IN THE SUPREME COURT OF FLORIDA

NO. _____

RICHARD EARL SHERE, JR.,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Robert T. Strain
Florida Bar No. 325961
Assistant CCRC

Denise L. Cook
Florida Bar No. 0648833
Assistant CCRC

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619-1136
(813) 740-3544
COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

This is Mr. Shere's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Shere was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. _____" followed by the appropriate page number. The postconviction record on appeal will be referred to as "PC-R. ____" followed by the appropriate page number.

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Shere's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, during the penalty phase of Mr. Shere’s trial, the prosecution improperly and prejudicially injected religious authority into the proceedings. Specifically, the State, during

cross examination of three separate witnesses, referred to the "Ten Commandments", "God's law" and quoted Romans 6:23 and Chapter 21 of the book of Exodus. By so doing, the State implied that there was higher law that should be followed by the jury which diminished the jury's sense of responsibility and displaced Florida law contained in the judge's instructions. Appellate counsel failed to present this and other significant matters to this Court on direct appeal. Had counsel done so, Mr. Shere would have received a new trial.

In addition, Mr. Shere's appellate attorney failed to raise on direct appeal Mr. Shere's disparate and disproportionate sentence. Bruce Demo (Mr. Shere's co-perpetrator) was sentenced to life while Mr. Shere received the death penalty. Mr. Shere was tried and convicted, prior to and separately from, Bruce Demo. Therefore, Mr. Shere's jury never was informed of, nor were they able to consider, his co-defendant's life sentence. Further, the record shows that Bruce Demo was the instigator of the murder, that Bruce Demo fired three fatal shots, and that he was equally (if not more) culpable in the killing.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Shere involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Shere. "[E]xtant legal principles...provided a clear basis for ...

compelling appellate argument[s]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). As this petition will demonstrate, Mr. Shere is entitled to habeas relief.

PROCEDURAL HISTORY

Mr. Shere was charged by indictment dated February 2, 1988 (R. 1006). He subsequently entered a plea of not guilty and requested a jury trial (R. 1013). Mr. Shere proceeded to a jury trial on April 18-21, 1989, in the Circuit court of the Fifth Judicial Circuit with the Honorable Raymond T. McNeal presiding (R. 1-848). On April 21, 1989, the jury returned a verdict finding Mr. Shere guilty as charged in the indictment (R. 849, 1210). The penalty phase was conducted on April 26, 1989 (R. 853-985). On that same day his penalty phase began and ended, with the jury returning a seven (7) to five (5) recommendation of death (R. 985, 1342). On May 17, 1989, Mr. Shere appeared before Judge McNeal for sentencing (R. 1536-1547). The trial court, reading directly from a pre-prepared order, imposed a sentence of death (R. 1546). The order was entered the same day (R. 1454-1458). The trial court found the three aggravating factors sought by the State (R. 1454-1456). The trial court found one statutory mitigating factor: the defendant's age (R. 1457). On direct appeal, Mr. Shere's conviction and sentence was affirmed. Shere v. State, 579 So. 2d 86, (Fla. 1991).

On February 1, 1993, Mr. Shere filed his initial Motion to Vacate Judgments of Conviction and Sentence. On February 26, 1993 the State filed a Motion to Strike Defendant's Motion to Vacate. On May 14, 1993, the Honorable Thomas D. Sawaya entered an Order granting the State's Motion to Strike on the ground the Mr. Shere's motion was unsworn and legally insufficient.

On July 12, 1993, pursuant to Fla. R. Crim. P. 3.850, Mr. Shere filed his Amended Motion to Vacate Judgments of Conviction and Sentence (PC-R. 1889-1937). The court granted a hearing on Claims III(to the extent that it overlapped with Claims IV, VI, and XV), IV, VI, and XV (PC-R. 1222-1228). On March 3, 1997, Mr. Shere filed his First Amended Motion to Vacate Judgments of Conviction and Sentence (PC-R. 2471). On May 15-16, 1997 and June 4, 1997 an evidentiary hearing was held (PC-R. 1-550). Mr. Shere was represented by private counsel–Mr. Byron Hileman (PC-R. 1-550). Judge McNeal entered an order on September 26, 1996 denying Claim XIX (PC-R. 2247) and on August 13, 1997 denying the remaining claims of Appellant's R. 3.850 motion (PC-R. 2641-2669). The trial court's orders denying relief on Mr. Shere's R. 3.850 motion was affirmed by this Court. Shere v. State, 742 So. 2d 215 (Fla. 1999), rehearing denied (August 24, 1999). On September 23, 1999 this Court issued its mandate. Mr. Shere has prepared and filed this petition for habeas corpus relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Shere's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Shere's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Shere to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in

this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Shere's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Shere asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE PROSECUTOR'S IMPROPER REMARKS AND BIBLICAL REFERENCES DURING THE PENALTY PHASE RENDERED MR. SHERE'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

During the penalty phase of Mr. Shere's trial, the prosecution improperly and prejudicially injected religious authority into the proceedings. Specifically, the State, during cross examination of three separate witnesses, referred to the the "Ten Commandments", "God's law" and quoted Romans 6:23 and Chapter 21 of the book of Exodus. By so doing, the State implied that there was higher law that should be followed by the jury which diminished the jury's

sense of responsibility and displaced Florida law contained in the judge's instructions.

Assistant State Attorney, Anthony Tatti, cross-examined defense mitigation witness Deanne Judith Simpson (Mr. Shere's sister). During his questioning, he referred to "God's Law" and the "Ten Commandments." While defense counsel objected to this, and the court sustained the objection, the court failed to give a curative instruction to the jury. The following exchange took place:

> BY MR. TATTI:
>
> Q. And you've described your brother as a religious man. Is that right? He believes in God?
>
> A. Yes.
>
> Q. He believes in God's law?
>
> A. He does now.
>
> Q. Yes, ma'am. Do you know whether or not he's aware of the Ten Commandments, the commandment against taking another human life?
>
> MS. BUCKINGHAM: I'm going to object to that, Your Honor. She can't say what he's aware of. It's irrelevant.
>
> THE COURT: Objection sustained.

(R. 884)(emphasis added).

The second instance of improper biblical reference by the State occurred during the State's cross examination of Rose Grindhein Sims, pastor of Trilby United Methodist Church, who was presented as a mitigation witness during the penalty phase. State Attorney Bradley E. King, during his questioning, referred to

himself as a Baptist, quoted a portion of Romans 6:23 from the Bible, and also referred to the “Ten Commandments.”

BY MR. KING:

Q. Reverend Sims, you indicated earlier, I think, that you counseled with Rick–

A. Yes.

Q. –about Christ and his Christian faith. Is that correct?

A. Yes, I sure did.

Q. And that was sometime prior to December of 1987. Is that correct?

A. Yes, sir.

Q. And correct me if I’m wrong. I’m Baptist and I think basically we believe the same thing.

A. I was a Baptist minister’s wife for many years.

Q. When you counseled with him, you explained to him, did you not, that he has personal responsibility for his sins. Is that right?”

A. Absolutely.

Q. And that he is responsible before God and everybody else for the sins he’s committed. Is that correct?

A. Yes. That we confess them to Christ and he forgives them.

Q. And he understood that concept.

A. He understood that one sin, but all of us have sinned. All of us have done things wrong.

> Q. Absolutely. And the wages of sin is death.[1]
>
> A. Exactly.
>
> Q. Did you discuss with Rick, I'm sure, sins and the Ten Commandments, and that one of the sins is thou shalt not kill or commit murder. Correct?

(R. 902-903).

While defense counsel failed to object to Mr. King's Bible quotation that "the wages of sin is death" and to his reference to the Ten Commandments, such comment constituted fundamental error.

However, further along in Mr. King's cross examination, defense counsel did object to improper prosecution comment regarding what the Bible teaches, regarding Mr. Shere's responsibility before God, and Rev. Sims' belief in the death penalty.

> BY MR. KING:
>
> Q. –does not the bible teach, I'm sure you explained to Rick, that regardless of that forgiveness, he still has personal responsibility for the act that he committed on Christmas of 1987?
>
> MS. BUCKINGHAM: Objection. That's been asked and answered, his personal responsibility.
>
> THE COURT: Overruled.
>
> BY MR. KING:
>
> Q. Is that correct, ma'am?
>
> A. Sir, I have never said that he committed an act on Christmas Eve.

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[1]Partial quotation from Romans 6:23.

Q. If this jury has found that he committed murder on Christmas, 1987, is he not, before God and everybody else, personally responsible for that act?

* * * *

Q. Okay. Do you hold a personal belief about the death penalty?

A. I don't believe that that's the question here, and I don't think that that is–

Q. Ma'am, –

A. Yes.

Q. –I'm sorry. I don't mean to interrupt, but–

MS. BUCKINGHAM: Your Honor, I'm going to have to object to this question.

THE COURT: Objection overruled.

BY MR. KING:

Q. Would you answer the question, please, ma'am?

A. I don't believe that is the question here. I think there's a whole lot of difference between a Bundy and a boy like this.

MR. KING: Your Honor, would you instruct the witness–

THE COURT: Ma'am, just answer the question. It calls for a yes or no, or if you feel like a yes or no is inadequate, then I'll let you explain it.

THE WITNESS: I think a yes or no is inadequate.

THE COURT: Then you've got to say one or the other and then explain it.

A. Okay. I believe that there are circumstances.

Q. Yes, ma'am.

A. Right.

Q. Circumstances that would warrant a death penalty.

A. Yes. When there is absolute evidence, when there are fingerprints,--

(R. 903-906)(emphasis added).

The third instance of improper biblical reference by the State occurred during Mr. Shere's testimony during penalty phase. Mr. King, again during cross-examination, referred to the Ten Commandments, to God's law, quoted from Chapter 21 of the Old Testament Book of Exodus, and asked if Mr. Shere had given the victim a Christian burial. Defense counsel objected to Mr. King's quotation from Exodus, the judge sustained the objection; however, no curative instruction was given to the jury. Even more prejudicial in this example is the fact that, despite the judge's favorable ruling, Mr. Shere proceeded to answer the improper question and agreed with the penalty of death based on biblical law.

BY MR. KING:

Q. Okay, You talked quite a bit with your attorney about your religious beliefs and you indicated, I think, that you have strong feelings about the Lord and you've been saved. Is that true?

A. Yes.

Q. I think you went on to say that you had been reading the bible and learning about the laws that god said apply to your life. Is that true?

A. Yes, sir.

Q. You know that one of those laws that God says applies to your life and everybody's life is one of the Ten Commandments, thou shalt not kill. Is that correct?

A. Yes, sir.

Q. Do you believe that applies to you, sir?

A. Yes, sir. I believe that applies to everyone.

Q. Right. Also, a little bit further in that same book, Exodus Chapter 21, more laws are given to Moses for the people of Israel. Part of those laws say that if a man lies in wait or premeditates the death of another man and by doing that kills him that the sentence is death.

MS. BUCKINGHAM: Your Honor, I'm going to have to object to this.

Q. Do you agree with that?

THE COURT: Objection sustained.

A. Yes, I believe–

Q. Mr. Shere, you said that you said a prayer for Drew and that was after his death. Is that right?

A. Yes, sir.

Q. Did you do anything to give him a Christian burial on Christmas of 1987?

MS. BUCKINGHAM: Object, Your Honor.

THE COURT: Objection overruled.

A. He was buried in a really beautiful place and I said a prayer over the grave after I was forced to cover him up.

(R. 949-951).

This Court has repeatedly warned prosecutors regarding the use of biblical references. In Ferrel v. State, 686 So. 2d 1324 (Fla. 1996), this Court said, "Without question, trial judges and attorneys should refrain from discussing religious philosophy in court proceedings." Id. at 1328. See also Bonifay v. State, 680 So. 2d 413 (Fla. 1996); Lawrence v. State, 691 So. 2d 1068 (Fla. 1997). This Court explained the purpose of that admonition:

> What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority. Ferrel at 1328, quoting People v. Sandoval, 841 P.2d 862, 883-884 (Cal. 1992)

This Court went on to state:

> The primary vice in referring to the Bible and other religious authority is that such argument may "diminish the jury's sense of responsibility for its verdict and...imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions." Ferrel at 1328, quoting People v. Wrest, 839 P.2d 1020, 1028 (Cal. 1992) (emphasis added).

Other states have also found biblical references to be improper and often prejudicial. In Carruthers v. State, 528 S.E. 2d 217 (Ga. 1992), the Georgia Supreme Court held that Carruthers' right to due process was abridged when the trial court allowed the inappropriate arguments over objections. The Court reversed the death sentence and remanded the case for re-sentencing. The Court held:

> This Court has noted its concern about the use of biblical authority during closing arguments in death penalty trials...The problem is that biblical references inject the often irrelevant and inflammatory issue of religion into the sentencing process and improperly appeal to the religious beliefs of jurors in their decision on whether a person should live or die. Moreover, many passages in the Bible, Talmud, and other religious texts prescribe or command a sentence of death for killing. By quoting these texts during closing arguments, prosecutors may "diminish the jury's sense of responsibility and imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions.

Id. at 221 (emphasis added).

* * * *

> It is difficult to draw a precise line between religious arguments that are acceptable and those that are objectionable, but we conclude that the assistant district attorney in this case overstepped the line in directly quoting religious authority as mandating a death sentence. In citing specific passages, he invoked a higher moral authority and diverted the jury from the discretion provided to them under state law. One passage cited explicitly states that whoever sheds another person's blood shall have his own blood shed by man; another states that those who take the sword shall die by the sword...Language of command and obligation from a source other than Georgia law should not be presented to a jury.

Id. at 222 (emphasis added).

The Pennsylvania Supreme Court in Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630 (Pa. 1991) not only found this type of argument to be prejudicial, but also established a per se rule of reversible error and warned that violators might be subject to disciplinary action. In Chambers, the prosecutor argued, "As the Bible says, 'and the murderer shall be put to death.'" Defense counsel objected, and the judge immediately gave a curative instruction to the jury. In vacating the death sentence and remanding the case for a new sentencing hearing the Pennsylvania Supreme Court held the following:

> We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

* * * *

> More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for Appellant. By arguing that the Bible dogmatically commands that "the murderer shall be put to death," the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of the death penalty.

Id. at 586 and 644 (emphasis added).

In Mr. Shere's case, the State repeatedly referred to the "Ten Commandments" and "God's law," and specifically quoted two verses from the Bible that stood for the proposition that "God's Law" supported the death penalty for murder. In addition, the State elicited testimony from witnesses regarding religion, and the the court allowed this to continue. While this did not occur during the State's closing argument, it occurred during testimony of three separate mitigation witnesses during the penalty phase. The biblical references were reiterated witness after witness, and biblical support for the death penalty was reinforced quotation after quotation. This religious support for the death penalty was further bolstered by Rev. Sims' agreement with the biblical passages cited and with her personal belief in the death penalty.

Arguments invoking religion can easily cross the boundary of proper argument and become prejudicial. Bonifay v. State at 418,

n. 10. In Mr. Shere's case this is exactly what happened. The most egregious example of this occurred during Mr. King's cross examination of Mr. Shere, where Mr. King specifically quoted the Bible:

> Also, a little bit further in that same book, Exodus Chapter 21, more laws are given to Moses for the people of Israel. Part of those laws say that if a man lies in wait or premeditates the death of another man and by doing that kills him that the sentence is death.

(R. 950) (emphasis added).

By quoting this passage and others and by eliciting Rev. Sims affirmative belief in the death penalty, the state improperly appealed to the religious beliefs of jurors and implied that there was a higher law that should be followed. These continual biblical references and quotations, which stood for the proposition that the Bible commanded the death penalty, diminished the jury's sense of responsibility and displaced Florida law contained in the judge's instructions.

A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it otherwise would have done." Darden v. State, 329 So. 2d 287, 289 (Fla. 1976). In Mr. Shere's case, his death sentence should be vacated, and the case should be remanded for a new penalty phase. Mr. Tatti's and Mr. King's comments were obviously prejudicial to Mr. Shere's case, especially in view of the 7-5 jury recommendation of death (and in view of the fact that the equally, if not more, culpable co-defendant Bruce

Demo was tried separately, but found guilty of only second degree murder and sentenced to life (R. 1461). The state's improper and prejudicial citation of a higher authority to justify the death penalty influenced the jury to reach the recommendation of death. Without the prejudicial comments, it is reasonably evident that the jury would have recommended life.

While most of the State's biblical references were preserved for appeal by a contemporaneous objection, some references were not objected to by Defense Counsel. However, even without a contemporaneous objection, these overt and continuous biblical references (that stood for the proposition that the Bible commanded the death penalty in this situation) constituted fundamental error. As a general rule, a contemporaneous objection is needed to preserve an improper comment for appellate review. See, e.g. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999), Urbin v. State, 714 So. 2d 411, 418 n. 8 (Fla. 1998), Chandler v. State, 702 So. 2d 186, 191 (Fla. 1997), Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996).

However, this Court has held:

> The sole exception to the general rule is where the unobjected to comments rise to the level of fundamental error, which has been defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brooks v. State, 2000 WL 674581 at p. 16 (Fla. 2000) (quoting McDonald at 505 which, in turn, quoted Urbin at 418 n. 8 which quoted Kilgore at 898).

The repeated injection of religious authority into Mr. Shere's penalty phase proceeding was so egregious that it also affected the validity of the proceeding. A penalty of death would not have been recommended by the jury, but for the State's constant reference to and quotation of the Bible. Therefore, these comments constituted fundamental error.

In Brooks v. State, 2000 WL 674581 (Fla. 2000), the defense attorney objected to some improper comments by the prosecutor, but failed to object to other comments. In reversing Brooks' death sentence and in remanding the case for a new penalty phase hearing this Court held:

> After carefully reviewing the prosecutor's penalty phase closing argument in this case, and considering the jury's close seven-to-five recommendation that Brooks be sentenced to death, we determine that the objected to comments, when viewed in conjunction with the unobjected-to comments, deprived Brooks of a fair penalty phase hearing.

Id. at 16.

Mr. Shere was also denied of a fair penalty phase hearing, especially when all of the prosecutor's comments are viewed as a whole and when the jury recommendation of death was only a 7-5 vote. Repeated reference to the Bible to support the penalty of death constituted fundamental error, and therefore, such comments (most of which Defense counsel did object to) did not need a contemporaneous objection to be preserved for appeal.

In order to grant habeas relief on the basis of ineffective assistance of appellate counsel, this court must determine "first, whether the alleged omissions are of such magnitude as to

constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995) (quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986); see, e.g., Teffeteller v. Dugger, 734 So. 2d 1009, 1027 (Fla. 1999).

By failing to raise this issue on direct appeal, appellate counsel's performance was deficient. Such deficient performance also undermined the confidence in the correctness of the result. These biblical references (regarding "God's law" and quotations from the Bible supporting the sentence of death) must have impacted the jury's recommendation in view of the 7-5 vote for death. Had the Florida Supreme Court had an opportunity to review this on direct appeal, Mr. Shere's sentence would have been reduced to life.

CLAIM II

MR. SHERE'S DEATH SENTENCE IS DISPROPORTIONATE, DISPARATE, AND INVALID IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Mr. Shere was tried individually before a jury in April of 1989. His co-defendant, Bruce Demo, was tried separately, but after Mr. Shere had been tried and convicted. Mr. Shere's jury recommended the sentence of death by the narrowest of margins (7-5 for death), while Mr. Demo received a life sentence which was affirmed in Demo v. State, 576 So. 2d 1328 (Fla. 5th DCA 1991). Mr. Shere's jury never was informed of, nor were they able to consider, his co-defendant's life sentence. Further, the record shows that Bruce Demo was the instigator of the murder (R. 257), that Bruce Demo fired three fatal shots, and that he was equally (if not more) culpable in the killing. Failure to raise this issue on direct appeal denied Mr. Shere of effective assistance of appellate counsel.

During the trial, the State in its opening statement, acknowledged that Demo called Shere on the night of the killing and that Demo participated in the killing (R. 257). Darlene O'Donnel testified during the state's case-in-chief (R. 693-703) that she lived with her aunt during the time of the killing and that Bruce Demo also lived there (R. 694). In the early morning hours of December 25, 1987, she testified that Demo made a phone call and then left the house (R. 695-697). She watched, from her bedroom window, while Mr. Demo and Mr. Shere drove off (R. 696-697). She also testified that every time Mr. Demo left the residence, he would carry a weapon (R. 699). She later saw Mr. Demo return around 4 a.m. and then heard the washing machine running (R. 701).

During the Defense case-in-chief, Detective Alan Arick testified that he interviewed Darlene O'Donnel and Bruce Demo (R. 751-755). He further testified that Ms. O'Donnel told him that when she heard Demo on the phone during the early morning hours of December 25, 1987, that Demo sounded angry (R. 752). Detective Arick further testified (reading from his deposition) during direct examination that Ms. O'Donnel said the following:

> Bruce was in the bedroom and she was out in the living room, but there was a thin wall between the two of them and she could hear Bruce sounding like he was angry talking to someone, saying he was angry with Drew, something to the effect that he was tired of Drew's bullshit or something like that. And she was later awake when– and then I go into how she was awake when Rick came over to pick up Bruce. (R. 753).

Detective Arick also interviewed Bruce Demo (R. 755). Detective Arick testified that Bruce Demo told him that he (Demo) had fired two shots to the victim's head and one shot to the victim's heart (R. 755). During his testimony, Detective Arick recounted other details of his interview with Mr. Demo:

> BY MR. FANTER:
>
> Q. After the statement that Mr. Blade said, what was the first thing and how did he begin his confession? What were his exact words? I believe it's a quote in your report.
>
> A. Okay. After he stated that, "he ran out of bullets. That's why he didn't shoot me," he then–Mr. Demo realized that he had made an incriminating statement regarding his involvement in the case. So he then made another statement shortly after that. I guess he was thinking things over in his mind, and he said, "<u>I fired the fatal shot</u>."

Q. What other shots did Mr. Demo tell you he inflicted on Drew Paul Snyder?

A. He told me that he fired two shots into the head of Drew Snyder and a third shot into Mr. Snyder's heart, into the chest area.

Q. Did he tell you where in the head he shot him?

A. Yes. He indicated that the first shot that he fired, Mr. Snyder was laying in the back seat of the car and he believed that he was laying face down, and he fired one shot into the back of Drew Snyder's head.

Q. Did he say he noticed any blood at that time?

A. He said that when the shot was fired, he noticed blood spurting up from Mr. Snyder's head.

Q. What was the next shot he told you he fired?

A. He said that Drew was then pulled from the vehicle. He said they pulled him out. I don't think we clarified which one of them pulled him from the vehicle, but once Drew was on the ground laying face up, then he fired another shot into Mr. Snyder's forehead, into the front of his head.

Q. And then he told you he fired another shot?

A. Yes. He said he fired a third shot into his chest.

Q. Did he tell you who dug the grave?

A. Yes. He said that Richard Shere dug the grave.

Q. Did he say Rick did that voluntarily or that he made him do it?

A. He told us that he made Richard dig the grave.

(R.753-756) (emphasis added).

Dr. LaMay (who had previously testified in the State's case-in-chief regarding the cause of death) said that the head and chest wounds were the fatal shots and that death would have ensued within minutes (R. 557, 569). Dr. LaMay testified that there was a fourth potentially fatal wound where death would have ensued within upwards of an hour (R. 589), and if the victim would have received medical attention, there was a likelihood that the victim could have survived (R. 589).

Prior to sentencing, Defense Counsel filed with the court a sentencing memorandum discussing, inter alia, proportionality (R. 1461, 1444). It stated:

> Proportionality in the treatment of defendants and co-defendants has been the basis of a major non-statutory mitigating circumstance. On May 4, 1989, co-defendant Bruce Michael Demo was found guilty of Second Degree Murder by a jury and sentenced by Judge John Futch to life imprisonment. Obviously this was based on the same facts and circumstances as proven in Shere's case.

(R. 1461).

In Judge McNeal's sentencing order (responding to the proposed mitigating circumstance that Shere was "under duress or under the substantial domination of Bruce Demo"), the judge found that "[i]ronically, Bruce Demo made a similar claim in his trial and was convicted of Second Degree Murder. There is no evidence of domination" (R. 1456). While the judge was aware of the disproportionate and disparate sentence, the judge failed to consider this as mitigation. Further, the jury was deprived of the mitigating evidence of Bruce Demo's life sentence because he was

tried after Mr. Shere. Failure to raise this disparate and disproportionate sentence on direct appeal constituted a substantial omission by appellate counsel that prejudiced the appellate process. As such, it denied Mr. Shere effective assistance of appellate counsel. Had this issue been raised on direct appeal, this Court would have reduced Mr. Shere's sentence to life in prison.

This Court has held that sentences among co-defendants in capital cases should be proportionate. See Hazen v. State, 700 So. 2d 1207 (Fla. 1997) (reversing death sentence where "two non-triggermen are involved if one of the defendants is a prime instigator and the other is not"); Curtis v. State, 685 So. 2d 1234(Fla. 1996)(reversing death sentence where "the actual killer was sentenced to life"); Scott v. Dugger, 604 So.2d 465 (Fla. 1992)(reversing the death sentence where the co-perpetrators "were equally culpable participants in the crime"); Slater v. State, 316 So. 2d 539 (Fla. 1975)(reversing death sentence where "the court that tried the appellant also permitted the 'triggerman'...to enter a plea of nolo contendere").

In Puccio v. State, 701 So. 2d 858 (Fla. 1997), this Court, in vacating the death sentence, held that the trial court erred in imposing death when other equally culpable co-perpetrators were sentenced to lesser punishments. "A trial court's determination concerning the relative culpability of the co-perpetrators in a first degree murder case is a finding of fact and will be sustained

on review if supported by competent substantial evidence." Id. at 860. See generally Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

However, in Mr. Shere's case, Bruce Demo (while equally culpable, if not more culpable) received a life sentence, and Judge McNeal erred in sentencing Shere to death, knowing of Demos' life sentence. This trial court error should have been raised on direct appeal. Furthermore, the judge's findings of fact in his sentencing order (R. 1454-1458) failed to truly address the culpability of Mr. Shere and Mr. Demo. Even if the order did address this point, it would not be supported by competent substantial evidence from the record.

This Court has also held:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

Slater v. State, 316 So. 2d 539,542 (Fla. 1975).

In Mr. Shere's case, the record shows that it was Mr. Demo who instigated the murder by placing the call to Shere, that it was Mr. Demo who fired three fatal shots, and that it was Mr. Demo who forced Mr. Shere to dig the grave. Yet, Bruce Demo was sentenced to life while Mr. Shere received the death penalty. Such an outcome was "clearly not equal justice under the law." Id. at 542. Justice requires that Mr. Shere's death sentenced be reduced to life.

Had Mr. Shere's appellate attorney raised this issue on direct appeal, this Court would have reduced Mr. Shere's sentence to life. Failure to raise disproportionate sentencing on direct appeal denied Mr. Shere effective assistance of appellate counsel.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON DIRECT APPEAL AS A SEPARATE ISSUE THE TRIAL COURT'S ERROR, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, THAT THE TRIAL COURT IMPROPERLY CONSIDERED THE STATUTORY MITIGATOR OF NO SIGNIFICANT PRIOR CRIMINAL HISTORY.

There are numerous examples in the record on appeal addressing the statutory mitigating circumstance of no significant history of prior criminal activity. Mr. Shere had no significant history of prior criminal activity, yet the trial court failed to find this mitigator. This was error. Failure to raise the trial court's error on appeal constituted ineffective assistance of appellate counsel.

During the penalty phase argument, Defense Counsel argued to the jury, "You can consider that he has no significant history of prior criminal activity. He told you that he has never been convicted of a felony before last week"(R. 975). The jury was also

instructed that one of the statutory mitigating circumstances they could consider was that "[t]he defendant has no significant history of prior criminal activity" (R. 982). Moreover, this mitigating factor was never rebutted by the State, neither to the jury in its penalty phase closing argument (R. 953-970) nor to the judge in its sentencing memorandum to him (R. 1371-1376). The existence of this mitigator was further emphasized in Defense Counsel's sentencing memorandum to Judge McNeal where Mr. Fanter argued that this statutory mitigator was proven at trial because "he has no significant history of prior criminal activity and none was alleged nor proven by the state" (R.1460)(emphasis added). However, in Judge McNeal's sentencing order he found that this mitigating circumstance had not been found. He wrote:

> Defendant was on pretrial release on pending charges of Burglary of a Dwelling and Robbery when the murder was committed. By his own admission in the presentence investigation, Shere was selling and using illegal drugs at the time of the offense and had been using marijuana since age thirteen. Convictions are not required to negate a mitigating factor of no significant history of prior criminal activity. Quince v. State, 477 So. 2d 535 (Fla. 1985)

(R. 1456).

Despite the trial court's finding, Mr. Shere's appellate attorney, in the direct appeal, never addressed this as a separate issue. The only mention of mitigating circumstances (in general terms) appears in Argument XI of Appellant's initial brief. Argument XI deals primarily with aggravating circumstances, and its heading mentions only aggravating circumstances. The only

statement of this specific mitigating circumstance appears in one sentence on page 30 of the initial brief where Mr. Shere's appellate attorney wrote: "The trial court stated that the Defendant had no significant history of prior criminal activity, but then seemed to find that was not a mitigating circumstance, because of statements made in the presentence investigation which is not a part of the record in the case." No argument or discussion of this can be found within the initial brief of the appellant. Furthermore, this Court's opinion in the direct appeal never specifically addressed this specific statutory mitigating circumstance.

In Ramirez v. State, 739 So. 2d 568 (Fla. 1999) the trial court found this mitigator to exist but failed to give it significant weight. This Court held that the trial court abused its discretion:

> The trial court further erred in finding that the defendant's arrest as a juvenile for stealing a ten-dollar bill from the dashboard of a pick-up truck 'millitat[ed] against giving significant weight' to the mitigating factor that Ramirez had 'no significant history of prior criminal activity.' Adjudication on the juvenile arrest was withheld, and Ramirez successfully completed an alternative program...The circumstances of the crime do not 'militate against' giving this statutory factor 'significant weight.' The trial court abused its discretion in so finding.

Id. at 582.

In Santos v. State, 591 So. 2d 160 (Fla. 1992), Santos was convicted of two counts of murder in the shooting death of his girlfriend and his 22 month old daughter. There was a history of

domestic problems between Santos and the victim and testimony that Santos had threatened to kill the victim on many occasions. The jury recommended death by a vote of 10-2, the judge found no statutory mitigators, and sentenced Santos to death. However, this Court, on direct appeal vacated the sentence and remanded the case for a new sentencing hearing. On remand, the Circuit Court reimposed the death penalty. On direct appeal of that sentence, Santos v. State, 629 So. 2d 838 (Fla. 1994) this Court held that the trial court erred in not finding the mitigating factor of no significant history of prior criminal activity:

> We also find (as the State concedes) that under Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1998), cert. denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989), the trial court should have found in mitigation that Santos had no prior history of criminal conduct. As noted in Scull, this mitigating factor must be found if a defendant had no significant history of criminal activity prior to the transaction in which the instant murder occurred.

Id. at 840.

Just as in Santos, Mr. Shere had no significant history of prior criminal activity. He had no felony convictions on his record and the pending charges he was facing at the time of his trial were merely allegations. Furthermore, during the penalty phase, the State failed to introduce any evidence to rebut the proven mitigator. Therefore, this mitigator should have been found by Judge McNeal.

Yet, Judge McNeal relied on Quince v. State, 477 So. 2d 535 (Fla. 1985) to negate the mitigator of no significant history of

prior criminal activity. However, that case is distinguishable from Mr. Shere's in that Quince involved a juvenile felony record of adjudications of delinquency. In Mr. Quince's case there was more than just unsubstantiated allegations. See Quince v. State, 414 So. 2d 185, 188 (Fla. 1982). Mr. Shere's case involved no prior felony convictions, and the incidents relied on by Judge McNeal were mere allegations. Judge McNeal should have first found this mitigator to exist. It was proven by Mr. Shere through his own testimony (R. 952). Further, it was never rebutted by the State through evidence on the record, nor was it ever argued by the State to not exist. The judge erred in failing to find this statutory mitigator, and Appellate Counsel was ineffective for failing to raise this as a separate issue on direct appeal. Such an omission by appellate counsel was substantial and as such, prejudiced the appellate process.

CLAIM IV

MR. SHERE'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So. 2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F.Supp.2d 1037 (D. Ariz 1999)(such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S.Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed

as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In Re: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]
>
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion.

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition.

In order to exhaust state court remedies, the claim is being filed at this time.

Prior to Mr. Shere's trial, his attorney (Mr. Fanter) filed a Motion to Appoint Confidential Expert (R. 1021), and the motion was granted by Order dated June 15, 1988 (R. 1029-1031). In the motion, Mr. Fanter alleged that he has reason to believe that Mr. Shere may have been insane at the time of the crime and that he may be incompetent to stand trial (R. 1021).

Further, Mr. Shere has been incarcerated since 1988. Statistics have shown that incarceration over a long period of time will diminish an individual's mental capacity. Inasmuch as Petitioner may well be incompetent at the time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Shere respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on September ___, 2000.

Robert T. Strain
Florida Bar No. 325961
Assistant CCRC

Denise Lyles Cook
Florida Bar No. 0648833
Assistant CCRC

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619-1136
(813) 740-3544
COUNSEL FOR PETITIONER

Copies furnished to:

The Honorable Raymond T. McNeal
Circuit Court Judge
110 NW First Avenue
Ocala, Florida 34475

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

Anthony Tatti
Assistant State Attorney
Office of the State Attorney
19 NW Pine Avenue
Ocala, Florida 34475

Richard Shere
DOC# 116320; P2125S
Union Correctional Institution
Post Office Box 221
Raiford, Florida 32083