IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,930**

ROY ALLEN HARICH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE

LARRY HELM SPALDING
Capital Collateral
Representative
Florida Bar No. **0125540**

BILLY H. NOLAS
Chief Assistant CCR
Florida Bar No. **0794351**

1533 South Monroe Street
Tallahassee, Florida **32301**
(904) 487-4376

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER

ALLAN M. PEPPER
STEVEN GLICKSTEIN
Florida Bar No. **0223281**
JOHN D. CHAPMAN
Admitted Pro Hac Vice
STANLEY N. ALPERT
Florida Bar No. **0716073**
SUZANNE M. JAFFE

425 Park Avenue
New York, New York **10022**
(212) 836-8000

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Notwithstanding the State's vituperative brief, Mr. Harich's position is straightforward and, we submit, not open to serious dispute: A criminal defendant on trial for his life has a right to reject a court-appointed attorney who is also a duly constituted special deputy sheriff. The attorney has an obligation to reveal his dual status to his client. The court, too, has an obligation to disclose this conflict of interest and to hold a hearing where, as here, the court is aware that a conflict may exist. Here, the court and defense counsel said and did nothing about it.

Even if the attorney's primary motivation for becoming a special deputy sheriff is to carry a concealed handgun, he still must inform his client that he has taken two oaths, that he was under both oaths at the time he represented his client, and that he could obey his oath to his client only by violating his oath to the sheriff. Even if the attorney's primary motivation for becoming a special deputy sheriff is to carry a concealed handgun, he still must inform his client that he has become a special deputy sheriff to obtain what even the State admits is a "special privilege" denied ordinary citizens (Answer Brief at 12) -- a personal favor so important to the attorney that it is a matter of life and death to him (T. 378, 384), yet so fragile that it can be revoked at the whim of the sheriff.

The State argues that "Howard" had no obligation to inform Mr. Harich that he was both a special deputy sheriff and defense counsel because "Howard had no duty upon representation to offer [Harich] a biography or curriculum vitae" (Answer Brief at 32).

Mr. Harich's position, however, is obviously not grounded on a desire for disclosure of an attorney's life history, but on the requirement that an attorney fulfill his obligation to disclose conflicts. The law in fact requires that even potential conflicts be disclosed. As for Judge Blount's obligations, the State seems unable to make up its mind as to what Judge Blount knew. According to the State, Judge Blount had no duty to Mr. Harich because, on the one hand, he had "heard only rumors," but then again, on the other hand, because he decided, erroneously, that "there was no conflict of interest" because "'it was general knowledge through the year' that Howard was an honorary deputy" (Compare Answer Brief at 42, with id. at 10 and 43).

In an effort to excuse Mr. Pearl's breach of his ethical obligations and Judge Blount's disregard of his judicial responsibilities, the State raises a Kafkaesque argument in support of a procedural bar. The State contends that because "'it was certainly not a secret and was generally known' in the courts of this circuit in which Howard worked" that Mr. Pearl was a special deputy sheriff, Mr. Harich -- who indisputably did not know of the conflict -- has waived his claim (Id. at 43). This argument is as unfair as it is illogical.

The only reason Mr. Harich did not raise the issue earlier is that the very persons charged with protecting his rights -- Judge Blount and Mr. Pearl -- failed to reveal the information to him. Judge Blount failed to fulfill his obligation to hold a hearing on the conflict, and Mr. Pearl failed to inform his client of the conflict, as required by the cannons of ethics. A criminal

defendant, especially in a capital case, cannot be deemed to have waived a claim when the very people charged with protecting his rights keep the matter hidden. Cf. Amadeo v. Zant, 108 S. Ct. 1771 (1988)(Procedural default doctrine cannot be invoked where the facts supporting a claim for relief are hidden from a capital defendant).

Moreover, the State's argument that Mr. Harich should have known of the conflict because the courthouse regulars knew is not logical. No one can seriously suggest, especially in a capital case, that because some judges, lawyers, and court personnel who work in the Volusia County court knew of the conflict, that Mr. Harich -- who is neither a judge nor a lawyer nor a marshall nor a court clerk nor works in the Volusia County courthouse -- knew or should have known what the court insiders knew. The State does not even contend that "non-insiders" knew of Mr. Pearl's affiliations. Due process of law does not permit waiver in such circumstances. Cf. Amadeo, supra.

ARGUMENT

(I)

MR. HARICH IS ENTITLED TO A NEW TRIAL AT WHICH HE CAN BE REPRESENTED BY COUNSEL WHO IS NOT A SPECIAL DEPUTY SHERIFF.

A. HOWARD PEARL WAS A SPECIAL DEPUTY SHERIFF

In an apparent effort to confuse this Court, the State argues that Mr. Pearl's Marion County commission, like the Volusia and Lake County commissions, was purely honorary. This argument does not hold up.

Although Mr. Pearl was not a paid special deputy sheriff with daily obligations, his position was neither "purely

honorary" nor handed to him "like [a] party favor," as the State contends some other counties may have done in passing out their sheriff's cards to the "Iranian Ambassador" or to "newborn children" (Answer Brief at 19-20). Neither the "Iranian Ambassador" nor "newborn children" solicited the office of special deputy sheriff, as Mr. Pearl did. Neither the "Iranian Ambassador" nor "newborn children" went to the Sheriff, filled out a formal application, listed their law enforcement experience, and swore before an official that they were becoming special deputy sheriffs "to participate and assist in protection of persons and property," as Mr. Pearl did (Answer Brief at 13). The "Iranian Ambassador" and "newborn children" did not swear that they would "well and faithfully perform the duties of special deputy," as Mr. Pearl did (T. 261).[1] The "Iranian Ambassador" and "newborn children" did not agree to report for duty "when summoned," as Mr. Pearl did (Answer Brief at 12). The "Iranian Ambassador" and "newborn children" did not carry with them -- including when crossing county lines -- a concealed handgun, a violation of Florida law for all except duly constituted deputies and special deputies, as Mr. Pearl did. Fla. Stat. Ann. sec. 790.01(2).

Similarly, the "Iranian Ambassador" and "newborn children" did not own and carry "a metal badge [which] seems to carry more importance than a printed card," as Mr. Pearl did (Answer Brief at 15). The "positions" of the "Iranian Ambassador" and "newborn

---

[1] "T. ___ refers to the Rule 3.850 Record on Appeal.

children" were not "contingent upon . . . [their] paying [their] own insurance," as Mr. Pearl's was (Id. at 15). The "Iranian Ambassador" and "newborn children" did not take an oath of office every four years and were not invoiced annually for comprehensive liability insurance, as Mr. Pearl was (Answer Brief at 17; T. 266). The "Iranian Ambassador" and "newborn children" did not try to gain access to the Volusia County Courthouse Annex, while armed, by presenting a deputy sheriff's card to court personnel, as Mr. Pearl did (T. 285). And the "Iranian Ambassador" and "newborn children" do not undertake to represent criminal defendants charged with murder, as Mr. Pearl did. In sum, the honorary cards that the "Iranian Ambassador" and "newborn children" may have received were something completely different from the position and status that Howard Pearl enjoyed as a duly constituted special deputy sheriff in Marion County.

The State's attempt to trivialize Mr. Pearl's special deputy sheriff status by relying on his supposed agreement with a dead man -- Sheriff Willis -- by euphemistically calling it a "Gentlemen's Agreement" is beside the point. The issue is whether Roy Allen Harich had the right to know that his lawyer was also a duly constituted special deputy sheriff at the time that he stood trial for his life. The truth of the matter is that Mr. Pearl maintained all of the objective indicia of a special deputy sheriff -- the oath, the gun, the badge, the insurance, the bond -- swore that he would report "when summoned" and swore that he wanted the commission both to carry a concealed

weapon and to "protect persons and property" (Answer Brief at 12-13).[2]

The State's claim that Mr. Pearl could have no law enforcement duties pursuant to statute is simply wrong. The Florida statutes provide that the duties of a special deputy include "aid[ing] in preserving law and order," and "rais[ing] the power of the county, by calling bystanders or others, to assist in quelling a riot or any breach of the peace, when ordered by the sheriff or an authorized general deputy." Fla. Stat. Ann. sec. 30.09(4)(e) & (f). These traditional law enforcement activities are explicitly authorized by statute to be performed by special deputies who are not certified as Florida law enforcement officers. Id., sec. 30.09(4). Contrary to the State's position, a special deputy's power to "aid in preserving law and order," and "raise the power of the county" are not limited to hurricane or emergency situations. Rather, the language of the statute makes it clear that the power "to aid in preserving law and order" is in addition to the power "to render necessary assistance in the event of any threatened or actual hurricane . . . ." Fla. Stat. Ann. sec. 30.09(4)(e).

As for the "posse comitatus," the State fails to point out that as a special deputy Mr. Pearl carried with him the same authority to "raise the power of the county" as the sheriff himself. Compare Fla. Stat. Ann. sec. 30.09(4)(f), with sec.

---

[2] Notably, this alleged "Gentlemen's Agreement," were there one, would have been an illegal agreement to evade Florida's gun control laws, usurp the power of the County Commissioners (who alone had the right to issue concealed weapons' permits), and subvert Florida's law enforcement statutes.

30.15(8). As a special deputy, Mr. Pearl swore to be the "raiser" of the posse, not the "raisee."

Furthermore, had there been a "special arrangement" removing these law enforcement duties from Mr. Pearl, as alleged by the State, the arrangement would have been required by law to be "recorded in a register . . ., showing the terms and circumstances of such appointment." Fla. Stat. Ann. sec. 30.09(4). Not surprisingly, the purported "Gentlemen's Agreement" referred to by the State was not recorded in the Marion County Sheriff's register or anywhere else. Such a secret, unrecorded arrangement -- if indeed there really was one -- would itself have violated Florida law, and would have been a nullity. In any event, if Mr. Pearl were conspiring in such a manner to violate the law, he still had a duty to disclose the conflict to Mr. Harich, because he would still have been beholden to the sheriff, his supposed co-conspirator.

The State's argument that Mr. Pearl may have never been summoned to perform these tasks is irrelevant. As an attorney, he took an oath whereby he owed an undivided duty of loyalty to his capital client. In contrast, as a special deputy sheriff, he took an oath which obligated him to "aid in preserving law and order." Fla. Stat. Ann. sec. 30.09(4)(e). It does not alleviate the conflict for the State to say that if Mr. Pearl had been called upon to serve, he would have violated his oath as special deputy sheriff (by refusing to serve) rather than violate his oath as an attorney. The client is entitled to a counsel whose <u>only</u> oath is to the client, especially in a case in which the client's life is at issue.

Moreover, the State's claim that there was no conflict because "at common law . . . by acceptance of an incompatible office, the office holder makes a binding election which ipso facto vacates the first office" (Answer Brief at 30) itself proves that Mr. Pearl abandoned the office of public defender -- not that he had abandoned the office of special deputy sheriff. Under the State's logic, Mr. Pearl "abandoned" the office of "special deputy" in 1972 when he became a public defender (T. 295). However, in 1973, when Mr. Pearl's initial commission expired and he took the oath of office and received a Certificate of an Appointment as a deputy sheriff (T. 263-265), he "abandoned" the office of public defender and could not properly have represented Mr. Harich.

Finally, to hear the State tell it, Mr. Pearl's conflict ended at the Volusia County line because he was licensed as a special deputy sheriff in Marion County (Answer Brief at 32). This is the same argument which was considered and rejected in People v. Rhodes, 524 P.2d 363, 366 (Cal. 1974), which articulated the common-sense principle that neighboring law enforcement agencies have "close working relationships" which cross county lines. The close working relationship between neighboring counties is highlighted by the "mutual aid agreement" between the sheriffs of Marion and Volusia Counties to share manpower and equipment (Moreland dep. 107-08). Accordingly, Howard Pearl had the obligation, had he been summoned, to serve alongside the Volusia County officers whom he was cross-examining at Mr. Harich's trial. Any "resentment" by Volusia law enforcement, were

Mr. Pearl to "go after" law enforcement officers too vigorously at Mr. Harich's highly publicized capital trial, could have cost Mr. Pearl his gun and his badge and, under the State's "Gentlemen's Agreement" view, would have subjected Mr. Pearl to a criminal prosecution. This is precisely why such conflict must be disclosed.

B. THE PER SE RULE APPLIES IN THIS CASE AND REQUIRES REVERSAL

Because the State has made a jumble of the law of conflicts of interest, we set forth below the law as it now stands. Conflict of interest claims are a class of sixth amendment claims. Sixth amendment claims traditionally fall into three categories.

In the first category, the ordinary case of alleged poor performance or **"ineffectiveness"** on the part of defense counsel, Strickland v. Washinston, **466** U.S. **668 (1984),** requires a two-part showing that counsel's performance was substandard and that the outcome would have been different had there been effective assistance of counsel. This rule is inapplicable here because Mr. Harich's claim is one of conflict of interest (**See** Initial Brief of Appellant, p. 1, et. seq.).

In the second category, involving conflicts of interest which are known to the defendant where the defendant does not object (generally such issues arise in cases of multiple representation) prejudice is presumed, but the defendant must still demonstrate that the conflict had an adverse effect upon the performance of counsel. **See** Cuyler v. Sullivan, **446** U.S. **335, 346-47 (1980).** ~~See also~~ Buenoano v. State, **15** F.L.W. **196** (Fla. April **5, 1990)** (where attorney enters into book deal with client midway through

penalty phase of capital case, claim of conflict of interest must show actual effect on trial performance because the conflict was obviously known to the defendant and not concealed).[3] Unlike Mr. Harich's case, multiple defendant cases and cases such as Buenoano are cases in which the conflict is open and known to the defendant. For obvious reasons, in these sorts of cases, the courts will not allow a defendant to go to trial with the conflicted attorney and, only if he loses, raise a conflict claim, unless the alleged conflict had an actual adverse effect upon counsel's performance.

The third category of conflict of interest cases are those like Mr. Harich's case in which defense counsel has concealed the conflict or has a concealed potential personal stake in the outcome, which is unknown to the defendant until sometime after trial because the attorney himself is in violation of the law. When there is a hidden conflict, the courts apply a per **se** standard under which prejudice is presumed, actual effect is not at issue, and reversal is mandatory without further culling of the record. The reason the courts do so is one of fundamental fairness: had the defendant known of the conflict prior to trial, the defendant would have had the right to new counsel and there would not have been a trial at which he would have needed to show an actual adverse effect on trial performance. It is plainly unfair -- and contrary to law -- to punish the defendant by holding him to a higher standard then this, and **"rewarding"**

---

[3] In his initial brief, Mr. Harich discussed why this standard is met in his case, even though the per **se** reversal rule applies.

counsel and the court for fa ling to fulfill their ethical and legal obligations to disclose, when a conflict such as the one at issue in this case is involved.

Contrary to the State's contention that the per se rule is applied only in Missouri (Answer Brief at 31), the rule has been applied by courts across the United States, including the State of Florida. See Morales v. State, 513 So. 2d 695 (Fla. 3d DCA 1987); ~~see also~~ Initial Brief of Appellant at 29-30, n. 7, and 34-35 (discussing this case law). The per se rule is the law under the sixth amendment. Indeed, the courts regularly apply the per se rule in cases such as this one -- where defense counsel simultaneously holds an undisclosed law enforcement position, be it of a police or prosecutorial nature. Morales, supra. There is no question that the per se rule applies under the sixth amendment. Moreover, since this is a capital case, the eighth amendment's requirement of heightened due process protections, see Beck v. Alabama, 447 U.S. 625 (1980), counsels that the per se rule must be applied.

The per se rule is applicable here. Had Judge Blount and Mr. Pearl not concealed the conflict, had they revealed to Mr. Harich that Mr. Pearl was a deputy sheriff of any kind, Mr. Harich would have demanded and received new counsel (T, 346-47). To force Mr. Harich now to prove effect or prejudice would have the unfair effect of rewarding concealment and evasion. This is not the law.

C. EVEN IF MR. PEARL WERE NOT A TRUE SPECIAL DEPUTY SHERIFF MR. HARICH IS ENTITLED TO A NEW TRIAL

1. Because Mr. Pearl Had An Undisclosed "Special Privilege" Mr. Harich is Entitled to a New Trial

Even if Mr. Pearl was a deputy sheriff solely so that he could carry a gun -- a contention belied by Mr. Pearl's failure to resign his commission after he received his "gun toters" permit from the Department of State -- he had a concealed conflict of interest which mandates a new trial. The privilege of carrying that gun, which was a matter of life or death to Mr. Pearl, was a "special privilege" (Answer Brief at 12) with a price. The price was that Mr. Pearl knew that "special privilege" could be revoked at any time and that therefore he had to consider both his client's interest and his own personal interests whenever he examined law enforcement officers. The fact that Mr. Pearl did not reveal this to his client mandates reversal (**See** generally Initial Brief at 32-37, discussing this issue).

The State's contention that the same argument would apply to Mr. Pearl's present gun permit from the Secretary of State is misguided. Mr. Pearl is entitled to his present permit as a matter of right by virtue of having satisfied statutory conditions. **See** Fla. Stat. Ann. sec. 790.06; cf. T. 253. By contrast his "gun toters" permit from the Sheriff was a "special privilege" -- one that was a matter of life and death to him. Furthermore, as discussed above and in Mr. Harich's initial brief, the position of special deputy sheriff entails a myriad of law enforcement obligations and loyalties. The receipt of a gun permit entails none.

In short, the "special privilege" that was so direly

important to Mr. Pearl had a direct bearing on his ability to represent his client zealously. Mr. Pearl's failure to disclose his "special privilege" mandates reversal.

2. Because Mr. Pearl Violated the Law if He Were Not a True Special Deputy Sheriff, Mr. Harich is Entitled to a New Trial

The State completely miscontrues Mr. Harich's separate and distinct point about potential violations of the criminal law. Mr. Harich is not contending that Mr. Pearl was a "common criminal"; it is the State which argues in such a manner as to make the accusation (Answer Brief at 27). Mr. Harich contends that Mr. Pearl was a duly constituted special deputy sheriff who had the right to carry a concealed weapon and to present a sheriff's badge and card. These facts were proven below without contradiction. The State, by contrast, contends that Mr. Pearl was not a "real" special deputy sheriff, which means that it was illegal for him to carry a concealed handgun or present sheriff's identification -- as discussed in Appellant's Initial Brief, if this were the case, Mr. Pearl was committing serious crimes (Id. at 34). Mr. Harich asks the Court not to impute such criminal conduct to Mr. Pearl, and to hold that he was a bona fide special deputy sheriff.

If the State is correct that Mr. Pearl is a phony special deputy, then Mr. Pearl is a criminal. And when a defense lawyer knows that too vigorous a defense or cross-examination may encourage others to reveal his crimes or potential crimes (say, prosecutors or police officers in an adjoining county who are not parties to the illegal arrangement with the sheriff, but have

"common knowledge" of it), the **per se** rule applies (**See** Initial Brief at 34-37). If Mr. Pearl attacked law enforcement too vigorously, he would have known that he may have had to deal with criminal penalties, or lose his gun, or lose his badge. It is precisely in circumstances such as this that an adverse effect may not be revealed by the record, because the record will not reflect what the attorney felt inhibited from doing. It is therefore precisely in circumstances such as this that the per se rule applies.

D. EVEN IF THE **PER SE** RULE IS NOT APPLIED, THE CONVICTION SHOULD BE REVERSED BECAUSE MR. PEARL'S CONFLICTED STATUS HAD *AN* ACTUAL ADVERSE EFFECT UPON COUNSEL'S PERFORMANCE

As discussed in the initial brief (pp. 37 to 42), even if the per se rule is not applied, this conviction and death sentence should be vacated because Mr. Pearl's conflicted status had an actual effect in his representation of Mr. Harich. In response, the State raises a series of self-serving, irrelevant, after-the-fact excuses for Mr. Pearl's so-called trial **strategy.**[4] For example, in response to Mr. Harich's argument that Mr. Pearl refrained from adequately testing the police officers' testimony at Mr. Harich's trial, the State claims that counsel "has no obligation to insist without evidence that the police are lying **. . . .**" (**See** Answer Brief at 36; cf. Initial Brief of Appellant at 37-41). But Mr. Harich himself testified that the police were lying, and in these circumstances an attorney certainly does have

[4] Mr. Pearl himself testified that he had only a very general recollection of the trial and could not specifically remember why he had done what he did (T. 331-32; 424).

the obligation to present a case that does not contradict his client's testimony -- i.e., to **"insist"** that the police are lying.

Moreover, Mr. Pearl did not simply refuse to attack the officers' credibility -- he personally vouched for their credibility before the jury, undermining **his** client's own testimony that the police were lying. For example, during cross-examination and in front of the jury, Mr. Pearl assured Sergeant Wall, and therefore the jury, that he did not "mean to offend you or that I mean that you are lying, because I know you too well for that . . ." (R. 606). He repeated the same vouching for Officer Wall during closing argument (R. 639). It would be a mockery of a true adversarial system to conclude that it is a constitutionally acceptable trial strategy to permit an attorney affirmatively to vouch for the credibility of witnesses when his own client testifies that those witnesses are lying. There can be no trial strategy that permits calling your own client a liar -- which was what Mr. Pearl did when he told the jury that the officers who testified in contradiction to his client where incapable of lying.

With respect to Mr. Pearl's bolstering of police testimony -- e.g., when Mr. Pearl bolstered Sheriff Burnsed's testimony that Mr. Harich in effect had confessed because he told the sheriff where he discarded the murder weapon -- the State claims that this Court has already decided that Mr. Pearl's conduct was not prejudicial and therefore that Mr. Harich is barred from **"relitigating"** Mr. Pearl's performance in connection with Burnsed's testimony. The contention that the earlier proceeding has preclusive effect on this one demonstrates a fundamental misunderstanding of the legal standard applicable to this case.

No one knew of the conflict when Mr. Pearl's performance was earlier considered. The conflict has now come to light. The standard which must be applied **now** is plainly different from the one that was applied to Mr. Harich's earlier claim of ineffective assistance of counsel. After all, in conflict of interest cases, prejudice is presumed. The courts did not know earlier that Mr. Pearl's actions and inactions were not solely based on the attorney/client relationship, but were based at least in part on a conflict involving undisclosed ties to law enforcement. Thus, this Court's earlier ruling does not preclude the very real possibility that counsel's performance was adversely affected by his hidden conflict of interest. And adverse effect on performance is readily apparent from this record (**See** generally Initial Brief of Appellant at **37-42**).

E. MR. HARICH IS ENTITLED TO A NEW TRIAL BECAUSE JUDGE BLOUNT FAILED TO HOLD A HEARING AND FAILED TO ACCORD MR. HARICH HIS RIGHT TO SELF-REPRESENTATION

As discussed in Mr. Harich's initial brief, Judge Blount failed to fulfill his obligation to hold a hearing required because there was "the possibility of a conflict of interest." Wood v. Georgia, **450** U.S. **261, 272-73 (1981)**; Initial Brief at **42-44**. Judge Blount's disregard of his duties mandates reversal because (i) it denied Mr. Harich his right to conflict-free representation, and (ii) it denied Mr. Harich his right to represent himself. Woods, supra.

The State lamely responds (Answer Brief at **42**) by saying that the reason there was no hearing was that "**Judge** Blount had no grounds to initiate a hearing" (**Id.** at **42**). On the next page,

however, the State squarely contradicts this same contention by saying that "Judge Blount testified below that 'it was general knowledge through the years' that Howard was an honorary deputy" (Id. at 43). Obviously Judge Blount did not care what kind of law enforcement officer Mr. Pearl was -- he simply defaulted in his duty to conduct a hearing.

In contrast to what the State would have this Court believe, Mr. Harich's claim is not that he was denied his right to self-representation as a result of Mr. Pearl's ineffective assistance of counsel (Id. at 42).[5] Rather, Mr. Harich's claim is that he was denied his right to self-representation as a result of the concealment of Mr. Pearl's status as a special deputy sheriff. Such concealment resulted in the violation of the basic premise behind the right of self-representation: a defendant "must be free personally to decide whether in his particular case counsel is to his advantage." Faretta v. California, 422 U.S. 806, 834 (1975).

It is a fact, established below, that Mr. Harich would have rejected Mr. Pearl's representation had he known that Mr. Pearl was a deputy sheriff of any kind. Mr. Harich never acquiesced in Mr. Pearl's representation. He certainly would never have acquiesced to the representation of an attorney with even potential loyalties to law enforcement had the conflict been

[5]Moreover, whether or not there was an actual conflict or ineffective assistance is irrelevant to cases involving the right to self-representation, because such cases are not "amendable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." McKaskle V. Wiggins, 465 U.S. 168, 177 (1984).

disclosed originally, as the sixth amendment required. "Unless the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the constitution . . . ." Faretta, 422 U.S. at 821. Mr. Harich did not even know that Mr. Pearl was a special deputy sheriff; had he known he could have exercised his right to self-representation. Thus, the concealment of Mr. Pearl's special deputy sheriff status effectively compelled Mr. Harich "to accept against his will a state appointed public defender, [thereby] depriv[ing] him of his constitutional right to conduct his own defense." Faretta, 422 U.S. at 834. See also Schafer v. State, 459 So. 2d 1138 (Fla. 5th DCA 1984)(reversing conviction where defendant was forced to proceed to trial with counsel he deemed to be ineffective, notwithstanding the trial court's finding of no conflict).

(II)

THE CONTEMPT ORDER AGAINST COUNSEL WAS UNLAWFUL.

In our initial brief we demonstrated that the contempt order was unlawful and should be quashed because:

a) Judge Blount did not have jurisdiction over this case when he issued the order because the previous day he had been recused on the grounds of bias and personal knowledge;

b) The law is clear that unintentional lateness is not grounds for contempt; and

c) Judge Blount's order did not comply with the statutory requirements for a contempt citation.

The State fails to respond fairly to any of these arguments. The argument that Judge Blount had jurisdiction because the order of recusal, although signed the day before the hearing, on June 8, was not filed until the day of the hearing, June 9, is pure

sophistry. The State fails to show how the ministerial filing of the order is relevant in light of the fact that Judge Blount knew about the order before the hearing. Moreover, because Judge Foxman already was in the courtroom, both Judges obviously considered the order valid. Nor does the State explain why Judge Blount went through the distasteful charade of pretending to recuse himself after he issued the contempt citation when in fact he had been recused by the Chief Judge the previous day.[6] The only explanation for this bizarre episode is that it was an attempt to intimidate Mr. Harich's counsel.

CONCLUSION

For all of these reasons, and those discussed in the initial brief, Mr. Harich's capital conviction and death sentence should be vacated and a new trial afforded where Mr. Harich can elect to be represented by a lawyer who is not also a special deputy sheriff. Short of that, this case should be remanded to another

[6]As for the other two arguments -- that unintentioned lateness is not grounds for contempt and Judge Blount's order was statutorily defective under Rule 3.830 -- the State cites boilerplate contempt law that either has no bearing on the issues or supports defense counsel on this appeal. See, e.g., State ex rel. Garlovsky v. Eastmoore, 393 So. 2d 567 (Fla. 5th DCA 1981) (reversing contempt citation based on willful disregard of court rulings because the court, like Judge Blount, failed to follow Rule 3.830); Porter v. Williams, 392 So. 2d 59 (Fla. 5th DCA 1981) (reversing contempt citation, even though counsel failed to appear at all because the court, like Judge Blount, failed to follow Rule 3.830); Rahn v. State, 447 So. 2d 1048 (Fla. 4th DCA 1984)(same).

court, other than in Volusia County, where Mr. Harich will be given a full and fair opportunity to litigate his claims.

Respectfully submitted,

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE

LARRY HELM SPALDING
Capital Collateral
Representative
Florida Bar No. **0125540**

BILLY H. NOLAS
Chief Assistant CCR
Florida Bar No. **0794351**

1533 South Monroe Street
Tallahassee, Florida **32301**
(904) 487-4376

KAYE, SCHOLER, FIERMAN, HAYS
HANDLER

ALLAN M. PEPPER
STEVEN GLICKSTEIN
Florida Bar No. **0223281**
JOHN D. CHAPMAN
Admitted Pro Hac Vice
STANLEY N. ALPERT
Florida Bar No. **0716073**
SUZANNE M. JAFFE

425 Park Avenue
New York, New York **10022**
(212) 836-8000

By: Billy H Nolas for all counsel of record
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Margene Roper, Assistant Attorney General, Department of Legal Affairs, **210** North Palmetto Avenue, Suite **447**, Daytona Beach, Florida **32114**, this 21st day of May, **1990**.

Billy H Nolas
Attorney