IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1960

RICHARD EARLE SHERE, JR.,

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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.

On page 16 and 17 of its Response, Respondent states:

> [T]he majority of Shere's objections to 'biblical references' were sustained (footnote omitted), leaving appellate counsel nothing to press on appeal in the first place. Because that is so, appellate counsel's performance was not deficient within the meaning of Strickland, nor was Shere prejudiced by the asserted 'omission.' Appellate counsel cannot have been ineffective with respect to this claim, and this Court should deny habeas relief.

While some of Mr. Shere's objections to the State's quotations from the Bible were sustained (R. 884, 950), other objections were overruled (R. 903-905, 950). However, for the objections that were sustained, the trial court gave no curative instruction to the jury (R. 884, 950). There were also incidents where the State quoted from the Bible, but where defense counsel failed to make an objection (R. 902-903, 949). Furthermore, as Mr. Shere stated in his Petition, the references to and quotations from the Bible stood for the proposition that death was the appropriate penalty for murder. This was fundamental error because it left the jury with the impression that a higher, divine law– "God's law"–should apply

instead of Florida law. Therefore, even in the absence of an objection, appellate counsel could have and should have raised this issue on appeal.

Respondent also states on page 17 in footnote 2 that "Shere cites no authority, because he cannot, for the proposition that a prosecutor's 'biblical reference' is fundamental error that need not be preserved for appeal by objection." While it is true that the Florida Supreme Court has not specifically addressed biblical references by the State vis-a-vis fundamental error, this Court has generally described fundamental error and has stated, "In order to constitute fundamental error, improper comments made in the closing arguments of a penalty phase must be so prejudicial as to taint the jury's recommended sentence." Thomas v. State, 748 So.2d 970 at 985 (Fla. 1999). Furthermore, 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)(emphasis added). In Mr. Shere's case, his death sentence should be vacated, and the case should be remanded for a new penalty phase because it is "reasonably evident that the [biblical] remarks might have influenced the jury to reach a more severe verdict than it otherwise would have done." Id. at 289. 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 tainted the jury's recommended sentence. Without the prejudicial comments, it is reasonably evident that the jury would have recommended life.

Further on pages 17 and 18 of its Response, Respondent states:

> In addition to being legally insufficient, this claim is wholly meritless because the complained-of cross examination was invited by the direct testimony of the witnesses(footnote omitted), which was, in keeping with the defense theory, religious in tone.
>
> * * * *
>
> It makes no legal sense to suggest, as Shere does, that the defendant may present a religious sort of defense, and at the same time, preclude the State from testing, through cross-examination, the legitimacy of that defense.

The defense theme in the penalty phase, inter alia, was that Shere was a "born again" Christian and attended church (R. 891), that Shere (along with his father) had done a significant amount of volunteer work at his church (building a new sanctuary)(R. 896), and because of this, Shere would have a good chance at rehabilitation if Shere were paroled after 25 years–assuming that the jury recommended a life sentence (R. 891). While the defense first elicited this information from mitigation witnesses, never

did the defense attorneys use biblical quotations to bolster their argument for life (R. 873-950). Yet, the State used biblical authority and quoted the Bible to bolster their argument for death. It was the State who brought up the Ten Commandments and quoted the commandment "thou shalt not kill" (R. 884, 903-904, 949-950). It was the State who characterized the Bible and the Ten commandments as "God's Law" (R. 884, 949). It was the State who quoted Chapter 21 from the book of Exodus 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). It was the State who asked Mr. Shere if he had given the victim a Christian burial (R. 950). And it was the State who quoted Romans 6:23 that "the wages of sin is death"(R. 902). The quotations from the Bible stood for the proposition that death was mandated for murder and implied that there was a higher authority that the jury should follow. The Bible quotations displaced Florida law given to the jury in the judge's instructions and tainted the jury's recommendation. This type of improper and prejudicial cross-examination was not invited by the direct testimony of the mitigation witnesses.

In Bonifay v.State, 680 So.2d 413 (Fla. 1996) this Court cautioned "...against the use or approval of arguments which use references to divine law because argument which invokes religion can easily cross the boundary of proper argument and become prejudicial argument" Id. at 418, F.N. 10. It would have been

appropriate for the State to properly test (through cross examination) Mr. Shere's mitigation theory of his potential for rehabilitation because he was born again, attended church, and did volunteer work at the church. However, by quoting the Bible to support the death penalty, the State crossed the boundary from proper cross examination to prejudicial and reversible error.

Biblical references by the State can also have Establishment Clause implications. "When the State invokes Biblical teachings to persuade a jury, there is at the very least, the appearance of state endorsement of those teachings." Sandoval v. Calderon, 2000 WL 1657783 (9th Cir. 2000). In Sandoval, the prosecutor used biblical quotations to provide justification for the imposition of the death penalty. Id. at *8. In addition to finding First Amendment Establishment Clause concerns, the Ninth Circuit also found the argument both improper and prejudicial:

> [A]ny suggestion that the jury may base its decision on a "higher law" than that of the court in which it sits is forbidden. See Jones v. Kemp, 706 F. Supp. 1534, 1558-59 (N.D. Ga. 1989); Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630, 644 (Pa. 1991). The obvious danger of such a suggestion is that the jury will give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law. In a capital case like this one, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a

> verdict. See Godfrey v. Georgia, 446 U.S. 420, 428 (1980)(citations omitted).
>
> * * * *
>
> Argument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty. The Supreme Court has disapproved of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. See Caldwell v. Mississippi, 472 U.S. 320 (1985)(citations omitted).

Id. at *8 and *9.

Because the prosecutor crossed the boundary from proper cross examination to prejudicial questioning and comment, because the State's references to biblical authority mandated death, and because this prejudicial argument tainted the jury's recommendation (especially in view of the close 7-5 jury vote), this Court should grant Mr. Shere habeas relief.

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.

On page 18, Respondent states, "This claim is not a basis for relief because the propriety of Shere's death sentence was determined on direct appeal. Shere v. State, 579 So.2d at 96." While the propriety of Mr. Shere's conviction and sentence may have been reviewed on direct appeal, this Court did not address the specific issue of the disparate treatment of Mr. Shere in comparison to his co-perpetrator, Bruce Demo, because appellate counsel failed to raise this issue on direct appeal. Respondent further states that "[t]his Court further addressed this issue in Shere's appeal from the denial of post conviction relief." This Court, in denying relief on the R. 3.850 motion, never addressed the disparate treatment between Shere and Demo. The passage to which Respondent cites on page 18 of its Response is only partially quoted by Respondent. The quotation from the Florida Supreme Court opinion reads in full:

> As his final claim, Shere asserts that Florida's death penalty statute is unconstitutional as applied to him based upon the credible and material factual evidence presented throughout the judicial proceedings and because of the aggravators that were

> improperly applied to him. He claims that at most the evidence reflected that Shere was an accessory, an unwilling and threatened participant. This claim is procedurally barred and, in the alternative, without merit. Shere has already litigated the sufficiency of the evidence presented at trial and has had that decision reviewed by this Court. See Shere. Moreover, Shere is also barred because he did not raise this claim in his 3.850 motion.

Shere v. State, 742 So.2d 215 at 218, F.N. 7.

Clearly, this quotation does not address disparate treatment between co-perpetrators. It addresses the constitutionality of Florida's death penalty as applied to Shere.

Respondent on page 19 of its Response asserts that "[i]n addition to being unavailable to Shere because of the procedural bar, this claim is based on an invalid legal premise, and, for that reason, does not support a claim of ineffective assistance of counsel." Because the issue of disparate treatment between co-perpetrators/co-defendants has not been addressed by this Court, this claim is not procedurally barred. As for the invalid legal premise, Respondent does not specify the invalid legal premise to which he refers.

Also on page 19 of its Response, Respondent states:

> Despite the histrionic assertions of Demo's 'greater culpability', Petition, at 27, the true facts are that, as a matter of law, Demo is less culpable than Shere and, therefore, his sentence is meaningless in the proportionality equation. See e.g., Larzelere v. State, 676 So.2d 394, 407 (Fla. 1996)("Disparate treatment of a co-defendant,

> however, is justified when the defendant is the more culpable participant in the crime.").

Respondent characterizes Petitioner's assertions regarding Demo's greater culpability as "histrionic." However, all references regarding Demo's greater culpability have been gleaned from the record and have not been dramatized. The fact that cannot be dramatized enough is that Mr. Shere sits on death row while the man who initiated the killing (R. 697) and shot three of the four fatal shots (R. 755) serves a life sentence.

Respondent asserts that Demo is less culpable as a matter of law even though this Court has not addressed the disparate sentencing issue. Finally, Respondent cites Larzelere v. State, id., for the proposition that disparate treatment of a co-defendant is justified when the defendant is the more culpable. Yet, the record shows that Bruce Demo was the more culpable participant in the crime. "When a co-defendant (or co-conspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the co-defendant may render the defendant's punishment disproportionate" Id. at 406. Larzelere is also distinguishable from Mr. Shere's case because in Larzelere, the co-defendant's son (Jason) was tried separately from his mother, Virginia Larzelere; however, the son was acquitted. Also, two of the State's key witnesses were not prosecuted even though they had minor involvement in the crime.

In Larzelere, this Court specifically addressed the culpability of the two State witnesses who were not prosecuted and held that "[u]nder no reasonable view of the evidence can it be said that the degree of culpability of Steven Heidle or Kristen Palmieri was equal to that of [appellant]." Id. at 407. This Court further held that "Jason's acquittal is irrelevant to this proportionality review because, as a matter of law, he was exonerated of any culpability." Id. at 407. Yet, in Mr. Shere's case, while Bruce Demo was also tried separately, he was convicted and sentenced to life. See Demo v. State, 576 So.2d 1328 (Fla. 5th DCA 1991). Further, Demo was equally if not more culpable than Mr. Shere. Therefore, "disparate treatment of the co-defendant may render [Mr. Shere's] punishment disproportionate." Larzelere at 406.

Finally on page 19 of the Response, Respondent states that "the sentencing court evaluated the relative culpability of Shere and Demo in Shere's sentencing order." While the sentencing court mentioned the fact that Demo received a life sentence, it did not (as Respondent states) "evaluate" the relative culpability of Shere vis-a-vis Demo. In Shere's sentencing order, Judge Mc Neal wrote:

> 2. Defendant also claims that he was under extreme duress or under the substantial domination of Bruce Demo (citation omitted). Ironically, Bruce Demo made a similar claim in his trial and was convicted of Second Degree Murder. There is no evidence of

domination.

(R. 1456).

Clearly, this passage from Shere's sentencing order fails to address the disparate treatment of Shere compared to his co-perpetrator, Demo, and instead addresses the statutory mitigating factor of "substantial domination of another person." Fla. Stat. 921.141(6)(e)(1987). This in no way is an "evaluation" of culpability. Had the sentencing court truly "evaluated" culpability, he would have discussed the fact that Demo initiated the killing by making the phone call to Shere (R. 697), that Demo admittedly fired three of the four fatal shots (R. 755), and that Demo made Shere dig the grave (R. 756).

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. This Court should grant Mr. Shere habeas relief.

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.

On page 20 of its Response, Respondent asserts that "[t]his claim is not a basis for relief because it was raised on direct appeal and decided adversely to Shere." However, as was discussed on pages 30-31 of the Petition, the only mention of Mr. Shere's lack of prior criminal history appeared in one sentence within appellant's initial brief. No argument, no discussion, and no case law accompanied this one sentence. Furthermore, this one sentence was buried in Argument XI of the initial brief which primarily addressed aggravating circumstances.

Also on page 20, Respondent cites this Court's opinion affirming denial of Rule 3.850 relief where this Court stated:

> Shere argues that the court gave inadequate consideration to Shere's age and lack of prior adult criminal record. These claims are also procedurally barred because they should have been raised on direct appeal. In fact, Shere did raise the issue of prior adult criminal record on direct appeal.

Shere v. State, 742 So.2d at 218 n. 7. However, a thorough reading of Shere v. State, 579 So.2d 86 (Fla. 1991) shows that this issue was never specifically addressed by this Court on direct appeal.

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 reply to the State's Response, Petitioner relies on the argument set forth in his initial Petition for Writ of Habeas Corpus.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on December ___, 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., 5th 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