IN THE SUPREME COURT OF FLORIDA

CASE NO.

ROBERT TEFFETELLER,

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 interlocutory appeal from a denial of relief on Mr. Teffeteller's claim that his trial counsel suffered from an undisclosed conflict of interest stemming from his position as a deputy sheriff in the State of Florida and that his counsel acted in favor of that conflicting interest by "guarding" Mr. Teffeteller as he was representing Mr. Teffeteller during his capital trial. Further proceedings below are being held in abeyance pending the disposition of this appeal. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The procedural history prior to this Court's most recent remand is contained in Mr. Teffeteller's initial brief on appeal from summary denial of his Rule 3.850 motion and in his initial brief following partial remand. This brief supplements appellant's briefing prior to the final remand.

Citations in this brief shall be as follows: the record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The supplemental record on appeal shall be referred to as SR. ___." The record on appeal from the resentencing shall be referred to as "R2. ___." The record on appeal from the original Rule 3.850 proceedings shall be referred to as "PC-R. ___." The record on appeal from the consolidated circuit court evidentiary hearing ordered on remand shall be referred to as "PC-R2. ___." The record on appeal from the circuit court partial evidentiary hearing ordered on second remand shall be referred to as "PC-R3. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Teffeteller has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. 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 stakes at issue.

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SUMMARY OF ARGUMENTS

1. Mr. Teffeteller's trial counsel suffered from an undisclosed conflict of interest arising from his position a Marion County Deputy Sheriff. He acted upon that conflicting interest by "guarding" Mr. Teffeteller during his capital trial. Mr. Teffeteller's conviction violated the laws and Constitutions of the State of Florida and the United States of America.

2. This Court should clarify its decision in Teffeteller v. State, 676 So.2d 369 (Fla. 1996), to specifically address the arguments raised in Mr. Teffeteller's initial brief on appeal from the summary denial of his Rule 3.850 motion in Case No. 77,646, and to grant the relief sought therein.

STATEMENT OF THE CASE AND FACTS

Mr. Teffeteller adopts and incorporates the Statement of the Case and Facts contained within his initial brief and his initial brief following relinquishment of jurisdiction.

Howard Pearl represented Mr. Teffeteller in his capital murder trial in 1980 (PC-R3. 109). Mr. Teffeteller was found guilty and sentenced to death. This Court reversed the death sentence and ordered a new jury sentencing proceeding. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

A new attorney replaced Mr. Pearl in the resentencing proceeding (PC-R3 109). On January 25, 1985 the jury recommended a sentence of death and Mr. Teffeteller was subsequently sentenced to death. This Court affirmed the death sentence. Teffeteller v. State, 495 So. 2d 744 (Fla. 1986).

Mr. Teffeteller filed a Rule 3.850 motion. That motion was denied by the trial court without an evidentiary hearing. A motion for rehearing was filed alleging the newly discovered "Howard Pearl" issue. The State subsequently wrote a draft order denying the "Howard Pearl" issue relying on the Harich record. The trial court signed this State-prepared order denying rehearing without an evidentiary hearing.

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. Teffeteller'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. Teffeteller'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-R. 6593-6600). Mr. Teffeteller 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-R. 6601-6617). That motion was denied (PC-R. 6618). Mr. Teffeteller filed a timely notice of appeal (PC-R. 6619).

On appeal, this Court vacated the decision of Judge Driver, holding:

> [w]e vacate the trial court's orders denying appellants rule 3.850 relief and remand for new proceedings. Furthermore, we find that appellants' 3.850 claims should be considered on an individual basis before the judges who would normally be assigned to hear the several appellants' 3.850 claims, rather than in a consolidated hearing. The appellants raise factually specific claims regarding Pearl's representation of them as well as other individual claims regarding their convictions and sentences. The trial courts should consider the appellants 3.850 claims individually and should conclude these matters within six months of this opinion.
>
> Moreover, as to the claims which raise ineffective assistance of counsel claims that "are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudice the defendant," Roberts v. State. 568 So.2d 1255, 1259 (Fla. 1990), the appellants are entitled to an evidentiary hearing. In light of our disposition of Teffeteller's 3.850 appeal, we do not address his habeas claims at this time.

Teffeteller v. State, 676 So.2d 369, 371 (Teffeteller II)(emphasis added).

Following this Court's opinion, Mr. Teffeteller moved to dismiss appellate counsel.[1] That motion was granted.

On remand, Mr. Teffeteller's case was then set for a Faretta hearing before the circuit court. Mr. Teffeteller stated that he did not want to proceed pro se. He asked for the opportunity to demonstrate that he was entitled to paid substitute counsel because he suffered a conflict of interest with CCR because the agency was without adequate resources to properly represent him within the time frame set by this Court. The circuit court refused to allow Mr. Teffeteller the opportunity to demonstrate that the conflict of interest existed. It told Mr. Teffeteller that his choices regarding counsel were limited to accepting CCR, finding private counsel, or proceeding pro se. Mr. Teffeteller stated that under the circumstances, he would accept CCR representation (PC-R3. 33). Undersigned counsel then inquired regarding the scope of the hearing:

> MR. KISSINGER: Your Honor, just for purposes of clarification, the Court's order said Howard Pearl hearing alone, only the Howard Pearl issue?
>
> THE COURT: Yes.
>
> MR. KISSINGER: That's what the Court's order -- I know that we have a differing opinion on what course -- .
>
> THE COURT: I'm not exactly sure either where we stand on that and that we'll set for another day. But let's do the Howard Pearl hearing at least and see how we come out on that.

(PC-R3. 33-34).

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[1]Significantly, Mr. Teffeteller did not ask to proceed pro se.

The "Howard Pearl" hearing was held on September 9-10, 1996. At that hearing, Mr. Teffeteller introduced the testimony of Four witnesses: (1) Edith Purser, the records custodian for the Marion County Sheriff's Department; (2) Donald Moreland, the Marion County Sheriff at the time of Mr. Teffeteller's conviction; (3) Robert Vogel, the Volusia County Sheriff; and, (4) Howard Pearl.

The witnesses established that Mr. Pearl filled out an Application for Employment as a special deputy with the Marion County Sheriff's Office under his predecessor's administration (PC-R3. 31, 111). Mr. Pearl applied by executing a standard form, (PC-R3. 55), used by all applicants at the time (PC-R3. 66-67). In his application Mr. Pearl asserted that he was interested in employment with the Marion County Sheriff's Office because: "(1) when called, I may participate and assist in protection of persons and property in my community ..." (Defense Ex. 4, p. 3). Mr. Pearl executed the Oath of Office, State of Florida, under both Mr. Moreland and his predecessor's tenure (PC-R3. 64-65, 110-111). In taking this oath Mr. Pearl swore that he was: "duly qualified to hold office under the Constitution of the State and that [he would] well and faithfully perform the duties of special deputy on which [he was] about to enter ..." (Defense Exh. 1-3). The rights, duties and responsibilities of deputy sheriffs were generally determined by statute (PC-R3. 55-56).

Mr. Moreland testified that, at the time of Mr. Teffeteller's trial, some of those duties included acting as law enforcement officers in other Florida counties (PC-R3. 62). Mr. Moreland stated that the statute required that Mr. Pearl insure himself in order to protect the sheriff against claims arising from Mr. Pearl's actions (PC-R3. 71). Mr. Moreland testified that the liability insurance was maintained to indemnify the sheriff should Mr. Pearl cause injury or

loss in his special deputy status (PC-R3. 86-87) ("We worry that they might take some action that would affect us" (PC-R3. 87).

Sheriff Vogel testified that if there were an attempted escape from a Volusia County courtroom, it would be the responsibility of the bailiffs to attempt to prevent that escape (PC-R3. 105). Mr. Pearl testified that, during the course of Mr. Teffeteller's trial, a bailiff[2] advised him that a possible escape attempt was suspected by courtroom personnel (PC-R3. 122). The bailiff informed Mr. Pearl that they thought Mr. Teffeteller was going to try to leave the courtroom and he may take Mr. Pearl with him (PC-R3. 123). Mr. Pearl accepted this information, without discussing it with his client, and considered it a "serious matter" (PC-R3. 123).

Mr. Pearl armed himself, (PC-R3 128-129), and advised the bailiffs that he was armed, (PC-R3. 125). Mr. Pearl was asked:

> Q ... Do you recall -- in response to the question: (Reading) Do you recall at the Harich trial whether you were armed?
>
> You stated: (Reading) Absolutely not. I was not armed. Generally, I am not, very seldom during trial.
>
> Then a paragraph passes and you state: (Reading) There was one guy a long time ago, I was armed because of information that had been given to me by deputies who were guarding him; that they very strongly suspected that an attempt would be made to hand him a gun by his wife or girlfriend, or whatever the status was. They were worried about it. I armed myself because I had made up my mind that, no matter what happened, if he did wind up armed, I was not leaving the courthouse with him as a hostage and wouldn't either. In that particular single case, he wouldn't have left the courtroom.

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[2]Mr. Pearl testified that, at the time of Mr. Teffeteller's trial, bailiffs were Volusia County Sheriff's deputies.

(PC-R3. 128-129)(emphasis added). He responded that "[a]t the time when I spoke those words, I'm sure I was telling the truth" (PC-R3. 132)(emphasis added).

Mr. Pearl made it clear that he was prepared to shoot his Mr. Teffeteller, if necessary. Mr. Pearl testified:

> A ... If this person, Mr. Teffeteller or anyone else, had put a gun to my head and said, "Come out. You're a hostage. I'm going to take you with me to make sure that I escape", I would have done whatever I had to do not to leave that courtroom with [Mr. Teffeteller].
>
> I don't know what that -- prayerfully, it would not have included pulling a gun and shooting somebody; that's the last thing in the world I'd want to do, ever; but, as I say, you're on hypothetical ground here and I'm happy with it, okay?
>
> Q Recognizing that these are very -- that we're just talking about what your intent was going to -- had it been necessary to use this weapon, would you have done it?
>
> A To save my life? That's why I carry a weapon. If I felt that in the defense of my life, I had to use the weapon, I would . . . .

(PC-R3. 167-168)(emphasis added). Not only did Mr. Pearl intend to shoot his client, if necessary, he failed to inform Mr. Teffeteller that while he sat next to him at his capital trial he was armed (PC-R3. 163).

The circuit court denied Claim XXX of Mr. Teffeteller's motion for rehearing and motion to amend (PC-R3. 47-52). This interlocutory appeal follows.

ARGUMENT I

MR. TEFFETELLER'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.

A. INTRODUCTION

In 1991, this Court addressed the matter of Howard Pearl's relationship with the Marion County Sheriff's Department and whether that relationship could constitute a impermissible conflict of interest which deprived his clients of their right to counsel under the constitutions of the United States of America and the State of Florida. Herring v. State, 580 So. 2d 135 (Fla. 1991); citing Harich v. State, 542 So. 2d 980 (Fla. 1989):

> With regard to Herring's public defender's service as a special deputy, we hold that due process principles require an evidentiary hearing. In Harich v. State, 542 So. 2d 980 (Fla. 1989), we found that this same public defender's service as a special deputy was sufficient to require an evidentiary hearing on the issue of whether his relationship to law enforcement officials affected his ability to provide effective legal assistance. After the evidentiary hearing in Harich, the trial judge made detailed findings of fact and denied relief. We affirm the trial judge, hold that the fact that this public defender was a special deputy in an adjacent jurisdiction, particularly given the circumstances of the duties and status of such deputy sheriff, did not result in a per se conflict of interest. Harich v. State, 573 So. 2d 303 (Fla. 1990).

580 So. 2d at 138. In the six years which have followed, the holding of Herring has become muddled as the State, some of Mr. Pearl's former clients, and the lower courts themselves have revisited already determined issues, or created new ones, in an effort, respectively, to relitigate whether Mr. Pearl was a law enforcement officer, to expand the "adverse effect" requirement of Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), to include unrelated deficient attorney performance, or to quickly dispose of an issue which, even in good light, reflects poorly on the representation of indigent criminal defendants in the State of Florida.

It is time to back away from the expansive interpretations of Herring and Harich, to reaffirm what issues are not open to question, and to resolve the one issue which must be decided, i.e., did Howard Pearl either take action on behalf of law enforcement interests and against Mr. Teffeteller's interests, or forego action in Mr. Teffeteller's interests in deference to the interests of law enforcement? Because this question must be answered in the affirmative, Mr. Teffeteller is entitled to a new trial. The interests of justice demand that relief be granted now and by this court, not at some point in the future, or by some other court, after the needless waste of limited judicial resources.

B. MR. PEARL WAS A LAW ENFORCEMENT OFFICER WITH THE MARION COUNTY SHERIFF'S DEPARTMENT

1. The Circumstances of Mr. Pearl's Appointment

The circuit court made the legal conclusion that Howard Pearl was not a law enforcement officer with the Marion County Sheriff's Department based upon a finding of facts identical to those set out in Harich. In so doing, the circuit court failed to take into account that, when faced with the same facts, this Court did not find that Mr. Pearl was not a Marion County law enforcement officer, rather that there Mr. Harich had made an insufficient showing that Mr. Pearl had acted on behalf of that law enforcement interest. Indeed, in Herring, this Court specifically limited Mr. Herring's burden to demonstrating that Mr. Pearl's status had adversely affected his representation, the second prong of the Cuyler test.

> With regard to Herring's public defender's service as a special deputy, we hold that due process principles require an evidentiary hearing. In Harich v. State, 542 So. 2d 980 (Fla. 1989), we found that this same public defender's service as a special deputy was sufficient to require an evidentiary hearing on the issue of whether his relationship to law enforcement officials affected his ability to provide effective legal assistance. After the evidentiary hearing in Harich, the trial judge made detailed findings of fact and denied relief. We affirm the trial

> judge, hold that the fact that this public defender was a special deputy in an adjacent jurisdiction, particularly given the circumstances of the duties and status of such deputy sheriff, did not result in a per se conflict of interest. Harich v. State, 573 So. 2d 303 (Fla. 1990).
>
> * * * *
>
> Accordingly, we remand this cause to the 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.

580 So. 2d at 138 (emphasis added).

There is no real question but that Howard Pearl was, and was intended by both himself and the Sheriff of Marion County, Florida, to be, a law enforcement officer. On August 8, 1970, Mr. Pearl filled out a four page application for the position of special deputy sheriff listing his law enforcement experience and extensive law enforcement training, including 200 hour of training over a three month period at the U.S. Treasury Department's Law Enforcement Officers Training School, in Washington D.C. In that application, which he certified to be true, Mr. Pearl stated, at paragraph 23, that he was, "applying for the position of deputy sheriff so that: (1) when called, [he could] participate and assist in protection of persons and property in [his] community; and (2) [he could] have authority to carry firearms, in the area of the Ocala National Forest, and elsewhere in the State, for the protection of self and family." Additionally, at paragraph 13 of his application, Mr. Pearl stated that he could report for duty when summoned (PC-R3. Exh. 4). Almost two weeks later, on August 21, 1970, Mr. Pearl executed his original oath of office in which he swore to perform the duties of a special deputy sheriff. (PC-R3. Exh. 3). The photographic identification card provided by the Marion County Sheriff's Department designated Mr. Pearl as a deputy sheriff (PC-R3. Exh. 9). Former Sheriff Moreland's reappointment letter of January 1, 1981 indicates that Mr. Pearl's status as of the date of Mr.

Pearl's trial was that of deputy sheriff (PC-R3. Exh. 7), as did the letter of reappointment dated four years later (PC-R3. Exh 6). At hearing, former Sheriff Moreland admitted that Mr. Pearl was a law enforcement officer (PC-R3. 90).

At hearing, the circuit court allowed Mr. Pearl and former Sheriff Moreland to contradict the truth of their own written representations even though there was no ambiguity in these documents. There are substantial reasons to reject their recent pronouncements that the position was merely honorary or merely political (PC-R3. 77, 80, 143). For example, Mr. Pearl's filled out a regular application for employment with the Marion County Sheriff's Department. It was over four pages long. While it can be argued that a sheriff, at least a wise sheriff, might want to keep some sort of record of just who was walking around with identification cards saying they were members of the sheriff's office, a four page application would not be necessary for that purpose.[3] In that application, Mr. Pearl provided his law enforcement experience and training. Again, if the position held by Mr. Pearl was merely honorary or political, as opposed to that of a law enforcement officer, that type of information would be unnecessary. Until the "Howard Pearl" issue was raised in Harich, neither Mr. Pearl, nor Sheriff Moreland, nor any writing executed by them, indicated that Mr. Pearl's position was merely honorary.

2. **The "Pistol Toting Permit"**

"Well, I know it was for pistol-toting . . . "

Donald Moreland
Marion County Sheriff
1973-1993

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[3]The State has never, in almost a decade of litigating this issue, ever introduced such an application from another allegedly "honorary" deputy.

(PC-R3. 80).

Most importantly, even assuming that everything said by Mr. Pearl and former Sheriff Moreland and every document they executed prior to Harich was false and everything they executed and said after Harich was true, there is still one point upon which all parties agree, and, in fact, this Court has found. At least one of the purposes Mr. Pearl had in associating himself with the Marion County Sheriff's Department was to allow him to carry a concealed weapon throughout the state of Florida (PC-R3. 115). Herring; Harich. There were two statutes which granted such authority. Fla. Stat. § 790.051 provided:

> Law enforcement officers are exempt from the licensing and penal provisions of this chapter [prohibiting, in part, the carrying of concealed weapons] when acting at any time within the scope of their official duties or when acting at any time in the line of or performance of duty.

Fla. Stat. § 790.051 (emphasis added).

Fla. Stat. § 790.052 provided:

> All full-time police officers, Florida highway patrolmen, agents of the department of Law Enforcement, and sheriffs' deputies shall have the right to carry, on or about their persons, concealed firearms, during off duty hours, at the discretion of their superior officers, and may perform those law enforcement functions which they normally perform during duty hours, utilizing their weapons in a manner which is reasonably expected of on-duty officers in similar situations.

Fla. Stat. § 790.052 (emphasis added).

It was the intent of the parties that Mr. Pearl's status allow him to carry a concealed weapon throughout the state. Under either section, it was their intent that Mr. Pearl be a law enforcement officer. Indeed, because Mr. Pearl clearly had to have been off-duty at some point during the almost twenty years he carried a concealed weapon, it was in all likelihood that it was

their intent that he be considered a "full-time . . . sheriffs' deputy." The fact that Mr. Pearl's letters of reappointment and photographic identification card designated him as a regular deputy sheriff was not because of a mistake, or some oversight, but because it was only the position of deputy sheriff which would fulfill what all parties agree was at least one of the intended purposes for Mr. Pearl's association with the Marion County Sheriff's Office.

C. MR. PEARL ACTED ON BEHALF OF A CONFLICTED INTEREST

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, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)); LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir.), cert. denied, 488 U.S. 958, 109 S. Ct. 397, 102 L. Ed. 2d 386 (1988); see also United States v. Khoury, 901 F.2d 948 (11th Cir.) (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, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (citing Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (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, 100 S. Ct. 63, 62 L. Ed. 2d 42 (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. 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).

The only question which remains is whether Mr. Pearl acted on behalf of the conflicted interest.[4] Former Sheriff Moreland described at hearing what law enforcement functions he would expect his deputies to perform in his name while in other counties. He testified that, not only did his deputies have the authority to act in other counties under formal requests for assistance under mutual aid agreements, they have similar authority when an informal verbal request is made (PC-R3. 22, 26-27). He also stated that his deputies have an interest in stopping a felony in another county (PC-R3. 29).

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[4]Mr. Teffeteller also continues to maintain, as he has throughout his these proceedings, that Mr. Pearl's status and actions create a per se conflict of interest and that no adverse effect needs be shown. United States v. Cronic, 466 U.S. 648 (1988).

Mr. Pearl's actions during Mr. Teffeteller's capital trial are not in dispute. Mr. Pearl testified that at Mr. Teffeteller's trial, he was approached by a Volusia County Sheriff's deputies, a bailiff, and informed that there was chance that Mr. Teffeteller would be slipped a gun during his trial and make an attempt to escape (PC-R3. 122-123). He testified that he armed himself with a concealed weapon (PC-R3. 123-124). He testified that he informed the bailiff that he was carrying the concealed weapon into the courtroom (PC-R3. 125). He testified that the bailiff allowed him to carry the concealed weapon into the courtroom, even though the bailiff could have asked Mr. Pearl to relinquish it (PC-R3. 125). He testified that the reason that he was carrying this weapon was that, should Mr. Teffeteller attempt to escape by taking Mr. Pearl with him, he would have prevented that escape by shooting Mr. Teffeteller (PC-R3. 167-168). Mr. Pearl did not inform Mr. Teffeteller that he was carrying this concealed weapon or of his intent to use it against Mr. Teffeteller if the need arose, nor did he inform the trial judge of this fact (PC-R3. 128).

From these undisputed facts, the circuit court concluded that Mr. Pearl did nothing to act against his client and in favor of the conflicted interest. The court also concluded that Mr. Pearl did not "guard" Mr. Teffeteller. The circuit court's conclusion is at once both wrong and a distinction without difference. The Volusia County Sheriff's Department learned of a possible escape by Mr. Teffeteller. A Volusia County deputy sheriff charged with preventing Mr. Teffeteller's escape, informed a Marion County deputy sheriff that an escape attempt might occur at a trial which the Marion County deputy was attending. The Marion County deputy used the rights and powers of his office to conceal a firearm on his person and carry it to the Volusia County Courthouse. Before he entered the courtroom, the Marion County deputy

showed it to the Volusia County Sheriff's deputy on duty. The Volusia County deputy allowed the Marion County deputy to carry his gun into the courtroom and sit next to Mr. Teffeteller. The Marion County deputy sat ready to shoot Mr. Teffeteller should he try to escape with the deputy in tow. Regardless of whether this Marion County deputy's, Mr. Pearl's, conduct constituted "guarding" Mr. Teffeteller[5], it was clearly in furtherance of, at least in part, law enforcement interests, and equally clearly against Mr. Teffeteller's interest. Moreover, the record of Mr. Teffeteller's trial shows that he wanted to call friends to testify on his behalf, but that Mr. Pearl, while armed with the knowledge that these witnesses would pass by Mr. Teffeteller, chose not to call them. It shows that the trial court gave Mr. Teffeteller no meaningful option other than to accept Mr. Pearl's choices because Mr. Teffeteller, being ignorant of his attorney's concerns over the law enforcement warning of a possible escape and/or the law enforcement steps Mr. Pearl had taken to prevent the same, could not provide the Court with grounds to suggest that a conflict of interest existed (R. 123). Mr. Teffeteller was thus denied the opportunity to inform the court that among the reasons that he sought dismissal of Mr. Pearl was the fact that Mr. Pearl was at that moment sitting next to him armed with a concealed weapon and prepared to shoot him.

Given the Marion County Sheriff's Department's interest in acting in a law enforcement capacity in other counties when needed and the Volusia County Sheriff's Department's act of informing Mr. Pearl of the possible escape attempt and of knowingly allowing Mr. Pearl to exercise his rights as a Marion County deputy sheriff by bringing a concealed firearm into the

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[5]The Third Edition of the American Heritage Dictionary defines "guard" as: "To watch over to prevent escape." The circuit court's legal conclusion that Mr. Pearl's efforts did not meet this definition is not supported by the undisputed facts.

courtroom to sit next to Mr. Teffeteller, there is no doubt but that Mr. Pearl, "took action on behalf of one [interest]," and, in so doing "adversely affect[ed] the appropriate defense of the other." Tatum, 943 F.2d at 376. Mr. Teffeteller is entitled to relief.

ARGUMENT II

THIS COURT SHOULD CLARIFY ITS PRIOR HOLDING BY SPECIFICALLY INSTRUCTING THE CIRCUIT COURT TO GRANT MR. TEFFETELLER AN EVIDENTIARY HEARING AND/OR APPROPRIATE RELIEF ON THE OTHER CLAIMS CONTAINED IN HIS RULE 3.850 MOTION.

The proper and just resolution of Argument I in Mr. Teffeteller's favor moots all issues pending before the circuit court. However, should this Court not order a new trial for Mr. Teffeteller based upon his counsel's law enforcement activity during Mr. Teffeteller's capital trial, there will remain a procedural quagmire which will virtually guarantee that the remaining claims contained in Mr. Teffeteller's Rule 3.850 motion will not be properly resolved without yet another remand from this Court. It is in the interests of justice that this Court provide further guidance to the circuit court and the parties hereto.

There is an issue still pending before the circuit court regarding whether Mr. Teffeteller is entitled to an evidentiary hearing on the remaining claims in his Rule 3.850 motion. The State has taken the position that Mr. Teffeteller is not entitled to such a hearing.

On remand, this Court stated:

> [w]e vacate the trial court's orders denying appellants rule 3.850 relief and remand for new proceedings. Furthermore, we find that appellants' 3.850 claims should be considered on an individual basis before the judges who would normally be assigned to hear the several appellants' 3.850 claims, rather than in a consolidated hearing. The appellants raise factually specific claims regarding Pearl's representation of them as well as other individual claims

> regarding their convictions and sentences. The trial courts should consider the appellants 3.850 claims individually and should conclude these matters within six months of this opinion.
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> Moreover, as to the claims which raise ineffective assistance of counsel claims that "are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudice the defendant," Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990), the appellants are entitled to an evidentiary hearing. In light of our disposition of Teffeteller's 3.850 appeal, we do not address his habeas claims at this time.

Teffeteller II, 676 So. 2d at 371 (emphasis added).

Mr. Teffeteller's Rule 3.850 motion contained many fully plead and factually supported claims based upon trial counsel's ineffective assistance, but not dependent upon Mr. Pearl's deputy sheriff status. Moreover, it contained many other fact-based post-conviction claims which by their nature could only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990) These included, but were not limited to, claims of newly discovered evidence and Brady violations. These claims were before this Court when it issued its decision in Teffeteller II. They had been fully briefed by both parties and will not be reiterated here. This Court's decision in Teffeteller II, however, is arguably silent as to those claims.

The questions now before the circuit court and all parties are: (1) whether this court's decision in Teffeteller addressed the need for an evidentiary hearing on these claims; (2) if it did not, whether the procedural posture of Mr. Teffeteller's case is that it was simply relinquished to the circuit court for a hearing on the "Howard Pearl" issue and should be returned to this Court for argument on, and resolution of, the remaining claims contained in his Rule 3.850 motion; and, (3) if this Court did resolve the other issues presented in Mr. Teffeteller's Rule 3.850 motion, how were these claims resolved?

Compounding this problem is the fact that, if this Court now holds that Mr. Teffeteller was required to present evidence on his remaining fact-based claims at the "Howard Pearl" hearing (which apparently is one argument being forwarded by the State (PC-R3. 134-135)), the proceeding before the circuit court has deprived him of procedural due process. Not only was he deprived of notice that he would have to present evidence on any claim other than the deputy sheriff issue, the circuit court stated just to the contrary (PC-R3. 33). Moreover, if Mr. Teffeteller was required to present evidence on his entire Rule 3.850 motion at the "Howard Pearl" hearing, he was substantially prejudiced by the trial court's refusal to allow him to demonstrate that CCR's suffered from a caseload conflict which prevented it from effectively representing Mr. Teffeteller at such an extensive hearing with the time frame set out by this Court and the circuit court.[6]

Following this Court's remand and grant of Mr. Teffeteller's Motion to Dismiss Appellate Counsel,[7] the circuit court held a hearing at which the State, undersigned counsel, and Mr. Teffeteller were present (PC-R3. 3). At that hearing, the circuit court took the position that this Court had determined that Mr. Teffeteller had waived his right to counsel and that its only function was to determine whether Mr. Teffeteller was competent to proceed (PC-R3. 5, 7, 15-16). Mr. Teffeteller stated that he did not want to proceed pro se, but that he wanted an attorney who had adequate time and resources to represent him. He also alleged that CCR had neither (PC-R3. 9-10). Undersigned counsel informed the circuit court that Mr. Teffeteller was

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[6]The "Hoard Pearl" hearing was held less than two weeks after CCR was reappointed to Mr. Teffeteller's case.

[7]Mr. Teffeteller's appellate counsel was the office of the Capital Collateral Representative (CCR).

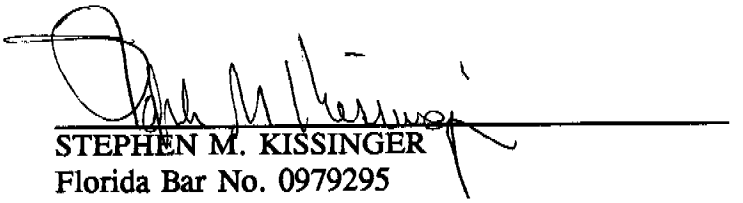
asserting that CCR had a conflict of interest and asked that Mr. Teffeteller be given the opportunity to demonstrate that conflict (PC-R3. 17-18). At the State's urging, the circuit court refused to allow Mr. Teffeteller the opportunity to demonstrate that a conflict of interest existed and told Mr. Teffeteller that the only choice which he had was to either accept CCR representation or proceed pro se (PC-R3. 28). It was only after the circuit court refused to allow Mr. Teffeteller to demonstrate that a conflict of interest existed between himself and CCR and allowed him no other choices but to retain private counsel, accept CCR, or represent himself, that Mr. Teffeteller accepted CCR representation.

Under the circumstances, if this Court should not grant Mr. Teffeteller the new trial on the "Howard Pearl" issue to which he is undeniable entitled and will inevitably receive, this Court should clarify its earlier decision to specifically hold that Mr. Teffeteller is entitled to an evidentiary hearing on the remaining fact-based claims raised in Mr. Teffeteller initial brief on appeal from the summary denial of his Rule 3.850 motion in Case No. 77,646, and that those errors should be considered and weighed in conjunction with the matters presented during the course of the "Howard Pearl" hearing. Kyles v. Whitley, 115 S. Ct. 1555 (1995).

CONCLUSION

On the basis of the forgoing points and authorities, Mr. Teffeteller respectfully request that this Court vacate his judgments of conviction and sentence and remand this matter to the circuit court with instructions to afford Mr. Teffeteller a new trial.

I HEREBY CERTIFY that a true copy of the foregoing supplemental initial brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 16, 1997.



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