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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCE(s)

SUPREME COURT OF FLORIDA

No. 89,937

TED HERRING,

Appellant,

-vs.-

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INTRODUCTION

Appellant Ted Herring was convicted of robbing a convenience store and shooting a clerk during the course of that robbery. Such crimes rarely, if ever, result in the imposition of a death sentence. Only one fact in the trial record brought about Herring's death sentence: one of the policemen who interviewed him, Dozell Varner, testified that Herring told him that he shot the clerk a second time to prevent him from testifying against him. This single piece of evidence furnished the basis for the "avoidance of arrest" aggravating circumstance and served to differentiate Herring's case from the many virtually identical cases in which Florida courts have vacated death sentences.

Varner's testimony, to say the least, was highly suspect. Although Herring's confession to the murder was tape-recorded, the statement Varner attributed to Herring was not on the tape. Two other policemen who interviewed Herring after his arrest testified that Herring had said nothing to them that was not in the taped confession. Varner's record as a police officer was abysmal. In his three prior years on the force, he had been the subject of 25 disciplinary violations.

Moreover, at the time of Herring's trial, Varner's wife was under indictment for grand theft; Varner was a suspect in that investigation and had already refused to take a lie detector test. A few years after the Herring trial, Varner left the Daytona Beach Police Department in disgrace and since then has never been employed as a policeman.

There was, in short, abundant evidence available to make any trier of fact extremely skeptical about the quality of Varner's testimony and to make any sentencing judge wary of imposing a death sentence based exclusively on such testimony. None of the above facts, however, was employed in Herring's defense or used to impeach Varner's testimony. The cross-examination of Varner, the State's key witness, covers two transcript pages. In his summation, Herring's appointed counsel, Howard Pearl, told the jury that the police officers who testified, including Varner, "are all good policemen, good detectives;" he further advised the jury that "Daytona Beach is fortunate to have men like that serving the community law enforcement officers."

Pearl's failure to challenge Varner's testimony made the acceptance of that testimony by the jury and the sentencing judge inevitable. Varner's testimony was literally the difference between life and death for Herring; it transformed Herring's reflexive shooting into a capital offense. In imposing the death sentence, the judge stated: "[t]he Defendant's age and difficult childhood are not sufficient mitigating factors to block imposition of the death penalty in a case where a Defendant, now with a prior violent felony conviction, murders an innocent clerk during a robbery so that the clerk will not testify against him. Indeed, Florida courts have repeatedly confirmed this conclusion, both in their opinions in this case and in other cases, where they have cited Varner's testimony in distinguishing Herring's case from those in which the "avoidance of arrest" aggravator was not established beyond a reasonable doubt.

The defense Pearl provided to Herring was not the result of mere incompetence. At the time he was representing Herring, Pearl was serving as a Special Deputy Sheriff in Marion County. Pearl maintained that status for 19 years; because he was a Special Deputy, he was able to carry a concealed firearm, a matter of great importance to him. Pearl's allegiance to law enforcement

made him unwilling to challenge law enforcement officers on behalf of his clients; he did not challenge the credibility of any law enforcement officer in this case or in any other case he tried as a public defender. Pearl's divided allegiance left Herring without a defense against the most damaging -- and most suspect -- evidence presented at trial.

In Herring v. State, 580 So. 2d 135, 139 (Fla. 1991), this Court remanded Herring's case for a hearing "to determine whether [Pearl]'s public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." In December 1992, Judge B.J. Driver consolidated Herring's hearing with those of other defendants represented by Pearl.

In Teffeteller v. Dugger (Herring v. State), 676 So. 2d 369 (Fla. 1996) (per curiam), this Court concluded that this hearing was "procedurally flawed and violated the appellants' right to due process." Id. at 37 1. This Court remanded the case so that each defendant's case could be heard individually. Id. In November 1996, Circuit Judge William C. Johnson held an evidentiary hearing in Herring's case and found that Pearl's dual status did not adversely affect his representation of Herring. The Circuit Court further held that Pearl's representation of Herring at trial was not ineffective, a conclusion that is indefensible on this record. That decision was erroneous and should be reversed and Herring's death sentence vacated.

STATEMENT OF THE CASE AND THE FACTS

A. Factual Background

Early on May 29, 1981, a 7-Eleven store clerk in Daytona Beach, Florida, was shot and killed during a robbery at the store. His body was discovered shortly thereafter. Herring v. State, 446 So. 2d 1049, 1051 (Fla.), cert. denied, 469 U.S. 989 (1984) ("Herring I"). The Medical Examiner concluded that the cause of death had been a bullet wound to the head, which was lethal, that the victim had also been shot in the neck, and had survived no longer than one minute. Id. at 1051-52.

On the morning of June 12, 1981, Herring was arrested while in possession of a stolen car. Herring I, 446 So. 2d at 1052. After hours of interrogation about matters that ranged far beyond auto theft,

Herring confessed to the robbery and homicide at the 7-Eleven store as well as to several other similar convenience store robberies during the same time period. Id. The confession was tape-recorded. Id. Herring stated that he entered the 7-Eleven store early on the morning of May 29 and after requesting a pack of cigarettes, he drew a gun and demanded money. Id. The clerk then made a sudden move, causing Herring to panic and shoot. 1982 Supp. R.O.A. at 127.[1] The shooting was not intentional and was certainly not planned -- in the four other similar armed robberies during the same time period to which Herring confessed, he never fired his gun or harmed anyone. 1982 Supp. R.O.A. at 103-09. Herring stated in his taped confession: "I shot him, you know, by mistake, but I meant to just put the gun to his head not for it to go off." 1982 R.O.A., Vol. II, at 75. The State offered no evidence to refute Herring's statement that he shot the clerk "by mistake." Prior to Herring's arrest, he had never been convicted, or even accused, of any violent crime. I.Q. tests performed during his childhood yielded a score of 80, indicating borderline mental retardation. Herring I, 446 So. 2d at 1052.

B. Procedural Background

1. The Trial And Sentence

In February 1982, Herring was tried for armed robbery and murder in the first degree arising out of the May 19, 1981 incident. State v. Herring, Case No. 81-1957-CC. As an indigent person, Herring was entitled to appointed counsel to represent him at trial. Howard B. Pearl, an Assistant Public Defender for the Seventh Judicial Circuit and Chief of the Capital Division, was

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[1] "1996 R.O.A." refers to the Record on Appeal from the 3.850 hearing held November 25-27, 1996. "1996 Tr." refers to the transcript of that hearing, which is part of the 1996 R.O.A. (in the Record on Appeal designated by this Court, the transcript of the November 1996 hearing was separately paginated). "1992 Master R.O.A." refers to the Record on Appeal for the consolidated appeal of eight defendants, including Herring, from a joint 3.850 hearing held December 15-18, 1992. "1992 R.O.A." refers to the Record on Appeal from that hearing specific to Herring. "1992 Supp. R.O.A." refers to the supplement to the 1992 R.O.A. (At the November 1996 hearing, the Circuit Court admitted into evidence the portions of the 1992 Master R.O.A., 1992 R.O.A., and 1992 Supp. R.O.A. germane to Herring's case. 1996 Tr. 121-127). "1990 R.O.A." refers to the Record on Appeal from the 1989 summary denial of Herring's amended 3.850 motion. "1982 R.O.A." refers to the Record on Appeal for Herring's 1982 direct appeal to this Court. "1982 Supp. R.O.A." refers to the supplement to the 1982 R.O.A.

appointed as Herring's trial counsel. After a three-day trial, the jury returned a verdict of guilty on both counts. 1982 R.O.A., Vol. 1, at 70-71.

The sentencing phase of Herring's trial was held on February 26, 1982. 1982 Supp. R.O.A. at 776. It lasted approximately two hours. The State offered the testimony of a probation officer, who interviewed Herring while he was in custody, and Herring's prior armed robbery conviction. 1982 Supp. R.O.A. at 777-79. Pearl abandoned his client during the sentencing phase of the trial, leaving Herring in the hands of Peyton Quarles, a less experienced colleague. Rather than sit at the counsel table, Pearl stood at the back of the courtroom for approximately five minutes and left in full view of the jury after hearing some particularly damaging testimony. 1992 Master R.O.A. at 407-08. In Herring's defense, Quarles offered only the testimony of Herring's mother. 1982 Supp. R.O.A. at 780-84, 790. Her testimony, and thus Herring's case, lasted only a few minutes and constitutes but three full pages of transcript. 1982 Supp. R.O.A. at 780-84.

The jury returned an advisory sentence of death by an eight-to-four vote. 1982 R.O.A., Vol. I, at 72. The trial judge followed the jury's recommendation and sentenced Herring to death on March 1, 1982. 1982 R.O.A., Vol. 1, at 73-77. The trial judge found the following four aggravating circumstances present:

> (1) That the defendant had been previously convicted of another capital offense or a felony involving the use or threat of violence to some person;
>
> (2) That the crime was committed while he was engaged in the commission of the crime of robbery;
>
> (3) That the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and
>
> (4) That the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

1982 R.O.A., Vol. I, at 73-74; Exh. 18-BB,[2] 1996 R.O.A. at 493-95. In mitigation, the court found two circumstances: (1) Herring's age at the time of the crime (19); and (2) Herring's difficult childhood, i.e., that he was raised essentially without a father, that he was hyperactive, that he had learning disabilities, and that he had trouble in school. 1982 R.O.A., Vol. 1, at 76; Exh. 18-BB, 1996 R.O.A. at 496. As discussed in detail below, the trial court, relying almost exclusively on Detective Dozell Varner's testimony, nevertheless imposed a sentence of death. 1982 R.O.A., Vol. 1, at 77; Exh. 18-BB, 1996 R.O.A. at 497.

2. Post-Conviction Proceedings

Upon his conviction, Herring diligently pursued all avenues of post-conviction relief. Herring appealed to this Court, which affirmed his conviction and sentence on February 2, 1984, and denied rehearing on April 11, 1984. Herring I, 446 So. 2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984).

On April 1, 1985, Herring filed a Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida. On July 24, 1985, the Circuit Court denied the motion without holding an evidentiary hearing. Herring appealed to this Court, which affirmed the Circuit Court's decision on December 30, 1986, and denied rehearing on March 2, 1987. Herring v. State, 501 So. 2d 1279 (Fla. 1986) ("Herring II").

On March 9, 1987, Herring filed a Petition for Writ of Habeas Corpus pursuant to Rule 9.030(a)(3) of the Rules of Appellate Procedure in the Supreme Court of Florida. On June 23, 1988, this Court denied relief and denied rehearing on August 25, 1988. Herring v. Dugger, 528 So. 2d 1176 (Fla. 1988) ("Herring III").

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[2] Citations in the form "Exh. ___" refer to the exhibits offered in evidence at the November 25-27, 1996 hearing, which are part of the 1996 R.O.A. The exhibits with numerical designations were admitted by the Circuit Court, and those with alphabetical designations were excluded by the Circuit Court.

On September 9, 1988, Herring filed a Petition for Writ of Habeas Corpus (the "Federal Petition") in the United States District Court for the Middle District of Florida. In support of the petition, Herring claimed, among other things, that the decision in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), which expressly overruled the application of the "heightened premeditation" aggravating circumstance in Herring I, required the vacation of Herring's death sentence. On January 21, 1989, the State moved to dismiss the Federal Petition on the basis that Herring's claim respecting the heightened premeditation aggravating circumstance had not been exhausted in the state courts. In its motion to dismiss, the State also acknowledged that, because the decision in Rogers followed the decision in Herring II, Herring could not have raised the issue of the effect of Rogers in his original Rule 3.850 motion. On February 16, 1989, after Herring consented to the State's motion in order to raise this claim in the Florida courts, the district court dismissed the Federal Petition without prejudice. Herring v. Dugger, Case No. 88791-CIV-ORL-18 (M.D. Fla. Feb. 16, 1989).

On March 9, 1989, Herring filed a Motion to Vacate Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, asserting that the decision in Rogers required a vacation of Herring's sentence. Thereafter, Herring filed a motion for leave to amend in order to raise a claim based upon Pearl's newly discovered and undisclosed conflict of interest. On May 25, 1989, the trial court denied relief under Rogers, but granted Herring leave to amend the motion in respect of Herring's Pearl claims. The amended motion was filed on June 14, 1989, and on November 5, 1989, the trial court summarily denied the amended motion without granting leave to take depositions or conducting an evidentiary hearing. Herring appealed the trial court's decision. Herring v. State, 580 So. 2d 135, 137 (Fla. 1991) ("Herring IV").

On appeal, this Court found that the heightened premeditation aggravating factor no longer applied to the circumstances presented by this case. Herring IV, 580 So. 2d at 138. However, this Court found that elimination of this aggravating factor did not compromise the weighing process of either the judge or the jury, and refused to grant a new sentencing hearing. Id. This Court

remanded the case to the Circuit Court for an evidentiary hearing "to determine whether [Pearl's] service as a special deputy sheriff affected his ability to provide effective legal assistance." Id. Two Justices of this Court dissented in part, stating that the case required "at the very least, a new sentencing hearing," and that they were "dubious about the reliability and proportionality of a death sentence under the circumstances presented here and under current law." Id. at 139.

The Circuit Court conducted an evidentiary hearing on December 15-18, 1992 (the "December 1992 hearing"), before Judge B.J. Driver, a retired circuit judge sitting by designation. The hearing was consolidated with the hearings of eight other defendants -Robert Teffeteller, Kenneth Quince, Robert Dale Henderson, Gerald Stano, Joel D. Wright, Johnny Robinson, Felix Castro, and Richard Randolph -- who had also been represented at trial by Pearl and asserted similar claims. At the conclusion of the hearing, Judge Driver held that none of the defendants was adversely affected by Pearl's status and denied Herring's 3.850 petition. Herring promptly appealed this ruling.

In Teffeteller v. Dugger (Herring v. State), 676 So. 2d 369 (Fla. 1996) (per curiam) ("Herring V"), this Court vacated Judge Driver's ruling on the ground that the December 1992 hearing was "procedurally flawed and violated the appellants' right to due process." Id. at 371. This Court, however, specifically confined its holding to this basis. It stated that "[we] do not reach the merits of the appellants' claims regarding Pearl's alleged conflict of interest." Id. Consequently, this Court remanded the case so that the Circuit Court could conduct individual evidentiary hearings on the claim concerning Pearl's Special Deputy Sheriff status and other individualized claims. Id.

The evidentiary hearing on Pearl's conflict of interest in Herring's case was held on November 25-27, 1996 (the "November 1996 hearing"), before Circuit Judge William C. Johnson. Judge Johnson heard factual testimony from, among other witnesses, Howard Pearl (Herring's trial counsel), Christopher Quarles (an Assistant Public Defender in Daytona Beach who served as appellate counsel in several cases for which Pearl served as trial counsel), Peyton Quarles (Herring's co-trial counsel), James B. Gibson (the Public Defender in Daytona Beach), Don Moreland (former Sheriff of Marion County), and Paul B. Crow (Varner's superior at the time of Herring's

interrogation). Judge Johnson also heard expert testimony from Professor Stephen Gillers, an expert in the field of legal ethics, from James M. Russ, a practicing lawyer in Florida and an expert in the field of criminal defense, and heard the proffered testimony of Dr. Werner Spitz, an expert in the field of forensic pathology.

C. Pearl's Deputy Sheriff Status

1. Pearl's Need To Carry A Concealed Firearm

Concerned with what he perceived to be the deterioration of the world "before his eyes," Pearl applied for a Special Deputy Sheriff position with the Marion County Sheriff's Department on August 8, 1970, to enable him to carry a concealed firearm throughout the State of Florida. 1992 Master R.O.A. at 261-62; Exh. 1, 1996 R.O.A. at 446-49. Pearl, who has testified that he felt "naked, incomplete, lonesome" without a firearm, wanted the privileges conferred by his appointment, was rarely without a gun, and used his deputy status to carry guns into courts and other places. 1996 Tr. at 36, 49-54; 1992 Master R.O.A. at 284-85, 299-301.

In his application for employment, Pearl stated that he was "applying for appointment as special deputy sheriff so that: (1) when called, I may participate and assist in protection of persons and property in my community; and (2) I may have authority to carry firearms, in the area of the Ocala National Forest, and elsewhere in the State, for protection of self and family." Exh. 1, 1996 R.O.A. at 446-49. Pearl has testified that he considered the privilege to carry a firearm a matter of life and death. See 1992 Master R.O.A. at 451. When Pearl was sworn in as a Special Deputy Sheriff on August 21, 1970, he took an oath to "faithfully perform the duties of special deputy." Exh. 2, 1996 R.O.A. at 45 1. At the beginning of each Sheriff's term thereafter, Pearl was reappointed as Deputy Sheriff and again took the oath of office. See 1996 Tr. at 259-61; 1992 Supp. R.O.A. at 199; Exhs. 6, 7, 1996 R.O.A. at 444, 463, 465.

On January 4, 1973, Pearl was issued an identification card, signed by Pearl and Sheriff Don Moreland, identifying Pearl as a "Regular Deputy Sheriff of Marion County, Florida." Exh. 3, 1996 R.O.A. at 461. The back of the Certificate of Appointment certified that Pearl was "a

regularly constituted Deputy Sheriff to serve and execute all legal papers and processes in Marion County, Florida, with full power to act as Deputy Sheriff of Marion County until [Sheriff Moreland's] term expires or this appointment is revoked." Exh. 3, 1996 R.O.A. at 461.

Pearl was listed on a Register of Special Deputy Sheriffs maintained by the Marion County Sheriff's Office. Exh. 21, 1996 R.O.A. at 430. In contrast with another of the Special Deputies listed on the register who was noted as having "no arrest powers," no such limitation was noted for Pearl. Exh. 21, 1996 R.O.A. at 430. In addition, Pearl was covered under a revolving bond account maintained by the Marion County Sheriff's Department with the Florida Sheriff's Self-Insurance Fund. Exh. 20, 1996 R.O.A. at 43542. Pearl made annual premium payments in order to remain covered under this general comprehensive liability policy. 1996 Tr. at 171; 1992 Supp. R.O.A. at 203-04; Exhs. 7-14, 1996 R.O.A. at 453-54, 467, 475, 477, 479, 481, 483, 485, 487, 489.

After his appointment, Pearl purchased a badge marked Deputy Sheriff of Marion County, even though, from Pearl's own admission, he did not need that badge to carry a gun. 1996 Tr. at 49; Exh. 16, 1996 R.O.A. at 491. Pearl acknowledged that he used his Deputy Sheriff badge and card to show them to people, holding himself out as a law enforcement officer. 1996 Tr. at 49. On one occasion, Pearl displayed his badge to a police officer who "got all excited" and "was trembling" when he saw that Pearl was carrying a gun. 1996 Tr. at 50. By Pearl's own admission, displaying the Deputy Sheriff badge served as "a tranquilizer." 1996 Tr. at 50.

On another occasion, Pearl displayed his Deputy Sheriff card to a security officer in a hospital, in order to be permitted to enter the hospital with several guns. 1996 Tr. at 53-54; Exh. 22, 1996 R.O.A. at 469-72. Pearl testified that displaying his card "calm[ed] down" the security officer. 1996 Tr. at 54.

On yet another occasion, Pearl showed his Deputy Sheriff card to a handgun dealer in order to get a special price for a gun. 1996 Tr. at 50-51. Sheriff Moreland testified that he only authorized full time Deputy Sheriffs to purchase weapons at a special price. 1996 Tr. at 287. By displaying his Deputy Sheriff badge, Pearl violated Sheriff Moreland's rules and held himself out as

a full time law enforcement officer. Pearl conceded that he never disclosed to the police officer, the hospital security officer, the handgun dealer, or any other person to whom Pearl displayed his Deputy Sheriff badge that he had no law enforcement duties. 1996 Tr. at 56.

Pearl served at the Sheriff's pleasure; his appointment could be revoked in the Sheriff's sole discretion. 1996 Tr. at 49-50; 1992 Master R.O.A. at 171, 188-89, 288-89. Sheriff Moreland testified that he had revoked the Special Deputy status of "quite a few people," upon learning that they had used their Special Deputy Sheriff status improperly. 1996 Tr. at 277-88. Pearl's desire to maintain his status, coupled with his knowledge that Sheriff Moreland could revoke his appointment at will, demonstrates that the scope and nature of Pearl's actual duties as a Special Deputy Sheriff are irrelevant; the conflict of interest at issue derived from Pearl's desire to carry a gun and his resulting dependence on the good will of -- and fear of antagonizing -- law enforcement officers.

On May 1, 1989, Pearl resigned from his position as a Special Deputy Sheriff. 1992 Supp. R.O.A. at 199. Pearl did so at the request of James B. Gibson, the Public Defender for the Seventh Judicial Circuit, who cited the conflict of interest inherent in Pearl's dual status. 1996 Tr. at 47-48, 732; 1992 Master R.O.A. at 226; 1992 Supp. R.O.A. at 299-300.

2. Pearl Recognized His Inherent Conflict, Yet Failed To Inform His Clients Of His Dual Status

Pearl never informed any of his clients that he was a Special Deputy, including Herring; according to Pearl, it was "none of their business." 1996 Tr. at 57, 198; 1992 Master R.O.A. at 304-05. Pearl disclosed his Special Deputy Sheriff status only to people who "ought to know," such as judges, prosecutors, and bailiffs. 1996 Tr. at 186. It never occurred to Pearl that the determination of whether he should represent capital defendants while serving as a Special Deputy was his client's to make, not his. 1996 Tr. at 57; 1992 Master R.O.A. at 305. Pearl, however, knew what his clients' reaction to disclosure of his status would be, for on March 2, 1989, he informed lawyers for Roy Harich, another defendant in a capital case, that he did not disclose his 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 886-87; Teffeteller Exh. 2[3] (Affidavit of Nancy K. Feinrider sworn to March 23, 1989); 1996 R.O.A. at 523-24.

Pearl conceded that an appointment as a Special Deputy in Volusia County would have been a conflict of interest. 1996 Tr. at 63; 1992 Master R.O.A. at 431. He admitted that the duties of law enforcement officers in Marion and Volusia were "crossover duties involving the jurisdiction to arrest outside of the city limits." 1996 Tr. at 188. Pearl also conceded that he could not meaningfully distinguish his Marion County appointment, admitting that his status did not change when he crossed the county line. 1992 Master R.O.A. at 979. Of course, there is no distinction between the two appointments for purposes of determining whether a conflict exists, a conclusion buttressed by the obligation of the Marion County Sheriff's Department, under long-standing mutual assistance agreements, to assist the Volusia County Sheriff if the need arises. 1992 Master R.O.A. at 224-25.

Pearl did not dispute that the duties of a law enforcement officer and a defense attorney are mutually inconsistent. 1996 Tr. at 64; 1992 Master R.O.A. at 312-13. While steadfastly maintaining that his Special Deputy Sheriff status had no effect on his representation of capital defendants, Pearl acknowledged that, during voir dire of prospective jurors, he inquires into law enforcement affiliations, for he recognizes such affiliations as a factor which may "color their outlook of the case," either "[c]onsciously or subconsciously." 1996 Tr. at 156-57; 1992 Master R.O.A. at 81 1. Pearl could not reasonably be expected to confess the conflict and its impact on his performance; however, his testimony on the effect of law enforcement affiliation supports the inevitable conclusion that his own status could have "subconsciously" affected his decision making at Herring's trial.

D. Pearl's Deficient Strategy And Performance At Trial

1. Pearl's Deficient Cross-Examination Of Varner And The

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[3] The affidavit of Nancy K. Feinrider was an exhibit received into evidence at the December 1992 hearing on behalf of all defendants. That exhibit was made a part of the 1992 Master R.O.A. and is also part of the 1996 R.O.A., see 1996 R.O.A. at 523-24.

Numerous Avenues Of Impeachment That Pearl Failed To Pursue

At the November 1996 hearing, Pearl professed a complete failure to recall his cross-examination of Varner at trial. 1996 Tr. at 82-85. At the December 1992 hearing, however, Pearl conceded the importance of Varner's testimony, which according to Pearl provided "the blueprint for [the] statutory aggravating circumstances," 1992 Master R.O.A. at 332, leading to Herring's death sentence. At trial, Varner gave an uncorroborated account of an alleged conversation with Herring with no other witnesses present:

> Q: Okay. It's very important, Officer, you understand, that we wish to hear exactly what the Defendant told you.
>
> A: Yes, ma'am.
>
> To the best of my recollection, when the store clerk got a hold of the note that was given to him, he started emptying the money out of the cash register, at which time the Defendant asked for some cigarettes, asked where were the Newport cigarettes.
>
> The Defendant pointed -- The clerk pointed to a rack which contained Newport Cigarettes, which was to the Defendant's right and the clerk's left.
>
> When the Defendant went to get some cigarettes out of the rack, the clerk made a motion somewhat towards him as to possibly remove the gun on the Defendant, himself.
>
> At this time, the Defendant stated that he shot the clerk once in the head or he shot him once. He stated at this time as the Defendant -- as the clerk was lying on the floor, he could observe that he was still living, and he shot him a second time to prevent him from being a witness against him, at which time he stated that he observed his body twitch; and he then left the store.

1982 Supp. R.O.A. at 550-51 (emphasis added).

Pearl has acknowledged that Varner's trial testimony "cut [Herring's] throat." 1992 Master R.O.A. at 370. Pearl also conceded that Varner's testimony was crucial to Judge Foxman's decision to impose a sentence of death. 1992 Master R.O.A. at 347. Indeed, in weighing the aggravating and mitigating circumstances, the trial court stressed the avoidance of arrest aggravator, stating that "[t]he Defendant's age and difficult childhood are not sufficient mitigating factors to block

imposition of the death penalty in a case where a Defendant, now with a prior violent felony conviction, murders an innocent clerk during a robbery so that the clerk will not testify against him." 1982 R.O.A., Vol. 1, at 77; Exh. 18-BB, 1996 R.O.A. at 497.

Any defense of Herring required that Pearl undercut Varner's testimony. Yet, constrained by his refusal to challenge law enforcement, Pearl cross-examined Varner only on whether Herring was given food and rest during his interrogation. 1982 Supp. R.O.A. at 553-54; 1992 Master R.O.A. at 332. This excuse for cross-examination consumes a mere two pages of the trial transcript. 1982 Supp. R.O.A. at 553-54. There is no possible justification for Pearl's performance, as he had available, but ignored, numerous avenues for impeachment of Varner. Herring's taped confession, Varner's prior testimony, and the testimony of Varner's own colleagues all contradicted Varner's devastating testimony. Moreover, Pearl also had at his ready disposal abundant character evidence with which to impeach Varner.

a. The Contemporaneous Tape Recording Of Herring's Confession Contradicts Varner

Herring's taped confession not only supports the argument that the clerk's death was an accident, but it stands in stark contrast to Varner's trial testimony:

> Varner: Okay. How about telling us like you told [me].
>
> Herring: Yea'. Well, I, when I asked for the pack of cigarettes, he told me they was over there in the comer. When I went to turn my head a little bit, I turned back and it looked like he was coming across the counter and I put the gun up to his head and he put his hand up and I shot him.
>
> White: As he put his, which hand up?
>
> Herring: He put, I think it was his right, his right hand up, and I shot him. But it was by mistake, I didn't mean to shoot him.
>
> White: Did you shoot him again?
>
> Herring: Yea'. Yes, I did, out of fear I did.
>
> White: Did you shoot him once he was down on the ground?

Herring: Yea', when he hit the ground I shot him.

1982 Supp. R.O.A. at 126-27. Herring's confession thus contained not a word about seeing that the clerk was still alive, eliminating a witness, or a "twitching body." More important, Herring's confession did not contain any of the testimony that Florida courts have recognized as the difference between life and death in similar cases. Yet Pearl never challenged Varner with the contradiction between the tape and Varner's recitation at trial of his conversation with Herring.

b. Varner's Testimony Was Also Contrary To That Of His Own Colleagues

Both of the detectives who assisted Varner in Herring's interrogation, Martin White and William Anderson, also testified at trial about Herring's confession. Neither of those officers made any mention of elimination of a witness. Both stated that the taped confession accurately reflected the conversation that had occurred on the day of Herring's arrest:

Q: Did that tape adequately reflect the conversations that occurred that day?

A: Yes, it did.

1982 Supp. R.O.A. at 523 (Testimony of White).

Q: And does [the tape] adequately reflect the conversation that you and the detectives had with Mr. Herring that day?

A: Yes, it does.

1982 Supp. R.O.A. at 556 (Testimony of White).

Q: Did you ask him any questions off the tape that you did not ask him on the tape?

A: No.

1982 Supp. R.O.A. at 534 (Testimony of Anderson).

Paul Crow, a former Director of Public Safety and Chief of the Daytona Beach Police Department who was Varner's superior at the time of the interrogation, testified that if unrecorded statements such as those alleged by Varner had been made, good police practice would have required that the interrogating officers obtain those statements in the taped confession.

1996 Tr. at 332-33; 1992 Master R.O.A. at 490-91. Pearl, however, made no attempt to impeach Varner by reference to his colleague's conflicting testimony or the shoddiness of his police work.

c. Varner's Own Shifting And Embellished Testimony Provided Ample Grounds For Impeachment

The tape of Herring's confession shows that the only person who talked about eliminating witnesses was Varner. During the taped confession, the following exchange occurred:

> White: Detective Varner, you got any questions for him?
>
> Varner: Yes. One question. Were you in any fear at any time since you hadn't conspired to perpetrate this robbery, that this guy might have shot you in the process of the robbery?
>
> Herring: Yea', well, I was, I was scared.
>
> Varner: Eliminate any witnesses.
>
> Herring: I was scared, you know. I was really scared. You know what I'm saying. In fact, you know -.

1982 Supp. R.O.A. at 121 (emphasis added).

Moreover, Varner's account of Herring's confession changed -- and grew more elaborate -- every time he testified. His first testimony, given at pre-trial deposition, lacked many of the details he inserted at trial:

> Q: What did he tell you?
>
> A: He admitted to being the only one in the store. He said he wrote the note and made his demands to the victim.
>
> And at one point the -- when the victim -- when Herring went to get a pair of cigarettes -- a pack of cigarettes, the victim had showed where they were on the counter. The victim had made a move towards him and his hand was up like this and Herring fired a shot, he said, and after he had hit the ground he shot him again to make sure he didn't see what was going on.

1982 Supp. R.O.A. at 888-89. Indeed, even though Varner's deposition testimony supported the argument that the shooting was an accident, Pearl never challenged Varner at trial on the changes to his testimony.

In addition, Pearl failed to argue or use for impeachment purposes Varner's clear tendency to embellish. During his direct examination, Varner's predilection was obvious and the Assistant State Attorney repeatedly admonished him not to put words in the defendant's mouth:

> Q: Do you recall exactly what he told you?
>
> A: Yes, ma'am.
>
> Q: Would you tell the jury what he told you?
>
> A: The Defendant stated that he had observed the -- He had done a surveillance on the Seven Eleven store, 205 South Ridgewood.
>
> Q: Excuse me, Officer. Did he use the word "surveillance"?
>
> A: No, ma'am.
>
> Q: Do you recall what terminology he used?
>
> A: Checked it out.
>
> Q: Okay.
>
> A: He had checked out the Seven Eleven, 205 South Ridgewood; and he knew what the schedules of the deliveries were and what was the best time to make a robbery, to make a hit.
>
> Q: Is -- Was that his terminology or yours, Officer?
>
> A: That was his terminology.
>
> * * *
>
> Q: Okay. It's very important, Officer, you understand, that we wish to hear exactly what the Defendant told you.
>
> A: Yes, ma'am.

1982 Supp. R.O.A. at 549-50 (emphasis added).

Pearl made no attempt to confront Varner with these statements, nor did he question Varner's veracity on this basis in his summation.

d. Pearl Made No Effort To Develop Available Evidence To Impeach Varner's Credibility

Varner's record as a police officer was deplorable, a fact that was no secret in the Daytona Beach legal and law enforcement community. Indeed, Pearl's co-counsel at Herring's trial testified that Varner "was not experienced [as a detective] and he did not know what he was doing," and had a reputation as a "clown." 1996 Tr. at 404; 1992 Master R.O.A. at 561, 567-68. The defense was also aware of the inconsistencies in Varner's testimony and that Varner had a tendency to embellish the facts in his testimony. 1996 Tr. at 402-03; 1992 Master R.O.A. at 568-69. Moreover, Crow, Varner's superior at the time of the Herring investigation, acknowledged that Varner's record was not that of "a first-rate policeman." 1992 Master R.O.A. at 5 16, 5 18. Crow further testified that he "didn't think that [Varner] was criminal investigation material." 1996 Tr. at 339. Pearl, however, made no effort to investigate or use any of the readily available evidence showing that Varner was an unprofessional police officer and generally unworthy of belief.

For example, during the three years prior to Herring's trial, Varner committed 25 disciplinary violations, including infractions for untruthfulness; overall poor performance; exercising poor judgment; failing to turn in reports as required; failing to follow directions; failing to honor a subpoena; poor follow-up investigation; poor administrative procedures; and assorted other rules violations. Exh. 23, 1996 R.O.A. at 528-30. Crow admitted that Varner's list of 25 disciplinary violations was "quite a sheet," that he himself gave Varner written reprimands for work that was "below standard," and that he came to question Varner's integrity even before Herring's trial. 1996 Tr. at 339, 341, 355; Exh. 23, 1996 R.O.A. at 528-30. Pearl testified, however, that Varner's record of disciplinary violations was irrelevant and that he made no effort to investigate Varner's record because Pearl's law enforcement sources and friends would have told him if that record was really bad. 1996 Tr. at 118-19, 127-28.

In addition, Pearl failed to develop critical evidence that, at the time of Herring's arrest and interrogation, Varner's wife, Wendy, had recently been arrested on charges of grand theft, activities as to which Dozell Varner himself was a suspect. 1996 Tr. at 329, 350, 359; 1992 Master R.O.A. at 493-99; Exh. 27, 1996 R.O.A. at 1004. Crow conducted the investigation of Wendy

Varner's criminal activities and arrested her. 1996 Tr. at 323, 325; 1992 Master R.O.A. at 493; Exh. 26, 1996 R.O.A. at 499-505. In connection with the investigation, he interrogated Dozell Varner. 1996 Tr. at 329, 330, 350, 359; 1992 Master R.O.A. at 493-94; Exh. 26, 1996 R.O.A. at 499-505. Both Dozell and Wendy Varner were asked to give -- and gave -- written waivers of their Miranda rights. 1996 Tr. at

4327, 328; 1992 Supp. R.O.A. at 3; Exhs. 26, BB, DD,[4] 1996 R.O.A. at 499-505, 526, 640, 814; however, each refused Crow's request to undergo a psychological stress evaluation, the equivalent of a lie detector test. 1996 Tr. at 330; 1992 Master R.O.A. at 495-96; Exh. 26, 1996 R.O.A. at 499-505. Crow testified that Varner's refusal to take that test caused him concern. 1996 Tr. at 340.

At the time of Herring's trial, the defense team was aware of the Wendy Varner criminal investigation. 1996 Tr. at 404; 1992 Master R.O.A. at 562-63. Yet Pearl made no use of the arrest of Wendy Varner and the investigation of Dozell Varner, facts that gave Pearl potent impeachment evidence tending to show that Dozell Varner was motivated to color or embellish his testimony regarding Herring's alleged untaped statements concerning the "witness elimination" motive. To the contrary, Pearl testified that the investigation of Wendy and Dozell Varner didn't "mean a thing to [him]" because "anybody can investigate anybody." 1996 Tr. at 130. Pearl further testified that Varner's refusal to take a lie detector test in connection with that investigation was also irrelevant because Pearl didn't "believe in lie detectors." 1996 Tr. at 132. In sharp contrast, Crow testified that, as Varner's investigation progressed, he came to question Varner's integrity and was concerned by Varner's refusal to take the lie detector test. 1996 Tr. at 339-40. Pearl's November 1996 testimony also conflicted with Pearl's December 1992 testimony on the same issue, where Pearl admitted that he made specific inquiries about the results of a polygraph test, conceding his belief that such test is reliable. 1992 Master R.O.A. at 840.

Wendy Varner was arrested for grand theft less than two weeks before Herring's arrest, 1996 Tr. at 329; Exhs. 26, 27, 1996 R.O.A. at 499-505, 1004. Pearl testified that her arrest

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[4] Exhibits BB and DD were erroneously excluded by the Circuit Court.

was irrelevant. 1996 Tr. at 132. Specifically, when asked whether her arrest might have given Varner a motive to cooperate with the department in order to rehabilitate himself, Pearl answered that he did not "see the connection" and did not "understand the question." 1996 Tr. at 132. Crow, Varner's supervisor, readily testified, however, that that arrest and Varner's investigation for grand theft prompted questions about Varner's integrity and credibility because Varner was a suspect in the case. 1996 Tr. at 33940. In short, Pearl ignored or failed to develop critical evidence to impeach the witness whose testimony unquestionably doomed Herring.

e. Medical And Ballistics Evidence Contradicting Varner's Testimony

In addition, the available medical and ballistics evidence contradicted Varner's account of Herring's "second shot." Based on, among other things, the medical examiner's report of an autopsy performed on the victim, the trajectory of the second bullet that was fired, photographs and sketches of the victim's position and the physical lay-out of the convenience store, the second shot could not have been fired in the way Varner's testimony suggested.

At the November 1996 hearing, Judge Johnson heard a proffer of testimony from Dr. Werner Spitz, an expert in the field of forensic pathology.[5] Dr. Spitz has been a pathologist and forensic pathologist for over thirty years; he has taught at Johns Hopkins University, at Wayne State University School of Medicine, and at the University of Windsor, Canada; he also was a member of a five-man committee investigating the assassination of President Kennedy for Vice-President Nelson Rockefeller and a member of the House of Representatives' Select Committee on Assassinations, responsible for investigating the assassinations of President Kennedy and Martin Luther King. 1996 Tr. at 538-40; Exh. 29, 1996 R.O.A. at 896-920.

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[5] Dr. Spitz's testimony at the 1996 hearing was based on a proffer because the Circuit Court excluded his testimony on the mistaken belief that Herring's 3.850 motion failed to plead Pearl's failure to develop forensic evidence. As we demonstrate infra, however, the Circuit Court made a finding of fact about that testimony and relied on Dr. Spitz's testimony in its January 1997 order. See infra at 77-78.

When asked whether he believed that any of the shots were fired when the victim was on the floor, Dr. Spitz made the following statements:

- "I don't believe any of these shots were fired when the victim was on the floor." 1996 Tr. at 576.
- "It is my opinion based on the information that I have that the victim was behind the counter on his feet when the two shots were fired and when the two shots were fired in rapid succession." 1996 Tr. at 576-77.
- "[T]he sequence of fire was in my view very close, very, very short. What I'm trying to say is that the shots rung out like boom boom, not shot number one and then a period and then shot number two." 1996 Tr. at 572.

When asked to explain his testimony, Dr. Spitz testified that two bullets were fired at the 7-Eleven clerk, one of which caused a wound first to the clerk's hand, then to his neck. 1996 Tr. at 569-72. The other bullet caused the clerk's wound to his left temple and caused immediate unconsciousness and death. 1996 Tr. at 573-74. The proximity between the neck and temple wounds -- 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 596-97. The gunpowder deposit on the clerk's skin establishes that that distance was less than 18 inches from the clerk's body. 1996 Tr. at 594. Moreover, regardless of the order in which the bullets were fired, the effect of the shots on the clerk also demonstrates that the bullets were fired while the clerk was standing, not while he was lying on the floor shielding himself with his hand: if the bullet that caused the temple wound was fired first, the clerk would have immediately lost consciousness and "would not have been able to formulate the need for shielding anything;" if the bullet that caused the hand and neck wounds was fired first, the clerk would only have experienced "temporary discomfort," and would not have fallen to the ground. 1996 Tr. at 575-76.

Dr. Spitz testified as follows:

> The downward course of the bullet in the neck seems to suggest that at that moment the shot in the left temple had already occurred because of the significant downward angle. It seems that at that moment, the victim had or was in the process of going down, of collapsing. The shot in the left temple caused instantaneous unconsciousness. And if that is the first shot, I can understand the downward angle.

* * *

But one thing is definite is that the hand was against the neck, in other words, the hand and neck shot are related, that the left temple shot would have caused immediate unconsciousness and immediate collapse and, therefore, may have been shot number one.

Q. Was the neck shot incapacitating?

A. The neck shot was neither incapacitating nor was it a fatal shot.

Q. Now, let's assume that the head shot was first. Could the victim have been shot in the neck while he was prone on the floor?

A. Again, anything is possible. But I doubt that considering all the other equivalences on the left side of the body, the distance is suggestive of being the same. The only thing that varies here is the angle and the angle is entirely consistent with him going down at that time.

Q. I ask you to assume that the head shot was first. Would the victim have been capable of shielding his neck with his hand at that point while lying on the floor?

A. From the -- after the head shot, the victim was unconscious as I indicated earlier, would not have been able to formulate a -- the need for shielding anything, the neck shot or anything else.

Q. So is it your opinion that if the head shot was first and the victim then crumpled to the floor, once on the floor, he could not have shielded the neck with his hand?

A. He could not -- he would not. He would have been unconscious. He would have been lying on the floor unaware of his environment.

Q. Now, let's assume that the shot through the hand and the neck was first. Is it your opinion that in that event, the victim could have been shot in the head while on the floor?

A. Anything is possible. But the neck shot would not have made him fall to the ground. The -- if the shot in the neck was fired first, he would have been able to do anything and that was not an incapacitating shot -- wound and he would not have collapsed or fallen unless there was some other intervening event that I'm not aware of.

But it is unlikely, totally unlikely that this shot would have done more than -- the neck shot would have done anything more than just cause temporary discomfort.

Q. So, Dr. Spitz, is it your opinion that whatever the sequence of shots was, it is highly unlikely the second shot was fired while the victim was prone on the floor?

A. That's correct. I don't believe any of these shots were fired when the victim was on the floor.

* * *

Q. Okay. And you say both of these shots were fired at close range. What does that mean?

A. Enough to deposit gunpowder on the body and probably soot as well.

* * *

A. The distribution of gunpowder here on the left forearm, left arm, left side of the neck, left side of the face --

Q. Uh-huh.

A. -- is highly unlikely on resulting from a single shot particularly since we are talking about a .22 caliber.

* * *

A. To deposit gunpowder, you're probably talking in terms of maybe up to 18 inches.

Q. No further than that?

A. In a .22, I would doubt it.

* * *

A. That is my duty as a forensic pathologist to know what gunpowder looks like and to know the distances of deposit of gunpowder in the skin, not only on the skin. No one knows that except the forensic pathologist because police don't work with skin. Police work with inert targets. So, therefore, when the question arises how far a weapon has to be away from skin, the question is for me and not to a policeman.

* * *

A. The first shot both shots were to the same general area of the body. In fact, they were within about five or six inches of each other. . . . The distance of fire is the same.

1996 Tr. at 573-76, 592-96. Accordingly, Dr. Spitz's testimony is consistent with the reflexive shooting defense and inconsistent with Varner's contention that Herring shot the 7-Eleven clerk "as the clerk was lying on the floor" in order to eliminate a witness. 1982 Supp. R.O.A. 550-51; supra at 16-17.

2. Pearl Also Failed To Challenge The Testimony Of The Other Law Enforcement Witnesses At Herring's Trial

Pearl's failure to cross-examine Varner was no aberration. His cross-examination of the two other investigating detectives who assisted Varner in Herring's interrogation, White and Anderson, was also essentially non-existent. As with Varner, the topics were food and rest -- and in the aggregate totalled four pages. See 1982 Supp. R.O.A. at 537-38, 560-63. More important, Pearl made no attempt to bring out on cross-examination that those officers made no mention of elimination of a witness. Nor did Pearl point out improprieties in their conduct of Herring's investigation or inconsistencies in their testimony.

At the suppression hearing, White testified that he had destroyed evidence of Herring's statements during the crucial period of his interrogation. According to White, the initial audio tape of Herring's statement was partly erased while he was playing it back. 1982 Supp. R.O.A. at 64-65, 70-72. Despite the fact that only a small portion of the tape had been erased and other parts of Herring's statement were contained on the tape, White destroyed the entire tape. 1982 Supp. R.O.A. at 522. Pearl made no mention of this destruction of evidence in cross-examining White at trial. Anderson testified at his pre-trial deposition that Herring never asked to speak to Varner alone, and that Herring never did speak to Varner alone. 1982 Supp. R.O.A. at 878-79. This contradicted Varner's testimony that Herring asked to speak to Varner alone during the time that the audio tape was turned off. 1982 Supp. R.O.A. at 82-86. At the suppression hearing, Anderson changed his testimony and stated that Herring had indeed asked to speak to Varner alone. 1982 Supp. R.O.A. at 27. When asked about this contradiction at the suppression hearing, Anderson admitted that he had changed his testimony. 1982 Supp. R.O.A. at 33-37. Pearl made no effort at trial to impeach Anderson with the prior inconsistent statement from the pre-trial deposition.

In addition to the detectives who interrogated Herring after his arrest, seven other law enforcement witnesses testified against Herring, including the following:

- Crow, who was present at the crime scene and, as noted, was also Varner's supervisor and participated in the investigation of grand theft charges against Varner's wife. 1982 Supp. R.O.A. at 422-23.

- Robert Kropp, a crime scene photographer with the medical examiner's office. 1982 Supp. R.O.A. at 473-75.
- Sergeant William Champion, an officer present at the crime scene. 1982 Supp. R.O.A. at 413-18.
- Sergeant Robert Sharpe, another officer present at the crime scene. 1982 Supp. R.O.A. at 419-21.
- Alfred Ledoux, a fingerprint technician with the Volusia County Sheriff's Department. 1982 Supp. R.O.A. at 583-87.
- James Walls, crime lab document examiner with the Florida Department of Law Enforcement. 1982 Supp. R.O.A. at 620-26.
- Adrian White, a Volusia County corrections officer. 1982 Supp. R.O.A. at 588-92.

Pearl failed to cross-examine any of these law enforcement witnesses.

3. Pearl Bolstered, Rather Than Challenged, The Testimony Of Law Enforcement Witnesses

Pearl's repeated bolstering of law enforcement witnesses at Herring's trial, and his admittedly favorable opinion of the credibility and veracity of law enforcement witnesses, demonstrate yet another way in which Pearl's dual status adversely affected his performance. During the voir dire of the jury panel at Herring's trial, a prospective juror stated that he did not respect the police officers in his hometown. 1982 Supp. R.O.A. at 221. Pearl gratuitously responded that "of course, the officers that testify here aren't from [the juror's hometown]," suggesting that the officers who would testify were indeed respectable. 1982 Supp. R.O.A. at 221. At the beginning of Pearl's voir dire of prospective jurors, Pearl remarked after the judge mistakenly asked for the State when he meant to ask for the defense that "[w]hen you said `State,' I almost stood up." 1982 Supp. R.O.A. at 284.

In his cross-examination of Benjamin Session, the Correctional Officer at the Daytona Beach City Jail who fingerprinted Herring, Pearl asked the witness whether the person whose fingerprints he took was present in the courtroom, thereby dramatizing the act of identification in the same manner often used by prosecutors. 1982 Supp. R.O.A. at 582. During his cross-examination of Charles Meyers, a lab analyst with the Florida Department of Law Enforcement specializing in forensic ballistics, Pearl gratuitously said "I know you don't make mistakes, and you're not careless."

1982 Supp. R.O.A. at 577. Similarly, Pearl prefaced his first question to Jennie Kuehn, a latent fingerprint examiner with the Florida Department of Law Enforcement, by needlessly stating that Ms. Kuehn was "a member of several professional associations and, of course, a long-time expert in the area of the identification of latent fingerprints." 1982 Supp. R.O.A. at 602-03.

Finally, in his closing argument, Pearl pointed out that the jury needed to evaluate the possibility of error on the part of the detectives who interrogated Herring. Yet, Pearl immediately contradicted himself, stating:

> Now, by that, I don't mean to say that I criticize or dislike policemen. Believe me, I do not; and I would not want to imply to you that I do. They do a very difficult and dangerous job of community service, and the policemen that you saw, Mr. Varner and Mr. Anderson, Mr. White, are all good policemen, good detectives.

1982 Supp. R.O.A. at 682 (emphasis added). At another point in his summation, Pearl added that, in his opinion, Varner, White, and Anderson were "good men," "well-dressed, literate," and that "Daytona Beach is fortunate to have men like that serving the community as law enforcement officers." 1982 Supp. R.O.A. at 688. In his November 1996 testimony, Pearl conceded that he did in fact believe that Daytona Beach was fortunate to have Varner, White, and Anderson as police officers. 1996 Tr. at 151-52. When questioned about why he offered this favorable assessment of these detectives, Pearl testified that he "knew them and . . . liked them," and that they were all good policemen. 1996 Tr. at 74.

4. Pearl Selected A Trial Strategy That Did Not Require Him To Challenge Law Enforcement

In light of Herring's prior course of robberies that resulted in no injuries, the obvious trial strategy would have been to argue that the shooting was accidental and reflexive and that Herring did not mean to shoot the clerk. This strategy, which was entirely consistent with Herring's taped confession and all the other evidence except Varner's testimony, see supra at 16-17, would of course have required a direct attack on Varner.

Instead, to avoid this confrontation, Pearl put Herring on the stand to testify that another man entered the 7-Eleven store during Herring's robbery attempt, proceeded to rob the store,

and in the process shot the clerk. 1982 Supp. R.O.A. at 645-46. Although Pearl also argued this theory to the jury in his summation, he did not believe in this theory and did not "think that any juror would have believed it." 1996 Tr. at 194; 1992 Master R.O.A. at 399. The outcome indicates that the jury and the trial court recognized this fact.

Pearl faced a number of choices in planning Herring's defense -- the theory of the defense, his strategy for cross-examination, and the structure of his closing argument. In each instance, he chose the option which did not require him to challenge law enforcement officers. At the November 1996 and December 1992 hearings, he could not justify any of these choices.

E. Pearl's Testimony At The November 1996 Hearing

Pearl's November 1996 testimony adduced compelling evidence of Pearl's conflict of interest, establishing his bias in favor of the law enforcement officers who testified against Herring at trial.

1. Pearl Never Challenged The Credibility Of Law Enforcement Officers

Pearl was unable to recall a single specific instance in any case where he challenged the credibility of law enforcement officers. While Pearl stated in conclusory fashion that he could think of "half a dozen, perhaps" instances where he had challenged the credibility of law enforcement officers, Pearl failed to set forth a single example of such an instance. 1996 Tr. at 65, 178.

Christopher Quarles, an Associate Public Defender who served as appellate counsel in several capital cases for which Pearl had served as trial counsel, testified that he could not think of a single instance where Pearl had challenged the veracity and truthfulness of a law enforcement officer. 1996 Tr. at 382-83. To the contrary, Quarles testified that Pearl always tended to treat law enforcement officers with great deference and always tended to praise their work. 1996 Tr. at 382. James B. Gibson, the Public Defender for the Seventh Judicial Circuit and Pearl's supervisor for over ten years, 1996 Tr. at 725-27, testified that he had no first hand knowledge of any occasion in any case where Pearl challenged the truthfulness or credibility of a law enforcement officer. 1996 Tr. at 731.

2. Pearl Admires The Law Enforcement Officers Who Testified Against Herring At Trial

As he did at Herring's trial and at the December 1992 hearing, Pearl repeated his admiration for the law enforcement officers who testified against Herring at trial and went to great length to defend their conduct in the Herring case. Specifically, Pearl contended that Varner was a good policeman, despite his abysmal record, his investigation for grand theft, and his wife's arrest for that crime; that White was a good policeman, despite his destruction of a portion of Herring's taped interrogation; that Anderson was a good policeman, despite his change of testimony under oath; and that Daytona Beach was fortunate to have these three individuals as police officers. 1996 Tr. at 146, 150, 152. Pearl also went to great lengths to defend Varner's, White's, and Anderson's conduct in the Herring case. With respect to Varner, Pearl refused to admit that Varner had embellished his story. 1996 Tr. at 107, 110. After reading the relevant portions of the record, Pearl could not agree that Varner's testimony got better the more times he gave it. 1996 Tr. at 110. In contrast to his 1992 testimony, Pearl could only see "a little enthusiasm, perhaps" on Varner's part. 1996 Tr. at 100.

With respect to White, Pearl was unwilling to condemn that detective's failure to volunteer, at the suppression hearing, that he erased and destroyed a tape. 1996 Tr. at 141. Specifically, Pearl testified as follows:

> Q. Now, it's true, is it not, that Mr. White had declined to disclose his erasure of the tape when this first came up at the suppression hearing?
>
> A. I wouldn't put it that way. Based on -- I don't remember, you understand. And I wasn't present at the suppression hearing. I'm only saying from what I read in the record, I don't get the idea that he was reluctant.
>
> Q. Officers aren't supposed to erase tapes and throw them away, are they?
>
> A. I don't know.

1996 Tr. at 141. With respect to Anderson's change of testimony under oath, Pearl went out of his way to defend Anderson's conduct. First, Pearl attempted to argue that there was no inconsistency between Anderson's deposition testimony (where Anderson testified that Varner was not with Herring during the off-the-record interrogation) and Anderson's suppression hearing testimony (where

Anderson testified that Varner was indeed with Herring during the off-the-record interrogation). 1996 Tr. at 147. Specifically, when asked why he failed to cross-examine Detective Anderson at trial on Anderson's prior inconsistent statement, Pearl answered that he if may not have thought that [that statement] was inconsistent." 1996 Tr. at 147. Second, when asked whether a witness' modification of his sworn testimony under oath *can affect* that witness' credibility, Pearl answered " [n]ot necessarily," an answer designed to rehabilitate Anderson's conduct. 1996 Tr. at 148. Third, as a last resort, Pearl attempted to second guess why Detective Anderson modified his testimony under oath. When asked whether the effect of Anderson's change in testimony was so that it would coincide with Varner's testimony, Pearl gave the following answer: "You are saying that he deliberately changed his testimony to coincide with Mr. Varner's. And I don't believe that. And I don't think it's true." 1996 Tr. at 151.

At bottom, throughout his November 1996 testimony, Pearl not only repeated his admiration for the law enforcement officers who testified against Herring at trial but also went also to great lengths to defend their conduct, so damaging to his client.

3. **Pearl Has A Selective Memory**

Pearl remembered virtually nothing about Herring's trial. Moreover, Pearl's testimony revealed a disinclination to recall the evidence and arguments presented at the trial or his mental impressions regarding the evidence and arguments presented. According to Pearl, he "recall[s] nothing about it, [his] preparation of this case or its trial. Or, so little that it would be of no value to you." 1996 Tr. at 95; 1992 Master R.O.A. at 3 29. The trial was "too long ago." 1992 Master R.O.A. at

330. Pearl's amnesia was virtually complete:

> Q. Now, Mr. Pearl, if you recall, Detective Varner was one of the witnesses who testified at the Herring trial. Correct?
>
> A. You have told me that. I do not recall. I don't recall anything about the trial whatever.
>
> Q. Let me back up. You recall representing Mr. Herring at the trial, don't you?

A. I do. I remember that there was a trial. I remember that Mr. Herring was my client.

Q. And you handled the guilt phase, and a lawyer named Peyton Quarles handled the penalty phase. Isn't that right?

A. That's correct. Yes.

Q. And you were the only lawyer representing Mr. Herring during the guilt phase. Is that right?

A. I think so. I can't be sure. But I think I've said so before. I believe that is true. I just do not have an independent recollection now of what happened so long ago.

Q. Do you recall that Mr. Herring's confession was offered in evidence? Isn't that right?

A. I don't recall it.

Q. You have no recollection of a tape of Mr. Herring's confession being offered in evidence?

A. I have no recollection of any part of this trial.

* * *

Q. Mr. Pearl, it was important to you, was it not, that the jury not believe Varner's testimony?

A. I don't remember.

Q. You have no recollection of defending Mr. Herring in this case?

A. I have recollection of being there, of conducting my part of the trial as his lawyer, but I have not seen this record since 1982 when he was first convicted. No one has ever shown me the record. I do not have my files. I have since -- I think you have them, in fact.

I've had no opportunity to review, to refresh my memory, to read this entire record, and to try to think sufficiently about the trial to refresh my memory about what happened. And now I can't. I just don't remember.

I remember that there was a trial. I've already told you that. But I do not remember the details of the trial. I don't remember except what you have shown me of who testified.

1992 Master R.O.A. at 329-30, 335-36.[6]

Thus, although Pearl insisted that there "must have" been some rational explanation for his conduct, his testimony is entitled to no weight, for Pearl repeatedly conceded that his attempts at post hoc rationalization were pure speculation. 1996 Tr. at 134, 153, 195; 1992 Master R.O.A. at 351, 370, 391, 454, 460. Indeed, Pearl was utterly unable to explain his "strategy" (if in fact he had one) with respect to his defense of Herring. For example, Pearl testified as follows with regard to his failure to cross-examine Varner adequately:

> Q. Well, if the prosecutor was emphasizing to the jury Detective Varner's statement, wasn't it in Mr. Herring's interest for you to emphasize things that contradicted that statement?
>
> A. I cannot tell you at this distance. I cannot. I do not remember that trial. I don't remember anything that happened during that trial.
>
> Q. You have no view as to whether that would be appropriate trial strategy, Mr. Pearl?
>
> A. It might have been an appropriate trial strategy. I admit that Mr. Epstein. It might also not have been. It might have been, in my judgment, maybe a thing I should not do in the conduct of that trial. It would depend on a number of things I don't remember. It would depend on a number of circumstances that don't come up to me on the cold record and certainly not from the few fragments that you have asked me now at last to read.
>
> So Mr. Epstein, I just can't help you. I can't give you an opinion on that. I wish I could, but I can't.

1992 Master R.O.A. at 346-47.

In addition, with respect to the critical evidence from Varner regarding the purported witness elimination motive and Pearl's failure to point out to the jury that the only reference in the

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[6] Furthermore, Pearl's claim that he "had no opportunity to review" the record of Herring's case is simply false. Pearl was given a number of opportunities to review the trial transcript at his deposition, but refused to do so. 1992 Master R.O.A. at 400-01. In fact, Pearl declined to answer questions at his deposition regarding his performance until ordered to do so by the Circuit Court. Pearl also refused to review the Herring trial transcript at hearing until directed by the Circuit Court. 1992 Master R.O.A. at 317-18. None of these materials apparently refreshed Pearl's recollection.

taped confession to an intent to eliminate a witness came from Varner, not Herring, Pearl testified that:

> Q. Now, don't you think it was appropriate, Mr. Pearl, for you to argue to the jury that the only reference to witness elimination on a tape recording came from Detective Varner and not from your client?
>
> Mr. Daly: Are you suggesting he didn't do that, counsel?
>
> The Witness: I beg your pardon, Mr. Epstein? Are you asking me something about something I did during the trial?
>
> Mr. Epstein:
>
> Q. Yes.
>
> A. I don't remember. I don't have a recollection of the trial. I don't know what I said. And I can't -even if you reconstruct it for me on this record, I'm not sure that I'm going to be able to answer the question since I didn't know what was going through my mind at the time.
>
> Q. Wouldn't you -- as you sit here now, Mr. Pearl, don't you think it's an appropriate trial strategy to argue to the jury that it was Detective Varner and not Mr. Herring who was talking about witness elimination?
>
> A. Differentially it is one -- it may be one effective trial strategy out of a half dozen that might have occurred to me in preparation for my final argument.
>
> Q. Are you saying you considered that strategy and rejected it?
>
> A. I didn't say that. I don't remember what I did. I don't know whether I considered it and rejected it or whether I did something else. At this distance, it is impossible for me to remember.

1992 Master R.O.A. at 352-53 (emphasis added).

In sum, Pearl professed a complete failure of recollection of the following points:

- Whether Varner, or any other police officers, testified about Herring's confession. 1996 Tr. at 82, 84; 1992 Master R.O.A. at 329, 330.
- Why he failed to impeach Varner's testimony with the conflicting evidence in the taped confession. 1996 Tr. at 93, 94, 95, 98, 116; 1992 Master R.O.A. at 346-47.

- **M** Why he failed to impeach Varner's testimony with conflicting testimony given by Detectives White and Anderson. 1996 Tr. at 114-15; 1992 Master R.O.A. at 361.

- **M** Why he failed to impeach Varner's testimony with prior inconsistent statements Varner had made under oath at his deposition. 1996 Tr. at 107, 113; 1992 Master R.O.A. at 358.

- **M** Why he failed to show that Varner embellished his trial testimony or argue that Varner's embellishment of the testimony undermined his credibility. 1996 Tr. at 100, 106; 1992 Master R.O.A. at 350-51.

- **M** Why he failed to impeach Varner's testimony with the extrinsic evidence demonstrating that Varner lacked credibility. 1996 Tr. at 117-18, 127; 1992 Master R.O.A. at 367-68.

- " What points he was trying to make in conducting Varner's cross-examination. 1996 Tr. at 94.

- " Why he failed to impeach White's testimony with evidence concerning White's destruction of a tape containing statements made by Herring during his interrogation. 1996 Tr. at 142; 1992 Master R.O.A. at 379-80.

- " Whether he concluded that White's evasive testimony concerning destruction of the tape indicated that White was being less than truthful. 1996 Tr. at 142-43; 1992 Master R.O.A. at 381, 383.

- " Whether he thought it was in Herring's interest to argue to the jury that White may have destroyed evidence of exculpatory statements made by Herring. 1996 Tr. at 142, 184; 1992 Master R.O.A. at 384-85.

- **M** Why he failed to impeach Anderson's testimony concerning Varner's interrogation of Herring with prior inconsistent statements under oath at his pre-trial deposition indicating that Herring never asked to speak to Varner alone and never did speak to Varner alone, even though Anderson admitted at the suppression hearing that he had changed his testimony. 1996 Tr. at 147-48; 1992 Master R.O.A. at 387-88, 389-91.

- **M** Why he argued to the jury a defense that he believed incredible. 1996 Tr. at 195-96; 1992 Master R.O.A. at 398.

- **M** Whether he examined the trajectory of the bullets to ascertain whether that trajectory was consistent with Varner's testimony, and whether he did anything with respect to the ballistics evidence. 1996 Tr. at 134.

At the 1996 hearing, Pearl also demonstrated that he had a selective memory. On direct examination, Pearl remembered virtually nothing about the Herring trial, including his trial strategy. 1996 Tr. at 82, 85, 87, 93, 95, 116, 118, 134, 143, 148, 195, 196. In sharp contrast, on cross-examination by the State, he vividly remembered facts that put law enforcement officers in a good light. For instance, Pearl remembered White's suppression hearing testimony that he had erased

"only a small portion of the tape." 1996 Tr. at 182. Pearl also remembered that the police "were, as far as [he] could tell, pretty candid" about White's destruction of the tape. 1996 Tr. at 184. Pearl also remembered that his argument to the jury about Varner's, White's, and Anderson's conduct during Herring's 71/2-hour interrogation was mere "chicanery." 1996 Tr. at 182.

Similarly, at the 1992 evidentiary hearing, in contrast to Pearl's lack of recall with regard to the facts of Herring's trial, Pearl demonstrated an amazing command of the facts of the other defendants' cases, several of which predated Herring's case. Among the details that Pearl was able to recall include the following:

- Pearl had a vivid and virtually complete recollection of the Wright case. 1992 Master R.O.A. at 701-27, 788-805. He recalled the names of witnesses he failed to call at trial and the substance of their likely testimony. 1992 Master R.O.A. at 715-16. Pearl also recalled minute details of how a fingerprint on a "very small kerosene stove" was found in the house of Wright's victim, 1992 Master R.O.A. at 704-05, and he testified at length about the significance of a glass vase and an uncalled witness who would have assisted Wright's defense by explaining the origin of the vase. 1992 Master R.O.A. at 798-801.

- With respect to the Teffeteller case, Pearl remembered where Teffeteller was arrested, details regarding the victim and the victim's name, and details regarding the discovery Pearl conducted. 1992 Master R.O.A. at 834-41.[7]

- In connection with Henderson's case, Pearl was able to recollect that a motion for disinternment of the victim was made and Pearl explained in detail why such a motion was made. 1992 Master R.O.A. at 898-900.

- As to the Castro case, Pearl had a clear recollection of the salient facts, including the extradition of Castro and his co-defendant, pre-trial proceedings and the details of Castro's plea agreement with the State. 1992 Master R.O.A. at 974-87.

- Regarding his representation of Quince, Pearl testified that "I certainly remember the case and what happened." 1992 Master R.O.A. at 453.

Pearl's recall of these other cases belies his claim of utter amnesia with respect to Herring's case.

4. Pearl Admits That His Theory Of Defense Was Incredible

[7] Indeed, although the Teffeteller case predated Herring's and Pearl "had no opportunity whatsoever to read [the Teffeteller] record since it was made, nor to review [his] **files** since they were turned over to CCR," Pearl nevertheless -- in contrast to Herring's case --could "remember . . . a large number of the issues involved and the facts of the case." 1992 Master R.O.A. at 833.

Pearl admitted that he chose to argue to the jury an incredible defense. 1996 Tr. at 194. Specifically, Pearl admitted that, at the time of trial, he "didn't think that [his defense] was a [credible defense]." 1996 Tr. at 191. Pearl also remembered his prior admission that, had he been a juror in this case, no one "could have convinced [him] that it was true. And therefore, [he didn]'t think [that the defense] was credible." 1996 Tr. at 194; 1992 Master R.O.A. at 399. Accordingly, Pearl chose to argue a defense incredible by all standards even though he admitted that this case was not inevitably a death penalty case and even though he also admitted that he had argued far more lurid cases than this one. 1996 Tr. at 152-53.

5. Pearl Admits That He Never Would Have Argued To The Jury The Accidental Shooting Defense

Despite his admission that his chosen defense was incredible, Pearl testified that he would not 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. In his November 1996 testimony, Pearl made a telling admission that expressly contradicts his contention that Herring's testimony locked him in an incredible theory of defense. 1996 Tr. at 176. Pearl expressly admitted that, regardless of Herring's trial testimony, he never would have argued the accidental shooting defense because Pearl failed to understand that defense.

1996 Tr. at 185-86. Pearl testified as follows:

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

1996 Tr. at 185.

The accidental shooting defense was consistent with Herring's taped confession and with all of the other evidence, except for Varner's testimony. See supra at 16-17. That defense was also consistent with Herring's course of prior robberies that resulted in no injuries. 1982 R.O.A. at 103-09. Pearl's decision to ignore the accidental shooting defense also reflects his lack of understanding of the applicable law. That the shooting was accidental and reflexive was critical, not because it was a defense to felony murder, but because it would have eliminated the avoidance of

arrest aggravating circumstance. The accidental shooting defense constituted the difference between life and death in Herring's case. The trial court's statements when imposing Herring's sentence make this clear. The court concluded that "[t]he Defendant's age and difficult childhood are not sufficient mitigating factors to block imposition of the death penalty in a case where a Defendant, now with a prior violent felony conviction, murders an innocent clerk during a robbery so that the clerk will not testify against him." 1982 R.O.A., Vol. I, at 77; Exh. 18-BB, 1996 R.O.A. at 497.

Varner's testimony, as Pearl has acknowledged, provided "the blueprint for [the] statutory aggravating circumstances." 1992 Master R.O.A. at 332. Because Pearl never challenged that testimony, the sentencing judge followed the blueprint.

F. The Expert Testimony At The 1996 Hearing

Judge Johnson heard expert testimony from Professor Stephen Gillers (an expert in the field of legal ethics) and from James M. Russ (an expert in the field of criminal defense). Both experts provided compelling evidence that Pearl had a conflict of interest resulting from his Special Deputy Sheriff status; that Pearl failed to represent Herring effectively, as a result of that conflict; and that Pearl's duties to Herring continued until the conclusion of Herring's trial. At the November 1996 hearing, Judge Johnson also heard testimony from Dr. Werner Spitz, an expert in the field of forensic pathology. Dr. Spitz provided critical evidence that the two shots were fired in rapid sequence while the clerk was still standing. Dr. Spitz's testimony squarely contradicts Varner's testimony that Herring fired the "second shot" while the victim was lying on the floor for the purpose of witness elimination.

1. Professor Gillers's testimony

Professor Gillers is a leading expert in the field of legal ethics: he has been a professor of law at New York University Law School since 1978; he has published numerous articles and The Regulation of Lawyers: Problems of Law & Ethics, a casebook used in Florida and throughout the country; and he has testified and offered evidence between 60 and 70 times in the last 13 years in Florida and other states. 1996 Tr. at 439-40; Exh. 31, 1996 R.O.A. at 881-94.

After reviewing the entire Herring trial transcript and all of Pearl's deposition testimony, Professor Gillers concluded that Pearl had an objective conflict of interest between his personal interest in continuing to be able to carry a handgun under his authority as Special Deputy Sheriff and his client's interest in having a lawyer capable of exercising his professional judgment to aggressively impeach the credibility of police officers in Volusia County. 1996 Tr. at 475-76. Pearl's conflict of interest arose from the specific facts of this case, which "could cause a reasonable client [to] objectively conclude that [Pearl]'s interest in retaining his right to carry a concealed firearm would interfere with his professional judgment about whether and how to attack [Varner's] credibility." 1996 Tr. at 472.

Professor Gillers further testified that, under DR 5-101 of the Florida Code of Professional Responsibility, Pearl came under an obligation to secure Herring's informed consent before he could represent him. 1996 Tr. at 472. Pursuant to DR 5-101, Pearl came under an obligation to inform Herring of the following facts:

- That Pearl valued the right to carry a concealed handgun. 1996 Tr. at 473.
- That Pearl's ability to carry a concealed handgun depended upon the good will of the Sheriff of Marion County, the neighboring county. 1996 Tr. at 473.
- That the Marion County Sheriff could revoke at will Pearl's permit to carry a handgun. 1996 Tr. at 473.
- That Pearl's ability and willingness to impeach Varner's credibility at trial was critical to the outcome of Herring's case. 1996 Tr. at 473-74.
- That Pearl's impeachment of Varner's credibility may have adverse consequences on Pearl's ability to carry a handgun in the future. 1996 Tr. at 473.

Pearl's subjective determination that there was no conflict was insufficient to waive that conflict, because the conflict of interest objectively existed. 1996 Tr. at 501. Only after a full disclosure of his conflict and an open discussion with Herring could Pearl secure an informed waiver of the DR 5-101 conflict. 1996 Tr. at 474.

Professor Gillers's testimony also contradicted Pearl's contention that he

was not responsible for the penalty phase of Herring's trial. Professor Gillers testified that Pearl's duties to Herring continued until after the conclusion of his trial because Pearl was "the more experienced and senior" of the two trial counsel, and because Pearl never purported to withdraw from Herring's representation. 1996 Tr. at 478.

2. Mr. Russ's testimony

Mr. Russ similarly testified to Pearl's conflict and similarly concluded that Pearl's status as Special Deputy Sheriff created a conflict of interest that adversely affected his ability to provide legal services to Herring. 1996 Tr. at 616-17. Mr. Russ is an expert in the field of criminal defense: he has been a criminal defense lawyer in Florida for over 30 years and has also practiced law in the office of the Orange County Solicitor, in Florida; before Herring's trial, he had served as trial counsel in eight[8] capital cases in Florida. 1996 Tr. at 602, 673; Exh. 30, 1996 R.O.A. at 842.

Mr. Russ testified that Pearl's representation of Herring was ineffective for the following two reasons. 1996 Tr. at 617, 642. First, Pearl failed to cross-examine effectively the police officers that the State called as witnesses and bolstered their testimony instead. 1996 Tr. at 617-21, 624-26, 638, 640-43. There was a "total failing in [his] cross-examination to [challenge the credibility, truthfulness, and professionalism of these officers.]" 1996 Tr. at 639. As to Varner, an aggressive impeachment of the officer's credibility was "not only proper but . . . compelled. 1996 Tr. at 631.

As to Pearl's failure to cross-examine Varner about Herring's alleged untaped confession, Mr. Russ testified as follows:

> In my opinion, that's why Mr. Herring is on death row today. That it was critical, this untaped what he says, Mr. Varner said was his incriminatory statement about the

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[8] In its January 31, 1997 Order, the Circuit Court ruled 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 capital cases in Volusia county at that time period."* 1996 R.O.A. at 1017 (emphasis added). At the November 1996 hearing, however, Mr. Russ testified that, by 1982, he had tried *eight* death penalty cases in Florida, and that he did not recall how many cases he had tried in Volusia County. 1996 Tr. at 656-57, 673-74.

> elimination of the witness or the avoiding of the arrest element, that was the critical part of the case. It wasn't on the tape.
>
> * * *
>
> Now to go further to your question as to the background of Mr. Varner, Mr. Varner's credibility, is to repeat what's critical to this case. So it's a matter of finding out what's behind the man, what drives this man to - to get on the witness stand under oath and make this type of statement under all these circumstances considering particularly [that] there's nothing on the tape to support what -- his testimony.

1996 Tr. at 626-27.

Pearl's representation was also ineffective because he adopted an incredible and irrational defense strategy and "as part of this irrational theory of defense allowed his client to take the witness stand and put on this incredible story of a second person in the 7-Eleven store." 1996 Tr. at 654. Mr. Russ described Pearl's irrational defense as follows:

> That's like putting his client's head in the meat grinder. He's arguing, on one side you have got a credibility issue, on one side you've got a -- a sworn commissioned police officer who said that off the tape this youth said, I killed him with the second shot so he wouldn't be a witness against me. And on the other side, you've got the defendant, a 19-year-old black youth who on the tape, the jury has heard the tape where in phase one of the tape he said, I was there but I didn't kill him, it was Mr. X who came in behind me and he killed him. And then on the second part of the tape from seven-fifty to seven fifty-four, this same youth is saying, I killed him but it was an accident and I didn't mean to do it and I was scared. And then he gets on the stand under oath in front of this jury under oath and tells them in the face of that tape having been heard by that jury where they heard the two -- two different stories by this 19-year-old youth, now he gets on the stand up here and under oath swears before God and the whole world and he now tells them that it was the second man who came behind him and did the killing.
>
> And then this lawyer argues it's a credibility contest between a sworn deputy sheriff and somebody who's been up here, for all purposes, perjuring himself in front of this jury. That's what I call putting your head in the meat grinder.
>
> * * *
>
> I'm saying it's an illogical, incomprehensible, incredible defense and it's [an][sic] incompetent argument that falls below the standard of effective assistance of legal counsel. It's a violation of the Sixth [Amendment][sic] Right to Legal Counsel.

1996 Tr. at 694-96.

Like Professor Gillers, Mr. Russ contradicted Pearl's contention that he was not responsible for the penalty phase of Herring's trial. At the November 1996 hearing, Mr. Russ testified

that, as counsel of record, Pearl was responsible for the entire trial. 1996 Tr. at 677. As to Pearl's contention that he and Quarles had divided their responsibilities, 1996 Tr. at 181, Mr. Russ testified that "lawyers can divide the work. They can't -- they can't duck the responsibility and walk out the door when things are going to the worms." 1996 Tr. at 677. Walking out the door five minutes after the beginning of the penalty phase is precisely the strategy that Pearl adopted, thereby abdicating his duties to both Quarles and Herring.

3. Dr. Spitz's testimony

Dr. Werner Spitz, an expert in the field of forensic pathology, testified at the November 1996 hearing that, based on his analysis of the autopsy report and the photographs available, the two shots were fired in rapid succession and from the same distance as the victim was standing behind the counter. Dr. Spitz did not believe any of the shots were fired when the victim was on the floor. See supra at 25-30. The State presented no forensic evidence contradicting Dr. Spitz's testimony, even though the State was on notice since at least 1992 that the forensic evidence was at issue. See infra at 76-77.

G. The Circuit Court's Decision

On January 31, 1997, the Circuit Court issued its decision on Herring's 3.850 motion. State v. Herring, No. 81-1957-CFA (Fla. Cir. Ct., Volusia County, Jan. 31, 1997), 1996 R.O.A. at 1012-18. In denying Herring's motion, the Circuit Court found that Pearl was never a law enforcement officer. 1996 R.O.A. at 1016. The Circuit Court concluded, among other things, that Pearl's status as a Special Deputy Sheriff did not create a conflict between Pearl's duty to defend Herring and his status, and that Pearl's dual status had no adverse effect on Pearl's representation. The Circuit Court also concluded that Pearl's representation of Herring had not been ineffective. 1996 R.O.A. at 1017-18. The instant appeal was filed on February 13, 1997. 1996 R.O.A. at 1019.

SUMMARY OF ARGUMENT

Herring is entitled to the vacation of his conviction and death sentence for each of the following reasons:

- Herring's Sixth Amendment right to counsel was violated because Pearl's special deputy status created an actual conflict that adversely affected Pearl's representation of Herring. That conflict arose from Pearl's personal interest in maintaining the ability to carry a concealed firearm, which in turn depended upon Pearl's remaining in the good graces of the Marion County Sheriff. Pearl's conduct of the Herring trial demonstrates that his conflict adversely affected his representation of Herring. In every single instance where Pearl had a choice, whether in overall strategy, selection of the jury, or examination of witnesses, he made the choice least likely to offend the law enforcement officials to whom he was beholden. The effect of those choices is equally clear. Varner's testimony, which Pearl failed to impeach even though he had abundant material at his disposal, led directly to Herring's death sentence, a fact recognized time and again by this Court.

- Pearl's conduct cannot be excused on the basis that Pearl's actions were "understandable" strategic choices. The "strategy" defense to an ineffective assistance claim is simply not available with respect to a claim -- such as Herring's -- that counsel suffered a conflict of interest that adversely affected his representation of his client. Even were such a defense available here, a claim of "strategy" presupposes an articulation of that strategy by counsel, not conjecture by the State or the trial court as to what counsel's strategy might have been. Pearl's failure to recall anything regarding his conduct of the Herring trial precludes the State's post hoc incantation of "strategy."

- The Circuit Court committed reversible error in failing to conduct a proper actual conflict analysis, which requires that the court consider evidence demonstrating the *adverse effect* of counsel's representation in its assessment of counsel's *actual conflict*, because a finding of adverse effect makes the actual conflict "very real." Freund v. Butterworth, 117 F.3d 1543, 1546, 1571 (11th Cir. 1997). The Circuit Court,

however, simply found that Herring had not established the existence of an *actual conflict,* and therefore that there could be no *adverse effect.* This conclusion was erroneous as a matter of law.

M The Circuit Court committed reversible error in its rulings about the testimony of Dr. Spitz, an expert in the field of forensic pathology. In its written order, the Circuit Court made an express finding of fact about Dr. Spitz's testimony and relied on this finding in denying Herring's Rule 3.850 motion. At the November 1996 hearing, however, the Circuit Court excluded Dr. Spitz's testimony and only allowed a proffer on the mistaken belief that Herring's Rule 3.850 motion fails to plead Pearl's failure to develop forensic evidence challenging the State's theory of the case. The Circuit Court's finding of fact and purported exclusion of Dr. Spitz's testimony are both clearly erroneous.

ARGUMENT

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

A defendant is deprived of the Sixth Amendment right to counsel where (i) counsel faced an actual conflict of interest and (ii) that conflict "`adversely affected'" counsel's representation of the defendant. Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); Freund v. Butterworth, 117 F.3d 1543, 1571 (11th Cir. 1997); LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir.), cert. denied, 488 U.S. 958 (1988); see also United States v. Khoury, 901 F.2d 948 (11th Cir.) (absent a knowing, voluntary waiver, defendant is entitled to representation free of actual conflict), modified on other grounds upon denial of rehearing, 910 F.2d 713 (11th Cir. 1990). Because the right to counsel's undivided loyalty "is among those `constitutional rights so basic to a fair trial.... [its] infraction can never be treated as harmless error.'" Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (citing Chapman v. California, 386 U.S. 18, 23 (1967)). Defense counsel is guilty of an actual conflict of interest when he "owes duties to a party whose interests are adverse to those of the defendant." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir.), cert. denied, 444 U.S. 833 (1979).

The Eleventh Circuit's recent decision in Freund provides guidance in analyzing this issue. In Freund, two defendants, Freund (a former physician who lost his ability to practice medicine after incurring brain damage) and Trent (a full-time criminal), were charged with the murder of a man who performed various tasks for Trent. Id. at 1549. All of the physical evidence pointed to Trent. Id. at 1546. Only one of several witnesses claimed to have seen Freund actually commit the murder, and that witness had "serious credibility problems." Id. at 1546.

At trial, Freund was represented by a law firm that had a strong incentive not to antagonize Trent because Trent, a former client of the firm, had made damaging allegations at a hearing about the firm that could seriously "harm [its] reputation in the eyes of the community." Id. at 1579. Further antagonizing Trent would have "posed serious risks to the law firm's own interests." Id. at 1547.

Freund's trial counsel could have adopted at least two defense strategies, one of which was to argue that Trent, not Freund, had committed the murder and to put the State to its burden of proof. Freund's counsel opted instead for a defense of insanity that "posed much less of a threat of conflict" because that defense was an implicit admission that Freund had committed the crime. Id. at 1577. After a jury trial, a Florida state court convicted Freund of first-degree murder. Id. at 1565. Thus, in Freund, like here, the State's theory of the case relied on a witness "with serious credibility problems;" defense counsel had its own incentive to coddle a critical witness who posed serious risks to its own interests; and counsel, who could have adopted at least two defense strategies, opted for the strategy that was the "least antagonistic" to its interest. Id. at 1546-47, 1577, 1581-82.

The Eleventh Circuit held that Freund "provides a classic example of how a conflict of interest can prevent a law firm from adequately representing a criminal defendant." Id. at 1546. Counsel's incentive not to antagonize Trent and decision to opt for the defense that was "least antagonistic" to its own interests was utterly incompatible with his obligation to represent his client zealously, an obligation going to "the foundation of justice" in a case involving the death penalty. Id. at 1573, 1579 (citing Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985)).

In conducting the Cuyler analysis, the Eleventh Circuit found that the inquiry into *actual conflict* and *adverse effect* "necessarily interrelate," because the two elements are "bound together." Freund, 117 F.3d at 1546, 1571. The court held that a significant *adverse effect* is by itself sufficient to demonstrate an actual conflict for Cuyler purposes: "the adverse effect leaves us with no doubt, for instance, that the conflict was very real." Id. at 1571. In United States v. Tatum, 943 F.2d 370, 375-76 (4th Cir. 1991), the court similarly noted the overlapping nature of the *actual conflict* and *adverse effect* prongs of the Sixth Amendment analysis and noted that "the failure of defense counsel to cross-examine a prosecution witness whose testimony is material . . . can be considered to be [an] actual lapse[] in the defense." Cf. Brien v. United States, 695 F. 2d 10, 15 (1st Cir. 1982) (In order to demonstrate an actual conflict, the defendant must first show that "some plausible alternative defense strategy or tactic might have been pursued . . . . He need not show that the defense

would necessarily have been successful if it had been used, but merely that it possessed sufficient substance to be a viable alternative." Second, the defendant must establish that the alternative defense was inherently in conflict with the attorney's other loyalties or interests.); United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990).

In this case, the Circuit Court failed to conduct the conflict of interest analysis mandated by Freund and similar cases. Instead, the Circuit Court simply stated that there cannot be an *adverse effect* in the absence of an *actual conflict.* Herring, No. 81-1957 CFA, at 6, 1996 R.O.A. at 1017. But here the evidence was overwhelming that Pearl's failure to even consider challenging law enforcement witnesses had an *adverse effect* on Herring's representation. Accordingly, the already strong evidence of Pearl's *actual conflict is* significantly bolstered by the compelling evidence of *adverse effect,* making Pearl's actual conflict "very real." Freund, 117 F.3d at 1571.

A. Pearl's Special Deputy Status Created An Actual Conflict

Defense counsel harbors an *actual conflict* of interest when he has "inconsistent interests;" that is, when counsel'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; United States v. Harris, 846 F. Supp. 121, 127 (D.D.C.), remanded by, 24 F.3d 1464 (D.C. Cir. 1994). Counsel's conflict of interest is "essentially a tension, a friction, a dissonance, within the attorney which does not permit the attorney's single hearted zealous advocacy" on behalf of his client. Harris, 846 F. Supp. at 127 (quoting United States v. Gambino, 864 F.2d 1064 (3d Cir. 1988)).

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 interests. Freund, 117 F.3d at 1575 (Where the facts of the case presented two possible strategies, counsel's obligation to his client was "to advise him of which strategy to pursue, guided by one consideration alone -- which strategy was in [the client]'s best interest.").

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"); Harris, 846 F. Supp. at 127-28 (actual conflict of interest established where alternative defense strategy required aggressive cross-examination of police officer whose testimony conflicted with that of other state witnesses, but counsel -- who had intimate relationship with that police officer -- was unwilling to zealously cross-examine him).

Pearl's need to carry a concealed weapon, dependent as it was upon maintaining the good favor of law enforcement in general and Sheriff Moreland in particular, who could revoke that privilege at will, is precisely the type of personal interest that may create a conflict as contemplated by the Sixth Amendment. Freund, 117 F.3d at 1578-79; Tatum, 943 F.2d at 376; Harris, 846 F. Supp. at 127-28. And where Pearl's job as a criminal defense lawyer required him to challenge law enforcement officers, the conflict between his personal interest and his professional duties that precluded him from doing so was direct and unavoidable.

Indeed, numerous courts and ethics opinions have held that even if such a relationship is characterized as an "indirect" conflict, it creates an unconstitutional actual conflict within the meaning of Cuyler. See People v. Rhodes, 524 P.2d 363, 365-66 (Cal. 1974) (city attorney may not assist in defense of criminal defendants from *different* neighboring city); People v. Washington, 461 N.E.2d 393, 395-98 (Ill. 1984) (where attorney served as part-time prosecutor, defendant was denied effective assistance of counsel because witnesses were police officers), cert. denied, 469 U.S. 1022 (1984); In re Advisory Opinion of the Kentucky Bar Association, 847 S.W.2d 723 (Ky. 1993) (municipal attorney may not engage privately in criminal matters, even if job excludes criminal matters, because vigorous cross examination could alienate police); In re Inquiry to Advisory Committee on Professional Ethics Index No. 58-91(B), 616 A.2d 1290, 1291 (N.J. Sup. Ct. 1992) (attorney/police officer forbidden to "represent clients in criminal matters with interests potentially

adverse to his employing municipality"); Howerton v. State, 640 P.2d 566, 567 (Okla. Crim. App. 1982) (part-time district attorney may not defend persons within or without his prosecuting jurisdiction); N.Y. STATE B. Ass'N COMM. PROFESSIONAL ETHICS Op. 615 (McKinney 1991) (law firm may not represent criminal defendants and employ lawyer who is also police officer).[9]

B. 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.'" Id. at 1580.[10] In Freund, there was a "viable alternative" to the insanity defense: a defense shifting the blame to Trent, Freund's co-

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[9] Courts have also held that, even if counsel has no law enforcement duties, counsel's close relationship with law enforcement officers may be sufficient to create an unconstitutional actual conflict of interest within the meaning of Cuyler, where that relationship constrains counsel from aggressively cross-examining law enforcement witnesses. In Harris, defense counsel ignored, because of such relationship, a "perfect opportunity" to zealously cross-examine a police officer whose testimony was "ripe for cross-examination." Harris, 846 F. Supp. at 127-30. The court held that the conflict of interest was established. Id. The court focused on the *"nature of the personal relationship"* between counsel and law enforcement officers and concluded that the "appearance of impropriety looms ominously over the facts of this case." Id. at 127, 133 (emphasis added) (counsel's intimate relationship with a police officer -- called to testify against her client -- and counsel's close relationship with many other officers who routinely gave her tips created conflict of interest where counsel had duty to aggressively cross-examine law enforcement officers).

Here, Pearl admitted that he had a close relationship with numerous police officers, and that he routinely relied on his law enforcement "sources" to give him tips. 1996 Tr. at 127-28, 157. Pearl's status as a Special Deputy Sheriff, coupled with this relationship of dependence, is precisely of the type that triggers a conflict of interest in a case where counsel's zealous representation of his client requires the aggressive cross-examination of law enforcement officers. See Harris, 846 F. Supp. at 146.

[10] A showing of adverse effect due to a conflict of interest is distinct from a general Strickland claim of ineffective assistance of counsel. See generally LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir. 1988) (noting difference between claims). In a general Strickland claim of ineffective assistance of counsel, prejudice must be shown, i.e., that the lack of effective representation "probably changed the outcome of [the] trial." Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir.) cert. denied, 474 U.S. 1013 (1985). In contrast, if a conflict of interest is shown, a defendant need only prove an adverse effect due to that conflict. See McConico v. Alabama, 919 F.2d 1543, 1548-49 (11th Cir. 1990).

defendant, and putting the State to its burden of proof. Id. at 1581-82. Yet Freund's counsel opted for the insanity defense, a defense much less antagonistic to Trent. Id. 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.

1. The Accidental Shooting Defense Was A Plausible And Reasonable Alternative Defense Strategy

To show *adverse effect*, Herring must "point to `some plausible alternative defense strategy or tactic [that] might have been pursued.'" Freund, 117 F.3d at 1579-80 (citing Fahey, 769 F.2d at 836). Where the state's theory of the case relies exclusively on a witness "with serious credibility problems," a defendant will easily articulate a plausible alternative strategy of defense by "focus[ing] [the] defense around the possibility that the police were completely mistaken about key facts" of the case. United States v. Harris, 846 F. Supp. 121, 129 (D.D.C. 1994) (where police officers involved in defendant's arrest provide conflicting testimony about key facts of case, "powerful" and "well-recognized" alternative defense strategy was to argue that police's theory of case was mistaken; officers' conflicting testimony provided counsel with "perfect opportunity" to do so); Freund, 117 F.3d at 1546, 1580 (plausible alternative defense existed and was "more than reasonable," where only evidence supporting state's theory was "witness with serious credibility problems").

In Herring's case, an obvious alternative strategy of defense was that the shooting of the 7-Eleven clerk was reflexive, that Varner lacked credibility, and that the testimony of the other law enforcement officers was also impeachable. That defense constituted a plausible alternative strategy because the State's theory of the case rested exclusively on a single witness (Varner), whose credibility was impeachable in numerous ways. See supra at 18-30; see also Freund, 117 F.3d at 1546, 1580; Harris, 846 F. Supp. at 129. That defense was also much more credible than the defense that Pearl chose and now admits no juror would have believed. 1996 Tr. at 191, 194; 1992 Master R.O.A. at 399. Moreover, the reflexive shooting defense, unlike Pearl's chosen defense, was consistent with all of the credible evidence in this case, including the forensic evidence.

Thus, Herring's alternate defense strategy was "more than reasonable" because it would have been consistent with all of the evidence in the case and conflicted only with the testimony of a single state's witness "with serious credibility problems." Freund, 117 F.3d at 1546, 1580.

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

Under the adverse effect test articulated by Freund, 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 (citing Fahey, 769 F.2d at 836). A defense strategy inherently conflicts with counsel's interests where adopting that defense requires the aggressive impeachment of a witness that counsel has "a strong incentive not to further 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 Harris, 846 F. Supp. at 129-30, 133 (defense strategy inherently conflicts with counsel's interest where counsel has intimate relationship with law enforcement witness whose testimony is "ripe for cross examination" and friendly relationship with other law enforcement officers; counsel's relationship with law enforcement officers created incentive to avoid aggressive cross-examination).

Here, 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. Every single step that Pearl should have taken to zealously represent Herring inherently conflicted with his need to carry a firearm and resulting allegiance to law enforcement. Sheriff Moreland testified that he could terminate Pearl's Special Deputy Sheriff status at will, and that he had, indeed, revoked the Special Deputy Sheriff status of "quite a few people." 1996 Tr. at 277. Pearl's failure to ever challenge the credibility of a law enforcement officer, supra at 34-35, demonstrates that Pearl would never have allowed Herring's representation to jeopardize his Special Deputy Sheriff status. Accordingly, Herring has clearly demonstrated that a reasonable alternative defense strategy was available to Pearl, and that that defense inherently conflicted with Pearl's personal interest.

3. Varner's Testimony Was The Only Support For The Avoidance Of Arrest Aggravating Circumstance

The accidental defense strategy was not only reasonable, but because of Florida law on avoidance of arrest aggravating circumstance, would have made the difference between life and death for Herring. The "avoidance of arrest" aggravator is set forth as the sixth aggravating circumstance enumerated in Florida's capital sentencing statute, and may only be applied where the State has demonstrated beyond a reasonable doubt that "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." Sec. 921.141(5)(e), Fla. Stat. (1996). In construing that circumstance, this Court has stated that:

> this aggravating circumstance is applicable primarily in the situation where [a] defendant kills a law enforcement officer in an effort to avoid arrest or effect escape. It may also be applicable when the factfinder determines that the dominant motive of the murder was for the elimination of witnesses.

Herzog v. State, 439 So. 2d 1372, 1378-79 (Fla. 1983). "[T]o support a finding of the avoidance of arrest circumstance when the victim is not a law enforcement officer, [as here,] `[p]roof of the requisite intent to avoid arrest and detection must be very strong . . . .'" Armstrong v. State, 399 So. 2d 953, 963 (Fla. 1981) (quoting Riley v. State, 366 So. 2d 19, 22 (Fla. 1978)) (emphasis added). "[I]t must clearly be shown that the dominant or only motive for the murder was the elimination of witnesses." Oats v. State, 446 So. 2d 90, 95 (Fla. 1984) (emphasis added), receded from on other grounds, Preston v. State, 564 So. 2d 120 (Fla. 1990). The avoidance of arrest aggravator is found where the "only logical inference from [the] facts is that [defendant] killed the victim to eliminate her as a witness." Wike v. State, No. 86,537, 1997 WL 417432, at *7 (Fla. July 17, 1997) (emphasis added).

The decisions of this Court subsequent to Herring's direct appeal demonstrate that absent the "avoidance of arrest" aggravator, Herring would not have been sentenced to death. For example, in Caruthers v. State, 465 So. 2d 496 (Fla. 1985), a convenience store clerk, who had known the accused, was found dead behind the store counter with the cash register open. Id. at 497. The accused confessed to the robbery and homicide, claiming that he shot the clerk three times after

the clerk made a sudden movement. Id. at 498. This Court concluded that imposing the death penalty under those circumstances, virtually identical to the facts presented by this case, but where no testimony on par with Varner's was submitted, was disproportionate under Florida law and reversed the death sentence, instructing the trial court instead to impose a life sentence. Id. at 499; see also Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993) (defendant's testimony that victim saw him clearly was insufficient to establish avoidance of arrest aggravator since "[t]he facts indicate that [the defendant] shot [the victim] instinctively and without a plan to eliminate her as a witness"); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (striking avoidance of arrest aggravator and based upon remaining two aggravators, prior conviction of a violent felony and murder during an armed robbery, and two mitigating circumstances, vacating death sentence as "this case does not warrant the death penalty"); Armstrong, 399 So. 2d 953, 963 (Fla. 1981) (evidence that victims were shot and "after the initial shooting, were laid [sic] out prone and then `finished off'" insufficient to prove intent to avoid arrest and escape detention); Menendez v. State, 368 So. 2d 1278, 1281-82 (Fla. 1979) (evidence that victims were in a submissive position at the time they were shot insufficient to prove intent to eliminate a witness).

Moreover, in Griffin v. State, 474 So. 2d 777 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986), this Court held that the avoidance of arrest aggravating circumstance was improperly applied where a convenience store clerk was shot twice and killed during a robbery. There, the trial judge inferred that the murder was committed to avoid arrest from evidence that the victim was the sole eyewitness and offered no resistance. Emphasizing Varner's testimony, this Court said that the "near identical circumstances" in Griffin could be distinguished by the "testimony from [Varner] that Herring had expressly stated that he shot a second time to prevent the clerk from being a witness." Id. at 781. Finding that "[t]here is no such evidence here . . . leads us to conclude that there is

insufficient evidence in this case to establish beyond a reasonable doubt that this was a witness-elimination killing," this Court held that there was no basis for the avoidance of arrest aggravator.[11]

In Herring's case, the sole basis for applying the avoidance of arrest aggravating circumstance was the testimony of Varner. What separates Herring's case from similar cases, such as Caruthers and Griffin, are the telling details that Varner supplied. Thus, Varner's testimony was literally the difference between life and death for Herring. Pearl's failure to challenge Varner's testimony, directly attributable to his conflict of interest, adversely affected the outcome of Herring's trial and requires that Herring's sentence and conviction be vacated. At a minimum, the Circuit Court's failure to conduct a proper *actual conflict* analysis, which requires that the court consider evidence demonstrating the *adverse effect* of counsel's representation in its assessment of counsel's actual conflict, Freund, 117 F.3d at 1571, requires that the order of the Circuit Court be vacated.

II. PEARL'S IMPLAUSIBLE THEORY OF DEFENSE AND ABANDONMENT OF HERRING DURING THE SENTENCING PHASE FURTHER EVIDENCE THE EFFECT OF HIS CONFLICT

A. The Theory Offered By Pearl In Herring's Defense Was, By Pearl's Own Admission, Incredible

Defense counsel has a duty to devise a defense strategy; the attorney may not simply rely on the defendant to formulate a theory of the case. Greer v. Miller, 483 U.S. 756, 766 n.8 (1987); Dunkins v. Thigpen, 854 F.2d 394, 400 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989). For example, in a directly analogous case, the Eleventh Circuit has held that defense counsel's performance was constitutionally deficient where the defendant was charged with capital murder and counsel failed, among other things, to develop and present a defense theory that the defendant killed without premeditation. Magill v. Dugger, 824 F.2d 879, 886-87 (11th Cir. 1987) (court found that it was unreasonable for counsel to put the defendant on the stand in a situation where the state would have the opportunity to prove premeditation on cross-examination).

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

At the November 1996 and December 1992 hearings, even Pearl admitted that the theory presented at Herring's trial, that another man shot the clerk, was incredible. 1996 Tr. at 191, 194; 1992 Master R.O.A. at 399. As Pearl indicated, the theory that he concocted to defend Herring was, in his own words, one Pearl did not "think that any juror would have believed," and that himself did not believe. 1996 Tr. at 194; 1992 Master R.O.A. at 399. Furthermore, even though Herring had been involved in four other cases involving similar convenience store robberies during the same time period in which no one was hurt, Pearl did not even consider defending the case on the theory that Herring lacked the intent to harm anyone when he entered the 7-Eleven on May 29, 1981. 1996 Tr. at 185-86; 1992 Master R.O.A. at 404-06. Instead, Pearl abdicated his defense responsibilities by presenting an incredible defense.

Pearl's admission that his theory of defense was incredible was confirmed by the testimony of Mr. Russ, an expert in the field of criminal defense. Mr. Russ testified that Pearl's theory of defense was incredible and incomprehensible, in that Pearl let Herring testify to an incredible story "which was totally contrary to any rational theory of defense." See supra at 50-51.

B. Pearl's Attempt To Distinguish The Guilt And Sentencing Phases Is Irrational And Not Supported By The Law

At the November 1996 and December 1992 hearings, Pearl attempted to draw a distinction between the guilt and sentencing phases of Herring's trial. According to Pearl, he "had no responsibility for the punishment or penalty phase" of Herring's trial, and "it was [Quarles's] responsibility alone to handle the sentencing phase of the trial." 1996 Tr. at 181; 1992 Master R.O.A. at 409. At the time of Herring's trial, Pearl had five years of experience in trying death penalty cases; Quarles had none. 1996 Tr. at 393, 727. Pearl testified, however, that "I just got away from [Quarles] because I had nothing to say to him and I didn't think I could help him." 1992 Master R.O.A. at 410.

Pearl's contention that his responsibilities ended with the conclusion of the guilt phase of Herring's trial lacks merit for the following reasons:

First, Pearl's contention that he had no responsibility for the penalty phase of Herring's trial is inconsistent with Pearl's admission 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. Accordingly, by Pearl's own admission, his responsibilities continued until the conclusion of the sentencing phase of Herring's trial.

Second, in contending that he had no influence on the penalty phase of Herring's trial, Pearl ignores that the most devastating evidence against Herring was adduced at the guilt phase of Herring's trial. Pearl failed to challenge any of that evidence, even though he now admits that that evidence was instrumental in the imposition of the death penalty. 1992 Master R.O.A. at 370.

Of course, the law does not, as Pearl would have it, tightly compartmentalize a bifurcated capital trial. Evidence presented in the guilt phase can be -- and, in Herring's case, was -- considered at sentencing. As such, there is often a carryover effect between the guilt and sentencing phases. The Eleventh Circuit has recognized that counsel's deficient performance during the guilt phase can prejudice a defendant at sentencing:

> Counsel's opening and closing arguments did nothing to raise a reasonable doubt in the jurors' minds that the killing was impulsive or that Magill's ability to premeditate was affected by his emotional problems. Lingering doubts as to whether the murder was premeditated can be an important factor when the jurors consider whether to recommend the death penalty.

Magill, 824 F.2d at 889. This is especially true where, as here, the crucial -- indeed sole -evidence to support the weightiest statutory aggravating factor (Varner's "witness elimination" testimony) was developed during the guilt phase of the trial. Accordingly, the distinction that Pearl attempted to draw between these two phases is nonexistent and his conduct during the guilt phase clearly prejudiced Herring.

Third, Pearl's contention that he had no responsibility for the penalty phase of Herring's trial is inconsistent with the legal duties of counsel of record: "counsel of record [has a] duty to supervise all aspects of the litigation." Hawkins v. Fulton County, 96 F.R.D. 416, 421 (N.D. Ga. 1982) (citing J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338 (D. Conn. 1981)). Where

counsel of record entrusts a particular aspect of the case to another attorney, "[he] is under a duty to exercise proper care in selecting the attorney and in supervising his work." Id.

Indeed, this Court has recently emphasized the importance of the responsibilities of senior counsel in capital cases. In its proposed minimum standards for appointed counsel in capital cases, the Court stated that senior counsel should have significant prior experience in capital cases. See 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) (in capital cases, lead trial counsel must have significant prior experience in death penalty cases, either as lead defense counsel or as co-counsel). As lead trial counsel and counsel of record, Pearl remained responsible for the entire trial and had a specific duty to supervise Quarles's work, an obligation that he simply abdicated after the conclusion of the guilt phase. Pearl's contention that his responsibilities ended with the conclusion of the guilt phase simply lacks merit.

III. PEARL'S FAILURE TO ARTICULATE A STRATEGIC RATIONALE FOR ANY OF HIS ACTIONS OR OMISSIONS PRECLUDES THE STATE FROM SHOWING THAT PEARL'S PERFORMANCE WAS NOT ADVERSELY AFFECTED BY HIS CONFLICT OF INTEREST

At the November 1996 and December 1992 hearings, the State attempted to argue that Pearl's mishandling of Herring's case could be excused as reasonable "trial strategy." See 1996 Tr. at 786, 808; 1992 R.O.A. at 315. Since Herring's claim is that Pearl suffered a conflict of interest, the appropriate standard is whether Pearl faced an actual conflict of interest and whether that conflict "adversely affected" Pearl's representation of Herring. Strickland, 466 U.S. at 692. Thus, even if Pearl articulated "strategic" reasons for certain of his actions during Herring's trial, such a defense does not lie where -- as here -- a defendant demonstrates the adverse impact that his counsel's actual conflict of interest had on his conduct of his client's defense.

Even if the "strategy" defense were properly invoked here, it is clear that "the court should not assume that [a potentially prejudicial omission] was merely a matter of strategy . . . . [I]nstead, 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

Daver v. State, 570 So. 2d 314 (Fla. 2d DCA 1990)). Counsel's actions are not entitled to the presumption of reasonableness where -- as here -counsel completely fails to articulate a rationale for a particular course of action. As the Eleventh Circuit has repeatedly held: "[T]he mere incantation of `strategy' does not insulate attorney behavior from review." Stevens v. Zant, 968 F. 2d 1076, 1083 (11th Cir. 1992), cert. denied, 507 U.S. 929 (1993); see also Bolender v. Singletary, 16 F.3d 1547, 1558 (11th Cir.), cert. denied, 513 U.S. 1022 (1994); Cave v. Singletary, 971 F.2d 1513, 1518 (11th Cir. 1992), cert. denied, 117 S. Ct. 774 (1997) ("[W]e wish to emphasize the district court's observation that the mere incantation of the word `strategy' does not insulate attorney behavior from review.").

The "strategy" defense is not available where the attorney "had no strategy" or "counsel's decision to forego evidence was not based on a reasoned tactical judgment. Stanley v. Zant, 697 F.2d 955, 966 (11th Cir. 1983), cert. denied, 467 U.S. 1219 (1984) (emphasis added); see also Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996) (finding counsel ineffective where counsel failed to investigate his options and "latched onto a strategy which even he believed to be ill-conceived" and "far fetched"); Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987) (finding counsel ineffective as decision not to investigate was unreasonable where counsel "explicitly testified that [the decision] was not in any way a strategic or tactical decision"). Nor will counsel's alleged "strategy" be upheld where counsel took virtually no action to prepare a defense. See House v. Balkcom, 725 F.2d 608, 618-20 (11th Cir.) (counsel found ineffective as they "prepared no defense strategy" which constituted no representation at all"), cert. denied, 469 U.S. 870 (1984); Williams v. State, 507 So. 2d 1122, 1123 (Fla. 5th DCA) (finding counsel ineffective and stating: "A trial strategy to do nothing . . . is not an acceptable one."), review denied, 5 13 So. 2d 1063 (Fla. 1987).

At both the 1996 and 1992 hearings, Pearl professed total amnesia regarding the details of Herring's trial and his trial strategy. 1996 Tr. at 82, 85, 87, 93, 95, 116, 118, 134, 143, 148, 153, 195, 196; 1992 Master R.O.A. at 321, 329-30, 335-36, 346-47, 350-53, 358, 361, 367-68, 379-85, 387-91, 396-98. This inability to recall, explain, or defend his actions is not only incredible, it is

also legally insufficient to overcome Herring's showing that Pearl's conflict adversely affected his representation of Herring. Rather than articulating any rationale for his actions, Pearl has testified in vague and conclusory fashion that he "must have" considered trial strategies and tactics. 1996 Tr. at 153. But Pearl was unable to elaborate on why he made various "strategic" decisions or what alternatives he examined and decided not to pursue. For example, at the November 1996 hearing, while Pearl conceded that he could not recall whether he considered defending Herring's case on the theory that Herring shot the clerk by accident, Pearl testified that he is "sure [he] must have." 1996 Tr. at 153. Pearl's "strategic" defense for his failure to contradict the State's ballistic and forensic evidence was as follows:

> A: I don't remember. I have no recollection of it. I should imagine if there was ballistic evidence, I would have took[ed] at it. I should imagine if there was an autopsy by the medical examiner, I would have read it and spoken to the medical examiner. But I don't remember.
>
> Q: You don't recall any of those things?
>
> A: I recall none of it.
>
> Q: You don't recall anything you did with respect to the ballistics evidence in this case?
>
> A: This is 16 years ago, Mr. Epstein. I've said this before. I don't remember anything about this case.
>
> Q: Did you examine the trajectory of the bullets to see if they were consistent with Mr. Varner's testimony?
>
> A: Haven't I answered that question, Mr. Epstein? You want me to answer it?
>
> Q: Is the answer no?
>
> A: The answer is, I don't remember.
>
> Q: Now, you recall from Mr. Varner's testimony that he said that Mr. Herring shot the clerk a second time while he was on the floor. Correct?
>
> A: I remember that you showed me a record in which Mr. Varner, apparently, said that, yes.
>
> Q: Did you attempt to see whether any physical evidence supported that testimony or contradicted it?

A: Ballistics evidence would not have done it. If that's what you're asking. Medical examiner's evidence might have. But I really don't recall anything about the medical examiner's testimony or his report.

Q: And that was the part of the case that you were responsible for, was it not?

A: Yes, I was.

1996 Tr. at 134-35.

Pearl's testimony that he "recall[s] nothing about . . . [his] preparation of this case or its trial [or] so little that it would be of no value to you," 1996 Tr. at 95, is consistent with his testimony at the 1992 hearing. At that hearing, Pearl testified that he had no recollection of the trial, of what he said, or of what he did because "[a]t this distance, it is impossible for [him] to remember." 1992 Master R.O.A. at 353.

Accordingly, at both hearings, Pearl precluded the Circuit Court from making any factual finding of strategy, enabling the Circuit Court to assess "particular decisions . . . for reasonableness [in light of] all the circumstances." Strickland, 466 U.S. at 691. If this Court were to accept Pearl's "mere incantation of `strategy,'" Stevens, 968 F.2d at 1083, without more, any defendant who raises a conflict claim (or, for that matter, an ineffective assistance of counsel claim) would be faced with a virtually irrebuttable presumption that counsel's decisions were "strategic." Although this Court must "evaluate the conduct from counsel's perspective at the time," Strickland, 466 U.S. at 689, Pearl's professed failure to recollect rebuts any presumption that his conduct was reasonable.

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

At the November 1996 hearing, the Circuit Court excluded Dr. Spitz's testimony and allowed only a proffer. 1996 Tr. at 565. In its written order, however, the Circuit Court made a specific finding of fact about Dr. Spitz's testimony and relied upon that finding in its decision to deny Herring's 3.850 motion. Herring, No. 81-1957-CFA, at 6-7, 1996 R.O.A. at 1017-18. The Circuit Court's exclusion of Dr. Spitz's testimony and finding of fact were both clearly erroneous.

A. The Circuit Court's Exclusion Of Dr. Spitz's Testimony Was

Clearly Erroneous

The Circuit Court excluded Dr. Spitz's testimony on the grounds that the subject matter of the testimony "was not specifically listed in the [3.850] motion." 1996 Tr. at 564-65. A 3.850 motion "requires allegations that are more than mere conclusions." Mitchell v. State, 581 So. 2d 990, 991 (Fla. 1st DCA 1991); Flint v. State, 561 So. 2d 1343 (Fla. 1st DCA 1990). The purpose of the motion, however, is not to detail the moving party's evidence, but "to obtain some type of response from the state to frame the issues in dispute." State v. Schiano, 696 So. 2d 531 (Fla. 4th DCA 1997) (purpose of 3.850 motion is to obtain some type of response from State to frame issues in dispute); see also Trowell v. State, No. 95-3082, 1997 WL 386117, *2 (Fla. 1st DCA, July 14, 1997) (motion for postconviction relief under 28 U.S.C. § 2255 (1994) is "federal counterpart to Florida Rule of Criminal Procedure 3.850"); United States v. Hearst, 638 F.2d 1190, 1194 (9th Cir.), cert. denied, 451 U.S. 938 (1981) (moving party in Section 2255 motion need make factual allegations, not detail his evidence). Moreover, where sufficient notice is given to the State, Florida courts have regarded the factual allegations set forth in the moving party's memorandum as part of the 3.850 motion. See, e.g., Myers v. State, 539 So. 2d 525, 526 n.2 (Fla. 1st DCA 1989) (where moving party's brief contains factual and legal contentions and is served along with motion, court will regard factual allegations of accompanying memorandum as part of motion).

Here, however, Herring sufficiently alleged in his initial and amended 3.850 motions Pearl's failure to develop forensic evidence and to adequately cross-examine State witnesses about forensic evidence. Herring's amended 3.850 motion specifically alleges that Pearl failed to develop competent evidence, failed to adequately cross-examine State witnesses, and improperly bolstered the testimony of these witnesses. Amended Motion To Vacate, Set Aside Or Correct Conviction And Sentence, ¶¶ 84-97, 1990 R.O.A. at 116-20. In addition, Herring's amended motion incorporates by reference the factual allegations contained in Herring's initial 3.850 motion. Id. at 1, 1990 R.O.A. at 102. In that motion, Herring made numerous allegations that the gun was "fired thoughtlessly, as

a reflex reaction rather than as a planned act." Motion To Vacate Sentence, 11 24, 47, 49, 1990 R.O.A. at 16, 28, 31.

Furthermore, the pre-hearing memorandum that Herring filed in advance of the December 1992 hearing expressly alleges that Pearl failed to develop forensic evidence and failed to cross-examine State witnesses about that evidence. December 13, 1992 Pre-Hearing Memorandum of Defendant Ted Herring In Support Of His Motion To Vacate, Set Aside Or Correct Conviction And Sentence, at 16-17, 19-21; 1996 Tr. at 563-64. Herring served that memorandum on the State four years before the November 1996 hearing, thereby giving the State ample notice that the forensic evidence was in issue. Accordingly, Dr. Spitz's testimony was admissible, and the Circuit Court committed reversible error in ruling otherwise at the evidentiary hearing.

B. The Circuit Court's Finding Of Fact Regarding Dr. Spitz's Testimony Is Clearly Erroneous

The Circuit Court appears to admit that it erred in excluding Dr. Spitz's testimony because it made a finding of fact about that testimony and relied on that finding in its order denying Herring's 3.850 motion. In its order, the Circuit Court gave to Dr. Spitz's testimony the same consideration and weight as it gave to any other evidence admitted at the November 1996 hearing. See Parks v. Zitnik, 453 So. 2d 434, 437 (Fla. 2d DCA 1984) (judge sitting as finder of facts is presumed to rest his judgment on admissible evidence); see also Banks v. United States, 516 A.2d 524, 526-27 (D.C. 1986) (presumption that judge sitting as trier of fact will consider only admissible evidence in making findings of fact reveals a basic faith" that judges performing their judicial functions rely only on admissible evidence); United States v. Masri, 547 F.2d 932, 936 (5th Cir. 1977) (judge sitting as finder of facts is presumed to rest his verdict on admissible evidence and disregard inadmissible evidence). In its January 1997 order, the Circuit Court held that 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 . . . . Thus, this Court finds that the Defendant has not proven Mr. Pearl was 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.

Herring, No. 81-1957-CFA, at 6-7, 1996 R.O.A. at 1017-18.

The Circuit Court's finding of fact is clearly erroneous. Dr. Spitz expressly testified that "the shots were fired in close proximity to each other" and from the same distance. 1996 Tr. at 597. Dr. Spitz testified that he did not "believe any of these shots were fired when the victim was on the floor." 1996 Tr. at 576. When asked by the State whether the clerk may have gone to the floor for reasons other than the head wound, Dr. Spitz gave the following answer:

> I don't believe that happened. So if you ask me what in this context here made him go to the ground, it's the head shot.

1996 Tr. at 590. Accordingly, the Circuit Court's finding of fact is utterly inconsistent with Dr. Spitz's testimony. The Circuit Court committed reversible error in making a clearly erroneous finding of fact and in relying upon that finding in its decision to deny Herring's 3.850 motion.

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: September 23, 1997

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the State of Florida by mailing the same by 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 23rd day of September, 1997.

John R. Hamilton

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