this

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[7]This "summary" is clearly not intended to be the "Summary of the Argument" required by the Appellate Rules because it does not address all issues raised in the brief.

appeal and may not be considered. *Doyle, supra*. Further, Shere has established no facts that even suggest an actual or constructive denial of counsel of the character necessary to establish a right to relief under the narrow *Cronic* criteria. This "issue," if that is what it is intended to be, is meritless.

II. THE "POISONED WELL OF JUDICIAL OBJECTIVITY" CLAIM

On pages 40-56 of his brief, Shere "takes issue with the opinions of the trial court and the evidentiary hearing court, one and the same person, regarding the Appellant's conduct and credibility." *Initial Brief* at 41. The precise nature of the "poisoning" claim is unclear, and the basis for relief contained within that claim is unidentified. However, regardless of those facts, it is clear that there is no reversible error contained in Claim II of Shere's brief.

Shere's claim is apparently based upon the credibility determinations made by the Circuit Court with regard to Shere's testimony. However, there is no support for the concept that an adverse credibility determination establishes "judicial bias," nor is there any basis for Shere's complaint based upon assignment of the Rule 3.850 proceeding to the original trial judge. Despite the histrionics of Shere's brief, the Circuit Court was entitled (and required) to make various credibility determinations in the course

of deciding the Rule 3.850 motion[8]. The fact that those decisions were adverse to Shere does not prove anything.[9] If the law were as Shere suggests, no case could ever be concluded adversely to any defendant because such a result would demonstrate "judicial bias." That is not the law because it is absurd. To the extent that Shere argues, on page 43 of his brief, that ineffective assistance of counsel "contributed to a poisoning of the court's thinking," that claim, to the extent that it can be considered a "claim," was not raised below, and cannot be raised for the first time on appeal. *Doyle, supra.*

On pages 43-44 of his brief, Shere argues that it was error to call Heidi Gruelich as a court witness, and that, because this is a death penalty case, "no error is harmless." The court-witness component of this claim was raised on direct appeal and decided adversely to the defendant's position. *Shere, supra,* at 90-94. Claims that were raised and decided on direct appeal may not be relitigated in a Rule 3.850 motion, and, moreover, claims may not

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[8]The situation about which Shere complains is no different than the situation that exists when the trial judge is required to make a pre-trial ruling on a defendant's motion to suppress. By its very nature, such a ruling requires the trial court to determine the defendant's credibility. An adverse ruling (which includes an adverse credibility determination) is not grounds for recusal, nor does it call the impartiality of the court into question.

[9]Of course, adverse rulings do not provide a legally sufficient basis for disqualification of a judge. *Barwick v. State,* 660 So.2d 685, 692 (Fla. 1995); *Jackson v. State,* 599 So.2d 103, 107 (Fla. 1992); *Gilliam v. State,* 582 So.2d 610, 611 (Fla. 1991); *Tafero v. State,* 403 So.2d 355, 361 (Fla. 1981).

be raised for the first time on appeal from the denial of a Rule 3.850 motion[10]. *Doyle, supra.* This "claim" suffers from both deficiencies, and, therefore, does not provide a basis for relief. Moreover, to the extent that Shere argues that "no error is harmless" in a death case, that argument is frivolous. The cases to the contrary are far too numerous to mention. *See, e.g., Hitchcock v. Dugger,* 481 U.S. 393, 399 (1987); *Bottoson v. State,* 674 So.2d 621 (Fla. 1996); *Horsely v. Alabama,* 45 F.3d 1486 (11th Cir. 1995). To the extent that Shere attempts to litigate the sufficiency of this Court's harmless error analysis, that claim was not raised in the Circuit Court and cannot be raised for the first time in this appeal. *Doyle, supra.*

On pages 44-50 of his brief, Shere argues that the Rule 3.850 trial court "confused the facts." In fact, the factual findings of that court are based upon the credible evidence contained in the record of the Rule 3.850 hearing, and, to the extent that some of that evidence is conflicting, the court's resolution of that conflict cannot be clearly erroneous. Shere's argument, at its most fundamental level, is that the trial court was wrong because it did not believe Shere's version of the facts and the slant that he has placed on the evidence. When all of the evidence is considered

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[10]*Florida Rule of Criminal Procedure* 3.850 is clear in its prohibition on relitigation of previously-decided claims. Likewise, this Court's prior decisions leave no doubt about the validity of this procedural bar. *See, Clark v. State,* 460 So.2d 886, 888 (Fla. 1984).

(rather than limiting the evidence to that which suits Shere's purpose), the trial court's order is well-supported by competent, substantial evidence, and should be affirmed in all respects.[11]

On pages 50-55 of his brief, Shere argues that "credible trial evidence contradicts most of the court rulings on aggravators and mitigators." Insofar as the cold, calculated, and premeditated aggravator is concerned, this Court upheld its application in this case on direct appeal. *Shere,* 579 So.2d at 95. Under settled law, Shere cannot relitigate that claim for a second time in his Rule 3.850 motion. *See, Jones v. Dugger,* 533 So.2d 290, 292 (Fla. 1990). If Shere's claim is that the 3.850 trial court should not have referred to the cold, calculated, and premeditated aggravator in the order denying Rule 3.850 relief, that argument is absurd because that aggravator was upheld on appeal. If Shere's claim is that the cold, calculated, and premeditated aggravator does not apply to this case, that claim is procedurally barred for the additional reason that it was not contained in the Rule 3.850 motion. *Doyle, supra.*

To the extent that Shere challenges the jury instructions given on the aggravators, the Rule 3.850 court correctly found those claims procedurally barred because those claims could have

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[11]On page 50 of his brief, Shere argues that "*Socher* [sic] *v. Florida* [citation omitted] and *Maynard v. Cartwright* [citation omitted] are applicable to the Shere case." Neither of those cases address the "issue" for which they are cited, and Shere's reference to those cases makes no sense.

been but were not raised at trial or on direct appeal. (R2653-2655). That is a settled procedural bar under Florida law. *Jackson v. State*, 648 So.2d 85, 90 (Fla. 1994). To the extent that Shere attempts to raise a "procedural due process" claim on page 51 of his brief, that claim was not raised in the trial court, and cannot be raised for the first time on appeal from the denial of Rule 3.850 relief. *Doyle, supra*. In any event, even if that "claim" was cognizable, it would not avoid the preclusive effect of the clear procedural bar.

On page 52 of his brief, Shere argues that "[i]n addition to the CCP aggravator, the EH Court found that the Appellant had no pretense of moral or legal justification, despite credible evidence establishing that he was not the shooter." If that argument is that the cold, calculated, and premeditated aggravator should not apply in this case, that claim was rejected on direct appeal, *Shere, supra* -- it is wholly improper to attempt to relitigate those claims in a Rule 3.850 motion. Finally, if the argument is that the absence of any pretense of justification for the murder is a fact that exists separate and apart from the cold, calculated, and premeditated aggravator, that argument makes no sense. The lack of any pretense of moral or legal justification is a component part of the cold, calculated, and premeditated aggravator, and its existence was affirmed by this Court on direct appeal. *Shere, supra*.

On pages 52-53 of his brief, Shere appears to argue that the "hindering law enforcement" aggravator does not exist. In his Rule 3.850 motion, Shere raised a claim concerning the **jury instruction** given as to this aggravator, but did not challenge the finding of the aggravator itself.[12] Because the claim contained in Shere's brief was not raised in the Circuit Court, it cannot be raised for the first time on appeal from the denial of relief. *Doyle, supra.* If Shere's claim is that the aggravator does not apply, this Court found to the contrary on direct appeal, when it held, in the context of ruling on the jury instruction claim, that this aggravator was supported by the evidence. *Shere, supra,* at 95.

To the extent that Shere argues that his "lack of an adult criminal record" was not properly considered in mitigation, the sentencing order (which is attached to Shere's initial brief as "Appendix C") shows that Shere was on pretrial release pending trial on Burglary and Robbery charges, and, by his own admission, was selling illegal drugs at the time of the murder. (R1456). The trial court properly refused to find the "no significant criminal history" mitigator. In any event, this claim is barred because it could have been but was not raised on direct appeal. To the extent that this sub-claim raises any other claims, such claims are raised for the first time in this appeal, and are not available to Shere

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[12]The Rule 3.850 trial court properly found the jury instruction claim procedurally barred. (R2655).

under long-settled law. *Doyle, supra.*

On pages 55-56 of his brief, Shere argues that there can be no procedural bar to consideration of **any** claim in a case in which a death sentence has been imposed. That claim, which is itself procedurally barred because it is raised for the first time in this appeal, is frivolous. This Court, and the federal courts, have repeatedly imposed and upheld procedural bars to consideration of untimely claims. *See generally, Wainwright v. Sykes,* 433 U.S. 72 (1977). While Shere employs various constitutional "buzzwords" in his argument, the fact that he cannot escape is that no constitutional issue is implicated by the procedural bar rule. This argument is undeserving of further comment. It does not establish a basis for relief.

III. THE UNCONSTITUTIONAL STATUTE CLAIM

On pages 57-63 of his brief, Shere argues that the Florida death penalty act is unconstitutional "in his case, . . . , based upon the credible and material factual evidence presented throughout the judicial proceedings." This, according to Shere, is because "aggravators were improperly applied to" him. This argument is foreclosed by a double layer of procedural bars.

The first procedural bar that applies to this claim is that the application of the cold, calculated, and premeditated aggravator to this case was litigated on direct appeal and decided adversely to Shere. *Shere, supra,* at 95. This court upheld that

aggravator, and the argument contained in Shere's brief is nothing more that his continuing quarrel with this Court's decision. Insofar as the "hindering law enforcement" aggravator is implicated, that claim was not raised on direct appeal, even though Shere did challenge the **jury instruction** given on that aggravator. The claim contained in Shere's brief, however, was never raised on direct appeal, and, therefore, is subject to a procedural bar.[13]

The second procedural bar to consideration of this claim is that the claim contained in Shere's brief is raised for the first time on appeal from the denial of Rule 3.850 relief. Under settled law, that is improper. *Doyle, supra.*

To the extent that Shere raises a claim concerning the Florida electric chair, that claim is procedurally barred because it could have been but was not raised at trial, on direct appeal, or in Shere's Rule 3.850 motion. That is a triple layer of procedural bars that precludes litigation of this claim. Alternatively and secondarily, this claim is controlled by *Jones v. State,* 701 So.2d 76 (Fla. 1997), and is without merit.

To the extent that Shere raises a claim that his death sentence is disproportionate, that claim is procedurally barred

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[13]Shere argues that he was an "accessory ... by his own words." *Initial Brief* at 58. That Shere stated such is not a surprise -- it is in his best interest to be an "accessory." However, Shere's self-serving testimony is not dispositive of the degree of his culpability. This Court determined, on direct appeal, that death was the proper punishment in this case.

because it could have been but was not raised on direct appeal or in the Rule 3.850 motion. To the extent that Shere argues that he is entitled to relief based upon "cumulative error," he does not deign to identify the purported errors for this Court. However, because no claim raised in this proceeding (whether properly preserved or not) is a basis for relief, there is no "error" to "cumulate" and, therefore, no basis for relief. The trial court should be affirmed in all respects.

CONCLUSION

Based upon the foregoing arguments and authorities, the 3.850 trial court's denial of relief should be affirmed in all respects.

Respectfully submitted,

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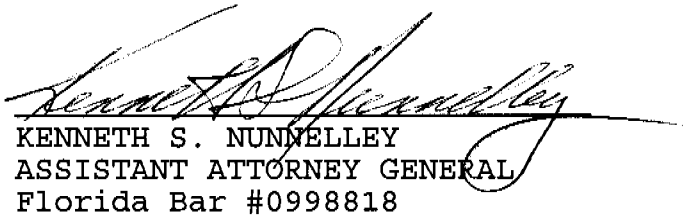
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to James H. Walsh, Capital Collateral Regional Counsel, Middle District, 405 North Reo Street, Suite 150, Tampa, Florida 33609-1004, this 17th day of August, 1998.

Of Counsel