IN THE SUPREME COURT OF FLORIDA

TED HERRING,

Appellant,

v. CASE NO. 89,937

STATE OF FLORIDA,

Appellee.

_______________________________/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
Assistant Attorney General
Fla. Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

This appeal is from Judge William Johnson's January 31, 1997 order denying relief on Herring's claim that his appointed assistant public defender, Howard Pearl, had a conflict of interest. An evidentiary hearing was held in this case on November 25-27, 1997.

This case returns to this Court following the March 7, 1996, decision of this Court in the "consolidated" cases addressing the claims of various defendants that Howard Pearl suffered from a conflict of interest at the time he represented them at their respective capital trials. *See, Herring v. State,* 676 So. 2d 369 (Fla. 1996).

The State does not accept the argumentative and histrionic statement of the case and facts contained in Herring's brief. Whether or not that brief complies with the *Rules of Appellate Procedure* is questionable, inasmuch as the "Statement of the Case and the Facts" reads as if it properly belongs in the argument section of an appellate brief, rather than being presented as a factual statement. Because Herring's brief does not contain a statement of the facts as contemplated by the *Rules of Appellate Procedure*, a motion to strike the brief and require the filing of a brief that complies with the rules would have been justified. However, the State has no desire to further delay the proceedings before this Court, and, for that reason, has not filed such a

motion.

Howard Pearl testified that he was a special deputy of the Marion County Sheriff's Office from 1970-1989. (TR30). He had obtained that status because he wished to be able to carry a concealed firearm because he had previously received threats. (TR34; 36). Howard Pearl paid yearly liability insurance premiums throughout the time that he was a special deputy.(TR44).

Mr. Pearl was not an assistant Public Defender when he became a special deputy in 1970. (TR165). The only reason that he wanted to be appointed as a special deputy was to obtain a permit to carry a concealed firearm. (TR165). Howard Pearl had no duties with the Marion County Sheriff's Office as a result of being a special deputy, and was not an employee of that agency. (TR166). He did not qualify as a certified law enforcement officer, nor did Howard Pearl want to so qualify. (TR167). The status occupied by Mr. Pearl was purely honorary -- he had no duties, nor was he expected to perform any. (TR168). Howard Pearl never appeared at the Marion County Sheriff's Office for meetings of any sort, and, in fact, his only contact with that agency was for the purpose of paying the yearly insurance premium, and for signing re-appointment documents at the beginning of each term of office. (TR168).[1] Those matters were handled by the Sheriff's secretary. (TR168). Howard Pearl's

[1] Mr. Pearl was re-appointed as a special deputy each time the Sheriff was reelected to another term of office. (TR168).

status was always that of a special deputy, and he was never issued a badge or uniform. (TR168).

Howard Pearl never made an arrest or stopped a suspect, and, in fact, never performed any law enforcement duties of any sort for the Marion County Sheriff's Office. (TR169). He was never carried on a duty roster as an active duty sheriff's deputy, and was never asked to function as a deputy sheriff by the Marion County Sheriff's Office. (TR169). Mr. Pearl's status as a special deputy had no effect on his representation of the clients he represented as an assistant public defender, and he never did or did not perform an act because of his status as a special deputy[2]. (TR170). His special deputy status was nothing more than a "gun-toter's permit," and, at that time, there was no other way to obtain a permit to carry a concealed weapon. (TR170-1). Mr. Pearl received no money from the Marion County Sheriff's Office, but he did have to pay them for his liability insurance. (TR171).

Howard Pearl testified that, during the course of his representation of Herring, the defendant testified that he did not shoot anyone. Mr. Pearl had no choice but to accept Herring's claim as true. (TR176). In the face of that testimony, a claim that the shooting had been an accident would have been inconsistent with the defendant's own testimony. (TR176). Once Herring testified, he was

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[2] Howard Pearl's only contact with the Marion County Sheriff's Office was in relation to administrative matters. (TR179).

stuck with that story. (TR181). A defense based upon an accident theory would not have been a defense at all, because it is contrary to the law. (TR185). It is the defendant's choice whether or not he will testify, and, absent perjury, defense counsel must defer to that choice. (TR199). Howard Pearl was bound to accept Herring's testimony -- that testimony left Mr. Pearl with nothing else to argue, because to do otherwise would have been to argue that his own client was a liar. (TR195). He could not argue contrary to Herring's testimony, and that testimony left him with no other options. (TR198).

Mr. Pearl never felt that his pistol permit was at risk from anything that he did as a lawyer, and, in fact, he had never considered that possibility. (TR180). In any event, Mr. Pearl would never have accepted instruction from any law enforcement officer regarding the handling of the cases assigned to him. (TR180).

Mr. Pearl testified that, in his opinion, it would have been inconsistent to cross-examine witnesses as to the "witness elimination" aggravator in the face of Herring's testimony that he did not shoot anyone. (TR180). Insofar as the tape-recorded statement of the defendant is concerned, Howard Pearl was aware that roughly five minutes of one of those statements had been "recorded-over" as a result of operator error. (TR139).[3] At one

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[3] The facts surrounding this incident were developed before trial during a hearing on Herring's motion to suppress. A copy of the pertinent pages is attached as exhibit 1.

time during the pre-trial discovery stage, one of the investigators had stated that he did not recall the defendant asking to speak privately with Detective Varner. (TR144). However, the investigator did recall that incident at the time of the suppression hearing. (TR148). There was nothing to be gained by arguing over the tape erasure, and it does not provide a basis for challenging the credibility of any of the law enforcement officers. (TR184). Making such a credibility attack in the absence of any proof can have, in Mr. Pearl's opinion, a negative effect on the jury. (TR184).

Howard Pearl testified that his co-counsel, Peyton Quarles, did not sit at the counsel table during the guilt phase of Herring's trial, and Mr. Pearl did not sit at the counsel table during the penalty phase. (TR155). The reason for that was because Mr. Pearl had no role at the penalty phase. (TR156).

Mr. Pearl testified that there was nothing in the tape-recorded interviews between the police and his client that would have been usable to impeach Detective Varner's testimony. (TR98). Challenging Varner's credibility would not have been effective because being hostile toward him in front of the sort of jury that was typical in Volusia County at that time would only have annoyed the jury. (TR115-6). Detective Varner did not have a bad reputation, and, if he had, Howard Pearl would have been aware of it. (TR128; 133). The fact that Detective Varner was "under investigation" in connection with an offense for which his wife was charged means nothing in the context of this case, and the fact

that Varner may have been a suspect does not cast doubt on his credibility. (TR130-31). The fact that Detective Varner's wife was being investigated does not create an issue that has any effect on this case. (TR132).[4]

Tom Galloway was assigned to the Internal Affairs Division of the Daytona Beach Police Department in 1981-1982. (TR218). Mr. Galloway has been employed as the director of security at the Daytona International Speedway for the last six years. (TR218). He knows Detective Varner, and has a vague recall of an investigation of him. (TR219). Detective Varner was cited several times for "using poor judgment." (TR221).

Don Moreland is the United States Marshall for the Middle District of Florida. (TR256). From 1973 until 1992, he was the Sheriff of Marion County, Florida.(TR256). Mr. Moreland knows Howard Pearl, who was a special deputy with the Marion County Sheriff's Office until he resigned that status on May 17, 1989. (TR257; 261). Mr. Moreland is not familiar with the Herring case at all. (TR258). Howard Pearl became a special deputy under Mr. Moreland's predecessor in office, and Mr. Moreland continued that status, which was requested, and granted, solely for the purpose of

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[4] In his brief, Herring claims that Detective Varner "left the police department in disgrace." The true facts are that Detective Varner resigned based upon a medical disability. (R539). That is hardly a "disgrace," and Herring's claim to the contrary is a blatant misrepresentation of the facts.

carrying a concealed firearm[5]. (TR258; 265-67). Howard Pearl was never a law enforcement officer. (TR268). Like all special deputies, Howard Pearl was required to pay the $100 per year liability insurance premium. (TR278). The fact that Howard Pearl was an assistant public defender influenced Mr. Moreland's decision to continue his special deputy status. (TR289). Mr. Moreland appointed Howard Pearl as a special deputy as a courtesy because he was an assistant public defender, but he was a special deputy with no law enforcement authority. (TR294).

Howard Pearl understood that his special deputy status was honorary, for weapons carrying authority only. (TR295; 313-314)[6]. A person appointed as a "regular" special deputy would have received basic law enforcement training. (TR295). Howard Pearl was never a certified law enforcement officer, never took part in training conducted by the Marion County Sheriff's Office, and the only contact between Mr. Moreland's office and Howard Pearl was related to the payment of the annual insurance premiums. (TR295). Mr. Moreland did not give special deputy status to Howard Pearl in the hope that it would influence how he tried cases, never attempted to influence how Howard Pearl represented his clients,

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[5] Mr. Moreland described the granting of special deputy status as "a political thing." (TR279).

[6] Howard Pearl never performed any law enforcement function with the Marion County Sheriff's Office -- there was nothing that he was supposed to do. (TR312; 315).

and, in fact, never discussed his clients with him. (TR296-7).[7]

Mr. Moreland testified that Howard Pearl was never compensated in any way by the Marion County Sheriff's Office, was issued no uniforms or equipment, never performed (or was asked to perform) any law enforcement duties, never attended any roll call at the Marion County Sheriff's Office, and never acted in any sort of law enforcement capacity. (TR297-300). Howard Pearl was not a law enforcement officer with the Marion County Sheriff's Office. (TR305).

Paul Crow is the retired Chief of the Daytona Beach Police Department. (TR318-19). Chief Crow was assigned to the Criminal Investigation Division of the Daytona Beach Police Department from 1979-1987. (TR320). Mr. Crow is somewhat familiar with this case. (TR320). Detective Varner was assigned to the Criminal Investigation Division at the time this case was under investigation. (TR320). Chief Crow is familiar with the incident involving Detective Varner and his wife, and recalls conducting interviews in connection with that case. (TR323-4). Detective Varner was not a suspect in the crime committed by his wife, and was never charged with any offense related thereto[8]. (TR353; 355). The reprimands contained in Detective Varner's personnel file are

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[7] Mr. Moreland never saw Howard Pearl in the courthouse. (TR296).

[8] Detective Varner never said anything to indicate that he was guilty of any crime. (TR361).

not at all unusual in quality or quantity, and, in fact, are "common." (TR356).

Chris Quarles has been an assistant public defender since 1980, and has been the chief of the capital appeals bureau for the last 10 years. (TR372-3). Mr. Quarles has not reviewed the transcript of this trial, and, despite his factual testimony to the contrary, has reviewed no transcript to determine if Howard Pearl has "challenged the credibility" of law enforcement officers. (TR384-5).

James Peyton Quarles was an assistant public defender at the time of Herring's capital trial, and, as such, was responsible for the penalty phase preparation and presentation. (TR391; 393-4). All capital cases were handled with one lawyer being responsible for the guilt phase, and another lawyer being responsible for the penalty phase proceeding if such became necessary. (TR395). In Herring's case, there was a very small chance of avoiding a conviction because of the confessions Herring had made. (TR396). Howard Pearl and Quarles discussed using an accident defense, but because of Herring's insistence, ended up using the "third party gunman" theory. (TR400; 416)[9]. Mr. Quarles did not attempt to discover any impeachment material to use against Detective Varner -- discovery of such information would not have been Howard Pearl's

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[9] As Mr. Quarles stated, the defendant makes the decision as to whether or not he will testify. (TR421).

responsibility. (TR410).

Under the facts of this case, an "accident" defense would not have been any defense at all -- the only purpose in presenting such a defense would be to confuse the jury. (TR422-23). There were few viable options in defending this case, and there was no valid defense that would have avoided a conviction. (TR431).

Stephen Gillers is a law professor at the New York University law school. (TR436). He was accepted as an expert in the field of legal ethics. (TR456). Mr. Gillers believes that Howard Pearl was working under a *per se* conflict of interest at the time of Herring's trial. (TR475). He has not read the testimony of Sheriff Moreland or Peyton Quarles, and thinks that Howard Pearl was responsible for the penalty phase representation of Herring. (TR477-78). Mr. Gillers has read this Court's decision in *Harich v. State,* but does not find it "dispositive." (TR490-91).

Werter Spitz is a forensic pathologist who was formerly the chief medical examiner for the Detroit, Michigan, area. (TR538-540). Herring offered Dr. Spitz' testimony in an effort to demonstrate the sequence of the infliction of the gunshot wounds which killed the victim. (TR545-7). The State objected to this testimony on the basis that it was not related to Howard Pearl's status as a special deputy, and the trial court sustained that

objection.[10] (TR565). Dr. Spitz' testimony was presented in the form of a proffer. (TR566 *et seq*). Dr. Spitz *thinks* that the wound to the victim's neck came first, but the gunshot wound to the victim's head might also have been first. (TR572). In Dr. Spitz' opinion, it is nearly impossible to say which gunshot wound was inflicted first. (TR572; 574). Dr. Spitz did not review the testimony of the defendant, and did not consider the possibility that the victim may have been on the floor when he was shot as a result of attempting to hide from the defendant. (TR590).[11]

James Russ has been a criminal defense attorney in Orlando, Florida, since 1965. (TR600-602). At the time of Herring's 1982 capital trial, Mr. Russ had represented *one* defendant whose case went into the penalty phase. (TR674). Mr. Russ disagrees with the findings of the trial court in the *Harich* case, even though he does not know what evidence that Judge heard. (TR661; 668). Mr. Russ is of the opinion that the fact that Howard Pearl had a special deputy's card created a *per se* conflict of interest. (TR673).[12]

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[10] Herring claims that the State's objection was sustained on another basis. However, the trial court's ruling is very clear -- the testimony of Dr. Spitz was excluded on relevancy grounds. (TR565).

[11] Dr. Spitz did not consider any variables in reaching his opinion, choosing instead to exclude any matters that conflicted with his version of the shooting.

[12] This "opinion" is directly contrary to the settled law in this State as announced by this Court in *Harich v. State,* 573 So. 2d 303 (Fla. 1990).

According to Mr. Russ, Howard Pearl was responsible for the entire case, even though Mr. Quarles had sole responsibility for preparation of the penalty phase. (TR677).[13] Mr. Russ further believes that Howard Pearl's status as a special deputy caused him to render ineffective assistance of counsel, but, Howard Pearl was "ineffective" whether or not there was a conflict. (TR697). The only credible theory of defense that Mr. Russ could suggest was to make the State prove its case and attack the credibility of the law enforcement officers who testified. (TR688-9). Mr. Russ would not have defended this case based upon an accidental shooting theory. (TR716).[14]

The State presented the testimony of James Gibson, the elected Public Defender for the Seventh Judicial Circuit (which includes Volusia County). (TR725). Mr. Gibson is Howard Pearl's employer, and had put Mr. Pearl in charge of the capital division of the Public Defender's Office. (TR725). Mr. Gibson was aware of Howard Pearl's status as a special deputy, and had known about that status, which was common knowledge, since 1971. (TR726). Mr. Gibson saw no problem with Howard Pearl being a special deputy through the Marion County Sheriff's Office, and there was no connection between

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13 This "opinion" is also directly contrary to settled Florida law. *Mills (Gregory) v. State,* 603 So. 2d 483 (Fla. 1992).

14 This testimony is squarely contrary to the argument in Herring's brief that the "accidental shooting" theory was a "credible" defense. See pages 26-28, below.

that status and Mr. Pearl's handling of death penalty cases in the Seventh Judicial Circuit. (TR726). That status was purely honorary, and was only for the purpose of allowing Howard Pearl to carry a gun. (TR726). Howard Pearl never failed to act responsibly on behalf of his clients, and there was no reason to question Mr. Pearl's integrity and ability. (TR727). Mr. Gibson has known Howard Pearl for many years, and, based upon that long professional relationship, has no doubt that Mr. Pearl's special deputy status had no effect on his representation of his clients. (TR732). Mr. Gibson asked Mr. Pearl to resign his special deputy status when it became an issue in the *Harich* matter -- by that time, the *Florida Statutes* had been amended to provide for the issuance of a license to carry a concealed firearm. (TR732).

On January 31, 1997, Judge Johnson issued his order denying relief on Herring's "Howard Pearl" claim. (R1012). The Court found, as a fact, that Howard Pearl:

> never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Marion County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other that a "gun toter's permit" as a result of his special deputy status.

(R1016). The Court went on to conclude that Howard Pearl did not suffer from an actual or *per se* conflict of interest, and found

that Mr. Pearl's representation of Herring was not ineffective under *Cuyler v. Sullivan,* 446 U.S. 335 (1980). (R1016-8). This appeal followed.

Notice of appeal was given on February 13, 1997. (R1019). The record was certified as complete and transmitted on May 23, 1997. (R1022). Herring's Initial Brief was filed on September 23, 1997.

SUMMARY OF THE ARGUMENT

1. The Volusia County Circuit Court correctly found that Howard Pearl did not suffer from either a *per se* or an actual conflict of interest by virtue of his status as a "Special Deputy" of the Marion County Sheriff's Office. The "Special Deputy" status was conferred for no purpose other than allowing Mr. Pearl to carry a concealed firearm. Moreover, the Circuit Court's finding that Howard Pearl's performance at the guilt phase of Herring's capital trial was constitutionally adequate is supported by competent, substantial evidence, and should not be disturbed on appeal. Herring's newly-advanced theory that the case should have been defended based upon a claim of "accident" is not a valid defense strategy, and there is no basis upon which the Circuit Court's denial of relief should be disturbed.

2. Herring's position ignores the settled law that counsel's performance is presumptively reasonable and adequate. Constitutionally adequate performance encompasses a wide range of actions on the part of counsel, and a defendant challenging counsel's performance bears a heavy burden of overcoming the presumption of effectiveness. Herring has failed to carry that burden, and the Circuit Court's denial of relief on Herring's ineffective assistance of counsel claim should be affirmed.

3. Herring argues, inconsistently, that the Circuit Court

erroneously excluded the forensic testimony of his hand-picked forensic pathologist, and that the Circuit Court considered that testimony and erroneously found facts based thereon. The testimony at issue was not relevant to the claim that was remanded from this Court for an evidentiary hearing, and the Circuit Court properly excluded that testimony on relevancy grounds. To the extent that Herring claims that the Circuit Court erroneously found facts based upon such testimony, the findings of the trial court are supported by competent, substantial evidence. Because that is true, this Court should not disturb those findings on appeal. The Circuit Court's ruling should be affirmed in all respects.

<u>ARGUMENT</u>

I. HOWARD PEARL DID NOT SUFFER FROM A CONFLICT OF INTEREST

On pages 55-67 of his brief, Herring argues that Howard Pearl was "guilty" of a conflict of interest because he was a special deputy, and that such conflict "adversely affected his representation" of the defendant. When the claim is stripped of its hyperbole and histrionics, the true facts demonstrate that there is no basis for relief to be found anywhere in this "claim."

The Legal Standard

The standard for evaluation of a conflict of interest claim was set out by the United States Supreme Court in *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), where that Court stated:

> We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Subsequently, the Court re-emphasized the heavy burden established by *Cuyler*: "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As is the case with an ineffective assistance of counsel claim, the conflict of interest standard is in the conjunctive: the defendant must

establish not only that counsel actively represented conflicting interests (an **actual** conflict), but also that there was an adverse effect on counsel's representation of the defendant as a result of that conflict. *See, e.g., Hernandez v. Johnson,* 108 F.3d 554, 560 (5th Cir. 1997) ("A mere possibility of conflict does not raise a presumption of prejudice, and 'until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.' *Cuyler,* 446 U.S. at 350, 100 S. Ct. at 1719."). In *Buenoano v. Dugger,* this Court stated:

> In light of the unusual facts of this case, we are not persuaded that the acts and omissions to which Buenoano refers, even if true and even if caused by a conflict of interest, resulted in prejudice necessary to overcome the overwhelming evidence of guilt. We are not convinced the outcome of the proceedings would have been different if counsel had performed in the manner in which Buenoano urges. Under any view, the outcome of the proceedings would have been the same.

Buenoano v. Dugger, 559 So. 2d 1116, 1120 (Fla. 1990). Herring cannot establish either prong of the *Cuyler* standard, and, consequently, has failed to carry his burden of proof.

The claim contained in Herring's brief is what has come to be known as a "Howard Pearl claim." This Court announced the law in this State as to this claim in *Harich v. State,* 573 So. 2d 303 (Fla. 1990), with the express approval of the following findings of fact entered by the Circuit Court of Volusia County:

> In June of 1972 Howard Pearl became an assistant public defender for the Seventh Judicial Circuit. In 1978 he

assumed responsibility for the defense of capital cases assigned to the public defender's office. In 1982 he represented the defendant Roy Allen Harich at the trial in this cause. He also represented Harich at the governor's clemency hearing. Pearl did not disclose his role as a special deputy to Harich.

....

Pearl became a special deputy sheriff for Marion County in 1970. This status continued until Pearl resigned in May of 1989. Pearl paid liability insurance each year and he was bonded. He was issued a deputy's card, and the card erroneously identified him as a regular deputy. He also took an oath of office. Pearl also purchased a deputy sheriff's badge from a gun shop.

Pearl's sole reason for becoming a special deputy was to permit him to carry a firearm. He wanted a "gun toter's permit." Pearl never intended to act as a deputy, and the sheriff of Marion County never intended for Pearl to act as a law enforcement officer. Specifically, Pearl:

1. was never certified as a Florida law enforcement officer, contrary to the allegations on Page Nine of the 3.850;

2. never held himself out as a regular deputy;

3. received no training as a deputy, contrary to the allegations on Page Ten of the 3.850;

4. never wore a deputy's uniform;

5. received no compensation as a deputy, contrary to the allegations on Page Ten of the 3.850;

6. was never issued any equipment;

7. never made an arrest or stop;

8. had no required duties as a deputy; was on no duty roster;

9. never acted as a regular deputy;

10. was never asked to act as a regular deputy;

11. was in fact a "special" or "honorary" deputy rather than a regular deputy.

....

In March of 1974 he was issued an honorary deputy's card by former Sheriff Duff. He performed no duties as a Volusia County deputy, and none were expected to be performed by him. The card was issued by the sheriff for good will and/or political purposes. It was issued to dignitaries like television personality Willard Scott, and was even issued by the sheriff to newborn babies. This card was solely honorary.

The Lake County card was issued by the former sheriff to Pearl in June of 1983. Much like the Volusia County card it was purely honorary. Pearl never acted as a Lake county deputy, never held himself out to be a Lake County deputy, and was never expected by the sheriff to act as a regular deputy.

....

The Defense 3.850 alleges that Pearl's role as a deputy sheriff caused him to render ineffective assistance of counsel to Harich. No evidence to support this contention was produced at the evidentiary hearing. In fact, the evidence was to the contrary. Pearl remained loyal to Harich. He betrayed no confidences to law enforcement. He effectively crossed-examined [sic] law enforcement officers. He did not ineffectively bolster their credibility. He did not ineffectively concede that a sexual battery took place. Pearl's role as a special deputy sheriff resulted in no prejudice to Harich. The deputy sheriff status did not in any way interfere with Pearl's role as a public defender.

....

The majority opinion in the Supreme Court decision mandating this evidentiary hearing expressed concern that the issue of Pearl's deputy status may not have been discoverable through due diligence. During the evidentiary hearing it became obvious the issue could have been easily discovered. Judge Blount knew Pearl was an honorary deputy. In fact, Pearl told many judges about his status. He never tried to keep the status secret. It was never anything he perceived to be a conflict. In addition to the judges the original prosecutor knew Pearl was a deputy; Pearl's employer, the Public Defender of the Seventh Judicial Circuit, knew; other members of Pearl's office knew, including

> the head of the capital appeals division. It was common knowledge in the Volusia County legal system. This issue could have easily been discovered back at the time of the 1982 trial or anytime thereafter.
>
> ....
>
> No actual conflict between Pearl's status as a special deputy sheriff and Harich's defense counsel has been demonstrated. Harich suffered no prejudice from Pearl's deputy status. Pearl rendered effective assistance to the defendant, the deputy status notwithstanding.
>
> The remaining question is whether Pearl's deputy status was a per se conflict of interest requiring no showing of prejudice to the defendant. There is no law to support this assumption and this Court is unwilling to make that quantum leap. The better view is that Pearl's honorary position, requiring no actual law enforcement duties, did not conflict with his role as a defense attorney. There is no actual, implied, or per se conflict. The Court finds no violation of *Florida Statute* 454.18, 27, 51, and 27.53; Article II, Section 5(a) of the *Florida Constitution;* or Disciplinary Rule 5-101A of the *Florida Code of Professional Responsibility.*
>
> Finally, this Court respectfully concludes that the defendant should be procedurally defaulted. The deputy status issue could and should have been discovered and raised in the original 3.850.

Harich v. State, 573 So.2d at 304-5. This Court went on to hold:

> We approve the findings of fact made by the trial judge and find that they are fully supported by this record. Considering the duties and status of a special deputy sheriff, as found by the trial judge, we conclude that the public defender did not violate the duty he owed to Harich and that the public defender's special deputy status, under the circumstances present in this case, did not result in a per se conflict of interest. **We agree with the trial judge that defense counsel's special deputy status was very different from that of an active or auxiliary deputy sheriff and that his position could best be characterized as "honorary."** . . . Further, we find no actual conflict or deficiency in this public defender's representation of Harich.

Harich v. State, 573 So. 2d at 306 [emphasis added].

This Court reaffirmed the *Harich* decision in its 1991 opinion remanding this case to the Circuit Court for "an evidentiary hearing to determine whether Herring's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." *Herring v. State,* 580 So. 2d 135, 139 (Fla. 1991). This Court expressly stated that no *per se* conflict of interest was present. *Id.*

The Circuit Court's Findings

With regard to Mr. Pearl's status with the Marion County Sheriff's Office, the Circuit Court summarized the evidence, and made the following findings:

> Accordingly, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Marion County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsel's assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

(R1016).[15]

The Circuit Court entered the following findings concerning the existence of either a *per se* or actual conflict of interest:

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[15] In his brief, Herring has abandoned any claim that Mr. Pearl was a law enforcement officer.

The defense expert, Professor Stephen Gillers, testified that, by the simultaneous existence of Mr. Pearl's special deputy status and his status as a public defender, there was a *per se* violation of the Florida Disciplinary Rule 5-101 which covers conflicts of interest. However, based on this Court's factual findings with respect to the actual scope of Mr. Pearl's duties as a special deputy sheriff with the Marion County Sheriff's Department, it finds that those duties were not in conflict with Mr. Pearl's duties as a public defender. Therefore, no *per se* conflict of interest existed between Mr. Pearl and the Defendant. *See Harich v. State,* 573 So. 2d 303, 305 (Fla. 1990) (finding no *per se* conflict of interest where defense counsel was a special deputy sheriff at the time of representation).

To prove that an actual conflict of interest existed between a defendant and his counsel, the defendant must show that his counsel actively represented conflicting interests and that the conflict adversely affected his counsel's performance. *See Cuyler v. Sullivan,* 446 U.S. 335, 348, 350, 100 S. Ct. 1708, 1718, 1719, 64 L. Ed. 2d 333 (1980); *Buenoano v. Dugger,* 559 So. 2d 1116, 1120 (Fla. 1990); *Burnside v. State,* 656 So. 2d 241, 244 (Fla. 5th DCA 1995).

Mr. Pearl testified that his special deputy status never interfered with his public defender duties and that the only purpose for this status was carrying a concealed firearm. In addition, Mr. Gibson, the Public Defender, testified that Mr. Pearl's status and his handling of capital cases had no connection and that Mr. Pearl's status never caused him to question Mr. Pearl's integrity or ability in representing clients. Further, Sheriff Moreland testified that the special deputy status issued to Mr. Pearl was never used to influence Mr. Pearl or the Public Defender's Office in any way.

Defense counsel interpreted Mr. Pearl's alleged ineffective cross-examinations and alleged bolstering of law enforcement officers as the adverse effect of his conflict of interest. However, defense counsel presented no evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting interests. Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed between Mr. Pearl and the Defendant resulting from Mr. Pearl's special deputy status.

The defense presented an expert in criminal defense, James M. Russ, Esquire, who testified that Mr. Pearl's cross examination of the law enforcement officers and his closing argument were ineffective under the *Cuyler* standard due to Mr. Pearl's special deputy status. However, Mr. Pearl testified that, even though he did not specifically remember this case, it was his practice to never outright attack and call law enforcement officers liars, unless he had certain proof of the misrepresentations, due to the nature of juries' views on law enforcement officers in Volusia County at that time. Therefore, this Court finds that the Defendant has not proven that, because of Mr. Pearl's status, his representation was ineffective, due to the fact that Mr. Russ would have aggressively pursued other avenues if he defended this case, specifically in light of Mr. Russ' limited experience (one case) of trying cases in Volusia County at that time period. Further, when the State asked the question of Mr. Russ, "Would Howard Pearl in your opinion have a conflict of interest and be deficient in representation in every case he tried while he had this special deputy's card from Marion County because of the, quote, fundamental conflict you testified to as per his dual service status," Mr. Russ answered "Yes," in conflict with the Florida Supreme Court's finding in *Harich.* [citation omitted].

The defense also presented an expert in forensic pathology, Dr. Werter Spitz, who testified that the second shot of the victim was consistent with a shot while the victim was falling down, not while the victim was lying on the ground, thereby, discounting the "witness elimination" factor. However, Dr. Spitz also conceded that the second shot was also consistent with the victim lying on the ground with a defensive move of his hand due to fear. In addition, the defense did not offer any testimony that this expert or any other expert was accessible or available to Mr. Pearl at the time of trial in this case. Also, both Mr. James Peyton Quarles, Esquire and Mr. Pearl's co-counsel, and the defense expert, Mr. Russ, stated that using an accident theory of defense to explain the second deadly shot was not viable, especially in the light that the Defendant testified at trial that another person shot the victim. Thus, this Court finds that the Defendant has not proven that Mr. Pearl was ineffective for not providing and expert who would testify to this theory of the second shot and that this absence of testimony was actually due to Mr. Pearl's

special deputy status.

(R1017-18).

The Decision of the Circuit Court Should be Affirmed

Florida law is settled that this Court will not substitute its judgment for that of the Circuit Court. *See, Trepal v. State,* No. 87,222 (Fla., March 27, 1997); *Orme v. State,* 677 So. 2d 258, 262 (Fla. 1996) ("Our duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent substantial evidence."). The findings of the Circuit Court that Mr. Pearl was not burdened by an actual conflict of interest are supported by the evidence contained in the record and should be affirmed in all respects. Likewise, the finding by that Court that Mr. Pearl's performance was not deficient as a result of his "special deputy" status is supported by competent substantial evidence and should not be disturbed.[16]

As set out above, Herring cannot prevail on his claim unless he can establish that Mr. Pearl represented conflicting interests and that that representation adversely affected his performance. *Cuyler, supra.* Herring cannot show a representation of conflicting interests -- Mr. Pearl did not purport to "represent" law

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[16] In his first Rule 3.850 motion, Herring raised no claim that Mr. Pearl rendered ineffective assistance. *See, Herring v. State,* 501 So. 2d 1279 (Fla. 1986). Mr. Pearl's performance was not challenged until his pistol permit came to light -- at that time, his performance apparently became much worse in the eyes of Herring's present attorneys.

enforcement, nor has he been shown to have any relationship with law enforcement personnel that was other than what an attorney actively engaged in the exclusive practice of criminal law would be expected to have. While it is at least theoretically true that the Sheriff of Marion County could have revoked Mr. Pearl's special deputy status for no reason at all, there is no evidence (outside the imagination of present counsel) remotely suggesting that that power of revocation was ever even mentioned to Mr. Pearl, much less held over his head to compel him to follow a particular course of action. In fact, the unchallenged testimony is that Sheriff Moreland did not grant Mr. Pearl special deputy status in the hope that it would affect how he handled his cases, never saw Mr. Pearl in the courthouse, never tried to influence how Mr. Pearl practiced law, and never discussed this or any other case with him. (TR296-97).[17] Mr. Pearl was equally emphatic in his testimony that his special deputy status had no effect on his representation of his clients, and that he never did or did not do something because of that status. (TR170). Stated simply, the only basis for the assertion that Mr. Pearl had a "conflict of interest" is found in the unsupported and hyperbolic assertions of Herring's present counsel -- there is no evidence that it even occurred to Mr. Pearl that his personal interests would be compromised by defending this case in the manner that has been developed through hindsight. The

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[17] Sheriff Moreland is not familiar with Herring's case. (TR258).

notion that Mr. Pearl was unwilling to "challenge law enforcement officers" because he feared the revocation of his pistol permit is devoid of evidentiary support -- that argument is repugnant to the oath of loyalty taken by every Florida lawyer, and is not the sort of fanciful claim that should be made when there is no evidence to support it and all of the evidence is to the contrary.[18] In the final analysis, this case does nothing more than plead hyperbolic suspicion and innuendo and claim that such demonstrates a conflict of interest. In contrast, the evidence that was presented *ore tenus* demonstrated that Mr. Pearl was not laboring under a conflict of interest. The Circuit Court heard the testimony of the various witnesses and was able to observe their demeanor and evaluate their credibility. That Court's finding that no conflict of interest exists should be affirmed in all respects.[19]

On pages 61-67 of his brief, Herring argues that a "plausible and reasonable alternative defense strategy" existed in the form of the "accidental shooting defense."[20] Incongruously, Herring

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As Justice Grimes pointed out in this Court's most recent opinion on this issue, the same claim could be made about lawyers who have friends in the sheriff's office or are former prosecutors.

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In his brief, Herring relies on a number of decisions, primarily from various Federal courts. None of those decisions are controlling because none of them address the peculiar facts that exist in this case. Each of the cases relied on by Herring is distinguishable on its face.

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Herring's "expert" witness, James Russ, would not have defended this case on such a theory. (TR716).

concedes in his statement of the facts that such a defense would not be a defense to a First Degree Murder conviction based on a theory of felony-murder. *See, Initial Brief*, at 46. However, according to Herring, the accidental shooting theory would have been a "defense" to the witness elimination aggravator. This new-found theory suffers from numerous deficiencies.

If Mr. Pearl had defended this case at the guilt phase on a theory that the shooting was "accidental", he would have been required to admit that his client was guilty of first degree murder under a felony-murder theory. Even if Herring had been willing to go along with such a theory of defense, and the evidence is clear that he was not (TR400; 416), the obvious danger in such strategy lies in the likelihood that the jury would not accept that it is possible to shoot someone two times by accident. Because the newly-advanced theory makes a First-Degree Murder conviction a virtual certainty, Herring would enter the penalty phase having admitted that one aggravator is present (felony-murder), and after having attempted to convince the jury that he shot the victim **twice** by accident.[21] The chance of success of such a theory is non-existent, and, had Mr. Pearl used that theory, he would certainly have been the object of a claim of ineffective assistance of counsel for

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[21] The murder weapon in this case was a small-caliber, double-action revolver.

pursuing a defense that was so obviously doomed to failure.[22] In any event, the defense theory chosen by Mr. Pearl is not so poor that it is possible for this Court to conclude that **no** reasonable attorney would have defended this case in this was. *See, Waters v. Thomas,* 46 F.3d 1506 (11th Cir. 1995). Mr. Pearl did not defend this case the way he did out of any deference to law enforcement -- he did what he did because he had no other options, especially after the defendant insisted on testifying that a "mystery gunman" interrupted Herring's robbery of the victim and shot him first. (TR176).

Herring also argues that this case should have been defended on the theory that the shooting was "reflexive." *Initial Brief,* at 62. Herring appears to use the phrase "accidental shooting" interchangeably with the phrase "reflexive shooting," but, linguistically, those phrases carry different connotations. If Herring is taking the position that Mr. Pearl should have argued that the victim was shot "by reflex," using such an argument would require effectively admitting guilt to First Degree felony-murder. Once again, it seems unlikely that Herring would have been willing to do that, and, in any event, such a theory is inconsistent with Herring's trial testimony about the "mystery gunman." Moreover, attempting to convince a jury that the victim was shot "by reflex"

[22] This theory of defense is not a "plausible, more than reasonable alternative" defense -- it is a fast way to insure Herring's conviction.

is even less likely to succeed than attempting to convince them that the shooting was an accident. Once again, Herring's problem lies in the fact (that is not disputed) that he shot the victim **twice**. Under those facts (which Mr. Pearl obviously could neither change nor challenge), attempting to convince the jury that the shooting was an accident had no probability of success. The "reflex" theory is no more reasonable than the "accident" theory -- it is not possible to conclude that **no** reasonable attorney would have chosen to defend this case as Mr. Pearl did rather than using either of the recently developed alternatives.

Running through Herring's brief is a failure to recognize that Mr. Pearl was not the attorney responsible for the penalty phase of Herring's capital trial. While Herring will likely take the position that Mr. Pearl retained the final responsibility for both trial phases, this Court has recognized that division of responsibility is appropriate and that such division must be taken into account in evaluating ineffectiveness of counsel claims. *See, e.g., Breedlove v. State,* 692 So. 2d 874, 875 (Fla. 1997); *Remeta v. State,* 622 So. 2d 452, 454 (Fla. 1993); *Mills (Gregory) v. State,* 603 So. 2d 483 (Fla. 1992). Because that is the law, and because Herring concedes guilt under a felony-murder theory, his claim that Mr. Pearl's special deputy status rendered his guilt phase representation ineffective collapses. To conclude otherwise would require this Court to determine that Mr. Pearl chose to put

up a defense to the charges against his client instead of admitting guilt because he feared that admitting guilt would jeopardize his pistol permit. That argument is illogical.[23]

In summary, the theories of defense that Herring now claims should have been used at his capital trial are solely applicable to the penalty phase because those theories require an admission of guilt, either expressly or tacitly. There is no reason that those potential defenses could not have been employed by penalty phase counsel had he chosen to do so. The fact that those theories are inconsistent with the guilt phase theory of the case does not foreclose their use, at least from a legal standpoint. *See, e.g., Singleton v. Lockhart,* 871 F.2d 1395, 1400 (8th Cir. 1989). However, the effectiveness of penalty phase counsel has already been litigated and decided adversely to Herring. *See, Herring v. State,* 501 So. 2d 1279 (Fla. 1986). Despite his efforts to cloud the issue, Herring's "alternate defense strategy" is purely a penalty phase theory that would have been impossible to implement at the guilt phase without insuring that the client would be convicted. Such a strategy is far from reasonable, and the position taken by Herring fails to recognize the reality that there are some

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[23] In theory, Herring could have admitted guilt to first degree murder and proceeded directly to the penalty phase. While that strategy may have some appeal with the benefit of hindsight, Herring had an absolute right to refuse to proceed in that manner, as he obviously did. The undersigned is unaware of any capital case where counsel was found to be ineffective for going to trial instead of pleading his client guilty.

cases that simply cannot be won. *See, Clisby v. Jones,* 26 F.3d 1054, 1057 (11th Cir. 1994). This is one of those cases. Mr. Pearl's status as a special deputy had no effect at all on his defense of this case, and the Circuit Court's denial of relief should be affirmed in all respects.

Herring also complains that "the strategy of challenging law enforcement was inherently in conflict with Pearl's need to carry a firearm" To support this argument, Herring constructs the argument that "the defense that the shooting was accidental and reflexive, coupled with an attack on the credibility of Varner, White, and Anderson, inherently conflicted with Pearl's personal interest in maintaining the good graces of law enforcement officers." *Initial Brief,* at 63. The first shortcoming with that argument is that an "accidental/reflexive" shooting theory is not supported by any facts, and is wholly at odds with the trial testimony of the defendant. *See,* pages 26-28, above. Because that is true, that "defense" cannot have conflicted with Mr. Pearl's "need to carry a firearm." The second deficiency with Herring's theory is that Mr. Pearl testified about his practice as to challenging the credibility of law enforcement personnel, and further testified that, in this case, he did not believe that the "evidence" that Herring claims should have been used to challenge the investigators was of the character that would make such a challenge successful. (TR98;130-32;184; R1017). Mr. Pearl's

strategy as to challenging the credibility of law enforcement officers was based upon his experience in trying cases before Volusia County juries at the time of Herring's trial -- that practice is not unreasonable, and Herring cannot demonstrate that *no* reasonable lawyer would follow such a strategy. *See, Waters, supra.*

The third shortcoming with Herring's theory is that there is **no** evidence to support the hyperbolic claim that Mr. Pearl was afraid that a challenge to the credibility of a law enforcement officer would result in the revocation of his concealed weapons license. There is no evidence indicating that the Sheriff of Marion County was even aware of Mr. Pearl's representation of his clients in Volusia County, nor is there any suggestion of communication between Volusia County and Marion County law enforcement personnel that was of such a character that a complaint about Mr. Pearl's representation of a client would result in the Marion County Sheriff taking any action at all. The true facts demonstrate that the Sheriff of Marion County had almost no contact with Mr. Pearl, and never discussed any of his cases with him. There is simply no support for the claim that Mr. Pearl defended this case as he did because he feared that to do otherwise would "jeopardize his special deputy status." (R1017). Any claim to the contrary is an unsupported and unfounded attack on Mr. Pearl's integrity, which, in this case, has been made without recognizing

that such an allegation, as abhorrent as it is to an attorney's oath of loyalty to his client, should not be made lightly, and certainly should not be made when there is no evidence to support such a claim.

Herring also claims that the testimony of Detective Varner was the only support for the "avoiding arrest" aggravating circumstance. While it is true that the testimony of Detective Varner supported the finding of the avoiding arrest aggravator, it is also true that there has been no challenge to the accuracy of that testimony. Despite the histrionics contained in Herring's brief, there is no showing that that testimony was inaccurate. Moreover, there was no valid basis upon which Mr. Pearl could have challenged that testimony at trial. While he *could* have attempted to challenge Detective Varner because his wife had been charged with a criminal offense, the connection between that event and Detective Varner's trial testimony is less than tenuous, at best. If such would have even been a valid basis for an attempt to impeach the testimony of the officer, without any support for the connection between the charges against the officer's wife and his trial testimony, such an "impeachment" could well be viewed as either *ad hominem* abuse of the officer or a desperate attempt to salvage a virtually hopeless case. Neither result would be favorable to the defendant, and it is not possible to conclude that no reasonable attorney would have chosen to forego such a strategy.

In any event, Mr. Pearl was not the attorney responsible for the penalty phase defense in this case. Because that is true, the "failure" to challenge the "credibility" of Detective Varner is not an issue insofar as Mr. Pearl is concerned.[24]

On pages 67-70 of his brief, Herring continues his argument, in a separately-numbered heading, that Howard Pearl had a conflict of interest with his client. The basis of this argument is Herring's assertion that Howard Pearl did not present a "credible" theory of defense. However, Herring ignores the fact that Howard Pearl was unable to invent facts to support the newly-developed defense theory, and literally had his hands tied by Herring's own statements. Whether or not Howard Pearl now believes that the theory of defense used at trial was incredible, the theory now advanced by Herring is equally incredible and, moreover, is wholly inconsistent with Herring's trial testimony. Howard Pearl could not invent the facts, nor could he prevent Herring from testifying if he desired to do so. Herring's claimed "further evidence" of a conflict of interest collapses because it does not square with the facts and realities of the case.

To the extent that Herring now claims that Howard Pearl was ineffective for not considering "defending the case on the theory that Herring lacked the intent to harm anyone" during the robbery

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[24] As set out below, Peyton Quarles was Herring's penalty phase attorney.

giving rise to this case, that argument ignores the fact that such a theory would require Herring to admit that he was guilty of First Degree Murder under a felony-murder theory. The defendant was obviously unwilling to do that, and, for that reason, Howard Pearl cannot have rendered ineffective assistance of counsel. The "theory of defense" now advocated by Herring is not a defense at all as to the guilt phase -- it amounts to a plea of guilty.

To the extent that Herring claims that the testimony of James Russ establishes that the theory of defense used at trial was incredible, that testimony is not credible. Mr. Russ had tried only one capital case in Volusia County during the relevant time period, and, moreover, is of the opinion that Howard Pearl had a *per se* conflict of interest because of his status as a special deputy. (R1017). That testimony is in direct contradiction of this Court's decision in *Harich v. State,* 573 So. 2d 303, 305 (Fla. 1990), where this Court specifically held that such status did not create a *per se* conflict of interest. Mr. Russ did not offer his expert opinion as to what Howard Pearl should have done when Herring insisted on testifying as he did. Of course, defense counsel takes the facts as he finds them, and the defendant has an absolute right to testify if he wishes. Mr. Pearl had no options available to him, and it is disingenuous to argue, as Herring does, that the case was tried as it was because of a "conflict of interest." The fact of the matter is that this case was defended as it was because no other theory

was available as a result of Herring's actions. Mr. Pearl tried the case based upon the facts as he found them, and it is absurd to suggest that a "conflict of interest" influenced Mr. Pearl's decision not to invent facts to replace those that were unfavorable. Counsel's duty does not extend that far, and the suggestion to the contrary is without legal support.

To the extent that Herring asserts that Howard Pearl "abandoned" him at the penalty phase of his capital trial, that claim has no factual support. Co-counsel Quarles was responsible for the penalty phase of the trial, and, contrary to Herring's claims, Howard Pearl's claimed ineffectiveness does not carry over into that part of the trial. *See, Mills (Gregory) v. State,* 603 So. 2d 482 (Fla. 1992) (Ineffective assistance of counsel inquiry focuses on attorney with responsibility for conducting penalty phase). Contrary to Herring's statement that "the law does not . . . tightly compartmentalize a bifurcated capital trial", that is precisely the case. In addition to failing because the facts do not support it, Herring's "claim" fails because it has no legal support.[25] *Mills, supra; Breedlove, supra; Remeta, supra.* The 3.850 trial court's denial of relief should be affirmed in all respects.

II. THE "FAILURE TO ARTICULATE A STRATEGIC RATIONALE" CLAIM

[25] Herring's reference, on page 70 of his brief, to the recently proposed minimum standards for appointed capital case counsel is meaningless -- those proposals came years after Herring's trial.

On pages 71-75 of his brief, Herring argues that because Howard Pearl was unable to articulate a "strategic rationale" for various decisions made during the course of this representation (because he could not remember due to the passage of time), the State is somehow precluded from showing that Howard Pearl's performance was **not** affected by the alleged conflict of interest. According to Herring, Howard Pearl's lack of memory "rebuts any presumption that his conduct was reasonable." *Initial Brief*, at 75. This "claim" has no legal basis because it is based on a false premise that ignores well-settled law regarding the evaluation of ineffective assistance of counsel claims.

Contrary to Herring's claim, there is no legal support for his "presumptive unreasonableness by default" theory. The law is, however, well-settled, that:

> . . . whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and its progeny.
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> Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). That result is no accident but instead flows from deliberate policy decisions the Supreme Court has made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential," and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance." *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66. The Supreme Court has instructed us to begin any ineffective assistance inquiry with "a strong presumption that counsel's conduct falls

> within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *accord, e.g., Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992) ("We also should always presume strongly that counsel's performance was reasonable and adequate ...."). Because constitutionally acceptable performance is not narrowly defined, but instead encompasses a "wide range," a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden. As we have explained:
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>> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.
>
> *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir. 1992).

Waters v. Thomas, 46 F.3d 1506, 1511-12 (11th Cir. 1995). Contrary to Herring's hyperbolic claims, there is no legal basis for concluding that, when counsel does not remember why he did a particular thing, he must have been either ineffective or laboring under a conflict of interest. The law is squarely to the contrary: "When counsel performs reasonably, we doubt that prejudice can exist within the meaning of *Strickland*. *See id*. at 694, 104 S. Ct. at 2068 (prejudice shown by "a reasonable probability that, **but for counsel's unprofessional errors**, the result of the proceeding would have been different") (emphasis added)." *Clisby v. Alabama,* 26 F.3d 1054, 1056 (11th Cir. 1994)(emphasis in original). Herring's argument ignores settled law, even though Herring pays

lip service to it by citation to *Strickland.* Herring's argument attempts to force a square peg into a round hole by claiming that Howard Pearl's testimony is a "mere incantation of strategy." Under settled law:

> As we stated in *Bertolotti v. State*, 534 So. 2d 386, 387 (Fla. 1988):
>
> > [I]n evaluating whether a lawyer's performance falls outside the wide range of professionally competent assistance "courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) **indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on claimant to show otherwise.**" *Quoting Blanco v. Wainwright*, 507 So. 2d 1377, 1381 (Fla. 1987).
>
> Further, the existence of another theory of defense, which may be inconsistent with the chosen theory of defense, does not mean that counsel was ineffective. *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); *Combs v. State*, 525 So. 2d 853 (Fla. 1988).

Jennings v. State, 583 So.2d 316, 320 (Fla. 1991) (emphasis added).

Herring tips his hand as to the true nature of his argument in the concluding paragraph of this claim, where he asserts that counsel's failure to remember **rebuts** any presumption of reasonableness. That argument incorrectly states the law by ignoring that the true rule of law is that counsel's performance is presumptively **reasonable,** and that there is **no** "loss of memory" exception to that rule. What Herring has attempted to camouflage as a rule based upon *Strickland* is not that at all -- it is an effort

to establish a presumption of deficient performance, which is flatly prohibited by *Strickland* itself and by the decisions of this Court on the same point of law. It is a settled rule that the defendant has a heavy burden of proof in attempting to establish an ineffective assistance of counsel claim as a basis for relief. Herring has ignored that principle in an effort to save a failing claim. Contrary to what Herring seems to argue:

> In death penalty cases, *Strickland 's* prejudice inquiry is no sanitary, academic exercise--we are aware that, in reality, some cases almost certainly cannot be won by defendants. *Strickland* and several of our cases reflect the reality of death penalty litigation: sometimes the best lawyering, not just reasonable lawyering, cannot convince the sentencer to overlook the facts of a brutal murder--or, even, a less brutal murder for which there is strong evidence of guilt in fact.

Clisby v. Alabama, 26 F.3d at 1057. Trial counsel's strategy is "not so patently unreasonable that **no** competent attorney would have chosen it." *Halliburton v. State,* 691 So. 2d 466, 471 (Fla. 1997) (emphasis added). There is no basis for relief, and the trial court's denial of relief should be affirmed in all respects.[26]

III. THE FORENSIC EVIDENCE CLAIM

On pages 75-78 of his brief, Herring complains that the Circuit Court's "rulings on the forensic evidence are clearly erroneous." *Initial Brief,* at 75. This "claim" consists of two

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[26] The relevance of this "claim" to the issue before this Court is not apparent since the trial court was not called upon to decide this case on *Strickland* grounds. Whether responsive briefing is truly necessary is open to question.

component parts, neither of which is a basis for reversal.

The first issue raised by Herring is his claim that the trial court erred in sustaining the State's objection to the testimony of forensic pathologist Werter Spitz. According to Herring's brief, that evidence was "excluded" on the State's objection that the "subject matter of the testimony 'was not specifically listed in the [3.850] motion.'" *Initial Brief*, at 75. The true reason for the exclusion of the testimony was that the testimony was not relevant because it was not related to Howard Pearl's status as a special deputy. (TR565). This Court's opinion remanding the matter to the Circuit Court for an evidentiary hearing on the Howard Pearl issue was unequivocal as to the scope of the remand:

> . . . we remand this cause to the trial judge to have an evidentiary hearing to determine whether Herring's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance. We deny relief on all other grounds.

Herring v. State, 580 So.2d at 139. The testimony of the witness was not relevant to the issue before the trial court on remand, and that court would not have abused its discretion if the evidence had been excluded in its entirety[27].

The second component of this claim is Herring's argument that the trial court did in fact consider the testimony of Dr. Spitz,

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[27] The trial court ultimately did consider the testimony -- the legal basis for the claim raised on pages 75-77 of Herring's brief is unclear. This portion of Herring's brief addresses a non-issue.

and, in so doing, erroneously found the facts based upon that testimony. Putting aside the obvious inconsistency between this sub-claim and the preceding one, the record of the proceedings demonstrates that the fact findings of the trial court are supported by competent substantial evidence, and, as such, will not be disturbed by this court. *See, e.g., Trepal v. State,* No. 87,222 (Fla., March 27, 1997); *Orme v. State,* 677 So. 2d 258, 262 (Fla. 1996) ("Our duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent substantial evidence."). Herring's forensic pathologist did, in fact, state that "anything was possible" insofar as the sequence of events at the time of the shooting were concerned, and that there was no way for him to determine which shot was fired into the victim first. (TR590; 574). The factfindings by the trial court are supported by competent substantial evidence, are not clearly erroneous, and should not be disturbed on appeal.

While the factfindings at issue above should not be disturbed, those findings are subsidiary to the finding that Howard Pearl was not ineffective for "not providing an expert who would testify to this theory of the second shot and that this absence of testimony was actually due to Mr. Pearl's special deputy status." (R1018). That finding, which is unchallenged, is the one that goes to the issue that was remanded for hearing. The findings of the trial

court are supported by competent substantial evidence, and should not be disturbed. The trial court also found, as a fact, that Howard Pearl's co-counsel, as well as the defense expert, James Russ, "stated that using an accident theory of defense to explain the second deadly shot was not viable, especially in the light that the Defendant testified at trial that another person shot the victim." (TR1018). That finding is likewise unchallenged by Herring.

The true issue is not whether the testimony of Dr. Spitz was improperly excluded, nor is it whether the trial court's factfindings as to that testimony are wrong. The issue is whether or not Howard Pearl did not present such testimony because of his special deputy status and thereby rendered ineffective assistance of counsel. Herring does not raise that issue in his brief, choosing instead to argue a claim that is not relevant to this Court's remand, and is not even related to the issue that this Court must decide. This testimony, assuming *arguendo* that it could have been used at trial, could only have been useful at the penalty phase -- that part of the trial was not Howard Pearl's responsibility. See pages 28-29, above. There is no suggestion that this issue is related in any way to Howard Pearl's special deputy status. There is no basis for reversal to be found in this issue, and the circuit court should be affirmed in all respects.

CONCLUSION

Based upon the foregoing, the Circuit Court's denial of relief should be affirmed in all respects.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
FLA. BAR #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief of Appellee has been furnished by U.S. Mail to John R. Hamilton, Foley & Lardner, 111 North Orange Avenue, Suite 1800, P.O. Box 2193, Orlando, Florida 32802-2193; Jeremy G. Epstein, Shearman & Sterling, Citicorp Center, 153 East 53rd Street, New York, New York 10022 and Leon H. Handley, Gurney & Handley, P.A., 225 East Robinson Street, Suite 450, Orlando, Florida 32801, this ______ day of December, 1997.

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Of Counsel