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STATEMENT OF THE CASE AND FACTS<sup>1</sup>

The facts of this case are set out in Quince v. State, 414 So.2d 185, 186 (Fla.), cert. denied, 459 U.S. 895 (1982):

In December of 1979, the body of an eighty-two year old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive, but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.

Based upon a fingerprint identification, appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased. The grand jury returned an indictment charging the appellant with first-degree murder, burglary, and sexual battery.

Pursuant to plea negotiations, appellant waived the right to a sentencing jury. After hearing and weighing the evidence, the trial judge imposed the death sentence, finding the existence of three aggravating circumstances: 1) the murder was committed during the commission of a rape; 2) the murder was committed for pecuniary gain; and 3) the murder was heinous. He considered and rejected all but one mitigating factor: appellant's inability to appreciate the criminality of his conduct. Due to the

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<sup>1</sup> The state rejects Quince's factual statement because it is slanted and argumentative.

conflicting evidence, however, he decided that this factor deserved little weight.

(Footnote omitted.) This Court affirmed Quince's<sup>2</sup> death sentence. Id. at 189.

In 1983 Quince's former postconviction counsel, Robert Udell and Russell Canan,<sup>3</sup> filed a motion for postconviction relief on Quince's behalf. That motion and the supplement to it charged that Howard Pearl, Quince's trial counsel, did not render effective assistance, citing close to forty instances of alleged ineffectiveness. (PC1 4:602-23).<sup>4</sup> After Quince's death warrant was signed, the trial court stayed his execution and held a four-day evidentiary hearing on the allegations in the postconviction motion. The trial court then denied relief, and this Court affirmed, quoting the trial court as follows: "This Court specifically finds there was no specific omission that was a substantial and serious deficiency, measurably below that of competent counsel. Given the totality of the circumstances, Mr.

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<sup>2</sup> Quince now calls himself "Rasikh Abdul-Hakim." All of his proceedings, however, are under his given name, Kenneth Darcell Quince, and the state will refer to him as "Quince" in this brief.

<sup>3</sup> Quince is now represented by the Office of the Capital Collateral Regional Counsel, Middle Region (CCRC-M).

<sup>4</sup> "PC1 4:602-23" refers to pages 602 through 623 of volume 4 of the record in Quince's appeal of his first postconviction motion, case no. 65,407, reported as Quince v. State, 477 So.2d 535 (Fla. 1985), cert. denied, 475 U.S. 1132 (1986).

Pearl rendered reasonably effective counsel.'" Quince v. State, 477 So.2d 535, 537 (Fla. 1985), cert. denied, 475 U.S. 1132 (1986).

Quince later filed a petition for writ of habeas corpus in federal court.<sup>5</sup> After an evidentiary hearing, the federal district court denied the petition, and Quince appealed to the Eleventh Circuit. While that appeal was pending, this Court decided Harich v. State, 542 So.2d 980 (Fla. 1989), in which it decreed that an evidentiary hearing should be held on Harich's claim that Pearl's being a special deputy sheriff constituted a conflict of interest. Quince filed a second postconviction motion with his trial court raising the same issue as Harich, i.e., Pearl's being a special deputy sheriff while representing him created a conflict of interest that denied him the effective assistance of counsel. (PC2 1:8 et seq.)<sup>6</sup> The federal circuit court granted Quince's motion to dismiss his federal petition. The state trial court summarily denied the second motion for postconviction relief, relying on the evidentiary hearing held on Harich's claim. (PC2 1:65). See Harich v. State, 573 So.2d 303 (Fla. 1990), cert. denied, 499 U.S. 985 (1991). On appeal from that denial this Court held that Quince, like others who raised the Pearl conflict of interest

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<sup>5</sup> These facts are taken from Quince v. State, 592 So.2d 669, 670 (Fla. 1992).

<sup>6</sup> "PC2 1:8 et seq." refers to page 8, and following pages, of volume 1 of the record on appeal of Quince's second motion for postconviction relief, case no. 77,610, reported as Quince v. State, 592 So.2d 669 (Fla. 1992).



claim, should receive an evidentiary hearing on the matter. Quince v. State, 592 So.2d 669 (Fla. 1992). In remanding this Court stated: "The chief judge may wish to consider this case with others in which the identical claim is raised." Id. at 671; cf. Wright v. State, 581 So.2d 882, 886 (Fla. 1991) ("the chief judge may consolidate this case with other cases in which the defendants make this identical claim"); Herring v. State, 580 So.2d 135, 139 (Fla. 1991) ("If other defendants raise this claim, however, we find that it would be proper for the chief judge to consolidate the cases for one hearing on this single matter").

The following movants' claims that Pearl's being a special deputy while representing them was a conflict of interest were heard together in an evidentiary hearing: Richard Randolph, Robert Henderson, Johnny Robinson, Joel Wright, Ted Herring, Gerald Stano, Felix Castro, Robert Teffeteller, and Kenneth Quince. B.J. Driver, a retired circuit court judge, was appointed to conduct the evidentiary hearing. Judge Driver held case management conferences on August 13, 1992 (PC3 T1:1),<sup>7</sup> October 13, 1992 (PC3 T2:39), and November 13, 1992. (PC3 T3:70). The movants and their counsel

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<sup>7</sup> "PC3 T1:1" refers to page 1 of volume 1 of the transcripts in the record on appeal in case no. 81,730, reported sub nom. Teffeteller v. Dugger, 676 So.2d 369 (Fla. 1996). The record in case no. 81,730 also contains a single volume of pleadings that will be referred to as "PC3 P," followed by a page number. Finally, the record in case no. 81,730 contains four volumes of supplemental record, numbered 1 through 4, that will be referred to as "PC3 SR," followed by volume and page numbers.

attended Pearl's deposition, taken at Florida State Prison on December 1, 1992. (PC3 SR1:1). The evidentiary hearing on Pearl's alleged conflict of interest began on December 15, 1992. (PC3 T4:109).

The evidentiary hearing concluded on December 18, 1992, and the court heard argument from the parties on March 31, 1993. (PC3 T10:1028). Judge Driver issued his order on Quince's motion on April 2, 1993 and held that Pearl's status as a special deputy did not create a conflict of interest. (PC3 P78-86). The judge made similar findings on all of the other movants' claimed conflict of interest.

Quince, Teffeteller, Herring, and Randolph appealed their orders to this Court. This Court reversed, holding that the circuit court erred in conducting a consolidated hearing. Teffeteller v. Dugger, 676 So.2d 369 (Fla. 1996). The circuit courts were directed "to conclude these matters within six months of this opinion." Id. at 371.

On remand Quince's case went back to his original trial judge, S. James Foxman. In August 1996 Judge Foxman disclosed that: his son was employed with the Attorney General's Office; he was the defendant in a suit by another judge and was being represented by the Attorney General's Office; and he testified in the 1992 hearing

before Judge Driver. (PC4 P17).<sup>8</sup> Quince moved to disqualify Judge Foxman in response to the judge's disclosure (PC4 P19-32), and Judge Foxman recused himself on August 27, 1996. (PC4 P18). The following week, this case was assigned to Judge William C. Johnson, Jr. (PC4 P33). Judge Johnson set an evidentiary hearing on Pearl's alleged conflict of interest for November 8, 1996. (PC4 SR21).

At the beginning of the hearing Quince filed a motion to disqualify Judge Johnson, who worked in the same Public Defender's Office as Pearl at the time of Quince's trial, "[b]ecause of Judge Johnson's relationship to Howard Pearl." (PC4 P38). After hearing counsels' argument, Judge Johnson recessed the hearing to research the matter. (PC4 T15). When the hearing resumed, the judge made two rulings: 1) the motion to disqualify was untimely; and 2) "[t]his Judge determines he stands fair and impartial in this case." (PC4 T15). Quince asked for leave of court to file a petition for writ of prohibition with this Court, which Judge Johnson denied. (PC4 15-16).

Quince presented three witnesses at the evidentiary hearing: Todd Moreland, former sheriff of Marion County (PC4 T19); Howard Pearl (PC4 T65); and James Gibson, the Seventh Circuit Public Defender. (PC4 T110). Moreland served as sheriff of Marion County

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<sup>8</sup> "PC4 P17" refers to page 17 of the single unnumbered volume of pleadings in the record on appeal in the instant case, no. 89,960. This record also includes single, unnumbered volumes of transcript and supplemental record that will be referred to as "PC4 T" and "PC4 SR," respectively, followed by page numbers.

for twenty years. (PC4 T20). Pearl's purpose in being designated a special deputy was to enable him to carry a concealed firearm (PC4 T30), and Moreland renewed Pearl's status primarily as a professional courtesy to his predecessor. (PC4 T31). Special deputies had to pay for their own liability insurance (PC4 T32) to protect the county and sheriff's office "in the event that they acted inappropriately and we were sued for some reason." (PC4 T36). Pearl's name appeared on the separate roster of special deputies rather than on the roster of regular deputies. (PC4 T39-40). The sheriff's office did not issue firearms, uniforms, or other equipment to special deputies, and special deputies were not entitled to any benefits from the sheriff's office. (PC4 T41-43; 54). Moreland, who spent thirty-five years with the Marion County Sheriff's Office, knew that Pearl never performed any official duties as a special deputy. (PC4 T44; 56).

Pearl would not have been able to use his special deputy status to obtain information about suspects in Marion County and never discussed cases with Moreland. (PC4 T46; 59). Moreland stated that giving Pearl special deputy status was a "purely political decision" based on his position as a public defender and member of the bar "and because he wanted it for pistol-toting purposes." (PC4 T47). Pearl had no power to make arrests. (PC4 T48). His special deputy status was intended to be an accommodation for Pearl and was not intended to provide him with

any law enforcement duties or responsibilities. (PC4 T51). The proper word to describe Pearl's status was "honorary because that's all they were." (PC4 T56). There were no formal agreements about special deputies because being one was "an honorary type of thing for pistol-toting purposes only, and we had many of them like that." (PC4 T65).

Howard Pearl testified that he lived in Marion County (Fifth Judicial Circuit), but that he had been a public defender in the Seventh Judicial Circuit for twenty-five years. (PC4 T66; 69). His purpose in being designated a special deputy was "[s]olely to have authority to carry a firearm concealed statewide" because he traveled through several jurisdictions. (PC4 T69). Pearl never performed any official duties as a special deputy and had no status as a law enforcement officer. (PC4 T72). He used being a special deputy only to carry a weapon and "made no other use of that status." (PC4 T73). He resigned as a special deputy in 1987 because the legislature passed a statewide concealed weapons statute under which he obtained a permit. (PC4 T76-77). He had no access to information that other public defenders would not have because of his being a special deputy. (PC4 T78-79). Pearl's being a special deputy did not influence his decision to advise Quince to plead guilty; instead, he "used [his] judgment as an attorney." (PC4 T89).

On cross-examination Pearl testified that he never functioned as a deputy sheriff (PC4 T95-96), that he became a special deputy before becoming a public defender (PC4 T96), and that his special deputy status was honorary only and never affected his representation of clients. (PC4 T97). He resigned after this Court decided Harich because he was concerned that his being a special deputy would be used to attack his performance as an attorney. (PC4 T99). Pearl continued to represent defendants in capital cases until 1993 (PC4 T104) and provided the same effort for capital defendants both before and after resigning as a special deputy. (PC4 T108). As Pearl commented: "I was dedicated to the interests of every client I had and I was loyal to every client that I had. It made no difference whether I was a special deputy or not." (PC4 T108).

Gibson, the public defender since 1977, testified that Pearl was the most experienced attorney in the office. (PC4 T112). He did not discuss Pearl's status as a special deputy with Pearl until it became an issue in postconviction cases. (PC4 T114). Gibson did not see being a special deputy as an issue, but "obviously the court system did. CCR saw it as an issue, and it was going to pop up in every single case." (PC4 T116). To his mind, however, Pearl's being a special deputy was never a conflict of interest. (PC4 T116). He knew that Pearl became a special deputy so that he could carry a firearm. (PC4 T121). Pearl was moved to misdemeanor

and juvenile cases not because of his performance in capital cases but because he "was very sick with cancer." (PC4 T123-24). Gibson never had any reason to question Pearl's integrity or credibility in his defense of capital defendants. (PC4 T124).

In its order denying relief the circuit court recited the procedural history of this case. (PC4 P44-47). The court then made findings of fact based on the testimony presented at the evidentiary hearing (PC4 P47-49) and found "as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer with the Marion County Sheriff's Department." (PC4 P49). In his conclusions of law the judge found no per se or actual conflict of interest (PC4 P50) and found "that no evidence or testimony was presented by the Defendant demonstrating an actual conflict of interest between Howard Pearl and the Defendant during his representation of the Defendant." (PC4 P51). After this order was filed, Quince moved to disqualify Judge Johnson for the second time (PC4 P52-60), and the judge denied that second motion. (PC4 P61-62). The notice of appeal was filed on February 19, 1997. (PC4 P73-74).

## SUMMARY OF ARGUMENT

### ISSUE I.

Judge Johnson held that he could stand fair and impartial between the parties and did not err in denying Quince's motion to disqualify the judge.

### ISSUE II.

The circuit court properly refused to allow Quince to present evidence regarding the ineffective assistance claims raised in his first postconviction motion.

### ISSUE III.

Quince did not prove that Pearl had an actual conflict of interest due to his status as a special deputy, and the circuit court's order denying relief should be affirmed.



ARGUMENT

ISSUE I

WHETHER THE CIRCUIT COURT PROPERLY DENIED  
QUINCE'S MOTION TO DISQUALIFY.

Quince argues that Judge Johnson erred in denying his motion to disqualify the judge and should have allowed Quince to appeal that refusal. There is no merit to these claims.

As explained in the statement of facts, Quince moved to disqualify Judge Foxman, and that motion was granted. On the day scheduled for the evidentiary hearing on his conflict of interest claim, November 8, 1996, Quince moved to disqualify the second judge assigned to this case, i.e., Judge Johnson. Counsel alleged that she learned that Judge Johnson worked for the public defender's office at the time of Quince's trial only two days prior to the evidentiary hearing. (PC4 T5). Although the motion to disqualify appears to have been filed within the ten-day period provided in Florida Rule of Judicial Administration 2.160(e), the state does not concede that the motion was timely. Judge Johnson was appointed to Quince's case on September 4, 1996 (PC4 P33), two months before counsel filed the motion to disqualify. The fact that Pearl and Johnson worked in the same office could have been discovered, and a motion to disqualify filed, in a more timely manner. Be that as it may, however, the circuit court did not dismiss the motion as untimely, but, rather, considered it.

Quince has demonstrated no error in Judge Johnson's denial of the motion to disqualify. Florida Rule of Judicial Administration 2.160(g) provides as follows:

(g) Determination -- Successive Motions. If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion.

Thus, as the parties agreed (PC4 T6-7), Judge Johnson was free to examine the merits of the motion.

Collateral counsel stated to Judge Johnson "that you know Mr. Pearl and you have already established a friendship with Mr. Pearl." (PC4 T7). The judge, however, corrected her and pointed out that the motion said "relationship," not "friendship," referring to a professional relationship. (PC4 T8). Counsel complained that Johnson should not judge Pearl's credibility due to their prior association. (PC4 T8). Judge Johnson then asked the prosecutor if he had "any problem with the fact that from this pleading I was at the time of this trial a member of the public defender's office?" (PC4 T9). The assistant state attorney had no objection to Judge Johnson remaining on the case. (PC4 T9-10).

Shortly thereafter, the judge stated that he "might have indirectly been involved in the processing and the administration of seeing to it that [Quince's] appeal was filed in 1980." (PC4

T12). The prosecutor responded that such possible actions would make "no difference. All you did was assure the rights of Mr. Quince." (PC4 T12). Judge Johnson then stated that his appellate responsibilities "were administrative primarily." (PC4 T12). As far as any relationship with Pearl, Judge Johnson stated:

My most vivid recollection of my relationship with Mr. Pearl is about my years in the public defender's office was a time when I required and sent something around that required the lawyers to do something and he got very mad at me and came pounding on my office door somewhat incensed. We got that straightened out, but that's my most vivid recollection of my relationship with Mr. Pearl.

(PC4 T13).

After recessing to research this matter (PC4 T15), Judge Johnson denied the motion to disqualify. (PC4 T15). In doing so the judge held that "he stands fair and impartial in this case" (PC4 T15), as required by section 38.10, Florida Statutes (1995).

Quince complains that he had a reasonable fear that he would not receive a fair hearing because Johnson and Pearl had been co-workers. He also argues that Johnson and Pearl's being co-workers created an appearance of impropriety. (Initial brief at 15). There is no merit to these arguments, and Quince's reliance on Maharaj v. State, 684 So.2d 726 (Fla. 1996), is misplaced.

In Maharaj "the trial judge who presided over this rule 3.850 proceeding was, at the time of Maharaj's trial, the supervising attorney of the assistant state attorney who prosecuted Maharaj."

Id. at 728. This Court held that the judge should have recused himself because of "these unique circumstances."<sup>9</sup> Id.

Here, on the other hand, Judge Johnson was a former public defender, not a prosecutor. As such, it would be logical and reasonable to expect any bias, if in fact Johnson had any, to be in favor of a defendant, not the state. Judge Johnson recognized that when he asked the prosecutor if the state had any objection to Johnson's hearing the case. Moreover, the anecdotal episode recited by Judge Johnson demonstrated the extent of his relationship with Pearl. If anything, that episode would have inclined the judge toward disbelieving Pearl.

Judge Johnson declared that he could be fair and impartial in deciding this case. Quince's conclusory allegations to the contrary were not supported by factual evidence, and he has not demonstrated any error in Judge Johnson's refusal to recuse himself.<sup>10</sup> See Barwick v. State, 660 So.2d 685 (Fla. 1995); City of Palatka v. Frederick, 128 Fla. 366, 174 So. 826 (1937); Davis v.

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<sup>9</sup> Recusal has been ordered in at least two other cases where the presiding judges were former prosecutors. Cave v. State, 660 So.2d 705 (Fla. 1995); Duest v. Goldstein, 654 So.2d 1004 (Fla. 4th DCA 1995).

<sup>10</sup> Quince based the amended motion to disqualify on Judge Johnson's announcement that he had some appellate responsibilities while with the public defender's office. Quince, however, has failed to demonstrate that Johnson had anything to do with his case, and the record on direct appeal does not show that Johnson filed anything in that case or, indeed, had anything to do with it.

State, 670 So.2d 1036 (Fla. 2d DCA 1996); Diaz v. Abate, 598 So.2d 197 (Fla. 3d DCA 1992). As explained in issue III, *infra*, the judge did not give undue weight to the testimony by Pearl and Gibson. The judge's ruling on disqualification should be affirmed.

There is likewise no merit to Quince's claim that the circuit court erred in not halting proceedings so that a petition for writ of prohibition could be filed with this Court, based on Rogers v. State, 630 So.2d 513 (Fla. 1990). Rogers does not support his argument. In Rogers this Court held that "all motions for disqualification of a trial judge must be in writing" and that "a presiding judge must afford a petitioning party a reasonable opportunity to file its motion." *Id.* at 516.

Rogers did not hold that previously scheduled proceedings must be stopped so that a petition for writ of prohibition challenging the refusal to recuse could be filed with a higher court. Instead, a request such as was made in this case is in the nature of a motion for continuance, the denial of which is within the circuit court's discretion. Sliney v. State, 699 So.2d 662 (Fla. 1997); Branch v. State, 685 So.2d 1250 (Fla. 1996), cert. denied, 117 S.Ct. 1709 (1997); Geralds v. State, 674 So.2d 96 (Fla.), cert. denied, 117 S.Ct. 230 (1996). Quince filed his written motion for disqualification immediately prior to his previously scheduled evidentiary hearing. He has demonstrated no abuse of discretion in the circuit court's refusal to abate that proceeding so that he

could file a petition for writ of prohibition on his meritless motion for disqualification.

As the prosecutor pointed out: "The fact that you know a lawyer in this town that's involved in this case, good luck finding some judge to do this case if that's what Miss Backhus feels disqualifies judges." (PC4 T10). If Quince's request to disqualify Judge Johnson were granted, no former prosecutor or public defender would be able to sit on any capital case simply because of their former employment. Such a rule is not warranted when, as here, a judge who neither prosecuted nor represented a defendant can aver that he or she stands fair and impartial as required by statute.

No error has been demonstrated, and Judge Johnson's refusal to recuse himself should be affirmed.

ISSUE II

WHETHER THE CIRCUIT COURT PROPERLY REFUSED TO ALLOW QUINCE TO PRESENT EVIDENCE OF THE INEFFECTIVE ASSISTANCE CLAIMS RAISED IN HIS FIRST POSTCONVICTION MOTION AND FOUND TO HAVE NO MERIT.

Quince argues that the circuit court erred by not permitting him to present evidence about the claims of ineffective assistance raised in his first motion for postconviction relief. There is no merit to this claim.

Quince bases this claim on the following statement in the opinion remanding his case: "Moreover, as to those claims which raise the ineffective assistance of trial counsel that 'are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant,' the appellants are entitled to an evidentiary hearing." Teffeteller, 676 So.2d at 371 (citation omitted). This statement is an obvious reference to Teffeteller and Randolph, both of whom had outstanding postconviction motions raising claims other than Pearl's alleged conflict of interest.<sup>11</sup> For both Quince and Herring, on the other hand, Pearl's alleged conflict of interest is the only viable claim they have left because this Court affirmed the denial of their prior postconviction motions. Quince v. State, 477 So.2d 535 (Fla.

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<sup>11</sup> The facts of Teffeteller's and Randolph's postconviction proceedings are set out in their briefs in Teffeteller v. State, case no. 77,646, and Randolph v. State, case no. 81,950. The state asks this Court to take judicial notice of the records and briefs in those cases.

1985), cert. denied, 475 U.S. 1132 (1986); Herring v. State, 501 So.2d 1279 (Fla. 1986). Thus, in Quince's original remand this Court stated that the remand was "for an evidentiary hearing on the conflict-of-interest issue to be held within thirty days of the filing of this opinion." Quince v. State, 592 So.2d 669, 671 (Fla. 1992). Similarly, this Court remanded for Herring's "trial judge to have an evidentiary hearing to determine whether Herring's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." Herring v. State, 580 So.2d 135, 139 (Fla. 1991).

During the hearing, the scope of the hearing was discussed, and the judge stated that he "understood it to be the ineffective issue only as pertains to [Pearl's] status as a special deputy." (PC4 T84). Counsel did not contest this statement. Both the circuit court and this Court fully considered Quince's claims of ineffective assistance in prior proceedings. They are, therefore, procedurally barred from consideration in this case or any future proceedings. Stewart v. State, 632 So.2d 59 (Fla. 1993); Francis v. Barton, 581 So.2d 583 (Fla.), cert. denied, 501 U.S. 1245 (1991). A remand does not revive previously considered issues. Davis v. State, 589 So.2d 896, 898 (Fla. 1991). Moreover, this Court has long recognized that "all points of law which have been adjudicated become the 'law of the case.' . . . Reconsideration is warranted only in exceptional circumstances and where reliance on



the previous decision would result in manifest injustice." Preston v. State, 444 So.2d 939, 942 (Fla. 1984). Quince has shown neither exceptional circumstances nor a manifest injustice, let alone both. The circuit court, therefore, did not err in refusing to allow Quince's counsel to present evidence on the claims of ineffectiveness raised in Quince's first motion for postconviction relief.<sup>12</sup> There is no merit to this claim, and it should be denied.

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<sup>12</sup> Counsel knew that any such claims of ineffectiveness were beyond the scope of this hearing and subpoenaed no witnesses to support those claims. (PC4 T128-31). Because there is no merit to the basic claim, the circuit court also did not err by refusing to allow counsel to submit a written proffer regarding a procedurally barred claim.

### ISSUE III

WHETHER THE CIRCUIT COURT'S ORDER DENYING RELIEF IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

Quince complains that the circuit court erred in denying relief because it found no conflict of interest. The record, however, supports the trial court's findings, and this claim has no merit.

The United States Supreme Court set out the standard for determining a conflict of interest in Cuyler v. Sullivan, 446 U.S. 335, 350 (1980): "We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." In discussing ineffectiveness of counsel claims in another case the Court stated that, although prejudice is presumed when some sixth amendment violations are established, a conflict of interest warrants only a limited presumption of prejudice. Strickland v. Washington, 466 U.S. 668 (1984). The Court then reiterated the Cuyler test: "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Id. at 692 (quoting Cuyler, 446 U.S. at 350). Thus, there are two parts to a conflict of interest claim: (1) the active representation of

conflicting interests, i.e., an actual conflict, that (2) has an adverse effect on the way counsel represents the defendant. The burden is on the defendant to satisfy both parts of the test. As found by the circuit court, Quince did not meet this test. Moreover, his brief demonstrates no error in the circuit court's ruling.

After hearing the witnesses' testimony, the circuit court made the following findings of fact:

The evidence and testimony from witnesses presented at the evidentiary hearing held on November 9th, 1996 pertained to whether Howard Pearl's status as a special deputy sheriff at the time he represented the Defendant made him a law enforcement officer with interests and duties adverse to the Defendant, thereby, establishing ineffective assistance of counsel.

**Howard Pearl's Status as a Marion County  
Special Deputy Sheriff**

Application

Howard Pearl applied to become a special deputy sheriff in Marion County in 1970. He sought to obtain this status in order to have the authority to carry a firearm throughout the State of Florida "for protection of self and family." The Sheriff at that time, Doug Willis by all accounts granted Mr. Pearl the status of special deputy sheriff at that time for the purpose of carrying a concealed firearm. Mr. Pearl continued his status as a special deputy sheriff under the Administration of Don Moreland, Sheriff Willis' successor. Sheriff Moreland testified that it was curtesy [sic] on the part of a successor sheriff to continue the Special Deputy Status of those who obtained that status during a predecessor's administration.

## Insurance

Despite the fact that Mr. Pearl was required to maintain liability insurance by the Marion County Sheriff's Department, he had no criminal law enforcement duties and unlike certified law enforcement officers of the Marion County Sheriff's Department, Mr. Pearl paid his own annual premium to maintain his insurance. It is evident to this Court in light of all the facts presented that this insurance was required not because Mr. Pearl was an employee of the Marion County Sheriff's Department, but rather, because it was the Marion County Sheriff's Department that had given him the authority to carry a concealed weapon. As such, the Marion County Sheriff's concern was that they might be liable for any improper actions of Mr. Pearl with his concealed firearm considering they were basically the licensing agency. It should be noted that Sheriff Moreland testified that Mr. Pearl was not monitored by the Sheriff's Office.

## Identification Card and Status

Notwithstanding the fact that Mr. Pearl's identification card issued by the Marion County Sheriff's Department indicated that he was "a fully constituted deputy sheriff," this Court finds that the testimony of Sheriff Moreland and Howard Pearl at the evidentiary hearing clearly shows that Mr. Pearl's status was an honorary one for the entire duration of his status as a Special Deputy Sheriff. Specifically, Mr. Pearl (1) was never certified as a law enforcement officer, (2) never received any compensation from or executed any w-2 tax forms for the Marion County Sheriff's Department, (3) received no law enforcement training from the Marion County Sheriff's Department, (4) never was issued a uniform, vehicle or any other equipment from the Marion County Sheriff's Department, (5) never was given any arrest powers and never made any arrests, stops or otherwise performed any duties as a deputy

sheriff of the Marion County Sheriff's Department, (6) never reported to any roll calls at the Marion County Sheriff's Department, (7) was never on a duty roster for the Marion County Sheriff's Department, (8) was never copied on any internal memoranda from the Marion County Sheriff's Department aside from notices of insurance renewal, (9) never held himself out as a regularly constituted deputy sheriff of the Marion County Sheriff's Department, (10) was never given any actual or apparent authority to act in the capacity of a deputy sheriff of the Marion County Sheriff's Department, (11) was not authorized through his status as Special Deputy Sheriff to obtain information on criminal activities, and (12) was never privy to any information received by the Marion County Sheriff's Department other than regular information which could have been received by a public defender. In fact, former Sheriff Moreland testified that the status as a special deputy sheriff was very common at the time, was a "political accommodation" and was typically given to someone with some sort of status in the community. Mr. Gibson, the Public Defender now and at the time of Mr. Pearl's representation of the Defendant, also testified that Mr. Pearl's status as a special deputy sheriff never created a conflict of interest with his representation of clients and was aware that Mr. Pearl's status was only for the purpose of carrying a concealed firearm. Furthermore, Mr. Gibson testified that his request to Mr. Pearl to resign his status as a special deputy was not due to any belief on his part that conflict existed because of Howard Pearl's status as a special deputy sheriff, but, because the issue was being raised in postconviction and because the law now permitted private individuals to become licensed to carry a concealed weapon. Mr. Pearl resigned from his status as a special deputy sheriff in 1989 [sic] after Mr. Gibson's request and shortly after the law had changed giving private individuals a means to obtain licensing to carry a concealed weapon throughout the State of Florida.

In light of the aforementioned facts, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer with the Marion County Sheriff's Department. Mr. Pearl was in essence granted a concealed weapons permit from the Marion County Sheriff's Department as many other individuals were at that time. Counter to defense counsel's assertions, the Court determines from the facts presented that Mr. Pearl had no manifest or actual authority to act as a fully constituted Deputy sheriff for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

(PC4 P47-49) (footnote omitted). The court then drew conclusions of law:

#### **Per Se Conflict**

Based on this Court's factual findings with respect to the actual scope of Mr. Pearl's duties as a special deputy sheriff with the Marion County Sheriff's Department, it finds that those duties were not in conflict with Mr. Pearl's duties as a defense attorney. Consequently, no per se conflict of interest between Mr. Pearl and the Defendant existed. See Harich v. State, 573 So.2d 303, 305 (Fla. 1990) (finding no per se conflict of interest where defense counsel was special deputy sheriff at time of representation).

#### **Actual Conflict of Interest**

To prove a claim that an actual conflict of interest existed between a defendant and his counsel, the defendant must show that his counsel actively represented conflicting interests and that the conflict adversely affected his counsel's performance. See Cuyler v. Sullivan, 446 U.S. 335, 348, 350, 100 S.Ct. 1708, 1718, 1719, 64 L.Ed.2d 333 (1980); Buenoano v. Dugger, 559 So.2d 1116,

1120 (Fla. 1990); Burnside v. State, 656 So.2d 241, 243 (Fla. 5th DCA 1995). As such, the Defendant has failed to demonstrate that any actual conflict of interest existed between the Defendant and his attorney Howard Pearl and no factual distinction was presented beyond the Howard Pearl Status issues raised and disposed of in Harich.

Supporting this determination the Court finds that not only did the Public Defender, Jim Gibson, testify that he never questioned Mr. Pearl's abilities or ethics, but, he believed that Mr. Pearl was the "most experienced and qualified attorney in the Public Defender's Office" at the time of Howard Pearl's representation of the Defendant. Mr. Gibson further testified that although the policy for taking pleas had changed to only accepting pleas through a negotiated plea agreement, he would not disapprove of a general guilty plea in certain cases. Furthermore, that policy change did not take place until after the defendant in the instant case entered a plea of guilty and received a death sentence. Finally, Mr. Gibson testified that he requested Mr. Pearl to resign his special deputy status because it had become an issue in postconviction and not because he in anyway believed it was a viable or meritorious issue, or even an issue at all. Additionally, Mr. Pearl testified that he loyally and diligently represented many capital defendants and did not end his capital representation of defendants until 1993, well after the resignation of his special deputy status.

In conclusion, the Court finds that no evidence or testimony was presented by the Defendant demonstrating an actual conflict of interest between Howard Pearl and the Defendant during his representation of the Defendant.

(PC4 P50-51) (footnote omitted).

Quince's brief contains broad conclusory statements that, rather than being supported by facts, are refuted by the record and the circuit court's findings. For example, on pages 22 and 23 of his initial brief, he states: "To keep in the Sheriff's good graces Mr. Pearl actually served two masters, the Sheriff of Marion Counties [sic], the chief law enforcement officer of those counties [sic] and Rasikh Abdul-Hakim, the indigent client charged with capital murder." Also, Quince claims that "[i]n representing Mr. Abdul-Hakim, Mr. Pearl took affirmative steps to associate himself with the Marion County Sheriff's Department, as well as those of Lake and Volusia County." (Initial brief at 24).

Contrary to these contentions, however, the record supports the circuit court's findings of fact and conclusions of law. Although Pearl purposely became a special deputy in Marion County so that he could carry a concealed weapon, he received no other benefit from that status and did not function as a law enforcement officer. Pearl had been a Marion County special deputy for ten years when he represented Quince, and there is no proof whatsoever, as Quince contends, that Pearl "took affirmative steps to associate himself" with any sheriff's department in connection with representing Quince. Pearl testified that he never let his being a special deputy in Marion County interfere with his work as a public defender. The testimony of Moreland and Gibson supported Pearl's testimony. Judge Johnson's findings, set out above, are



based on the facts brought out at the evidentiary hearing and refute Quince's current contentions. His conclusions that Pearl's being a special deputy did not constitute an actual conflict of interest and did not prejudice Quince are properly drawn from and supported by the record.

This same claim was before this Court in Harich v. State, 573 So.2d 303 (Fla. 1990), cert. denied, 499 U.S. 985 (1991), where Judge Foxman, after an evidentiary hearing, held that Harich demonstrated no actual conflict between Pearl's status as a special deputy and his representation of Harich. Id. at 305. Judge Foxman concluded: "'The better view is that Pearl's honorary position, requiring no actual law enforcement duties, did not conflict with his role as a defense attorney.'" Id. This Court quoted Judge Foxman's findings and conclusions, id. at 304-05, and approved them, holding "that they are fully supported by this record." Id. at 305. This Court concluded

that the public defender did not violate the duty he owed to Harich and that the public defender's special deputy status, under the circumstances present in this case, did not result in a per se conflict of interest. We agree with the trial judge that defense counsel's special deputy status was very different from that of an active or auxiliary deputy sheriff and that his position could best be characterized as "honorary." . . . Further, we find no actual conflict or deficiency in this public defender's representation of Harich.

Id. at 305-06.

The same circumstances exist here, and the same conclusions should be drawn in the instant case. Quince produced no new evidence at his 1996 hearing from what Harich presented several years earlier. Quince made no greater or more compelling showing of an actual conflict of interest due to Pearl's being a special deputy than Harich did. The facts compelled the findings and conclusions both in Harich and in this case because the claimed conflict of interest has no basis in law or in fact.

Quince has not shown that Pearl's status as an honorary or special deputy affected his desire or ability to represent Quince. Thus, he has not met the first part of the Cuyler test, i.e., that Pearl's active representation of competing interests constituted an actual conflict of interest. To the contrary, the evidence showed that Pearl's being a special deputy had no effect on his representation of his clients. (PC4 T97, 108). His judgment as an attorney, not his being a special deputy, guided his representation of Quince. (PC4 T89).

Even if by some stretch of the imagination, and by ignoring Harich, the evidence could be interpreted to show an active representation of competing interests, Quince has failed to show any prejudice due to the conflict's affecting Pearl's performance. Quince's confessions and physical evidence supported his convictions. As found by the circuit court in denying Quince's first postconviction motion:

3. The real point of this case is that trial 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 Defendant's 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 counsel.

(PC1 4:707-08). Quince testified during the evidentiary hearing on his first postconviction motion and, on direct examination, admitted that he first lied to the police but later changed his story and confessed. (PC1 2:253). He confirmed that he burglarized the victim's home, intending to rob her so that he could pay his drug debts (PC1 2:272), and that he raped and killed the victim. (PC1 2:273). It is readily apparent that Quince suffered no prejudice from Pearl's representation.

Strickland v. Washington made clear that the burden of proving ineffectiveness is on the movant, a conclusion earlier reached by this Court. E.g., Smith v. State, 445 So.2d 323, 325 (Fla. 1983) ("When ineffective assistance of counsel is asserted, the burden is on the appellant to specifically allege and establish grounds for

relief and to establish whether such grounds resulted in prejudice to him"), cert. denied, 467 U.S. 1220 (1984); Meeks v. State, 382 So.2d 673, 675 (Fla. 1980) ("when ineffective assistance of counsel is asserted, the burden is on the person seeking collateral relief to specifically allege and establish the grounds for relief and to establish whether these grounds resulted in prejudice to that person"), cert. denied, 459 U.S. 1155 (1983). Quince alleged a conflict that could have created ineffectiveness, but he failed to prove it. He has shown no causal connection between the alleged conflict of interest and any deficiency in Pearl's performance. Because Quince has failed to carry his burden under Cuyler and Washington, the circuit court's order denying relief should be affirmed. Cf. Porter v. State, 653 So.2d 374 (Fla. 1995) (actual conflict of interest not demonstrated); Gorby v. State, 630 So.2d 544 (Fla. 1993) (same), cert. denied, 513 U.S. 828 (1994); Buenoano v. Dugger, 559 So.2d 116 (Fla. 1990) (same); see also Steinhorst v. State, 695 So.2d 1245, 1248 (Fla.) ("When the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory. Under that standard, we will not alter a trial court's factual findings if the record contains competent substantial evidence to support those findings"), cert. denied, \_\_\_ U.S. \_\_\_ (December 8, 1997); Orme v. State, 677 So.2d 258, 262 (Fla. 1996) ("Our duty on appeal is to review the record in the light most favorable to the

prevailing theory and to sustain that theory if it is supported by competent substantial evidence"), cert. denied, 117 S.Ct. 742 (1997).

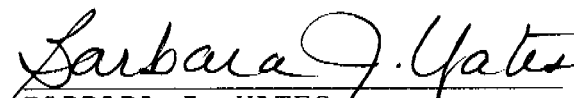
Judge Johnson correctly limited the hearing to the alleged conflict of interest. (See issue II, supra). Quince challenged Pearl's performance in his first motion for postconviction relief, and, after a four-day evidentiary hearing, the circuit court held that Pearl rendered effective assistance. This Court affirmed. Quince v. State, 477 So.2d 535 (Fla. 1985), cert. denied, 475 U.S. 1132 (1986). Therefore, except for the alleged conflict, Pearl's effectiveness has been addressed and is no longer at issue. Quince attempts to raise and reargue previously rejected claims of ineffectiveness under the conflict of interest issue. (Initial brief at 27-33). He has not, however, demonstrated any error in the circuit court's rulings. The circuit court correctly found that Pearl's being a special deputy sheriff did not constitute a conflict of interest and correctly limited the hearing to that issue. This Court should affirm the order denying postconviction relief.

CONCLUSION

Therefore, the State of Florida asks this Court to affirm the circuit court's denial of relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

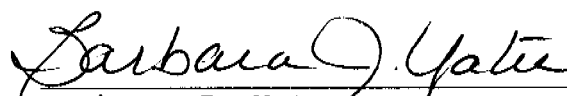
  
BARBARA J. YATES  
ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 293237

OFFICE OF THE ATTORNEY GENERAL  
THE CAPITOL  
TALLAHASSEE, FL 32399-1050  
(850) 414-3300 Ext. 4584

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Terri Backhus, 100 South Ashley Drive, Suite 1300, Tampa, Florida 33601-3294, this 5<sup>th</sup> day of February, 1998.

  
Barbara J. Yates  
Assistant Attorney General