SUPREME COURT OF FLORIDA

Case No. 89, 937

TED HERRING,

Appellant,

-vs.-

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

LEON H. HANDLEY
GURNEY & HANDLEY, P.A.
225 East Robinson Street
Suite 450
Orlando, Florida 32801
(407) 843-9500

JON M. WILSON
Florida Bar No. 0139892
JOHN R. HAMILTON
Florida Bar No. 774103
FOLEY & LARDNER
111 N. Orange Avenue
Suite 1800
P.O.Box 2193
Orlando, Florida 32802-2193
(407) 423-7656

JEREMY G. EPSTEIN
ALAN S. GOUDISS
JAMES R. WARNOT, JR.
KATHRYN TABNER
DANIEL SCHIMMEL
SHEARMAN & STERLING
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Attorneys for Appellant

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INTRODUCTION

Nowhere in its answering brief does the State dispute that Detective Dozell Varner's testimony was devastating to Herring. This concession is for good reason -- the trial court based its finding of witness elimination motive exclusively on Varner's testimony, and this Court has repeatedly recognized that without Varner's testimony there would be no foundation for the witness elimination aggravating factor. Without that aggravating factor, Herring would not have been sentenced to death.

In apparent disregard of the entire hearing record, the State claims that Varner's testimony stands unchallenged. To the contrary, the record overwhelmingly demonstrates that Herring's trial counsel, Howard Pearl, failed to make use of the numerous opportunities available to him for undermining Varner's testimony. As Herring demonstrated at the hearing below and in his Initial Brief ("Init. Br.") here,[1] Varner's trial testimony was contrary to Herring's taped confession, contrary to the testimony of Varner's fellow investigating officers, and

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[1] Contrary to the State's contention, Answer Brief of the State of Florida ("St. Br.") at 1, Herring's Statement Of The Facts And The Case in his Initial Brief complies fully with the Florida Rules of Appellate Procedure. Herring's brief gives a full and fair statement of the case, as contemplated by Rule 9.210(b) of these Rules. See, e.g., Thompson v. State, 588 So. 2d 687 (Fla. 1st DCA 1991) (initial brief must provide Appellate Court with full and fair statement of the case). Moreover, this Court has repeatedly stated that, in death penalty cases, it will exercise careful scrutiny of the facts to ensure that the death penalty is reserved for "only the most aggravated and unmitigated of [the] most serious crimes." Jones v. State, 23 Fla. L. Weekly S36 (Fla. Jan. 15, 1998) (citing cases).

in fact, differed from his own pre-trial testimony. Not only could Pearl have destroyed Varner's testimony based on these facts alone, but Varner's general credibility also could have been easily attacked with evidence that Varner had an atrocious record as a police officer -- including numerous citations for misconduct and lack of integrity -- and the fact that Varner himself was a suspect in a criminal investigation underway during Herring's trial. Pearl, however, did not use any of these fertile grounds for impeaching the witness whose few lines of testimony doomed Herring. Pearl did not challenge Varner at all: he asked a few questions regarding whether Herring had been given food and rest during interrogation and then sat down.

In support of Pearl, the State is ultimately reduced to the standard incantation of "trial strategy," a defense that cannot be established here, for it presupposes that the record supports a finding that the challenged conduct resulted from articulated strategic decisions. Here, in contrast with his clear recollection of the trials of his other former clients who participated in the December 1992 evidentiary hearing, Pearl remembered nothing of Herring's trial and made no claim that his acts were the product of strategic choices. The State concedes Pearl's amnesia and offers no answer to Herring's argument that a finding of trial tactics requires, at a minimum, a record that identifies counsel's purported strategic decisions. The State is simply wrong that any initial presumption that Pearl's conduct was reasonable can be made irrebuttable by memory loss, and the showing made by Herring rebuts any such presumption. The speculations of the State and the Circuit Court simply do not substitute for evidence of "strategy."

At bottom, the record evidence compels a finding that Pearl's failure to challenge Varner or any of the other law enforcement witnesses at Herring's trial resulted from his need to remain in the good graces of the Marion County Sheriff and of law enforcement generally so that he could carry a concealed firearm in the State of Florida, a privilege that was of vital importance to Pearl. This is precisely the type of personal interest that can create, and in this case did create, a disabling Sixth Amendment conflict. The State disputes none of the record evidence on the following critical points:

- The ability to carry a concealed firearm was extremely important to Pearl, who felt "naked, incomplete, lonesome" without a gun. 1996 Tr. at 36; 1992 Master R.O.A. at 284-85, 299-301.[2]
- At the time of Herring's trial, Pearl had the ability to carry a concealed firearm only through his special deputy status, which he retained solely

[2] For record citations, Herring follows in this Reply Brief the same convention utilized in his September 23, 1997 Initial Brief of Appellant. See Init. Br. at 5 n.1 & 7 n.2.

through the good graces of the Marion County Sheriff. 1996 Tr. at 49-50; 1992 Master R.O.A. at 171, 18889, 288-89.

- **M** Pearl did not disclose his special deputy status to his clients because he believed that they would have declined to be represented by him had they known; 1992 Master R.O.A. at 886-887; Teffeteller Exh. 2 (Affidavit of Nancy K. Feinrider sworn to March 23, 1989); 1996 R.O.A. at 523-24; Init. Br. at 14-15.

- **M** Pearl recognized that affiliations with law enforcement can consciously or subconsciously affect the decision making of participants in a criminal trial. Init. Br. at 15; 1992 Master R.O.A. at 811.

- **M** Pearl admitted that it would have been improper to have been a special deputy in Volusia County and conceded that nothing changed when he crossed the Marion County line on his way home from work each evening. 1996 Tr. at 63; 1992 Master R.O.A. at 431, 979.

- **M** Pearl admitted that the duties of a criminal defense lawyer inherently conflict with those of a law enforcement officer. 1996 Tr. at 64; 1992 Master R.O.A. at 312-13.

- **M** Pearl could not recall a single specific instance in any case where he challenged the credibility of law enforcement witnesses. 1996 Tr. at 65, 178; 1992 Master R.O.A. at 320.

- **M** In Herring's case, Pearl admitted that he chose an inherently incredible trial strategy and a tactical approach to each witness that avoided attacking law enforcement. Init. Br. at 33-34; 4445.

- **M** Pearl failed to utilize the numerous means at his disposal to impeach directly Vamer's testimony. Init. Br. at 16-30.

- **M** Pearl acknowledged that Vamer's testimony was extremely damaging to Herring's case and provided "the blueprint for [the] statutory aggravating circumstances." 1992 Master R.0.A. at 331, 332, 391; St. Br. at 34.

The adverse effect of Pearl's performance establishes his conflict as a matter of law, and absent an outright confession of conflict by Pearl at the evidentiary hearing, there could be no better chain of inferences leading from Pearl's status to the adverse effect on his representation of Herring.

ARGUMENT

I. PEARL'S DEFICIENT PERFORMANCE AND CONFLICT OF INTEREST PREJUDICED HERRING

The parties agree that Herring is entitled to relief if Pearl's special deputy status constituted an actual conflict of interest and that conflict adversely affected Pearl's representation of Herring. Init. Br. at 46-47; St. Br. at 40-41; see Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). To meet the Cuyler standard of

adverse effect, however, Herring "is not required to go so far as to prove that the outcome of his trial would have been different [i.e., prejudice]." LoConte v. Dulzger, 847 F.2d 745, 754 (11th Cir.), cert. denied, 488 U.S. 958 (1988); Cuyler, 446 U.S. at 346-50; Freund v. Butterworth, 117 F.3d 1543, 1571 (11th Cir. 1997); see Init. Br. at 61, 71. Rather, Herring need only show that Pearl's conflict had an adverse effect on his trial performance and prejudice is thereafter presumed. LoConte, 847 F.2d at 754; Strickland v. Washington, 466 U.S. 668, 696 (1984); Freund, 117 F.3d at 1571. That, we respectfully submit, Herring easily does here.

The Eleventh Circuit's decision in Freund provides guidance in analyzing the issues before this Court because the facts of Freund and Herring are strikingly similar and both cases address the exact same legal issues. Init. Br. at 55-57. In Freund, two defendants (Freund and Trent) were charged with murder. Freund, 117 F.3d at 1556. The State's theory of the case -- that Freund, not Trent, stabbed the victim to death -- was weak because all the physical evidence pointed to Trent, and only one witness, who had "serious credibility problems," claimed that she had seen Freund commit the crime. Id. at 1546, 1556.

At trial, Freund was represented by a law firm that had a strong incentive not to antagonize Trent, a former client of the firm, who had made damaging statements about the firm and had the ability to further harm the firm's reputation. Id. at 1579. Antagonizing Trent would have "posed serious risk to the law firm's own interests." Id. at 1547.

Freund's trial counsel had a choice of at least two theories of defense. Id. at 1580. To argue that Trent had committed the crime and to put the State to its burden of proof would have been a strategy "more than reasonable under the facts of [Freund's] case," but inconsistent with the firm's own interests. Id. at 1580, 1582. Freund's counsel opted instead for the much weaker defense that Freund was insane at the time of the crime. Id. at 1556, 1581 n. 91.

In Freund, like here, the State's theory of the case relied on a witness "with serious credibility problems;" defense counsel had an incentive to avoid impeaching that witness, because doing so would pose serious risks to his own interests; as a result, defense counsel, who had a choice of strategies, opted for a strategy that was "the least antagonistic" to his interests. Freund, 117 F.3d at 1546-47, 1577, 1581-82; Init. Br. at 56. Quite understandably, the State seeks to trivialize Freund (and all other federal cases) in a footnote, but the State cannot dispute that Freund is the conflict case with a factual scenario most similar to Herring. The State's failure even to address Freund is compelling evidence of precisely how close it is to the facts of this

case. Freund holds that the inquiry into *actual conflict and adverse effect* necessarily interrelate and that significant evidence of *adverse effect* is by itself sufficient to demonstrate an *actual conflict* under Cuyler. Freund, 117 F.3d at 1571 ("The adverse effect leaves us with no doubt, for instance, that the conflict was very real").

Despite the State's efforts to bury Freund in a footnote, this Court and lower Florida courts do not hesitate to take guidance from the Eleventh Circuit in addressing constitutional issues in capital cases. See, e.g., Rose v. State, 675 So.2d 567, 571-72 (Fla. 1996) (relying upon the legal standard outlined by the Eleventh Circuit in considering a claim of ineffective assistance of counsel in a capital trial); Lee v. State, 690 So.2d 664, 667 (Fla. 1st DCA 1997) (applying the test outlined by the Eleventh Circuit for waiver of right to conflict-free counsel).

As in Freund, Pearl's incentive not to antagonize critical witnesses and to opt for a defense that served his own interests was utterly incompatible with his obligation to represent Herring zealously, an obligation going to "the very foundation of justice" in a case involving the death penalty. Freund, 117 F.3d at 1573, 1579 (citing Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985)).

A. Pearl's Conflict Adversely Affected His Representation Of Herring

To demonstrate adverse effect, Herring must first "point to `some plausible alternative defense strategy or tactic [that] might have been pursued' . . . [and that] was reasonable under the facts." Freund, 117 F.3d at 1579-80 (citing United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985)). Second, Herring must also demonstrate that that alternative strategy was "`inherently in conflict with . . . the attorney's other loyalties or interests.'" Freund, 117 F.3d at 1580. In Freund, the Eleventh Circuit held that counsel's "choice of the least antagonistic of two defenses . . . [was] sufficient [to establish adverse effect]." Id. at 1582, n. 92. This Court should do the same.

1) The accidental shooting defense was a reasonable and plausible alternative defense

The State contends that Pearl's failure to argue the accidental shooting defense to the jury and concurrently to impeach law enforcement witnesses had no adverse effect on Herring's representation. St. Br. at 27-37. In support of that contention, the State explains (i) that the accidental shooting defense was doomed to failure because the clerk was shot twice; (ii) that Pearl could not have argued that defense to the jury because Herring's testimony locked him into an incredible theory of defense; (iii) that the accidental shooting defense

and the concomitant impeachment of law enforcement witnesses only would have been relevant at the penalty phase for which Pearl was not responsible; and (iv) that the defense was hopeless because Varner's testimony was accurate and the law enforcement witnesses were not impeachable. Id. These explanations are contrary to Florida law and the evidence in this case.

(a) The State's contention that the accidental shooting defense was doomed to failure because the clerk was shot twice is contrary to Florida law and to the evidence in Herring's case

The State contends that the accidental shooting defense was "doomed" and that Herring's was a hopeless case "that simply [could not] be won" because the clerk was shot twice. St. Br. at 28-32, 34. It is unclear whether this comment is directed only to the guilt phase or to the case as a whole. But if the State means that the death penalty was inevitable, its assertions ignore Florida law on the avoidance of arrest aggravator; ignore the record; ignore that any lawyer looking at the case would have known that the critical issue in Herring's case was not Herring's guilt, but the penalty; and ignore that evidence adduced at the guilt phase had a devastating effect at the penalty phase.

As this Court has repeatedly held, in cases cited in Herring's Initial Brief and in decisions issued since that brief was filed, the avoidance of arrest aggravator is proper only upon a clear showing that "the dominant or [sole] motive for the murder was the elimination of witnesses." Oats v. State, 446 So. 2d 90, 95 (Fla. 1984); see Init. Br. at 64-67. The avoidance of arrest aggravator is found where the "only logical inference from [the] facts is that [the defendant] killed the victim to eliminate her as a witness." Wike v. State, 698 So. 2d 817, 823 (Fla. 1997), cert. denied, 118 S. Ct. 714 (1998) (emph. added).

The State, however, never contends that the killing at issue was anything other than a robbery gone bad, and makes no attempt to sustain its burden of showing that, without Varner's testimony, the State could have proved that witness elimination was Herring's "dominant or sole motive." As this Court's decisions on many occasions demonstrate, the second shot alone certainly does not satisfy this burden, notwithstanding the State's assertion. St. Br. at 28. In Armstrong v. State, 399 So. 2d 953, 963 (Fla. 1981), this Court held that evidence that the victims were shot and then, "after the initial shooting were laid [sic] out prone and then `finished off,'" was insufficient to establish witness elimination. In Caruthers v. State, 465 So. 2d 496 (Fla. 1985), under circumstances virtually identical to this case, this Court struck down the witness elimination aggravator and reversed the death sentence where the defendant shot a convenience store clerk (who knew the

defendant) not twice, but three times. Id. at 498-99. And, in Griffin v. State, 474 So. 2d 777 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986), this Court explicitly drew a comparison to Herring's case and held that "[u]nder near identical circumstances," including a second shot, there was no basis for the aggravator in the absence of testimony on par with Varner's. Id. at 781;[3] see also Init. Br. at 64-67.

Just two months ago, in Pomeranz v. State, 703 So. 2d 465 (Fla. 1997), this Court struck down the avoidance of arrest aggravator and reversed the death sentence where the defendant shot a store clerk five times (three times, then twice again at close range after the clerk had collapsed on the floor). Even though the record established that there was an interval of up to twenty seconds before the last two shots were fired at the victim who was on the floor, this Court held that there was insufficient evidence to support a finding that the murder was committed to avoid arrest. Id. at 466-67, 471.

Absent the witness elimination aggravator,[4] the State's conclusory assertion that Herring was a case that "cannot be won," St. Br. at 32, is simply insupportable in light of cases such as Caruthers and Livingston v. State, 565 So. 2d 1288 (Fla. 1988); see Init. Br. at 64-67.[5] Indeed, Herring's case is strikingly similar to Livingston. There, after invalidating the witness elimination aggravator because the State had not "established beyond a reasonable doubt that eliminating the murder victim as a witness was the dominant or [sole] motive," 565 So. 2d at 1292, the remaining aggravating factors were (i) previous conviction of violent felony and (ii) that the killing was committed during an armed robbery. Id.[6] Absent Varner's testimony, these would be the same two aggravators remaining in Herring's case. After weighing these two remaining aggravators against mitigating factors almost identical to those in Herring's case -- troubled childhood, youth at the time of the crime, and marginal intellectual functioning -- this Court held in Livingston:

> we find that this case does not warrant the death penalty

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[3] Because, unlike here, there were no mitigating circumstances in Griffin, this Court affirmed Griffin's sentence.

[4] This Court previously struck down the heightened premeditation aggravator in Herring v. State, 580 So. 2d 135, 138 (Fla. 1991).

[5] In its analysis of the avoidance of arrest aggravator, the State admits that the "testimony of Detective Vamer supported the finding of the avoiding arrest aggravator," but does not cite any other evidence of witness elimination. St. Br. at 34. That is because there is none.

[6] Again, as in Armstrong, Caruthers, and Griffin, this Court struck down the aggravator even though multiple shots were fired.

> and, therefore, vacate that sentence and direct the trial court to resentence Livingston to life imprisonment with no possibility of parole for twenty-five years.

Id.; see also Caruthers, 465 So. 2d at 499.[7] In Jones v. State, this Court has recently held that under Florida's capital sentencing scheme, imposition of the death penalty must be limited to cases involving facts far more egregious than Herring's and offering little or no mitigating circumstances. Jones v. State, 23 Fla. L. Weekly S36 (Fla. Jan. 15, 1998) (death sentence reversed where robbery victim shot twice -- first in the leg, then on top of the head -- and defendant had learning disabilities with IQ of 76.) This Court added that

> [t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions `the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes.' State v.Dixon, 283 So. 2d 1, 7 (Fla. 1973).

Id. at S36. Thus, absent the witness eliminator aggravator, the State's assertion that this case "cannot be won," St. Br. at 32, is contrary to years of consistent rulings of this Court. Moreover, as James M. Russ testified at the 1996 hearing,[8] the accidental shooting defense was a feasible theory of defense, and the case as a whole could have been won. 1996 Tr. at 716.[9]

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[7] At the very least, invalidation of the witness elimination aggravator would mandate a new sentencing hearing, since this Court "cannot know" whether "the result of the weighing process by both the jury and the judge [would] have been different had the impermissible aggravating factor not been present...." Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). Such a finding is consistent with this Court's 1991 opinion in Herring's case, where it declined to order a new sentencing hearing after striking the heightened premeditation aggravating factor because "the facts and circumstances . . . regarding how Herring committed the murder are [not] changed." Herring, 580 So. 2d at 138. If Pearl had properly impeached Varner, of course, those "facts and circumstances" would be very much changed.

[8] The State seeks to belittle Mr. Russ's testimony by contending that he had tried but a single capital case in Volusia County before Herring's trial. St. Br. at 36. Mr. Russ's qualifications in the field of criminal defense are beyond reproach and are evidenced not only by his experience in trying criminal cases in Florida, including death penalty cases, but also by his numerous other activities, including as a member of this Court's Committee on Standard Instructions in Criminal Cases, as a member of numerous committees of The Florida Bar, and as First Vice President of the National Association of Criminal Defense Lawyers. 1996 R.O.A. at 841-43. Moreover, the State's assertion is wrong. Mr. Russ actually testified that before Herring's trial, he had tried no less than eight capital cases in Florida, but could not recall how many cases he had tried in Volusia County. Init. Br. at 49 n.8.

[9] Mr. Russ's testimony demonstrates that there were at least two reasonable alternative theories of defense available to Pearl in Herring's case. Mr. Russ testified that while the accidental

(b) The State's claim that Herring's testimony locked Pearl into an incredible theory of defense is contrary to the evidence

The State contends that Herring's testimony locked Pearl into an incredible theory of defense and precluded Pearl from arguing the accidental shooting defense to the jury. St. Br. at 3, 4, 35, 36, 37. That contention squarely contradicts Pearl's testimony at the 1996 hearing.

At the 1996 hearing, Pearl admitted that he never would have argued to the jury the accidental shooting defense, even if Herring had not testified that another man entered the 7-Eleven store during Herring's attempted robbery and shot the clerk. 1996 Tr. at 185.

Init. Br. at 45-46. Pearl testified as follows:

> Mr. Daly, one thing I fail to understand, if a man commits [a] [sic] armed robbery and shoots a victim in the course of it, there is no such thing as accidentally.[10]

1996 Tr. at 185. Thus, from Pearl's own words, his election to avoid the accidental shooting defense was not attributable to Herring's testimony.

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shooting defense was a possible theory of defense, Mr. Russ's proposed defense would have put the State to its burden of proving each element of felony murder, focusing on the reliability and voluntariness of Herring's confession, the critical element of the State's case: Herring's confession -- that of a 19-year-old individual with disabilities bordering on mental retardation -- was elicited after 7 1/2 hours of interrogation by police officers whose credibility and police techniques were impeachable in numerous ways. 1996 Tr. at 619-27, 638-39, 640, 716.

In Freund, the Eleventh Circuit held that, in a death penalty case, putting the State to its burden of proving each element of the charged offense is always a reasonable theory of defense, even where defense counsel knows that his client committed the offense. Freund v. Butterworth, 117 F.3d 1543, 1572-73 (11th Cir. 1997). That is because defense counsel's duty to represent his client zealously in a death penalty case goes to the foundation of justice, and it is not counsel's role to determine guilt or innocence. Id. Accordingly, both Freund and Mr. Russ's testimony demonstrate that at least two reasonable theories of defense were available to Pearl. His election of either of these theories could likely have precluded the imposition of the elimination of witness aggravator and the death penalty.

[10] Pearl's failure to understand that the shooting of the 7-Eleven clerk was accidental is puzzling in light of Herring's pre-trial confession that in the four other similar armed robberies that he committed during the same time period, he never fired his gun or harmed anyone. 1982 Supp. R.O.A. at 103-09; Init. Br. at 5. This Court has, on numerous occasions, vacated a death sentence where the record established that in the course of a robbery gone bad, the defendant's gun accidentally discharged. See, e.g., Sinclair v. State, 657 So. 2d 1138, 1139, 1142-43 (Fla. 1995) (death sentence vacated where record established that two gunshot wounds were caused by accidental discharge). If anything, Pearl's testimony at the 1996 hearing condemns his performance, since it demonstrates that Pearl apparently cannot distinguish between felony murder and capital murder.

In addition, Pearl's alleged failure to remember anything about his trial strategy is by itself sufficient to deprive the State of the evidence it needs to show that Herring's testimony was forced upon Pearl. To make its showing, the State is reduced to relying on six lines of vague and conclusory testimony by Pearl. 1996 Tr. at 176; St. Br. at 3. There, Pearl testified as follows:

> Well, my recollection of the trial itself is not refreshed. It's just too long ago. It does, however, indicate to me what the defense was. The one thing I didn't remember was that Mr. Herring had taken the witness stand and had decided, by doing so, to behandle [sic] his own case, more or less.

1996 Tr. at 176. These six lines simply reflect Pearl's interpretation of the transcript and do not constitute evidence that Herring forced upon Pearl his decision to testify and the contents of Herring's testimony. To the contrary, Pearl's testimony at the 1996 hearing revealed a disinclination to recall any evidence and arguments presented at trial and a virtually complete amnesia of Herring's trial. Init. Br. at 37-43. According to Pearl, he "recall[s] nothing about it, [his] preparation of this case or its trial[,] [o]r so little that it would be of no value to you." 1996 Tr. at 95; 1992 Master R.O.A. at 329.

(c) The State's contention that the accidental shooting defense was relevant only to the penalty phase for which Pearl was not responsible is contrary to Pearl's responsibilities at Herring's trial

Running through the State's brief are contentions that Pearl was responsible only for the guilt phase of Herring's trial; that the accidental shooting defense could only have been used at the penalty phase of that trial; and that Pearl is thus not accountable for his failure to argue that defense. St. Br. at 5, 9, 28, 30, 31, 36, 37. These contentions miss the point: Pearl's failure to impeach Varner in the guilt phase let stand unchallenged the most damaging penalty phase evidence:

- The most devastating evidence against Herring was adduced at the guilt phase of Herring's trial (for which Pearl admits that he was responsible), and had a carry over effect at the penalty phase. See, e.R., Maizill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987) (counsel's deficient performance at the guilt phase can prejudice defendant at penalty phase); Init. Br. at 69-70.

- Pearl admitted that he remained Herring's counsel until after the conclusion of the trial, and that he played an active part in Herring's sentencing at the end of the case. 1996 Tr. at 155-56; Init. Br. at 69.

- As Herring's counsel of record, Pearl came under an obligation to supervise all aspects of Herring's case. See Hawkins v. Fulton County, 96 F.R.D. 416, 421 (N.D. Ga. 1982) (counsel of record has duty to supervise all aspects of litigation, to exercise care in selecting attorneys who will work on case, and to supervise their work); Init.

Br. at 70.[11]

> " The testimony of Professor Gillers and of Mr. Russ at the 1996 evidentiary hearing was that Pearl, as counsel of record, and as the most experienced lawyer in this case, was responsible for the entire trial. 1996 Tr. at 478, 677; Init. Br. at 49, 51.

The State's attempts to rely on Breedlove v. State, 692 So. 2d 874, 875 (Fla. 1997), Remeta v. State, 622 So. 2d 452, 454 (Fla. 1993), cert. denied, Remeta v. Singletary, 117 S. Ct. 1320 (1997), and Mills v. State, 603 So. 2d 482 (Fla. 1992) are misguided because none of these cases draws the artificial line between the guilt phase and the penalty phase of a capital trial that the State claims exists. St. Br. at 30. These cases all recognize that one attorney may be primarily responsible for the guilt phase of a capital trial and another attorney for the penalty phase of that trial. Breedlove, 692 So. 2d at 875; Remeta, 622 So. 2d at 454; M&, 603 So. 2d at 483. None of these cases deny that evidence adduced in the guilt phase can be critical to the penalty phase, however. Nor do Breedlove, Remeta, or Mills even suggest that the attorney primarily responsible for the guilt phase is absolved of responsibility when he fails to challenge such evidence, despite having numerous means to do so.

Accordingly, none of Breedlove, Remeta, and Mills authorizes Pearl's complete abandonment of Herring at the penalty phase.[12]

(d) The State's contention that Varner's testimony was accurate and that Varner and White were not impeachable is contrary to all of the evidence in Herring's case

The State finally contends that no alternative defense was available to Pearl because "there is no showing that [Varner's] testimony was inaccurate," St. Br. at 34, and because Varner and White were not impeachable. St. Br. at 5-8. Herring's Initial Brief provides ample demonstration that Varner's testimony was inaccurate and a detailed description of the numerous avenues of impeachment of Varner's testimony that Pearl

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[11] This Court's proposed minimum standards for appointed counsel in capital cases demonstrate that it views lead trial counsel in a capital case as a supervisor in charge of reviewing the work of less experienced co-counsel. In re Proposed Amendment To Florida Rules Of Judicial Administration -- Minimum Standard For Appointed Counsel In Capital Cases, No. 90,635 slip. op., (Fla. July 3, 1997); See Init. Br. at 70.

[12] In addition to poisoning the penalty phase by his conduct in the guilt phase, Pearl abdicated his duties to Herring by walking out the door in full view of the jury five minutes after the beginning of the penalty phase. See Clark v. State, 690 So. 2d 1280, 1283 (Fla. 1997) (counsel's attempts to distance himself from his client in penalty phase in full view of jury constitutes abdication of his responsibilities to his client).

failed to explore. Init. Br. at 16-30. The forensic evidence adduced at the 1996 hearing, the testimony of Varner's own colleagues, and Herring's taped confession all provide overwhelming evidence that Varner's testimony about the witness elimination was utterly inaccurate. Indeed, the forensic evidence was offered to prove a simple but irrefutable point: the shooting could not have happened the way Varner said it did. Dr. Spitz's testimony demonstrates that both shots were fired at the 7-Eleven clerk in rapid succession as the clerk was standing behind the counter and not as Varner suggested, "as the clerk was lying on the floor" in order to eliminate a witness. 1982 Supp. R.O.A. 550-51; Init. Br. at 16-17, 25-30; see infra at 30-31. Varner's testimony also offered numerous avenues of impeachment that Pearl failed to explore:

- Herring's taped confession contained no mention of the clerk being still alive when he was hit by the second bullet. 1982 Supp. R.O.A. at 12627; Init. Br. at 18.
- Varner's testimony was contrary to that of White and Anderson. 1982 Supp. R.O.A. at 523; 1982 Supp. R.O.A. at 556; Init. Br. at 19.
- Varner's superior at the time testified that if unrecorded statements such as those alleged by Varner had been made, good police practice required to obtain those statements on a tape. 1996 Tr. at 332-33; 1992 Master R.O.A. at 490-91; Init. Br. at 19-20.
- The tape of Herring's confession showed that the only person who talked about eliminating a witness was Varner. 1982 Supp. R.O.A. at 121; Init. Br. at 20.
- Varner's record as a police officer was deplorable and included, during the three years prior to Herring's trial, 25 disciplinary violations, including infractions for overall poor performance, exercising poor judgment, assorted rules violations, and untruthfulness. Init. Br. at 22-25.
- Forensic evidence demonstrates that neither of the shots was fired when the victim was on the floor. 1996 Tr. at 576-77; Init. Br. at 25-30.

The State also alleges that an alternative defense involving the aggressive impeachment of Varner and White was not reasonable because these officers were not impeachable. St. Br. at 5-6, 8-9. Specifically, the State contends that Varner's disciplinary record was "common," St. Br. at 8-9, and that the arrest of Wendy Varner for grand theft at the time of Herring's arrest had no bearing on Varner's credibility. St. Br. at 5-6, 8. The State also argues that White was not impeachable because "[t]here was nothing to be gained by arguing over [White's] tape erasure." St. Br. at 4-5.

No witness who testified about Varner's disciplinary record at the 1996 hearing concluded that Varner's record was "common." St. Br. at 8-9. While Paul Crow, Varner's superior at the time, did testify that some of the *verbal* reprimands appearing on Varner's record were common, 1996 Tr. at 355-56, Crow

described the entirety of Varner's record (including infractions for untruthfulness, exercising poor judgment, and overall poor performance) as "quite a sheet." 1996 Tr. at 339, 341, 355; Exh. 23, 1996 R.O.A. at 528-30; Init. Br. at 22-23. Crow further testified that he "didn't think that [Varner] was criminal investigation material," and that his record was not that of "a first rate policeman." 1996 Tr. at 339; 1992 Master R.O.A. at 516-518.[13]

Equally inaccurate is the State's contention that Varner was not a suspect in the investigation of his wife for grand theft, which would have given Varner a reason to fabricate his testimony. St. Br. at 8. Not only was Varner a suspect in that investigation, but Crow testified that he came to question Varner's integrity, and that Varner's refusal to take the equivalent of a lie detector caused him concern. 1996 Tr. at 329, 339-40, 350, 359; 1992 Master R.O.A. at 493-99; Exh. 27, 1996 R.O.A. at 1004; Init. Br. at 23-24. Accordingly, Varner's sordid record and the contemporaneous investigation for grand theft provided Pearl with numerous avenues of impeachment that he carefully avoided.

The State also argues that White's testimony was not impeachable because there was nothing to gain by arguing over his destruction of an entire tape of Herring's confession. St. Br. at 4-5. At the 1996 hearing, Pearl admitted that the taped confession of Herring was important, and that during his trial examination of White, Pearl failed to ask a single question about White's destruction of an entire tape. 1996 Tr. at 141-42. Pearl also conceded that the tapes could have contained material helpful to Herring. 1996 Tr. at 196. At a minimum, Pearl should have challenged White's testimony regarding his alleged accidental destruction of the tape. Derrick v. State, 581 So. 2d 31 (Fla. 1991) (defense counsel always entitled to cast doubt on validity of prosecution witness' testimony). Pearl also could have challenged White's suppression hearing testimony that no exculpatory material was on the tape. See Freund, 117 F.3d at 1572-73 (counsel "may always put the prosecutor to his burden of proving every element of the charged offense," in particular in death penalty case, where professional duty of counsel goes to the very foundation of justice). Thus, the State's contention that there was nothing to be gained by questioning White about his destruction of evidence is preposterous on its face.

2) The Strategy Of Challenging Law Enforcement Was Inherently In Conflict With Pearl's Need To Carry A Firearm

[13] At the 1992 hearing, the Circuit Court erroneously allowed only a proffer of that portion of Crow's testimony. 1992 Master R.O.A. at 517-18.

To show the adverse effect of Pearl's conflict, Herring must demonstrate that adopting an alternative defense strategy would have required the aggressive impeachment of a witness that counsel had a strong incentive not to antagonize. Freund, 117 F.3d at 1579 (defense strategy inherently conflicts with law firm's interests where strategy involves impeaching witness that law firm fears antagonizing because witness may retaliate); see also United States v. Harris, 846 F. Supp. 121, 129-30, 133 (D.D.C.), remanded by, 24 F.3d 1464 (D.C. Cir. 1994); Init. Br. at 63.

The evidence of inherent conflict between Pearl's duty to aggressively impeach Varner, White, and Anderson and Pearl's personal interest in retaining his permission to carry a concealed firearm and resulting need to maintain the good graces of law enforcement is overwhelming:

- Pearl never challenged the credibility of any law enforcement witness.
- Pearl did not disclose his special deputy status to his clients because he believed that they would have declined to be represented by him had they known.
- Pearl admitted that he inquires into the law enforcement affiliates of prospective jurors because such affiliations may color their outlook of the case, either consciously or subconsciously.
- Pearl also admitted that a special deputy appointment in Volusia County would have been a conflict, but Pearl could not meaningfully distinguish his Marion County appointment.
- Pearl admitted that he chose an inherently incredible trial strategy and a tactical approach to each witness that avoided attacking law enforcement.
- Pearl failed to utilize the numerous alternate means at his disposal to impeach directly Varner's testimony.
- Pearl acknowledged that Varner's testimony was extremely damaging to Herring's case and provided "the blueprint for [the] statutory aggravating circumstances."

See supra at 3-4. In summary, every single step that Pearl should have taken to zealously represent Herring at trial inherently conflicted with Pearl's need to maintain the good graces of law enforcement and to carry a concealed firearm. Init. Br. at 63-64.

B. Pearl's Personal Interest In Retaining His Special Deputy Status Was In Actual Conflict With His Duties To Herring And Led To His Deficient Performance

A defense attorney has an actual conflict under Cuyler when the attorney's interests diverge from those of his client "with respect to a material factual or legal issue or to a course of action." Freund, 117 F. 3d at 1571; Harris, 846 F. Supp. at 127; Init. Br. at 58. Counsel's obligation of zealous

advocacy includes the obligation to "put [his client's] interests above all else" and an obligation to make every tactical choice based exclusively on his client's best interest. Freund, 117 F.3d at 1575. Thus, the Freund court held that an actual conflict of interest exists if counsel's "own personal interests would be compromised by pursuing a particular defense theory." Id. at 1579 (actual conflict of interest established where alternative defense strategy required aggressive cross-examination and attack on credibility of state witness that counsel had personal reason not to antagonize); United States v.Tatum, 943 F.2d 370, 375-76 (4th Cir. 1991) (counsel may "harbor substantial personal interests which conflict with the clear objective of his representation of the client"); Init. Br. at 58-59. In conducting the conflict of interest analysis, the Freund court held that strong evidence of *adverse effect* will establish an *actual conflict* under Cuyler. Freund, 117 F.3d at 1571; Init. Br. at 55-58.

The State does not dispute that the ability to carry a concealed firearm was of great importance to Pearl and admits that during the relevant time period, the office of Special Deputy Sheriff was the only mechanism by which Pearl could fulfill this need. St. Br. at 2-3. The State also admits that the Sheriff of Marion County could revoke Pearl's permit at will. St. Br. at 26. Pearl's need to remain in the good graces of law enforcement and to carry a concealed firearm is precisely the type of personal interest that may create a conflict of interest under the Sixth Amendment. Freund, 117 F.3d at 1578-79; Init. Br. at 58-61. As Professor Gillers testified at the 1996 hearing, in Herring's case, that conflict became direct and unavoidable since the facts of the case required Pearl to effectively impeach and attack the credibility of law enforcement officers.[14] 1996 Tr. at 469-75; Init. Br. at 59.

The State's reliance on Harich v. State, 573 So. 2d 303 (Fla. 1990), cert. denied, 499 U.S. 985 (1991), St. Br. at 10, 11, 13, 18, 21-24, 36, is ironic. If anything, that case confirms that Herring is entitled to the relief he seeks. In Harich, the trial court found, and this Court agreed, that Pearl "effectively crossed-examined [sic] law enforcement officers." Harich, 573 So. 2d at 305. That, of course, is precisely what Pearl did not do in Herring's case; Pearl's performance -- particularly his persistent refusal to challenge the credibility

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[14] Professor Gillers, an expert in the field of legal ethics, testified that *under the facts of this case,* Pearl harbored a conflict of interest between his personal interest in continuing to be able to carry a concealed firearm and his client's interest in having a lawyer willing to aggressively impeach Vamer, White, and Anderson. 1996 Tr. at 469-76; Init. Br. at 47-49. Contrary to the State's gross mischaracterization of his testimony, Professor Gillers never testified Pearl had a per se conflict of interest. St. Br. at 10.

of law enforcement officers despite the overwhelming impeachment evidence at his disposal -- was deficient and tainted by his affiliation with law enforcement. See Init. Br. at 16-25, 3033. And, in Harich, this Court also found that Pearl did not "bolster [law enforcement] credibility." 573 So. 2d at 305. Here, the record is replete with instances of Pearl doing just that. Init. Br. at 32-33. Thus, in Harich, this Court set forth the showings necessary to demonstrate an actual conflict that has an adverse effect, and Herring made those very showings at the hearing below.[15]

The State does not even address the test for finding an actual conflict as set forth above and in Harich, arguing instead that Pearl performed no law enforcement duties, St. Br. at 2-3, and that Pearl had a practice of challenging law enforcement witnesses. St. Br. at 32. See Init. Br. at 34-35. The State also maintains that there was no conflict because the Marion County Sheriff would not have monitored Pearl's activities in the next county. St. Br. at 33. This argument is legally irrelevant under Cuyler and its progeny as set forth above. See supra at 21-22. It is also beside the point: if anything, the issue is what Pearl thought, not the Marion County Sheriff, and Pearl knew there were tensions between his representation of criminal defendants and his special deputy status. Freund, 117 F. 3d at 1582 (critical consideration in conflict of interest analysis is that counsel could have *reasonably concluded* that engaging in aggressive impeachment of law enforcement officers would have posed risks to his own interest); see supra at 20-22; Init. Br. at 14-16.

II. THE STATE'S SPECULATION REGARDING PEARL'S SUPPOSED TRIAL TACTICS IS UNAVAILING; PEARL HIMSELF COULD NOT ARTICULATE A STRATEGIC RATIONALE FOR ANY OF HIS ACTIONS OR OMISSIONS

While the State concedes that Pearl remembered nothing of the trial and could only speculate regarding his failure to cross-examine Varner, it nevertheless argues that Pearl is entitled to rely on a presumption of reasonableness, and that Pearl's memory failure does not rebut that presumption. St. Br. at 38-41. The State's argument, differently stated, is this: even though Pearl can offer no coherent justification for anything he did at trial, the State is entitled to rely merely on a "presumption of reasonableness" to demonstrate that his conduct was proper. No Florida case says anything of the sort. Moreover, Herring does not rely on memory failure -- at the 1996 hearing, he adduced overwhelming evidence that Pearl's conduct of the case was

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[15] The State's assertion that Professor Gillers did not find this Court's ruling in Harich dispositive seriously misstates the record. St. Br. at 10. Professor Gillers testified that Herring's case offers the precise evidence of ineffective cross-examination and improper bolstering of law enforcement witnesses that this Court found missing in Harich. 1996 Tr. at 491.

indefensible, and that the alternative strategy of aggressive impeachment of Varner would have avoided the death penalty. Indeed, Pearl admitted that the defense he chose to argue to the jury was incredible, and that he would not have believed it had he been a juror in Herring's case. 1996 Tr. at 191, 194; 1992 Master R.O.A. at 399; Init. Br. at 44-45. In the face of that evidence, the State cannot simply stand put. It must, but cannot, elaborate on Pearl's strategy. That, however, cannot be done because the evidence is overwhelming that Pearl professed complete amnesia about Herring's trial, about his trial strategy, and about his abject failure to challenge the Varner testimony that by Pearl's own admission was extremely damaging. 1992 Master R.O.A. at 331, 391; Init. Br. at 16-17.

- Pearl recalled nothing about the evidence and argument presented at trial, his preparation of this case, or the trial. 1996 Tr. at 82, 85, 87, 95; 1992 Master R.O.A. at 329.
- Pearl recalled "so little [about this case] that it would be of no value to you." 1996 Tr. at 95.
- He did not even recall whether Varner was a witness. 1992 Master R.O.A. at 329.
- Pearl disclaimed any knowledge of what his trial strategy might have been. 1996 Tr. at 93, 94, 95, 116, 118, 134, 143, 148, 195, 196.
- He repeatedly conceded that any strategy that he might discern from his review of the record was pure speculation. 1996 Tr. at 94, 134, 135, 149, 185, 195, 196.

Thus, Pearl articulated nothing, and the State merely argues that this case could not be won because the clerk was shot twice, St. Br. at 28, 32, and that Pearl's trial decisions, whatever they might have been, cannot be challenged. St. Br. at 38-41. In the face of contrary evidence, however, the presumption of reasonableness will hold up only where trial counsel is able to describe his trial strategy and to articulate reasons for his trial decisions. See, e.g., Rose v. State, 675 So. 2d 567, 570 (Fla. 1996); Flores v. State, 62 So. 2d 1350, 1351 (Fla. 2d DCA 1995). As the Eleventh Circuit has repeatedly held, the State's "mere incantation of `strategy'" is entitled to no weight. Stevens v. Zant, 968 F.2d 1076, 1083 (11th Cir. 1992), cert. denied, 507 U.S. 929 (1993); see Init. Br. at 71. Rather than accepting the State's interpretation of the record, "counsel generally should be heard from, and if necessary cross-examined, as to whether a decision truly was `tactical.'" Rhue v. State, 603 So. 2d 613, 615 n.4 (Fla. 2d DCA 1992) (citing Dauer v. State, 570 So. 2d 314 (Fla. 2d DCA 1990)). Thus, any presumption that Pearl's trial decisions were reasonable and strategic must be rebutted where Pearl admits that he remembers nothing about Herring's trial or "so little that it would be of no value to you," and where Pearl's amnesia deprives this Court of the ability to review his trial decisions and

discern whether they reflect a strategy. 1996 Tr. at 95.

In order to ascertain whether trial counsel's had a reasonable strategy, Florida courts typically engage in a careful review of counsel's testimony at the evidentiary hearing. See, e.g., Rose, 675 So. 2d at 570; Flores v. State, 662 So. 2d 1350, 1351 (Fla. 2d DCA 1995). In Rose, a defendant under a death sentence claimed that his trial counsel was deficient at the guilt phase for failing to call several witnesses who, Rose alleged, could have shed doubt on the State's theory of the case. Rose, 675 So. 2d at 570. In upholding the trial court's denial of relief, this Court carefully reviewed the testimony of trial counsel at the evidentiary hearing. Id. In particular, this Court noted trial counsel's testimony that he considered calling these witnesses at trial, but elected not to do so because each of them "had inherent problems," and he determined that their testimony would have been more detrimental than helpful. Id. Trial counsel did not merely assert that these witnesses had "inherent problems," but gave a detailed description of each of these problems. Id. This Court concluded that

> the trial court did not err in concluding that Rose's claims of ineffective assistance of trial counsel during the guilt phase constitute claims of disagreement with trial counsel's choice [of] strategy . . . . In light of counsel's testimony at the hearing, it is apparent that counsel was aware of the witnesses in question and knowledgeable about the pros and cons of calling them as witnesses.

Id. Thus, in Rose, this Court did not rely on a mere conclusory assertion that counsel must have had a strategy; it scrutinized counsel's testimony to determine whether he really had a strategy. Id. at 570; see also Flores, 662 So.2d at 1351 (counsel's testimony at evidentiary hearing must give court opportunity "to hear the rationale behind the decision from the attorney whose work was questioned").

The specific inquiry into facts surrounding counsel's trial decisions is precisely the kind of inquiry that the Circuit Court could not perform in Pearl's case because of Pearl's selective amnesia,[16] Init. Br. at 37-44. A finding that Pearl's actions were strategic in the absence of any opportunity to cross-examine him regarding his alleged strategy, due to that amnesia, 16 would violate Herring's Sixth Amendment right of cross-examination. Pointer v. Texas, 380 U.S. 400, 403-406 (1965); Davis v. Alaska, 415 U.S. 308, 315-16 (1974). Accordingly, Pearl's total lack of recollection precludes the defense of trial strategy to justify his conduct.

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[16] Pearl was fully conversant with the facts of the cases involving the other defendants at the December 1992 hearing, several of which predated Herring's case. Init. Br. at 43-44.

Even if Pearl's recollection had been complete, his conduct is without justification: "A trial strategy to do nothing . . . is not an acceptable one." Williams v. State, 507 So. 2d 1122, 1123 (Fla. 5th DCA), review denied, 513 So. 2d 1063 (Fla. 1987); see Init. Br. at 71-75. Similarly, this Court has held that any presumption that counsel's trial decisions were reasonable will be overcome where counsel failed to investigate his options, failed to make a reasonable choice between them, and "latched onto a strategy which even he believed to be ill-conceived." Rose, 675 So. 2d at 572-73. Counsel is never "at a liberty to abdicate his responsibility to [his client]." Id. at 573. Abdicating his responsibility to his client is exactly what Pearl did with Varner's devastating testimony. The State's (and the Circuit Court's) unfounded assumptions regarding Pearl's trial strategy are entitled to no weight.

III. THE CIRCUIT COURT'S RULINGS ON THE FORENSIC EVIDENCE ARE CLEARLY ERRONEOUS

A. Dr. Spitz's testimony is properly before this Court

The State admits that the testimony of Dr. Spitz is properly before this Court.[17] St. Br. at 42 n.27. First, the State concedes that, while the Circuit Court purported to sustain an objection to the admission of Dr. Spitz's testimony, it "ultimately did consider the testimony." Id. Second, in its brief, the State has wisely abandoned its contention that Dr. Spitz's testimony should be excluded on the grounds that Pearl's failure to develop forensic evidence and to impeach Varner with that evidence was insufficiently pleaded in Herring's 3.850 motion. Id. The State now admits that "[t]his portion of Herring's brief addresses a non-issue." Id.[18]

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[17] Dr. Werner Spitz has been a pathologist and forensic pathologist for over thirty years; he has taught at numerous universities including Johns Hopkins; and has served on a five-man committee investigating the assassination of President Kennedy and on the House of Representatives' Select Committee on Assassinations. Init. Br. at 25-26.

[18] In fact, the State now wants to have it both ways. The State erroneously contends that the objection sustained at the hearing addressed the relevance of Dr. Spitz's testimony, not the sufficiency of Herring's pleading. St. Br. at 42. The transcript of the 1996 hearing is clear, however, that the State's objection and the Circuit Court's ruling were focused on Herring's alleged failure to amend the 3.850 motion. Before the Circuit Court ruled on the State's objection, counsel for Herring described the relevance of Dr. Spitz's testimony -- that forensic evidence was a powerful tool that Pearl could have used at trial to challenge Varner's testimony. 1996 Tr. at 550, 552.

The State's repeated objection to Dr. Spitz's testimony was that the failure to cross-examine law enforcement officers with forensic evidence was not sufficiently pleaded in Herring's 3.850 motion. At the hearing, counsel for the State stated that he

B. The Circuit Court's Findings of Fact Regarding Dr. Spitz's Testimony Are Clearly Erroneous

Dr. Spitz's testimony at the 1996 hearing demonstrates that the second shot could not have been fired as the victim lay prone on the floor, contrary to Varner's testimony. 1996 Tr. at 569-597; Init. Br. at 25-30. Accordingly, Dr. Spitz's testimony contradicts the only testimony at Herring's trial that supported the elimination of witness aggravator and the death penalty.

Dr. Spitz testified that two bullets were shot at the 7-Eleven clerk, one of which caused a wound to the clerk's hand and neck, the other to his temple. 1996 Tr. at 569-73. The bullet that caused the wound to the clerk's temple also caused immediate unconsciousness and death. 1996 Tr. at 573-74. Dr. Spitz further testified that the proximity between the neck and temple wound -- within six inches of each other -- and the angles of the shots demonstrate that the two bullets were fired in rapid succession and from the same distance. 1996 Tr. at 590-97; Init. Br. at 26-27. Further, the gunpowder deposit on the 7-Eleven clerk's skin establishes that that distance was less than 18 inches from the clerk's body. 1996 Tr. at 594; Init. Br. at 27.

Contrary to the State's contention, Dr. Spitz considered whether the clerk may have fallen on the floor between the first and second shots. 1996 Tr. at 590. Dr. Spitz acknowledged that the clerk could have fallen for reasons unrelated to the neck shot (such as falling on objects lying on the floor), but he concluded that that did not occur. 1996 Tr. at 590. Based. inter alia, on the proximity between the wounds, the angles of shot, and the gunpowder deposit on the clerk's skin, Dr. Spitz concluded the two shots were fired in rapid succession as the clerk was standing behind the counter on his feet. Init. Br. at 26-30. Dr. Spitz did not believe that any of the shots were fired when the victim was on the floor. 1996 Tr. at 576; Init. Br. at 26. Dr. Spitz's

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> would have been glad to try to defend it if somebody had placed it in the motion.
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> * * *
>
> And I'm not prepared [t]o [sic] defend against it because it's not in the motion.

1996 Tr. at 553-54. While the Circuit Court did not explain the ground on which it ruled, 1996 Tr. at 565, prior to its ruling, it made several remarks which all addressed the sufficiency of Herring's pleading and Herring's failure to amend. 1996 Tr. at 556, 560, 564. Thus, it is clear that the Circuit Court sustained the State's objection on that ground, not on a relevance ground.

testimony plainly shows that, contrary to Vamer's trial testimony, Herring did not shoot the clerk "as the clerk was lying on the floor" in order to eliminate a witness. 1982 Supp. R.O.A. at 550-51; Init. Br. at 25-30. The State offered no evidence to rebut this testimony.

CONCLUSION

For the foregoing reasons, Herring respectfully requests that this Court (i) find that Pearl had an actual conflict of interest that adversely affected his representation of Herring in violation of the Sixth Amendment, and (ii) vacate and set aside Herring's conviction and sentence, or, in the alternative, vacate Herring's sentence and remand for a new hearing.

Dated: February 24, 1998

Leon H. Handley
Florida Bar No. 0033418
GURNEY & HANDLEY, P.A.
225 East Robinson Street
Suite 450
Orlando, Florida 32801
(407) 843-9500

Jon M. Wilson
Florida Bar No. 0139892
John R. Hamilton
Florida Bar No. 774103
FOLEY & LARDNER
111 North Orange Avenue
Suite 1800
P.O. Box 2193
Orlando, Florida 32802-2193
(407) 423-7656

and

Jeremy G. Epstein
Alan S. Goudiss
James R. Warnot, Jr.
Kathryn Tabner
Daniel Schimmel
SHEARMAN & STERLING
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Attorneys for Ted Herring

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 U.S. mail, prepaid to Kenneth S. Nunnelley, Esq., Assistant Attorney General of the State of Florida, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, this 24th day of February, 1998.

John R. Hamilton

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