IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,614

RICHARD EARLE SHERE, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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APPELLANT'S ARGUMENT IN RESPONSE AND REBUTTAL TO STATE'S ARGUMENT THAT APPELLEE'S CLAIMS OF INEFFECTIVENESS OF POST-CONVICTION COUNSEL ARE NOT A VALID BASIS FOR RELIEF.

A. LEGAL BASIS FOR RELIEF FOR INEFFECTIVENESS OF POST-CONVICTION COUNSEL

The Appellee's harsh dismissal of Appellant's contention that his post-conviction counsel was ineffective at the evidentiary hearing and that such ineffectiveness presents a valid basis for relief overlooks recent statutory and case law developments which should militate this Court to clarify its dicta contra in Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996); see also State v. Kenny, 23 Fla. L. Weekly S229 (1998), citing Hill v. Jones, 81 F.3d 1015, 1025 (11th Cir. 1996).

The Fifth District Court of Appeal, in Steele v. Kehoe, 23 Fla. L. Weekly D771 (1998), has certified to this Court the issue of whether, under the facts of Steele, the District Court should order a hearing to determine if post-conviction counsel was, in fact, retained and, if so, to address the issues such counsel should have raised in the Motion for Post-conviction Relief, which Mr. Steele alleges his counsel failed to file. Steele, 23 Fla. L.

Weekly at D771.

In Steele, the post-conviction attorney was sued for malpractice because he did not timely file a 3.850 motion, thereby barring, as by any statute of limitation, the client's ability to seek post-conviction relief. Id.

Although affirming (subject to the question certified) the dismissal of Mr. Steele's malpractice action on the ground that, even if Mr. Steele were entitled to damages, those damages should not be monetary but, rather, should remedy his continued incarceration, the Steele court confronted a case of negligence per se of post-conviction counsel and, thus, shined a stark light on the limitation of Appellee's reliance on Lambrix. For Steele squarely presents, in a non-capital context, the question: whether a defendant who retains post-conviction counsel, as Mr. Shere did, is then entitled to the effective assistance of that counsel and, if so, what remedy is available to him if counsel does not acquit himself competently? See also Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990) (defendant was denied effective assistance when post-conviction counsel failed to call several witnesses in post-conviction action seeking relief from judgment imposed after trial counsel failed to find and interview potential alibi witnesses); Iovieno v. Commissioner of Correction, 699 A.2d 1003 (Conn. 1997)

(habeas counsel found ineffective for failure to timely file the petition for certification to appeal); People v. Johnson, 609 N.E.2d 304 (Ill. 1993) (post-conviction counsel ineffective for failure to investigate and present evidence); Waters v. State, 574 N.E.2d 911 (Ind. 1991) (post-conviction counsel did nothing but enter Notice of Appearance); People v. Butler, 541 N.E.2d 171 (Ill. App. Ct. 1989) (post-conviction counsel ineffective for failing to raise issue concerning consecutive sentences); and Patton v. State, 537 N.E.2d 513 (Ind. Ct. App. 1989) (post-conviction counsel ineffective for failing to present evidence of attempt to reconstruct record of guilty plea hearing or evidence that reconstruction was not possible).

Based upon Steele and the above-cited cases commended to this Court from other jurisdictions, the Appellant urges this Court to examine the effectiveness of Mr. Shere's 3.850 counsel and, to assist the Court, briefly reiterates the factual bases of his claims against post-conviction counsel.

B. ALLEGATIONS OF INEFFECTIVENESS OF POST-CONVICTION COUNSEL

At Mr. Shere's evidentiary hearing, his privately retained 3.850 counsel failed to effectively examine the extent of his trial attorneys' experience and backgrounds. (EH Tr. 136, 206). The

record is incontrovertible that neither of Mr. Shere's attorneys had practiced law very long or had much, if any, experience in a murder case wherein the State is seeking the sanction of execution. (EH Tr. 136, 206). However, on examination of each attorney, Mr. Shere's 3.850 counsel extracted no specifics regarding their qualifications and expertise and appears not to have investigated either attorney sufficiently. (EH Tr. 136, 206). Surprisingly, Appellee accepts Ms. Buckingham-Toner's attendance at a seminar as acceptable experience for counsel in a capital case. (Answer Brief p. 5).

The 3.850 counsel also failed to take any steps to correct Mr. Fanter, the "lead"[1] trial counsel, when Mr. Fanter stated, "I am sure I did" when asked if he cross-examined Mr. Pruden, a key witness, at trial. (EH Tr. 276) The trial transcript shows that Mr. Fanter had no questions for Mr. Pruden at trial. (R. 741) Further, the 3.850 counsel failed to investigate or present Mr. Pruden, or to introduce documentation of Mr. Pruden's criminal record or commitment proceedings, documentation of which, because it was not properly discovered and introduced, the Appellee now

[1] Mr. Fanter and Appellee seem to concede that Mr. Fanter was "lead" counsel, but offer no explanation why he exercised no "lead" role, or role at all, in the penalty phase.

urges this Court to ignore. (Appellant's Brief, Appendix B).

The 3.850 counsel failed to present evidence or argument of how Mr. Shere's own testimony, properly prepared and presented by trial counsel, would have affected the outcome. (As it was, the substance of Mr. Shere's proposed testimony at trial was not tendered.) Instead, the quality of "mock trials" in the jail was bandied about. (EH Tr. 155, 257, 387-388, 421). However, the alleged mock interrogator, Mike Johnson, was not presented as a witness.

Regarding the devastating hearsay testimony of Bruce Demo, introduced at trial by the State through Mr. Fanter's blunder of calling Detective Arick as the only defense witness, the 3.850 counsel focused in his Motion on Mr. Fanter's failure to object to the prejudicial effect of the testimony rather than on attacking the folly of Mr. Shere's attorneys calling such a witness at all. (Motion at 14; R. 02485). Further, 3.850 counsel apparently did not talk to Mr. Demo, did not seek to call him as a witness, and did not call any witnesses to attack Mr. Demo's credibility or establish Mr. Demo's long criminal record or controlling nature, a key feature of the domination mitigator. Instead, the Court heard from Mr. Fanter's investigator of the hearsay statements by a middle-school teacher of Mr. Shere. (EH Tr. 443-444). Thus, the

3.850 attorney was fatally ineffective in failing to present evidence, which was readily available to him via Mr. Shere's clemency proceeding, that Demo was, in fact, a dominant leader, a killer, and, by the account of Regina Shaffer, his girlfriend, was, in fact, the dominant and actual killer of Mr. Snyder. Mr. Shere wanted the public defender to call Demo. (EH Tr. 406). Regrettably, Ms. Shaffer was not called as a witness. By contrast, Mr. Shere, a young man, had no substantial criminal record. (EH Tr. 398). As at his trial, during which his "penalty-phase lawyer," Ms. Buckingham-Toner, failed to competently present evidence of mitigation known to her, the 3.850 counsel failed to challenge the ill-formed record of Mr. Demo's likely actions as the actual killer of Mr. Snyder.

Similarly, the 3.850 counsel failed to properly investigate or produce Ray Pruden, who was "Baker-Acted" four months after testifying against Mr. Shere at trial. (Appellant Brief, Appendix B). Mr. Pruden's credibility was again unchallenged by Mr. Shere's counsel, despite the fact that Mr. Shere's trial counsel testified that the State had rested its case on the testimony of Mr. Pruden and Ms. Gruelich. (EH Tr. 261-263). Mr. Pruden was ignored and Ms. Gruelich, according to this Court, was improperly called as a witness by the trial court. Shere v. State, 579 So.2d 86, 94 (Fla.

1991).

Finally, 3.850 counsel did call Dr. Larson as an expert witness, although Dr. Larson's testimony did not help, and, in fact, damaged Mr. Shere's case. (EH Tr. 62-66). During Dr. Larson's examination, 3.850 counsel made no coherent argument as to what Dr. Larson's testimony was to accomplish, miring much of the hearing in speculative "psycho-babble" presented with no clear purpose and without adequate preparation.

Apparently, Dr. Larson was called to clear up the testimony of Dr. Fisher, who testified while on pain medication and who complained several times of his lack of coherence. (EH Tr. 482, 538). Dr. Fisher had been the expert appointed by the trial court upon the Motion of Mr. Fanter to assist the defense at trial, although by training he was not a psychologist but an education major. (EH Tr. 463). Dr. Fisher did testify that he thinks he talked to Ms. Buckingham-Toner and emphasized that she needed to check Mr. Shere's mental health history and rule out "manic personalty disorder." (EH Tr. 485-486). However, Ms. Buckingham-Toner consulted no expert on Dr. Fisher's recommendation. (EH Tr. 150). Dr. Larson noted that Dr. Fisher's report was "atypical" regarding mitigation. (EH Tr. 46-47).

The Appellee cites Mr. Fanter's opinion, as though he was

competent to provide such testimony, as support for its argument that Mr. Shere had no such mental state problems. (EH Tr. 267). At least Ms. Buckingham-Toner admits she knew nothing about such issues. (EH Tr. 142).

C. CONCLUSION

This Court should remand this case to the Circuit Court for a new evidentiary hearing on the ground that Mr. Shere's post-conviction counsel was prejudicially ineffective.

ARGUMENT II

ARGUMENT IN RESPONSE AND REBUTTAL TO APPELLEE'S ARGUMENT THAT THE CIRCUIT COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING THAT APPELLANT WAS NOT PREJUDICED BY NOT RECEIVING EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.[2]

A. THE STANDARD

The Appellant's trial was unfair and unreliable because his trial counsel, in both the guilt phase and the penalty phase, failed to represent him effectively. The performance of the Appellant's trial counsel was deficient, and the record reveals errors so serious that those two, inexperienced lawyers were, in reality, not functioning as counsel. Their performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668 (1984).

B. GUILT PHASE

Alan Fanter, Mr. Shere's "lead" counsel, who was apparently "assisted" by Ms. Buckingham-Toner (although she testified she was lead counsel on the penalty-phase), testified at the evidentiary hearing that he allowed Mr. Shere final say over jury selection. (EH Tr. 251). By failing to advise Mr. Shere on the selection of

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[2] To the extent the trial court summarily denied Claim III on the pleadings, the Appellee contends that those allegations were amended by the record of the evidentiary hearing and cites to the evidentiary hearing as support for his claim that trial counsel were ineffective in their investigation, preparation and conduct.

jurors and on his fundamental right to testify in his own behalf, Mr. Fanter abdicated his professional responsibility to advise his client of his constitutional rights. See Campos v. U.S., 930 F.Supp. 787 (D.N.Y. 1996) (defendant suffered prejudice as a result of trial counsel's failure to advise client he had fundamental right to testify). Allegedly, Mr. Fanter's "strategy" was to exhaust peremptory challenges to present cause challenge and change-of-venue issues for appeal. (EH Tr. 251-252). However, he does not indicate precisely how he or Ms. Buckingham-Toner attempted to "counsel" Mr. Shere on the selection of jurors. (EH Tr. 250-252).[3] Interestingly, his trial notes contained no reference to what Mr. Shere thought of the jurors. (EH Tr. 250).

Similarly, Mr. Fanter and Ms. Buckingham-Toner failed to advise their client on his fundamental right to testify. Campos, 930 F. Supp. at 787. In reality, Mr. Fanter believed that his client was a liar. (EH Tr. 216). He did not believe Shere's "self-serving" statement that Demo was involved. (EH Tr. 263). Mr. Fanter admitted that Shere did not trust him. (EH Tr. 217). Had he

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[3] Strangely, Ms. Buckingham-Toner claims that she was constrained from writing notes to Mr. Shere because a member of the State Attorney's Office had picked her notes out of the trash. (EH Tr. 180). Unfortunately, she is not asked about this or the "problem" it caused.

properly investigated Mr. Demo, he could not have held this poisonous opinion.

Further, despite evidence of drug use by Mr. Shere at the time of the offense, Mr. Fanter could see no basis for the assertion of the defenses of insanity, lack of ability to form specific intent, or voluntary intoxication. (EH Tr. 268-271).

Although Mr. Fanter did not believe his client and, apparently, did not familiarize himself with Brewster Demo's credibility, character, and record, the Circuit Court found that Mr. Fanter "had nothing to lose" at the end of the State's case by putting on, as Mr. Shere's only witness, Detective Arick, whose testimony would otherwise have not been introduced. (CC Order 10; R. 2650). At trial, however, the Court repeatedly cautioned against this folly. (EH Tr. 231). Apparently, Ms. Buckingham-Toner echoed Mr. Fanter's decision on the presentation of the taped statement introduced through Detective Arick as a defense witness, and, thus, Mr. Fanter offered up his client to the State. (EH Tr. 216).

The Appellee and Mr. Fanter seem to concur with the Trial Court that the case was over before the State rested and that Mr. Fanter would have been justified in any strategy that might bedevil the untrained citizens of the jury. (CC Order, P. 11; R. 02651).

However, despite the Trial Court's and the Appellee's conclusion that the case was over, Demo's testimony (admitted through Arick during the defense's case) was specifically cited by this Court on direct review as damaging, in conjunction with Pruden's, whom Mr. Fanter declined to cross-examine at all during the trial (an "omission of adversarial examination" the Appellee claims is now barred). Shere, 579 So. 2d at 90.

Finally, Mr. Fanter failed to foresee that, although "Demo's statement confirmed that he fired the fatal shot," Mr. Fanter would not be able to get that statement into evidence while the State would be able to introduce whatever it wanted on cross. A trial attorney who would take such a gamble and fail to understand the implications of such an elemental aspect of the adversarial system as the limitation of direct examination is ineffective, and that ineffectiveness allowed the State to introduce the most damaging, untested evidence against Mr. Shere, who was thus effectively denied, by his own attorney, his constitutional right of confrontation of witnesses. (EH Tr. 231-233).

C. PENALTY PHASE

The representation of Mr. Shere by Ms. Buckingham-Toner during the penalty phase of Mr. Shere's trial was prejudicially

ineffective.[4]

The Appellee is impressed that Ms. Buckingham-Toner attended at least one seminar concerning the representation of defendant's facing capital murder charges prior to Shere's trial. (EH Tr. 136). In preparation of her first murder trial, she met with Shere, explained the penalty phase to him, and asked him to provide her with names of potential penalty-phase witnesses. (EH Tr. 138). The extent of her further investigation and preparation then consisted of possibly talking to Dr. Fisher once and to three members of Shere's family, conversations far more meager in their memories than in hers. (EH Tr. 152).

Although Ms. Buckingham-Toner testified she intended to present a case that Mr. Shere was a "follower," her investigator, David Franklin, testified that his teachers were of no help. (EH Tr. 483). Again, like Mr. Fanter and Ms. Buckingham-Toner, Mr. Franklin considers himself competent to testify that Mr. Shere was

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[4] Again, Mr. Fanter and Ms. Buckingham-Toner do not directly address why or how allocation of responsibility was divided, but Appellant contends that Mr. Fanter, who seemed to be the lead attorney, was per se ineffective for abdicating all responsibility for the penalty phase to the unqualified Ms. Buckingham-Toner. Mr. Fanter's abdication is particularly ironic in light of his claim that he put Arick on, in part, to support the penalty-phase presentation. (Court Order, P. 11).

not psychotic, just "unrealistic." (EH Tr. 445).[5]

Most fatally, perhaps, Ms. Buckingham-Toner failed to take any significant action in response to Mr. Fisher's recommendation that his testing showed the possibility of "mania." (EH Tr. 150). She talked to no other experts, sought no professional opinions, and substituted her judgment, uninformed by any previous experience with these issues, for that of her own expert. (EH Tr. 150). She even felt herself competent to dismiss Mr. Shere's headaches as a possible mitigator and admitted that without an expert she could not prove anything regarding headaches. (EH Tr. 200).

Her explanation for not presenting Mr. Shere's headaches or head injury to the jury is that she wasn't about to advocate to the jury that a headache could be a mitigator for such a crime. (EH Tr. 167, 197). She also did not call Dr. Fisher as a witness, but doesn't remember why. (EH Tr. 166). These decisions show that Ms. Buckingham-Toner simply did not understand mitigation or the purpose of a penalty phase trial and did not prepare or present an effective defense. She thought Shere was "stupid" and "didn't understand the issues." (EH Tr. 157). This is evidence that both

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[5] Although obliquely raised in Appellee's brief, Mr. Franklin seems to be accusing CCR of stealing documents from his file. Hopefully, the Court will disregard this irrelevant, unsubstantiated aside.

of Mr. Shere's counsel could not represent their client properly and zealously because of admitted, preconceived views of his guilt and, indeed, of his character and value as a person. She blatantly testified that she did not present any evidence of Mr. Shere's head injury because it was "not going anywhere." (EH Tr. 176).

D. CONCLUSION

The Circuit Court committed reversible error in entering its Order denying the Appellant the relief sought in his 3.850 Motion. The record establishes that the ineffectiveness of his counsel at trial prejudiced the verdict and sentence entered against him and this Court should remand this case for a new trial.

ARGUMENT III

ARGUMENT IN RESPONSE AND REBUTTAL TO APPELLEE'S ARGUMENT THAT THE CIRCUIT COURT'S ORDER WAS PROPERLY SUPPORTED BY THE RECORD.

A. THE STANDARD

The findings in the Trial Court's Order must be supported by the Record. Further, the due process right to an impartial and disinterested tribunal is violated when the Judge is biased against the defendant. Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995) (evidence that "the judge had a fixed predisposition to sentence this particular defendant to death if he were convicted" warrants relief.)

B. JUDICIAL BIAS

The Circuit Court's Order on the 3.850 Motion considered whether the decision to introduce the evidence -- presumably Arick's testimony -- was "careless or unconcerned." (CC Order P. 10). The Court then cites the experience of Mr. Fanter and Ms. Buckingham-Toner! Id. However, the integrity of counsel's decision-making is irrelevant if the introduction of the evidence is obviously against the client's interests. Further, the Circuit Court improperly considers who is making the decision: "a highly ethical and competent trial attorney who has dedicated his life to defending people who are charged with crimes." (CC Order P. 10).

Such a character appraisal is not a proper finding from the Record and is not relevant to counsel's performance at trial, and Appellant contends that this indicates that the Circuit Court did not weigh or consider the evidence in a fair and unbiased manner. Amazingly, the Trial Court ultimately justifies the futile tactical decision of calling Detective Arick by writing that he has seen weaker arguments prevail in front of "a jury of untrained citizens." (CC Order P. 11). Such findings have no foundation in the record and are not the proper test for the Court to apply in determining whether the ineffectiveness of counsel was prejudicial.

C. RELIANCE ON ERRONEOUSLY ADMITTED EVIDENCE

On direct appeal, this Court addressed the issue of the Trial Court calling Heidi Gruelich as a witness. Shere,579 So. 2d at 93-94. The Appellant contends that his counsel should not have allowed Ms. Gruelich to be manipulated, but concedes that the issue of the Circuit Court calling her was raised on direct appeal and disposed of by this Court's opinion (harmless error). Id. at 94. Nevertheless, the Circuit Court, considering the 3.850 Motion, should not have relied on any of her testimony as support for its Order. Further, the Circuit Court cites Ms. Gruelich's testimony favorable to the State and rejects testimony favorable to the Appellant. (CC Order, PP. 9-10). It is ironic for Appellee to now

cite Ms. Gruelich's testimony as support for its position after initially indicating, at trial, it could not vouch for her credibility. (ROA 703).

D. MULTIPLE STATEMENT FALLACY

In its Order, the Court, erroneously relying on Dr. Larson's account of conflicting versions, finds the Appellant had changed his versions of the crime. Such an account is not in the record. The defendant gave only one statement after his arrest. (EH Tr. 340-397, 450). The only inconsistent comment by Mr. Shere was the general denial made neither under arrest nor oath. (EH Tr. 340-345). Thus, the 3.850 Court erred in writing, "Defendant gave several inconsistent statements after his arrest." There is no basis in the record for such a finding.

E. THE RECORD DOES NOT SUPPORT THE CIRCUIT COURT'S FINDINGS ON AGGRAVATORS AND MITIGATORS

Mr. Shere herein reiterates the contention sent out on pages 50-55 of his Brief that the record evidence does not support the court's findings of aggravating and mitigating circumstances.

Although the Appellee argues that such findings are not "clearly erroneous" or are "credibility" determinations, as Appellant has already substantiated, the Court's errors are factual inaccuracies, ignoring Mr. Demo's role of domination and

instigation, ignoring the fact that Mr. Shere thought he was to be killed (EH Tr. 373, 423), ignoring the fact that Mr. Demo ordered the shovel packed into the car (R. 351, 404), and the fact that Mr. Demo ordered Shere to bury the body[6]. (R. 363, 411, 415-417).

Similarly, the Circuit Court discounted the clear evidence that Mr. Shere was under the domination of Mr. Demo, vividly demonstrated in the image of Demo turning the gun on Mr. Shere and ordering Mr. Shere to bury the victim. (R. 363, 411, 415-417).

Finally, the Court fails to consider uncontradicted trial testimony that Mr. Shere tried to talk Mr. Demo out of killing Mr. Snyder and asked Demo to take Snyder to the hospital. (EH Tr. 421, 452).

Without considering these inaccuracies, the Circuit Court had no basis for finding the CCP aggravator applicable.

F. CUMULATIVE EVIDENCE OF JUDICIAL BIAS

The Appellant, in his Initial Brief, has cited other problems with the Order. Significant among those, the Court found that bullets from the defendant's gun were removed from the victim's

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[6] This telling fact was ignored by Mr. Shere's attorneys and by the Court. Apparently, Demo's limp explanation is that he made Shere bury Snyder because he was angry at Shere for killing Snyder. The obvious, common-sense explanation is that Demo was in total control and that his command to Shere was a threat.

body. (CC Order P. 10). The record only supports the conclusion that Demo fired both guns and that the fatal shot came from a pistol. (R. 352-354, 417, 419-422, 434-436).

Further, the Circuit Court, calling Demo a "co-defendant," wrote that "he" (who?) fired the fatal shot and the defendant did not act alone. (Order, P. 11). The only competent evidence is that Demo fired the fatal shot. (EH Tr. 236-237; ROA Vol XVII P. 240; R. 353).

G. CONCLUSION

Based on the foregoing, the Appellee contends that the findings of fact and conclusions of law in the Circuit Court's Order are not supported by the record and urges this Court to find from the record that Mr. Shere is entitled to a new trial, or alternatively, to remand the case to the Circuit Court to make findings of fact which are consistent with the record.

ARGUMENT IV

ARGUMENT IN RESPONSE AND REBUTTAL TO APPELLEE'S ARGUMENT THAT THE DEATH PENALTY CAN BE CONSTITUTIONALLY APPLIED TO THE APPELLANT.

A. THE STANDARD

This Court and the United States Supreme Court have upheld the imposition death penalty under certain circumstances. Proffit v. Florida, 428 U.S. 242, 49 L.Ed. 913, 96 S.Ct. 2960 (1976); Gregg v. Georgia,428 U.S. 153, 49 L.Ed.2d 346, 96 S.Ct. 2909 (1976). However, under the facts of this case, the death penalty cannot constitutionally be applied to Mr. Shere on the grounds that Mr. Shere's conviction and sentence are tainted by ineffective representation, that the Trial Court's objectivity has been called into question by the substance of its Order, and that a less culpable killer cannot be executed if the more culpable killer does not receive the death penalty.

B. NO MITIGATION PRESENTED

Prior to imposition of the death penalty, the Defendant is entitled to present evidence of mitigation. However, virtually no evidence of mitigation was presented, not because it doesn't exist, but, rather, because Mr. Shere's trial counsel failed to competently investigate his life and his medical history and failed to represent him effectively. This dearth of mitigation evidence

was noted by this Court when it reweighed the aggravators and mitigators after striking down the H.A.C. aggravator on direct appeal. Shere, 579 So. 2d at 90.

C. JUDICIAL BIAS

The Appellant has already addressed the Trial Court's lack of objectivity. Apparently, the Trial Court, perhaps understandably, succumbed to the temptation to support local attorneys who may have appeared in front of the Court for years, and who, with the years, may have matured into fine attorneys. When that opinion and professional camaraderie is challenged by one whom the same Court has condemned to death, the Court might well, as it has in this case, lack the objectivity necessary to properly weigh the evidence before it, particularly when that evidence challenges the trial effectiveness of counsel.

D. PROPORTIONALITY

A less culpable perpetrator should not receive the sanction of death if the more culpable perpetrator receives a lesser sentence.

In Hazen v. State, 700 So.2d 1207 (Fla. 1997), this Court held that a less culpable, non-triggerman defendant cannot receive a death sentence when the more culpable, non-triggerman defendant receives a life sentence. Id. at 1214, citing Slater v. State, 316 So.2d 539, 542 (Fla. 1975). The Hazen court, citing Witt v. State,

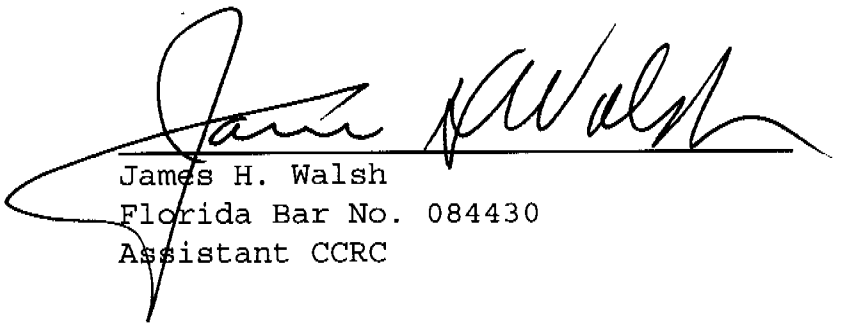
342 So.2d 497, 500 (Fla. 1977), further noted that a co-defendant's sentence was a factor that had to be considered when sentencing Witt. Hazen, 700 So. 2d at 1214. Importantly, the Witt court considered the ages of the perpetrators. Witt, 342 So. 2d at 500. As in the instant case, Witt was much younger than his co-perpetrator. Id. at 500. Unfortunately, because of the failure of Mr. Shere's counsel to present an effective defense, the respective roles of Mr. Shere and Brewster Demo were not presented to the jury. However, the evidence, fairly considered, shows that Demo dominated Shere to the point of turning his gun on Shere and ordering Shere to bury the victim. (R. 415). Demo, however, convicted of Second Degree Murder, is not on Death Row.

E. CONCLUSION

On the grounds that the Appellant was so poorly represented that he, in effect, did not have counsel at trial, that the Trial Court has demonstrated a bias against the Appellant, and that the more culpable killer is not on Death Row, this Court should remand this case for a new trial or, alternatively, commutation of the sentence to life.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 21, 1998.



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