IN THE SUPREME COURT OF FLORIDA

ROY ALLEN HARICH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 74,620

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT, IN
AND FOR VOLUSIA COUNTY, FLORIDA FROM
THE DENIAL OF POST CONVICTION RELIEF
AND FROM ORDERS HOLDING COUNSEL IN
CONTEMPT OF COURT

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This cause concerns the brutal murder of one teenage girl, Carlene Kelley, and the attempted murder of a second teenage girl, Deborah Miller. Deborah, the surviving victim, testified at trial and stated that she and Carlene met 22-year-old Roy Allen Harich at a filling station in Daytona Beach. The girls were in the process of walking to the pier when they stopped at the filling station, and they accepted his offer of a ride to their destination. Rather than going to the beach, however, Deborah stated that the group drove around town in Harich's van and smoked a pipe of marijuana belonging to the girls. They later decided to go to the woods where Harich was growing several marijuana plants to obtain some more marijuana. On the way, they stopped at a convenience store and purchased a six-pack of beer. When they arrived at the marijuana patch, they found that the marijuana leaves were damp so they placed the leaves on the van's engine cover to dry. They waited and talked for about an hour while trying to dry the leaves. Deborah then asked if they could leave, and they got into the van and departed.

Deborah testified that Harich drove only a few yards down the deserted road before he stopped the van, held a gun on the girls, and ordered them to undress. He forced Carlene Kelley to perform fellatio on him. Deborah further testified that, though she did not actually see the act, she heard sounds which indicated that Harich also had sexual intercourse with Carlene. Harich then told the girls to get dressed, which they did. As they started to walk away, he said that it was a long walk

through the woods and that he would give them a ride, promising not to do anything more to them. The girls acquiesced and got back into the van.

Harich drove them about a quarter of a mile before Carlene said she needed to use the bathroom. He stopped the van and told Deborah and Carlene that they could walk the short distance to the road, but they should lie down behind the van while he drove away. They complied with this direction and lay down on their stomachs. Deborah stated that Carlene began to cry and beg him not to shoot her. Deborah looked up and saw that Harich had wrapped a towel around the barrel of his gun. He told Carlene he would not shoot her if she was quiet, but immediately shot her in the back of the head. He also shot Deborah in the back of the head. Deborah further testified that Carlene was still alive after the shooting and that both she and Carlene were crying softly when she saw Harich return carrying a knife. Deborah described how he stood behind her, lifted her head by her chin, and began cutting her neck with the knife; she tried to protect herself with her hands. Harich left Deborah and cut Carlene's throat, severing her spinal cord and causing instantaneous death.

Deborah did not lose consciousness, and after concluding that Carlene was dead, she crawled and dragged herself out of the woods onto the side of the highway where she was found by a passing motorist. Medical testimony reflected that Deborah had a bullet wound in the back of her head and a severe laceration that extended across her neck, all the way through the neck in the posterior area, almost to the backbone, and all the way through

the musculature in the anterior of the neck, down to the midline where the windpipe was severed. The emergency room doctor observed that, when Deborah arrived at the hospital, she was literally holding her head on with her hands. He testified that, in his opinion, it was almost unbelievable that Deborah could sustain this severe an injury and survive. At the hospital, Deborah was able to tell the police that her attacker was named Roy, and she provided a physical description of both the man and his van. She was the primary witness for the state and was able to identify Harich at trial.

Harich testified in his own behalf, stating that he had consumed a substantial amount of beer and smoked marijuana that evening. He admitted picking up the girls at the filling station and driving them to a deserted area in the woods to pick marijuana. He testified that they waited in the woods for more than an hour while trying to dry the marijuana leaves, and that, when Deborah Miller asked if they could leave, they got into the van and departed. Harich denied the sexual battery of Carlene Kelley, her murder, and the attempted murder of Deborah Miller. He stated that he drove the girls out of the woods and dropped them off at a nearby convenience store so they could call a friend for a ride home.

The jury found Harich guilty of the first-degree murder of Carlene Kelley; the attempted first-degree murder of Deborah Miller; the use of a firearm in the commission of a felony; and two counts of kidnapping.

In the penalty phase, Harich presented a clinical psychologist who testified that, though Harich was competent at the time of the offense, he was operating at that time under the influence of extreme mental or emotional disturbance because of his consumption of substantial amounts of drugs and alcohol. Harich called character witnesses who testified that he worked very effectively as a volunteer fireman and that he had been a model prisoner while confined in jail before his trial.

The state presented as evidence in the penalty phase the testimony of two law enforcement officers, Sergeants Vail and Burnsed, concerning statements Harich had made during interrogation; these statements had been suppressed during the guilt phase of the trial. The trial judge decided to admit these statements into evidence under the more liberal evidentiary standard of the penalty phase established in section 921.141(1), Florida Statutes (1981). At the conclusion of the penalty phase, the jury voted nine-to-three to recommend imposition of the death penalty.

The trial judge agreed with the jury and imposed the death penalty, finding as aggravating circumstances (1) that Harich murdered Carlene Kelley while he was committing or attempting to commit the crimes of sexual battery and kidnapping; (2) that he killed Carlene Kelley for the purpose of avoiding and preventing his lawful arrest; (3) that the killing of Carlene Kelley was especially heinous, atrocious, and cruel; and (4) that the capital felony was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal

justification. The trial court found one mitigating circumstance, specifically, that Harich had no significant prior history of criminal activity.

This court affirmed Harich's convictions and sentences. Harich v. State, 437 So.2d 1082 (Fla. 1983). Certiorari was subsequently denied by the United States Supreme Court. Harich v. Florida, 465 U.S. 1051 (1984).

The governor signed a death warrant for Harich in March, 1986. After an execution date was set, Harich petitioned this court for a writ of habeas corpus. His arguments were unanimously rejected. Harich v. Wainwright, 484 So.2d 1237 (Fla.), cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 993 (1986). Next, on March 17, 1986, Harich filed a motion to vacate judgment and sentence in the Circuit Court for Volusia County, Florida pursuant to Florida Rule of Criminal Procedure 3.850 and sought an evidentiary hearing. Harich's only cognizable claims at this stage were two assertions of ineffective assistance of trial counsel: (1) that trial counsel did not prepare an involuntary intoxication defense; and (2) that trial counsel did not call available witnesses during the sentencing phase. On March 18, 1986, the trial court denied the motion and the request for a hearing, and this court affirmed. Harich v. State, 484 So.2d 1239 (Fla. 1986). On March 18, 1986, Harich filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The district court dismissed the petition that same day, and denied Harich's request for an evidentiary hearing. The Eleventh

Circuit Court of Appeals affirmed the denial of habeas corpus relief finding that Harich had not been deprived of the effective assistance of counsel and specifically indicating "Indeed, we think that the lawyer was above average if not outstanding in representing his client in this case." Harich v. Dugger, 844 F.2d 1464, 1471 n.7 (11th Cir. 1988), cert. denied ___ U.S. ___, 109 S.Ct. 1355, 103 L.Ed.2d 822 (1989).

After the governor signed a second death warrant in March 1989, Harich filed a second motion for relief pursuant to Rule 3.850. After the trial court denied relief, Harich appealed and also filed with this court a petition for a writ of habeas corpus, raising numerous grounds for relief including the contention that a conflict of interest existed by the failure of Harich's trial counsel to reveal to Harich that he served as a special deputy sheriff in an adjacent county at the same time he represented Harich, and that trial counsel's service as a special deputy sheriff resulted in his providing Harich ineffective assistance at trial. All of the claims were found by this court to be either procedurally barred or meritless with the exception of the conflict of interest claim. This court found that the allegations in Harich's rule 3.850 motion concerning trial counsel's alleged service as a special deputy sheriff were sufficient to require an evidentiary hearing with regard to counsel's duties as a special deputy sheriff and whether this relationship to law enforcement affected his ability to provide effective legal assistance to Harich. This court also stated "...We also conclude that, as a result of the unusual factual

allegations in this case, it may be that this issue could not have been discovered previously through due diligence and that, as a consequence, our procedural default rule would be inapplicable." Harich v. State, 542 So.2d 980, 981 (Fla. 1989). The language of the court would seem to indicate that the applicability of the procedural default rule is a viable post-evidentiary hearing issue. This court remanded this cause for an evidentiary hearing on the conflict of counsel claim and directed that the hearing take place within sixty days from the date the opinion became final. 542 So.2d at 982. The opinion issued April 20, 1989, rehearing was denied June 2, 1989, and mandate issued on June 2, 1989. A stay of execution was granted pending resolution of the issue.

Justice Overton dissented with an opinion in which Justices McDonald and Grimes concurred. In Justice Overton's view the conflict of counsel issue should have been rejected on the grounds of procedural default as nothing in the record indicated why the allegation could not have been discovered before the first 3.850 motion was filed in 1986. Justice Overton indicated that: "By allowing this claim to be made, the majority is making a mockery out of the two-year limitation and the restriction on multiple post-conviction motions.'' Moreover, it was the Justice's view, as well, that Harich should lose on the merits of this claim: "The fact that trial counsel was a special deputy sheriff in an adjacent county and an adjacent circuit does not result in a per se conflict of interest any more than if he had been a member of his neighborhood crime watch. The real question

is whether counsel performed effectively while representing Harich." Justice Overton saw no justifiable claim of ineffectiveness in this proceeding and commented upon the fact that the Eleventh Circuit found Mr. Pearl to be above average if not outstanding. **542** So.2d at **982.**

Pursuant to the opinion of this court an evidentiary hearing began on June **9, 1989** before the original trial judge, the Honorable Uriel Blount Jr. The hearing commenced at **9:30** a.m. Despite the fact that defense counsel John Chapman and Nancy Feinrider received notice on May **3, 1989** to be present at such time and had been in the courtroom before, they did not appear in the courtroom until **9:56** a.m. (R **41).** Judge Blount ordered them to stand at the podium and requested them to show cause why they should not be held in contempt (R **40-41).** The only feeble response offered by Mr. Chapman was that: "We called your honor's chambers earlier this morning. We made a call to your law secretary. We explained to her we had gotten lost and had run into traffic. We would ask your honor to accept our apologies." Judge Blount remembered that it was already **9:35** a.m. when the call indicating counsel was lost was received (R **41).**[1] Judge Blount, upon determining that no excusing or mitigating circumstances had been shown, found Mr. Chapman and

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[1] Not only was counsel late but Mr. Chapman, upon arriving, indicated that he was not ready to proceed on the claim he should have been ready to proceed on upon filing on March **17, 1989.** Despite notice of the hearing by the lower court, Mr. Chapman, in a superabundance of legal caution, declined to prepare until the issuance of mandate (R **36-38).** These same attorneys were unable to appear for final argument because they were "fogged in" in New Jersey (R **459).**

Ms. Feinrider to be in contempt of court and fined them each $250.00 (R 43-44; 523-526). Judge Foxman later stayed the payment of the fine for purposes of appeal (R 243).

On Wednesday at 12:31 p.m. a motion was faxed to the clerk by defense counsel to disqualify the court from presiding over the proceedings. It had not been filed or properly sworn to. On June 7, 1989, at 1:05 p.m. a copy was delivered to the judge by the clerk. At the time of the hearing on June 9, 1989, no original copy had been received or filed with the clerk (R 44). Although Judge Blount found the motion and supporting affidavit to be legally insufficient and that it had not been timely filed, he disqualified himself anyway in order to avoid the appearance of impropriety and "for further orderly disposition of the matter." (R 44-45). Judge S. James Foxman was reassigned in an order entered June 8, 1989 by Chief Judge Kim C. Hammond but not formally filed until June 9th, the day of the hearing (R 530). Evidently the ground for moving the court to recuse itself was the belief that "Judge Blount knew of defense counsel's divided loyalties well before defendant moved to vacate his conviction yet failed to disclose this information to defendant or to conduct the requisite hearing," thus, necessitating the calling of Judge Blount as a "material witness in support of defendant's claim of conflict of interest predicated on his trial attorney's concealed status as a sheriff while unsuccessfully representing defendant in his capital murder trial." (R 486).

Judge Blount was called by the defense as the first witness at the evidentiary hearing. He first expressed some agitation

with defense counsel, stating: "I considered it a breach of ethics of you attempting to contact me this week and ex-parte me. You called my office three times for conversations and I refused to talk with you and told you the hearing was set for **9:30** a.m. this morning." (R 64). Judge Blount then testified that in Florida, deputy sheriffs are appointed on an honorary basis routinely by sheriffs when they vote for the sheriff that is elected and such position carries no title or prestige but is an ego kick (R 70). At the time of trial Judge Blount did not consider holding a hearing as to whether there was a conflict of interest because there was no conflict as far as he knew (R 81). It was general knowledge through the years that Howard Pearl held such a position and Judge Blount believed it to be an honorary deputy position in Marion County with no power of arrest. In conversation through the years Judge Blount learned that it was necessary for Howard Pearl to be armed because he lived in Salt Springs, a recreational area, which was heavily occupied on weekends but sparsely occupied weekdays, which made his place subject to vandalism (R 58; 74). Judge Blount did not tell Harich he was being represented by "some sort of law enforcement official" as he would have considered it a breach of his duty to talk ex parte to Harich and perceived no conflict (R 64; 81).

Howard Pearl was appointed to represent Harich in **1981** (R 244). Prior to that time, in **1970,** Howard's life had been threatened and was again threatened by someone in the community whom he believed, when drunk, was capable of carrying out such threat (R 378). Howard, therefore, wanted some legal authority

to carry a concealed firearm (R 378). Because of the circumstances of his life Howard felt that it was important for him to be able to carry a firearm (R 385). He also possesses some expertise in their use. He started with competitive shooting at age fifteen and has spent most of his life carrying and shooting firearms and instructing others on their use. It has been his lifelong hobby (R 384).

Howard could have applied to the county commission for a permit to carry a concealed firearm but its use would have been restricted to one county which would have been of no value whatever since he travelled outside the county (R 379). Because of this fact, Howard went to Sheriff Willis of Marion County and asked him if he would appoint him as a special deputy sheriff in order that he might have legal authority to carry a firearm. He told Sheriff Willis that while he had formerly been a law enforcement officer years before, that he was not a certified law enforcement officer as would be required under the laws of this state and never has been and would have no powers of arrest (R 378, 386). Sheriff Willis knew that Howard had neither the intention nor the legal authority to carry out any assignment that he might want to give him (R 379). He knew that Howard was engaged in the practice of law and had no desire to have the power of arrest or to interfere with the affairs of any other person (R 248). Howard testified that the agreement was implicit in what he asked Sheriff Willis for and what he knew and what he knew Howard wanted. It was clear to the Sheriff that Howard had neither the opportunity nor the desire nor the credentials to

serve as a law enforcement officer in any capacity in this state (R **259).** The agreement with Sheriff Willis was for the purpose of allowing Howard to carry a weapon (R **379).** Howard viewed his special deputy status simply as a "gun toter's permit," stating, "If I were ever challenged by a law enforcement officer who might see that I was carrying a concealed firearm, I could just identify it and explain it by showing him that I was a special deputy sheriff" (R **380).** (Howard was challenged twice once by the Ocala Police Department and once when he was late he tried to use the card to pass into a courtroom but the metal detector picked up the gun and he had to put it away. He admits this was poor judgment on his part. R. 285. Howard carried a Derringer in his wallet R **358).**

Sheriff Willis' secretary gave Howard an application to fill out, which Howard completed and signed on August **8, 1970.** On the front of the application a typewritten "X" indicates he was applying for a position as a "Special Deputy" (R 536). On pages **1-A** and **2** Howard listed his education and law enforcement background (R **537-538).** He offered Sheriff Willis a select part of his background because he was asking the Sheriff to grant him a special privilege and he wanted to assure him that he was not the kind of person who was going to play drug store cowboy with it and was a responsible, experienced person who was very familiar with firearms (R **381).** In response to Question **13,** page **1,** "If appointed, when can you report for duty?" Howard indicated "when summoned." (R *536).* But the Sheriff and he both knew that he would never summon him as he was an attorney engaged

in the practice of law and not a certified law officer (R 248). In response to Question 3 on page 3 "Why are you interested in employment with this law enforcement agency?" Howard responded "I am applying for appointment as special deputy sheriff *so* that: (1) when called, I may participate and assist in protection of persons and property in my community; and (2) I may have authority to carry firearms, in the area of the Ocala National Forest, and elsewhere in the State, for protection of self and family." (R 539). Despite Howard's proclamation of being ready to serve, the Sheriff knew that Howard was not available for service and that he couldn't employ Howard to perform law enforcement service if he wanted to. Howard did not expect to be called to serve and did not intend to serve and both he and the Sheriff knew it and the Sheriff could not ask him to perform the duties of a certified law officer, either to effect an arrest or serve legal papers (R 249; 250). Howard saw no reason why the application should not protect Sheriff Willis from the possibility of some embarrassment if it were reviewed (R 383). Howard further testified "Certainly, I felt that if I had put in my application solely and exclusively that I wanted a gun toter's permit, and had he issued his appointment on that basis, that he might have been criticized for it. That it was an appointment solely to favor an individual whom had made a sort of political favor. So I included that. But it had no meaning in terms of either my intention to perform services, nor his intention or ability to assign me any law enforcement service" (R 384).

Howard also took an oath on August **21, 1970** swearing that he would support, protect and defend the Constitution and Government of the United States and of the State of Florida and that he was duly qualified to hold the office of Special Deputy and would well and faithfully perform the duties of Special Deputy (R 540). Howard did not view this as taking office as a law enforcement officer but as taking office not only pursuant to whatever powers the Constitution of the State of Florida gave him but whatever powers or duties the Sheriff conferred upon him, which in this case was the power to carry a concealed firearm accompanied by no duties whatsoever (R **260-262**). Howard was issued a card by Sheriff Willis and the word "special" was typed diagonally across the face of the card (R **262**). The card was discarded or destroyed long ago (R **255**). Howard was also required to go to an insurance company and pay a premium for the issuance of a bond which was sent to the Sheriff (R **262-263**).

Howard Pearl was not listed on a duty roster, performed no duties and was assigned no duties and has never been paid a penny by the Marion County Sheriff's Department (R **388, 390**). He once did a personal favor for a man who had saved his house from burning down. The man was a local deputy sheriff from Salt Springs and Howard rode with him to serve divorce papers on a man reputed to be violent. But it was done only as a personal favor and occurred well before he became an Assistant Public Defender and he believes it occurred before he was appointed as a special deputy (R **391-393**). He was never issued a uniform, equipment or a badge. He purchased a badge, himself, and carried it from time

to time in the event he was ever challenged by any law enforcement officer to show cause why he was carrying a firearm. Showing a badge is quicker and Howard believes that there are times when a metal badge seems to carry more importance than a printed card (R **389).**

In January, **1973,** Don Moreland was elected Sheriff of Marion County (R **263).** Howard's appointment ended when Sheriff Willis was defeated in the election and he had to seek reappointment from newly-elected Sheriff Moreland (R 395). Sheriff Moreland had been a deputy sheriff under Sheriff Willis and was sympathetic to Howard's request for the continuation of his special deputy sheriff's commission without any responsibilities for the purposes of carrying a weapon (R **395–396;** Deposition of Don Moreland p.9; **11-12).** He did not require Howard to fill out a new application. Howard told him and he fully understood that Howard was an Assistant Public Defender and not a certified law enforcement officer (Deposition of Don Moreland p. **10; 13-14).** Sheriff Moreland consented to appoint him in the same way and for the same purpose that Sheriff Willis had done (R **396)** contingent upon Howard's paying his own insurance. (Deposition of Don Moreland p.10). Sheriff Moreland described Howard's commission as "primarily honorary for the purpose of carrying a weapon.'' He further testified that in **1970** it was a common practice for sheriffs to make appointments such as this and not expect the person to be involved in law enforcement or to have the power to make arrests. He testified that "I never intended for Mr. Pearl to make any arrest for us.

I knew out front that he wanted it for purposes of carrying a weapon. We never called him." (Deposition of Don Moreland p. 13-14; 31).

Sheriff Moreland indicated that he wanted to issue Howard, along with every other deputy and special deputy, an identification card, and that Howard should report to a certain address where they would take his photograph, then the card would be made out and the Sheriff would later sign it, it would then be laminated and returned to Howard (R 398-399). Howard went to the address and there were between twenty-five to forty people standing in line waiting to be photographed. Howard believes that in the confusion he was misidentified as a "regular" deputy (R 399). The identification card he was issued refers to him on both the front and back as a "Regular Deputy Sheriff" (R 541). Sheriff Moreland thought that this was the card issued to Howard by Sheriff Willis but it was never his understanding that Howard was a full-fledged deputy sheriff (Deposition of Don Moreland p. 56). Howard felt that as long as he wasn't going to use the card, it hardly mattered what it said (R 399). Howard was routinely sent reappointment letters at the beginning of each new term of office and they also referred to him as a "Deputy Sheriff." (R 400; 542). Defense Exhibit 5, reappointment letter of January 1, 1981 appears to have been a form letter and Howard believes they must have been sent out to everyone (R 400). Sheriff Moreland confirmed this. He indicated that the term "deputy sheriff" was used in a generic sense and in his mind he was reappointing Howard as a special deputy sheriff and never

expected him to exercise any of the authority of a full-fledged deputy sheriff (Deposition of Don Moreland p.95). His continuing oaths of office also mistakenly designated him as a "Deputy Sheriff." (R **543).** Howard testified that "I was certainly duly qualified to do nothing the way I understood the oaths. It is necessary that the oaths be filled out and returned to the Sheriff in order to occupy the status that I had." (R 401). Both Howard and Sheriff Moreland knew when Howard was reappointed as a Special Deputy that he would have no duties (R **401).** Despite the fact that Howard had previously paid a bond, about five years ago the Sheriff required him to be insured and he paid an annual premium to Sheriff Moreland of **$100.00,** then later **$200.00** (R **270).** Sheriff Moreland annually invoiced him by personally addressed letters and such letters made clear the position to be covered by comprehensive liability insurance was that of "Special Deputy." (R **544-552).**

Sheriff Moreland testified in his deposition that when he renewed Howard Pearl's application it was not his intent to have Howard as a deputy sheriff because he had not completed the law enforcement training under the statute (Deposition of Don Moreland p.38). Howard Pearl has never been a certified law enforcement officer and was not trained as one by his office *(Id.* at p. **94).** "It was a courtesy to him because he had been on the roster for a period of time and it was a courtesy to the former sheriff to continue that and because he was an attorney and had much training in law and there was a very small possibility that we would incur any liability as a result of improper actions on

his part. His position carried no powers of arrest. He has never been called upon to make investigations or called out for a search. He has never provided any information concerning any pending criminal investigation or with reference to Roy Allen Harich. He does not ride with the Sheriff's personnel. He has no duties or job description and has not been trained. He does not participate in any programs. He has never been paid or received any benefits. In fact, ninety-nine percent of the Sheriff's personnel would not even know Howard Pearl by name or sight." (Deposition of Don Moreland pp. p. **38; 89; 92; 98).** Sheriff Moreland has never personally called for Howard Pearl's assistance on any occasion. He has been employed in the Sheriff's Office since **1957** and has personal knowledge that Howard "has not conducted investigations for us or worked for us, paid or nonpaid." *(Id.* at **89).** In addition to deputy sheriffs there is a status in his office called a "special deputy" which persons he could call upon to form a posse comitatus. Such deputy must be a certified law enforcement officer. Such appointments are no longer even made. He never needed to call Howard as such because of the size of his force. *(Id.* at 40-41).

Leon Lowry is a Special Agent with the F.D.L.E. Division of Criminal Justice Standards and Training Commission (Deposition of Leon Lowry p.**3).** Pursuant to sections **943.10** and **943.1395** Florida Statutes **(1989)** Mr. Pearl would have to receive training and certification to perform the duties of a deputy sheriff or a special deputy sheriff with few exceptions. See, **§30.09(4)** Fla. Stat. **(1989).** Mr. Lowry keeps records of certified law

enforcement officers. (*Id.* at 4). He conducted a record search in the computer system and confirmed that Howard Pearl had never been trained or certified as a law enforcement officer in the state of Florida (*Id.* at **5-6**). All officers who were employed on or before June **21, 1968** were grandfathered and there would be no training record of them. However, he reviewed the agency files for the Marion, Volusia, Putnam and St. John's County Sheriffs' Offices and found no Howard B. Pearl listed (*Id.* at **8-10**).

In **1987** the legislature passed a new act for the licensing of private citizens to carry concealed firearms throughout the state. Howard filed an application with the Secretary of State in **1987** and was issued a license in **1988**. Since he now has the power to carry a concealed firearm as he wished, he resigned as a special deputy in Marion County on May **1**, 1989 (R **252-255**).

Sheriff Edwin H. Duff, II of Volusia County used to hand out honorary deputy sheriff's cards to "a select few of his friends" numbering in the one thousand to two thousand range (R **118; 123; 161**). They were good will cards and he gave them to personal friends or people he hoped would support him in his bid for re-election (R **161**). They were handed out like party favors (R **280**). Although Howard did not solicit such a card, Ed Duff gave him one, and not wanting to hurt Mr. Duff's feelings, Howard took it and then threw it in his drawer at home (R **280-281**). Such cards were also issued to his Excellency Ardeshir Zahedi, Iranian Ambassador, Imperial Embassy of Iran, N.B.C. Weatherman Willard Scott, Dr. Neil Frank of the National Hurricane Center (R **170**), to newspapermen, reporters, civic leaders and attorneys (R

163-164) and to newborn children (R 163). A similar card was issued to Howard by the Sheriff of Lake County, Florida (R 278). As Judge Blount testified "In Florida, deputy sheriffs are appointed on an honorary basis routinely by the sheriffs when they vote for the sheriff that's elected. It carries no title or prestige. It's an ego kick (R 70). Harich concedes on page 17 of his Initial Brief on appeal that these commissions are purely honorary, so they need not be discussed in depth.

Howard further testified at the evidentiary hearing below that he knew nothing of the B.O.L.O. on Harich and no such communication was made to him (R 294). He does not socialize with police officers (R 320). He has never had a case in which it appeared to him that there was any basis for a claim that a defendant had been framed by police officers by virtue of planted evidence or a conspiracy to tell an untruth and if so, he would have attacked such evidence (R 323). In regard to his representation of criminal defendants Howard declared: "My loyalty is singly and totally to a client to whom I give representation. His interests are paramount in my mind, and nothing else is by contrast of any consequence or importance at all." (R 377). He has never performed any investigation or in any way aided either the Marion County Sheriff's Department, the Lake County Sheriff's Department or the Volusia County Sheriff's Department in the conviction of any of his clients while a public defender and his special deputy status never interfered with the representation of his clients (R 405). No one ever even asked him to do anything that would interfere with that duty (R 406).

His loyalty to his clients has never been divided in the slightest by anything and he did not do anything differently for Harich because he was a special deputy (R 406). He viewed his deputy card the same way that he now views his state permit to carry a concealed firearm: "It is the same function, and to me and in my mind it had exactly the same importance." (R 409). He never did any investigation or in any way assisted the Sheriff's Department in Harich's case (R 419). The suggestion that he may have revealed any of his clients' confidences to any law enforcement agency or the Sheriff's Department horrifies him (R 420). He conducted the defense of this case in as loyal and as aggressive a manner as he could consistent with making sure that he didn't either offend the jury or cause them to believe that he had lost his credibility (R 424). His special deputy cards did not affect the way he argued or presented his case to the jury (R 427). The expert sociologist retained by Harich never even talked to Howard and even if his opinion is correct that all law enforcement officers believe that anyone who is arrested and accused of a crime is guilty, Howard does not (R 431). Judge Blount was declared an expert in criminal law and he testfied that he perceived no ineffectiveness in Howard's representation of Harich (R 96-98).

At the conclusion of the hearing Judge Foxman entered an order on June 21, 1989 denying post conviction relief (R 608-612). He specifically found that the claim was procedurally barred as Howard's status was common knowledge in the Volusia County legal system and could easily have been discovered back at

the time of the 1982 trial or anytime thereafter (R 611). He concluded, as well, that no actual conflict of interest had been demonstrated (R 612).

SUMMARY OF ARGUMENT

1. It was common knowledge in the Volusia County legal system that Howard Pearl was an honorary special deputy and such evidence could have been discovered previously through due diligence. The conflict of interest claim based on such fact should be procedurally barred.

2. No actual conflict of interest has been demonstrated. Howard Pearl was not a regular deputy sheriff. The agreement with the Sheriffs did not contemplate this and was made only so Howard could carry a gun; no duties were ever performed by Howard and could not have been since he lacked training and certification as required by sections 943.10 and 943.1395 Florida Statutes (1989); he had no powers of arrest pursuant to section 30.09(4), Florida Statutes (1989); he received no compensation; he was issued no equipment. He was never asked to and did not perform the duties of even a special deputy. Howard's status cannot be deemed anything other than honorary. He was no more beholden to the Sheriffs of Marion County than he now is to the Secretary of State for his statewide permit. His status had no impact upon the way he performed his duties as an Assistant Public Defender in his defense of Roy Allen Harich and Harich's defense was not thereby compromised or prejudiced. All these facts were ascertained at full and fair evidentiary hearing below.

3. Post conviction counsel for Harich after exhibiting an acute unwillingness to go forward with this claim were properly found to be in contempt of court for arriving late at the evidentiary hearing below.

ARGUMENT

I. DEFENSE COUNSEL WAS NOT A DULY CONSTITUTED DEPUTY SHERIFF IN MARION COUNTY DURING THE COURSE OF HIS REPRESENTATION OF HARICH BUT ONLY AN "HONORARY" OR "SPECIAL" DEPUTY, WHICH STATUS CREATES NO CONFLICT OF INTEREST REQUIRING DISCLOSURE TO THE CLIENT OR VACATION OF THE CONVICTION AND SENTENCE.

A. HOWARD PEARL WAS NOT A DULY CONSTITUTED DEPUTY SHERIFF IN MARION COUNTY.

Harich contends that the lower court's conclusion that Howard Pearl was an honorary or special deputy sheriff is unsupported by the record. Such contention is belied by the statement of the facts in this case, which need not be exhaustively and repetitiously set out again in argument. Brief review of such statement reveals many facts which argue against any identification of Howard as a regular deputy sheriff: (1) the gentleman's agreement between Howard and the successive Marion County Sheriffs was not intended to confer any status upon Howard but only to give him the right to carry a gun with no concomitant duties; (2) no duties were ever performed by Howard and could not have been undertaken by him since he lacked training and certification pursuant to sections **943.10** and **943.1395** Florida Statutes **(1989),** and he had no powers of arrest pursuant to section **30.09(4),** Florida Statutes **(1989); (3)** he received no compensation and (4) he was issued no equipment.

The application filled out by Howard hardly elevates his status to something above that contemplated in the gentleman's agreement. When he indicated he would report when summoned he

knew very well that he never would be summoned. He revealed his law enforcement background only to demonstrate that the special deputy card would be in the hands of a responsible person. His sole motivation for seeking a card was to be able to carry a gun and the reason given on the application: "to protect persons and property", was set out only to avoid embarrassment to the Sheriff. When he took the oath that he would perform the duties of a special deputy he well knew that he would be assigned no duties. Howard was not issued the same card as any other deputy - the word "Special" was stamped across the front. Of course Howard carried a concealed handgun, that was the very purpose of his even wanting the card. He purchased his own badge for personal use based on notions of expediency in identification - he was not issued one. He was insured and bonded because there was no reason for the Sheriffs to incur liability as the result of their favor and such cost was borne by Howard. The only "thing" Howard ever wanted was to carry a firearm which is what he obtained such status for and used his card on rare occasions when challenged.

Harich next argues that the lower court's ruling that he was not a "regular" deputy was erroneously based on the finding that he was not certified as a law enforcement officer but section 30.09(4) Florida Statutes (1989), creates exceptions where a special deputy need not possess the minimum requirements established for law enforcement officers by the Criminal Justice Standards and Training Commission. Since section 30.09(4) applies to "special" deputies Harich must be conceding that

Howard is not a regular but a special deputy but that such exceptions still create a conflict situation.

Pursuant to section 30.09(4) a non-certified special deputy may be appointed (a) on election days, to attend elections (e) to aid in preserving law and order, or to render necessary assistance in the event of any threatened or actual hurricane, fire, flood, or other natural disaster, or in the event of any major tragedy such as an airplane crash, train or automobile wreck, or similar accident (f) to raise the power of the county, by calling bystanders or others, to assist in quelling a riot or any breach of the peace and (g) to serve as a parking enforcement specialist. It is readily apparent that these activities are not the traditional duties of a law enforcement officer. It is also hard to see how the rendering of assistance in a hurricane by Howard in a separate county or his assistance in parking cars or at elections could impact in any way upon Harich's defense. Moreover, Howard or any other citizen could be called upon by the Sheriff to perform these and the remaining duties under the statute since pursuant to section 30.15 Florida Statutes (1989), sheriffs have the authority to command any person to assist them in the execution of their duties, or the summoning power of "posse comitatus," as Howard refers to it.

Harich also conveniently overlooks the fact that Howard never did perform such duties. He was a "special" special deputy, as the prosecutor below referred to him. There was no intent on the part of the Sheriffs that *any* duty be performed. There was nothing in the appointment of Howard which pretended to

confer on him the general powers of the office of Sheriff, and there was a special arrangement which reserved from him, as is permissible in the case of special deputies, any authority which may be implied by or involved with his deputation. Howard had no authority to perform any act in the absence of the Sheriffs' manifestation of an intent to have him perform such duty. Guarantee Trust & Deposit Co. v. Buddington, **23** Fla. **514**, **2** So. **885, 890 (1887).**

In State v. Dinwiddie, **237** S.W.2d **179, 183** (Mo. **1951),** cited by the appellant, the state objected to defense counsel's dual role as counsel and deputy sheriff - a title given as a courtesy, as the Sheriff would have to summon and call for the jury in that case. The venue of the crime charged was laid in the same county in which defense counsel was a deputy sheriff, which is not the case here. As argued in Point V, Harich certainly had grounds for objection prior to the trial. By not voicing such objection he received the benefit of representation by one of the bar's most brilliant litigators. Not liking the result, he now seeks to belatedly impale him by virtue of Missouri law and the citing of a case in which the defendant fought to retain the likes of Howard. Such a claim should not be allowed.

Counsel's attempts to characterize as a common criminal an outstanding member of the Florida Bar who has brilliantly defended not only Harich but Gerald Stano and other such

defendants must fail.[2] In Howard's line of work he had every reason to fear for his life and actually received threatening mail. The Sheriffs of this state are empowered to appoint special deputies and can reserve from them any powers they so choose. There is nothing illegal about this arrangement.[3] There is nothing immoral in permitting the more sane among us, who by virtue of public service may put their own lives in jeopardy, from arming themselves so such public service can be continued. There is a shortage of Howard Pearls in the criminal justice system. The shortage may even be greater if it is discerned that the reward for such dedication is subjection to an inquisitorial system Roy Allen Harich was not even made to face.

B. THE SOLE ISSUE IN THIS CASE IS WHETHER *AN* ACTUAL CONFLICT OF INTEREST EXISTED NOT WHETHER DUAL OFFICE HOLDING IS PROSCRIBED BY THE FLORIDA CONSTITUTION, STATUTES AND COMMON LAW.

The sole issue in this case is whether an actual conflict of interest existed, not whether dual office holding is proscribed by the Florida constitution, statutes or common law. The propriety of Howard's appointment as a "special" special deputy should not be determined in a collateral proceeding where the sole effect would be to put in jeopardy a valid and final judgment of conviction and sentence. The remedy, now gone by, for enforcing dual office holding prohibitions is an ouster or

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[2] Howard Pearl has not had a single client executed (R 17). The Public Defender describes him as an "advocate's advocate." (R 43-44). The Eleventh Circuit Court of Appeals found his efforts on behalf of Harich to be above average if not outstanding. Harich v. Dugger, 844 F.2d 1464, 1471, n.7 (11th Cir. 1988).

[3] That is an issue purely collateral to this case in any event. See, Gryzik v. State, 380 So.2d 1102 (Fla. 1st DCA 1980).

quo warranto proceeding. Gryzik v. State, 380 So.2d 1102, 1106 (Fla. 1st DCA 1980). Unlike the exclusionary rule, prohibitions against dual office holding exist to preserve and protect a public interest unrelated to the interests of criminal defendants in the defense of charges lodged against them. See, 380 So.2d at 1106.

Howard's lack of training precludes him from being considered a "regular" deputy. Because of the gentleman's agreement by which virtually all powers were reserved from Howard by the Sheriffs, his appointment does not even rise to the level of that of a "special" deputy. It is clear that in Howard's case the Sheriffs did not delegate any part of their sovereign authority. Howard's appointment can hardly be considered as the taking of an "office" under dual "office" holding prohibitions. The term "office" implies a delegation of a portion of the sovereign power to and the possession of it by, the person filling the office, while an "employment" does not comprehend a delegation of any part of the sovereign authority. State ex rel. Holloway v. Sheats, 78 Fla. 583, 83 So. 508 (1920). There is no express constitutional or statutory prohibition against one person's holding two public "employments." 1960 Op.Atty.Gen. 060-49, March 14, 1960. Being unpaid, Howard's position does not even rise to the level of an "employment", no less an "office". Even a "regular" deputy sheriff who is not paid for acting in such capacity and holds another office does not run afoul of constitutional or statutory prohibitions against dual office holding. Rampil v. State, 422 So.2d 867 (Fla. 2d DCA 1982).

Harich also conveniently overlooks the fact that Howard became a "special" special deputy long before the trial in this case. Even if he could be said to have been holding two "offices", it would have no effect upon this case. It was generally accepted at common law that by acceptance of an incompatible office, the office holder makes a binding election which *ipso facto* vacates the first office. Florida recognizes this rule.[4] Gryzik v. State, 380 So.2d 1102, 1104 (Fla. 1st DCA 1980).

Harich cites a string of cases from foreign jurisdictions finding an impermissible conflict between simultaneous law enforcement and criminal defense functions. They involve defense attorneys acting as prosecutors or as an assistant attorney general - situations not analogous to the present one. Howard's status was not that of an "inactive" deputy sheriff. He was an uncompensated honorary special deputy without duties and with no unimpaired loyalty to his client. Under present counsel's unique analysis Howard would now be a state agent. Because he now has a statewide gun permit his real loyalties and affinities must lie with the Secretary of State and not his clients. This reasoning is no less faulty than that employed in arguing under the rubric of constitutional and statutory provisions that the right without obligation to carry a firearm bestowed upon Howard by the

[4] Had Howard actually performed any duties as a special deputy he could then be considered a *de facto* officer, but he performed no duties whatsoever. 380 So.2d at 1104.

Sheriffs of Marion County created a loyalty to them which impaired his loyalty to his client, Missouri law aside.[5]

What occurred below was that a condemned killer was allowed to probe and pick at the mind processes of a noted trial attorney on the basis of information which should have revealed to counsel the absence of divided loyalties even before the filing of their pleading.

C. HOWARD PEARL WAS AND IS A CONSUMMATE ASSISTANT PUBLIC DEFENDER OF THE MOST VILE CAPITAL OFFENDERS WHO JUST HAPPENS TO CARRY A GUN FOR SELF-PRESERVATION IN VIOLATION OF NO DISCIPLINARY OR ETHICAL RULE.

Howard Pearl had no conflicting employment prohibited except upon consent of the client which could adversely affect his professional judgment in violation of DR5-101(A) or Rule 4-1.7(b), Rules Regulating the Florida Bar. Howard Pearl simply sought the sanction of the state to carry a firearm to protect his own life. It makes no difference whether such right was conferred upon him by a sheriff or the state of Florida as no duties were imposed or loyalties thereby created which could adversely affect his professional judgment. The state is only obligated to provide an effective lawyer for Harich. He received an outstanding lawyer. Having nothing to lose, he now states his

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[5] State v. Dinwiddie, 237 S.W.2d 179, 183 (Mo. 1951), cited by Harich in support of every possible proposition has been previously discussed. It goes without saying that Missouri law, especially old law, is not binding upon this court. But should this court find such reasoning persuasive, it should also be prepared to say that the issuance of a statewide gun permit creates divided loyalties as well. Also it should be remembered that the court in Dinwiddie was not faced with the issue of whether to vacate a final judgment and sentence since proceedings were timely instituted before trial *so* that the court would be more inclined to consider "appearances" of impropriety with the luxury at hand of simply appointing substitute counsel.

preference that "he wouldn't want anyone who ever had anything to do with law enforcement" (R 350). His belated "consent" is not needed and Howard had no duty upon representation to offer him a biography or *curriculum vitae*. As Howard stated "that status as a special deputy sheriff had absolutely no bearing whatever on my duties or my function as a defense lawyer. If it had thought for one minute that it had even impinged on my conscience, or if there would have been the slightest hesitation to act differently, I would have resigned immediately." (R 408). Thus, it never occurred to Howard to seek Harich's approval (R 408). That such a thought could occur to defense counsel after investigation of the circumstances in this case is bewildering.

11. HOWARD PEARL WAS NOT BEHOLDEN TO THE SHERIFF FOR HIS GUN, COMMITTED NO CRIMINAL ACTS, AND HIS STATUS AS A SPECIAL DEPUTY CREATED NO CONFLICT OF INTEREST.

Post conviction counsel next argue that Howard's right to carry a concealed weapon was dependent upon the largesse of the Sheriff and insultingly suggest that he may have toadied up to a sheriff, in a totally separate county, who had no interest in this case, by conducting a less than vigorous cross-examination of police officers, unconnected with the Sheriff, and employed in the county where venue lay in this case. It is also suggested that Howard may have held back in cross-examination for fear such police officers would in return investigate Howard's "criminal" activities. On this basis counsel would have this court apply a per se rule of reversal.

To accept this hypothesis this court must first believe that a sheriff has no interest in justice. It must secondly believe that the Sheriff would be affronted by Howard's performance of his duties as a public defender in a totally separate county even though the Sheriff knew what Howard did for a living when he gave him the card. Thirdly, it must believe there was some paranoid network in operation keeping the Sheriff apprised of all Howard's actions. It is no less odd to argue that one who never kept his status a secret in legal and judicial circles would fear prosecution by virtue of cross-examining professionals who routinely appear in court and expect to be cross-examined. Howard legally carried a gun. There is nothing illegal about not calling an unpaid special deputy to serve -- his very status and presence in the community, much like crimewatch, could act as a deterrent to crime without the impairment of loyalty to his client.

In all honesty, this claim is not worthy of an answer. Counsel is surely aware that the Supreme Court in Cuyler v. Sullivan, 446 U.S. 335 (1980), held that an allegation of a possible conflict does not result in the conclusion that a defendant received inadequate representation. In this case counsel has alleged an improbable conflict.

III. DEFENSE COUNSEL WAS NOT LABORING UNDER A CONFLICT OF INTEREST IN VIOLATION OF THE SIXTH AND EIGHTH AMENDMENTS AND HIS STATUS AS A SPECIAL DEPUTY IN A SEPARATE COUNTY DID NOT ACTUALLY AFFECT THE TRIAL.

When a trial court has notice of a potential conflict and fails to inquire, a reviewing court will presume prejudice to the defendant. See, Holloway v. Arkansas, 435 U.S. 475, 484 (1978). On the other hand, when the trial court has no notice of a potential conflict of interest and the claim is raised for the first time on appeal or in a collateral proceeding, the defendant must prove that an "actual conflict of interest adversely affected the lawyer's performance" to demonstrate a constitutional violation. Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980). In distinguishing possible conflicts of interest from actual conflicts of interest, the Supreme Court held that an allegation of a possible conflict does not result in the conclusion that a defendant received inadequate representation. On the other hand, in those instances in which a defendant can show a conflict of interest that actually affected the adequacy of representation, prejudice need not be demonstrated in order to obtain relief. *Id.* at 349. In Cuyler, the Supreme Court explained that, for a defendant to demonstrate that counsel's performance was adversely affected by a conflict of interest, the defendant must show: 1) that the attorney was actively representing conflicting interests and 2) that the record demonstrates specific instances in which defense counsel acted or refrained from acting due to the conflicting interests. *Id.* at 346-47.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court explained its decision in Cuyler v. Sullivan. The Court in Strickland held that a two-part test must be met to

establish ineffective assistance of counsel. First, counsel's performance must be shown to have been deficient. Second, the deficient performance must have actually prejudiced the client. Applying that rationale to its earlier decision in Cuyler, the Court said that a conflict of interest is so egregious a violation that it clearly establishes the first prong of Strickland and gives rise to a presumption of prejudice to satisfy the second prong, even in the absence of other proof of actual prejudice. Strickland, 466 U.S. at 692. However, the Court specifically noted that the presumption of prejudice for conflicts of interest is not quite the per se rule of reversal that exists for certain other sixth amendment claims such as the denial of the right to counsel. *Id.* Therefore, under certain circumstances the presumption of prejudice in conflict cases could be rebutted if other evidence against a defendant is so overwhelming that prejudice could not be found merely because of the conflict of interest. Buenoano v. State, Nos. 75,213 & 75,346, Slip op. p.9 (Fla. April 5, 1990).

Applying this criteria it is clear that counsel was not laboring under a conflict of interest. Harich has made allegations of only a possible conflict. He has failed totally to demonstrate that his attorney was actively representing conflicting interests.

Howard was not a regular deputy sheriff by agreement or statute and could not and did not perform the duties of such deputy. Howard was an honorary or "special" deputy without duties. He was no more "beholden" to the Sheriff than he now is

to the state of Florida for his statewide permit. Howard sought only the right of self protection and in seeking the same a probing of his mental processes below revealed no law enforcement bent.

Contrary to counsel's assertions, the record fails to demonstrate specific instances in which defense counsel acted or refrained from acting due to the conflicting interests. Counsel has no obligation to insist without evidence that the police are lying, and Howard's actions hardly amounted to bolstering their testimony. Howard has, in the past, when there has been a basis, attacked police testimony in cases as to the accuracy and the truth of the officer (R 322). But, as Howard indicated, "juries here are almost half retired people from somewhere else who are very conservative and love the flag. You don't attack a police officer without losing your credibility unless you've got it locked.'' Howard, wisely, won't attack a witness unless he can prove what he's saying (R 324). Howard denies that he was vouching for the credibility of Officer Wall - he was simply speaking to the jury (R 326-327): "I tell you that I could not back off and refuse to examine a police officer because of my loyalty I felt to him, consciously or unconsciously but that I conducted the defense of this case in as loyal and as aggressive a manner as I could consistent with making sure that I didn't either offend the jury or cause them to believe that I had lost my credibility" (R 424).

The record reflects that on cross-examination of Officer Wall, Howard brought out the fact that as part of the

conversation Harich had actually said he remembered nothing because he was drunk, high or both and that such statements were not memorialized in any way either by being reduced to writing or recorded (R 371-372), and were not acknowledged by Harich. During rebuttal cross-examination of Officer Wall Howard reasonably tried to show that what the officer had heard was that as Harich drove away he saw the girls in the back of his truck but had mistakenly written down, with the intervention of time, that they were laying on the ground (R **606**). In closing argument, Howard exhorted the jury to use their common sense to conclude that Officer Wall was wrong because Harich had talked to a lawyer before the police came, who had advised him of his rights, was a reasonably intelligent young man going to Daytona Beach Community College, knew he was under suspicion but did not think he had killed anyone and it would not have been logical for him to tell the police he left the girls laying on the ground, and it was much more likely he said he saw them in the back of his van as he drove away and he did not say "in the woods." Howard argued further "...But Tommy Wall, like any other human being is entitled to be wrong once or more in his life. He is entitled to make a mistake. He doesn't want to admit it, of course." (R **639-645**).

Harich now also takes the incongruous position of attacking counsel for reinforcing Deputy Burnsed's testimony that Harich told him where the murder weapon could be found by eliciting testimony on cross-examination that it was possible the gun was in the drainage ditch and they had just failed to find it. On

direct appeal, Harich complained that such testimony was irrelevant and went to bad character and was evidence of a non-statutory aggravating circumstance. It must be remembered that at this point in time Harich had already been convicted and the goal was to establish with the help of a medical expert that Harich was suffering from the effects of alcohol and acting out of character and counsel could have felt there was no point in having Harich look like a deliberate liar. This court already determined, in any event, that evidence that the gun had been thrown into a canal was not critical or prejudicial given the surviving victim's testimony in the guilt phase. Harich v. State, 437 So.2d 1082, 1086 (Fla. 1983). Harich simply seeks relitigation in the guise of a conflict of interest claim.

Harich does not suggest how Howard was supposed to cross-examine and impeach Officer Champion as to the time of the initial call at 11:59, fixing the time of the incident in contradiction to Harich's testimony, when such time was established, as well, by virtue of a compute readout and log (R 590).

Had Officer Vail wished to tailor his testimony or buttress Officer Wall's testimony, it could have been accomplished by pretrial collaboration between the two and the issue of lack of sequestration of Officer Vail as an incident of counsel's ineffectiveness based on conflict is frivolous.

It is clear that nothing Howard could have argued would have prevented the finding of the aggravating factor that the murder was committed during a sexual battery in view of the surviving

witness' testimony that Harich first forced Carlene Kelley to perform fellatio on him and then had intercourse with her (R **462-464).** As Howard indicated "there wasn't any way in the world under the rules of evidence that could be kept out because it was a part of the circumstances of the entire encounter between the two young ladies and Mr. Harich." (R **426).** Howard described Miss Miller as being the most devastating state witness he had ever seen: (R **427).**

> Her demeanor, her appearance, her testimony were incredibly fine (R **427).** The jury believed her. I watched the jurors. I watched their body language, the expressions on their faces with the way they turned their heads. They believed it. Okay. So I wasn't going to go to that jury and say, don't believe Debra Miller. They would have come right over the bar and hung me if they heard that because they knew better. They were sure she had told the truth (R **427-428).**

Even an attempted sexual battery would have been enough to support this factor. Penetration and ejaculation were not even necessary for a sexual battery to have taken place so counsel would certainly not have been required to hire a pathologist to testify as to the lack of sperm in the body cavities if this were indeed so. The kidnapping of the victims also supported the finding of this factor. As Howard indicated "conceding that the sexual battery also took place and was an accompanying felony when faced with the testimony of Miss Miller was a free gift in an attempt to have the jury believe that I was trying to tell them the truth, too, they could believe me when I spoke to them. And it was *so* obvious that they believed it, that it was not a

contention at all." (R 429). Harich does not suggest what information was available with which to impeach this witness. Little would have a been accomplished by pointing out that Harich lured them back in the van by promising not to harm them when he had a gun and their free will was limited.

In view of the fact that Harich wrapped a gun in a towel, shot the girls in the head then deliberately slashed their throats, Miller's pretrial deposition testimony that "he seemed to have it all planned out only as it came" would hardly have prevented the finding in aggravation that the murder was cold and calculated.

It is clear that Harich held the victims against their will and it is sophistry to argue that they "voluntarily" reentered the van after the sexual battery simply upon his promise that he would not harm them when he had already held them at gunpoint and still possessed the gun. They were certainly confined against their will at the time they were shot and their throats slashed.

Harich was certainly not entitled to the statutory mitigating circumstances of §921.141(6)(c) that the victims were a participant in the defendant's conduct or consented to the act by virtue of the fact they reentered the van after the sexual battery. Harich, after all, still had a gun and could have shot them there had they not seemed to believe his promise not to harm them further. However, one looks at it, Harich was the one in control.

After claiming innocence and contending he left the girls alive, Harich complained in his first motion for post conviction

relief that a defense of voluntary intoxication was not used. He complained prior to the granting of a stay in this case that he was not counseled about his former position. No testimony was elicited by Harich at the hearing below in regard to this issue and he does not now overtly argue this issue on appeal. Such issue should be deemed to be waived. Surely this is an accusation that could have been lodged in the first 3.850 motion which contained numerous allegations of ineffective assistance of counsel. [6]

The evidence against Harich was overwhelming and virtually screamed for a sentence of death, *so* that prejudice cannot be found even in the event there was a conflict of interest. In not slicing deeply enough Deborah Miller's throat, as was his intent, he sliced his own, for the testimony at trial of this devastating witness took the day despite Howard's valiant efforts on Harich's behalf and regardless of any alleged inadequacies attributed to a conflict of interest.

IV. THE TRIAL COURT DID NOT FAIL TO HOLD A HEARING AND HAD NO OBLIGATION TO AFFORD HARICH THE OPPORTUNITY TO OBTAIN SUBSTITUTE COUNSEL OR PROCEED PRO SE.

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[6] Not only is the present "conflict" claim being utilized to relitigate claims already decided in the context of ineffective assistance of counsel, but the claim seeks as well to litigate for the first time claims that could have been riased as early as direct appeal and which would have had no chance of success on the merits even had they been raised. What is sought to be reached by this claim demonstrataes its use to abuse 3.850 procedure. All the allegations and arguments contained in footnote 16, **p.** 41 of appellant's Initial Brief should be deemed waived.

Judge Blount had no grounds to initiate a hearing. He had heard only rumors that Howard was an honorary deputy sheriff, which he knew carried no title or prestige (R 70). He certainly had no obligation under Faretta v. California, 422 U.S. 806 (1975), to advise Harich of the right of self-representation. Faretta does not kick in every time the words "ineffective assistance of counsel" are mouthed. There being no actual conflict, this point is not only without merit but is moot as well.

V. THE CLAIM THAT DEFENSE COUNSEL WAS A DEPUTY SHERIFF DURING THE COURSE OF HIS REPRESENTATION OF HARICH WHICH CREATED A CONFLICT OF INTEREST IS PROCEDURALLY BARRED.

This court found that the allegations in Harich's Florida Rule of Criminal Procedure 3.850 motion concerning trial counsel's alleged service as a special deputy sheriff were sufficient to require an evidentiary hearing with regard to counsel's duties as a special deputy sheriff and whether this relationship to law enforcement affected his ability to provide effective legal assistance to Harich. See, Harich v. State, 542 So.2d **980, 981** (Fla. **1989).** The question of whether such evidence could have been discovered previously through due diligence was left open. 542 So.2d at 981. Such issue should now be resolved by application of the procedural default rule.

As Justice Overton indicated in his dissenting opinion in which Justices McDonald and Grimes concurred: "By allowing this claim to be made, the majority is making a mockery out of the two-year limitation and the restriction on multiple post-

conviction motions." 542 So.2d at 982. After a full and fair evidentiary hearing, it is now perfectly obvious that Harich secured an unwarranted stay of execution. Testimony at the hearing reflects that such claim could long ago have been brought to the attention of the courts. Justice has been ill-served not only in this case but in all pending Volusia County death penalty cases in which Howard Pearl served as defense counsel, since this claim has been raised in them all, at every level of litigation.

Judge Blount testified below that "it was general knowledge through the years" that Howard was an honorary deputy (R 58; 74). Everyone in the court system in Deland knew that Howard was an honorary deputy sheriff and Howard never tried to hide the fact (R 357). The prosecutor in this case, himself an honorary deputy sheriff, knew of Howard's status (R 352-355). Howard's associates at the Public Defender's Office long knew of his status. Deposition of Peyton Quarles, p.7; Deposition of Christopher Quarles, p. 13-14. The Public Defender, James B. Gibson knew of Howard's status for many years, even before the trial in this case. He testified that it was common knowledge. Deposition of James B. Gibson, p. 17-18. Howard testified that he told Judges Perry, Eastmoore, Watson and Weinberg of his affiliation with the Marion County Sheriff (R 312). In his own words "it was certainly not a secret and was generally known" in the courts of this circuit in which Howard worked (R 419).

As Justice Overton previously noted, "nothing in the record indicated why the allegation could not have been discovered before the first 3.850 motion was filed in 1986." 542 So.2d at

982. The record now conclusively indicates that this claim could well have been discovered before 1986. This claim should now be found to be procedurally barred under the two year limitation and the restriction on multiple post-conviction motions, as Justice Overton previously indicated. As Judge Foxman concluded after hearing the evidence in this case, "This issue could have easily been discovered back at the time of the 1982 trial or anytime thereafter." (R 611)

VI. A FULL AND FAIR EVIDENTIARY HEARING WAS HELD BELOW IN ACCORDANCE WITH THE DICTATES OF DUE PROCESS.

Intimidated New York counsel should have been ready to litigate this claim, which should have been based on previously ascertained truths and facts, at the time of filing the motion to vacate judgment and sentence in March 1989. Mandate in this case issued on June 2, 1989. The hearing did not begin until June 9, 1989. Jurisdiction was clearly vested in the trial court on June 2, 1989 to go forward with the ordered evidentiary hearing. As a courtesy, Judge Blount gave counsel notice of his intent to schedule such hearing as early as May 3, 1989 (R 41). Judge Blount, whom counsel criticize, did not even preside over the hearing. The astute and learned Judge Foxman gave counsel much leeway and adjourned the proceedings to allow counsel to depose witnesses (R 202-206). Counsel does not even identify what further witnesses could have been called or what their testimony would have been. It can hardly be said that counsel ever desired to call an expert witness since the unavailability of one was used as a basis for moving for a continuance. Nevertheless,

Judge Foxman accepted and considered such experts' written postulations in rendering his decision (R **239**). While Ms. Feinrider and Mr. Chapman were fogged in, Francisco Rivera of CCR was at the hearing on the final day and could have made oral argument. Written argument was submitted, in any event. Due process was more than complied with in this case and the court exercised great restraint.

VII. POST CONVICTION DEFENSE COUNSEL WERE PROPERLY FOUND TO BE IN CONTEMPT OF COURT BY JUDGE BLOUNT.

Defense counsel John Chapman and Nancy Feinrider had been in Judge Blount's courtroom before in litigation in this case prior to the entry of a stay of execution by this court (R **41**). They received notice on May **3, 1989,** that the evidentiary hearing in this case would be held at **9:30** a.m. on June **9, 1989** (R **41**). They did not appear in the courtroom until **9:56** a.m. (R **41**).[7] The first words out of Mr. Chapman's mouth upon his arrival were that he was not ready to proceed because he had been given "inadequate notice," despite the fact that he had known of the hearing since May **3, 1989**.[8] Mr. Chapman did, in fact, subsequently engender further delay as the proceedings were

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[7] Counsel, in footnote 1, page 2 of their initial brief on the contempt citation state that "although Judge Blount believed that defense counsel arrived at **9:56** a.m., that **is** the time the hearing started, not the time that counsel arrived in the courtroom." This statement is preposterous. John Chapman agreed on the record with Judge Blount that he had arrived at **9:56** a.m. (R **41**). The hearing did not start until defense counsel arrived.

[8] Mr. Chapman's unique theory seems to be that Judge Blount lacked authority to even address him until the issuance of mandate despite the fact that counsel himself tried to ex parte Judge Blount on several occasions.

ultimately recessed to allow Chapman to take depositions and prepare the case he should have been ready to go forward with at the time of filing the post conviction motion.[9] He did not appear for closing argument because he was "fogged in" in New Jersey. He received a generous extension of time from this court to prepare his brief on appeal. There should be no doubt in this court's mind that the name of the game was "delay." It began at 9:30 a.m. on June 9, 1989 (R 41).

Defense counsel now argue that the contempt order was an abuse of discretion and should be vacated because there was no finding of contumacious intent and nothing in the record suggests that the delay was intended to embarrass, hinder or obstruct the court's functions or authority; because the court failed to comply with Florida Rule of Criminal Procedure 3.830 and include a recital of those facts upon which the adjudication of guilt was based; and because Judge Blount had no jurisdiction to punish counsel since the Chief Judge had ordered Judge Blount to recuse himself the day before.

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[9] Contrary to the allegations made in the pleadings and affidavits filed by Mr. Chapman and Ms. Feinrider, Howard Pearl told them he was not and never had been a certified law enforcement officer and had never performed any duties as a special deputy (R 410). He made it plain he was not an active law enforcement officer. He never told them that he was paid by Marion County or had a commission in the Sheriff's Reserve (R 410). He never told them or their investigator that he was obligated to serve any particular number of hours per month. He said exactly the opposite (R 411). He never told them that he had fulfilled the requirements of the Police Standards and Training Commission, that he possessed powers of arrest or that his duties were the same as those of a full-time deputy sheriff (R 412).

A judgment of contempt is generally entitled to a presumption of correctness. In re Weinstein, 518 So.2d 1370 (Fla. 4th DCA 1988). In the present case the judge properly informed the contemnors of the accusations against them, inquired whether they could show cause why they should not be adjudged guilty of contempt, and gave the alleged contemnors an opportunity to present evidence of mitigating circumstances. See, Kahn v. State, 447 So.2d 1048 (Fla. 4th DCA 1984).

Trial judges are in the best position to evaluate trial conduct - not appellate judges reviewing a sterile and inanimate record far removed from the living and compelling realities of the trial bench. State ex. rel. Garlovsky v. Eastmoore, 393 So.2d 567, 573 (Fla. 5th DCA 1981). Non-appearance pursuant to an order of the court is normally considered a direct criminal contempt. Sandstrom v. State, 390 So.2d 448 (Fla. 4th DCA 1980); Porter v. Williams, 392 So.2d 59 (Fla. 5th DCA 1981). Counsel were clearly dilatory in this case, cf. Sewell v. State, 443 So.2d 165 (Fla. 1st DCA 1983), and their failure to appear was hardly the result of forgetfulness. Cf. Lowe v. State, 468 So.2d 259 (Fla. 2d DCA 1985). Because of the fact that counsel early on manifested an obvious intent that the hearing not go forward on that date and had been in this courtroom before, Judge Blount clearly had the discretion and authority to reject counsels' excuse that they "had gotten lost and had run into traffic" as somewhat less than mitigating (R 41), and find the existence of contumacious intent.

Counsel now continue on appeal in the same vein and basically argue that Judge Blount had no business at the hearing even though he was the trial judge, voluntarily recused himself despite inadequate unfiled pleadings, and took the bench to announce such recusal to the parties. Counsel also fail to point out to this court that at the time of the hearing on June **9, 1989**, the original motion to disqualify Judge Blount had not even been filed with the clerk (R 44). The order reassigning Judge S. James Foxman to the case by Chief Judge Kim C. Hammond was not filed (in open court) until the time of the hearing on June **9, 1990** (R **530).** That it may have been signed the day before was due only to the initiative of Judge Blount. Thus, Judge Blount had every reason to preside over the proceeding until the point recusal was announced or the order was formally filed. It makes little difference, in any event, to whom the affront was directed. Judge Foxman did not vacate such order and Judge Blount could clearly act as his assistant or agent.

Pursuant to Florida Rule of Criminal Procedure **3.830** the record includes orders reciting those facts upon which the adjudications of guilt were based (R **523-526),** i.e. failure to timely arrive at the evidentiary hearing pursuant to order of the court.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the order denying post conviction relief and the orders of contempt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Billy H. Nolas, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 13th day of April, 1990.

Margene A. Roper
Of Counsel