IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE

Appellant

vs. CASE NO. 77,610

STATE OF FLORIDA

Appellee

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS

On August 11, 1980, Appellant Kenneth Darcell Quince pleaded guilty to murder in violation of 810.02 Fla. Stats., and burglary of an occupied dwelling, in violation of 810.02 Fla. Stats.

Following a sentencing hearing before the Honorable S. James Foxman without an advisory jury, on October 20, 1980, the Court adjudged Appellant guilty of both offenses and imposed a sentence of death on October 21, 1980.

Appellant was represented at the above proceedings by Mr. Howard B. Pearl, Assistant Public Defender.

The appeal from the judgment of conviction and sentence was heard in the Supreme Court of Florida which affirmed the judgment of the trial court as to guilt and sentence on March 4, 1982. Quince v. State, 414 So. 2d 185 (Fla. 1982). Rehearing was denied on May 27, 1982. Cert. denied, 459 U.S. 895 (1982).

A motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850 was filed in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida on July 5, 1983.

This motion was denied by this Court after an evidentiary hearing on April 30, 1984 and affirmed by the Florida Supreme

Court on September 5, 1985 in Quince v. State, 477 So. 2d 535 (Fla. 1985). Rehearing was denied on November 19, 1985. The United States Supreme Court denied certiorari. Quince v. Florida, 106 S.Ct. 1662 (1986).

Defendant filed a Petition for Writ of Habeas Corpus in the federal district court in Orlando, raising a number of claims, including ineffective assistance of counsel. The petition was denied, after an evidentiary hearing, on December 21, 1988. An appeal was taken to the Eleventh Circuit Court of Appeals in Atlanta. During the pendency of such proceedings, appellant was made aware of the then pending Harich litigation before this Court regarding the alleged conflict of interest pertaining to his trial counsel, Howard B. Pearl. Harich v. State, 573 So. 2d 303 (Fla. 1990).

Accordingly, Mr. Quince filed a Motion to Vacate Conviction and Sentence in the Circuit Court for Volusia County on May 30, 1989. Appellant requested, inter alia, an evidentiary hearing on the conflict of interest issue. Upon appellant's motion, his appeal was dismissed in the Eleventh Circuit to allow him to pursue this claim in the state courts.

On November 6, 1989 the Circuit Court, relying exclusively on the record adduced in the Harich evidentiary hearing, summarily denied defendant's motion. On November 20, 1989, Defendant filed a Motion to Disqualify the Hon. S. James Foxman and a Motion for Rehearing and Motion for Leave to Amend. On February

19, 1991, the Circuit Court issued its Order denying the above motions. An appeal was timely noted.

In the interim period, this Court ruled that considerations of due process required remands in two cases, Herring v. State, No. 75,209 (Fla. May 2, 1991)(16 F.L.W. S293) and Wright v. State, No. 74,775, (Fla. May 9, 1991)(16 F.L.W. S311) for evidentiary hearings on the Pearl conflict of interest issue notwithstanding this Court's decision in Harich v. State, 573 So. 2d 303 (Fla. 1990).

B. Statement of Facts

The Circuit Court, the Hon. S. James Foxman, took judicial notice of the entire Harich record. (Judge Foxman was the presiding judge in the Harich post-conviction proceedings.) The Court denied a separate evidentiary hearing for appellant. Accordingly, appellant now incorporates by reference the Harich record for purposes of this appeal.

In addition, appellant moved to disqualify the presiding judge on the grounds that he was prejudiced against appellant and his counsel and because he might have been called as a material witness in the matter. Russell F. Canan, Esquire of Washington, D.C., was appellant's lead counsel in the initial 3.850 proceedings and was lead counsel in the litigation that was commenced in May of 1989. It was alleged that shortly after Judge Foxman

issued his order denying relief on April 30, 1984 in the initial post-conviction proceeding, he gave a speech at a meeting of the Volusia County Criminal Defense Lawyers' Association wherein he expressed his disdain for claims of ineffective assistance of counsel claims, especially those brought by out-of state attorneys against local attorneys. Judge Foxman also suggested in his speech that because of "regional prejudice," these out-of-state lawyers "look down their noses at us to think we're a bunch of rednecks." See Robert Nolin, Learn Self Defense, Judge Tells Lawyers, Daytona News Journal, June 15, 1984, App. 121.

The motion to disqualify was denied, again without an evidentiary hearing.

ARGUMENT

I. MR. QUINCE WAS DEPRIVED OF HIS RIGHT TO AN EVIDENTIARY HEARING ON HIS 3.850 MOTION PERTAINING TO THE PEARL CONFLICT OF INTEREST ISSUE

In Harich v State, 542 So. 2d 980 (Fla. 1989), this Court held that the same public defender's service as a special deputy was sufficient to require an evidentiary hearing on the issue of whether his relationship to law enforcement officials affected his ability to provide effective legal assistance. After an evidentiary hearing was held before the Hon. S. James Foxman, the Court made findings of fact and denied relief. This Court affirmed. Harich v. State, 573 So. 2d 303 (Fla. 1990)

Appellant brings the same issue before this Court. He requested and was denied an evidentiary hearing below. Rather, the

trial court adopted the Harich findings and summarily denied both an evidentiary hearing and relief.

Subsequent to this Court's decisions in Harich, the Court has remanded to the trial court for an evidentiary hearing two other cases that raised the same conflict of interest issue concerning attorney Pearl, Herring v. State, No 75,209 (Fla. May 2, 1991) (16 F.L.W. S293) and Wright v. State, No. 74,775, (Fla. May 9, 1991) (16 F.L.W. S311). This Court's rulings in Herring and Wright make clear that considerations of due process mandate an evidentiary hearing for this appellant as well where he has raised an identical claim. Moreover, as noted below in Section III herein, appellant has raised an issue as to the impartiality of the trial judge that was summarily denied below without an evidentiary hearing. There is no principled reason why this case should also not be remanded for such a hearing consistent with this Court's prior decisions.

II. APPELLANT'S CONVICTION AND SENTENCE SHOULD BE VACATED BECAUSE THE COURT AND HIS COUNSEL DENIED HIM HIS RIGHT TO CONFLICT-FREE REPRESENTATION GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Throughout these proceedings, the State has attempted to focus on a narrow question: "Did Mr. Pearl fulfill all the technical requirements to carry the title of deputy sheriff under Florida law?" Although we are prepared to prove that Mr. Pearl was, in fact, a bona fide deputy sheriff, the State's proposed question is not the proper one. The constitutional question which this Court must address is not what title Mr. Pearl had, but

"whether he was subject to conflicting interests." McConico v. Alabama, 919 F.Ed 1543, 1546 (11th Cir. 1990). The undisputed facts demonstrate that Mr. Pearl --whether he is called a "full," "special" or "honorary" deputy --was "subject to conflicting interests," and, by not disclosing the conflict of interest to appellant, denied him his right to conflict-free counsel guaranteed under the sixth, eighth and fourteenth amendments to the United States Constitution.

A. MR. PEARL WAS SUBJECT TO AN ACTUAL CONFLICT OF INTEREST BECAUSE EITHER (i) HE HAD A SWORN DUTY TO LAW ENFORCEMENT WHILE HE SERVED AS DEFENSE COUNSEL TO KENNETH QUINCE OR (ii) HE WAS AN "HONORARY" SHERIFF WHO CARRIED A CONCEALED WEAPON WITHOUT STATUTORY AUTHORITY AND WAS THUS BEHOLDEN TO THE SHERIFF'S OFFICE FOR A SPECIAL PRIVILEGE THAT HE CONSIDERED A MATTER OF LIFE AND DEATH

1. The Undisputed Facts Demonstrate That Mr. Pearl Had A Sworn Duty to Law Enforcement Inconsistent With His Duty As A Public Defender

As an indigent person, appellant was entitled to appointed counsel following his arrest for murder and related charges. Under section 27.51 of the Florida Statutes, the Public Defender's Office of the Seventh Judicial Circuit is charged with the representation of indigent persons accused of crimes in Volusia County, Florida. An Assistant Public Defender, Mr. Howard Pearl, was appointed as appellant's trial counsel. Unbeknownst to appellant at the time of trial, and unbeknownst to appellant or his counsel during subsequent collateral proceedings, in addition to serving in the Capital Division of the Public Defender's Office, Mr. Pearl also had law enforcement affiliations since 1970.

On August 8, 1970, Howard Pearl applied to the Sheriff of Marion County, Doug Willis, for appointment as a "special deputy sheriff" (T. 536). He completed the same application that everyone else who applied for that position completed. When Pearl applied for the position, he was forthcoming about his motivation. He said that he wanted to serve as a law enforcement officer and carry a gun, so that:

> 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.
> (T. 539).

In response to the question on the application: "[i]f appointed, when can you report for duty?", Mr. Pearl represented that he would report for duty "[w]hen summoned" (T. 536).[1]

To demonstrate that he would report for duty "when summoned" and to ensure that he would be commissioned with the Marion County Sheriff's office, Mr. Pearl listed, in a rider annexed to the main application, his extensive law enforcement background -- both his relevant employment and training (T. 537). As for his prior "law enforcement employment," Mr. Pearl listed the five

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1. The Circuit Court's order simply ignored this evidence, and all of the evidence presented below, in finding that "Pearl never intended to act as a deputy, and the Sheriff of Marion County never intended for Pearl to act as a law enforcement officer." Harich v. State, 573 So.Ed 303, 304 (Fla. 1991).

years he had spent with the United States Treasury Department as a "criminal investigator (Special Agent)," his four-year stint as a "criminal investigator" in the United States Army Reserve, his four-year service as an Assistant "Attorney General of Florida" with "short periods as a special investigator" and his tenure in the County Solicitor's Office in Hillsborough County (T. 537).

As for his prior law enforcement training, Mr. Pearl noted that he had completed a "200 hour course of instruction in criminal investigation & enforcement law" for which he had earned a "Certificate of Completion" (T. 537). Mr. Pearl further noted that he had completed two-week courses in 1949, 1950, 1951 and 1952 totaling 250 hours "in criminal investigation & enforcement" while attending the Provost Marshal General's School in Camp Gordon, Georgia (T. 537). Mr. Pearl certified that all the representations he made in the application were "true and complete" (T. 539).

Mr. Pearl's application followed the same route as any other deputy or special deputy sheriff application: it was approved by the Sheriff and forwarded to the County Commissioners for their approval. (Moreland Del. 21-22) After his application was approved by the County Commissioners for Marion County (Moreland Del. 21-22), Mr. Pearl, like any other special deputy, took an oath of office as a "Special Deputy Sheriff" (T. 25960). In that oath, which he signed before a notary public, Mr. Pearl swore that he was "duly qualified to hold office under the Con-

stitution of the State" of Florida and that he would "well and faithfully perform the duties of special deputy on which [he] was about to enter" (T. 540). Like any other deputy or special deputy, Mr. Pearl was issued an identification card and was bonded and insured in the event that the sheriff's office were sued for any wrongful acts committed within the scope of Mr. Pearl's employment and duties (T. 541; 262). He obtained a badge and carried a concealed handgun. (Moreland Del. 55; T. 287-88).

Mr. Pearl did not resign his commission when he became an assistant public defender with the Seventh Judicial Circuit in 1972 (T. 295-96). Rather, in 1973, the newly elected Sheriff, Don Moreland, reappointed Mr. Pearl, this time as a "deputy sheriff" in Marion County (T. 265). Mr. Pearl took another oath of office in which he again swore that he was "duly qualified" to hold office and that he would "well and faithfully perform the duties" of a deputy sheriff (T. 266). In addition, Sheriff Moreland issued Mr. Pearl the official identification card of the Marion County Sheriff's office (T. 541). The front of that card, which contained Mr. Pearl's photograph, stated that Mr. Pearl was "a regular deputy sheriff of Marion County, Florida" (T. 541). The reverse of the card was dated January 4, 1973, and contained Sheriff Moreland's signed "certification" that Mr. Pearl was a regularly empowered and constituted deputy sheriff with the full powers of that office:

> Howard B. Pearl is a regularly constituted deputy sheriff to serve and execute all legal papers and process in Marion

> County, Florida with full power to act as Deputy Sheriff of Marion County until my term expires or this appointment is revoked. S/ Don Moreland Sheriff Marion County Florida.

(T. 541) (emphasis added) (copies of the identification card, oaths, badge and other indicia of office are attached to the appendix herein.)

Because the Sheriff's power to appoint deputies expired every four years at election time, Mr. Pearl's commission expired every four years, and every four years he had to be reappointed to office (T. 26). Thus, in 1977, 1981, 1985 and 1989, Mr. Pearl was reappointed as a deputy sheriff in Marion County. Every four years, Mr. Pearl received the oath of office from the Marion County Sheriff (T. 266). And every four years, in the Public Defender's office, he swore before the Public Defender's notary public that he was "duly qualified to hold the office of Deputy Sheriff" and that he would "well and faithfully perform" his duties (T. 268). Mr. Pearl continued to do so even after he began handling capital murder cases exclusively in 1978 (T. 377).

Because Mr. Pearl took the oath of office as a law enforcement officer, he was required to be bonded and insured like any other Florida deputy. He carried a $1,000 bond payable to the Governor of Florida in the event that the State were sued for a wrongful act undertaken in Mr. Pearl's official capacity. (T. 403). In addition to the bond, Mr. Pearl was required to, and did, maintain comprehensive liability insurance. By virtue of his deputy sheriff position, Mr. Pearl was placed in the high risk

category and was required to, and did, pay a $100 annual insurance premium from 1980 through 1985 and a $200 annual insurance premium from 1986 through 1988 (T. 270; 272-74).

Solely because he was a deputy sheriff, Mr. Pearl could, and did, carry a concealed handgun on his person across county lines. As Mr. Pearl testified, "I had no other authority to carry a concealed firearm." (T. 284). In addition, Mr. Pearl had several occasions to take advantage of his position as deputy sheriff. For example, to avoid passing through a metal detector while entering the Volusia County Courthouse Annex, where the evidentiary hearing on Mr. Harich's Rule 3.850 claim was continued, Mr. Pearl presented his deputy sheriff's card to court personnel (T. 285, 295). On another occasion, Mr. Pearl presented his deputy sheriff's card when he was questioned by an Ocala police department officer about why he was carrying a concealed weapon (T. 285).[2]

The Marion County Sheriff's Department did not dispute that Mr. Pearl had a genuine affiliation with the Department. As

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2. In addition, another witness testified that Mr. Pearl assisted the Marion County Sheriff in serving process or apprehending a felon. (C. Quarles Del. 32-34). Mr. Pearl disputed this testimony; he claimed to have only a hazy recollection of the incident, but that his best recollection was that this occurred prior to his affiliation with the Sheriff's office, although he conceded that on earlier occasions he had told people otherwise. (T. 291; 391-93).

Sheriff Moreland testified, Mr. Pearl is "a reputable attorney," and the Marion County Sheriff's Department was proud to have "a person of Mr. Pearl's caliber as a special deputy sheriff" because if "something serious happened and I needed the power of the County . . . we would simply call on him" (Moreland Del. 40-42).

In sum, regardless of Mr. Pearl's exact title, it is clear from the undisputed facts that Mr. Pearl did have a sworn duty to support the Sheriff's Office. Mr. Pearl made a formal application to become a law enforcement official; he swore under oath to serve when called; he was formally approved by the county government; he took an oath of office before a Notary Public every four years which made him the servant of the county sheriff; and he carried a concealed weapon, formal sheriff's identification and a badge -- things he had absolutely no right to do if his affiliation with law enforcement was not genuine and things that were done by all the other regularly constituted deputy sheriffs.

2. Mr. Pearl's Law Enforcement Affiliation Was Concealed from Mr. Harich

By the time of Mr. Quince's trial in 1980, Mr. Pearl's affiliation with the Marion County Sheriff's office was apparently known by some judges and lawyers in Volusia County, though not among the defendants Mr. Pearl represented (T. 58). The head of the Volusia County Public Defender's Office, Jim Gibson, knew about Mr. Pearl's affiliation with the Marion County Sheriff's

office (Gibson Dep 18), (T. 57-58, 352). Mr. Pearl never informed Mr. Quince about Mr. Pearl's position with the Marion County Sheriff's office or with the other offices (T. 617-18).

Indeed, Mr. Pearl's affiliation with these sheriffs' offices did not come to the attention of Mr. Quince until 1989 when counsel for Mr. Quince was made aware of the Harich litigation when this Court granted a stay of execution in that case in 1989. Even though Mr. Pearl had been interviewed several times previously by Mr. Harich's post-conviction counsel, he had never informed them of his affiliations (T. 618, 676, 677, 679). 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. Only when he was confronted by Harich's lawyers with this information did Mr. Pearl admit to his affiliation with the Marion County Sheriff's office; Mr. Pearl then explained that he had not brought the Marion County commission to Mr. Harich's attention because Mr. Harich would have demanded different counsel (T. 679). There is no reason to suggest that Mr. Quince would have done otherwise.

At the Harich evidentiary hearing, Mr. Pearl glibly testified that he had not informed his client of the conflict of interest because he deemed it to be "totally irrelevant to my function as his defense lawyer" since "I [do not] owe to any client a curriculum vitae and a biography when I am appointed to

epresent him" (T. 300-01). Despite the certified statement in his original application that he applied to become a deputy sheriff, in part, so that "when called, I may participate and assist in protection of persons and property in my community," Mr. Pearl claimed, when confronted under oath with his prior sworn statements, that his sole motivation for being a law enforcement officer was to enable him to carry a concealed weapon (T. 539, 248-49).

This testimony was patently untrue as evidenced by the fact that after Mr. Pearl had received a "gun-toters" permit in 1988, and therefore no longer needed his affiliation with the Sheriff to carry a pistol, he nonetheless retained his position as deputy sheriff (T. 253). When Pearl first received his commission he could only carry a concealed handgun across county lines by serving as a special deputy sheriff. The statute was later amended to provide for the issuance of a permit upon the completion of certain requirements (T. 251-253). Mr. Pearl successfully completed the requirements and received a "gun toters " permit in 1988 (T. 251-253, 407, 555-556). He nonetheless retained his commission with the Marion County Sheriff's Office, thus belying his claim that his sole motivation for that commission was to carry a concealed handgun since even when he received the gun toters permit (and thus had a right to carry a concealed weapon across state lines without being a law enforcement officer) he nonetheless retained his commission with the Marion County sheriff's office.

Mr. Pearl reluctantly resigned his sheriff's commission only when his boss, Jim Gibson, made it clear to him that he would lose his job as an assistant public defender if he continued his affiliation with the Marion County Sheriff's office (T. 417, 443). This occurred in May, 1989, after this Court remanded Harich's appeal to the Circuit Court for an evidentiary hearing on the conflict of interest claim (T. 417-18, 445).

3. Mr. Pearl, Whether Having An Actual or "Honorary" Affiliation With the Sheriff's Office, Had An Actual Conflict of Interest When He Represented Petitioner While Concealing That Affiliation

What constitutes an actual conflict of interest under the Sixth Amendment's right to conflict-free representation is simple and easy to apply: "[A] conflict of interest exists when an attorney is placed in a situation conducive to divided loyalties." Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991). Or, as the Eleventh Circuit recently explained in McConico v. Alabama, 919 F.2d 1543, 1546 (11th Cir. 1990) (quoting Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir. 1983)), "[An] [a]actual conflict of interest is evidenced if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action."

a. Pearl as a Duly Constituted Deputy Sheriff Had a Conflict of Interest

That Mr. Pearl had a conflict of interest seems beyond dispute. On the one hand, as a member of the Florida bar he had sworn to uphold his client's interests "zealously." See Rules

Regulating the Florida Bar Preamble: A Lawyer's Responsibilities, Chapter 4, § 2 (1990). On the other hand, as a state law enforcement officer, he had sworn to uphold the interests of law enforcement. (T. 261) These loyalties, responsibilities and obligations are plainly inconsistent because a sheriff's responsibilities are to the state and to aid in law enforcement while a defense attorney's responsibilities are solely to his client, sometimes at the expense of law enforcement. Controlling is the very recent Eleventh Circuit case of McConico v. Alabama, 919 F.2d 1543 (11th Cir. 1990). There, the Eleventh Circuit issued the Writ vacating a defendant's conviction because of his attorney's undisclosed conflict of interest: Ricky Morton was murdered, and attorney Pickard represented Brenda McConico, as a beneficiary of Morton's estate, in a suit to recover insurance proceeds. Attorney Pickard subsequently represented Brenda McConico's husband, James McConico Jr., in a criminal prosecution for the murder of Morton. Thus, attorney Pickard had to take the position in representing Brenda McConico that Ricky Morton was not the aggressor, but that his death was an accident, and had to take the position in representing James McConico Jr. that Ricky Morton was the aggressor and that the homicide was justifiable self defense. McConico thus argued "that this structural conflict tempered Pickard's representation during the criminal proceedings and that Pickard never raised the possibility either with him or the state court." Id. at 1545.

The Eleventh Circuit found that this was an actual conflict because "Pickard simultaneously represented conflicting interests." Id. at 1546. The Eleventh Circuit thus rejected "Pickard's assertion that dual representation did not actually hamper his defense of appellant" because "he was in a situation of inherent conflict." Id. at 1547. The court continued:

> Had Pickard had any doubt about the possibility of conflict, he could have raised it with his client or the trial court, but he did not.

Id. at 1547.

Pearl's conflict was no less real than the attorney in McConico. He, too, was "simultaneously represent[ing] conflicting interests" when he served as a deputy sheriff while also serving as Harich's sole defense attorney. Packard's potential conflict became "actual" when he had to cross-examine Brenda McConico, his former client, Pearl's conflict became actual when he had to cross-examine fellow members of the law enforcement community And Pearl, like Pickard, "could have raised [the conflict] with his client, but he did not."

Pearl's conflict, like Pickard's, mandates that the conviction and sentence be vacated because the conflict strikes at the very heart of the trial's truth-finding function. As one Court of Appeals explained in granting the Writ because of an undisclosed conflict of interest, "an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney

with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition." Osborne v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988). Or, as the United States Supreme Court explained, "an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation." Fern v. Ackerman, 444 U.S. 193, 204 (1979).

Similarly, Pearl had no less of a conflict than attorney Bailey who entered into a book contract with the defendant Hearst as compensation for serving as counsel, and thus had a possible conflict because he may have been thus motivated to employ tactics that would make the book more interesting at the expense of his client's legal position. See United States v. Hearst, 638 F.2d 1190 (9th Cir. 1980), cert. denied 451 U.S. 938 (1981). Pearl had no less of a conflict of interest than attorney Stewart who represented defendant Kretske -- over the objection of co-defendant Glasser, who was also represented by Stewart. Glosser v. United States, 315 U.S. 60 (1942). Pearl, like the conflicted attorneys in McConico, Hearst and Glasser, suffered from being "placed in a situation conducive to divided loyalties." As such, Pearl suffered from a conflict of interest when he represented Quince at the same time that he served as a special deputy sheriff.

Indeed, Pearl's conflict is far worse than that of the attorneys in McConico, Hearst and Glasser because it was in viola-

tion of law. Various state bar associations have considered, and prohibited, conflicts not nearly as egregious as Mr. Pearl's. A recent New York Bar Association ethics opinion, for example, explained that DR5-101(A) of the Code of Professional Responsibility barred an entire law firm from representing criminal defendants, where even one of its members served as a law enforcement officer. New York Ethics Opinion 615 (1991). The New York State Bar Committee on Professional Ethics explained:

> No matter how earnest and complete a defense the lawyer provides, there is an obvious danger that a convicted defendant will believe that his defense was inadequate because of the lawyer's bias as a police officer. Conversely, the public might lose faith in the criminal justice system if it believes that the lawyer was employed in the hope that the lawyer's position as a police officer might enable the lawyer to obtain more lenient treatment for the defendant. A police officer is widely viewed as a representative of the people. We believe that the representation of a criminal defendant by a police officer could lessen public confidence in the integrity of the criminal justice system.

A recent New Jersey ethics opinion similarly prohibited a police officer, who had been recently admitted to the bar, from representing a defendant charged with violating the local health code, a charge that was penal in nature. New Jersey: Opinion 610 (1988) (National Reporter on Legal Ethics). Similarly, a law firm employing an attorney who is a police officer may not represent criminal defendants in the county where the police officer is employed or is nearby. Connecticut Informal Opinion 85-1 (1985). A lawyer representing a county in civil matters may not also represent criminal defendants if his civil representation of the

county requires collaboration with the county sheriff or the law enforcement authorities of the county. Tennessee Formal Ethics Opinion 83-F-53 (1983). A lawyer may not represent criminal defendants in cases in which the sheriff or officers of the sheriff's department are witnesses for the prosecution while at the same time representing the sheriff in defense of an alleged civil rights violation. Tennessee Formal Ethics Opinion 83-F-56 (1983). A lawyer may not represent a criminal defendant when the lawyer's spouse is a sheriff, unless the lawyer advises his client of the possible effect on his professional judgment and the client consents to the representation. Wisconsin Formal Ethics Opinion E-85-2 (1985).

The common sense notion that the interests of law enforcement "conflict" with those of the defense attorney were discussed in detail by the California Supreme Court in People v. Rhodes 524 P.2d 363 (Cal. 1974). There the Court overturned the conviction of a defendant who had been represented by a city attorney responsible for prosecuting violations of city ordinances.

The California Supreme Court in Rhodes noted that city police officers are the principal witnesses used by a city attorney in prosecuting violations of municipal ordinances. This might cause a city attorney acting as defense counsel to conduct a less than whole-hearted cross-examination: "[H]e might be reluctant to engage in an exhaustive or abrasive cross eamination of such officers even though such might well be required." Id. at 365.

Similarly, the city attorney might "dilute" his criticism of police officers:

> [He] might also be influenced to dilute his criticism of local police conduct even though the situation calls for stressing the impropriety of police activity.

Id. Such commentary is particularly prescient in this case, where Mr. Pearl has frankly admitted that he believes all police officers are truthful and has never had a case -- in his entire 17-year career as a public defender -- where he has called into question the veracity of a police officer.

As for any contention in this case that Mr. Pearl's commission was in Marion rather than Volusia County, the California Supreme Court in Rhodes rejected this very argument. The Court pointed out that:

> Neighboring and overlapping law enforcement agencies have close working relationships, and resentment engendered by a city attorney within the membership of such agencies would have an adverse effect on the relationship of the city attorney with members of his local police department.

Id. at 366. Thus, the conviction was overturned even though the city attorney did not have jurisdiction over the state criminal charge he was defending against.[3]

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3. Mr. Pearl's responsibilities extended from Marion County, where he served as deputy sheriff, into adjoining Volusia County -- where he served in the Capital Division of the Public Defender's Office -- as well. Under Florid Statutes secs. 23.12 et seq., Florida has enacted an overall law enforcement scheme which coordinates mutual cooperation among law enforcement agencies throughout the state. Mutual aid agreements for voluntary cooperation and requested assistance encourage members of any law enforcement agency to render assistance outside their own jurisdiction. In so doing, all the privileges, powers and immunities

Other state court decisions are in accord with the California Supreme Court's approach and have found an impermissible conflict between simultaneous law enforcement and criminal defense functions. See, e.g., State v. Dinwiddie, 237 S.W.2d 179, 183 (Mo. 1951) ("It could not be contended, in any view that may be taken, that it would be proper for the sheriff himself to serve as defense counsel. And for the same reason, the appointment of the sheriff's deputy, even if inactive, would not be allowed to stand over the objection of the prisoner.") (emphasis added). Accord People v. Washington, 461 N.E.2d 393, 397 (Ill.), cert. denied sub no. Illinois v. Washington, 469 U.S. 1022 (1984) (defense attorney served as prosecutor in adjoining county); People v. Fife, 392 N.E.2d 1345, 1346 (Ill. 1979) (defense counsel was special assistant attorney general); State v. Crockett, 419 S.W.2d 22, 29 (Mo. 1967) (trial counsel was assistant attorney general).

Appellant recognizes that the above-quoted authorities -- whether they be ethics opinions or cases from various states -- do not explicitly address the sixth amendment of the United States Constitution. But all these authorities are directly on

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granted to law enforcement officers -- whether paid, volunteer or auxiliary -- within their own jurisdiction are retained and apply with equal effect in other jurisdictions.

point as to the existence of a conflict of interest when a lawyer affiliated with law enforcement seeks to act as defense counsel. That being so, these decisions are -- in effect -- dispositive of the sixth amendment issue in this case, since the sixth amendment guarantees a criminal defendant the right to conflict-free counsel. Wood v. Georgia, 450 U.S. 261 (1981); McConico v. Alabama, 919 F.Ed 1543 (11th Cir. 1990).

b. The State's Arguments For Why Mr. Pearl Had No Conflict Are Meritless

Throughout the proceedings, the State contended that there was no conflict of interest because Pearl was merely an "honorary" -- i.e. not a bona fide -- law enforcement official. However, there is no such thing under Florida law as an "honorary" deputy sheriff entitled to carry a concealed handgun across state lines. Indeed, the State has never cited a single statute, rule regulation or other authority that purports to give a purely "honorary" deputy the right to carry a pistol.

Moreover, one need only examine Pearl's two other sheriffs' "commissions," which indeed were honorary, to see why the Marion County commission was the real thing. Besides his commission in Marion County, Mr. Pearl also carried deputy sheriff cards for Volusia and Lake Counties (T. 298). These cards were bestowed as a token of friendship by the sheriffs of those counties (T. 280). In stark contrast to the Marion County commission, however, the Volusia and Lake County commissions did not comply with formal procedures (such as completion of an application, demonstration

of law enforcement background and approval by the County Government); they required no oath (such as the ones Mr. Pearl took in 1977, 1981, 1985 and 1989); they conferred no privileges (such as the right to carry a concealed weapon); and they entailed no obligations (such as payment of insurance or bond premiums or the renewal of an application and oath of office) (T. 275; 437-38).

The Lake County commission was "honorary": no procedures were followed to obtain the commission and it conferred no benefits. The Volusia County commission was "honorary": it, too followed no procedures and conferred no benefits.

The Marion County commission, however, was anything but "honorary." That commission existed pursuant to statute, was offered pursuant to formal procedures, including approval by the County Government and the taking of a formal oath of office, and demanded specific obligations, such as the payment of bond and insurance premiums. Significantly, the Marion County commission permitted Mr. Pearl to carry a concealed weapon -- something he had absolutely no right to do pursuant to the honorary commissions in Lake and Volusia Counties or otherwise, unless he was a Bonn tide law enforcement official. Mr. Pearl admitted as much when he stated, "I had no other authority to carry a concealed firearm." (T. 284).

Thus, the State's argument that Pearl's Marion County commission was "honorary" is flatly contradicted by the undisputed fact that Pearl, pursuant to that commission, carried a concealed

handgun. As mentioned above, there is no such thing under Florida law as an honorary deputy sheriff who is entitled to carry a concealed handgun across county lines. No Florida statute or regulation allows a purely "honorary" deputy to carry a concealed pistol. Only a genuine law enforcement official, such as Pearl, had that right.

The State also argued that no conflict existed because Mr. Pearl was barred from performing law enforcement duties because he was not fully certified. This is not true. Although Mr. Pearl apparently was not certified to perform all the duties of a Florida deputy sheriff because he had not completed the required hours of formal training (T. 387, 396), he nevertheless had important law enforcement duties pursuant to statute. That is because certification Is a prerequisite to performing some -- but not all -- of the duties of law enforcement. Thus, although uncertified, Mr. Pearl had the obligation, when called by the sheriff, to "aid in preserving law and order." Fla. Stat. Ann. § 30.09(4)(d). Similarly, an uncertified deputy sheriff, such as Pearl, had the obligation to "raise the power of the county . . ., to assist in quelling a riot or any breach of the peace, when ordered by the sheriff . . . ." Id. § 30.09 (4)(f). Thus, whether or not Mr. Pearl was certified to perform all the duties of a deputy sheriff, he had a duty of loyalty to the sheriff and an obligation, pursuant to statute, to perform significant law enforcement services when called. In this connection, it is sig-

nificant that Sheriff Moreland explicitly reserved the right to call upon Mr. Pearl in an emergency. (Moreland Dep. 40-42) And, equally important, Mr. Pearl took a solemn oath promising to "well and faithfully perform th[ose] duties" when called (T. 540, 543).

Finally, the State claims that Mr. Pearl's conflict of interest can be excused because Mr. Pearl never actually performed the duties of a law enforcement official; for example, Mr. Pearl claims never to have worn a uniform, or patrolled in a squad car, or made an arrest. This argument is irrelevant to the existence of a conflict of interest for at least two reasons.

First, while Mr. Pearl arguably never performed any duties as a law enforcement official -- and there is conflicting testimony on this issue -- there is no dispute that Mr. Pearl enjoyed some very important privileges of being a law enforcement official, most notably the privilege of carrying a concealed weapon and the right (which he twice exercised) to present his sheriff's identification when questioned for doing so. One can hardly be characterized as "inactive" if one enjoys the privileges of office, even if one does not perform all the responsibilities.

Second, and perhaps more importantly, whether or not Mr. Pearl actually performed any services for the sheriff does not in any way diminish the fact that over a period of nineteen years he four times took an oath of office swearing allegiance to the

sheriff. Unless one is to conclude that the taking of a solemn oath is a meaningless act -- and we note that the sanctity of oaths is the very foundation of our judicial systems -- it is clear that Mr. Pearl had a duty of loyalty to law enforcement, a duty wholly at odds with his duty as defense counsel.

In the only other reported decision involving an inactive law enforcement officer, the Supreme Court of Missouri squarely held that even an inactive law enforcement official has a conflict of interest when he also serves as defense counsel. In State v. Dinnwiddie, 230 S.W.2d 179 (Mo. 1951), the Supreme Court of Missouri affirmed the disqualification of defense counsel who was also a deputy sheriff, despite the claim that defense counsel "was a deputy in name only; that he had not actively participated in this or any other criminal case in that capacity . . . ." Id at 182. Notwithstanding the defense counsel's inactive status as a law enforcement official, the court held that defense counsel had an irreconcilable conflict of interest: "It could not be contended, in any view that may be taken, that it would be proper for the sheriff himself to serve as defense counsel. And for the same reason, the appointment of the sheriff's deputy, even if inactive, would not be allowed to stand over the prisoner's objection." Id. at 183.[4]

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4. In Dinnwiddie, the court held that the conflict between law enforcement and defense counsel positions was so great that even the prosecutor could challenge the duality of status. A fortiori, a criminal defendant must have the same right.

In sum, it is clear that Mr. Pearl had a genuine affiliation with the Sheriff's Office that was incompatible with his role as defense counsel. Regardless of the exact title used to scribe his status -- whether "full deputy," "special deputy," "honorary deputy" or "inactive deputy" -- the fact remains that Mr. Pearl's commission was approved by the official county government; that he four times took an oath of office, swearing a solemn oath to serve the sheriff; and continuously accepted at least one very important benefit of that office, the right to carry a concealed handgun. That status -- whatever it is called -- necessarily requires loyalty to the sheriff and is inconsistent with the criminal defense function.

c. Even if Pearl Were an "Honorary" Deputy Sheriff He Had a Conflict of Interest

Even if Pearl were an "honorary" deputy sheriff, he nonetheless had a conflict of interest because he was at the mercy of the sheriff for a privilege that could be revoked at any time at the sheriff's whim. Given the paramount importance of this privilege to Mr. Pearl -- Mr. Pearl testified that he had been physically threatened and felt "naked" and "incomplete" without his weapon (T. 384) -- Mr. Pearl was beholden to the sheriff at the expense of Mr. Quince, who necessarily took an adversarial position to law enforcement. Moreover, the very law enforcement authorities he cross examined at Quince's trial had the power to arrest Pearl for carrying a concealed weapon, unless Pearl was a genuine sheriff, and thus Pearl was beholden both to the sheriff

who gave him the privilege and the law enforcement officers in Volusia County who failed to prosecute him.

Mr. Pearl's authority to carry a concealed weapon was totally dependent on the largess of the Sheriff: the commission was "at will" and could be revoked at any time. See Wilkerson v. Butterworth, 492 So. 2d 1169, 1170 (Fla. 4th DCA 1986): Szell v. Lamar, 414 So. 2d 276, 277 (Fla. 5th DCA 1982). Thus, while defending a criminal defendant, Mr. Pearl knew that if he questioned, cross-examined, challenged, or cast doubt upon the police officers with too much vigor, he ran the risk that the Sheriff's office could strip him of his gun at any time and without any warning. Thus beholden to the Sheriff's office, Mr. Pearl had a conflict of interest, which cannot be squared with the sixth amendment's right to undivided loyalty, particularly given the eighth amendment's requirement of heightened reliability in capital proceedings. Cf. Beck v. Alabama, 447 U.S. 625 (1980).

The carrying of a concealed weapon was not simply a convenience to Mr. Pearl. He testified that carrying a gun was a matter of life and death to him, because his life had been threatened (T. 378), and that without a gun he felt "naked" or "incomplete." (T. 384). Hence, Mr. Pearl was at the mercy of the Sheriff's office for something which was of the utmost importance to him. And as Professor Monroe Freedman, an expert in legal ethics, attested, "[t]he ancient aphorism reminds us that 'gifts are hooks,' and gifts that are subject to revocation or termina-

tion -- like defense counsel's power to carry a gun --have an especially potent grappling effect." (T. 624, 628).

When a lawyer's professional judgment "reasonably may be affected" by personal interests such as Mr. Pearl's, the sixth amendment and the attorney disciplinary rules forbid the representation, absent an informed and voluntary waiver by the defendant (T. 627-31); Code of Professional Responsibility, DR5-101(A); EC5-1. That being so, Mr. Pearl had a conflict of interest even if he were an "honorary" sheriff, for he put himself in the Sheriff's control on a matter of "life and death" importance to him.

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. see. 790.06; cf. T. 253. Because his present gun permit is matter of right (not privilege), Pearl owes no duty of loyalty to the state for his current gun permit.

By contrast, Pearl's earlier "gun toters" permit from the Sheriff was a "special privilege" not available to ordinary citizens. That privilege, however, which was a matter of life and death to Pearl, could be revoked at the whim of the sheriff. Pearl was thus indebted to the sheriff for something that was of the utmost importance to him.

Moreover, if Pearl were not a genuine law enforcement officer -- as the State contends -- he had a conflict for an addi-

tional reason: he was committing a crime each and every time he crossed from Marion County into Volusia with his concealed weapon. Thus, by falsely holding himself out as a deputy solely to carry a concealed handgun across county lines (and thus evade Florida's gun control laws), Pearl risked arrest by those very same law enforcement officers he cross-examined at Quince's trial -- law enforcement officers who apparently knew Mr. Pearl carried a weapon but who winked at the practice. Among the crimes Pearl was committing -- again assuming he was not a bona fide tide law enforcement officer -- were the following:

1) Carrying a concealed firearm: which, under Fla. Stat. Ann. § 790.01(2) is a felony in the third degree. Carrying such a concealed weapon is defined by statute to be "a breach of peace," which subjects the felon to arrest without a warrant. Id. § 790.02. Further, carrying a pistol without a license is a second degree misdemeanor.

2) Making false statements: having made false statements to obtain the privilege of being a deputy sheriff, Mr. Pearl would have violated Fla. Stat. Ann. § 817.03, which provides that making a false statement to obtain "rights [or] privileges," such as Mr. Pearl's right to carry a concealed handgun, is a misdemeanor of the first degree.

3) Impersonating a law enforcement officer: when Mr. Pearl was stopped by law enforcement authorities and asked why he was carrying a concealed weapon in violation of Florida law, he pre-

sented his deputy sheriff's card and claimed to be one. (T. 285). Indeed, every time Mr. Pearl carried his concealed weapon or deputy sheriff's identification, he was impersonating a sheriff. This violates § 843.08 of the Florida statutes, providing that "[w]ho ever falsely assumes or pretends to be a sheriff, . . . deputy sheriff . . . and takes upon himself to act as such . . . shall be deemed guilty of a misdemeanor of the first degree. . . ."

4) Falsifying records: for repeatedly re-registering as a special deputy, if by secret agreement Mr. Pearl were not a special deputy, Pearl conspired with and assisted Sheriffs Willis and Moreland in falsifying records, which is ~official misconduct, a felony of the third degree." Fla. Stat. Ann. § 839.13, § 839.25.

Thus, Pearl had an actual conflict of interest if he was not a real law enforcement officer because he risked criminal arrest by the very law enforcement officers Pearl cross-examined as Quince's attorney. An attorney personally at risk of criminal prosecution presents the clearest example of a conflict of interest. See, e.g., United States v. Cancilla, 725 F.2d 867, 870 (Ed Cir. 1984) ("What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities"); Virgin Islands v. Zepp, 748 F.Ed 125, 139 (3d Cir. 1984 (same).

The State, of course, will argue that it is preposterous to accuse Mr. Pearl of committing a crime and that there was no

serious risk of prosecution. But that argument proves our point: If Mr. Pearl was not committing a crime by carrying a concealed weapon, sheriff's identification and a badge, it is only because his affiliation with the Sheriff's Office was genuine. Indeed, if Mr. Pearl had been prosecuted for wrongly carrying a gun and a badge, he undoubtedly would have been acquitted -- on the ground that he was a Bonn tide law enforcement official who had complied with all the formalities of office, including approval by the County government and the taking of the oath of office.

The State, however, cannot have it both ways. If Mr. Pearl was not a bona fide law enforcement official, then he was a fraud risking prosecution if he cross-examined Quince's law enforcement accusers to harshly. On the other hand, if Mr. Pearl was genuinely affiliated with the Sheriff's Department and therefore certified to carry a gun and a badge, he had no business representing Mr. Quince as a criminal defendant.

d. Summary

In sum, based on the undisputed facts, Mr. Pearl was subject to an undisclosed conflict of interest when he served as appellant's sole trial attorney while simultaneously affiliated with law enforcement. This conflict of interest is founded on (i) longstanding Supreme and Circuit Court precedent from Glasser v. United States, decided in 1942, to McConico v. Alabama, decided in 1990; and (ii) the common sense notion embodied in various ethics opinions and cases that the criminal defense function is

inconsistent with any law enforcement affiliations. Conversely, even if Mr. Pearl were an honorary deputy sheriff, he had a conflict of interest because (i) he was indebted to the sheriff for a privilege that was literally a matter of life and death importance to him and (ii) he risked criminal prosecution by those very law enforcement officials he cross-examined as Kenneth Quince's lawyer.

B. MR. PEARL'S CONCEALED CONFLICT OF INTEREST IS A PER SE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

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. . . . [W]hen a defendant is deprived of the presence and assistance of his attorney . . . in, at least, the prosecution of a capital offense, reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (emphasis added; citations omitted).

Squarely on point is the United States Supreme Court's decision in Wood v. Georgia, 450 U.S. 261 (1981). In Wood, the petitioners had been convicted of distributing obscene materials and were sentenced to probation contingent on paying substantial fines. The Georgia court revoked their probation when they failed to pay the fines. The Supreme Court granted certiorari on an equal protection issue having to do with the fine itself, but then on its own motion vacated the petitioners' probation revocation because the trial court had failed to inquire into a pos-

sible conflict of interest on the part of the petitioners' attorney. The possibility of a conflict was apparent not from any concrete evidence, but from the circumstances of the representation. In particular, the petitioners' lawyer, who had been selected and paid by the employer, pressed a constitutional attack rather than arguing for leniency and a reduction in the fines, apparently to create a test case for the petitioner's employer. The Supreme Court remanded the matter for a factual determination of whether a conflict existed and squarely held that "if the [district] court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests." Id. at 273-274 (emphasis added).

Mr. Quince's claim that his court-appointed counsel had an undisclosed conflict of interest goes to the very heart of the constitutional requirement that testimony be tested in the crucible of cross-examination conducted by an advocate whose sole loyalty is to his client and whose sole interest is in furthering his client's interests within the bounds of the law. Counsel's conflict of interest undermines the fact-finding process itself and hence the reliability of the guilt-innocence and sentencing determinations. As such, deprivation of the right to conflict fee counsel is a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

> Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'"

Arizona v. Fulminante, 59 U.S.L.W. 4235, 4243 (March 26, 1991) (quoting Rose v. Clark, 478 U.S. 550, 577-78 (1986)).

In cases of a concealed conflict, there is no need to adduce proof that the "actual conflict of interest adversely affect[en] counsel's performance or impair[en] his client's defense." Westbrook v. Zant, 704 F.Ed 1487, 1499 (11th Cir. 1983). Instead, prejudice is presumed because:

> [a] conflict of interest may affect the actions of an attorney in many ways, but the greatest evil . . . is in what the advocate finds himself compelled to refrain from doing . .. Holloway v. Arkansas. 435 U.S. at 490. . . . In such circumstances a reviewing court cannot be certain that the conflict did not prejudice the defendant. Accordingly, it is settled that once an actual conflict is shown, prejudice is presumed.

Barham v. United States, 724 F.Ed 1529, 1534 (11th Cir. 1984) (Wisdom, J., concurring) (emphasis added), cert. denied, 467 U.S. 1230 (1984).[5]

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5. While a panel of the Eleventh Circuit in McConico v. Alabama, 724 F.Ed at 1529, 1531 (11th Cir. 1990) purported to hold that Barham is no longer good law, that panel decision flatly contradicts the holdings of the United States Supreme Court in Holloway v. Arkansas and Wood v. Georgia. The McConico panel's reliance upon Strickland v. Washington, 466 U.S. 668 (1984) as overruling prior precedent is misplaced. Strickland, unlike Holloway and Wood, was not a conflict of interest case but an ordinary run-of-the-mill ineffective assistance case, which did not purport to overrule the Supreme Court's earlier rulings in conflict cases.

This is not to say that every conflict case is governed by the per se rule. Allegations of conflict of interest, in the context of a single lawyer representing multiple defendants where the defendant fails to object at trial, are governed by Cuyler v. Sullivan's requirement that the defendant must show that the conflict of interest "adversely affected" the adequacy of his representation. 446 U.S. 335, 349 (1980). As the Supreme Court of Illinois stated in People v. Washington, 461 N.E.2d 393, 397 (Ill. 1984), curt. denied sub no. Illinois v. Washington, 469 U.S. 1022 (1984), "[t]he approach in joint representation cases is different from the per se rule because, as was recognized in Cuyler, possible conflict inheres in almost every instance of multiple representation.'".

The reason for requiring the showing of an "actual effect" when counsel represents more than one defendant is that a multiple representation is, by definition, not concealed, and include many potential advantages to the defendant. Justice Frankfurter explained in Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting) that:

> There are advantages and disadvantages in having separate counsel for each defendant or a single counsel for more than one. Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.

Given the fact that such a defendant made a strategic choice by permitting a single attorney to represent both himself and a co-defendant, he will not lightly be permitted a second trial merely by alleging a conflict of interest he knew about from the start.

On the other hand, concealed conflicts of interest, such as the one here, are so invariably pernicious, so without the possibility of any redeeming virtue that they are "always real, not simply possible, and . . . by [their] nature, [are] so threatening as to justify a presumption that the adequacy of representation was affected." United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984). In those kinds of conflicts, courts refrain from searching the record to determine what could or should have been done differently, and instead invoke a rule of per se illegality. See United States v. Cronic, 466 U.S. 648, 658 (1984) ("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified").[6]

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6. Numerous courts across the country impose a per se rule under similar circumstances. See, e.g. Zurita v. United States, 410 F.Ed 477 (7th Cir. 1969); (remanding case for evidentiary hearing where petitioner alleged that his attorney had business connections with the alleged robbed bank); Berry v. Gray, 155 F. Supp. 494, 497 (W.D. Ky. 1957) (applying per se rule of illegality where county attorney prohibited by statute from acting as counsel in any case in opposition to interest of county represented); People v. Washington, 461 N.E.2d 393 (Ill. 1984) (affirming reversal of conviction where defense counsel also served as part time city prosecutor); State v. Crockett, 419 S.W.2d 22, 29 (Mo. 1967) (vacating conviction where defendant represented by assistant attorney general); People v. Fife, 392 N.E.2d 1345 (Ill. 1979) (a special assistant attorney general handling only unemployment compensation cases for the state on a part-time basis could not serve simultaneously as defense counsel); People v. Kester, 361 N.E.2d 569 (Ill. 1977) (former assistant state's attorney who had made appearances on the state's behalf in defendant's prosecution improperly switched to the defense side); Kelly v. State, 640 S.W.2d 605 (Tex. Crim. App. 1982) (invoking per se rule where defendant represented by municipal court prosecutor); Howerton v. State, 640 P.2d 566, 567 (Okla. Crim. App. 1982) (invoking per se rule where defense at-

The distinction between dual representation cases, where an actual affect test is applied, and cases where the conflict is concealed or unsuccessfully objected to (as in Wood and Holloway), was cogently discussed by Judge Wisdom in his concurring opinion in Barham v. United States, 724 F.Ed 1529, 1533-36 (lath Cir. 1984). Appellant respectfully suggest that Judge Wisdom's approach accurately distills the Supreme Court's commands on the issue of what remedy is to be provided in conflict cases. Under that Supreme Court precedent, once this Court determines that Mr. Pearl had a concealed conflict of interest, the Court "must" vacate the tainted proceeding. Wood v. Georgia, 450 U.S. at 274.

C. EVEN IF MR. PEARL WERE AN HONORARY DEPUTY SHERIFF, HE HAD A CONFLICT OF INTEREST THAT IS A PER SE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND

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torney doubled as a part time district attorney in an unidentified county since a part-time district attorney "may not be appointed to defend persons either within or outside the jurisdiction in which he serves as assistant district attorney"); Skelton v. State, 672 P.2d 671, 671 (Okla. Crim. App. 1983) (invoking Be rule where defendant represented at trial by same person who prosecuted at arraignment and preliminary hearing as an assistant district attorney since "[t]he public has a right to absolute confidence in the integrity and impartiality of the administration of justice") (quoting Howerton, 640 P.2d at 568); Worthen v. State, 715 P.2d 81 (Okla. Crim. App. 1986) (invoking per se rule and reversing conviction where defense counsel had previously served as an assistant district attorney); United States Ed Rex. Miller v. Myers, 253 F. Supp. 55, 57 (E.D. Pa. 1966) (invoking per se rule where defense counsel represented victims of the alleged crime in an unrelated civil suit while defending the accused without informing him of the dual representation).

FOURTEENTH AMENDMENTS BECAUSE HE RISKED CRIMINAL PROSECUTION IF HE WERE DISCOVERED.

In addition, the per se standard is invariably applied where, as here, an attorney conceals his divided loyalties in violation of statute or himself risks criminal prosecution by the very law enforcement officers he is cross-examining. Thus, even if one were to believe Mr. Pearl's explanation that he was not a real sheriff but went through a charade over a period of close to twenty years solely to carry a concealed weapon between counties that he otherwise did not have a right to carry, he had a concealed conflict of interest that violated the sixth, eighth and fourteenth amendments on two other grounds: he was beholden to the very law enforcement interests adverse to his client for that privilege and was himself committing a crime. The courts regularly apply a per se rule of reversible error where, as here, defense counsel is in violation of the law and may be prosecuted if too vigorous a defense or cross-examinations of law enforcement witnesses can lead the police officers who take the stand one day to prosecute him the next day.

In Solina v. United States, 709 2d 160, 167-69 (2d Cir. 1983) (Friendly, J.), the defendant was competently represented by someone who (unbeknownst to defendant) was a law school graduate who had failed the bar examination but held himself out as a lawyer. The unlicensed practice of law violated the rules governing attorneys and subjected defense counsel to possible prosecution. The district court upheld the defendant's conviction be-

cause the defendant "had not been prejudiced by [defense counsel's] not being a licensed attorney. . . ." Id. at 161. The fact that defendant plainly suffered no prejudice from his unlicensed advocate was recognized by the Second Circuit, which explained at 162:

> that the evidence of Solina's guilt was overwhelming; that examination of the 14 instances of ineffectiveness alleged by Solina's present counsel showed that these were inconsequential or within the permissible range of professional judgment; and thus that Solina had received representation . . . which met the standard . . . involving . . . incompetency of counsel.

Nevertheless, the Second Circuit reversed defendant's conviction, holding that this was a per se violation of the sixth amendment. That court's reasoning, which is applicable to this case, is that an individual acting as an attorney in violation of statute might fear that if he defended his client too vigorously it would draw attention to his failure to comply with the applicable laws and that he might be unmasked. The court explained:

> Such a person cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background and discover his lack of credentials. Yet a criminal defendant is entitled to be represented by someone free from such constraints.

Id. at 164. By a parity of reasoning, in this case, like Solina, there was a conflict between the client's interest in a vigorous defense and Mr. Pearl's personal interest in masking his violations of Florida law and attorney disciplinary rules.

In United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984), the Second Circuit applied the Solina per se rule to a situation

where defense counsel may have been implicated in the crime for which his client was on trial. The court reasoned:

> What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities...?
> Nor do we regard Solina as inconsistent with Cuyler v. Sullivan. . . . The court in Cuyler was concerned with the effect of multiple representation, a situation that invariably raises the possibility of harmful conflict that often does not exist in fact. Solina involved a different type of conflict for a lawyer, which is always real, not simply possible, and which, by its nature, is so threatening as to justify a presumption that the adequacy of representation was affected.

Id. at 870. Accord Virgin Islands v. Zepp, 748 F.2d 125, 139 (2d Cir. 1984).

Assuming, as the State does, that Pearl was not a genuine deputy, a defense which strenuously challenged the Volusia police officers' credibility might have caused inquiry into Mr. Pearl's practice (known among law enforcement officials) of carrying a concealed weapon across county lines into Volusia County in violation of the criminal law. And even if criminal prosecution did not ensue, it certainly could have resulted in the Sheriff's withdrawal of Mr. Pearl's privilege to carry a concealed weapon which, as Mr. Pearl put it, would have stripped him "naked" of his right to gun, thus rendering him "incomplete" (T. 628).

In sum, the per se rule applies whether Mr. Pearl was or was not a genuine law enforcement official. If he was a special deputy sheriff, his obligations as a law enforcement officer squarely conflicted with his obligations as petitioner's defense attorney. If he was an honorary special deputy, then the commis-

sion was a sham; he was a participant in a crime; and his advocacy was undermined because of the risk that he would be unmasked by the law enforcement officers to whom he was beholden, yet whom he cross-examined as Quince's lawyer. In either event, appellant is entitled to a new trial.

D. EVEN IF THE PER SE RULE DOES NOT APPLY, DEFENSE COUNSEL'S CONFLICT OF INTEREST VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT ADVERSELY AFFECTED THE TRIAL

Even assuming that McConico v. Alabama's (919 F.2d 1543 (1990)) "adverse effect" test controls, rather than the per se rule, Quince can show that Pearl's conflict of interest "had some adverse effect on counsel's performance." 919 F.Ed at 1548. Mr. Pearl's position and affiliation with law enforcement affected his thinking as a lawyer. His sympathies with law enforcement wove their way into his performance at trial, when, for example, Mr. Pearl refused to challenge law enforcement authorities, in a critical juncture of the case,--the importance of the recommendations contained in the pre-sentence report--wherein the report relfected the recommendation of the prosecutor, two police officers and the author of the P.S.I. (a retired police officer), that Mr. Quince should receive the death penalty.

In the Harich litigation, Mr. Pearl defended his performance in this regard, and in so doing made clear that his law enforcement affiliations affected his views. He explained that in his view attacking or contradicting the accounts of the law enforcement officers he knew would have been unproductive since, as

Mr. Pearl put it, "[t]he law enforcement officers that I know here have all been edicated, professional, truthful people" (T. 324; emphasis added).

As a general practice, Mr. Pearl does not challenge the credibility of law enforcement officers: he said that he never used a defense premised on fabricated testimony or planted evidence because, he claimed, he "never had a case in which it appeared . . . that there was any basis that there was a claim that the defendant had been framed by police officers" (T. 323).

This long history of docility toward law enforcement is entirely inconsistent with the role of a defense attorney and can only be explained by Mr. Pearl's affiliation with law enforcement. Even if only subconsciously, Mr. Pearl could not find it within himself to attack the honesty of police officials.

This Court's earlier holding that Peral provided effectivce representation, is no longer valid because what that the once presumed was trial strategy, now must be viewed in the light of a conflict of interest, which was not known to the court. As was the case in McConico, where the Court of Appeals had likewise rejected an ineffective assistance of counsel claim before the conflict of interest was revealed, counsel's performance must be reevaluated -- with a much more critical and discerning eye -- once a conflict of interest is shown.

These failings were caused by Mr. Pearl's conflicting loyalties. His failure to cross-examine his fellow officers

vigorously notwithstanding their very damaging testimony; his failure to independently investigate the facts rather than relying on law enforcement's investigation, his failure to develop mitigating evidence despite the availability of such evidence; are all adverse effects of Mr. Pearl's conflicting loyalties.[7]

In language squarely applicable to this case, the Eleventh Circuit explained in McConico v. Alabama, 919 F.2d 1543, 1549 (11th Cir. 1990):

> Taken together, these oversights were harmful to appellant's defense. Although they may not have changed the outcome of the trial, that is not what the constitutional standard requires. Appellant need only show that the conflict of interest of counsel adversely affected counsel's representation, and based on the foregoing evidence from the record, we conclude that Pickard

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7. As Professor Blau, a noted Florida psychologist, attested, it is likely that these failings flowed from the conflict between Mr. Pearl's status as a sheriff and a defense attorney. A person who has "[t]he classic indicia of commitment and involvement in law enforcement [which] are the badge, the gun, and the commission" is "clearly and strongly antagonistic to perpetrators of crimes" (T. 646). The identification with law enforcement results in certain firmly held beliefs, "such as the belief that those apprehended are probably guilty, that law enforcement officers are necessarily trustworthy, or that criminal rehabilitation is ineffective if not impossible. . . ." (T. 646). Professor Blau concludes that: A defense attorney who is so assigned and who is also associated with law enforcement in any way is likely to be in conflict between the assigned role of protagonist, protector of defendants' rights and liberties, and the individual's role as antagonist in his capacity as a deputy or special deputy sheriff. It is likely than an individual in such psychological conflict will not be able to render full, committed, satisfactory professional services to his or her client (T. 647-48).

> [defense counsel] was in a situation that had an adverse effect on appellant's defense.

In sum, even if the Court were to apply the "adverse effect" test, appellant has demonstrated that counsel's divided loyalties had an "adverse effect" on his performance under the sixth and fourteenth amendments. Like attorney Pickard in McConico, Pearl "was in a situation that had an adverse effect on appellant's defense." Id. at 1549. Mr. Quince's conviction and sentence should therefore be vacated.

III. THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE TRIAL COURT

Appellant's Rule 3.50 motion to vacate or set aside his sentence was summarily denied on November 6,1989, by the Circuit Court of Volusia County, Hon. S. James Foxman, without benefit of an evidentiary hearing. Rather, the Circuit Court relied on findings made by the Court in the Harich case. As argued above, the application of findings of fact from one case to another case is unprecedented end wholly contrary to law.

Following the denial of the Rule 3.850 motion, appellant moved for rehearing and to recuse Judge Foxman on the basis of a public address he made to the Volusia County Criminal Defense Lawyers Association on June 14, 1984, shortly after the evidentiary hearing on appellant's Rule 3.850 motion, held April 23-26, 1984. At that hearing, and indeed throughout his post-conviction litigation, appellant was and is presently represented my Russell F. Canan, Esq., of Washington, D.C. At the

address to the Association, Judge Foxman suggested that because of "regional prejudice, out-of state lawyers look down their noses at us and tend to think we're a bunch of rednecks." Judge Foxman further expressed disdain for claims of ineffective assistance of counsel brought by out-of-state lawyers against lawyers from Volusia County. The substance of Judge Foxman's remarks were reported by the Daytona News-Journal in an article covering the speech dated June 15, 1984.

Because of the temporal proximity of Judge Foxman's speech at the Association meeting to the evidentiary hearing conducted in this case, Quince had a good faith belief and well grounded fear, see Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983), that his counsel was the reference point for the Judge's remarks about out-of-state counsel and about claims of ineffective assistance of counsel, and that he could not receive a fair disposition of his second Rule 3.850 motion whre the same out-of state attorney was again attacking the performance of a local attorney.

Pursuant to Fla. Rules of Crim. Proc. Rule 3.230, appellant moved to disqualify Judge Foxman and appended to his motion two affidavits setting forth the facts relied upon to show grounds for disqualification, and a certificate of counsel that the motion was made in good faith. The motion was not, however, filed ten days or more before the time the case was to be called for trial, as is required sectionl (c) of the Rule; therefore, pur-

suant to the Rule, counsel showed cause for failure to do so. First, because the matter before the Circuit Court was a Rule 3.850 motion to vacate or set aside sentence, there was no date or time certain upon which the case would be called for a hearing as requested in the appellant's pleadings. Indeed as ocurred in this case, there was no hearing at all. Second, counsel had no way of knowing who would be presiding over the motion. On September 27, 1989, Judge Foxman, presiding, ordered the State to respond to the allegations contained in the Rule 3.850 motion. This was the first indication that Judge Foxman would preside over the motion. The State's responsive pleading indicated that the State sought to rely on the findings of fact made by Judge Foxman at the Harich hearing, and was filed on October 23, 1989. Judge Foxman summarily dismissed the motion on November 6, 1989. Due to the unavailabilty of counsel Canan, counsel Dayan filed the motion to disqualify at the first possible moment upon learning on November 11, 1989 that the trial court had summarily dismissed the 3.850 motion. Appellant also filed a motion for rehearing on the Rule 3.850 motion and thus gave the trial court a full opportunity to rule on the disqualification motion as well as the merits of the 3.850.

Judge Foxman dealt with the recusal motion in the same two-page order denying the Rule 3.850 motion, and did not focus solely on the objective determination that this Court's cases have required of a Judge considering a motion to recuse --

whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. MacKenzie v. Super Kids Bargain Store, 565 So.2d 1332 (Fla. 1990); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988). Instead, Judge Foxman's order focused as well on the truth of the allegations, and to the extent that the order dealt with the appropriate inquiry, it did not make specific findings of fact which this Court can rely on for its appellate review.

This order does not comport with this Court's instruction in Suarez that a trial judge may not pass on the truth of the allegations contained in the motion to dismiss. Suarez, 527 So.2d at 191. Further the Circuit Court concluded that the motion was facially insufficient, yet it is unclear why the Circuit Court so held. The motion was supported by two affidavits, as required by statute; it was further supported by a certificate of counsel that the motion was made in good faith. Therefore, neither the parties nor this Court, for purposes of appellate review, have the Circuit Court's reasons for its holding that the motion was facially insufficient, except insofar as those reasons are asserted by one of the parties.

In sum, appellant moved to disqualify Judge Foxmnan us soon as practicable after it became apparent that the State would seek to rely on findings of fact made by Judge Foxman in the Harich case. The motion contained the required affidavits and certificate but the Circuit Court held that the motion was not facially

sufficient without specifying what was not sufficient. The ruling on the motion to disqualify did not comport with the requirements of this Court's instructions, and appellant is entitled to: a) an evidentiary hearing on the motion to disqualify; and b) the disqualification of Judge Foxman and adjudication of his Rule 3.850 motion by another judge of the Circuit Court.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Richard Martell, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32399, this 21 day of June, 1991.

Russell F. Canan