No. 75,209

In The

Supreme Court of Florida

TED HERRING,

Appellant,

-vs.-

STATE OF FLORIDA

Appellee.

ON APPEAL FROM DENIAL OF MOTION TO VACATE JUDGMENT AND SENTENCE BY THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR VOLUSIA COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

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SUMMARY OF ARGUMENT

In Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 98 L. Ed.2d 681, 108 S. Ct. 733 (1988), this Court explicitly acknowledged that the application of Florida's heightened premeditation aggravating circumstance in Herring v. State, 446 So. 2d 1049 (Fla.), cert. denied, 469 U.S. 989, 83 L. Ed.2d 330, 105 S. Ct. 396 (1984), was erroneous. This Court stated that "[s]ince we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in Herring v. State, 446 So. 2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989 (1984), to the extent it dealt with this question." 511 So. 2d at 533.

Herring's death sentence was based on what this Court now recognizes to be a clearly inapplicable aggravating circumstance. Herring thus stands sentenced under an interpretation of that aggravating circumstance that applies to no other death-sentenced defendant; it applies to him, and him alone. The United States Supreme Court has made clear that any capital sentencing scheme in which cases where the death penalty is applied are indistinguishable from cases where it is not, is unconstitutional. If the Florida capital sentencing scheme is to survive constitutional scrutiny, Herring's death sentence must be vacated.

This appeal raises a second defect in Herring's sentence. Relying on this Court's decision in Harich v. State, 542 So. 2d 980 (Fla. 1989), Herring moved to vacate his conviction on the ground that his appointed trial counsel had a conflict of interest arising from his connection with law enforcement authorities. Herring's trial counsel, like Harich's, was Howard Pearl, who was simultaneously a public defender in Volusia County and a special deputy sheriff in adjoining Marion County. This Court was sufficiently troubled by that dual status in Harich to remand for an evidentiary hearing; it also observed that "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." 542 So. 2d at 981.

In summarily denying Herring's motion, the trial court disregarded the Harich opinion in two crucial respects: it denied Herring a hearing, and it held (without making any factual findings) that Herring could have raised this issue at trial. The trial court ruled against Herring based on findings made in the Harich case, thus making an unprecedented -- and entirely improper -- use of collateral estoppel principles. On this issue, Herring, like Harich, is entitled at least to a remand for an evidentiary hearing.

STATEMENT OF FACTS

A. Factual Background

Early on May 29, 1981, a 7-Eleven store clerk in Daytona Beach, Florida was shot and killed during a robbery at the store. His body was discovered shortly thereafter. R.O.A. at 10.* The Medical Examiner concluded that the cause of death had been a bullet wound to the head, that the victim had been shot twice, that both shots were fired within approximately one minute, and that the shot to the head was lethal. R.O.A. at 10. There were no witnesses to the crime and the murder weapon was never found. R.O.A. at 11.

On the morning of June 12, 1981, Herring was arrested while in possession of a stolen car. R.O.A. at 11. After hours of interrogation about matters that ranged far

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* "R.O.A." refers to the Record on Appeal.

beyond auto theft, Herring confessed to the robbery and homicide at the 7-Eleven store. R.O.A. at 11. The confession was tape recorded. R.O.A. at 11. Herring stated that he entered the 7-Eleven store early on the morning of May 29. After requesting a pack of cigarettes, he drew a gun and demanded money. The clerk then made a sudden move, causing Herring to panic and shoot. The shooting was not intentional and was certainly not planned. Herring stated in his confession: "I shot him, you know, by mistake, but I meant to just put the gun to his head not for it to go off." R.O.A. at 11-12.

All of the surrounding circumstances indicated that the shooting was an accident. The State offered no evidence to refute Herring's statement that he shot the clerk "by mistake." In his confession, Herring admitted to four other armed robberies in the same time period; he never fired his gun or harmed anyone during any of these incidents. Prior to his arrest, he had never been convicted, or even accused, of any violent crime. IQ tests performed during his childhood yielded a score of 72, indicating borderline mental retardation.

Howard Pearl, an Assistant Public Defender in Volusia County and Chief of the Capital Division, was appointed as Herring's trial counsel. R.O.A. at 103. At the same time he was representing Herring, Pearl also was

serving as a special deputy sheriff in Marion County, a position he had held for approximately 15 years. R.O.A. at 103. Pearl never told Herring of his dual responsibilities, and thus concealed a conflict of interest that is clearly condemned under Florida law. R.O.A. at 105-06.

B. Procedural Background

1. The Trial and Sentence

In February 1982, Herring was tried for armed robbery and murder in the first degree arising out of the May 29, 1981 incident. State of Florida v. Herring, Case No. 81-1957-CC. On February 25, 1982, the jury returned a verdict of guilty on both counts. R.O.A. at 12.

The sentencing phase of Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. It lasted approximately two hours. The State offered the testimony of a probation officer, who interviewed Herring while he was in custody, and Herring's prior armed robbery conviction. R.O.A. at 12.

In Herring's defense, Herring's other appointed counsel, J. Peyton Quarles, who had never before tried a capital case, offered only the testimony of Herring's mother. R.O.A. at 13. Her testimony, and thus Herring's case, lasted only a few minutes and constitutes but three pages of transcript. The jury thereafter returned an advisory sentence of death by an eight-to-four vote. R.O.A.

at 13. The trial judge followed the jury's recommendation and sentenced Herring to death on March 1, 1982. R.O.A. at 13.

The trial judge found that four aggravating circumstances and two mitigating circumstances applied and that the aggravating circumstances outweighed the mitigating circumstances. Id. The aggravating circumstances found by the trial judge were:

(1) That the defendant had been previously convicted of another capital offense or a felony involving the use or threat of violence to some person;

(2) That the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of the crime of robbery;

(3) That the crime for which the defendant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and

(4) That the crime for which defendant was to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. R.O.A. at 13-14.

The two mitigating circumstances found by the trial judge were:

(1) The age of the defendant (19) at the time of

the crime; and

(2) The defendant's difficult childhood, i.e., that the defendant was raised essentially without a father, that he was hyperactive, had learning disabilities, and had trouble in school. R.O.A. at 14.

2. State Post-Conviction Proceedings

Herring appealed to this Court, which affirmed his conviction and sentence on February 2, 1984, and denied rehearing on April 11, 1984. The decision is reported as Herring v. State, 446 So. 2d 1049 (Fla.), cert. denied, 469 U.S. 989, 83 L. Ed.2d 330, 105 S. Ct. 396 (1984) ("Herring I").

On April 1, 1985, Herring filed a Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida. On July 24, 1985, the Circuit Court denied the motion. No evidentiary hearing was held. Herring appealed to this Court, which affirmed the Circuit Court's decision on December 30, 1986, and denied rehearing on March 2, 1987. The decision is reported as Herring v. State, 501 So. 2d 1279 (Fla. 1986) ("Herring II").

On March 9, 1987, Herring filed a Petition for Writ of Habeas Corpus pursuant to Rule 9.030(a)(3) of the Rules of Appellate Procedure in the Supreme Court of Florida. As grounds therefor, Herring claimed his appellate counsel

rendered ineffective assistance. On June 23, 1988, this Court denied relief and denied rehearing on August 25, 1988. The decision is reported as Herring v. Dugger, 528 So. 2d 1176 (Fla. 1988) ("Herring III").

3. The Federal Petition

On September 9, 1988, Herring filed a Petition for Writ of Habeas Corpus (the "Federal Petition") in the United States District Court for the Middle District of Florida. As grounds therefor, Herring claimed, among other things, that the Florida Supreme Court's decision in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 98 L. Ed.2d 681, 108 S. Ct. 733 (1988), which expressly overruled the application of the "heightened premeditation" aggravating circumstance in Herring I, required the vacation of Herring's death sentence.

On January 21, 1989, the State moved to dismiss the Federal Petition on the basis that Herring's claim respecting the heightened premeditation aggravating circumstance had not been exhausted in the state courts. Specifically, the State argued that:

> Since by virtue of the decision in Rogers, one of the aggravating factors upon which the trial court based its decision to ignore [sic] the death penalty would seem to have been eliminated in this case, the issue of whether the trial court would have, or could have, still imposed that same sentence has yet to be presented to any state court.

R.O.A. at 41.

In its motion to dismiss, the State also acknowledged that, because this Court's decision in Rogers followed the decision in Herring II, Herring could not have raised the issue of the effect of Rogers in his original Rule 3.850 motion. Moreover, although Rogers was cited to this Court in Herring III, the Court limited its holding to the issue of ineffective assistance of appellate counsel and expressly refused to reach the issue of the impact of Rogers on Herring's sentence. Herring III, 528 So. 2d at 1179. Accordingly, the State argued in its motion to dismiss Herring's Federal Petition:

> Although Florida Rule of Criminal Procedure 3.850 does not usually permit a successive motion to be filed, nor one more than two years after the judgment and sentence have become final, there are exceptions which could possibly be met in this case, and petitioner could file another Rule 3.850 motion under the authority of Witt v. State, 387 So. 2d 922 (Fla. 1980) and Witt v. State, 465 So. 2d 510 (Fla. 1985).

R.O.A. at 41-42.

On February 16, 1989, after Herring consented to the State's motion in order to raise this claim in the Florida courts, the district court dismissed the Federal Petition without prejudice. Herring v. Dugger, Case No. 88-791-CIV-ORL-18 (M.D. Fla. Feb. 16, 1989); R.O.A. at 45.

4. Posture Of This Appeal

On March 9, 1989, Herring filed a Motion to Vacate

Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida. R.O.A. at 1. As grounds therefor, Herring claimed that the Florida Supreme Court's decision in Rogers v. State required the vacation of Herring's death sentence. On May 25, 1989, the Circuit Court denied the motion but granted Herring leave to amend his Rule 3.850 motion to assert a claim based upon appointed trial counsel's undisclosed conflict of interest. R.O.A. at 100. The amended motion was filed on June 14, 1989 and denied by the Circuit Court on November 5, 1989. R.O.A. 102, 220. The Circuit Court did not grant Herring an evidentiary hearing or leave to take discovery. Rehearing was denied on November 30, 1989, and the instant appeal was filed on December 19, 1989. R.O.A. at 232, 233.

ARGUMENT

I.

THE ERRONEOUS APPLICATION OF THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE TO THE FACTS OF THIS CASE REQUIRES VACATION OF HERRING'S DEATH SENTENCE

A. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation Of The Eighth And Fourteenth Amendments

Herring I has now been explicitly overruled by Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 98 L. Ed.2d 681, 108 S. Ct. 733 (1988)

("Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in Herring [I], to the extent it dealt with this question."); see Herring III, 528 So. 2d at 1178 ("Since our decision in Herring [I], this Court, in Rogers v. State, adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in Herring [I]."") (citations omitted). Rogers and Herring III confirm that Herring is now entitled to relief on the merits of this claim.

1. The Application Of The Heightened Premeditation Aggravating Circumstance To The Facts Of This Case Was An Aberration In Florida Capital Jurisprudence

The ninth aggravating circumstance enumerated in Florida's capital sentencing statute is that:

> [t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla. Stat. Ann. § 921.141(5)(i) (West Supp. 1984) (the "heightened premeditation aggravating circumstance").

At the time Herring was sentenced to death, Florida case law clearly defined the scope of this aggravating circumstance. It was restricted to circumstances in which the degree of premeditation is shown to be greater than that necessary to establish premeditation for conviction in the guilt/innocence phase of a capital felony trial. See Preston

v. State, 444 So. 2d 939 (Fla. 1984) (citing cases). It applies only to cases in which "the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Id. at 946. Consequently, "[p]roof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction." Maxwell v. State, 443 So. 2d 967, 971 (Fla. 1983); accord Washington v. State, 432 So. 2d 44, 48 (Fla. 1983) ("[t]his aggravating circumstance inures to the benefit of the defendant insofar as it requires proof beyond that necessary to prove premeditation"); Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 72 L. Ed.2d 862, 102 S. Ct. 2258 (1982).

In this case, there was no evidence of a preconceived plan to commit a murder. Nor does the record contain any evidence of "a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Preston, 444 So. 2d at 946. On the contrary, the homicide here was a spontaneous event which occurred quickly and thoughtlessly. Nothing in this case suggests premeditation, heightened or otherwise. Herring undertook to rob a convenience store, as he had done on prior occasions. In his confession, the product of eight hours of interrogation by the police, he

stated that the clerk's sudden movement caused him to panic and fire his gun. He stated that he shot the clerk "by mistake," "out of fear," and in response to what he perceived to be a threatening movement by the clerk. R.O.A. at 10-11; cf. Cannady v. State, 427 So. 2d 723, 730 (Fla. 1983) ("[t]hese statements establish that [the defendant] had at least a pretense of a moral or legal justification, protecting his own life"). The State offered no evidence that contradicted Herring's version of the shooting. There is thus no evidence of reflection. The evidence demonstrates that the gun was fired reflexively, as a spontaneous reaction rather than a planned act.

Moreover, there was no evidence that the homicide was preconceived. In fact, the record shows that the contrary was the case. In confessing to the crime for which he was sentenced to death, Herring also confessed to four other armed robberies in which no one was hurt and his gun was never fired. This refusal to use his gun in these other cases demonstrates forcefully that he had no intention of using it in the present case, and that he did so only as a responsive act.

The heightened premeditation aggravating circumstance has been held inapplicable to cases in which the evidence established that the victim was killed "intentionally and deliberately," but nothing more. Maxwell,

443 So. 2d at 971. Rather, this "aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders." McCray v. State, 416 So. 2d 804, 807 (Fla. 1982). Although this Court in McCray also observed that "that description is not intended to be all-inclusive," id., nothing in any case construing Section 921.141(5)(i) -- save one, Herring I -- suggests that this aggravating circumstance is applicable to any capital felony case unless there is substantial evidence that the killer first devised a plan to commit the murder and thereafter put that plan into effect.

Numerous cases construing Section 921.141(5)(i) prior and subsequent to Herring's direct appeal have rejected the applicability of this aggravating circumstance to facts which show far more "lengthy, methodic or involved . . . atrocious events" and in which there was a far more "substantial period of reflection and thought by the perpetrator" than was established here. See, e.g., Preston, 444 So. 2d at 945 (heightened premeditation aggravating circumstance held inapplicable where, after robbing a convenience store, the murderer kidnapped the store clerk, forced her to walk a mile and a half at knifepoint, after which the murderer cut the clerk's throat "by severing the jugular veins, trachea and main arteries of the neck," stabbed the victim numerous times about her body, and cut a cross mark into her forehead); White v. State, 446 So. 2d

1031 (Fla. 1984) (heightened premeditation aggravating circumstance held inapplicable where the evidence established that defendant had robbed a convenience store, in the course of which he shot and killed a customer; shot the store clerk twice, paralyzing him permanently from the neck down; and attempted to shoot two other persons who came into the store); Blanco v. State, 452 So. 2d 520, 526 (Fla. 1984), cert. denied, 469 U.S. 1181, 83 L. Ed.2d 953, 105 S. Ct. 940 (1985) (although defendant, while committing a burglary, shot the victim six times after the victim had fallen from his first shot, Florida Supreme Court concluded "there was no showing of heightened premeditation beyond a reasonable doubt necessary to the proper application of this factor"); Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988) (heightened premeditation aggravating circumstance held inapplicable where "the evidence [did] not indicate that [the defendant] had a conscious intention of killing [the victim] when he decided" to commit the robbery); Garron v. State, 528 So. 2d 353 (Fla. 1988) (heightened premeditation aggravating circumstance held inapplicable where killing of stepdaughter appeared to have been a "spontaneous reaction").* The

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* See also McCray, 416 So. 2d at 805 (heightened premeditation aggravating circumstance held inapplicable where the murderer first stole several boxes of rifles

(Footnote continued on next page)

decision reached in Herring's direct appeal was, and remains, a solitary aberration in the construction of the heightened premeditation aggravating circumstance.

A noteworthy example of how the Florida courts have, with the sole exception of Herring I, consistently applied the heightened premeditation aggravating circumstance can be

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(Footnote continued from previous page)

from the victim's van, and later, after taking them to the edge of a wooded area, returned to the victim's van where the killer yelled, "This is for you, you motherfucker," and shot the victim three times in the abdomen); Cannady, 427 So. 2d at 730 (heightened premeditation aggravating circumstance held inapplicable where the killer first abducted a hotel employee and later shot victim five times, killing him); King v. State, 436 So. 2d 50 (Fla. 1983), cert. denied, 466 U.S. 909, 80 L. Ed.2d 163, 104 S. Ct. 1690 (1984) (heightened premeditation aggravating circumstance held inapplicable where the victim had first been struck on the head with a blunt instrument by her roommate, who thereafter shot her in the head); Peavey v. State, 442 So. 2d 200 (Fla. 1983) (heightened premeditation aggravating circumstance held inapplicable where the elderly victim was stabbed several times and his apartment was ransacked by defendant, who sprayed shaving cream on the door lock to avoid detection and had, prior to the murder, accompanied the victim into his apartment by helping him with his groceries); Harris v. State, 438 So. 2d 787 (Fla. 1983), cert. denied, 466 U.S. 963, 80 L. Ed.2d 563, 104 S. Ct. 2181 (1984) (heightened premeditation aggravating circumstance held inapplicable where evidence revealed that the victim, a 73-year-old woman, was killed after she fought long and hard for her life); Drake v. State, 441 So. 2d 1079 (Fla. 1983), cert. denied, 466 U.S. 978, 80 L. Ed.2d 832, 104 S. Ct. 2361 (1984) (heightened premeditation aggravating circumstance held inapplicable in spite of evidence that the victim was first kidnapped; later raped, using her bra to tie her hands behind her back; and finally killed, being stabbed repeatedly in the lower chest and abdomen).

found in Caruthers v. State, 465 So. 2d 496 (Fla. 1985), a case decided one year after Herring I. In Caruthers, this Court reversed a death sentence and instructed the trial court to impose a life sentence on the basis of a factual record virtually identical to the record here. The material facts of Caruthers were that (1) a convenience store clerk, who had known the accused, was found dead behind the store counter, with the cash register open, and (2) after his arrest, the accused confessed to the robbery and homicide, claiming that he shot the clerk three times after the clerk made a sudden movement. 465 So. 2d at 497-98. Finding that the operative facts failed to establish "a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder," this Court concluded that the imposition of the death penalty was disproportionate. Id. at 498-99.

This Court vacated Caruthers' death sentence based, in part, upon a finding that two aggravating circumstances were erroneously applied. Both of these same aggravating circumstances form the basis for Herring's sentence. Yet, despite the startling similarities between Caruthers and Herring, this Court reached a totally inconsistent conclusion on direct appeal in Herring's case. The only meaningful differences between the present case and Caruthers weigh in Herring's favor: Herring had never met the store clerk

before, unlike Caruthers, who was known to his victim; and the clerk was shot twice in Herring, three times in Caruthers. If the Florida death penalty statute can permit two diametrically opposite results to flow from the same set of facts, then that statute surely is being applied in an arbitrary and capricious fashion.

On direct appeal in this case, this Court affirmed the trial court's ruling as to the applicability of this aggravating circumstance. Herring I, 446 So. 2d at 1057. Justice Ehrlich dissented from this finding, stating:

> We have, since McCray and Combs, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.145(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Id. at 1058 (Ehrlich, J., concurring in part, dissenting in part) (emphasis supplied).

Justice Ehrlich's analysis of the inapplicability of this aggravating circumstance to Herring's case was correct, as this Court acknowledged in Rogers:

> There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which bear the

> indicia of "calculation". Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our holding in Herring v. State, 446 So. 2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989 (1984), to the extent it dealt with this question.

511 So. 2d at 533 (emphasis supplied).

Herring's death sentence is unique under Florida's capital sentencing statute, and as a consequence, Herring is in a class of one on death row in Florida. In no case, either before Herring's or since, has this aggravating circumstance been applied under facts remotely resembling the facts of this case, and this Court has held it erroneous to do so.

2. The Application Of The Heightened Premeditaton Aggravating Circumstance Is An Error of Constitutional Dimension

While the Florida capital sentencing scheme has been upheld on constitutional grounds as written, Proffitt v. Florida, 428 U.S. 242, 49 L. Ed.2d 913, 96 S. Ct. 2960 (1976), the Eighth and Fourteenth Amendments require that it be applied consistently and fairly. Gregg v. Georgia, 428 U.S. 153, 49 L. Ed.2d 859, 96 S. Ct. 2909 (1976); see also Spaziano v. Florida, 468 U.S. 447, 459-60, 82 L. Ed.2d 340, 104 S. Ct. 3154 (1984); Eddings v. Oklahoma, 455 U.S. 104, 110-11, 71 L. Ed.2d 1, 102 S. Ct. 869 (1982).

Where, as here, a capital sentencing statute requires the application of a defined aggravating

circumstance to impose a death sentence, "[p]art of a State's responsibility . . . is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion.'" Godfrey v. Georgia, 446 U.S. 420, 428, 64 L. Ed.2d 398, 100 S. Ct. 1759 (1980) (quoting Gregg, 428 U.S. at 196 n.47, 96 S. Ct. at 2936). A particular sentence of death violates the Eighth Amendment where a state court "fail[s] to apply its previously recognized limiting construction of [an] aggravating circumstance" which forms the basis of that death sentence. Maynard v. Cartwright, 486 U.S. 356, 100 L. Ed.2d 372, 108 S. Ct. 1853 (1988) (citing Godfrey, 446 U.S. at 429, 100 S. Ct. at 1765).

In Cartwright, 486 U.S. at 356, the Court unanimously affirmed the vacatur of a death sentence based on the erroneous application of a statutory aggravating circumstance. At issue was Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. Relying on Godfrey, the Court concluded that the Oklahoma Court of Criminal Appeals had "failed to apply its previously recognized limiting construction of the aggravating circumstance," and that, as a result, "there was 'no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" Cartwright, 486 U.S. at 363, 108 S. Ct. at 1859 (quoting Godfrey, 446 U.S. at 433, 100 S. Ct. at 1767). The Court concluded that the application of the aggravating

circumstance to the facts of Cartwright "without some narrowing principle to apply to those facts" violated the Eighth Amendment. Id.

In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002, 78 L. Ed.2d 697, 104 S. Ct. 508 (1983), the Eleventh Circuit vacated a death sentence on the basis of, among other things, the erroneous application of Florida's "heinous, atrocious, and cruel" aggravating circumstance, as well as the state's "risk of death to many persons" aggravating factor. Relying on Godfrey, the court held that "[a]pplication of [these] aggravating factor[s] to the facts of this case is not only inconsistent with the Florida Supreme Court's construction of the provision[s]; it also reflects an absence of control or guidance of the sentencing judge's discretion." 685 F.2d at 1265-66. The court concluded that the erroneous application of the statutory aggravating circumstances "suggests no 'inherent restraint on the arbitrary and capricious infliction of the death sentence,'" and therefore violated the Eighth Amendment. Id. at 1264-65 (quoting Godfrey, 446 U.S. at 428, 100 S. Ct. at 1764).

As the Eleventh Circuit later explained in Hargrave v. Wainwright, 804 F.2d 1182, 1194 (11th Cir.), rehearing en banc granted and vacated on other grounds, 809 F.2d 1486 (11th Cir. 1986):

In sum, the state reviewing courts in both

> Proffitt and Godfrey failed to give any explanation or set forth any facts upon which the courts justified their findings of the particular aggravating circumstance under review. Moreover, upon an independent examination of the record, neither this circuit in Proffitt nor the Supreme Court in Godfrey could distinguish the facts in the case before it from the many in which the state courts had not found the particular aggravating circumstance to apply.

Id. (emphasis supplied). This rationale applies with particular force to the present case.

3. Herring Is Entitled To A New Sentencing Hearing

As a matter of Florida law, Herring is entitled to a new sentencing hearing. As the United States Supreme Court has recognized, under Florida law, "[i]f the trial court found that some mitigating circumstances exist . . . a defendant must be resentenced when [the] trial court[] erroneously consider[s] improper aggravating factors." Barclay v. Florida, 463 U.S. 939, 954-55, 77 L. Ed.2d 1134, 103 S. Ct. 3418 (1983). Under such circumstances, a resentencing is required because

> the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Elledge v. State, 346 So. 2d 998, 1003 (1977) (quoting State

v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 40 L. Ed.2d 295, 94 S. Ct. 1950 (1974)); see also Elledge, id. ("Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial."); accord Barclay, 463 U.S. at 963, 103 S. Ct. at 3431-32 (Stevens, J., concurring); Magwood v. Smith, 791 F.2d 1438, 1450 (11th Cir. 1986) (defendant "entitled to new sentencing hearing in order to satisfy the constitutional safeguards for sentencing in death penalty cases" where trial court erroneously rejected two mitigating circumstances during sentencing phase). Herring's death sentence has therefore been irremediably infected by the erroneous application of the heightened premeditation aggravating circumstance.

B. The Trial Court Committed Clear Error In Summarily Dismissing Herring's Rogers Claim

In summarily dismissing Herring's Rogers claim, the trial court simply accepted the State's arguments that this Court's decision in Eutzy v. State, 541 So. 2d 1143 (Fla. 1989), effectively foreclosed the relief Herring seeks, and that, in any event, Herring's Rogers claim was "procedurally defaulted in that it [was] untimely presented in violation"

of Rule 3.850. R.O.A. at 100-01. In so holding, the trial court failed to address the constitutional significance of the Rogers decision as applied to Herring, misread this Court's decision in Eutzy, and accepted arguments proffered by the State in plain violation of the very procedural default rules -- which apply with equal force to the State -- cited by the trial court in disposing of Herring's claim.

1. The Trial Court Misread Eutzy As Foreclosing Herring's Rogers Claim; In Fact, Eutzy Confirms That Herring Is Now Entitled To Relief

In its Order summarily dismissing Herring's Rogers claim, the trial court did not consider the aberrational nature of the application of the heightened premeditation aggravating circumstance to the facts of Herring's case; it did not consider the numerous indistinguishable cases in which that circumstance was held to be inapplicable; it did not analyze the effect of the Rogers holding overruling Herring I as applied to Herring himself; it did not even mention the binding United States Supreme Court precedent, including Cartwright and Godfrey, on point. Instead, the court below merely accepted the State's argument that Herring was not entitled to the benefit of the Rogers decision in light of this Court's opinion in Eutzy, holding that the "decision in Rogers . . ., restricting the applicability of the cold, calculated, and premeditated aggravating factor was

not a fundamental change in the law which 'should be given retroactive effect' but was a mere 'evolutionary refinement' in the law which should not be utilized to abridge the finality of judgments." R.O.A. at 100-01 (quoting Eutzy, 541 So. 2d at 1147) (emphasis in original). This holding reflects the trial court's misapprehension of Herring's Rogers claim and its misreading of Eutzy as dispositive.

In essence, Herring argued below, as he does here, that his death sentence was an aberration in Florida capital jurisprudence; that is, Herring I was a mistake at the time it was decided. The Rogers decision, which "expressly overruled the application of [the heightened premeditation] aggravating circumstance under the factual situation set forth in Herring [I]," Herring III, 528 So. 2d at 1178, thus confirmed the aberrational nature of Herring's death sentence.* As such, the critical issue before the trial

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* The State argued below that "Rogers does not specifically invalidate the cold, calculated, and premeditated murder aggravating factor found established in this case." R.O.A. at 49. This argument obviously is incorrect in light of this Court's unequivocal statement in Herring III. It also is contrary to the position taken by the State in federal court: "[B]y virtue of the decision in Rogers [citation omitted], one of the aggravating factors upon which the trial court based its decision to [impose] the death penalty would seem to have been eliminated in this case." R.O.A. at 41. For reasons discussed more fully in Section I.B.2., infra, the State should be barred from denying the validity of Herring's Rogers claim.

court was not whether Rogers applied retroactively to Herring, but rather, whether Herring could remain under a sentence of death imposed on the basis of a statutory aggravating circumstance wrongly applied -- as Rogers confirmed -- in the first instance. Eutzy did not address this question.*

Indeed, this Court's decision in Eutzy does nothing to diminish Herring's claim that his death sentence is an aberration; if anything, Eutzy supports Herring's position. In holding that Rogers was not a "jurisprudential upheaval" requiring retroactive application to Eutzy, 541 So. 2d at 1147, this Court recognized that the law of the heightened premeditation aggravating circumstance had not changed. Rather, Rogers was merely an "evolutionary refinement" in a body of law that had been applied consistently -- with the exception of this case -- since well before the decision in

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* In his Rule 3.850 motion, Herring argued, in the alternative, that if Herring I was not an aberration, then Rogers must be viewed as a fundamental change in Florida law warranting retroactive application. R.O.A. at 15-33. The Eutzy Court did not address this alternative question presented in Herring's motion; namely, whether Herring himself -- as opposed to an entire class of capital defendants -- is entitled to retroactive relief in light of this Court's acknowledgment in Rogers of the erroneous application of the heightened premeditation aggravating circumstance in Herring I. Therefore, Herring maintains that if the decision in Herring I was not an aberration, then he, and he alone, is entitled to the retroactive benefit of Rogers.

Herring I. Under these circumstances, Supreme Court decisions such as Cartwright and Godfrey, among others, make clear that Herring's death sentence violates the Eighth and Fourteenth Amendments. The trial court's misapprehension of Herring's claim and misreading of Eutzy are more than sufficient grounds for reversal.

2. The Trial Court Erred In Failing To Hold The State Procedurally Barred From Denying The Validity Or Timeliness Of Herring's Rogers Claim

As noted above, the trial court summarily denied Herring's Rule 3.850 motion "for the reasons set forth in the State's . . . Motion to Strike." R.O.A. at 100. These "reasons" included the State's procedural default argument and its misreading of the Eutzy decision. Yet, when the State moved to dismiss Herring's Federal Petition, it argued that (i) the heightened premeditation aggravating circumstance "would seem to have been eliminated in this case;" (ii) Herring "failed to exhaust his available state court remedies" by "never specifically present[ing] to any state court his [Rogers] argument;" and (iii) Herring "could file another Rule 3.850 motion under the authority of Witt v. State, 387 So. 2d 922 (Fla. 1980) and Witt v. State, 465 So. 2d 510 (Fla. 1985)." R.O.A. at 41-42.

In short, the State successfully obtained a dismissal of Herring's Federal Petition on the basis of these

arguments, then argued below that Herring's current Rule 3.850 motion lacked merit and, in any event, was time-barred. The State cannot have it both ways. Having invited Herring to litigate his Rogers claim in the Florida courts, the State waived its ability to deny the timeliness of Herring's current Rule 3.850 motion or the validity of Herring's claim that his death sentence was an aberration.* Under these circumstances, the trial court was obligated, at a minimum, to find Herring's Rule 3.850 motion timely filed, whether because the State had waived any timeliness defense, or because the State was estopped by its conduct in federal court from asserting such a defense.

"Waiver of claims is not a principle that works only to the detriment of petitioners." Smith v. Zant, 887 F.2d 1407, 1438 (11th Cir. 1989) (en banc) (Kravitch, J., concurring in part and dissenting in part); see generally Granberry v. Greer, 481 U.S. 129, 134, 95 L. Ed.2d 119, 107 S. Ct. 1671 (1987) (declining "to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while

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* Of course, the State was free to argue that the Eutzy decision foreclosed retroactive application of Rogers to Herring, and did so. However, the State was barred from taking contradictory positions in federal and state court with respect the propriety of applying the heightened premeditation aggravating circumstance to the facts of this case, as it also did. See n.* at 25, infra.

holding [a procedural] defense in reserve for use on appeal if necessary"); Murray v. Carrier, 477 U.S. 478, 91 L. Ed.2d 397, 106 S. Ct. 2639 (1986); Smith v. Murray, 477 U.S. 527, 91 L. Ed.2d 434, 106 S. Ct. 2661 (1986); Wainwright v. Sykes, 433 U.S. 72, 53 L. ed.2d 594, 97 S. Ct. 2497 (1977). Where, as here, "[t]he state selected its defenses and its arguments . . . it must accept the ramifications of those choices." Smith v. Zant, 887 F.2d at 1438 (Kravitch, J., concurring in part and dissenting in part).

In this case, the State should be held to have waived any time-bar objection to Herring's Rogers claim in light of the exhaustion defense it asserted in response to Herring's Federal Petition. Indeed, the State affirmatively represented in its motion to dismiss the Federal Petition that Herring's claim was not time-barred. The trial court's failure to acknowledge and enforce the State's waiver was clearly erroneous.

II.

TRIAL COUNSEL'S UNDISCLOSED CONFLICT OF INTEREST IN VIOLATION OF THE LAWS AND CONSTITUTION OF THE STATE OF FLORIDA DENIED HERRING THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE FLORIDA CONSTITUTION AND THE UNITED STATES CONSTITUTION

This Court has already recognized that Howard Pearl's simultaneous service in the dual capacities of law enforcement officer and defense counsel in adjacent counties makes out a prima facie case of ineffective assistance of

counsel. In the consolidated cases Harich v. State and Harich v. Dugger, 542 So. 2d 980, 981 (Fla. 1989), this Court held that Pearl's service in an adjacent county as a special deputy sheriff was sufficient to require an evidentiary hearing on the issues of whether Pearl's "relationship to law enforcement officials affected his ability to provide effective legal assistance" to the defendant, and whether, "as a result of the unusual factual allegations in this case," Florida's "procedural default rule would be inapplicable." Harich, 542 So. 2d at 981.

In this case, the trial court -- the very same court to which Harich was remanded for an evidentiary hearing -- found that Herring's claim of ineffective assistance was meritless and, in any event, time-barred because counsel's deputy status could have been discovered at the time of trial. It did so not on the basis of an evidentiary hearing and particularized factual record, but instead, in reliance upon the factual findings made at Harich's hearing. The trial court's summary dismissal of Herring's claim flies in the face of this Court's holding in Harich, and cannot be reconciled with the United States Supreme Court's proscription against the use of collateral estoppel in habeas corpus proceedings.

A. Trial Counsel's Undisclosed Conflict Of Interest Presumptively Denied Herring The Effective Assistance Of Counsel

By virtue of the Harich litigation, Herring has

recently discovered that for over twenty years, his trial counsel, Howard Pearl, has been a special deputy sheriff for the Marion County Sheriff's Department. He is a sworn, certified auxiliary law enforcement officer pursuant to section 943.10 of the Florida Statutes, having fulfilled the requirements of the Police Standards and Training Commission. Pursuant to Section 30.09(4) of the Florida Statutes, Pearl possesses full powers of arrest. In connection with his service as a special deputy sheriff, he has been issued a permit to carry, and does carry, a concealed weapon. R.O.A. at 159.

Pearl's responsibilities extend from Marion County -- where he serves as special deputy sheriff -- into adjoining Volusia County -- where he served as Chief of the Capital Division of the Public Defender's Office of the Seventh Judicial Circuit. All the privileges, powers and immunities granted to law enforcement officers -- whether paid, volunteer or auxiliary -- within their own jurisdiction are retained and apply with equal effect in other jurisdictions.

Neither the Public Defender's Office nor Pearl ever disclosed to Herring that Pearl was simultaneously serving as special deputy sheriff for Marion County. Pearl informed Harich's present counsel that the reason he did not inform Harich of this conflict was his concern that Harich would

have insisted upon alternate counsel. R.O.A. at 164-65. Had Herring been informed of Pearl's status, he too would have insisted upon different counsel.*

Pearl's undisclosed conflict of interest presumptively establishes that Herring was denied effective assistance of counsel at trial. "[I]t is beyond dispute that the sixth amendment guarantee of effective assistance of

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* Pearl's simultaneous service as a sheriff and public defender violated numerous provisions of Florida law. First, Pearl's conflicting status as both an assistant public defender and auxiliary sheriff violates section 454.18 of the Florida Statutes, which plainly states that "No sheriff . . . or deputy . . . shall practice [law] in this state." Second, Pearl's dual responsibilities violated Section 5(a), Art. II of the Florida Constitution which provides:

> No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein.

See State ex rel. Smith v. Jorandby, 498 So. 2d 948, 949 (Fla. 1986); see also Fla. Atty. Gen. Op. 077-63 (1977) (auxiliary police officer is an "officer" within the purview of the constitutional provision against dual office holding); Fla. Atty. Gen. Op. 86-84 (1986) (same). Third, Mr. Pearl's divided responsibilities violated the common law doctrine of incompatibility. Cf. Gryzik v. State, 380 So. 2d 1102, 1104 (Fla. Dist. Ct. App. 1980). Fourth, Mr. Pearl's representation of Herring while serving as a law enforcement officer violated several of the disciplinary rules promulgated by this Court, including DR5-101(A), which prohibits conflicting employment except upon consent of the client after full disclosure, and DR5-105, which mandates that a "lawyer shall decline proffered employment if in the exercise of his independent professional judgment in behalf of a client . . . is likely to be adversely affected."

counsel comprises two correlative rights: the right to counsel of reasonable competence . . . and the right to counsel's undivided loyalty." Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). Defense counsel is guilty of an actual conflict of interest when he "owes duties to a party whose interests are adverse to those of the defendant." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir.), cert. denied, 444 U.S. 833, 62 L. Ed.2d 42, 100 S. Ct. 63 (1979). Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial . . . [its] infraction can never be treated as harmless error. . . . [W]hen a defendant is deprived of the presence and assistance of his attorney . . . in, at least, the prosecution of a capital offense, reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (citations omitted); see also Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981), cert. denied, 456 U.S. 1011 73 L. Ed.2d 1308, 102 S. Ct. 2307 (1982).

B. Trial Counsel's Conflict Of Interest Substantially Prejudiced Herring At Both The Guilt And The Sentencing Phases Of His Trial

In addition to his undisclosed conflict of interest, Pearl's conflicting responsibilities had a devastating impact upon his effectiveness in representing Herring, which resulted in prejudice to Herring not only at the guilt phase, but at the subsequent sentencing phase as well. Compelling

evidence of this prejudice include: Pearl's failure to conduct any cross-examination at all of numerous witnesses, his bolstering of the testimony of law enforcement witnesses, his ineffective cross-examination of law enforcement witnesses, and his failure to properly prepare a defense.

1. Failure To Cross-Examine Witnesses

During the guilt phase of the trial, the State offered the testimony of some twenty witnesses, of whom sixteen were connected in some fashion with law enforcement. Yet, Pearl totally failed to cross-examine nine of the twenty witnesses, of whom seven were connected with law enforcement. Pearl failed to cross-examine or question in any way:

> (a) Sergeant Champion, the second policeman to arrive on the scene of the crime;
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> (b) Sergeant Sharpe, another policeman summoned to the scene of the crime;
>
> (c) Sergeant Crow, another policeman summoned to the scene of the crime;
>
> (d) Robert Kropp, a photographer with the Medical Examiner's office who took pictures at the crime scene;
>
> (e) Alfred Ledoux, a fingerprint technician;
>
> (f) James Walls, a document examiner at the crime lab; and
>
> (g) Adrian White, a corrections officer with the Volusia County Department of Corrections.

R.O.A. at 115.

Pearl also failed to cross-examine Donald Moore and

Lewis Blin, two civilians who first discovered the body of the victim. Pearl also made no objections when the State attempted to put on Randall Johnson, a prisoner in custody in the Volusia County Jail who allegedly would have testified as to statements made by Herring regarding the crime. R.O.A. at 115-16. Even though Johnson refused to testify (and was cited for contempt), Pearl's silence was highly prejudicial to Herring, as the jury was left to speculate as to Herring's statement and was reminded of his status as a prisoner.

Pearl's failure to conduct any cross-examinations of any of these witnesses (while failing to otherwise object to their testimony) can be attributed only to the conflicting obligations imposed upon him by his dual responsibilities. Pearl's decision not to anger the very individuals whose assistance he would require in his capacity as special deputy sheriff caused him not to confront them at all, thereby compromising Pearl's ability to effectively represent Herring.

2. Bolstering Of Testimony Of Police Officers And Law Enforcement Personnel

At various points throughout the guilt phase of the trial, Pearl actually bolstered the testimony of law enforcement representatives. For example, during jury selection, while the entire venire panel was present, one of the prospective jurors stated that he did not respect the police officers in his home town, and Pearl gratuitously offered the statement that "of course, the officers that

testify here aren't from [the juror's home town]," suggesting that the officers who will testify are indeed respectable. R.O.A. at 116. And in what can only be described as a telling slip, at the start of the defense's voir dire of prospective jurors the trial judge mistakenly asked for the state when he meant to ask for the defense, and Pearl responded, "When you said 'State' I almost stood up." R.O.A. at 116.

During his cross-examination of Charles Meyers, a lab analyst with the Florida Department of Law Enforcement specializing in forensic ballistics, Pearl gratuitously stated, "I know you don't make mistakes, and you're not careless." R.O.A. at 117. Similarly, Mr. Pearl began his cross-examination of Jennie Kuehn, a latent fingerprint examiner with the Florida Department of Law Enforcement, by prefacing his question with "[a]s a member of several professional associations and, of course, a long-time expert in the area of the identification of latent fingerprints . . ." R.O.A. at 117.

In his closing argument, Pearl bolstered the testimony of the police officers who interrogated the defendant by extolling their reputations:

> "Now, by that, I don't mean to say that I criticize or dislike policemen. Believe me, I do not; and I would not want to imply to you that I do. They do a very difficult and dangerous job of community service, and

> the policemen that you saw Mr. Varner and Mr. Anderson, Mr. White, are all good policemen, good detectives. . . ."

R.O.A. at 117.

Pearl's comments bolstering and enhancing the credibility of the law enforcement officers are telling evidence of the direct conflict between Pearl's status as a public defender and as a law enforcement officer that severely compromised his ability to render effective assistance of counsel to his client.

3. Ineffective Cross-Examination Of Witnesses

Pearl's limited cross-examination of other law enforcement officers left much to be desired. During the brief cross-examinations which Pearl did conduct of police officers, he failed in his duty to defend his client vigorously by attempting to impeach the credibility or cast doubt on the testimony of the law enforcement representatives.

The most important testimony offered by the State relating to Herring's guilt came from the three policemen who were present during Herring's interrogation and his confession -- officers Anderson, Varner and White. Their testimony and their credibility were crucial to the State's case. Yet in his cross-examinations, Pearl refrained from making any effort to impeach their testimony or credibility, asking each only the same few brief questions regarding the length of time of the interrogation and what if any food or

rest was given Herring. R.O.A. at 118.

Pearl's cross-examination of Detective Varner failed to question or challenge a statement of that witness that was crucial to the defendant's sentence. The witness testified that while the tape recorder which had been recording the interrogation was turned off, the defendant told him that the defendant shot the victim a second time "to prevent [the victim] from being a witness against [the defendant]." R.O.A. at 118. As Detective Varner was well aware, this testimony supports an aggravating circumstance that could be, and was in fact, used to enhance the penalty of the defendant. Herring's own statements on the tape recording contradict this testimony, and the only references to this alleged witness elimination motive on the tape came from Detective Varner himself, who purposefully interjected the statement. Yet Pearl made no effort whatsoever to challenge the statement or to attack Varner's credibility. R.O.A. at 119. Pearl's failure to challenge this dubious statement resulted in the trial judge's inclusion of this factor in sentencing the defendant to death.

Pearl's cross-examination of Detectives White and Anderson was no better. Pearl asked Detective White how long Herring has been in police custody before he was booked, whether Herring had been given food or water, and what efforts the police made to recover the murder weapon. R.O.A.

at 119. Similarly, Pearl only asked Detective Anderson what time Herring was taken into custody and what time the tape recorder was turned off, and whether Herring had been given food or rest. R.O.A. at 119. Pearl made no effort to challenge either detective's statements or their credibility.

4. Failure To Properly Prepare A Defense

Pearl's choice of issues upon which to conduct cross-examination of witnesses reveals that he conducted the trial without a coherent theory of defense. Pearl's most extensive cross-examination during the entire trial is of Jennie Keuhn, a latent print examiner with the Florida Department of Law Enforcement. Pearl attempted to elicit doubt that the fingerprints on the robbery note were those of the defendant, when the defense had admitted that the paper examined by the witness belonged to the defendant.

Pearl's decision to concentrate on this issue rather than on issues more material to the defendant's guilt can be explained only by his reluctance to confront the law enforcement officers whose testimony was most damaging to the defendant. Pearl's law enforcement bias clearly undermined his effort to raise a reasonable doubt in the minds of the jury, and to present any theory of defense. Moreover, Pearl did not make an opening statement, thus never responding to the State's opening statement and never providing the jury with the defense's theory of the case.

Pearl's dual responsibilities compromised his ability to provide effective representation to Herring in violation of the Sixth, Eighth and Fourteenth Amendments. Pearl's failure to give an opening statement, or to cross-examine numerous witnesses offered by the State, or to conduct a coherent and effective cross-examination of other witnesses where such testimony was crucial to the outcome of his case, and his repeated and gratuitous statements bolstering the testimony of the police and the State's experts, all had a devastating impact not just on the guilt phase of Herring's trial, but also on the sentencing phase.

C. The Trial Court Erred In Refusing To Grant Herring An Evidentiary Hearing And Leave To Take Discovery In Aid Of His Conflict Of Interest Claim

The full impact of Pearl's conflict of interest is still unknown. The trial court never reached the merits of Herring's particularized Sixth Amendment claim. It refused to hold an evidentiary hearing and, instead, relied on its factual findings in Harich in summarily dismissing Herring's claim. R.O.A. at 220-26. Because Herring's claim of ineffective trial counsel raises a number of critical factual issues not resolved by the trial court, Herring is entitled, at a minimum, to a reversal and remand for an evidentiary hearing and discovery in aid of this claim.

Under Rule 3.850, a claim of ineffective assistance

of counsel usually presents issues of fact to be resolved at an evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Maxwell v. Wainwright, 490 So. 2d 927, 930 (Fla.), cert. denied, 479 U.S. 972, 97 L. Ed.2d 418, 107 S. Ct. 474 (1986). Generally, trial courts are encouraged to hold evidentiary hearings in Rule 3.850 proceedings. See, e.g., Martin v. State, 455 So. 2d 370, 372 (Fla. 1984); State v. Kaufman, 456 So. 2d 531 (Fla. Dist. Ct. App. 1984); Overton v. State, 494 So. 2d 527, 528 (Fla. Dist. Ct. App. 1986). Wrongful denial of an evidentiary hearing can never be deemed harmless error. Holland v. State, 503 So. 2d 1250, 1252 (Fla. 1987).

Harich is dispositive of the issue. Like Harich, Herring's "allegations . . . concerning trial counsel's alleged service as a special deputy sheriff are sufficient to require an evidentiary hearing." Harich, 542 So. 2d at 981. As discussed above, Herring's claim of ineffective assistance of trial counsel raises a number of critical and particularized factual issues left unresolved by the trial court. Accordingly, under the authority of Harich, Herring is now entitled to an evidentiary hearing on this issue.*

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* At the time Herring moved for an evidentiary hearing, he

(Footnote continued on next page)

D. The Trial Court Erred In Denying Herring's Amended Motion To Vacate On The Basis Of Factual Findings Made In A Proceeding To Which Herring Was Not A Party

The trial court found that the Herring was estopped from presenting evidence in support of his claim of ineffective assistance of counsel because the same factual assertions and legal argument had been presented to and rejected by the same trial court after an evidentiary hearing in State v. Harich, Case No. 81-1894-BB (Fla. Cir. Ct. June 21, 1989).*

(Footnote continued from previous page)

also moved for leave to take depositions in order to develop an adequate factual record. The trial court never ruled formally on these motions. Where, as here, discovery may aid a petitioner in demonstrating the illegality of his conviction or sentence, courts have not hesitated to grant leave to conduct such discovery. Cf. South Florida Blood Service v. Rasmussen, 467 So. 2d 798, 803 (Fla. Dist. Ct. App. 1985); see also Wiggins v. Smith, 434 F.2d 245 (5th Cir. 1970) (interrogatories directed at issue of ineffective assistance of counsel); U.S. ex rel. Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), cert. denied, 372 U.S. 915, 9 L. Ed.2d 729, 83 S. Ct. 717 (1963) (requests for admissions); Wagner v. U.S., 418 F.2d 618 (9th Cir. 1969) (depositions and interrogatories); Moorer v. South Carolina, 368 F.2d 458 (4th Cir. 1966) (production of documents); Thompson v. Crawford, 656 F. Supp. 1183 (S.D. Fla. 1987) (deposition of trial judge); U.S. v. Debose, 496 F. Supp. 341 (W.D. Okla. 1980) (interrogatories directed at issue of ineffective assistance of counsel); Esposito v. Manson, 65 F.R.D. 658 (D. Conn. 1975) (interrogatories directed at prosecutor's good or bad faith in withholding from state prisoners statements given by witnesses).

* Harich's appeal from the trial court's denial of his Rule 3.850 motion is pending before this Court. Harich v. State, No.74,620 (Fla. filed Aug. 17, 1989).

The court's unprecedented application of the collateral estoppel doctrine denied Herring an opportunity to present fully and fairly his particularized claim of ineffective assistance of counsel.

Application of collateral estoppel is particularly inappropriate in a Rule 3.850 proceeding. The United States Supreme Court has stated emphatically that collateral estoppel is inapplicable in habeas corpus proceedings. Sanders v. United States, 373 U.S. 1, 8, 10 L. Ed.2d 148, 83 S. Ct. 1068, 1073 (1963). Indeed, "[c]onventional notions of finality of litigation have no place where life and liberty is at stake and infringement of constitutional rights is alleged." Id. This holding applies with particular force here, where Herring claims that the undisclosed conflict of interest of his trial counsel prejudiced him in violation of the Sixth and Fourteenth Amendments.

Moreover, even if the collateral estoppel doctrine were available in criminal proceedings, Herring could not be bound by the findings made in Harich, a proceeding to which Herring was not a party. Under Florida law, collateral estoppel may be invoked only when the identical issue has been litigated between the same parties or those in privity with them. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984). This Court recently reaffirmed the general rule of mutuality. Zeidwig

v. Ward, 548 So. 2d 209 (Fla. 1989). No Florida court has ever sustained the use of collateral estoppel against a party who did not participate in the prior proceeding. Herring was not, and could not have been, a party to the proceeding in which Harich unsuccessfully presented his individual claim of ineffective assistance of counsel. Thus, Herring was denied a full and fair opportunity to present his evidence on the conflict question, and how that conflict prejudiced him at trial in violation of the Sixth and Fourteenth Amendments.

CONCLUSION

The trial court's Order should be reversed and Herring's conviction and sentence should be set aside; in the alternative, Herring's death sentence should be vacated with instruction to impose a life sentence; in the alternative, Herring's death sentence should be vacated and the case remanded for a new sentencing hearing; or, in the alternative, the case should be remanded for an evidentiary hearing and discovery with respect to Herring's conflict of interest claim.

Dated: March 8, 1990

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the State of Florida by mailing the same Federal Express, next day delivery, prepaid to Sean Daly, Esq., Assistant Attorney General of the State of Florida, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, this 8th day of March, 1990.

Alan S. Goudiss