THE SUPREME COURT OF FLORIDA

CASE NO. 91,614

RICHARD EARL 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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Richard Earl Shere, Jr, appeals to the Florida Supreme Court for review of a denial of relief issued by Honorable Raymond T. McNeal, Circuit Judge, in response to the Appellant's Motion for Postconviction Relief. The Florida Supreme Court affirmed the Circuit Court's conviction and death sentence (Shere v. State, 579 So. 2d 86 (Fla. 1991)), and the Evidentiary Hearing Court summarily denied most of twenty-three (23) claims filed by the Appellant in his First Amended Motion to Vacate Judgments of Conviction and Sentence, pursuant to Fla. R. Crim. P. 3.850.

The Appellant contends that errors arising from ineffective counsel, judicial prejudice, and flawed aggravators resulting in the death penalty violate the Constitutions of both the State of Florida and the United States of America. The Evidentiary Hearing Court found that R. 3.850 counsel failed to adequately develop specific instances to substantiate the errors claimed. This appeal, in three (3) arguments, will substantiate--page and line from the court record--the most serious of the Appellant's claims.

Citations shall be referenced as follows: Record of trial, R-; Record on Appeal of original court proceedings, ROA, Vol.--, p.--; Record of Rule 3.850 Evidentiary Hearing, EH Tr--; R. 3.850 Hearing Order, EHO--; Evidentiary Hearing Court, EH Court; and the Florida Supreme Court, FSC.

REQUEST FOR ORAL ARGUMENT

The Appellant, Richard Earl Shere, Jr., has been sentenced to death. Resolution of the issues involved in this appeal--ineffective counsel, judicial prejudice, and flawed aggravators that resulted in the unconstitutional application of the death penalty--shall determine, therefore, whether he lives or dies. A full opportunity to present these issues through oral argument is more than appropriate in this case, given the gravity of the issues, as substantiated by the court record.

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STATEMENT OF THE CASE

On January 14, 1989, the Appellant was charged with one count of first degree murder in the death of Drew Paul Snyder. (R. 1006) He pled not guilty. He was tried by a jury and was convicted of said offense on April 26, 1989. On that same day, his penalty phase began and ended, with the jury returning a seven (7) to five (5) verdict of death (R-1342). On May 17, 1989, the court sentence the Appellant to death.

On direct appeal, the Florida Supreme Court (FSC) affirmed the conviction and sentence. Shere v. State, 579 So. 2d 86, (Fla. 1991). The FSC struck the heinous, atrocious, or cruel aggravating circumstance but ruled it harmless error. It also held, as harmless error, the trial court's calling of Heidi Greulich as a court's witness.

The Appellant filed a Motion for Fla. R. Crim. P. 3.850 relief, asserting twenty-three (23) claims. The majority of the claims addressed ineffective counsel, improper jury instructions, failure of State agencies to produce records under Chapter 119 Fla. Stat., and denial of rights under Amendments to the United States and Florida Constitutions.

The R. 3.850 Hearing Judge and the trial Judge were one and the same person. The Order Denying Defendant's Motion for Postconviction Relief, dated August 13, 1997, summarily denied Claims I, II, V, VII, VIII, IX, X, XI, XII, XIII, XIV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII.

Claim III was summarily denied, except for those parts that overlapped Claims IV, VI, and XV. After an Evidentiary Hearing that ran for three (3) days, the EH Court denied these claims as well, on their merits (EHO 29, ROA 02669).

STATEMENT OF THE FACTS

In the early morning hours of December 25, 1987, Drew Paul Snyder, Bruce "Brewster" Demo, and the Appellant, Richard E. Shere, Jr., went rabbit hunting in the area of Ridge Manor Estates, Hernando County, Florida.

The hunt resulted in the shooting of several rabbits and in the death of Mr. Snyder, who was killed either by a shot to the forehead, a shot to the back of the head, a shot to the chest, or a shot to the thigh--any of which may have been the fatal wound. The homicide occurred between the hours of 2:00 am and 4:00 am on Christmas Day, 1987. The testimony and statements of the only two persons who actually know what happened are in opposition to each other on a number of points; but both men agree that Mr. Demo, not Mr. Shere, fired the fatal shot. At least, Mr. Demo admits to firing the fatal shot in one of his several versions of the crime. Mr. Demo, the elder of the two men, had a lengthy criminal record (see Appendix A); yet he is serving a life sentence for the crime; while Mr. Shere is on Death Row.

Mr. Shere's trial began on April 18, 1989, and concluded, in short order, with his sentencing on April 26, 1989.

The State's first witness was Karen Ann Snyder, widow of the victim, Drew Paul Snyder. She testified that she last saw her husband in the early morning hours of December 25, 1987 (R-262-263, 269). About three weeks later, she learned of her husband's death from Regina Shaffer (Mr. Demo's girlfriend) (R-267). In her testimony, Karen Snyder identified the Appellant and said that

she also knew Bruce Michael Demo (R-268).

Detective James Blade of the Hernando County Sheriff's Office (HCSO) then testified that he and Detective Alan Arick investigated the death of Drew Paul Snyder, the victim (R-300-302).

On January 13, 1988, the officers located the Appellant and interviewed him for 45 minutes. At that time, the Appellant, who was neither under arrest nor under oath, denied knowledge of the crime (R-304). At the conclusion of the interview, the Appellant was placed in the Hernando County jail, upon revocation of a bond on an unrelated matter (R-306).

Later that day, the officers located Bruce Demo, whom they interviewed. Mr. Demo gave a statement containing different versions of the crime, including one in which Mr. Shere forced Mr. Demo to fire the fatal shot. Mr. Demo was charged with the murder of Mr. Snyder and jailed (R-306-307).

Detective Blade testified that, on the following day, January 14, 1988, the officers interviewed Heidi Greulich, the teenage girlfriend of the Appellant. He also testified that Regina Shaffer was the girlfriend and cohabitant of Bruce Demo (R-307).

Detective Blade said that, later on January 14, the officers interviewed the Appellant for a second time, re-advising him of his constitutional rights, and the Appellant gave a recorded statement. During the ensuing seven-hour period, the Appellant cooperated freely with the police by giving his statement and by

offering to lead them to various crime-related sites. His statement given at the jail was recorded, but his comments made in cooperating with the police at the crime sites were not recorded (R-308-309).

The Appellant also cooperated by consenting to a search of his residence and led officers to the house of a Mr. Ham, where they obtained a .22 cal. rifle which the Appellant had recently sold to Mr. Ham (R-381-382). The State marked for identification and introduced into evidence the tape of the Appellant's January 14, 1988, recorded statement (R-314-315).

Detective Blade testified that the officers obtained a shovel from the residence of Mr. Demo, pursuant to statements given by Mr. Demo and the Appellant that on the morning of the crime, Mr. Demo put a shovel into the Appellant's car (R-317-318, 329-330). Detective Blade told the court that he believed a shovel had been place in the Appellant's vehicle by Mr. Demo (R-330).

Based on a telephone tip, the officers located Raymond Pruden, a man with a record of drug use and mental problems (see Appendix B), who said he had information on the crime. On January 20, 1988, Detectives Arick and Blade interviewed Mr. Pruden (R-322). During the Shere trial, Detective Blade did not state nor did defense counsel ask if he knew about Raymond Pruden's mental health problems.

On cross-examination, Detective Blade stated that, yes, the Appellant was cooperative with the police. During his January

14th statement, given at the jail, the Appellant showed concern for the safety of his young and pregnant girlfriend, Heidi Greulich (R-329).

The next State witness was Detective Alan Arick of HCSO, who began the investigation into the disappearance of Drew Snyder and the possibility of foul play (R-337-338). Detective Arick first met the Appellant on January 13, 1988 (R-339-340). At that time, the Appellant, who was neither under arrest nor under oath, spoke with Detectives Arick and Blade voluntarily but was not taped (R-340-341). The Appellant said that he had no knowledge of the disappearance of Mr. Snyder and had been with his girlfriend, Heidi Greulich, during the early hours of December 25, 1987. He told the officers that the back seat of his car was sold for junk (R-345-346). The officers then took the Appellant to the Hernando County jail, where they had his outstanding bond, on a subsequently dismissed charge, revoked.

Detective Arick testified that the Appellant gave a statement at the jail on January 14, 1988, after the officers had obtained a statement from Mr. Demo incriminating the Appellant. The Appellant told the officers that he had been thinking and had decided to talk (R-347-348).

The Appellant stated that, during the early morning hours of December 25, 1987, he had received a telephone call from Bruce Demo. The Appellant said that Mr. Demo was upset with Drew Snyder, the victim. Mr. Demo yelled over the telephone that the victim had "a big mouth," and that they "needed to get rid of

him" (R-349). The Appellant said that Mr. Demo more or less made him come to the Demo house, even though the Appellant didn't want to go (R-349).

After identifying photographs of the Appellant's vehicle, Detective Arick continued to testify about the Shere statement. Upon arriving at Mr. Demo's residence, the Appellant stated that Mr. Demo put a shovel in the trunk of the Appellant's car (R-351). After driving around for a while, they picked up the victim and went rabbit hunting in Ridge Manor Estates. When Mr. Demo said he wanted to drive, the Appellant obediently stopped the car. The Appellant exited the driver's side, placed the .22 cal. pump rifle on the car roof, and walked to the passenger side to urinate. While doing so, the Appellant saw Mr. Demo and the victim struggle for the rifle. A shot was fired striking the victim in the head (R-352). To avoid being shot, the Appellant dropped to the ground. He heard a series of shots and, as he stood up, saw Mr. Snyder laying in the back seat of the car. The victim was bleeding badly, and Mr. Demo was holding the gun (R-352-353).

The Appellant stated to the officers that he told Mr. Demo they had to take the victim to the hospital (R. 353, 421). The detective continued: "...Bruce [Demo] produced a .22 semiautomatic handgun and he [Demo] shot--he [Shere] said that Bruce [Demo] shot--Drew in the forehead with the handgun" (R-353, 421). With the victim still breathing, "... Bruce [Demo] then went over to Drew and put the handgun close to Drew's chest and

shot one more time and shot Drew in the chest with the handgun" (R-354).

They loaded the victim into the trunk of the car, drove to a another location, and buried the body. The Appellant, when asked by the officers about the location, said he could take them to it (R-354). The Appellant's comments to the police at the various crime sites, which would have helped establish his willingness to cooperate, were not taped (R-355). The State introduced a series of photographs of the areas where the Appellant took the officers (R-356-370).

The detective also testified that he asked the Appellant about the motive for killing Drew Snyder. The detective said the Appellant told him:

> "...that during his phone conversation with Bruce Demo earlier that morning [12/25/87], Bruce had told him that Bruce and Drew were involved in the theft of some air conditioners at a place in Dade City, and that Bruce was afraid that Drew was going to tell the cops that he was involved with the theft of these air conditioners and he was upset about that. He also said that Bruce told Richard [the Appellant] that Drew had ratted out on him about something that Drew and Richard had done."

(R-371-372).

The State Attorney asked Detective Arick about the burial location, additional photographs, and a prepared video. The detective testified that the Appellant, in his statement, said he burned the back seat of his car. The Appellant cooperated by taking the officers to the shooting scene, as well as the burial scene (R-383). The State introduced more photographs into evidence (R-384-392).

Detective Arick then identified the tape of the Appellant's interview of January 14, 1988 (R-397). The tape, which was played for the court and jury, confirmed that Mr. Demo called the Appellant between 12:30 am and 1:00 am on December 25, 1987. It established that Mr. Demo was thinking of killing the victim (R-402), that the Appellant tried to "put Mr. Demo off" from killing the victim, and that the Appellant didn't want to get involved (R-403). The Appellant stated:

> And he [Demo] brought it, you know, up a couple times about, oh, why don't we go get him and stuff and then go take him out and stuff, and I told him no, I didn't want to, you know, and I'm just going back to bed. I said that about five or six times I wanted to, you know, just go back to bed and forget about it and stuff....And then he threatened to kill me a couple times saying that I better come over and pick him up, then you know, go over to Drew's house..."

(R-403-404).

The tape set forth that when Mr. Demo loaded his shovel into the Appellants's car (R-404), the Appellant began to suspect that perhaps Mr. Demo and the victim were planning to kill him, and he felt "a little bit of danger" (R-406-407).

The tape confirmed the testimony of Detective Arick that the Appellant set the rifle on the roof of the car. The gun went off. He heard the victim say, "Oh, my God, Brewster [Demo]." Mr. Demo fired the gun several more times (R-409-410). The victim was laying in the back seat still breathing. Mr. Demo pulled out a handgun and shot the victim in the forehead. The Appellant said, "Brewster, we got to get him to the hospital and stuff" (R-410).

Instead, Mr. Demo shot the victim in the back of the head.

The Appellant again said they needed to get the victim to the hospital (R-410-411, 421). Mr. Demo was still handling the handgun when they buried the victim (R-413-418).

On the tape, the Appellant then repeated his version of the shooting of the victim by Mr. Demo (R-421-423). The Appellant stated that Mr. Demo threatened him if he told Heidi Greulich [Appellant's girlfriend]. The Appellant was also afraid for the child Heidi was carrying (R-425-426).

The tape re-enforced the motive Mr. Demo had for killing the victim. Mr. Demo said he and the victim were stealing air conditioners and "other stuff." Mr. Demo said he was tired of the victim ripping him off and always besting him. Lastly, Mr. Demo suspected the victim was ratting on him (R-426-428). The Appellant stated that he saw Mr. Demo still with the pistol "sometime after the shooting" (R-436-437).

The playing of the Shere statement concluded Detective Arick's direct testimony as a State witness, and his cross-examination by defense counsel was very brief, negligently brief. The detective answered that, yes, the Appellant did break down and cry at times during the interview (R-449).

On re-direct examination, Detective Arick agreed that the Appellant's statement of January 14, 1988, was inconsistent with his denial during the short interview of January 13, 1988.

The next significant witness was Cheryl LaMay, M.D., Medical Examiner for the area. She testified that she performed the autopsy on Mr. Snyder, the victim. Of a total of ten (10) gunshot

wounds on the victim, (R-553) four shots were possibly fatal--a shot to the forehead, a shot to the chest, a shot to the back of the head, and a shot to the back. Any one of the four could have been the "fatal shot" (R-555-568, 569-570). The forehead shot was made at close range (R-577); the chest shot was made at close range (R-578); the shot to the thigh was made at close range (R-581). It is possible that the last shot, to the chest, was the killing shot (R-587).

Ballistic evidence provided by FBI witnesses established that the shots to the head were fired from a pistol. The FBI agents, as technical witnesses, did not establish who actually shot the victim, but the pistol was Mr. Demo's.

The next significant witness was Darlene O'Donnell, niece of Regina Shaffer, Mr. Demo's live-in girlfriend. Ms. O'Donnell was visiting her aunt at the time of the murder, and her testimony supported the Appellant's statement. She testified that late on Christmas Eve, Mr. Demo called someone and then left the house about 30 to 45 minutes later with the Appellant (R-694-698). She said that Mr. Demo left carrying a pistol, as he always did (R-699-700). She was "almost positive" that Mr. Demo put a shovel into the Appellant's car(R-702).

The Appellant stated that Mr. Demo shot the victim with a pistol in the head and chest, and the coroner and the FBI witnesses said that the head and chest wounds were made by a pistol. The uncontested trial testimony was that Mr. Demo carried a pistol at all times and that he was the shooter of the victim.

This trial certitude was to become confused and obfuscated, as the case progressed--even though the Florida Supreme Court found that the shots fired into the victim's head came from a pistol. Shere v. State, supra.

The last State witness was Raymond Pruden, who testified that the Appellant told him he killed the victim, shooting him as many as fifteen (15) times. Mr. Pruden claimed that the Appellant never mentioned Bruce Demo (R-739-740). Defense counsel chose not to cross-examine Mr. Pruden--an error that could prove fatal for the Appellant (R-741).

ARGUMENT I

INEFFECTIVE REPRESENTATION BY COUNSEL AT TRIAL AND AT THE EVIDENTIARY HEARING DENIED THE APPELLANT HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE COUNSEL IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IN VIOLATION OF THE FLORIDA CONSTITUTION.

The Appellant was ill-served by his counsel at three crucial periods during his criminal justice experience--at his trial, during his appeal to the Florida Supreme Court, and at the R. 3.850 evidentiary hearing. Representation failing in material and specific aspects has denied the Appellant his federal and state constitutional rights, as this argument will substantiate based on the court record.

The Appellant recognizes that a party to any litigation, criminal or civil, is not guaranteed a perfect trial, but, in a capital case, representation must be as near perfect as humanly possible. A capital defendant on appeal can not expect

representation to rise to an astronomical height, but representation must not fall so low as to undermine confidence in the jury's verdict and the judge's opinion.

In the Appellant's R. 3.850 Motion, of twenty-three (23) claims filed on his behalf, Claim VI, which addressed denial of effective counsel at the trial level, was segmented into three sub-claims:

(A) Failure of counsel to allow the Appellant to testify in his own behalf during the guilt phase of the trial;

(B) Failure of counsel to object to State's comment on the Appellant's right to remain silent; and

(C) Introduction by counsel into evidence of hearsay statements by Mr. Demo, even though there was no joint trial of Mr. Demo and the Appellant.

The Appellant respectfully asks the FSC to consider his total legal representation. To determine the ineffectiveness of his counsel, he asks the FSC to consider the totality of the circumstances and to weigh his representation problems, not as isolated incidents but throughout the case. He contends that deficiencies of counsel were actual, substantial, and prejudicial, resulting in a verdict of guilt and a penalty of death. Strickland v. Washington, 466 U. S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). The Shere case bears many similarities to the landmark Florida case involving ineffective counsel criteria. The total circumstances for establishing the Appellant's claim of ineffective counsel representation involve a

mixture of law and fact King v. Strickland, 714 F. 2d 1481 (11th Cir. 1983) and of commission and omission:

> --The Appellant contends that the totality of conduct by counsel, at the trial and at the evidentiary hearing, was of such a magnitude as to deny him his constitutional rights.
>
> --The Appellant contends that the totality of errors by counsel are of such a magnitude as to constitute deficiencies beyond the range of professional performance.
>
> --The Appellant contends that the totality of commissions of mistakes by counsel are of such a magnitude as to establish a belief by reasonable observers that an opposite result would have occurred had counsel acted differently.
>
> --The Appellant contends that the totality of omissions by counsel are of such a magnitude that a sufficient probability exists that a different verdict would have been reached had counsel acted differently.

The pivotal error--permitting evidence of conflicting versions of the murder to be introduced at the trial and at the R. 3.850 hearing--constitutes ineffective representation by counsel. Had the Appellant's counsel at each stage of the proceedings not introduced conflicting or inconsistent testimony, the Appellant would not be on Death Row today. Without impugning the ethics or moral character of his counsel, the Appellant is compelled to appeal counsel errors

of commission and omission that occurred throughout his case.

TRIAL COUNSEL ERROR

The Appellant addresses the following counsel errors as the most serious committed during the trial.

The Calling of Detective Arick as a Defense Witness

By calling Detective Alan Arick back as a defense witness at the trial, counsel committed material and substantial error. The Public Defender's decision was not consistent with the best interest of the Appellant. This error cannot be dismissed as mere strategic miscalculation, but has to be viewed as reversible error.

Because Detective Arick had testified as the main State witness, trial counsel had ample opportunity to establish statutory and non-statutory mitigators and to verify who fired the fatal shot. With further cross-examination, counsel could have elicited the facts--that the Appellant did not want to go with the shooter, that he tried to dissuade the shooter, and that after the shooting he asked the shooter to take the victim to the hospital. Trial counsel thus had no reason for calling the detective back as a defense witness.

The State Attorney, for his own reasons, did not call Mr. Demo as a witness; but defense counsel, by calling back Detective Arick, gave the State Attorney the opportunity on cross-examination to draw from the detective those portions of Mr. Demo's statement that conflicted with the Appellant's statement. This error by counsel vitiated the Appellant's uncontested version of the circumstances of the killing.

It cannot be stated strongly enough that, <u>but for</u> the introduction of Mr. Demo's statement through Detective Arick's

cross-examination as a defense witness, the jury would not have heard of Mr. Demo's charges against the Appellant. Absent the Arick cross-examination, a reasonable jury would not have reached a verdict of guilty of murder in the first degree; a reasonable jury would have voted for a lesser offense, if not complete exoneration. The FSC recognized defense counsel's error and found that "Demo's statement and Pruden's testimony were very damaging" (Shere v. State, supra, p. 90). But for counsel error, the FSC would have had no basis for this finding.

Introduction of Mr. Demo's statement diminished the Appellant's unrefuted statement including Mr. Demo's threats to the Appellant's teenage girlfriend and their unborn child. This error gravely damaged the Appellant's uncontroverted version of the incident presented during the State's case.

The error of calling Detective Arick as a defense witness undermines the integrity of the jury's verdict. This grave error poisoned the jury in both the guilt phase and the penalty phase; and it helped poison the judge's view of the Appellant and his credibility. The damage poisoned the trial, and the Court knew it was a mistake. The trial judge did all he could to make the Public Defender understand the potential damage, issuing several warnings. The Public Defender thus was well aware of the risks involved in calling back Detective Arick (ROA Vol. XVII, p. 230-231, R-745-750).

Unfortunately for the Appellant, the judge was right; and the person paying the ultimate price for this counsel error is the

Appellant himself. He is joined, though, by the citizens of Florida who trust that the death penalty will result only from a fair trial by jury.

The Public Defender admitted that calling Detective Arick was a mistake. At the evidentiary hearing, he first said, "No, it was not a mistake," but then added, "It may have turned out to be a mistake, but at the time I thought it was right" (ROA Vol. XVII, p. 233). The trial counsel had to admit his mistake in calling Detective Arick. The detective "--he was somewhat more evasive than I expected." And he "couched his answers just a little different" from what the public defender expected (ROA Vol. XVII, p. 241). For instance, the detective only testified about that part of the Demo statement accusing the Appellant of the murder. The detective failed to mention Mr. Demo's different versions of the crime, including one version in which he [Demo] fired the fatal shot because the Appellant ordered him to do so (ROA Vol. XVII, p. 240). Yet, on re-direct, the Public Defender elicited from the detective that Mr. Demo said that the Appellant shot the victim in the chest (R-762). Detective Arick's testimony was so damaging to the Appellant, no amount of rationalization can excuse the calling of Detective Arick (R-752-762). It was ineffective legal assistance.

Omissions of Adversarial Examination

Omissions of adversarial examination render the trial counsel's performance so substantially deficient as to undermine the confidence of reasonable persons in the jury's verdict.

After permitting the spurious statement of the older and

wiser Mr. Demo to twist the facts, Appellant's counsel compounded that error by failing to correct it. Counsel erred by failing to expose Mr. Demo's lengthy criminal record; his reputation, or lack thereof, in the community; his joint criminal activities with the victim, Mr. Snyder; and his dominance in dealings with the younger Appellant. These matters could and should have been brought out by such State witnesses as Detectives Arick and Blade, Karen Snyder (victim's widow), Robert McGinnis (victim's father-in-law), Heidi Gruelich, Raymond Pruden, and Darlene O'Donnell (niece of Mr. Demo's girlfriend, Regina Shaffer). Add to these, counsel's error in failing to locate and produce Ms. Shaffer, a potentially crucial witness, who first informed Mrs. Snyder of her husband's death. Counsel also failed to inform the jury and judge of the several inconsistent versions of the crime contained in Mr. Demo's statement.

Once the jury heard of Mr. Demo's allegation that the Appellant killed the victim, counsel erred by failing to attack Mr. Demo's credibility. This error was exponential in compounding the damage done the Appellant by Detective Arick's cross-examination as a defense witness. It is unacceptable error that falls measurably outside the range of acceptable professional performance in a capital death case.

Ranking up there with the failure to attack Mr. Demo's credibility was counsel's failure to cross-examine the State witness, Raymond Pruden. Later, at the evidentiary hearing, the Public Defender mis-spoke when asked if he attacked Mr. Pruden's

credibility by cross-examining him. He answered that he was sure he did. The trial record, however, shows the Public Defender stating, as to the witness Mr. Pruden, "I have no cross-examination, Your Honor" (R-741). Nor did counsel attack the credibility of this mentally unstable witness in the closing argument (ROA Vol. XVII. pp. 275-276).

The Pruden testimony and that of Heidi Greulich, which was completely worthless because of her confused condition, were prime candidates for attacks as to credibility. The Pruden testimony should have been attacked at the trial level and at the R. 3.850 level, had the respective counsel properly prepared. Because of rule constraints, the Appellant is not able, in this appeal, to present the facts in support of these assertions--despite the FSC finding that "Demo's statement and Pruden's testimony were very damaging" Shere v. State, supra, p. 90.

The failure of the Appellant's trial counsel to meet the minimum adversarial testing requirements in a capital case establishes actual prejudice to the Appellant. This prejudice makes the ineffective assistance of counsel a denial to the Appellant of a fair trial Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed 2d 636 (1986); United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1988); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932).

A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of the issues. Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.

Ct. 236, 87 L.Ed 268 (1942) and Strickland v. Washington, supra.

The breakdown of the adversarial process at the trial preserves the Appellant's claim of ineffective counsel regardless of subsequent procedural bars Stano v. Drugger, 921 F. 2d 1125 (11th Cir. 1991) (en banc).

Failure to Act as Advocate

By their own testimony, the trial counsel were not in the proper frame of mind to act as advocate for the Appellant. From the outset, trial counsel had disdain for the client, as the following excerpts will establish.

The lead trial counsel testified at the EH, "I told him [Appellant] my professional opinion was he was a liar, it was obvious he was lying, and we were better off with his taped statement" [Emphasis added]. The second chair counsel echoed this abandonment of the attorney-client relationship (ROA Vol. XVII p. 216). This testimony alone provides sufficient cause for a finding of ineffective counsel Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940); U.S. v. Swanson, 943 F. 2d 1070 (9th Cir. 1991).

The trial counsel also substantiated the Appellant's claim of ineffective counsel by admitting that, when picking a jury, he abrogates his responsibility to the client:

> Because it's their trial and I'm not what I would consider an expert in jury selection, I do the best I can, but I also defer to my client to people they feel good or bad about."

(ROA Vol. XVII, p. 251) [Emphasis added].

How could the Appellant, a minimally educated 22-year old, be expected to pick a jury? Counsel's admission on this point alone establishes grounds that the Appellant was denied effective counsel.

After having to pick his own jury, the Appellant was pressured by the defense team to decide whether to testify or not at the guilt phase of the trial. The Appellant did not testify and later regretted it. At the penalty phase of his trial, the Appellant, in an outburst, pleaded with the Judge:

> I don't feel like I've been allowed to testify or make that decision.

(ROA Vol. XVI, p. 158).

Trial counsel later admitted that the Appellant "didn't understand what we were talking about, about testifying or not" (ROA Vol. XVI, p. 158). Yet, trial counsel still pressured him to make the decision, when counsel knew the Appellant didn't have the capacity to understand the legal ramifications of the decision. When asked, at the EH, if the Appellant understood the issues, trial counsel testified:

> I don't really think he understood the issues well enough to discuss the issues with us.

(ROA Vol. XVI, p.157).

Yet another egregious example of failure to act as advocate occurred at the EH, when the Public Defender, on cross-examination, testified <u>inaccurately</u> that, absent the "self-serving statement" of his client, the evidence when the State rested its case indicated that the Appellant was the one who killed the victim (ROA Vol.

XVII, p. 263). The trial record does not support this indictment by defense counsel of his own client. Counsel's claim that the Appellant's statement was "self-serving" is beyond comprehension.

A close reading of counsel's EH testimony reveals that the Public Defender, by making such inaccurate and damning statements, failed to act as advocate for the Appellant. The Appellant was entitled to an advocate at the trial, rather persons who had contempt for him.

The trial counsel considered the Appellant stupid. Trial counsel knew the Appellant did not know all the different nuances of all the different cases or legal strategy in the courtroom, and "he (Appellant) didn't understand what we (trial counsel) were talking about, about testifying or not" (ROA Vol. XVI, pp.157-158). The lack of professional representation by trial counsel permeated the whole trial and made the Appellant's defense a sham.

Rather than deny the client his constitutional rights, defense counsel should have stepped down from the case; but since that did not happen, the Appellant asks the FSC to appoint, at a new trial, responsive counsel see, U.S. v. Swanson, supra; U.S. v. Bradford, 528 F. 2d 899 (9th Cir. 1975).

It further appears, that trial counsel mixed up the Appellant's January 13th interview with his January 14th recorded statement and with comments made to the Public Defender's investigator, which are not part of the trial record. At the EH, trial counsel inaccurately testified that the Appellant gave four different versions of the crime (ROA Vol. XVII, pp. 255-256). The

trial record, however, contains only one Appellant statement introduced into evidence by Detective Arick and supported by a tape of that statement. No other statement by the Appellant was introduced at the trial (R-336-455).

On cross-examination at the EH, the State Attorney mis-spoke when he stated that he introduced Mr. Shere's statements--plural. The record reflects only one Appellant statement and one tape of that single statement introduced into evidence (R-336-455). Detective Arick testified that he did not tape the January 13th conversation with the Appellant, as nothing pertinent was said (R-342). If the State has other statements and has not furnished this material to the Appellant, then there may be grounds for a Brady claim.

The following question and answer, recorded at the EH, are predicated on fallacious assumptions by both the State Attorney and the trial counsel. When the State Attorney asked, "And isn't [it?] also true that I did not just introduce the taped version of the statement; that there were also several non-taped statements that he made prior to the taped statement being made?" the Public Defender answered, "Yes, sir" (ROA Vol. XVII, p 259). The trial counsel went on to testify that there were gross inconsistencies in the Appellant's statements [plural].

It is obvious that both the State Attorney and the Public Defender had not read the trial record prior to the EH and were just winging it--all to the detriment of the Appellant. Trial counsel wrongly accepted the testimonies of Heidi Greulich and

Raymond Pruden as establishing beyond a reasonable doubt that the Appellant was the shooter (ROA Vol. XVII, pp. 262-263).

A close and objective reading of the trial record shows that the State's case does not support the conviction of anyone of any crime using the beyond a reasonable doubt criteria.

The EH transcript suggests that the State Attorney and the Public Defenders did not review the trial record prior to the EH.

Failure to Focus on Uncontroverted Testimony and Evidence

Had counsel, at each level of the proceedings, provided the jury and the court only with the Appellant's uncontroverted version introduced by the State in Detective Arick's testimony and re-enforced by the taped interrogation of the Appellant, a different verdict would have resulted. This is not speculation; a close reading of the court record speaks to the fact that the verdict was in error.

The trial record demonstrates that the State had a weak case for a murder felony conviction. The State's case rested on the detectives' testimony regarding the Appellant's statement, the tape of that statement, and the highly questionable testimonies of Raymond Pruden and the court's witness, Heidi Greulich. Certainly no death penalty conviction could have rested on such a tenuous foundation. The State would have barely survived a motion for a judgment of acquittal, had the defense rested without calling a witness.

Up until introduction of the Demo accusation through a defense witness, the jury had good reason to believe the Appellant, for he

was uncontradicted by credible witnesses in his statement that Mr. Demo shot the victim. The jury had good reason to believe the two detectives who presented uncontradicted evidence that the Appellant was afraid for the safety of his girlfriend, their unborn child, and himself. The Appellant's fear, unchallenged at the conclusion of the State's case, was reaffirmed in the penalty phase, when the Appellant stated that he did not kill the victim and that he "was afraid" for his life (R-949, 951).

Such uncontradicted testimony and evidence should have weighed heavily on a reasonable jury's verdict and should have been cause for reasonable jurors to conclude that a verdict of not guilty was appropriate. Defense counsel erred by failing to focus on the uncontroverted testimony and evidence.

POSTCONVICTION COUNSEL ERROR

R. 3.850 counsel had a duty to substantiate trial counsel error. The EH Order, which summarily denied most of Appellant's claims, stated that R. 3.850 counsel failed in this duty. The EH Order, in itself, substantiates postconviction error.

R. 3.850 counsel failed to elicit whether the lead trial counsel had ever been a lead counsel in the guilt and/or penalty phase of a capital case (EH Tr. 206). The second chair Public Defender counsel had no experience in a capital case. Between the two of them, neither had any experience in handling the penalty phase of a death case (EH Tr. 135, 206).

The EH record reflects that R. 3.850 counsel was not familiar with the trial record. As an example of ineffective representation,

on re-direct examination at the EH hearing, R. 3.850 counsel asked the lead trial counsel if he attacked Mr. Pruden's credibility by cross-examining him. The Public Defender answered, "I'm sure I did. I don't recall, specifically" (ROA Vol. XVII, p. 275-276). The court record, however, is unequivocal; trial counsel did not ask Mr. Pruden one question (R-741). R. 3.850 counsel revealed his own unfamiliarity with the trial record by failing to challenge trial counsel on this misstatement of fact.

Failure to Act as Advocate

The EH Order on the R. 3.850 Motion stated that the Appellant's testimony during the evidentiary hearing was not credible (EHO-7, ROA p.02648):

> ...he did not present any specific evidence or argument to show how his testimony in the guilt phase would have improved his chances to be found not guilty of first degree murder.

R. 3.850 counsel thus compounded the error of the trial counsel who had pressured the Appellant to decide whether to testify in the guilt phase. R. 3.850 counsel did so by failing to establish how the Appellant's testimony at the guilt phase of the trial would have reasonably altered the jury's decision or at least would have probably produced a different outcome by the jury both at the guilt and penalty phases of the trial.

Filing twenty-three (23) claims was not enough; counsel had to prove these claims but failed to do so. 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).

Postconviction Counsel Errors Regarding Mr. Demo

At the R. 3.850 hearing, counsel wrote in the First Amended Motion to Vacate at page 14 (ROA 02485):

> ...defense counsel was ineffective in permitting without objection Detective Arick to testify to the extremely inculpatory and prejudicial statements of Co-defendant Bruce Demo to the effect that Shere shot Drew Snyder first and then ordered Demo at gunpoint to "finish him off" with additional shots

(R. 757-758) [Emphasis added].

Counsel made two (2) substantial errors in this excerpt from the motion, in addition to not having read the court record.

First, the pages and material cited refer to the State's cross-examination of Detective Arick, who had been called by the Public Defender as a defense witness. Defense counsel, therefore, could not object to the information coming in through his own witness. The error was not in failing to object, as postured in the motion, but in the very fact that the Public Defender called and presented Detective Arick as his own witness. This fatal strategy set up a prosecutor's dream opportunity, which the able prosecutor seized upon in this case--to the detriment of the Appellant.

Second, counsel improperly referred to Mr. Demo as a "Co-Defendant," and the transcript of the testimony (R-758, line 17-18), was "...to finish Drew off," not to "finish him off." The Shere trial had but one defendant, and maintaining the fiction of co-defendants was detrimental to the Appellant.

In addition, counsel wrongly asserted that "...defense counsel

did not object because he recognized he had 'opened the door' on direct examination..." (R. 754-56); (EH Tr. 15-16, ROA 02485-6). The Public Defender "opened the door" by merely calling Detective Arick as a defense witness, and the damage only mounted as Mr. Demo's accusation was brought into play (R-753) .

These telling details demonstrate the failure of R. 3.850 counsel to adequately prepare and present the Appellant's claims, thus denying him Federal and State constitutional rights.

At the evidentiary hearing, the Public Defender admitted that he waived the Appellant's Sixth Amendment confrontation rights, with reference to Mr. Demo's non-appearance at the trial (ROA Vol. XVII, pp. 233, 274). By doing so, counsel also waived the ability to impeach Mr. Demo, based on such blatantly false accusations as that the Appellant shot the victim four (4) times in the chest--a charge refuted by the medical examiner and ballistics experts. Counsel, at the same time, waived the right to establish Mr. Demo's lack of credibility because of his criminal history and record.

Introduction of the Demo statement transformed the trial into a "he said--he said" capital case, in which the Appellant's credibility could no longer be considered in a vacuum. R. 3.850 counsel failed to clarify, correct, explain, or mitigate the damage done the Appellant by trial counsel, who failed to discredit Mr. Demo's accusation, after needlessly allowing the jury to hear of it.

R. 3.850 counsel's failure to present Bruce "Brewster" Demo at the evidentiary hearing is yet another example of ineffective

counsel contributing to judicial prejudice. Short of calling Mr. Demo, R. 3.850 counsel should have posed questions regarding Mr. Demo's credibility to the two Public Defenders who testified at the evidentiary hearing. Because no such questions were asked, the EH court continued to accept the self-serving Demo accusation as credible.

Postconviction Counsel Errors Regarding Mr. Pruden

After failing to attack Mr. Demo's credibility, R. 3.850 counsel also failed to produce Mr. Pruden or to question his credibility and motives. In 1989, four (4) months after testifying in the Shere trial, Mr. Pruden was Baker Acted by the Hernando County Mental Health authorities (see Appendix B). Counsel did not develop the fact of Mr. Pruden's reputation in the community for drug abuse. By failing to pursue these facts, which challenge the credibility of a crucial State witness, R. 3.850 counsel contributed to judicial prejudice with regard to the Appellant.

At the EH, the Appellant's trial counsel testifies that he believed at the time the State rested its case the testimony of Heidi Greulich and Ray Pruden made it appear that the Appellant was solely responsible for the killing. (ROA Vol. XVII, p. 262-263). This in incredible! Yet, Heidi was called as a Court's witness because neither side would vouch for credibility.

The trial court and the FSC were both of the opinion that Mr. Pruden's testimony was damaging. R. 3.850 counsel erred by failing to call Mr. Pruden, thus denying the court the benefit of an adversarial examination of Mr. Pruden. As to this one witness, the

Appellant has twice suffered damage due to his counsels' faulty judgments. This failure to call Mr. Pruden is so fundamental as to render the Order denying the R. 3.850 motion flawed.

The Calling of Dr. Larson as a Defense Expert

At the R. 3.850 hearing, Appellant's counsel called James Larson, a Ph.D. in clinical psychology, as an expert witness for the defense; yet, upon cross-examination by the State, Dr. Larson testified that the Appellant told him different versions of the killing (Vol XVI, pp. 64-65).

Counsel knew or should have known that the Larson testimony would raise questions regarding the Appellant's seemingly different versions of what happened to the victim. Sure enough, just as in the trial, the prosecutor took advantage of the opening and introduced allegedly different versions of the shooting. The calling of Dr. Larson as a defense expert was a clear and unequivocal prejudicial error.

The Doctor testified to what has been viewed as conflicting statements by the Appellant, thus cementing in the judge's mind the concept of an "erratic and difficult" Appellant, who lacked credibility (EHO-8, ROA 02648). The Larson testimony, rather than helping the Appellant, contributed to judicial prejudice.

At Dr. Larson's initial evaluation of the Appellant on May 7, 1993 (EH Tr. 21, 61), it appears, albeit very sketchily, that the Appellant's comments were consistent with his 1988 statement (EH Tr. 64-66).

Dr. Larson's second meeting with the Appellant, on June 10,

1994, produced equally sketchy comments which seemingly contradicted the Appellant's statement entered as evidence at the trial. In June 1994, Dr. Larson was at the prison to evaluate another prisoner, and finding himself with free time, called the Appellant's then counsel, who authorized additional, unplanned testing of Richard Shere (EH Tr. 62-66).

In response to the State's Attorney's questions, Dr. Larson testified that, at this second meeting, the Appellant agreed with a supposition raised by Dr. Larson that the Appellant and the victim struggled over the gun, and it discharged (EH Tr. 66).

The damage was severe. The EH judge accepted the uncontested Larson testimony and, in his Order denying the Motion for Postconviction Relief, stated that the Appellant insisted on repeatedly changing his version of the murder:

> He even told Dr. James Larson, the expert he retained for the R. 3.850 proceedings, different versions of what happened that evening. [The crime occurred in the early morning hours of Christmas Day.]

(EHO 7 ROA 02647).

The evidentiary hearing was mired in psychological, clinical psychological, neuropsychological, and psychopathological semantics and speculation, which the EH Court rightly found worthless. The EH Court discounted most of Dr. Larson's testimony because of the following shortcomings:

> --The Doctor failed to establish that a mental health expert could have offered any relevant testimony on the existence of voluntary intoxication or diminished capacity during the guilt phase or on the existence of

statutory or non-statutory mitigation in the penalty phase of the trial (EHO, p. 21, ROA 02661);

--The Doctor failed to establish that the Appellant's mental status prevented him from forming the specific intent to commit first degree murder (EHO, p. 21, ROA 02661);

--The Doctor failed to offer testimony that would support a defense of voluntary intoxication or diminished capacity (EHO, p. 21, ROA 02661);

--The Doctor reached a conclusion as to possible brain damage suffered by the Appellant that was materially different from that given the trial attorneys (EHO, p. 21, ROA 02661);

--The Doctor offered testimony about substantial domination of the Appellant by another person that was "tenuous at best" (EHO, p. 22, ROA 02662);

--The Doctor retracted on cross-examination his opinion that the Appellant suffered from a dependant personality disorder, and therefore, was a follower (EHO, p. 22, ROA 02662);

--The Doctor failed to specifically address any mitigating circumstances or establish a basis for his opinion that statutory mitigating circumstances existed (EHO p. 22, ROA 02662).

Not only did Appellant's EH counsel fail him; so did the mental health expert retained in his defense. By discounting most

of Dr. Larson's testimony, the EH Court substantiated Appellant's claim of ineffective counsel in the postconviction phase. Either Dr. Larson was ill-prepared, or he was the wrong expert; either way, R. 3. 850 counsel erred in calling him.

Unfortunately, the EH Court did accept one part of Dr. Larson's testimony--that regarding seemingly "different versions" of the crime. But for this testimony, the EH Court would not have been able to write the aforementioned damning statement about the Appellant, and there would have been no conflicting statements at the R. 3.850 evidentiary hearing. Just as the trial jury was influenced by the conflicting Demo accusation, the EH court was influenced by the conflicting Larson testimony--to the injury of the Appellant.

SUMMARY OF FACTS

The tragic miscalculation by the Public Defender in calling Detective Arick and permitting the prejudicial, self-serving statements of Mr. Demo to convict the Appellant of first-degree murder is a legal travesty. The patent, ineffective assistance of counsel was, in fact, clearly and substantially deficient to the prejudice of the Appellant. It was beyond the pale of reasonably competent death penalty performance.

No logical argument can be made that the Public Defender team gave competent and correct consideration of the State's evidence, for had counsel done so, they would not have knowingly caused Mr. Demo's self-serving statement to be heard by the jury. The bias of the Public defenders against their client contaminated their

thinking--the Appellant was a liar--liar--liar--liar.

Not only was the jury made up of "untrained citizens," as the trial judge wrote, but the defense counsel was regrettably untrained (EHO-11, ROA 02651). Defense counsel is not being questioned on ethics or competency in non-capital cases, but, despite the court's positive comment on the competency and experience of both trial counsel, they were not prepared for a capital case (EHO 10, ROA 02650).

To the Appellant's detriment, both Public Defenders were on a learning curve. The Appellant is paying a high price for their education.

At every level in these proceedings, counsel failed to resolve crucial conflicts between the statement of the Appellant and that of Mr. Demo regarding the shooting of Drew Paul Snyder. These failures by counsel establish a reasonable likelihood that, absent these errors, the Appellant would have been found guilty of a lesser offense, if not exonerated completely.

The court record shows that the evidence is not overwhelming as to the guilt of the Appellant; in fact, the opposite is true. Errors by counsel at the trial level, at the appellate level, and at the R. 3.850 level are so grave as to affect the fairness and reliability of the proceedings, thus undermining the confidence of the public in the integrity of the criminal justice system in Florida.

As a result of counsel errors at the trial and at the evidentiary hearing, the court never heard a clear and defined

presentation of favorable testimony nor cross-examination of unfavorable testimony. The Appellant does not contend that he was snow-white, but neither is this troubled young man the cold and ruthless killer the court has opted to depict him (EHO 11, ROA 02651).

SUMMARY OF LAW

Appellate courts have reversed convictions in capital cases, where the following failures by counsel have been demonstrated--all of which apply in the Appellant's case:

--Counsel failed to obtain discovery, (Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed. 2d 305 (1986);

--Counsel failed to conduct proper pre-trial investigation, (Henderson v. Sargent, 926 F. 2d 706 (8th Cir. 1991); U.S. v. Baynes, 687 F 2d 659 (3rd Cir. 1982);

--Counsel failed to interview potentially favorable witnesses, (Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990);

--Counsel failed to obtain evidence potentially favorable to the client (such as a transcript of Mr. Demo's statement with its many versions of the crime), (Nixon v. Newsome, 888 F. 2d 112 (11th Cir. 1989); and

--Counsel failed to present an intelligent, knowledgeable, and effective defense, (Caraway v. Beto, 421 F. 2d 636 (5th Cir. 1970), Crane v. Kentucky, supra;

--Counsel failed to present mitigating circumstances at the penalty phase of the trial and at the EH, Strickland v. Washington, supra; Young v. Zant, 677 F.2d 792 (11th Cir. 1982)

--Failure of Counsel to object to the admission of aggravating circumstances CCP (F.S. 921.141 (5) (i) (1997) and hindering the enforcement of laws (F.S. 921.141 (5) (g) (1997)), Gardner v. Ponte, 817 F. 2d 183 (1st Cir. 1987)

There is a reasonable probability, but for trial counsel's errors, whether colored or not by an acknowledged bias, the result in each of the Appellant's verdicts would have been different.

The Appellant asks the FSC to consider trial counsel actions and inactions under the standard announced in United States v. Cronic, supra, and discussed in Strickland:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. (466 U.S., at 659, 104 S.Ct., at 2047. Strickland, 466 U.S. 668 at 692.

Under this standard, a per se presumption of prejudice applies. The presumption arises when there is actual or constructive denial of counsel or where counsel fails to subject the government's case to adversarial testing (United States v.Cronic, supra; Stano v. Dugger, supra).

As a result of the R. 3.850 counsel errors here described, the

Appellant did not receive adequate assistance of counsel at the evidentiary hearing. Since the evidentiary hearing was the venue for a full hearing on the Appellant's claim of ineffective counsel, he was entitled to the effective assistance of counsel under the Sixth Amendment to the United States Constitution there also.

In United States v. Cronic, supra, the Supreme Court spoke to circumstances in which no attorney could render effective assistance. No such circumstances affected the Appellant's collateral litigation. Even though, in Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988), the FSC noted that capital petitioners in Florida are entitled to effective postconviction assistance of counsel, the Appellant did not receive the assistance to which he was entitled. The circumstances surrounding the Appellant's evidentiary hearing were infected by condemning factors of ineffective legal representation.

On May 31, 1991, the Overton Committee (The Supreme Court Committee on Postconviction Relief in Capital Cases) submitted a report that discussed the duties of collateral counsel in capital cases. The Committee recognized that "each Death Row inmate should have competent counsel to represent him or her in postconviction relief proceedings." Its findings assume the role of postconviction proceedings in insuring that the process which results in a death sentence is free from legal error. It assumes that such proceedings are conducted in an appropriate manner, given the gravity of the punishment.

The Appellant was entitled, by law, to meaningful assistance,

see section 27.702, Fla. Stat. (1987) and Spalding v. Dugger, supra. The Overton Commission highlighted this entitlement as the basis of fair and reliable procedures in postconviction proceedings. What would the Overton Commission think of the Appellant's evidentiary hearing, where counsel failed to provide the competent postconviction counsel to which the Appellant was entitled?

When the ineffective assistance of counsel is so pervasive that it affects the process of the deliberations of guilt--prejudice must be presumed U.S. ex rel. Green v. Rundle, 434 F. 2d 1112 (3rd Cir. 1970).

The United States Supreme Court has recognized that the focus of postconviction proceedings is the fundamental fairness of the proceedings, especially where the adversarial process has broken down Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L. Ed 2d 392 (1980). It is clear that the adversarial process broke down in the Shere case, both at the trial and postconviction levels.

A single error, if substantial or of a constitutional nature, may be sufficient to establish an ineffective counsel claim Nero v. Blackburn, 597 F. 2d 991, (5th Cir. 1979); Nelson v. Estelle, 642 F. 2d 903, 906 (5th Cir. 1981). This appeal documents multiple errors of a substantial or constitutional nature.

Failure to act as advocate is a ground for granting a new trial. The Appellant, therefore, merits a new trial.

When the Public Defender at the Shere trial abrogated his responsibilities in picking a jury--a critical part of an

attorney's trial performance--the Appellant suffered actual and substantial damage and loss of his constitutional rights to effective counsel Young v. Zant, 677 F.2d 792 (11th Cir. 1982), Francis v. Spraggins, 720 F. 2d 1190 (11th Cir. 1983). See, U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991).

Contrary to the EH Court's opinion in its Order denying the postconviction Motion to Vacate, an opinion which stated that the Public Defender made no careless or unconcerned decision to introduce evidence at the trial, the opposite is sadly true.

The Public Defender made a fundamental, grievous, and reversible error, regardless of reason, in presenting Detective Arick as a defense witness, thus opening the door for the conflicting and convicting testimony of the shooter Mr. Demo.

Ineffective assistance of counsel is also attributable to R. 3.850 counsel's mishandling of the postconviction proceedings. While ambitiously raising twenty-three (23) claims of error, which the EH Court in the main summarily denied, counsel allowed legitimate and reversible error to be overlooked or obfuscated by excess verbiage. Further, R. 3.850 counsel chose not to elicit testimony that would have established claims regarding the ineffectiveness of the trial counsel.

The totality of the errors of trial counsel and R. 3.850 counsel so contaminated the fairness of the proceedings as to deny the Appellant his United States and State of Florida constitutional rights, in the following ways--all previously documented in this appeal:

--The Appellant was denied substantive due process.

--He was denied procedural due process.

--He was denied the right to competent and effective presentation of his case.

--He was denied confrontational examination of Mr. Demo, who was accuser and alter ego of the State.

--He was denied adversarial testing of Mr. Pruden's "damaging" testimony.

--He was denied counsel to serve as advocate for him, counsel who would not admit to calling him "a liar."

As a result, the trial jury was denied relevant and material evidence to form a valued judgment, both at the guilt phase and the penalty phase. Clear and substantially different decisions by jury and courts would have resulted but for the ineffectiveness of the respective counsel. Death Row would not be Mr. Shere's undeserved fate.

ARGUMENT II

THE TRIAL COURT ERRED IN THE PENALTY PHASE BY ISSUING IMPROPER INSTRUCTIONS TO THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED (CCP) AGGRAVATOR (Sec. 921.141 (5)(i), Fla. Stat. (1987)), HINDERING OR DISRUPTING THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS AGGRAVATOR (SEC. 921.141 (5) (G), Fla. Stat. (1987), AND BY FAILING TO CREDIT THE APPELLANT WITH MITIGATORS.

THE EVIDENTIARY HEARING COURT ERRED BY DENYING SUMMARILY CLAIMS I, II, V, VII, VIII, IX, X, XI, XII, XIII, XIV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, AND XXIII, THUS DENYING THE APPELLANT A FULL AND FAIR HEARING WITH PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

A close reading of the court record reveals that court errors occurred at each level of the Shere case. In this argument, the Appellant will address only the most egregious of these errors.

Poisoning the Well of Judicial Objectivity

The Appellant 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.

The judge, who was both trial judge and R. 3.850 hearing judge, described the Appellant as an "erratic and difficult" client who insisted on repeatedly changing his version of the murder. There are sufficient indications in the record that the a combination of the State Attorney and the Public Defender had created an aura of many versions of the shooting as allegedly given by the Appellant. This appears to have tainted the judge's views.

The judge referred to Dr. Larson's account of seemingly conflicting versions of the crime (EHO 7, ROA 02647). The judge later wrote that the Appellant had changed his versions of the murder and therefore was "not credible" (EHO 8, ROA 02648). Such court opinions lack the support of uncontradicted evidence in the court record and thus call into question judicial objectivity.

The Appellant respectfully asks the Florida Supreme Court to consider the genesis of this poisoning. The failure of the judge to understand the Appellant's personality and the following factors leading to its formation resulted in judicial bias:

--Psychological testing shows the Appellant to have marginal intelligence (ROA Vol. XVI, p. 53).

--He is not a leader, but a follower (ROA Vol. XVI, p. 27).

--He had a troubled home life and physical problems including possible brain damage (ROA Vol. XVI, p. 70).

--He was a juvenile delinquent but, until the time of his arrest on murder in the first degree, had no criminal convictions as an adult.

The judge preferred to describe the Appellant as "erratic and difficult" rather than criticize counsel for mishandling the case. A close reading of the Order Denying the Motion shows that the judge repeatedly extolled the virtues of the two Public Defenders (EHO 10, ROA 02650), to the detriment of the Appellant.

--Yes, the Appellant was "erratic" but, rather than being "difficult," he was having difficulties with his counsel.

A close reading of the court record suggests that any reasonable person would have had difficulties with counsel who failed to act as advocate.

--Yes, the Appellant was argumentive, scared, even panicky.

--Yes, he had a difficult time dealing with reality (ROA Vol. XVII, p. 23).

What person of his background, in the life-threatening environment of a murder trial, would not react as he did? First, counsel pressured him to pick his own jury. Second, the Appellant then had to decide whether to testify or not.

Trial and EH judicial prejudice did not result from the Appellant's singular outburst of frustration with his counsel but from cumulative counsel errors. Such errors were rooted the belief the Appellant was untruthful, in the calling of Detective Arick as

a defense witness at trial, and in the failure to adversarially test the State's witnesses. By failing to stay within the range of acceptable professional performance, counsel contributed to a poisoning of the court's thinking and opinion, which, in turn, led to a questionable verdict by the jury.

The Calling of Heidi Gruelich as a Court's Witness

The trial court erred in permitting Heidi Greulich to testify as a Court's witness, when, for good reason, both prosecution and defense refused to vouch for her credibility. Her confused testimony was useless and not worthy of credit. The FSC found the calling of this witness a court error, albeit a "harmless error." It follows, a fortiori, then that the R. 3.850 Order should not have considered any part of her testimony (EHO pp. 9-10, ROA 02649-02650). Contrary to the FSC opinion, however, the EH Court contended that the State established through Heidi Greulich that the Appellant killed the victim (EHO 10, ROA 02650). In a lesser case, the harmless error rationale might suffice; but in a death penalty case, no error is harmless.

The calling of Heidi Greulich, a minor, occurred when the State, which had a weak case, asked that she be presented as a Court's witness. On examination by the State, this sad teenage girl, answered, "I don't recall," "I don't know," or "I don't remember," a total of forty-one (41) times (Tr. 704-729). She admitted that, when interviewed by the police, she was taking Valium and felt "groggy." She admitted saying things that were slightly "fouled up" (R-707-708, 713-714).

Heidi Greulich testified that the Appellant told several different stories to protect her, which was consistent with Detective Arick's testimony during the State's case and with the tape of the Appellant's statement. She testified that the Appellant told her "falsified stories" (R-714-715, 724-725). To this young girl, the events under question were all a "vagueness," and she "was pulling dates out of the sky" (R-728).

The trial court erred in calling this witness; the FSC rightly found it error; and the EH Court erred by disregarding the FSC finding. The FSC, by calling it "harmless error," however, disregarded the impact of the Heidi Gruelich testimony on the jury.

"Harmless error" must be established beyond a reasonable doubt. The declaration of Heidi Gruelich's testimony as "harmless error" combined with the "harmless error" of the HAC aggravator had to impact the jury, and therefore can not be established beyond a reasonable doubt Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 l.Ed. 2d 705 (1967).

Confusing the Facts

The lower court judge officiated at both the trial and the R. 3.850 hearing. As is the way with human nature, he may have relied on unverified recollections of trial testimony and thus confused matters of one proceeding with the other. In any event, the R. 3850 Order Denying the Motion to Vacate contains findings contrary to the court record. It contains factual errors (R. 336-455, EHO 9, ROA 02649).

The judge mixed the EH claims with faulty recollections of the

trial testimony. As an example, in the EH Order, the judge found that "The physical evidence, including projectiles removed from the victim's body that came from defendant's gun, was extremely damaging" (EHO 10, ROA 02650). This finding is not based on any EH testimony but comes from the judge's faulty recollection of the trial record. In contrast to this finding, the trial testimony during the State's case was that Mr. Demo fired both guns and that the fatal projectiles were fired from a pistol.

The EH Court wrote in its Order denying the R. 3.850 motion: "The codefendant's statement confirmed that he [Demo?] fired the fatal shot and that the defendant (Appellant) did not act alone" (EHO 11, ROA 02651). Here the EH judge contradicted his finding quoted above; he also erred by referring to a co-defendant, when the Shere case has but one defendant. The EH Court further confused the facts contained in the trial record when it found "...there was overwhelming evidence that the defendant was guilty of first degree murder" (EHO 11, ROA 02651). The trial record does not substantiate such a finding. In fact, there was no credible evidence presented at the trial that would support the EH Court's finding.

The confusion of facts may well be attributable to having the same judge officiate at both trial and evidentiary hearing.

As another example, the EH Court erred by finding that "...the State introduced evidence at the trial that the defendant gave several inconsistent statements after his arrest" (R-336-455). The court record does not support this finding; on the contrary, the record establishes that, <u>after his arrest</u>, the Appellant only gave

one statement, which he stood by in his penalty phase and EH testimony.

To support its contention of inconsistent statements, the EH Court referenced pages of Detective Arick's State testimony and of the Appellant's taped January 14, 1988, interrogation (R-336-455). These pages, however, include no mention of inconsistent statements by the Appellant after his arrest. The only comments "inconsistent" with his statement was made by the Appellant on January 13, 1988, when he was neither under arrest nor under oath (R-341-346). Detective Arick testified that, on January 13, 1988, the Appellant went voluntarily with him to an interview room and that the interview was not taped. Detective Arick stated, "Well, I didn't feel that he said anything pertinent during the course of the interview that we needed to tape record" (R-342) [Emphasis added].

In response to the State Attorney's questioning, Detective Arick said that, on January 13, 1988, the Appellant made no statement implicating himself in any crime and denied any knowledge of the disappearance or death of Drew Snyder, the victim (R-345-346). The only valid conclusion regarding the January 13, 1988, interview is that the Appellant was, in effect, asserting his constitutional rights to remain silent and to have an attorney present. The pre-arrest interview was not a recorded statement.

Once more, the only "inconsistent" comments by the Appellant were in the form of a general denial made while neither under arrest nor under oath. Even the State Attorney concluded that the Appellant's initial denial of knowledge of the crime was of minor

consequence and worthy of only passing comment in his closing argument. Yet neither trial counsel, appeal counsel, nor R. 3.850 counsel bothered to expand, explain, correct, or argue against this confused notion of "inconsistent statements" held by the trial court, the State Attorney, the jury, and the EH Court.

The fixation of the EH Court on alleged inconsistent statements by the Appellant was fueled by counsel and State Attorney errors at the trial and at the R. 3.850 hearing (ROA Vol XVII, pp. 255-256). Counsel wrongly called as defense witnesses, Detective Arick at the trial and Dr. Larson at the evidentiary hearing. Their damaging testimonies, erroneously called forth by counsel, created the court climate of inconsistency and lack of credibility that clung to the Appellant.

The EH Court, in another mistaken notion, excused trial counsel's error of calling Detective Arick as a defense witness by finding that "at the conclusion of the State's case, the defendant was in a desperate situation" (EHO 9, ROA 02649). Again, the court record does not support this finding, nor does it support the EH Court's contention that trial counsel was "a highly competent...trial attorney" (EHO 10, ROA 02650). The court record belies the Court's view. Was anyone in the Shere case reading the court record?

The court, both at the trial and the R. 3.850 hearing, acted in an arbitrary and capricious manner in deciding which evidence was credible and which was not--further confusing the facts.

Detective Arick's testimony established that the Appellant was

arrested at 1730 hours on January 14, 1988, on murder in the first degree, based upon the probable cause of a highly questionable statement made by Bruce M. Demo.

One version of the crime contained in Mr. Demo's statement was an accusation that he [Demo] witnessed the Appellant shoot Drew Paul Snyder with a small caliber rifle four (4) times in the chest killing him. This accusation was debunked at trial by the Medical Examiner (R-559, 570-571), and the FBI ballistics experts who found one (1) shot to the chest and that from a pistol. Among the many inconsistencies in the Demo statement was an admission that he [Demo] fired the fatal shot.

Mr. Demo's statement, erroneously introduced in the course of the Appellant's case, was replete with conflicting, inconsistent, and self-serving representations, none of which were revealed as such nor adversarially tested by defense counsel. This grave counsel error fueled judicial bias throughout the proceedings.

With regard to the witness, Heidi Greulich, the trial court appears to have accepted her testimony pointing to the Appellant as the killer but gave little credence to her testimony that the "stories" told her by the Appellant were meant to protect her from Mr. Demo's revenge (EHO 9-10, ROA 02649-02650). The FSC on direct appeal ruled that the trial court erred in calling Heidi Gruelich as its witness. Shere v. State, supra. Still, the lower court wrote in its EH Order, "The State also established that the defendant told his girlfriend that he had killed the victim himself..." (R.714-717); (EHO 10, ROA 02650).

The State witness, Darlene O'Donnell, strongly supported the Appellant's version of events. Ms. O'Donnell, niece of Regina Shaffer (Mr. Demo's girlfriend), testified to events she saw and heard during the late hours of Christmas Eve 1987 and the early morning hours of Christmas Day. She knew that Mr. Demo called someone thirty (30) minutes before the Appellant drove up to the residence (R-697). She testified that Mr. Demo carried a pistol with him every time he left the house (R-699). She is "almost positive" she heard a shovel being loaded into the Appellant's car by Mr. Demo (R-702). Mr. Demo returned about 4:00 am and did something unusual; he ran the laundry washer (R-701).

Her credible testimony damages Mr. Demo and supports the Appellant, who stated that Mr. Demo called him; Mr. Demo was mad at the victim for "ratting him out;" Mr. Demo brought the shovel and the handgun; Mr. Demo controlled the Appellant enough to make him drive to Mr. Demo's residence early on Christmas morning. And they contradict the self-serving statement made by Mr. Demo to Detective Arick. Ms. O'Donnell's testimony negates the court's notion that the State's case was such as to cause the defendant to be in "desperate straits."

Trial counsel's failure to impeach the State's witness, Raymond Pruden, influenced the Order denying the R. 3.850 motion. In its Order, the EH Court accepted Mr. Pruden's unchallenged testimony that the Appellant said he shot the victim up to fifteen (15) times (EHO 10, ROA 2650). In doing so, the EH Court discounted the Medical Examiner's testimony, which refuted Mr. Pruden's story

(R-559, 570-571). The FSC also discounted the Medical Examiner's testimony by finding Mr. Pruden's testimony damaging to the Appellant (Shere v. State, supra, p. 90).

Once again, the failure of the Public Defender to cross-examine a pivotal witness contributed to judicial prejudice. A close reading of the court record reveals that reliance of the trial court on the unchallenged Pruden testimony diminished court rulings at all levels of the case.

Whatever the reasons, the EH Court judge, who also served as trial judge, mixed data from the different proceedings; thus, Socher v. Florida, 504 U. S. 527, 112 S.Ct 2114, 119 L.Ed. 2d 326 (1992); and Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed. 2d 372 (1988) are applicable to the Shere case.

Court Error Involving Aggravators and Mitigators

The credible trial evidence contradicts most of the court rulings on aggravators and mitigators.

The EH judge, for instance, erred in writing that the Appellant and "... his accomplice [Mr. Demo] planned the murder several hours before the actual killing" (EHO 14, ROA, 02654). The court record does not offer any credible evidence at any stage of the proceedings to support a cold, calculated, and premeditated (CCP) aggravator. (Sec. 921.141 (5) (i) Fla. Stat. (1987)). The credible trial evidence has the Appellant as the follower--a statutory mitigating circumstance in which the Appellant was an accomplice with a relatively minor part in the activity (Sec. 921. 141 (6) (d) & (e) Fla. Stat. (1997)). With due diligence, trial

counsel could have established that the CCP aggravator was not proved beyond a reasonable doubt, which would have influenced court rulings.

The failure of the Appellant's respective counsel to properly raise legal questions on the weighing of statutory and possible non-statutory mitigators against the CCP and the informer aggravators denied the Appellant procedural due process see, Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987); McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L.Ed. 2d 369 (1990)); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed. 2d 384 (1988); Hodges v. Florida, 113 S. Ct. 33 (1992): Maynard v. Cartwright, supra.

The EH Court erred in finding that "The simple act of packing a shovel in the back of his car before picking up Drew Snyder...clearly established that the defendant [Shere?] contemplated his actions carefully before the murder" (EHO 14, ROA 02654). The uncontradicted testimony of Ms. O'Donnell and the Appellant refute the Court's faulty recollection of the trial testimony. The packing of the shovel clearly established that Mr. Demo contemplated his actions carefully before the murder.

The court in its written Judgment and Sentence (ROA 1454-1458) (Appendix C) and EH Order (EHO 14, ROA 02654), stated that the Appellant loaded a shovel into the car to help establish the grounds for a CCP aggravator. The uncontradicted testimony is that Mr. Demo loaded the shovel into the Appellant's car.

With regard to the Appellant's claim of error in jury

instructions and most of the other claims, the EH Court found that R. 3.850 counsel failed to establish the facts to prove them. Counsel merely stated conclusions, to the detriment of the Appellant. Again counsel error contributed to judicial prejudice.

The EH Court denied the Appellant's claims dealing with instructions on the CCP aggravator, even though the facts of the case establish no basis for it. The court record shows no evidence of cold, calculated, nor heightened premeditation--quite the opposite. The Appellant was a passive personality in the commission of the crime. The credible evidence was that Mr. Demo called the Appellant (R-349, 402, 697), that the Appellant tried to talk Mr. Demo out the killing (R-403), that Mr. Demo had the Appellant come to his house, and that Mr. Demo loaded the shovel into the car (R-351, 404, 702).

In addition to the CCP aggravator, the EH Court found that the Appellant had no pretense of moral or legal justification (EHO 14, ROA 02654), despite credible evidence establishing that he was not the shooter.

The facts here do not meet the test of the aggravating circumstance of cold, calculated, and premeditated Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Porter v. State, 564 So 2d 1060 (Fla. 1990).

As to the trial court's instruction on the statutory aggravator of hindering or disrupting the lawful exercise of a governmental function or law enforcement (F.S. 921.141 (5) (g) (1987)) (victim's alleged actions as an informer), the credible

evidence was that Mr. Demo, not the Appellant, would benefit from eliminating an informer (R-349, 426-428).

The State failed to produce any evidence the Appellant knew the victim was an informant, beyond a reasonable doubt. There was no testimony that the Appellant knew the victim was an active informant, that the victim had participated in an investigation of the Appellant, and that the information of the victim led to the arrest of the Appellant Francis v. State, 473 So 2d 672 (Fla. 1985). The evidence must show that the dominant motive for the killing was the elimination of the witness Bates v. State, 465 So. 2d 490 (Fla. 1985); Jackson v. State, 575 So. 2d 181 (Fla. 1991). The trial court's Judgment and Sentence (ROA 1454-1455), fails to accurately substantiate the requirements for hinderance of a governmental function or the enforcement of laws aggravator. Detective Arick relied upon the Appellant's statement about the motive for the killing--as being solely Mr. Demo's (R-371-372, 426-428). Sliney v. State, 699 So. 2d 662 (Fla. 1997).

The FSC ruled in the direct appeal that ten (10) shots did not amount to a heinous, atrocious, and cruel (HAC) aggravator but that the other aggravators should remain Shere v. State, supra. The FSC ruling was made despite credible evidence that, but for counsel error, the uncontradicted testimony established Mr. Demo as the shooter. He was the one who had the motive required to seek the death of the victim. Detective Arick testified that the Appellant did not have the motive to kill Mr. Snyder but Mr. Demo did (R-371-372). In the penalty phase of the trial, the Appellant denied

being the shooter (R-949), and no credible testimony contradicted him.

The Appellant's age at the time of the crime was the only statutory mitigating factor found by the trial court. Appellant's age and lack of a priori adult criminal record were given short shrift, however, by the trial judge and not properly pursued by respective counsel thereafter (Sec. 921.141 (6) (a) and (g) Fla. Stat. (1987)). (See, Appendix C)

The sentencer may not be denied or precluded from considering any relevant mitigating circumstances Mills v. Maryland, supra, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 21 (1982).

The failure of counsel to adequately develop and articulate the Appellant's mitigators at each and every stage of the judicial proceedings denied the Appellant both procedural and substantive due process Murphy v. Puckett, 893 F. 2d 94 (5th Cir. 1990). It also clouded the court climate and court rulings.

The Appellant was denied substantive due process by the failure of respective counsel to present and argue such statutory and non-statutory mitigating circumstances as the Appellant's cooperation with authorities, his abandonment of the crime as established by his requests to take the victim to the hospital, his passivity, and his efforts to dissuade Mr. Demo from his homicidal desire.

The uncontradicted trial testimony was that, rather than doing the shooting, the Appellant attempted to talk the shooter, Mr.

Demo, out of it (R-349, 402-403).

The Appellant twice asked the shooter, Mr. Demo, to take the victim to the hospital (R-353, 421, 452). Such requests are a non-statutory mitigating circumstance; yet counsel, at every stage of the proceedings, all but ignored this mitigator. This failure by counsel led to the court's misinterpretation of the evidence.

The trial record establishes that the Appellant cooperated with the police in waiving the formality of a search warrant for his home, in showing the police the crime scenes, and in locating the man to whom he sold the rifle (R-361, 365, 368, 371, 379, 381-383, 385, 393-394). Appellant's cooperation with the police was never developed as a non-statutory mitigating circumstance, nor was it ever argued at subsequent judicial hearings.

Cumulative counsel error led to error in the court rulings on aggravators and mitigators. The weighing of invalid aggravators which are combined with the weighing of aggravators and mitigators by the sentencer violates the Eighth Amendment of the U.S. Constitution. A new trial is mandated for this error See, Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed. 2d 854 (1992).

Procedural Bars v. Procedural and Substantive Due Process

The EH Court denied the Appellant procedural and substantive due process by relying on a fiction--that claims asserted in the R. 3.850 Motion to Vacate were procedurally barred.

The due process provisions of the U.S. and Florida Constitutions have a clear purpose--to assure every person the opportunity for a full and fair consideration and for presenting

evidence of any and all possible denials of the basic protection envisioned by the constitutional framers. In death penalty cases, the basic protection overrule the compromising of due process for any reason.

There can be no procedural bar, albeit statutorily and artificially imposed on the rights of an individual, that would keep evidence of innocence from being presented to the courts, whenever and wherever found. It is unconstitutional to deny an individual freedom or life based on a fiction that substantial and material evidence or conduct not raised or questioned at a designated time or before a designated court can be procedurally barred from ongoing legal proceedings.

The Appellant admits that raising and questioning such evidence or conduct may be time-consuming, costly, and politically incorrect. The Appellant contends, however, that no individual should be condemned to prison or death because of the frailty, incompetence, inexperience, or inability of counsel. The Appellant asks the FSC to consider if a convicted person has the right to raise, at this stage of his case, counsel errors that contributed to court errors and judicial prejudice. As the FSC and other courts have maintained, there is always time for the basic question--is it fair?

The Appellant asks the FSC to determine the fairness of arbitrary and capricious dismissal of efforts to establish counsel and court error.

ARGUMENT III

FOR THIS APPELLANT, THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL, AS IT IS CRUEL AND UNUSUAL PUNISHMENT AND IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND OF THE FLORIDA CONSTITUTION.

The Constitution of the United States prohibits punishment that is cruel and unusual (U.S. Constitution, Amendment VIII). The Florida Constitution bars any punishment that is either cruel or unusual (Florida Constitution, Article I, section 17).

The Appellant asserts that, in his case, the Florida death penalty is unconstitutional, based upon the credible and material factual evidence presented throughout the judicial proceedings. The lack of significant aggravating circumstances--a major weakness in his conviction--should have been raised by counsel and/or court. Instead, aggravators were improperly applied to the Appellant, thus rendering the death penalty cruel and unusual punishment.

A close reading of the court record reveals that the lower court judge and the jury confused credible testimony with questionable testimony, misinterpreted testimony, and applied the law incorrectly, thus rendering the death penalty cruel and unusual punishment.

In the FSC opinion, Shere v. State, supra., Justice Barkett wrote about the facts leading up to the killing as follows:

> "...Shere received a telephone call from Demo advising him that Demo was thinking about killing Snyder, and threatened to kill Shere if he did not help."

Yet the Justice failed to write that the Appellant tried to dissuade Mr. Demo from his mission to kill the victim (R-349, 402-403). The fact that Mr. Demo threatened the Appellant and that the

Appellant tried to dissuade Mr. Demo from killing the victim, in turn, negate any CCP aggravator. These facts, which were trial certitudes, needed to be raised, however, as non-statutory mitigators. They were never raised at any level of the proceedings, thus rendering the death penalty cruel and unusual punishment.

Nor did the FSC acknowledge the fact of the Appellant's desire to get the victim to a hospital (R-353, 421, 452). This abandonment of the crime, which negates a CCP aggravator, was never raised as a non-statutory mitigator, thus rendering the death penalty cruel and unusual punishment.

The FSC wrongly opined that the evidence against the Appellant came largely from his own mouth. The trial record shows that the Appellant, in his statement, maintained that Mr. Demo was the shooter. This pivotal evidence was introduced by the State testimony of Detective Arick and the tape of the Appellant's January 14, 1988, statement (R-352-354, 409-411, 419-423). The Appellant, in his only testimony at the trial, denied shooting the victim (R-949).

Richard Shere was an accessory, at most, and an unwilling and threatened participant, as established by his own words. A close reading of the court record demonstrates that he was not the mover and shaker of the tragic events of Christmas Day 1987, thus rendering the death penalty cruel and unusual punishment.

Counsel and court overlooked the mitigator involving the Appellant's cooperation with the police. The proverb--no good deed goes unpunished--applies to the Appellant's cooperation with

authorities; instead of being rewarded, he was punished. Mr. Shere, not Mr. Demo, cooperated with the police even to the point of locating the person to whom he sold the .22 cal. rifle used by Mr. Demo to shoot the victim. The preponderant evidence points to Mr. Demo's pistol as having fired the fatal shot, thus rendering the death penalty cruel and unusual punishment for the Appellant.

The Appellant, with no significant criminal history and only slight juvenile problems, was just twenty-one (21) years of age when the homicide occurred. His lack of criminal record and young age were not properly presented at any level in the proceedings, thus rendering the death penalty cruel and unusual punishment Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

The FSC concluded that, "Demo's statement and Pruden's testimony were very damaging." The points made in Argument I: Ineffective Counsel suggest that this conclusion by the FSC was influenced by the failure of trial and appellate counsel to perform within the acceptable range of professional demands. In a capital case, acceptable performance by counsel is paramount. The Appellant asserts that his constitutional rights have been violated by the failure of counsel to properly present to the courts clear, defined, precise, factually correct, and legally sound arguments. The failure of counsel to present such arguments, in turn, has resulted in a cruel and unusual punishment being unfairly and unconstitutionally ordered for Richard Shere.

As the admonition goes--every case must rise and fall on its own merits--so too must each case rise and fall on the merits of

counsel Strickland v. Washington, supra.; Hitchcock v. Drugger, supra. Because death is an unique punishment, a thoughtful and deliberate proportionality review must consider the totality of the circumstances in this case Sinclair v. State, supra; Porter v. State, supra.

The Appellant contends that, in his case, the electric chair must be considered as cruel and unusual punishment in violation of his constitutional rights see Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996); Campbell v. Wood, 18 F. 3d 662 (9th Cir. 1994); Eddings v. Oklahoma, supra.

It is well settled that the death penalty must be proportional to the culpability of the Appellant. The uncontradicted testimony demonstrates the individual culpability of the Appellant was disproportionate his participation in the incident and thus, to the sentence Sinclair v. State, supra; Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed. 2d 127 (1987); Jackson v. State, supra.

Florida law recognizes the cumulative effects of errors, both as to the procedural and substantive aspects of a trial. The Appellant contends that, in his case, cumulative errors deprived him of the assistance of effective counsel, of procedural due process, of substantive due process, of sentencing based upon acceptable and proper criteria. These deprivations, taken together, denied the Appellant a fair trial and denied him a verdict based on evidence establishing guilt beyond and to the exclusion of any reasonable doubt, thus rendering the death penalty cruel and unusual punishment.

The United States Supreme Court, like the Florida Supreme Court, consistently emphasizes the unique quality of the death penalty punishment in its enormity and finality. Most, if not all of the late Mr. Justice Marshall dissents in death cases, he cited Gregg v. Georgia, 428 U. S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed 2d 859 (1976). Mr. Justice Marshall would have considered the death penalty cruel and unusual punishment especially in this case.

The Appellant claims that deprivations resulting from cumulative error deny him his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under corresponding Amendments to the Florida Constitution Chapman v. California, supra; State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Jackson v. State, supra; Derden v. McNeel, 938 F. 2d 605 (5th Cir. 1991); Jones v. State, 569 So.2d 1234 (Fla. 1990).

CONCLUSION

The Appellant contends that, at each level of the judicial proceedings, he was denied adequate legal representation. A close reading of the court record reflects that, in fact, his legal representation fell substantially below the standards promulgated by the Constitutions of the United States and of the State of Florida, as interpreted by the U.S. Supreme Court and the Florida Supreme Court.

The EH transcript establishes that the trial counsel for the Appellant testified that he called his client "a liar." Trial counsel admitted that he failed to act as advocate by forcing his

client to choose his own jury. Trial counsel testified that they knew the Appellant did not understand the legal issues involved in the case yet still forced him to make legal decisions.

Counsel and court allowed the evidence in this case to become obscured and muddied, resulting in both the court and the jury reaching improper, inaccurate, and incorrect decisions. The failure of trial counsel to act in a responsible and professional manner forms the basis of a reversal. No life should be forfeited based upon the injustices that have occurred in the Shere case.

The Appellant is a victim of a deadly mixture--a low mentality, turbulent family environment, occasional abuse of drugs and alcohol, possible brain trauma, a follower personalty, and a natural sense of honesty combined with ineffective counsel at each stage of his legal proceedings. The proof of this premise is that he is on Death Row, and the shooter is not.

The Appellant prays that the FSC will correct the verdict and remand this case for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF has been furnished by Federal Express, to all counsel of record on May 15, 1998.

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APPENDIX A

APPENDIX B

APPENDIX C