

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,960

KENNETH D. QUINCE, N.K.A.,
RASHIKH ABDUL HAKIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal from a denial of relief following remand by this Court for evidentiary hearing on Mr. Abdul-Hakim's claim that his trial attorney, Mr. Howard Pearl, suffered from an undisclosed conflict of interest at the time he represented Mr. Abdul-Hakim and, as a result, Mr. Abdul-Hakim's conviction violated the constitutions of both the State of Florida and the United States of America. The motion was brought pursuant to Fla. R. Crim. P. 3.850. Originally, this matter was remanded by the United States Court of Appeals for the Eleventh Circuit to the Federal District Court, which in turn sent this matter back to state court. This Court remanded this case to the Honorable B.J. Driver, circuit judge, retired, for evidentiary hearing. Upon the request of Florida Supreme Court Chief Justice Leander J. Shaw, Jr., Mr. Abdul-Hakim's case was consolidated for hearing by the chief judge of the Seventh Judicial Circuit. The circuit court subsequently denied Mr. Abdul-Hakim's claims after evidentiary hearing. On appeal, this Court found the hearing below was procedurally flawed and violated Mr. Abdul-Hakim's right to due process. This Court vacated the circuit court's order denying rule 3.850 relief and remanded for a new evidentiary hearing. The circuit court denied Mr. Abdul-Hakim's claims after evidentiary hearing. This appeal follows.

The following symbols will be used to designate references to the record in this instant cause:

"R. ____" -- record on appeal concerning original court

proceedings;

"SR. ___" -- supplemental record on appeal;

"HC-R. ___" -- record of federal habeas corpus proceeding;

"PC-R. ___" -- record on appeal from the original Rule 3.850 proceedings;

"PC-R2. ___" -- record on appeal from the consolidated circuit court evidentiary hearing ordered on remand;

"PC-R3. ___" -- record on appeal from the circuit court evidentiary hearing ordered on remand;

"PC-T. ___" -- transcript of proceedings dated November 8, 1996 (Motion to Disqualify Judge and Howard Pearl issues).

REQUEST FOR ORAL ARGUMENT

Mr. Abdul-Hakim has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Abdul-Hakim, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

On January 3, 1980, Mr Abdul-Hakim was arrested for a burglary charge stemming from the December 28, 1979, sexual assault and murder of Frances Bowdoin. During custodial interrogation on January 3, 1980, Mr. Abdul-Hakim made an admission concerning the death of Ms. Bowdoin but denied sexually assaulting her (HC-R. - App. Vol. I at 47, STR. 36-7, 42-51). Mr. Abdul-Hakim was charged with first degree murder (HC-R. STR. 46). On January 4, 1980, Mr. Howard Pearl was appointed to represent Mr. Abdul-Hakim at trial (PC-R. 412-13). Mr. Abdul-Hakim was subsequently charged with first degree murder, sexual battery, and burglary of an occupied dwelling, in violation of Sections 782.04, 794.011 and 810.02 Fla. Stats., respectively (HC-R. R. App. Vol. I at 1). On February 4, 1980, a court order was obtained to seize samples of Mr. Abdul-Hakim's blood, saliva, head hair, and pubic hair (HC-R. R. App. Vol. I at 2-3), and the police initiated further interrogation of Mr. Abdul-Hakim, outside the presence of his counsel (HC-R. STR. 51-52). On August 11, 1980, Mr. Abdul-Hakim, on advice of Mr. Pearl, entered pleas of guilty to the felony murder of Ms. Bowdoin and the burglary of her home (HC-R. PTR. 5-6, 12-14). Unknown to Mr. Abdul-Hakim at the time was the fact that his lawyer, Mr. Pearl, was also a law enforcement officer. Mr. Pearl made this recommendation, even though he had only taken one deposition and conducted no investigation (PC-R. 446). On advice of counsel, Mr. Abdul-Hakim also waived his right to an advisory sentencing jury despite Mr. Pearl's belief that Mr. Abdul-Hakim was not competent

at the time (PC-R. 499).

The plea and sentencing phase of trial were conducted before the Honorable Judge Foxman on October 20, 1980. Mr. Pearl appeared as counsel for Mr. Abdul-Hakim at sentencing phase.

At sentencing phase, the State presented juvenile records to negate any contention that the Mr. Abdul-Hakim was entitled to a finding that he had no significant history of criminal activity (HC-R. STR. 4-8). Defense counsel objected to the admission of these documents (HC-R. STR. 7). The Court admitted the juvenile record but reserved a ruling on their relevance to a finding of prior criminal activity (HC-R. STR. 8, 41).

The State presented the testimony of Officer Larry Lewis, who had investigated the homicide and burglary (HC-R. STR. 9-10). Officer Lewis described the crime scene (HC-R. STR. 13-16, 25-7, 29-34, 46, 58-70), the results of tests conducted by the Sanford Crime Lab (HC-R. STR. 16-20, 47, 67-8), and the identification of latent fingerprints found at the decedent's house (HC-R. STR. 27-8, 35). Officer Lewis also testified about the arrest, interrogation, and statements of petitioner (HC-R. STR. 35-7, 41-53, 55-8). However, Mr. Pearl had deposed only Mr. Lewis and had not deposed any other investigating officer so there was no impeachment testimony offered to rebut Mr. Lewis (PC-R. 446).

The State next called Dr. Arthur Botting, the medical examiner who conducted the autopsy of Ms. Bowdoin (HC-R. STR. 70-2). Dr. Botting recounted the injuries sustained by Ms. Bowdoin, as well as his opinion as to how they occurred, and the possible effects of

the injuries (HC-R. STR. 77-98). Dr. Botting concluded that Ms. Bowdoin had been struck several times, sexually battered, and strangled. Mr. Pearl had not investigated any issues concerning the sexual battery or whether Mr. Abdul-Hakim had been the person to commit this act (PC-R. 448). Mr. Pearl could not rebut this aggravating circumstance even though his role as Mr. Abdul-Hakim's defense counsel was to diminish the effect of aggravating circumstances. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994).

The defense presented the testimony of Dr. McMillan, the psychologist appointed by the Court in September to examine petitioner (HC-R. R. App. Vol. I at 13-14; STR. 132-3). Dr. McMillan testified to the results and significance of various psychologist tests she administered to Mr. Abdul-Hakim as well as her oral examination of him (HC-R. STR. 140-5). Dr. McMillan concluded that Mr. Abdul-Hakim's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired but that he was not experiencing an extreme mental or emotional disturbance at the time of the offense (HC-R. STR. 145-9). Of course, Dr. McMillan's report was incomplete because Mr. Pearl had not investigated Mr. Abdul-Hakim's family background or history in school (PC-R. 529). This failure to investigate also prevented him from impeaching doctors Barnard and Rossario, who testified for the State in rebuttal.

Mr. Pearl called Dr. Stearn, the psychiatrist who the Court appointed at his request to examine petitioner prior to the

sentencing hearing (HC-R. R. App. Vol. I at 13-4; STR. 150). Based on his examination of petitioner, the evaluations of the other doctors, the presentence investigation report, and police reports of the crime (HC-R. STR. 153-6), Dr. Stern testified that he found no evidence to mitigate the offense (HC-R. STR. 157-8, 163-5). Of course, Mr. Pearl had not provided Dr. Stern with the relevant background information because he had not investigated his case. (PC-R. 529). In fact, Mr. Pearl met and discussed the case with Dr. Stearn during a ten minute recess in the courthouse hallway (PC-R. 572, 574).

On October 21, 1980, the Circuit Court rendered its verdict, finding:

- (1) the murder was committed during a rape (F.S. 921.141(5) (d));
- (2) the murder was committed for pecuniary gain (F.S. 921.141(5) (f)); and
- (3) the murder was especially heinous, atrocious, and cruel (F.S. 921.141(5) (h))

(HC-R. R. App. Vol. I at 18-19).

The Court determined that Mr. Abdul-Hakim had a "significant prior criminal history," negating the first enumerated mitigating circumstance based on the juvenile records that the State presented. Although the Court found that Mr. Abdul-Hakim was substantially impaired under F.S. 921.141(6) (f), the Court further determined that age (he had been 20 years old at the time of the incident) was not a mitigating circumstance (F.S. 921.141(6) (g)) and that the remaining statutory factors were inapplicable (HC-R.

R. App. Vol. I at 19-20). The Court concluded that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. Abdul-Hakim to death (HC-R. R. App. Vol. I at 20).

Without the benefit of an advisory jury, on October 21, 1980, Judge Foxman sentenced Mr. Abdul-Hakim to die for murder in the first degree and burglary. Mr. Abdul-Hakim timely filed his notice of appeal to this Court.

This Court affirmed the judgments of the trial court on March 4, 1982 in Quince v. State, 414 So.2d 185 (Fla. 1982). Rehearing was denied on May 27, 1982.

The United States Supreme Court denied a petition for writ of certiorari on October 4, 1982 in Quince v. Florida, 459 U.S. 895 (1982) (Marshall and Brennan, JJ., dissenting).

On July 5, 1983, Mr. Abdul-Hakim filed a Motion for Post Conviction Relief, in the Seventh Judicial Circuit in Volusia County, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (PC-R. 602-19).

On January 31, 1984, while the motion was pending, the Governor of Florida signed a death warrant ordering petitioner's execution on February 20, 1984 (PC-R. 667-68). On February 8, 1984, the circuit court granted Mr. Abdul-Hakim's application for a stay of execution, (PC-R. 669), and subsequently granted his request for an evidentiary hearing on the motion for post conviction relief (PC-R. 673).

The circuit court held an evidentiary hearing on April 23-26, 1984. Mr. Abdul-Hakim's motion for postconviction relief was

denied on April 30, 1984 (PC-R. 707-708).

Mr. Abdul-Hakim filed a timely notice of appeal to the Supreme Court of Florida, (PC-R. 709), which affirmed the circuit 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, 475 U.S. 888 (1986) (Brennan and Marshall, JJ., dissenting).

In August, 1988 a petition for a writ of habeas corpus was filed in the Middle District of Florida, the Orlando Division. This petition was originally denied by the federal district court. Later, based upon the United States Supreme Court decision Hitchcock v. Dugger, 481 U.S. 393 (1987) the federal court granted a hearing.

The United States District Court, after the evidentiary hearing, again denied habeas corpus relief.

On appeal, Mr. Abdul-Hakim moved to remand the appeal due to the recent discovery that Mr. Abdul-Hakim's trial attorney, Howard Pearl, was a deputy Sheriff in Marion County at the time he represented Mr. Abdul-Hakim. On September 21, 1989 the United States Court of Appeals for the Eleventh Circuit vacated the judgment of the federal district court and remanded the matter back to that court. The federal district court was instructed to allow Mr. Abdul-Hakim to amend his federal habeas after the conflict of interest issue concerning Mr. Pearl had been presented to the state courts.

On April 8, 1992, Florida Supreme Court Chief Justice Leander J. Shaw, Jr. requested the Chief Judge of the Seventh Judicial Circuit consolidate all cases in which "Howard Pearl" claims were properly raised. Justice Shaw assigned Judge B.J. Driver (Senior Judge) to proceed to the Seventh Judicial Circuit Court to hear all cases involving the "Howard Pearl" issue. Mr. Abdul-Hakim's claim regarding Mr. Pearl's undisclosed conflict was therefore consolidated with claims raised by eight (8) other defendants who had also been represented by Mr. Pearl during their trials.

After an evidentiary hearing on Mr. Abdul-Hakim's claim regarding Mr. Pearl's undisclosed conflict, the court issued an order denying that Mr. Pearl's Deputy Sheriff status constituted a conflict with his duties as an Assistant Public Defender (PC-R2, 6593-6600). Mr. Abdul-Hakim filed a motion for rehearing on the basis that he was denied due process and a full and fair hearing as a result of the conditions in the courtroom during the evidentiary hearing and the court's rulings during the hearing (PC-R2. 6601-6617). That motion was denied (PC-R2. 6618). Mr. Abdul-Hakim filed a timely notice of appeal (PC-R2. 6619).

On appeal, this Court found the hearing below was procedurally flawed and violated Mr. Abdul-Hakim's right to due process. Quince v. State, 676 So.2d 369 (Fla. 1996); (PC-R3. 3-6). This Court vacated the circuit court's order denying rule 3.850 relief and remanded the case to the original trial judge, Judge Foxman for a new evidentiary hearing. Id.

Judge Foxman gave a list of disclosures stating that he had

been a witness in the prior proceeding (PC-R3. 17). Mr. Abdul-Hakim filed a motion to disqualify, (PC-R3. 19-32), which was subsequently granted (PC-R3. 18). Judge William C. Johnson was assigned to the case (PC-R3. 33).

On November 6, 1996, counsel for Mr. Abdul-Hakim learned that Judge Johnson was a former colleague of Howard Pearl and had worked with Mr. Pearl in the Public Defender's Office during the time of Mr. Abdul-Hakim's capital proceedings. Mr. Abdul-Hakim filed a motion to disqualify, (PC-R3. 34-43), which was denied in open court (PC-T. 15). Counsel for Mr. Abdul-Hakim was denied leave to file a petition for writ of prohibition (PC-T. 16). An amended motion to disqualify was filed subsequent to Judge Johnson's revelation of new facts indicating he not only had a prior relationship with Howard Pearl but he also was involved in Mr. Abdul-Hakim's case (PC-R3. 52-60). Judge Johnson accepted the dates reflected in the motion to disqualify as an accurate reflection of his employment in the Public Defender's Office (PC-T. 7). Judge Johnson further stated, "I might have indirectly been involved in the processing and the administration of seeing to it that his [Mr. Abdul-Hakim's] appeal was filed in 1990" (PC-T. 12). The amended motion to disqualify was denied (PC-R3. 61-62). After evidentiary hearing, the circuit court issued an order denying Mr. Abdul-Hakim's claims (PC-T. 44). Mr. Abdul-Hakim filed a motion for rehearing, (PC-R3. 64-71), which was denied (PC-R3. 72). This appeal follows.

SUMMARY OF THE ARGUMENT

1. The Circuit Court erred in denying Mr. Abdul-Hakim's motion to disqualify Judge Johnson. Mr. Abdul-Hakim was entitled to a full and fair hearing before an impartial arbiter. That did not occur. The Circuit Court also refused to allow Mr. Abdul-Hakim's counsel to appeal the Circuit Court's decision, in violation of Rogers v. State, 630 So. 2d 513, 516 (Fla. 1994).

2. The Circuit Court erred in limiting Mr. Abdul-Hakim's ability to present his ineffective assistance of counsel claims at the evidentiary hearing and the opportunity to proffer evidence relating to that claim, in violation of the Sixth, Eight and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

3. The Circuit Court erred in denying relief to Mr. Abdul-Hakim's claim that his trial counsel suffered from an undisclosed conflict of interest arising from his position as a Marion County Deputy Sheriff. Mr. Abdul-Hakim was deprived of his Sixth Amendment right to counsel because his counsel served two masters - the Sheriff of Marion County and Mr. Abdul-Hakim. This conflict violated Mr. Abdul-Hakim's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. ABDUL-HAKIM'S MOTION TO DISQUALIFY JUDGE JOHNSON AND IN REFUSING HIS COUNSEL'S REQUEST FOR LEAVE TO APPEAL THE DECISION.

By order of this Court on remand, Mr. Abdul-Hakim is entitled to full and fair Rule 3.850 proceedings, Quince v. State, 676 So.2d

396 (Fla. 1996); (PC-R3. 1-16); see also Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); Holland v. State, 503 So.2d 1354 (Fla. 1987), including the fair determination of the issues by a neutral, detached judge. A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So.2d 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Even the appearance of impartiality is sufficient to warrant reversal. Suarez v. Dugger, 527 So.2d 191, 192 (Fla. 1988).

The proper focus of inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially." Chastine v. Broome, 629 So.2d 293, 294 (Fla. 4th DCA 1994); Rogers v. State, 630 So.2d 513, 515 (Fla. 1994). In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's [] decision is in fact a life or death matter." Id.

A. ERROR TO DENY THE MOTION TO DISQUALIFY JUDGE.

On November 6, 1996, counsel for Mr. Abdul-Hakim learned that Judge Johnson was a former colleague of Howard Pearl and had worked with Mr. Pearl in the Public Defender's Office during the time of Mr. Abdul-Hakim's capital proceedings. On November 8, 1996, Mr. Abdul-Hakim filed a motion to disqualify, (PC-R3. 34-43), which was denied in open court after argument (PC-T. 15). Counsel for Mr.

Abdul-Hakim argued:

Your Honor, you do have a prior relationship with a party who is going to be called and his credibility is going to be judged and his credibility really is the sole, sole issue regarding whether or not he has a conflict of interest and how that affected his subsequent trial of Mr. Quince.

So in an abundance of caution, I think it's proper for the Court to disqualify itself and send it back for random selection of another judge who has no relationship to Mr. Pearl or Mr. Quince's case prior to today. I mean this is a death penalty case.

(PC-T. 8).

It's from Canon 31-B of the Code of Judicial Conduct. it says a judge formerly employed by a government agency, however, should disqualify himself or herself in proceeding if the judge's impartiality might reasonably be questioned because of such association.

... The subject of this action is Mr. Pearl's credibility, and Mr. Pearl's credibility would be judged by you who had a prior association with him in the public defender's office and, according to Mr. Pearl, a prior relationship of some sort whether friendly or otherwise.

(PC-T. 11). Judge Johnson agreed that he worked with Mr. Pearl in the Public Defender's Office (PC-T. 7). Judge Johnson then revealed, "that I might have indirectly been involved in the processing and the administration of seeing to it that his [Mr. Abdul-Hakim's] appeal was filed in 1980" (PC-T. 12). Counsel then argued in support of the motion to disqualify:

I think the Florida Supreme Court remanded this case back and did it with the express purpose of guaranteeing that Mr. Quince had a full and fair hearing with emphasis on the fair hearing because that was the problem with the last hearing, so that just underscores the argument outlined in the motion to disqualify.

I think it's only proper that Mr. Quince be entitled to a judge who's had no prior dealings with one of the witnesses¹ in the case and certainly no prior dealings with the case itself and I think it would be improper, with all due respect, for you to sit and pass judgment on this case.

(PC-T. 14-15).

The Court, after a ten minute recess, denied the motion to disqualify finding the motion untimely filed and stated "this Judge determines he stands fair and impartial in this case. Let's move forward" (PC-T. 15).

1. The motion to disqualify was timely.

Mr. Abdul-Hakim's motion to disqualify was not untimely. Rule 2.160(e) provides:

Time. A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling. Any motion for disqualification made during a trial must be based on facts discovered during the trial and may be stated on the records and shall also be filed in writing in compliance with subdivision (c).

Counsel for Mr. Abdul-Hakim explained that the facts constituting the grounds for the motion were discovered on November 6, 1996 after conversation with Mr. Pearl. The motion to disqualify was filed on November 8, 1996, well within the ten-day time period set forth in Rule 2.160(e) (PC-R3. 34). Compare Foley v. Fleet, 644

¹Judge Johnson not only had a prior relationship with witness Howard Pearl, but also with witness James Gibson. James Gibson was the Public Defender at the time of Mr. Pearl's representation of Mr. Abdul-Hakim. See PC-T. 111-12; circuit court order denying relief at p. 6. Mr. Gibson therefore, was also Judge Johnson's supervisor during this time period.

So.2d 551 (Fla. 4th DCA 1994) (motion to disqualify filed 30 days after grounds for disqualification became known was untimely). Nevertheless, the State argued a non-existent due diligence component to the rule and asserted the motion was untimely (PC-T. 9-10). Counsel for Mr. Abdul-Hakim then explained the factual circumstances surrounding the filing of the motion to disqualify.

MS. BACKHUS: I learned on Wednesday after speaking with Mr. Howard Pearl that you and Mr. Pearl worked in the same public defender's office at the time of that Mr. Quince's case was being tried. I was not aware of that information prior to talking to Mr. Pearl on that date. Because Mr. Quince had been transported from UCI here to Volusia County, I did not have the opportunity to have him sign the affidavit that's required to make the motion a legally sufficient motion until yesterday when I was down here on another matter.

So that is why the motion was not filed yesterday. Today is the first opportunity I have had filing with the Court.

(PC-T. 5).

I explained to the Court why the motion was filed at the time it was filed. I did not talk to Mr. Pearl until prior to this hearing because, quite frankly, Your Honor, I didn't have time to do it until then. That's when I discovered the fact and that's when I brought it to everyone's attention.

(PC-T. 12). Clearly, the motion to disqualify was not untimely. Moreover, the amended written motion to disqualify which contained the new facts revealed in open court by Judge Johnson on November 8, was also timely filed (PC-R3. 52). Thus, the Court's ruling that the motion was untimely is clearly erroneous.

2. The motion to disqualify was legally sufficient.

The Court's ruling denying the motion to disqualify on its merits also is erroneous. The aforementioned circumstances of this case are of such a nature that they are "sufficient to warrant fear on [Mr. Abdul-Hakim's] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So.2d 191, 192 (Fla. 1988).

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where the judge has a personal bias or prejudice concerning a party, has personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(b) specifically state that a judge shall disqualify himself where:

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it.

This factual situation applies here. Not only did Judge Johnson state on the record and in open court that he may have worked directly on Mr. Abdul-Hakim's case by helping file the direct appeal, he also worked and had a relationship with Mr. Pearl - the lawyer about whom this case concerns.

Moreover, the commentary to Canon 3E(1)(b) states:

a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Additionally, this Court recently reversed a capital case based on Canon 3E, Code of Judicial Conduct, and facts similar to those presented in this case. In Maharaj v. State, 684 So.2d 726 (Fla. 1996), this Court found that the ethical conflict issue, presented by the fact that the trial judge who presided over the rule 3.850 proceeding had worked as a supervisor in the same office as the attorneys who worked on the defendant's capital case, warranted reversal and remand before a new judge. Id. at 728.

In the instant case, it is undisputed that Judge Johnson worked with Howard Pearl in the Public Defender's Office. It is also clear that Judge Johnson held a supervisory position in the Office. He was involved in the administration of seeing to it that Mr. Abdul-Hakim's appeal was filed (PC-T. 12). Judge Johnson also recalled "a time when I required and sent something around that required the lawyers to do something and he [Howard Pearl] got very mad at me" (PC-T. 13). As such, Mr. Abdul-Hakim should be afforded the same relief as in Maharaj.

Mr. Abdul-Hakim had a reasonable fear that he would not receive a fair hearing before Judge Johnson because of the aforementioned circumstances. The appearance of impropriety violates state and federal constitutional rights to due process to which Mr. Abdul-Hakim is entitled.

3. Mr. Abdul-Hakim was prejudiced by the circuit court's error.

The prejudice which resulted from the denial of the motion to disqualify is evident from the court's order denying relief. The court gave undue weight to Mr. Pearl's self-serving statements that his position with the sheriff's office was "honorary" and Mr. Gibson's statement that Mr. Pearl's status as a special deputy sheriff never created a conflict of interest with his representation of clients. Any information which challenged the credibility of either Mr. Pearl or Mr. Gibson was overlooked by the circuit court in its order denying relief. See Argument III infra.

As a public defender, Judge Johnson had previous knowledge of Mr. Abdul-Hakim's case and Mr. Pearl's status as a special deputy. Judge Johnson had a relationship with Mr. Pearl and Mr. Gibson which interfered with his ability to be a fair and impartial arbiter of the facts regarding the propriety of Mr. Pearl's actions. Mr. Abdul-Hakim filed a timely motion to disqualify based on these facts. Reversal and remand for evidentiary hearing in front of a new and impartial judge is warranted.

B. ERROR TO DENY LEAVE TO APPEAL.

The truth of the factual allegations contained in Mr. Abdul-Hakim's motion to disqualify judge is not disputed. In fact, Judge Johnson acknowledged that the facts are accurate and revealed further facts supporting disqualification. See e.g. PC-T. 7, 12. That the factual allegations are true only serve to further validate the reasonableness of Mr. Abdul-Hakim's fear that he would not receive a full and fair hearing on his claims for relief.

At the evidentiary hearing, counsel for Mr. Abdul-Hakim attempted to inquire into the ineffective assistance of counsel issue during direct examination of trial counsel, Mr. Howard Pearl (PC-T. 83). The State objected:

MR. DALY: Objection to the relevance of this line of questioning. Mr. Pearl's effectiveness has already been challenged in the previous 3.850 in this case and upheld. The only thing relevant that we have left to determine is the Howard Pearl special deputy sheriff question.

THE COURT: That's my understanding of the Supreme Court's directive. The only issue I would consider is that.

(PC-T. 84). The Court then modified its statement:

THE COURT: Well, I understood it to be the ineffective issue only as pertains to his status as a special deputy sheriff in Marion County. That was the way I interpreted the order.

(PC-T. 84). Although the State then contended that it "withdrew its objection," (PC-T. 85), and the court contended it "had made no ruling limiting evidence," (PC-T. 85, 129), the State continued to object during the remainder of this line of questioning with the court sustaining the last two objections. See e.g. PC-T. 85, 86, 88, 92. Mr. Abdul-Hakim's right to due process was violated by the limitations imposed upon the inquiry regarding ineffective assistance of counsel. Mr. Abdul-Hakim's rights were further impinged when the court disallowed a proffer of witness testimony regarding the ineffective assistance of counsel issue.

B. DENIAL OF PROFFER OF EVIDENCE.

After the examination of witness James Gibson, counsel for Mr.

Abdul-Hakim informed the court that there were no further witnesses in light of the fact that no other witnesses would be allowed as far as the ineffective assistance of counsel claim was concerned (PC-T. 128). Counsel twice requested to make a written proffer (PC-T. 129, 132). The court ignored each request, instead demanding that the defense rest.

MS. BACKHUS: I request to make a written proffer.

THE COURT: The defense rests? Do you rest?

MS. BACKHUS: If it's the Court's will, yes, I rest.

(PC-T. 132).

"The disallowance of the proffer thwarts a defendant's right to cross examine witnesses guaranteed by the sixth amendment and article I, section 16 of the Florida Constitution," Rozier v. State, 636 So.2d 1386, 1388 (Fla. 4th DCA 1994), citing Pender v. State, 432 So.2d 800, 802 (Fla. 1st DCA 1983), and precludes the right to preserve errors on appeal. See §90.104(1)(b), Fla. Stat. Thus, a trial court commits reversible error if it denies a request to proffer testimony which is reasonably related to the issues at trial. Wood v. State, 654 So.2d 218, 220 (Fla. 1st DCA 1995) citing Jenkins v. State, 547 So.2d 1017, 1022 (Fla. 1st DCA 1989).

In Rozier v. State, the court stated:

The primary purpose of a proffer is to include the proposed evidence in the record so the appellate court can determine whether the trial court's ruling was correct. Phillips v. State, 351 So.2d 738, 740 (Fla. 3rd DCA 1977). Accordingly, refusing to allow a proffer of evidence is error because it precludes full and effective appellate review. Piccirillo v.

State, 329 So.2d 46, 47 (Fla. 1st DCA 1976).

Rozier v. State, 636 So.2d at 1387-88; accord Porro v. State, 656 So.2d 587 (Fla. 3rd DCA 1995). The court should have allowed a proffer so as to permit Mr. Abdul-Hakim to complete his record. Porro v. State. Because there is no record evidence revealing what the proposed testimony would have included, the exclusion of the proffer cannot be harmless beyond a reasonable doubt. Rozier, at 1388; Pender v. State, 432 So.2d 800, 802 (Fla. 1st DCA 1983). Reversal and remand is warranted.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING RELIEF.

Mr. Abdul-Hakim's conviction violated the laws and constitution of the State of Florida and the United States of America due to trial counsel's undisclosed conflict of interest. The creation of Howard Pearl as a deputy sheriff by the Sheriff of Marion County was an act of political patronage on the part of the Sheriff (PC-T. 47, 52). In this act of political patronage Mr. Pearl received a benefit from the Sheriff (PC-T. 69). Since the right to carry a gun was an act of political patronage on the part of the Sheriff this benefit could be revoked at any time. The privilege to carry a gun and Mr. Pearl's status as a deputy sheriff depended entirely on remaining in good favor with the Sheriff of Marion County, or as stated by Mr. Pearl, he had "to stay out of trouble" (PC-T. 69). To keep in the Sheriff's good graces Mr. Pearl actively served two masters, the Sheriff of Marion Counties, the chief law enforcement officer of those counties and Rashikh

Abdul-Hakim, the indigent client charged with capital murder. These two masters came into conflict with each other and denied Mr. Abdul-Hakim his right to counsel as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution.

A defendant is deprived of the Sixth Amendment right to counsel where (i) counsel faced an actual conflict of interest, and (ii) that conflict "'adversely affected'" counsel's representation of the defendant. Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir.), cert. denied, 488 U.S. 958 (1988); see also United States v. Khoury, 901 F.2d 948 (11th Cir. 1990), modified on other grounds upon denial of rehearing, 910 F.2d 713 (11th Cir. 1990); (absent a knowing, voluntary waiver, defendant is entitled to representation free of actual conflict), modified on other grounds upon denial of rehearing, 910 F.2d 713 (11th Cir. 1990).

Because the right to counsel's undivided loyalty "is among those 'constitutional rights so basic to a fair trial, . . . [its] infraction can never be treated as harmless error.'" Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (citing Chapman v. California, 386 U.S. 18, 23 (1967)). Defense counsel is guilty of an actual conflict of interest when he "owes duties to a party whose interests are adverse to those of the defendant." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir.), cert. denied, 444 U.S. 833 (1979).

In United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991), the court noted the overlapping nature of the "actual conflict" and

"adverse effect" prongs of the Sixth Amendment analysis. Tatum, 943 F.2d at 375-76. There, the court stated:

[an attorney's] representation of conflicting interests . . . is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client. When the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of the other. Moreover, an adverse effect may not always be revealed from a review of the affirmative actions taken. Rather, the failure to take actions that are clearly suggested from the circumstances can be as revealing. Thus, the failure of defense counsel to cross-examine a prosecution witness whose testimony is material . . . can be considered to be [an] actual lapse[] in the defense.

Id. at 376 (emphasis added).

In 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. He did so because he was concerned with what he perceived to be the deterioration of the world "before his eyes" and that as a deputy sheriff he would be able to carry a concealed firearm throughout the State of Florida (PC-T. 69). He sought the political favors of the Sheriff and in fact benefited from the Sheriff's patronage. He affirmed during the circuit court hearing that he applied for the Marion County position because he was "interested in employment

with this law-enforcement agency [the Marion County Sheriff's department]. . . so that: (1) when called, I may participate in protection of person and property in my community" (PC-T. 28, 71, 77; PC-R3. Defense Exhibits Nos. 1 & 4). He regularly executed oaths to continue to perform the duties of his office, (PC-T. 36, 70; PC-R3. Defense Exhibit No. 4), and was accordingly re-appointed to that position, (PC-T. 31), until his voluntary retirement. He resigned only after his representation of Mr. Robert Teffeteller, and only after his supervisor, Mr. James Gibson, insisted he do so because of the conflict of interest raised by Roy Harich and other defendants (PC-R2. 266; PC-T. 77, 115). At the time Mr. Gibson insisted that Mr. Pearl resign, Mr. Gibson also discussed applicable statutes with Mr. Pearl, including discussing a statute that said deputy sheriffs should not be practicing law (PC-T. 116).

Obviously, the sheriff's departments of Marion, Lake, and Volusia counties of the State of Florida are entities with interests adverse to Mr. Abdul-Hakim. Even if this Court were to consider only Mr. Pearl's deputy sheriff status in Marion County, his law enforcement responsibilities extended from Marion County into Volusia County -- where he served in the Capital Division of the Public Defender's office. Under Fla. Statutes Secs. 23.12, et seq., Florida has enacted an overall law enforcement scheme which coordinated 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 granted to law enforcement officers -- whether paid, volunteer or auxiliary -- within their own jurisdiction are retained and apply with equal effect in other jurisdictions.

Not only could Mr. Pearl utilize the privileges, powers and immunities conferred upon him by Marion County in Volusia County, he did so, and did so in a manner directly hostile to his own client. In the case of Robert Teffeteller, learning of Mr. Teffeteller's alleged escape plans from Volusia County deputies, Mr. Pearl concealed a firearm on his person and took that firearm into the Volusia County courthouse, both acts which he was allowed to do solely because of his special deputy status in Marion County. He brought that gun into the courtroom for a single purpose, to use against his client in the event of an escape attempt. Mr. Pearl admitted that he brought his gun to court with him, (PC-T. 73), and he also stated he may have brought his gun to some of Mr. Abdul-Hakim's hearings (PC-T. 74). This is an example of Mr. Pearl's cooperation with his law enforcement colleagues.

Although Mr. Pearl contends that he never held himself out as a "regularly constituted deputy sheriff," (PC-T. 96), he "bought a badge," (PC-T. 92), and showed it along with his deputy sheriff ID card to policemen who "got worried because I was armed" (PC-T. 93). Moreover, the card that Mr. Pearl carried specifically said "Deputy Sheriff." Mr. Pearl never notified any of the law enforcement agencies that the card was in error and should have read "Special Deputy Sheriff" (PC-T. 107).

In an effort to remain in the good graces of the law enforcement community Mr. Pearl rejected the interest of Mr. Abdul-Hakim in favor of the competing interest of the law enforcement officers. Even though Mr. Abdul-Hakim was prohibited from presenting evidence regarding how Mr. Pearl's deputy sheriff status affected his investigation and litigation of illegal police activity, which would have revealed even more occasions in which Mr. Pearl chose to work for the benefit law enforcement, rather than his client, (see e.g. PC-T. 88, 92, 132), he has presented more than enough evidence to entitle him to relief. He has shown that he was represented by an attorney who held positions with a number of law enforcement agencies, who time and time again swore under oath to perform the law enforcement duties associated with those positions, who testified in open court that those oaths were honestly made, who held himself out to those "who needed to see it" as a law enforcement officer, and ultimately, when faced with a distinct choice between loyalty to his client and service to law enforcement, chose the latter.

In this case, Mr. Pearl stated he did not have to depose any of the investigative officers because chief investigator Larry Lewis "would talk to me" and "would do so privately. I didn't have to take his deposition or force him to speak to me" (PC-T. 80). Mr. Pearl's premise for failing to take the depositions of other law enforcement officers was that since Mr. Lewis supervised others he would have an all encompassing knowledge of each person's actions (PC-R. 421, 445-46, 479). Mr. Pearl also failed to depose

the forensic examiners concerning the scientific evidence in this case. Mr. Pearl has stated that he discussed the information of Mr. Baer, one of the State's serologist but did not depose him (PC-R. 447). Of course, without deposing Mr. Baer, Mr. Pearl could not have been impeached if Mr. Abdul-Hakim had had a trial.

Mr. Pearl failed completely to meet the State's case and to make the State prove the elements of the crimes it had alleged against Mr. Abdul-Hakim. He failed to investigate the charge of sexual battery assuming that Mr. Abdul-Hakim had committed the crime even though the burden of proof rests with the State (PC-R. 448). Mr. Pearl assumed Mr. Abdul-Hakim to be guilty and did not challenge the State's case. In fact, Mr. Pearl testified that the evidence in Mr. Abdul-Hakim's case "was fairly straightforward and simple" (PC-T. 82). He did not make determinations of guilt or innocence, and contrary to his testimony, he presumed Mr. Abdul-Hakim guilty.

A No person is guilty in my book until he either enters a plea of guilty or a jury finds him guilty. That's -- I don't determine whether a person is guilty or not, if you want me to restrict myself to that interpretation of your question.

(PC-R. 433-34). Mr. Pearl had allowed his loyalty to the State to overshadow his responsibility to Mr. Abdul-Hakim by not challenging the sexual battery issue. Later this incident was used to aggravate Mr. Abdul-Hakim's case, making him eligible to be sentenced to death.

Mr. Pearl's failure to challenge the charge of sexual battery allowed the State to use that offense as evidence to the trial

court in support of the "in the course of a felony" aggravating circumstance.⁴ Mr. Pearl was ineffective for failing to challenge this aggravating circumstance as well as the other aggravators alleged against Mr. Abdul-Hakim. The role of a defense counsel in a capital case is to neutralize the aggravating circumstances. Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994). As a result of Mr. Pearl's background and status as a special deputy sheriff Mr. Abdul-Hakim's defense was effected and no effort was made to neutralize the aggravating circumstances.

Mr. Pearl's failure to resist the State's case in any manner allowed it to easily convict Mr. Abdul-Hakim. Mr. Pearl failed to file a motion to suppress Mr. Abdul-Hakim's statement obtained under custodial interrogation because Mr. Pearl trusted the interrogating officer to be honest.

A Well, I knew that he was honest. I knew that he was competent. He was generally -- had a good reputation in the community in which he worked and resided, and I knew from prior experience with him that I could rely on him to tell me the truth when he spoke.

(PC-T. 83).

...it appeared as if the statements made by Mr. Quince to Detective Lewis had been made after Miranda warning and were voluntary.

Q When did you make this determination?

⁴The use of a criminal act to both support the finding of felony murder and the finding of the "in the course of a felony" aggravating circumstance violates the Eighth and Fourteenth Amendment to the United States Constitution. See Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). Here, even though there was no jury the sentencing judge used the "in the course of a felony" aggravator to sentence Mr. Abdul-Hakim even though he had also used the same felony to convict Mr. Abdul-Hakim.

A When I learned of the fact that he made these statements.

(PC-T. 91).

Without challenging the State's case or conducting any independent investigation, Mr. Pearl advised Mr. Abdul-Hakim to plead guilty to the offense.

Q That you failed to demand a trial by jury.

A I did. I did so fail. That is true.

Let me rephrase that. I decided upon reflection and upon analysis of the case that a jury trial was not the best way to present the Defendant's defense. Therefore, I advised the Defendant that we should waive the jury trial.

(PC-R. 481). Since Mr. Pearl was laboring under a conflict that he had not conducted any investigation, therefore, no decision can be the result of any strategy. He had not deposed critical law enforcement officers, he had not investigated the elements of the crime with which Mr. Abdul-Hakim was charged and he failed to require the State to prove each and every element of the offense. Since Mr. Pearl was part of the State police authority itself any advice to Mr. Abdul-Hakim to plead guilty is seriously suspect in light of the fact that Mr. Pearl believed Mr. Abdul-Hakim to be incompetent at that time.

Mr. Pearl advised Mr. Abdul-Hakim to enter a plea of guilty even though he believed that Mr. Abdul-Hakim was not competent. Mr. Pearl has testified:

And I felt that a discussion with Mr. Quince at that time concerning those unresolved matters would be fruitless and unprofitable.

I want to add that in essence you had to be there. Mr. Quince, when I know him, appeared to be and impressed me to be an extremely impaired person. We did not communicate in ordinary conversation. His responses were mostly limited to 'yeses' or 'noes.' When I asked him whether he understood something I had said, he indicated that he did. But, he was so uninformative, so seemingly uninterested, so seemingly out of it and unresponsive that I doubted whether in fact I was communicating with him effectively. That may have restricted to some extent the amount of information I might have otherwise shared with him because I see no profit in talking about things to a person who does not understand or appreciate the information that I'm giving him. And I was --

Throughout the time that I was representing Mr. Quince, I had that problem with him. My impression was he was impaired and that communication with him was not getting through.

(PC-R. 429-30).

I felt that certainly, in my opinion, Mr. Quince at the time I was dealing with him was partially or totally incompetent to stand trial because he was, based on my experience with him, unable to communicate with me sufficiently to help me prepare defenses for him. More or less, I was left on my own and wasn't getting much help.

(PC-R. 431).

The only thing I wanted to add was that back then Mr. Quince, I call him -- I know he has a new name but I only knew him by Mr. Quince -- did not respond to the things I was saying. He seemed somehow to be out of it. I couldn't communicate with him. He wasn't responsive to me seemingly in any way. It impressed me so much that I asked that he be examined by a clinical psychologist because I thought that he must have some mental problem.

(PC-T. 87-88).

Although Mr. Pearl felt strongly that Mr. Abdul-Hakim was not

competent to stand trial he advised Mr. Abdul-Hakim to enter a plea of guilty. He advised him to enter this plea believing Mr. Abdul-Hakim to be incompetent and knowing that Mr. Abdul-Hakim could not question Mr. Pearl's judgment.

Another effect of the conflict of interest that existed because of Mr. Pearl's status as deputy sheriff was his failure to investigate and present the compelling evidence of Mr. Abdul-Hakim's background. If he had conducted this investigation he would have found a troubling history of a child who was raised without a father. Mr. Abdul-Hakim's father had died in an automobile collision when Mr. Abdul-Hakim was five years old. He was brought up by a single mother who had to work outside the home to support her family of eight children. Mr. Abdul-Hakim was raised with his brothers and sisters in a small home with no supervision.

Not only was Mr. Abdul-Hakim's home life troubling but he also suffered from severe learning disabilities that resulted in poor grades and eventually brought Mr. Abdul-Hakim's education to a close in the tenth grade. These learning disabilities kept Mr. Abdul-Hakim from understanding the nature of the constitutional rights he was waiving and also from fully understanding the recommendations Mr. Pearl was making to him.

Because of Mr. Pearl's status as a representative of the State and at the same time as his role of Mr. Abdul-Hakim's defense counsel Mr. Abdul-Hakim was effectively denied his right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United

States Constitution. Mr. Pearl was more interested in ending the criminal proceeding as soon as possible with as little trouble to the persons accusing Mr. Abdul-Hakim of first-degree murder. As part of the patronage given to Mr. Pearl by the various sheriffs, Mr. Pearl was under an obligation to them and ignored the duty he owed to his mentally ill, capital client. An effective advocate, as contemplated by the Sixth Amendment, would have at least determined whether the State could meet its burden of proving that Mr. Abdul-Hakim guilty and would not have surrendered Mr. Abdul-Hakim's life because he thought Mr. Abdul-Hakim may have committed the crime.

Mr. Pearl's willingness to support the State over the interest of his own clients is well pointed out in the case of Robert Teffeteller. In that case, Mr. Pearl took a concealed loaded weapon into a Florida courtroom, sat next to his client, Mr. Teffeteller and while purporting to be his advocate, stood ready and willing to shoot him down should he try to escape.

The United States Supreme Court recognized:

(i)n certain Sixth Amendment contexts, prejudice is presumed. . . . Prejudice, in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.

Strickland v. Washington, 466 U.S. 668, 692 (1984).

Under this standard, a conflict of interest is subjected to a "similar, though more limited, presumption of prejudice" than the per se presumption. Strickland, 466 U.S. 692. Under Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) prejudice is presumed if Mr.

Abdul-Hakim demonstrates that Mr. Pearl (1) "actively represented conflicting interests" and (2) the "actual conflict of interest affected his lawyer's performance." Here, Mr. Pearl was representing both sides of the adversarial process. As a deputy sheriff, he represented the interests of the State to convict and execute Mr. Abdul-Hakim, but as Mr. Abdul-Hakim's advocate his competing role was to hold that State to its burden of proof. This conflict actually affected Mr. Pearl's performance in his failure to defend Mr. Abdul-Hakim and in advising him to plead guilty when he believed Mr. Abdul-Hakim to be incompetent.

The Sixth, Eighth and Fourteenth Amendments do not stand for the proposition that a capital defendant only has a right to representation by a special deputy sheriff who believes his client to be guilty and who wants save the State the trouble of a trial. Mr. Abdul-Hakim's representation by Mr. Pearl was a mockery of the adversarial system. He is entitled to a new proceeding and counsel of undivided loyalty.

The circuit court's order fails to address Mr. Abdul-Hakim's ineffective assistance of counsel claim. Instead, the circuit court made findings of fact in a vacuum. The final order thus suggests that the evidence introduced at hearing supports the conclusion that Mr. Pearl's status as a special deputy sheriff was not a per se or actual conflict of interest. See Circuit court order at page 7, (hereinafter, "Order"). In drawing this conclusion, the court failed to analyze the testimony during the hearing in conjunction with the record in this case. Furthermore,

the court denied Mr. Abdul-Hakim the opportunity to present testimony on the ineffective assistance of counsel issue. Had the court considered the record and allowed evidence to be presented, it would have learned that Mr. Pearl's testimony at the evidentiary hearing and Mr. Pearl's omissions and inactions at trial are inapposite. Moreover, Judge Johnson's conflict of interest gave undue credibility to the self-serving testimony of Mr. Pearl and Mr. Gibson. These statements cannot support a finding that a conflict of interest does not exist in this case.

The circuit court found that Mr. Pearl's status was "an honorary one for the entire duration of his status as a Special Deputy Sheriff." See Order at page 5. The court then provided a litany of items Mr. Pearl did not have that a law enforcement officer typically has, such as a uniform, training, a car, etc. Id. However, the court ignored Mr. Pearl's testimony regarding his law enforcement background and training, (PC-T. 81), which Mr. Pearl "certainly put that fact on [his] application" to secure deputy sheriff status (PC-T. 82; PC-R3. Defense Exhibit No. 1). The court also ignored Mr. Pearl's application for appointment which stated the reason for applying was "so that, one, when called, I may participate in the assistance and protection of persons and property to my community" (PC-T. 77-78; Defense Exhibit No. 1). Also ignored was Mr. Pearl's admission that he received an identification card which read "Deputy Sheriff" with no designation that he was anything other than a law enforcement officer (PC-R3. Defense Exhibit No. 3; PC-T. 37). The court further overlooked Mr.

Pearl's testimony that when he was approached by law enforcement personnel he never told them that he was only a "special" deputy sheriff and only had an honorary status. In fact, Mr. Pearl wanted other law enforcement personnel to think that he was deputy sheriff authorized to carry a gun and make arrests. He did this so that the police would not be so nervous about him carrying a concealed weapon (PC-T. 93). Other law enforcement who were presented with the ID card and badge did not know that Mr. Pearl had no actual authority because everyone issued such items had the apparent authority under the statute. Even Sheriff Moreland testified that Mr. Pearl had apparent authority to act under the statute (PC-T. 37).

Sheriff Moreland testified that he had an "informal agreement" with Mr. Pearl not to exercise any of the "apparent" authority authorized by statute (PC-T. 64). Mr. Pearl had the apparent authority to act as a law enforcement officer regardless of any informal agreement between himself and the Sheriff. If there had been no apparent authority, then no informal agreement would have been necessary. In its findings, the court ignored these facts presented at the evidentiary hearing.

Further, Sheriff Moreland testified that Mr. Pearl was required to be bonded and carry insurance while other special deputy sheriffs were not required to do so (PC-T. 34). For example, Sheriff Moreland testified that citizens deputized for a posse would not be required to have liability insurance (PC-T. 64). Sheriff Moreland required insurance to protect the department from

liability should Mr. Pearl mishandle or abuse his status (PC-T. 36). It is clear that Mr. Pearl could be sued in his capacity as a special deputy sheriff and subject the Marion County Sheriff's Department to liability for his actions. Unless Mr. Pearl had some type of apparent authority, this insurance would have been unnecessary.

The court found that Mr. Pearl's status did not create a conflict interest of any kind. See Order at page 7. For this proposition the court relied on the testimony of Mr. Pearl's supervisor, James Gibson. Once again, the Court failed to analyze Mr. Gibson's testimony in conjunction with the record in this case.

At the time of Mr. Abdul-Hakim's trial in 1980, Mr. Pearl was inexperienced at capital felonies and had only tried a "few" cases of this magnitude, (PC-T. 67), as Mr. Abdul-Hakim's case was one of his earliest capital cases (PC-T. 106). Mr. Pearl testified that he did not think that his status as a deputy sheriff was relevant to his client's interests (PC-T. 86). Mr. Gibson testified that the only reason he asked Mr. Pearl to resign his status as a special deputy sheriff was that "the issue was being raised in postconviction" (PC-T. 116).

The Public Defender's Office was embarrassed at being sued by every client that Mr. Pearl had represented in a capital murder case. Mr. Gibson and Mr. Pearl knew that had they told any of Mr. Pearl's clients prior to trial that Mr. Pearl was a special deputy sheriff, these clients would have taken steps to remove him from their cases. Thus, Mr. Pearl testified, "Never, never. I never

even mentioned to [Mr. Abdul-Hakim] that I was a special deputy sheriff" (PC-T. 89). Mr. Gibson also testified and the court adopted that he never questioned Mr. Pearl's abilities or ethics (PC-T. 124). This is not a surprising revelation. By admitting that he questioned Mr. Pearl's abilities, Mr. Gibson also would be admitting that he retained an employee whose ethics he questioned. No employer would make such an admission. Nonetheless, the actions of Mr. Gibson in requesting Mr. Pearl's resignation as a special deputy and his subsequent requirement that Mr. Pearl not plead his clients guilty without something in return, (PC-T. 119-120), demand the conclusion that Mr. Pearl's actions and performance was viewed critically and was corrected. The court ignored these considerations in its order.

It was a conflict of interest not to give Mr. Abdul-Hakim prior notice that the person advising him to waive jury and plead guilty had a special status with the law enforcement personnel who were prosecuting him. Mr. Abdul-Hakim also was entitled to know why his counsel was not challenging the State's case or conducting any investigation.

The court failed to address how Mr. Pearl's status affected his performance at trial. Mr. Pearl's status would explain his vouching for the credibility of the police witnesses during Mr. Abdul-Hakim's trial. See Vol.III-11, 24. Mr. Pearl failed to challenge pre-trial statements given to the police in a Motion to Suppress. Mr. Pearl failed to investigate the adequacy of police procedures, crime scene analysis or any other official procedure.

Mr. Pearl testified that he did not challenge the credibility of the police officers because he knew them to be "fine" officers whom he could "trust" (PC-T. 83). Even if Mr. Pearl knew the reputation of each officer, he still had a duty to zealously represent Mr. Abdul-Hakim by putting the State to its burden of proof. Instead, Mr. Pearl acted as a second prosecutor by vouching for the State's case. This is an adverse interest and adverse effect. This is the conflict of interest under Cuyler v. Sullivan, 446 U.S. 335 (1980). Mr. Abdul-Hakim was entitled to know that his defense counsel was a deputy sheriff, be it honorary, special or actual. Mr. Abdul-Hakim suggests that he was not told about this status because he would have fired Howard Pearl and requested conflict-free and effective counsel, to which he was entitled to under the Sixth Amendment. Mr. Abdul-Hakim is entitled to relief.

CONCLUSION

Mr. Abdul-Hakim was denied the assistance of conflict free counsel at the proceedings where he was sentenced to death. This is a violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Mr. Abdul-Hakim was denied a fair and impartial hearing judge that refused to disqualify himself. Mr. Abdul-Hakim was denied a full and fair hearing on his claims.

This Court should remand this matter back to the circuit court and a new, impartial judge, for a full and fair hearing to determine whether Mr. Abdul-Hakim's counsel was laboring under an impermissible and unconstitutional conflict of interest.

Afterwards, this Court should vacate the judgments and sentence of death since they rest upon a violation of the Sixth and Fourteenth Amendments to the United States Constitution.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first-class, to all counsel of record on November 3, 1997.



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