IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE,

Appellant,

v. CASE NO. 77,610

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 300179

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Because the events of the prior proceedings in this case are relevant to Quince's latest appeal, Appellee would set forth the following additional facts:

Appellant was indicted, on January 17, 1980, on one count of first degree murder, one count of sexual battery and one count of burglary of an occupied dwelling, in regard to an incident occurring on December 28, 1979 (OR 1).[1] On February 22, 1980, Assistant Public Defender Howard Pearl, representing Quince, filed a motion for determination of Appellant's sanity, pursuant to Fla.R.Crim.P. 3.210, requesting the appointment of experts to assess Quince's sanity at the time of the offense, as well as his competency to assist his attorney in preparation of his defense (OR 4). The motion was granted, and three experts - Drs. Barnard, Carrera and Rossario - were appointed (OR 5-8). Proceedings were continued until the experts had finished their reports (OR 9-10). On August 11, 1980, defense counsel filed a motion to dismiss the felony charges, or, in the alternative, to force the State to elect (OR 11-12).

The matter came up for a hearing that day, and, following argument of counsel, the State agreed to formally drop the sexual battery count and to "merge" it into the murder count (Transcript

---

[1] (OR ___) represents a citation to the original record on appeal in Quince's direct appeal to this court, **Quince v. State**, Florida Supreme Court Case No. 59,984. (PCR(1) ___) represents a citation to the record on appeal prepared in regard to the appeal taken from the denial of Quince's first post-conviction motion, **Quince v. State**, Florida Supreme Court Case No. 65,407, whereas (PCR(2) ___) represents a citation to the record on appeal in this case, **Quince v. State**, Florida Supreme Court Case No. 77,610.

of August 11, 1980, at 1-5). At this point, attorney Pearl announced that Quince would enter a plea of guilty to the remaining counts; he affirmed that the only condition of the plea was that the sentencing jury be waived and a subsequent proceeding be held for the presentation of aggravating and mitigating circumstances (Transcript, at 5-7). The prosecutor clarified that the State would be seeking the death penalty, and Judge Foxman went through a lengthy plea colloquy with Quince as to his understanding of the plea and its consequences (Transcript, at 8-17); during the course of this colloquy, Quince personally admitted the truth of the State's charges against him (Transcript, at 14). Judge Foxman found that the plea was freely, voluntarily and intelligently made, and ordered a presentence investigation report, setting sentencing for a month away (Transcript, at 17-19). Counsel, however, requested, and received, the appointment of additional mental health experts, specifically to testify as to the existence of mitigation, and proceedings did not recommence until October 20, 1980 (OR 13-17).

At this proceeding, the State presented four witnesses, and the defense, two. The State's first witness was Debbie Grubbs, deputy clerk for the juvenile court, and, through her, the State introduced into evidence Quince's substantial juvenile record (Transcript of October 20, 1980, at 4-9; OR Vol. II). Attorney Pearl vigorously objected to the admission of this evidence, preserving the claim for appeal (Transcript, at 7-9). **Quince v. State**, 414 So.2d 185, 188 (Fla. 1982). Larry Lewis was the only police officer to testify, and, through him, the State introduced

photographs and slides of the crime scene (Transcript, at 10-34). Lewis also testified that Quince's fingerprints had been found both inside and outside the window of the victim's bedroom, the point of entry (Transcript, at 27-29). Following the match of the fingerprints, Lewis went to talk with Quince, who lived two blocks away from the victim (Transcript, at 35-36). After being advised of his rights, and waiving such, Quince originally denied all knowledge of the offense; upon further questioning, however, he gave a detailed confession to the murder, claiming that he had broken into the victim's house to steal certain items and had been surprised to find her at home; although he denied raping the victim, Quince admitted strangling her and subsequently pawning various stolen items (OR 42-45). Lewis testified that Quince later admitted to raping the victim, after having been confronted with evidence to the effect that sperm had been found in her vagina (OR 53). Lewis was able to retrieve certain of the items pawned by Quince, such as a ring and a tape deck (OR 53-54). On cross-examination, attorney Pearl brought out the fact that Quince had cooperated with authorities (OR 56-58). The State also called the medical examiner, Dr. Botting, who testified in much detail as to the cause of the victim's death, using slides and photographs (OR 74-99); attorney Pearl, through his examination, elicited testimony from the witness to the effect that certain of the head wounds found could have been caused by the victim falling against a sharp object, as opposing to having been struck by another individual (OR 82-85).

The State then called its last witness, Dr. Barnard, one of the experts appointed to determine Quince's competency (OR 102-130). Over attorney Pearl's objections, he was allowed to testify as to his opinion that two of the statutory mitigating circumstances did not apply (OR 108-114). Due to the unavailability of Drs. Carrera and Rossario, their reports were introduced into evidence (OR 131-132; State's Exhibits #8 & #9). Attorney Pearl then called two experts of his own, Drs. McMillan and Stern (OR 132-165). Dr. McMillan testified that Quince was borderline mentally retarded and that his ability to conform his conduct to the requirements of the law was substantially impaired, under §921.141(6)(f), Fla.Stat. (1979) (OR 144-146); Dr. Stern testified that Quince "was not functioning with all of his marbles" (OR 158). In his closing argument, attorney Pearl attacked several of the proposed aggravating circumstances, and emphasized Quince's low intelligence and "limited mental ability" (OR 191-198). He reiterated his position that Quince's juvenile record should not be considered for any purpose, and contended that the mitigating circumstances relating to age and mental state had been established (OR 198-204). The next day, Judge Foxman formally sentenced Quince to death, finding three aggravating circumstances, that the homicide had been committed during a rape, §921.141(5)(d), Fla.Stat. (1979), that the homicide had been committed for pecuniary gain, §921.141(5)(f), Fla.Stat. (1979), and that the homicide had been especially heinous, atrocious or cruel, §921.141(5)(h), Fla.Stat. (1979); in mitigation, he found that Quince's capacity to conform his

conduct to the requirements of the law was substantially impaired, §921.141(6)(f), Fla.Stat. (1979) (OR 18-20).

Following this Court's affirmance of Quince's conviction and sentence, Appellant, represented by his present counsel, filed a motion for post-conviction relief on July 5, 1983 (PCR(1) 602-619). In this pleading, Quince presented three claims for relief, the primary one relating to ineffective assistance of counsel; Quince's concerns related to attorney Pearl's alleged failure to investigate an alibi defense, failure to investigate the circumstances of the crime and failure to present sufficient evidence in mitigation; defense counsel also made a specific allegation that Pearl had been ineffective for failing to object to certain portions of the presentence investigation report (PCR(1) 604-611). On January 31, 1984, while the motion was pending, a death warrant was signed for Quince. On February 8, 1984, Quince filed an application for stay of execution and supplement to the 3.850 motion, such supplement bringing to twenty-five the number of specific allegations of ineffective assistance of counsel (PCR(1) 621-652). A hearing was held the next day (PCR(1) 594-601). At this time, Judge Foxman announced that he would grant a stay of execution and schedule an evidentiary hearing on Quince's motion for the next month; the prosecutor placed the following on the record:

> . . . I would like to request as a matter of record at this stage, is that at least counsel represent that all matters that are raisable that can be raised regarding these proceedings be raised during this hearing. And that there can be a representation that there is no conscious effort to leave anything undone for purposes of later

> collateral relief. I want a representation of good faith at this level.

(PCR(1) 598-599).

Upon the request of defense counsel, the evidentiary hearing was continued from March 19, 1984, to April 23, 1984 (PCR(1) 700-701); a subsequent continuance request was denied (PCR(1) 706). The evidentiary hearing lasted two days, and at such hearing, counsel presented fourteen (14) witnesses, including Quince himself; the State called two witnesses, including Howard Pearl, Quince's trial attorney (PCR(1) 29-582). Most of the defense witnesses related to Quince's claim that Pearl had failed to investigate and present evidence in mitigation concerning Quince's family background and mental condition. At the beginning of the hearing, collateral counsel outlined the evidence which he intended to present (PCR(1) 11-18). Judge Foxman specifically asked counsel whether he intended to pursue the allegations in the 3.850 motion to the effect that attorney Pearl had been ineffective for failing to contest Quince's guilt or to offer an alibi defense; counsel said that such allegations would not be pursued (PCR(1) 18). The following then took place:

> THE COURT: All right. So candidly on the record right now, we agree that this defendant did kill that victim? Is that your position?
>
> MR. CANAN: Yes.
>
> THE COURT: Thank you.

(PCR(1) 18-19).

Judge Foxman then asked why the allegation had been included in the first place, and defense counsel stated that such had simply

been done "to make sure that the waterfront was covered", apparently with the expectation that it, or other allegations, could later be "discarded" (PCR(1) 20). During the hearing, Quince expressly testified that his confession to the murder had been truthful, and, further, affirmed his guilt for the offense (PCR(1) 253, 360-361); Quince stated that he had broken into the victim's house because he was behind in his payments to his drug supplier (PCR(1) 270).

Howard Pearl offered extensive testimony as to his legal background and experience, and as to every facet of his representation of Kenneth Quince; his testimony comprises some one hundred and seventy eight (178) pages of transcript. Pearl estimated that he had, by that date, handled eighty (80) capital cases (PCR(1) 411). Pearl also stated that he had repeatedly asked the State, in this case, for a plea bargain, and had literally "begged and pleaded" with the state attorney to allow Quince to receive a life sentence; these efforts have been unavailing (PCR(1) 441). Because he was concerned about a "communication problem" with Quince, Pearl had him evaluated by psychiatric experts (PCR(1) 431). All of the experts found Quince competent and sane, and Pearl then requested the appointment of experts to look for mitigation for use at sentencing (PCR(1) 438-441). Pearl stated that he found no basis to move to suppress Quince's confession, or to attack the legality of his arrest, and that he reviewed with his client the strength of the State's case (PCR(1) 482, 503-504, 451). Pearl testified that, in his judgment, the best tactic was to waive a

sentencing jury and to ask the judge for mercy (PCR(1) 451); he said that he could see no way to prevent the State from proving all of its case (PCR(1) 465-466). Attorney Pearl said that, in his opinion, a jury would not have been helpful, in that they would most certainly have returned a death recommendation, which he felt that Judge Foxman would have followed (PCR(1) 455-458); he also expressed his opinion that, at that point in time, blacks had been underrepresented on Volusia County juries (PCR(1) 455-458). Defense counsel, accordingly, concluded that Quince's best chance to avoid a death sentence was with a sentencing judge alone, who would be more receptive to the evidence presented in mitigation (PCR(1) 458-460). Pearl also specifically testified that he had not offered any objection to certain of the comments in the presentence investigation report because he felt that, in his experience, the written comments of the prosecutor or parole officer would carry no weight with the judge, especially in a capital sentencing (PCR(1) 484-485, 541, 567-568); Pearl noted that he had preserved his objection to any consideration of Quince's juvenile record at this time (PCR(1) 485-487).

On April 30, 1984, Judge Foxman denied the 3.850, and his order contained the following findings:

> The real point of this case is that trial defense counsel did the best he could with a very difficult case. His approach was calculated, intelligent and plausible. He knew what he was doing and where he was going. Even the defendant admitted they took a 'calculated risk' and they lost. We can speculate with hindsight what else may have been done, but even hindsight analysis collides with the reality of this case. The defendant committed an unspeakable crime. The hideousness of it would certainly offend

> the average juror. More important to this analysis, the defendant confessed to the crimes. Other evidence supported the confessions. Given these factors the defense options were limited. The public defender fashioned a defense to avoid the death penalty. The failure of this defense does not mean the defendant had ineffective assistance.

(PCR(1) 707-708).

Quince appealed this ruling to this Court, and, in its opinion rendered September 5, 1985, **Quince v. State**, 477 So.2d 535 (Fla. 1985), this Court held that Quince was not entitled to relief under **Strickland v. Washington**, 466 U.S. 668 (1984). On August 8, 1986, collateral counsel filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, raising, **inter alia**, a claim of ineffective assistance of counsel; this petition was subsequently amended twice. On September 15, 1988, Quince was afforded an evidentiary hearing on this petition, and, at such time, the State presented Howard Pearl as a witness (Transcript of Proceedings, **Quince v. Wainwright**, Case No. 86-0685-Civ-Orl-19, at pages 168-182). The federal district judge subsequently denied all relief, and Quince appealed this ruling to the Eleventh Circuit Court of Appeals. Over the State's objection, this appeal was dismissed, and the district court's order vacated, on September 21, 1989, so as to allow Quince to return to state court and to present his claim of "conflict of interest" in regard to Howard Pearl's status as a special deputy sheriff.

SUMMARY OF ARGUMENT

Summary denial of Quince's successive motion for post-conviction relief was not error, and should be affirmed in all respects. Collateral counsel's motion to recuse the presiding judge was untimely, accompanied by deficient affidavits, and, in all respects, facially insufficient. As to the primary claim presented - the alleged conflict of interest by trial counsel, Howard Pearl - Quince has failed to demonstrate why the circuit court's finding of procedural bar was error; in contrast to the other defendants who have raised this claim, Quince has already attacked the competency of his trial counsel in a prior post-conviction motion, and, most significantly, received a full evidentiary hearing thereon, at which Pearl testified. There has been no showing that, with the exercise of due diligence, this claim could not have been discovered and presented earlier, in accordance with Florida's procedural rules.

Assuming that the merits of Quince's claim are properly before this Court, he is entitled to neither relief nor a remand for an evidentiary hearing. Under all the circumstances of this case, it is flatly impossible that any alleged conflict of interest on the part of Howard Pearl, due to his status as a special deputy, had any adverse affect upon his performance or upon the reliability of the result below. Quince's allegations are altogether insufficient to even state a claim for relief, and it must be noted that, in contrast to either Roy Harich or Ted Herring, Kenneth Quince has never contested his guilt. Quince pled guilty to the instant murder in 1980, and, at the 1984 post-

conviction hearing, expressly reaffirmed his guilt under oath on the stand. He has never moved to withdraw his plea nor has he ever denied his responsibility for the brutal and heinous murder at issue. Likewise, his sentence of death is fairly and fully supported by the record and is in no attributable to any act or omission on the part of defense counsel. Quince's presentation of this claim is simply an improper attempt to further delay justice in this cause, and all relief should be denied.

ARGUMENT

POINT I

THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DENYING QUINCE'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF; THE CLAIM ASSERTED IS PROCEDURALLY BARRED, AND, UNDER ALL OF THE CIRCUMSTANCES OF THIS CASE, NO HEARING WAS REQUIRED

As his first point on appeal, Quince contends that the circuit court below erred in failing to afford him an evidentiary hearing on his claim of conflict of interest; Quince cites to two of this Court's recent decisions, **Herring v. State**, 580 So.2d 135 (Fla. 1991), and **Wright v. State**, 16 F.L.W. S311 (Fla. May 9, 1991), in which this Court remanded for evidentiary hearings on claims involving conflict of interest, stemming from assistant public defender Howard Pearl's status as a special deputy. While Appellee can well understand why opposing counsel would rely upon the above precedents, the State respectfully suggests that neither they, nor any other precedent of this Court, mandate that an evidentiary hearing be held in this cause. To some extent, the necessity for an evidentiary hearing is interwoven with the merits, or lack thereof, of Quince's underlying claim. **See, e.g., Engle v. Dugger**, 576 So.2d 696, 699 (Fla. 1991) (whether summary denial of 3.850 was error depended on sufficiency of allegations). Appellee respectfully submits, however, that there are at least three reasons why no hearing was called for **sub judice:** (1) the underlying claim is procedurally barred; (2) Quince could not be entitled to relief, even if he proved what he alleged, and (3) Quince has failed to sufficiently allege a cause for relief. Each contention will briefly be addressed.

As one of his bases for denying an evidentiary hearing, Judge Foxman found that Quince's conflict of interest claim was procedurally barred, because it was raised for the first time in Appellant's second motion for post-conviction relief, and because no good cause had been shown for Quince's failure to raise it either in the prior motion in 1984 or prior to January 1, 1987. (PCR(2) 65-66). It should be beyond dispute that an evidentiary hearing is not required on a procedurally barred claim. As will more fully discussed **infra**, the judge's ruling is in accordance with this Court's precedents. **See, e.g., Spaziano v. State**, 570 So.2d 289 (Fla. 1990); **Squires v. State**, 565 So.2d 318 (Fla. 1990); **Agan v. State**, 560 So.2d 222 (Fla. 1990); **Spaziano v. State**, 545 So.2d 843 (Fla. 1989); **Eutzy v. State**, 541 So.2d 1143 (Fla. 1989); **Bundy v. State**, 538 So.2d 445 (Fla. 1987); **Johnson v. State**, 536 So.2d 1009 (Fla. 1988); **Demps v. State**, 515 So.2d 196 (Fla. 1987). While collateral counsel alleged in their motion that they did not learn of Howard Pearl's status as a special deputy until the fall of 1988, there was **no allegation** that such fact could not have been discovered, prior to such time, through due diligence, as required by Rule 3.850 itself. **See, e.g., Witt v. State**, 465 So.2d 510 (Fla. 1985). This omission is particularly significant, given the fact that Kenneth Quince, as opposed to the defendants in either **Harich v. State**, 542 So.2d 980 (Fla. 1989), or **Herring, supra**, received a formal evidentiary hearing on the first 3.850 motion filed, alleging ineffective assistance of counsel; at such evidentiary hearing in this case, in 1984, Howard Pearl offered extensive testimony, and obviously could have been examined on this subject.

Further, this Court has repeatedly held that no evidentiary hearing is necessary on a motion for post-conviction relief if the record conclusively demonstrates that relief is not warranted, **see, e.g., Stano v. State**, 520 So.2d 278, 280 (Fla. 1988), or where, as here, the movant's allegations, even if proven, would provide no basis for relief. **See, e.g., Steinhorst v. State**, 498 So.2d 414, 415 (Fla. 1986). Such holdings are applicable **sub judice**. While Appellant understandably gives lip service to the alleged need for a hearing under **Herring** and **Wright** (Initial Brief, at 4-5), it should be noted that he then devotes the next thirty-nine (39) pages of the Initial Brief to his argument that the "undisputed facts" established a "**per se**" conflict of interest, such that relief should be granted (Initial Brief, at 5, 6, 12, 33, 34, 39-40, 42-43). If Quince truly feels that the undisputed facts demonstrate that relief must be granted, then, obviously, an evidentiary hearing would be an unnecessary formality. Further, it must be noted that this Court has conclusively rejected, as a matter of law, the contention that Howard Pearl's status as a special deputy resulted in a **per se** conflict of interest. **See, e.g., Harich v. State**, 573 So.2d 303, 305-306 (Fla. 1990); **Herring**, 580 So.2d at 138-139 (". . . the fact that this public defender was a special deputy in an adjacent jurisdiction particularly given the circumstances of the duties and status of such special sheriff did not result in a **per se** conflict of interest."). Accordingly, it is difficult to see what purpose an evidentiary hearing would serve in this case.

Appellee reads this Court's recent opinions in **Herring** and **Wright** as holding that, under appropriate circumstances, evidentiary hearings are warranted on claims of this nature. There would, however, not seem to be any absolute rule in this regard, **see, e.g., Swafford v. Dugger**, 569 So.2d 1264, 1267 (Fla. 1990) (no evidentiary hearing required on defendant's claim involving Howard Pearl's status as a special deputy, where, **inter alia**, Swafford "could not have been prejudiced."), and it is well established that evidentiary hearings are not required on every claim of conflict of interest. **See, e.g, Porter v. State**, 478 So.2d 33, 35-36 (Fla. 1985) (summary denial of 3.850 motion proper, where claim of defense attorney's conflict of interest "belied by the record"); **Buenoano v. Dugger**, 559 So.2d 1116, 1119-1120 (Fla. 1990) (evidentiary hearing not required on claim involving counsel's conflict of interest, where evidence against defendant was "so overwhelming that prejudice could not be found merely because of conflict of interest."). As will be demonstrated **infra**, the **Buenoano** holding is fully applicable **sub judice**, and the State respectfully questions the extent to which Quince has even alleged any adverse impact upon his defense, stemming from Pearl's status as a special deputy. It should be noted that Quince has, for all intents and purposes, been largely content to rely upon the pleadings filed in **Harich**, and, indeed, on direct appeal, it is Appellant, not Appellee, who has incorporated by reference the entire **Harich** record (Initial Brief, at 3); significantly, opposing counsel would seem to rely upon the **Harich** record in support of his **factual** allegations, in

that he cites to it for such propositions as "Mr. Pearl never informed Mr. Quince about Mr. Pearl's position with the Marion County Sheriff's Office or with the other offices. (T 617-618)" (Initial Brief, at 13). Because Quince has failed to demonstrate why his case should be resolved any differently from **Harich,** and/or any specific respect in which Howard Pearl's status as a special deputy resulted in actual prejudice or adverse impact, the circuit court's summary denial of his motion for post-conviction relief should be affirmed in all respects.

POINT II

THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF, AS TO QUINCE'S CLAIM THAT HIS CONVICTION AND SENTENCE SHOULD BE REVERSED DUE TO COUNSEL'S ALLEGED "CONFLICT OF INTEREST"

Quince's primary claim for relief is, of course, his claim that his conviction and sentence should be reversed due to Howard Pearl's "conflict of interest". In his Initial Brief, Quince not only incorporates by reference the entire **Harich** record (Initial Brief, at 3), but also essentially re-presents the same legal arguments raised by **Harich** on appeal, to the effect that Pearl's status as a special deputy constituted a "**per se**" conflict of interest, such that relief is mandated.[2] Because Appellee reads this Court's decisions in **Harich** and **Herring** as conclusively rejecting this legal argument, **see, e.g., Harich**, 573 So.2d at 305-306, **Herring**, 580 So.2d at 138-139, the State does not see any purpose in addressing these arguments. Rather, Appellee perceives the narrow issue in this case to be whether Quince has even **alleged**, let alone demonstrated, the existence of an "actual conflict of interest [which] adversely affected his lawyer's performance". **Bouie v. State**, 559 So.2d 1113, 1115 (Fla. 1990); **Cuyler v. Sullivan**, 446 U.S. 335, 350 (1980). Because he has not done so, and because the record in this cause conclusively shows that Quince is entitled to no relief, the circuit court's summary

---

[2] Indeed, Quince would seem to have literally incorporated by reference portions of the Initial Brief in **Harich v. State**, Florida Supreme Court Case No. 73,930. (**Compare** Initial Brief, **Harich v. State**, filed February 11, 1990, pages 5-12, 18-20, 23-25, 26, 27-30, 33-35, 36, **with** Initial Brief, **Quince v. State**, pages 6-43).

denial of Quince's motion for post-conviction relief should be affirmed in all respects.

Before proceeding to the merits of Quince's claim, it is necessary to determine whether, in fact, it is properly presented. As noted earlier, Judge Foxman found this claim to be procedurally barred, because it had not been raised in Quince's first post-conviction motion and/or otherwise prior to January 1, 1987 (PCR(2) 65-66). This Court's precedents would seem to clearly provide that it was Quince's burden **below** to allege, and demonstrate, that this claim could not have been raised earlier, not only because the facts were unknown to the movant or his counsel, but also because such facts "could not have been ascertained by the exercise of due diligence." Fla.R.Crim.P. 3.850. The instant motion contains no such allegation (PCR(2) 13-14), and, as a result, would seem to be facially insufficient. It should be noted, however, that the Initial Brief in this cause contains the following allegations:

> Although not part of this record, undersigned counsel, who represented Mr. Quince in the original 3.850 proceedings, attempted to interview Mr. Pearl prior to the hearing but Mr. Pearl declined to be interviewed.

(Initial Brief, at 13).

Seeing as this matter is, concededly, "not part of the record", one wonders why opposing counsel brings it up, and, given the fact that this matter was never presented to Judge Foxman below, Appellee would contend that it is procedurally barred when presented for the first time on post-conviction appeal. **See, e.g., State v. Barber**, 301 So.2d 7, 9 (Fla. 1974) (appellate

court must confine itself to review of matters first presented to the trial court); **Doyle v. State**, 526 So.2d 909, 911 (Fla. 1985) (claim not presented in Rule 3.850 motion could not be raised for the first time on appeal).

Aside from the above, Quince's "explanation" it hardly convincing. In contrast to either Roy Harich or Ted Herring, Kenneth Quince was afforded a full evidentiary hearing on his first 3.850 motion in 1984; indeed, a stay of execution was expressly granted for this purpose, and collateral counsel was afforded months to prepare. Pearl testified extensively at the two-day evidentiary hearing, not only as to his background and experience, but also as to all facets of his representation of Quince (PCR(1) 404-582). While he was a state witness, it is inconceivable that defense counsel could not have "interviewed" Pearl prior to his testimony, either through subpoenaing him or by otherwise compelling his attendance at a deposition or other discovery proceeding. Due diligence has been held to require some effort on the part of counsel, and such requirement would hardly seem to be an inequitable one. **Cf. Coney v. State**, 258 So.2d 497 (Fla. 3rd DCA), **cert. denied**, 262 So.2d 448 (Fla. 1972) (denial of continuance not error, where defense counsel failed to subpoena missing witness, exhibiting "lack of due diligence").

This Court held, in **Harich v. State**, 542 So.2d 980, 981 (Fla. 1989), that due to the unusual circumstances, it "may have been" that the issue regarding Pearl's status could not have been discovered through due diligence. This is a long way from holding that every former client of Howard Pearl is entitled to

an evidentiary hearing on demand on this claim, regardless of the number of years which have passed or the number of prior collateral attacks which have been litigated. The circuit court's determination that this was an improper successive petition is correct, and should be affirmed, in light of this Court's many pertinent precedents. **See, e.g., Spaziano v. State**, 570 So.2d 289 (Fla. 1990) (denial of successive 3.850 motion affirmed, where defendant failed to show why argument not raised prior to two year limitation or in previous proceedings); **Squires, supra** (denial of successive 3.850 motion raising ineffective assistance of counsel claim affirmed, where prior motion had raised such claim on different grounds); **Agan, supra** (denial of successive 3.850 motion raising State suppression of evidence affirmed, where prior motion had presented such ground; defense contentions that advent of Public Records Act excused procedural default rejected, given fact that "due diligence" had not been exercised); **Spaziano**, 545 So.2d 843 (Fla. 1989) (denial of successive 3.850 motion raising ineffective assistance of counsel affirmed, where prior motion had raised such claim); **Eutzy, supra; Bundy, supra; Johnson, supra; Demps, supra.**

Assuming that the merits of Quince's claim are properly before this Court, he is nevertheless entitled to no relief. Both this Court, as exemplified by the **Bouie** and **Buenoano** decisions, as well as the federal courts, as exemplified by **McConico v. State of Alabama**, 919 F.2d 1543 (11th Cir. 1990), relied upon by Appellant, have construed the decisions of the United States Supreme Court, such as **Cuyler, Strickland v.**

Washington, 466 U.S. 668 (Fla. 1984), and **Burger v. Kemp**, 483 U.S. 776 (1987), as holding that, even if an actual conflict of interest has been demonstrated, as between attorney and client, relief is not warranted unless such conflict "adversely affected the lawyer's performance". While the State by no means concedes that such "actual" conflict existed **sub judice**, for purposes of this argument, it is sufficient to focus upon the "adverse affects", or lack thereof, stemming from such conflict. In the post-conviction motion filed in the circuit court, collateral counsel alleged the following:

> Although defendant need not show that Mr. Pearl's divided loyalties adversely affected his trial performance, as shown in detail below, there is abundant evidence that Mr. Pearl's conflict of interest indeed adversely affected his trial performance. For example, he failed to vigorously cross-examine fellow law enforcement officers and other witnesses; he failed to properly investigate the crime or properly prepare a defense; he failed to counsel defendant properly; and he failed to make proper trial objections, including objecting to a death sentence based, in large part, on facts and circumstances defendant was never indicted for, accused of, or prosecuted for.

(PCR(2) 13).

In the Initial Brief, collateral counsel also alleges:

> . . . Mr. Pearl refused to challenge law enforcement authorities, in a critical junture [sic] of the case, -- the importance of the recommendations contained in the pre-sentence report -- wherein the report relfected [sic] the recommendation of the prosecutor, two police officers and the author of the PSI (a retired police officer), that Mr. Quince should receive the death penalty.

(Initial Brief, at 43).

Likewise, on appeal, collateral counsel reiterate their contention that evidence of the adverse affects of this conflict includes Pearl's failure to cross-examine fellow officers "vigorously" "notwithstanding their very damaging testimony", failure to independently investigate the facts and failure to develop mitigating evidence, despite its availability (Initial Brief, at 44-45). The State renews its objection to any allegation raised for the first time on appeal, **see, Barber, supra, Doyle, supra,** and suggests that any such contentions are procedurally barred; the State likewise questions the specificity of the allegations contained in the 3.850 motion. **Cf. Kennedy v. State**, 547 So.2d 912, 913 (Fla. 1989) (defendant must allege specific facts which demonstrate a deficiency on the part of counsel which is detrimental to the defendant, in order to state a claim for relief under **Strickland v. Washington**). Even giving Quince the benefit of every conceivable doubt, he has still failed to sufficiently allege a claim for relief.

Initially, the State would contend that collateral counsel's continued references to Pearl's performance at "trial" are puzzling in the extreme. There was **no trial** in this case. Kenneth Quince, as opposed to Roy Harich or Ted Herring, has **never** contested his guilt. Not only did Quince enter a plea of guilty in 1980, but, most significantly, he reaffirmed his guilt when testifying at the 1984 evidentiary hearing, such hearing, of course, focused upon the alleged failings of Howard Pearl (PCR(1) 253, 360-361). Thus, any suggestion that Quince's conviction is at all attributable to counsel's alleged "conflict" is nothing

less than poppycock. It should also be noted that, even at this juncture, Quince offers no denial of his guilt and makes no motion to withdraw his plea; likewise, there has never been any suggestion that, with different counsel, he would not have pled guilty. Such omissions should conclusively bar any claim for relief in this regard. **Cf. Elledge v. Graham**, 432 So.2d 35 (Fla. 1983) (necessity for motion to withdraw plea); **Hill v. Lockhart**, 474 U.S. 52 (1985) (defendant who entered plea of guilty had failed to state claim for relief under **Strickland v. Washington**, absent omission that, but for counsel's deficiencies, he would not have pled); **Stano v. Dugger**, 921 F.2d 1125 (11th Cir. 1991) (**in banc**) (same).

Once this case is viewed in its proper perspective, Quince's allegations literally collapse like a house of cards. Any claim that Pearl failed to "investigate properly or prepare a defense" is difficult to square with reality. Kenneth Quince confessed to this murder. His fingerprints were found at the scene and he pawned several items stolen from the victim. At the first 3.850 proceeding, collateral counsel had to withdraw an allegation that Pearl should have investigated an alibi defense, when it became obvious that absolutely no evidence existed to support such allegation (PCR(1) 18-20); at that time, collateral counsel contended that the allegation had only been made simply to "cover the waterfront" (PCR(1) 20). Collateral counsel likewise specifically told Judge Foxman that Quince was not denying his guilt (PCR(1) 20). Although Quince has been examined by no less than five mental health experts, there has never been any

suggestion that he was insane at the time of this offense. There was no "defense" presented to this crime, for the very simple reason that no "defense" exists.

Likewise, collateral counsel's suggestion that Pearl failed to "vigorously cross examine" police witnesses "notwithstanding the very damaging testimony" is difficult to take seriously. There was exactly **one** police witness at the sentencing proceeding - Officer Larry Lewis. Lewis' testimony was largely technical in the extreme, in that he demonstrated for the court slides and photographs of the murder scene (OR 9-69). Considering that the primary focus of this proceeding was sentencing, and not the adjudication of guilt, it is difficult to see what a "vigorous" cross-examination of this witness would have accomplished for Quince, who, as noted, to this day does not deny his guilt. Presumably, collateral counsel does not suggest that attorney Pearl should have cross-examined the witness as to such matters as whether the victim was really dead or whether she had in fact been raped as well as strangled; as it was, Pearl utilized his cross-examination to emphasize that Quince had cooperated with the authorities (OR 56-58). **Cf. McConico, supra** (conflict of interest adversely affected counsel's performance where, had counsel vigorously cross-examined witness, who later recanted, he might have elicited favorable testimony).

As to Pearl's actual performance at the sentencing phase, it should be noted that he called two expert mental health witnesses, and, as a result of their testimony, Judge Foxman found that the statutory mitigating circumstance, relating to

Quince's inability to conform his conduct to the requirements of the law, §921.141(6)(f), Fla.Stat. (1979), existed (OR 132-165; 18-20). Collateral counsel's conclusory assertion that "more" (unspecified) mitigation could have been presented is simply a recycling of the allegations presented and rejected in the 1984 proceeding. At that evidentiary hearing, Pearl testified extensively as to why he had chosen to utilize the expert witnesses, as opposed to members of Quince's family, contending that the family members would have done more harm than good to the defense, given the fact that they could be extensively cross-examined as to the details of Quince's juvenile record, a matter which Pearl wished to keep out; Pearl also testified that Judge Foxman was adequately apprised of the details of Quince's background, not only through the testimony of the mental health experts, but also through their reports (PCR(1) 470-471, 490-491, 494-496, 536-538, 546-547). This type of strategy is clearly permissible, **see, e.g., Card v. Dugger**, 911 F.2d 1494 (11th Cir. 1990), and, of course, this Court, as well as the circuit court, conclusively held, in Quince's first post-conviction proceeding, that he was entitled to no relief on the basis of **Strickland v. Washington**. **Quince**, 477 So.2d at 536-537. Collateral counsel's only other allegation involves Pearl's failure to object to the sentencing recommendations of the police officers and parole officer in the presentence investigation report. This matter, likewise, was litigated in 1984, and Pearl testified at that time that he knew for a fact that Judge Foxman did not consider such

matters in sentencing (PCR(1) 484-485, 541, 567-568).[3] Similarly, both this Court and the circuit court found no basis for relief under **Washington** in regard to this allegation. **Id.** Howard Pearl's status as a special deputy, simply so that he could carry a gun for his own protection, had literally **no** effect upon his representation of Kenneth Quince, and no relief is warranted. **Cf. Bouie, supra; Cuyler, supra.**

Appellee likewise suggests that this Court's holding in **Buenoano** is applicable. In such case, the defendant claimed that her attorney had an actual conflict of interest, because he had entered into a book contract. Buenoano not only alleged that she had received ineffective assistance, in certain respects, but that the conflict of interest created a presumption of prejudice. This Court found that no relief was warranted, and indeed held that not even an evidentiary hearing was required on any of the allegations. This Court reached such conclusion because it found the evidence to be so overwhelming "that prejudice could not be found merely because of the conflict of interest". **Buenoano**, 559 So.2d at 1120. This case presents an even stronger basis for

---

[3] In the Initial Brief, opposing counsel cites to Pearl's testimony at the **Harich** hearing, in regard to why he did not object to these matters (Initial Brief, at 44). Once again, it should be noted that it is Appellant, not Appellee, who apparently views the **Harich** record as dispositive, and, that, once again, Quince is utilizing such record in support of **factual** allegations. Such being the case, Appellee respectfully suggests that Quince is estopped from continuing to demand an evidentiary hearing of his own. **Cf. Gurr v. State**, 7 So.2d 590 (Fla. 1942) (defendant estopped from accepting benefits of error he created); **Meeks v. State**, 339 So.2d 186 (Fla. 1976) (where defendant specifically approved procedure utilized by court, he was estopped from later attacking it on appeal); **Holmes v. State**, 374 So.2d 944 (Fla. 1979).

application of such holding. Judias Buenoano contested her guilt. As noted, Kenneth Quince did not, and does not to this day. Thus, the only inquiry pertains to the propriety of the instant sentence of death.

Quince has never alleged how any counsel, special deputy or not, could have prevented the finding of the three aggravating circumstances in this case - that the homicide was committed during a sexual battery, that it was committed for pecuniary gain or that it was especially heinous, atrocious and cruel. §§921.141(5)(d), (f) & (h), Fla.Stat. (1979). As to mitigation, it is also clear that, despite close to ten years of litigation, Quince has simply failed to offer any explanation for this homicide which casts him in any light other than that of a brutal and loathsome killer. The original sentencer took his mental problems, such as they were, fully into account at the sentencing in 1980, and, surely, the fact that this murder was committed because Quince was behind in his payments to his drug supplier is hardly a matter which should sway a rational sentencer. The claim in regard to counsel's failure to object to certain portions of the presentence investigation report is a true canard. Judge Foxman's sentencing order, of course, makes no reference to any improper matter (OR 18-20), and this Court has consistently held, under comparable circumstances, that error will not be presumed in this regard. **See, e.g., Engle**, 576 So.2d at 702 (claim that sentencing judge improperly considered victim impact evidence without merit, in that "judges are trained to render their decisions without regard to impermissible

evidence."); **Grossman v. State**, 525 So.2d 833 (Fla. 1988). The conclusions which Judge Foxman reached in denying Quince's first motion for post-conviction relief remain fully applicable:

> . . . The defendant committed an unspeakable crime. The hideousness of it would certainly offend the average juror. More important to this analysis the defendant confessed to the crime. Other evidence supported the confessions. Given these factors the defense options were limited. The public defender fashioned a defense to avoid the death penalty. The failure of this defense does not mean the defendant had ineffective assistance.

(PCR(1) 707-708).

Kenneth Quince's status as a death row inmate owes nothing to Howard Pearl's status as a special deputy.

In conclusion, Quince's raising of this "conflict of interest" claim is essentially a "red herring", in that, under the circumstances of this case, it is clear that any conflict of interest on the part of counsel could have had no conceivable effect upon counsel's performance or, ultimately, the result of the proceedings. While it may be that evidentiary hearings are required in some of Howard Pearl's other capital cases, there was no necessity for one in this cause. Quince's raising of this claim, however, has accomplished one thing. It has delayed this case for at least two years. Although this is a 1979 murder, and although this Court affirmed Quince's conviction and sentence in 1982, Quince, despite his self-avowed guilt, has still not completed one full round of collateral litigation. Appellee respectfully cannot see that due process dictates that this case must forever bounce between courts like some sort of judicial

ping-pong ball, especially when the ultimate result of any collateral litigation in this case is so clear. Accordingly, the circuit court's summary denial of Quince's successive motion for post-conviction relief should be affirmed in all respects.

POINT III

THE CIRCUIT COURT DID NOT ERR IN DENYING QUINCE'S UNTIMELY AND FACIALLY INSUFFICIENT MOTION FOR RECUSAL

On November 22, 1989, some sixteen days after Judge Foxman had denied Quince's second motion for post-conviction relief, collateral counsel filed their motion to disqualify the judge, pursuant to Fla.R.Crim.P. 3.230 (PCR(2) 94-105). The motion alleged that Judge Foxman should remove himself from the case, because he was prejudiced against Quince, as evidenced by the fact that, some five and one half years previously, he had, on June 14, 1984, given a speech to a local bar association in which he had sought to advise local attorneys how to prepare against claims of ineffective assistance of counsel; at this time, the judge had made reference to a recent post-conviction proceeding over which he had presided, in which "out of town" counsel had "looked down their noses" at local counsel (PCR(2) 105). The motion was accompanied by an affidavit executed by one of Quince's three attorneys, to the effect that it was made in good faith; the affiant also recited that he had spoken with two local attorneys, one of whom had been present at the speech but would offer no affidavit of his own, and another, who had not been present, but who would attest that the speech had been the topic of local conversation (PCR(2) 99-104). The motion was also accompanied by an affidavit from another attorney, Nathan Dinitz, who stated that he had been present during this speech; Dinitz' affidavit, however, also contained the following:

> While I do recall the meeting in 1984, I have also actively practiced criminal law before

> Judge Foxman, and I feel that his rulings are unbiased, equitable and fair, without prejudice and without regard to whether the attorney is in-state or out-of-state.

(PCR(2) 113-114).

Following response by the State, Judge Foxman made the following finding on February 19, 1991:

> Defendant's motion to disqualify Honorable S. James Foxman, Circuit Judge, is hereby DENIED. For the reasons set forth in the State's response, this Court finds the motion is untimely and facially insufficient; this Court specifically notes that one of the supporting affidavits contradicts the allegations of the motion itself.

(PCR(2) 396).

On appeal to this Court, collateral counsel raise a number of contentions, all of the bewildering. Thus, Quince claims, on one hand, that Judge Foxman, in denying the motion, improperly "focused on the truth of the allegations"; likewise, and literally in the next breath, collateral counsel complain that they were not afforded an evidentiary hearing on their motion to disqualify and further point to the lack of "specific findings of fact" (Initial Brief, at 49). Counsel maintain that they "showed cause" for their failure to file a timely motion, and say that no earlier filing was possible because there was no "time certain set for when the case would be called up for a hearing"; likewise, they state that they simply could not have known earlier who would be presiding over the motion, and suggest that they need not have moved for disqualification, until "after it became apparent that the State would seek to rely on findings of fact made by Judge Foxman in the **Harich** case." (Initial Brief,

at 49). Further, collateral counsel aver that the affidavits were fact sufficient, and that a well-grounded fear was presented that Quince would not receive a fair hearing. Each of these contentions will now be addressed.

As to the issue of timeliness, Quince's failure to comply with the time limits of Rule 3.230 remains unexcused. Contrary to appellate counsel's representation, the motion for recusal contains **no** explanation as to why such was filed five **years** after the event in question (PCR(2) 94-97). The motion simply relates that the speech occurred on June 14, 1984. Inasmuch as the speech was reported in the newspapers, and apparently the subject of "local comment", according to collateral counsel's affidavit, collateral counsel's failure to present this claim earlier is much less easy to understand. Any contention that counsel could not have known that Judge Foxman would be presiding over this second 3.850 proceeding in this case is dubious in the extreme. The judge, in any event, rendered an order to show cause on September 27, 1989, directing the State to respond to Quince's 3.850 motion; the order bears Judge Foxman's signature and was served on opposing counsel (PCR(2) 61). Accordingly, any motion for disqualification should have been served on or before October 8, 1989. The undersigned has absolutely no idea why opposing counsel suggests that their motion to recuse was not "necessary" until Judge Foxman resolved the **Harich** claim. Either opposing counsel wished the judge to preside over their case or they did not. The circuit court's denial of this motion, based on untimeliness, should be affirmed. **See, e.g., Jones v. State**, 411

So.2d 165 (Fla. 1982) (motion to disqualify judge from presiding over capital sentencing should have been filed prior to trial; no basis shown for untimely filing, i.e., motion not based upon event occurring at trial).

Further, the affidavits accompanying the motion were deficient. Such affidavits should have set forth the facts relied upon to show a basis for disqualification, and, when taken with the motion, should have demonstrated a "well-grounded fear on the part of the movant that he would not receive a fair trial at the hands of the judge"; as this Court held in **Tafero v. State**, 403 So.2d 355, 361 (Fla. 1981), the facts and reasons given in the sworn affidavit must "tend to show personal bias or prejudice". **See also Dragovitch v. State**, 492 So.2d 350, 353 (Fla. 1986) (affidavits for recusal insufficient, absent showing of some actual bias or prejudice, so as to create a reasonable fear that a fair trial could not be had). As Judge Foxman noted, the affidavit of Nathan Dinitz attested to his **lack** of bias toward out-of-state attorneys (PCR(2) 396, 113-114). The circuit court's denial of this motion, on the basis of the deficiency of the affidavits, should likewise be affirmed.

Finally, taking all of the allegations at face value, it is still clear that Quince failed to demonstrate that he merited relief under **Livingston v. State**, 441 So.2d 1083 (Fla. 1983), or **Suarez v. Dugger**, 527 So.2d 190 (Fla. 1988) - i.e., that he had a well-grounded fear that he would not receive a fair hearing at the hands of Judge Foxman. It is only the paranoia of collateral counsel that links the judge's remarks in 1984 to this case. At

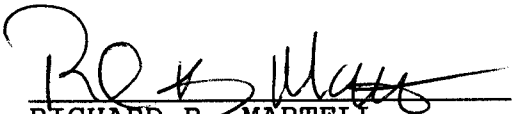
the bar association meeting in question, Judge Foxman was simply offering general advice to a body of lawyers. He never mentioned Quince or Quince's counsel. Most significantly, the newspaper article, upon which this entire claim is premised, states that the evidentiary hearing described by Judge Foxman at this time had lasted "four and a half days" (PCR(2) 105); Quince's initial 3.850 hearing, which occurred approximately a month and a half prior to this speech, lasted two days (PCR(1) 1-592). Even if Judge Foxman had been referring to Quince's counsel, it is well established that a judge's remarks that he is not impressed with a lawyer's behavior are not, without more, grounds for recusal. **See, e.g., Nassetta v. Kaplan**, 557 So.2d 919, 921 (Fla. 4th DCA 1990). Appellant's motion was simply insufficient, and the denial of the motion for recusal at bar should be affirmed in all respects. **See, e.g., Tafero, supra** (denial of motion to recuse affirmed; defendant's contention that because judge had formally been highway patrolman, he could not be impartial in murder prosecution where victim a trooper, insufficient basis for relief); **Yesbick v. State**, 408 So.2d 1083, 1085 (Fla. 4th DCA), **cert. dismissed**, 417 So.2d 331 (Fla. 1982) (denial of motion for recusal affirmed; contention that judge prejudiced against defense counsel insufficient basis for relief); **Jones v. State**, 446 So.2d 1059 (Fla. 1984) (defendant not entitled to disqualify original trial judge from presiding over 3.850 proceeding, simply due to fact that judge had earlier spoken well of trial attorney, whose competence was now at issue).

CONCLUSION

WHEREFORE, for the aforementioned reasons, the circuit court's summary denial of Quince's successive motion for post-conviction relief should be affirmed in all respects.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. 300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Russell F. Canan, Esq., MILLIKEN, VAN SUSTEREN & CANAN, 419 7th Street, N.W., Suite 402, Washington, D.C. 20004; and to Mr. Robert G. Udell, Esq., 3601 East Ocean Boulevard, #205, Stuart, Florida 34996, this 5th day of August, 1991.

RICHARD B. MARTELL
Assistant Attorney General