IN THE SUPREME COURT OF FLORIDA

Case No. 73,930

ROY ALLEN HARICH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE

LARRY HELM SPALDING
Capital Collateral
Representative
Florida Bar No. 0125540

BILLY H. NOLAS
Chief Assistant CCR
Florida Bar No. 0794351

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER

ALLAN M. PEPPER
STEVEN GLICKSTEIN
Florida Bar No. 0223281
JOHN D. CHAPMAN
Admitted Pro Hac Vice
STANLEY N. ALPERT
Florida Bar No. 0716073
SUZANNE M. JAFFE

425 Park Avenue
New York, New York 10022
(212) 836-8000

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Harich's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. **3.850.**

The following shall be used in this brief to designate references to the record: "R. ___" (Record on Direct Appeal); "T. ___" (Record on Appeal of the denial of Rule **3.850** relief). All other citations shall be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Harich has been sentenced to death and the resolution of the issues involved in this action shall determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture, under similar circumstances. 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, and Mr. Harich through counsel accordingly respectfully requests that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

PROCEDURAL HISTORY

Roy Allen Harich was convicted of murder and other crimes in the Volusia County Circuit Court and was sentenced to death in 1982. The judgment and sentence were affirmed on direct appeal, and a Rule 3.850 motion, filed in March of 1986, was also denied. Mr. Harich filed a second 3.850 motion on March 27, 1989. The motion was predicated, in part, on newly discovered evidence that Appellant's trial counsel, Howard Pearl, was affiliated with law enforcement agencies at the time he was representing Mr. Harich, and that Mr. Pearl therefore had a divided loyalty and conflict of interest during his representation of Mr. Harich. Mr. Harich was never informed of the conflict, either by Mr. Pearl, the State or the circuit court judge. On March 28, 1989, the lower court denied the motion (T. 29). On March 30, 1989, this Court heard argument on defendant's 3.850 motion and issued a stay of execution.

On April 20, 1989, this Court vacated the trial court's order and remanded for an evidentiary hearing on Appellant's claim regarding Mr. Pearl's divided loyalty and conflict of interest (T. 479-85). On May 5, 1989, Appellant moved for a rehearing on several of the claims that this Court rejected. On May 3, 1989, a month before the mandate issued, and while the action was still pending before this Court, the Honorable Uriel Blount ordered that the evidentiary hearing commence at 9:30 A.M. on June 9 (T. 473). On May 9, 1989, defense counsel notified Judge Blount by letter that as Mr. Harich's appeal was still pending in this Court, the Circuit Court did not have jurisdiction to set a hearing date (T. 475-76).

On June 2, 1989, Appellant, through counsel, moved the lower court to adjourn the June 9, 1989, evidentiary hearing. Defense counsel pointed out that since the Circuit Court still did not have jurisdiction and the hearing was less than a week away, they could not obtain compulsory process for depositions, document discovery and hearing witnesses, and therefore were prejudiced in their ability to prepare adequately for the hearing (T. 485-94). Unbeknownst to defendant or counsel, on that date, June 2, 1989, this Court denied defendant's motion for rehearing and the mandate issued (T. 477-78). However, neither defendant nor counsel learned about this order until the afternoon of June 6 -- less than 72 hours before the hearing -- and had no time to take discovery. That same day, Appellant moved Judge Blount to recuse himself because he would be called as a material witness and had pre-judged the case (T. 44). On June 8, 1989, the Chief Judge of the Seventh Judicial Circuit ordered that Judge Blount recuse himself and that Judge Foxman preside (T. 530).

Notwithstanding the Chief Judge's recusal order, Judge Blount commenced the evidentiary hearing on June 9, 1989, in DeLand (T. 36). At the outset, Judge Blount held defense counsel, who were not from the area and were traveling to the hearing from out of town, in contempt of court for allegedly arriving at the hearing 26 minutes late and ordered the payment of a total of $500 in fines within 48 hours (T. 43). Judge Blount rejected counsel's argument that they had no contumacious intent because they had run into traffic and become lost driving to the courthouse from Orlando and had notified the Court well

before the scheduled 9:30 starting time that they would be slightly delayed (T. 42).[1]

After holding defense counsel in contempt, Judge Blount denied the motion to recuse himself, notwithstanding the Chief Judge's recusal order removing him the previous day. Judge Blount stated that the recusal motion was "legally insufficient" because it was not filed ten days prior to the hearing, i.e., before the mandate issued and the Circuit Court had jurisdiction (T. 44). However, Judge Blount purported voluntarily to recuse himself "to provide for an orderly disposition of this matter and to avoid an appearance of impropriety . . . ." (T. 45). Judge Blount's order of "voluntary" recusal is undated.

Appellant called as his first witness the Honorable Uriel Blount who had presided over the trial and had appointed Mr. Pearl to represent Mr. Harich (T. 55). Following Judge Blount were Edwin Duff 11, the former Sheriff of Volusia County, who had appointed Mr. Pearl as deputy there in 1974, Officer Vail, who participated in the investigation of the crime and, finally, the current Sheriff of Volusia County, Robert Vogle (T. 106, T. 177, T. 184). Sheriff Vogle was not, however, in the courtroom and in lieu of taking further testimony, the Court ordered depositions.

Beginning late in the afternoon of June 9 and continuing throughout the weekend, Appellant deposed James Gibson, Esq., the Public Defender of Volusia County: Christopher Quarles, Esq., an attorney in the appellate division of that office: Peyton

---

[1] Defense counsel are also appealing their contempt citations and have addressed those issues in a separate brief to this Court.

Quarles, Esq., an attorney who participated in the "workup" of the Harich case along with Mr. Pearl in 1982; Don Moreland, Sheriff of Marion County; Officers Burnsed and Wall, who had participated in the investigation of this offense; Sheriff Vogle of Volusia County; and Mr. Pearl. The State deposed A. Leon Lowry, an officer with the Florida Department of Law Enforcement.

When the hearing resumed in Daytona Beach on June 12, the Court entered into evidence the depositions of Messrs. Gibson, Lowry, Moreland and Vogle and Peyton and Christopher Quarles (T. 232-33).[2] Mr. Pearl testified on June 12 and 13 and the Court concluded that day by setting aside June 16 for additional testimony, particularly expert testimony, as well as closing statements (T. 454). The Court assured counsel that they could recall Mr. Pearl on June 16 (T. 454). On the evening of June 15, a dense fog forced the cancellation of all flights from Newark airport and defense counsel were unable to leave for Florida (T. 459-460; 588). On the morning of the following day, counsel advised the Court by facsimile transmission of the cancellation of their flight, and moved for an adjournment of the hearing until counsel could arrive, present expert testimony, recall Mr. Pearl and make closing arguments (T. 588-606). Notwithstanding the physical impossibility of counsel's presence in court, the Court denied defendant's motion and heard oral argument only from the State on June 16 (T. 466).

On June 21, the Court issued a five-page order denying the

---

[2] Those depositions, which are part of the record, are cited in this brief by witness and deposition page number.

3.850 motion (T. 608-612). On July 5, defendant moved for an order reopening the hearing (i) to permit defendant to introduce expert testimony and (ii) to present evidence concerning the Court's ruling of procedural default (T. 613-80). On July 18, the Court denied defendant's motion to reopen (T. 682).

STATEMENT OF FACTS

On July 8, 1970, Howard Pearl applied to the Sheriff of Marion County, Doug Willis, for appointment as a "special deputy sheriff" (T. 536). In response to the question "[w]hy are you interested in employment with this law enforcement agency?" Mr. Pearl listed two reasons: to assist in law enforcement and to carry a gun:

> I am applying for appointment as special deputy sheriff so that: (1) when called, I may participate and assist in protection of persons and property in my community; and (2) I may have authority to carry firearms, in the area of the Ocala National Forest, and elsewhere in the State, for protection of self and family.

(T. 539). In response to the question on the application "[i]f appointed, when can you report for duty?" Mr. Pearl represented that he would report for duty "[w]hen summoned" (T. 536).

To ensure that he would be commissioned with the Marion County Sheriff's office, Mr. Pearl listed, in a rider annexed to the main application, his extensive law enforcement background -- both his relevant employment and training (T. 537). As for his prior "law enforcement employment," Mr. Pearl listed the five years he had spent with the United States Treasury Department as a "criminal investigator (Special Agent)," his four year stint as a "criminal investigator" in the United States Army Reserve, his four year service as an "attorney General of Florida" with "short

periods as a special investigator" and his tenure as County Solicitor in Hillsborough County (T. 537).

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

After his application was approved by the County Commissioners for Marion County, Mr. Pearl took an oath of office as a "Special Deputy Sheriff" (T. 259-60). In that oath, which he signed before a notary public, Mr. Pearl swore that he was "duly qualified to hold office under the Constitution of the State" of Florida and that he would "well and faithfully perform the duties of special deputy on which [he] was about to enter" (T. 540). He was issued an identification card and was bonded and insured in the event that the sheriff's office were sued for any wrongful acts committed within the scope of Mr. Pearl's employment and duties (T. 541; 262). In addition, he obtained a badge (Moreland dep. 55; T. 287-88).

Mr. Pearl did not resign his commission when he became an assistant public defender with the Seventh Judicial Circuit in 1972 (T. 295-96). Rather, in 1973, the newly elected Sheriff, Don Moreland, reappointed Mr. Pearl, this time as a "deputy

sheriff" in Marion County (T. 265). Mr. Pearl took another oath of office in which he again swore that he was "duly qualified" to hold office and that he would "well and faithfully carry out his duties" as a deputy sheriff (T. 266). In addition, Sheriff Moreland issued Mr. Pearl a deputy sheriff's card (T. 541). The front of that card, which contained Mr. Pearl's photograph, stated that Mr. Pearl was "a regular deputy sheriff of Marion County, Florida" (T. 541). The reverse of the card was dated January 4, 1973, and contained Sheriff Moreland's signed "certification" that Mr. Pearl was a regularly empowered and constituted deputy sheriff with the full powers of that office:

> Howard B. Pearl is a regularly constituted deputy sheriff to serve and execute all legal papers and process in Marion County, Florida with full power to act as Deputy Sheriff of Marion County until my term expires or this appointment is revoked.
>
> S/ Don Moreland
> Sheriff Marion County Florida

(T. 541) (emphasis added).

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

handling capital murder cases exclusively in 1978 (T. 377).

Because Mr. Pearl was a regularly empowered deputy sheriff, he was required to be bonded and insured like any other Florida deputy. He carried a $1,000 bond payable to the Governor of Florida in the event that the State were sued for a wrongful act undertaken in Mr. Pearl's official capacity (T. 403). In addition to the bond, Mr. Pearl was required to, and did, maintain comprehensive liability insurance. By virtue of his deputy sheriff position, Mr. Pearl was placed in the high risk category and was required to, and did, pay a $100 annual insurance premium from 1980 through 1985 and a $200 annual insurance premium from 1986 through 1988 (T. 270).

Solely because he was a deputy sheriff, Mr. Pearl could and did carry a concealed handgun on his person across county lines. As Mr. Pearl testified, "I had no other authority to carry a concealed firearm" (T. 284). In addition, Mr. Pearl had several occasions to take advantage of his position as deputy sheriff. For example, to avoid passing through a metal detector while entering the Volusia County Courthouse where Mr. Harich was tried, Mr. Pearl presented his deputy sheriff's card to court personnel (T. 285, 295). Mr. Pearl presented his deputy card when he was questioned at a sporting goods store about why he was carrying a concealed weapon (T. 285). In addition, another witness testified that Mr. Pearl assisted the Marion County Sheriff in serving process or apprehending a felon (Quarles dep. 32-34). Mr. Pearl disputed this testimony; he claimed to have only a hazy recollection of the incident, but that his best

recollection was that this occurred prior to his affiliation with the Sheriff's office, although he conceded that on earlier occasions he had told people otherwise (T. 291; 391-93). The Marion County Sheriff's Department benefitted as well as the affiliation enhanced its prestige. As Sheriff Moreland testified, Mr. Pearl is "a reputable attorney" and the Marion County Sheriff's Department was proud to have "a person of Mr. Pearl's caliber as a special deputy sheriff" because if "something serious happened and I needed the power of the County . . . we would simply call on him" (Moreland dep. 40-42).

Besides his commission in Marion County, Mr. Pearl also carried deputy sheriff cards for Volusia and Lake Counties (T. 298). These cards were bestowed as a token of friendship by the sheriffs of those counties (T. 280). In contrast to the Marion County commission, the Volusia and Lake County commissions did not comply with formal procedures (such as approval by the County Commissioners), required no oath, conferred no privileges (such as the right to carry a concealed weapon), and entailed no obligations (such as payment of insurance or bond premiums) (T. 275).

By the time of Mr. Harich's trial in 1982, Mr. Pearl's affiliation with the Marion County Sheriff's office was apparently known by judges and some lawyers in Volusia County, though not among the defendants Mr. Pearl represented (T. 58). The head of the Volusia County Public Defender's office, Jim Gibson, knew about Mr. Pearl's affiliation with the Marion County Sheriff's office (Gibson dep. 18). The prosecutor who prosecuted Mr. Harich, Horace Smith, likewise had some understanding of Mr.

Pearl's affiliation (T. 352). No one, however, told Mr. Harich about Mr. Pearl's position with the Marion County Sheriff's office or with the other offices (T. **617-18**). Neither Mr. Pearl nor anyone else ever informed Mr. Harich.

Judge Uriel Blount, who presided over Mr. Harich's trial and sentenced him to death, also knew that Mr. Pearl was "some sort of law enforcement official" (T.58). Judge Blount, however, did not inquire into what sort of law enforcement official Mr. Pearl was. The trial judge thought, erroneously, that Mr. Pearl's Marion County appointment was the kind of deputy sheriff "appointed on an honorary basis routinely by sheriffs when they vote for the sheriffs that are elected" **(T.70)**. Judge Blount did not hold any sort of hearing to determine the extent of Mr. Pearl's law enforcement affiliations and whether they presented a conflict of interest with Mr. Pearl's obligations to his client, Mr. Harich (T. **66**). And Judge Blount never informed Mr. Harich of Mr. Pearl's situation, nor inquired whether Mr. Harich had any objection.

Indeed, Mr. Pearl's affiliation with these sheriffs' offices did not come to the attention of Mr. Harich until **1988**, when a private investigator retained by Mr. Harich's post-conviction counsel heard about it through an inadvertent remark by another assistant public defender (T. **679**). Even though Mr. Pearl had been interviewed on several earlier occasions through the years by Mr. Harich's post-conviction counsel, he had never informed them of his affiliations **(T. 618, 676, 677, 679)**. Only when he was confronted with this information did Mr. Pearl admit to his

affiliation with the Marion County Sheriff's office; Mr. Pearl then explained that he had not brought the Marion County commission to Mr. Harich's attention because Mr. Harich would have demanded alternative counsel (T. **679**).

Mr. Pearl's opinion was accurate. At the evidentiary hearing Mr. Harich testified that he had never been told about Mr. Pearl's affiliations, and, had he been told, he would have demanded new counsel (T. **346, 349-50**). As Mr. Harich put it, "I wanted somebody behind me that didn't have any affiliations with law enforcement or any sheriff's departments" (T. **350**).

At the same evidentiary hearing, Mr. Pearl testified that he had not informed his client of the conflict of interest because he deemed it to be "totally irrelevant to my function as his defense lawyer" because "I [do not] owe to any client a curriculum vitae and a biography when I am appointed to represent him" (T. **300-01**). Despite the certified statement in his original application that he applied to become a deputy sheriff, in part, so that "when called I may participate in protection of persons and property in my community," Mr. Pearl now claimed that his sole motivation for being a law enforcement officer was to enable him to carry a concealed weapon (T. **539, 248**).

However, after Mr. Pearl had received a "gun-toters" permit in **1989**, and therefore no longer needed his affiliation with the Sheriff to carry a pistol, he nonetheless retained his position as deputy sheriff. Only when his boss, Jim Gibson, made it clear to him that he would lose his job as an assistant public defender if he continued his affiliation with the Marion County Sheriff's office, did Mr. Pearl resign (T. **417; 418; 443**). This occurred

in May, **1989**, after this Court remanded Mr. Harich's appeal to the Circuit Court for an evidentiary hearing on the conflict of interest claim **(T. 445)**.

Defense Counsel's Actual Conflict at Trial

Mr. Pearl's position and affiliation with law enforcement affected his thinking as a lawyer. His attitudes wove their way into his performance at trial, during which Mr. Pearl not only refused to challenge law enforcement officers, but instead vouched for their credibility, applauded their honesty and excused inconsistencies in their testimony **(See, e.g., R. 372, R. 606, R. 639, R. 761, R. 762)**. Mr. Pearl defended his performance in this regard, and in so doing made clear that his law enforcement affiliations affected his views. He explained that in his view attacking or contradicting the accounts of the law enforcement officers he knew would have been unproductive since, as Mr. Pearl put it, "[t]he law enforcement officers that I know have all been dedicated, professional, truthful people" and juries "are very conservative and they love the flag and you don't attack a police officer without losing your credibility, unless you've got it locked" **(T. 324)**. Mr. Pearl does not challenge the credibility of law enforcement officers: he said that he never used a defense premised on fabricated testimony or planted evidence because, he claimed, he "never had a case in which it appeared . . . that there was any basis that there was a claim that the defendant had been framed by police officers" (T. **323)**. As for his conduct with respect to law enforcement officers at the Harich trial, Mr. Pearl admitted that he had

little recollection of that case and could shed little light on his specific strategy (T. 318).

SUMMARY OF ARGUMENT

I. Appellant was denied his right to the effective assistance of counsel because his trial counsel owed conflicting duties to two masters: on the one hand, he was a deputy sheriff in Marion County, where he swore to uphold law enforcement interests, and on the other hand, he was defense counsel in a capital case, where he owed defendant an undivided duty of loyalty. The Court's finding that Mr. Pearl was an "honorary" deputy sheriff is belied by every fact in the record; "honorary" sheriffs do not file formal applications, are not approved by county Commissioners, do not take oaths of office, do not carry badges and, most tellingly, do not carry concealed weapons. Mr. Pearl's undisclosed conflict of interest is a **per se** violation of the sixth amendment to the United States Constitution and, a violation of the Florida Constitution, statutes, common law and attorney disciplinary rules, all of which require that Appellant's conviction and sentence be vacated.

11. Even if Mr. Pearl were an "honorary" deputy sheriff, as the court below believed, he still had a conflict of interest when he represented Mr. Harich. Because Mr. Pearl held his commission at the will of the Sheriff, he could be terminated at any time and could thus forfeit, at the whim of the Sheriff, the gun that was a matter of life or death to him, and without which he felt, in his words, "naked" and "incomplete." In addition, by holding a commission as a deputy sheriff while in fact being only an "honorary" one, Mr. Pearl was subject to criminal prosecution

for illegal possession of a concealed weapon, impersonating a sheriff, and other crimes, and thus he could not represent his client vigorously in opposition to law enforcement, because of the risk of prosecution. As numerous cases have held, this conflict of interest -- i.e., fear of losing an important benefit or risk of criminal prosecution -- is itself a per se violation of the right to effective assistance of counsel and mandates that Appellant's conviction and sentence be vacated.

III. Even if the per se rule does not apply, defense counsel's conflict of interest violates the sixth amendment because it actually affected what he did at the trial. It is clear that Mr. Pearl's affiliation with law enforcement made him reluctant to challenge the credibility of police officers. This is manifested by counsel's repeated bolstering of law enforcement testimony in contradiction to his own client's testimony, vouching for the honesty of law enforcement personnel, and failing to cross-examine law enforcement personnel vigorously or at all. A criminal defendant, particularly in a capital case, is entitled to an attorney who will have absolute loyalty solely to the client. Mr. Pearl's status affected him, and Mr. Harich's capital conviction and death sentence therefore violate the sixth and eighth amendments.

IV. The trial court's failure to hold an inquiry or hearing on the conflict question prior to trial -- despite the judge's admission that he knew Mr. Pearl was "some sort of law enforcement officer" -- and to afford Appellant the opportunity either to object, request or obtain substitute counsel, or to

proceed pro **se** also violated Florida law and the sixth and eighth amendments. Had Appellant been informed of Mr. Pearl's law enforcement affiliations, he would have demanded new counsel or could have proceeded pro **se**. Because the court did not hold a hearing, or make any inquiry, Appellant was denied these rights, mandating that the conviction and sentence be vacated.

V. The Circuit Court's ruling that defendant's claim is procedurally barred is erroneous as a matter of law and fact. Contrary to the lower court ruling, Mr. Harich did not waive his claim simply because some judges and lawyers in Volusia County may have known about defense counsel's conflict when it is undisputed that no one ever told the defendant and that neither the defendant nor any of his post-conviction counsel had reason to suspect the conflict. Mr. Pearl was interviewed throughout the years and never disclosed anything concerning his law enforcement affiliations to Mr. Harich's counsel until 1989, the Rule 3.850 motion presenting this issue was filed immediately after counsel learned of it.

VI. The 3.850 hearing in this case did not comport with rudimentary due process. The repeated attempts by the lower court to intimidate counsel, the precipitous scheduling of the hearing by the court when it still lacked jurisdiction, the denial of Appellant's right to take discovery before the hearing so that counsel could adequately prepare, the denial of Appellant's right to call witnesses, and the flat out denial of Appellant's right to counsel on the final day of the hearing are examples of the improprieties which took place below. This case

should therefore be remanded to another court, where defendant will be given a full and fair opportunity to litigate his claims.

ARGUMENT

ARGUMENT I

ROY ALLEN HARICH'S COURT-APPOINTED COUNSEL WAS A DULY CONSTITUTED DEPUTY SHERIFF IN MARION COUNTY DURING THE ENTIRE COURSE OF HIS REPRESENTATION OF MR. HARICH, BUT MR. HARICH WAS NEVER INFORMED, AND THE UNDISCLOSED CONFLICT OF INTEREST REQUIRES THAT APPELLANT'S CAPITAL CONVICTION AND SENTENCE BE VACATED.

A. MR. PEARL WAS A DULY CONSTITUTED DEPUTY SHERIFF IN MARION COUNTY

Besides Mr. Pearl's say-so, there is absolutely nothing in the record supporting the lower court's conclusion that he was an "honorary" deputy sheriff. In fact, the undisputed documentary evidence and all the facts presented to the lower court prove just the contrary: that at the time of Mr. Harich's trial, Mr. Pearl was a regular deputy sheriff with the Marion County Sheriff's office. Mr. Pearl applied for the position of special deputy sheriff, not **"honorary"** sheriff, in 1970. He completed the same application that everyone else who applied for that position completed. He said that he would report for duty "when summoned" and to demonstrate that he would be able to do so he revealed his extensive background in law enforcement: both his practical experience and training. Contrary to his testimony now, when he applied for the position he was forthcoming about his motivation -- "to protect persons and property," and not just to carry a gun (as Mr. Pearl now argues). Mr. Pearl certified that this representation was "true and complete."

Mr. Pearl's application followed the same route as any other deputy or special deputy sheriff application: it was approved by

the Sheriff and forwarded to the County Commissioners for their approval. After the County Commissioners approved his application, Mr. Pearl, like any other deputy or special deputy, took the oath: he swore that he was "duly qualified to hold office under the Constitution of the State of Florida and that he would well and faithfully perform the duties of special deputy . . . ." Nor did his Marion County commission stop at the formalities of office. Mr. Pearl was issued the same identification card as any other deputy or special deputy. He carried a concealed handgun like any other deputy or special deputy. He had a badge like any other deputy or special deputy. He was insured and bonded like any other deputy or special deputy. And several times, when necessary, he used his status in order to obtain the things he wanted.

That the Marion County commission was genuine is clearly demonstrated by comparing it to the Volusia and Lake County commissions, which can be characterized as honorary. Unlike the Marion County commission, those commissions were given as an **"honor"** or "political favor" to infants, television personalities, dignitaries and the like. Unlike Mr. Pearl's Marion County appointment, none of these "honorary deputies" had to complete an application, demonstrate a law enforcement background, be approved by County Commissioners or take an oath. None of these truly **"honorary"** positions permitted the honorary deputy sheriff to carry a concealed handgun, wear a badge or carry a regular deputy sheriff's identification. None of these truly "honorary" positions required the honorary deputy sheriff

to pay insurance premiums each year, maintain a bond, renew the application every four years or take a regular oath of office.

The Lake County commission was "honorary": no procedures were followed to obtain the commission and it conferred no benefits. The Volusia County commission was "honorary": it, too, followed no procedures and conferred no benefits. The Marion County commission was anything but honorary. That commission existed pursuant to statute, was offered pursuant to formal procedures, including approval by the County Commissioners, and demanded specific obligations, such as the payment of bond and insurance premiums. Most tellingly, the Marion County Commission permitted Mr. Pearl to carry a concealed weapon -- something he had absolutely no right to do unless he was a bona fide deputy sheriff. Mr. Pearl admitted as much when he stated, "I had no other authority to carry a concealed firearm" (T. 284). Mr. Pearl had to take action, as a deputy, when called. The court's ruling that Mr. Pearl was an "honorary" deputy sheriff in Marion County is wrong, is supported by no fact in the record, and is conclusively rebutted by every pertinent fact in the record.

The nub of the court's ruling -- that Mr. Pearl was not a regular deputy because he was not certified as a Florida law enforcement officer (T. 610) -- fails to recognize that special deputy sheriffs need not be certified, and can nevertheless perform significant law enforcement duties. For example, a special deputy who is not certified must, when called, "aid in preserving law and order." Fla. Stat. Ann. sec. 30.09(4)(d). Moreover, a special deputy, even though not certified, must

"raise the power of the county . . ., to assist in quelling a riot or any breach of the peace, when ordered by the sheriff . . . ." Id. sec. 30.09(4)(f).[3] Preserving law and order and raising the power of the county are powers which devolved upon defense counsel and which have real, not imagined, significance in Florida's law enforcement scheme. Thus, whether or not Mr. Pearl was certified, he had law enforcement duties and obligations pursuant to statute.

That Mr. Pearl may not have used these powers is of no consequence to conflict analysis. As the Missouri Supreme Court explained in State v. Dinwiddie, 237 S.W.2d 179, 183 (Mo. 1951) (emphasis added):

> It could not be contended, in any view that may be taken, that it would be proper for the sheriff himself to serve as defense counsel. And for the same reason, the appointment of the sheriff's deputy, even if inactive, would not be allowed to stand over the objection of the prisoner.

Here, Mr. Harich was never even given the opportunity to object. Moreover, the State ignores the logical fallacy in its argument that Mr. Pearl was not a real deputy sheriff. If true Mr. Pearl, as well as Sheriffs Moreland and Willis, would be implicated in a web of criminal conduct, including:

1) Carrying a concealed firearm: which, under Fla. Stat. Ann. sec. 790.01(2), is a felony in the third degree. Carrying such a concealed weapon is defined by statute to be "a breach of

---

[3] Although section 30.09(4) appears in the statute as an "exception" section to general bond and surety requirements of sheriffs and their deputies, this Court has held that the section delineates the required and permitted duties of special deputies. Ramer v. State, 530 So. 2d 915 (Fla. 1988).

peace," which subjects the felon to arrest without a warrant. Id. sec. 790.02. Further, carrying a pistol without a license is a second degree misdemeanor.[4] Id. sec. 790.05.

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

3) Impersonating a law enforcement officer: when Mr. Pearl was stopped by law enforcement authorities and asked why he was carrying a concealed weapon in violation of Florida law, he presented his deputy sheriff's card and claimed to be one (T. 285). Indeed, every time Mr. Pearl carried his concealed weapon or deputy sheriff's identification, he was impersonating a sheriff. This violates sec. 843.08 of the Florida statutes, providing that "[w]hoever falsely assumes or pretends to be a sheriff, . . . deputy sheriff . . . and takes upon himself to act as such . . . shall be deemed guilty of a misdemeanor of the first degree . . . ."

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

---

[4]The statute explicitly excludes sheriffs and deputy sheriffs. Sec. 790.05.

Certainly, if either Howard Pearl or Sheriffs Willis or Moreland had been charged with these crimes, their defense would have been that Mr. Pearl was in fact a deputy sheriff, and no doubt they would have prevailed since Mr. Pearl had filled out the necessary application, been approved by the necessary county authorities, taken the necessary oaths, carried the necessary bond and insurance and so on. The court's conclusion that Mr. Pearl was merely an "honorary" deputy sheriff means that he had no right to carry a gun and would lead to the unreasonable conclusion that Mr. Pearl and Sheriffs Moreland and Willis were participating in numerous felonies, and had conspired to commit them.

Such a finding of criminality cannot stand on this record, when Mr. Pearl and the sheriff's department took every step to assure that Mr. Pearl completed all requirements necessary for actual appointment as a duly constituted deputy sheriff. Unless this Court is prepared to find that a fraud was committed, the lower court's conclusion that Mr. Pearl's position was "honorary" is unsupported.

B. BY REPRESENTING APPELLANT WHILE SERVING AS AN UNDISCLOSED DEPUTY SHERIFF, MR. PEARL VIOLATED THE FLORIDA CONSTITUTION, STATUTES AND COMMON LAW

Once it is established that Mr. Pearl is a duly commissioned special deputy, Mr. Pearl could not serve as Mr. Harich's defense counsel. The Constitution, statutes and, common law of Florida all prohibited Mr. Pearl from simultaneously serving as a law enforcement officer and public defender. At a minimum, Mr. Harich was entitled to know about the conflict and to the opportunity to object, but no one told him and no one gave him

this opportunity.

First, Mr. Pearl's dual responsibilities violated Section 5(a), Art. II of the Florida Constitution, which provides that:

> No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein.

The Florida Attorney General has squarely construed this provision to encompass "auxiliary" police officers. See, e.g., Fla. Atty. Gen. Op. 077-63 (1977) (auxiliary police officer is an "officer" within the purview of the constitutional provision against dual office holding); Fla. Atty. Gen. Op. 86-84 (1986) (same). Since public defenders are state officers as well, State ex rel. Smith v. Jorandby, 498 So. 2d 948, 949 (Fla. 1986), Mr. Pearl's simultaneous service as a law enforcement officer violated Section 5(a), Article II of the Florida Constitution.

Second, Mr. Pearl's status as both an assistant public defender and special deputy sheriff also violated sec. 454.18 of the Florida Statutes. That statute plainly states, in no uncertain terms, that "No sheriff . . . or deputy . . . shall practice [law] in this state. . . ." Mr. Pearl clearly violated this statute when he represented Mr. Harich while commissioned as a special deputy sheriff.

Third, defense counsel's divided responsibilities violated the common law doctrine of incompatibility, which prohibits defense counsel's incompatible responsibilities here. The doctrine of incompatibility holds that:

> [i]f the duties of the two offices are such that when "placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to

declare them legally incompatible."

Gryzik v. State, 380 So. 2d 1102, 1104 (Fla. App. 1980)(citation omitted).

As a public defender, Mr. Pearl owed Mr. Harich an undivided duty of loyalty. As a deputy sheriff, however, he had a duty to the Sheriff. Such inconsistent obligations "might disserve the public interests," and "might or will conflict" -- thus violating the rule against incompatibility. Such inconsistent obligations also violate the constitutional and statutory provisions cited above -- which are, in effect, codifications of the common law rule.

The application of the incompatibility doctrine to the facts of a case such as this was discussed in detail by the California Supreme Court in People v. Rhodes, 524 P.2d 363 (Cal. 1974). There the court overturned the conviction of a defendant who had been represented by a city attorney with responsibility for prosecuting violations of city ordinances.

The Court noted that city police officers are the principal witnesses used by a city attorney in prosecuting violations of municipal ordinances. This might cause a city attorney acting as defense counsel to conduct a less than whole-hearted cross-examination: "He might be reluctant to engage in an exhaustive or abrasive cross-examination of such officers even though such might well be required." Id. at 365. Similarly, the city attorney might "dilute" his criticism of police officers:

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

Id. at 365.

The Court explained that conflicting representation was forbidden so that the criminal justice system could maintain a proper appearance of impartiality:

> It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as is possible, the appearance of impropriety.

Id. at 367.

As for any contention in this case that Mr. Pearl's commission was in Marion, not Volusia, County, the California Supreme Court rejected this very argument. The Court pointed out that:

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

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

Other state court decisions are in accord with the California Supreme Court's approach and have found an impermissible conflict between simultaneous law enforcement and criminal defense functions.[5] In doing so, the courts have rejected the argument that the "inactive" status of a deputy

---

[5] See also People v. Washinston, 461 N.E.2d 393, 397 (Ill. 1984)(defense attorney served as prosecutor in adjoining county); People v. Fife, 392 N.E.2d 1345, 1346 (Ill. 1979)(defense counsel was special assistant attorney general); State v. Crockett, 419 S.W.2d 22, 29 (Mo. 1967)(trial counsel was assistant attorney general).

sheriff is relevant since the duty of loyalty owed the Sheriff is not dependent upon how active the deputy is. See e.g., State v. Dinwiddie, 237 S.W. 2d 179, 183 (Mo. 1951)("It could not be contended, in any view that may be taken, that it would be proper for the sheriff himself to serve as defense counsel. And for the same reason, the appointment of the sheriff's deputy, even if inactive, would not be allowed to stand over the objection of the prisoner." (emphasis added)).

Without discussion, reasons or citation to any authority, the court below simply rejected sub silentio Appellant's claims that Mr. Pearl's dual status violated the Florida Constitution, statutes and common law. That holding was in error and should be rejected as a matter of law.

C. MR. PEARL'S UNDISCLOSED DUAL STATUS VIOLATED THIS COURT'S DISCIPLINARY RULES

Mr. Pearl's representation of Mr. Harich while commissioned as a law enforcement officer also violated several of this Court's disciplinary rules, including DR5-101(A), which prohibits conflicting employment except upon consent of the client after full disclosure, and DR5-105, which mandates that a "lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client . . . is likely to be adversely affected . . . ."[6]

---

[6]Subsequent to the representation at issue in this case, Florida enacted the Rules Regulating The Florida Bar. Rule 4-1.7(b) states:

> A lawyer shall not represent a client if the lawyers exercise of independent professional judgment in the

(footnote continued on following page)

Various state bar associations have considered, and prohibited, conflicts similar to the one at hand. A recent New Jersey ethics opinion, for example, prohibits a police officer who had been recently admitted to the bar from representing a defendant charged with violating the local health code, a charge that was penal in nature. New Jersey Opinion 610 (1988) (National Reporter on Legal Ethics). Similarly, a law firm employing an attorney who is a police officer may not represent criminal defendants in the county where the police officer is employed or nearby. Connecticut Informal Opinion 85-1 (1985). A lawyer representing a county in civil matters may not also represent criminal defendants if his civil representation of the county requires collaboration with the county sheriff or the law enforcement authorities of the county. Tennessee Formal Ethics Opinion 83-F-53 (1983). A lawyer may not represent criminal defendants in cases in which the sheriff or officers of the sheriff's department are witnesses for the prosecution while at the same time representing the sheriff in defense of an alleged civil rights violation. Tennessee Formal Ethics Opinion 83-F-56

(footnote continued from previous page)

> representation of that client may be materially limited by . . . the lawyers's own interest.

The Comment to this Rule states that:

> Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken. in which event the representation should be declined . . . . Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest.

(1983). A lawyer may not represent a criminal defendant when the lawyer's spouse is a sheriff, unless the lawyer advises his client of the possible effect on his professional judgment and the client consents to the representation. Wisconsin Formal Ethics Opinion E-85-2 (1985).

Without discussion, reasons or citation to any authority, the court below rejected **sub silentio** Appellant's claim that Mr. Pearl's conflict of interest violated the disciplinary rules promulgated by this Court. This holding is in error and should be rejected as a matter of law.

D. MR. PEARL'S UNDISCLOSED DUAL STATUS IS A PER SE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL, AND CONTRAVENED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Mr. Pearl's dual position also violates the sixth amendment, which guarantees a criminal defendant the assistance of counsel. "The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations." People v. Washinston, 461 N.E.2d 393, 396 (Ill. 1984), cert. denied, 469 U.S. 1022 (1984). Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial . . . [its] infraction can never be treated as harmless error . . . . [W]hen a defendant is deprived of the presence and assistance of his attorney . . . in, at least, the prosecution of a capital offense, reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 489 (1978)(citations omitted). After all, "[c]ounsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid

conflicts of interest." Strickland v. Washington, 466 U.S. 668, 688 (1984), citing Cuyler v. Sullivan, 446 U.S. 335, 346 (1980).

Once an actual conflict is demonstrated, there is no need to adduce proof that the "actual conflict of interest adversely affect[ed] counsel's performance or impair[ed] his client's defense." Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983). Instead, prejudice is presumed because:

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

Barham v. United States, 724 F.2d 1529, 1534 (11th Cir. 1984) (Wisdom, J., concurring)(emphasis added), cert. denied, 467 U.S. 1230 (1984).

Although conflicts of interest arise in a variety of contexts, courts have distinguished between those that are per se unlawful and those in which the defendant must show that the conflict "actually affected" counsel's performance. Allegations of conflict of interest in the context of a single lawyer representing multiple defendants, where the defendant fails to object at trial, are governed by the standard enunciated in Cuyler v. Sullivan, where the defendant must show that the conflict of interest "actually affected" the adequacy of his representation. 446 U.S. 335, 349 (1980). See also People v. Washinston, 461 N.E.2d at 397 ("[t]he approach in joint representation cases is different from the per se rule because, as was recognized in Cuyler 'a possible conflict inheres in

almost every instance of multiple representation.'").

On the other hand, some conflicts are so invariably pernicious, so without the possibility of any redeeming virtue that they are "always real, not simply possible, and . . . by [their] nature, [are] so threatening as to justify a presumption that the adequacy of representation was affected." United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984). In those kinds of conflicts, courts refrain from searching the record to determine what could have been done differently, and instead invoke a rule of **per se** illegality. See United States v. Cronic, 466 U.S. 648, 658 (1984) ("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"). The **per se** standard is invariably applied where, as here, an attorney conceals his divided loyalties in violation of statute or in other circumstances that do not support the presumption of undivided loyalty.7

'Numerous courts across the country impose a **per se** rule under similar circumstances. See, e.g., Solina v. United States, 709 F.2d 160, 167-69 (2d Cir. 1983) (invoking **per se** rule where defendant was represented by law school graduate who was not admitted to the bar); Zurita v. United States, 410 F.2d 477 (7th Cir. 1969) (remanding case for evidentiary hearing under per se standard where petitioner alleged that his attorney had business connections with the alleged robbed bank); Berry v. Gray, 155 F. Supp. 494, 497 (W.D. Ky. 1957) (applying per se rule of illegality where county attorney prohibited by statute from acting as counsel in any case in opposition to interest of county represented): People v. Washinuton, 461 N.E.2d 393 (Ill. 1982) (affirming reversal of conviction where defense counsel also served as part-time city prosecutor); State v. Crockett, 419 S.W.2d 22, 29 (Mo. 1967) (vacating conviction where defendant represented by assistant attorney general): People v. Fife, 392

(footnote continued on following page)

Mr. Pearl's dual position as public defender and special deputy sheriff violated Mr. Harich's sixth and eighth amendment rights to effective, conflict-free counsel in this capital case.[8] Because "once an actual conflict is shown, prejudice is presumed," Barham v. United States, supra, 724 F.2d at 1534, Mr. Harich's conviction must be vacated.

(footnote continued from previous page)

N.E.2d 1345 (Ill. 1979)(a special assistant attorney general handling only unemployment compensation cases for the state on a part-time basis could not serve simultaneously as defense counsel); People v. Kester, 361 N.E.2d 569 (Ill. 1977)(former assistant state's attorney who had made appearances on the state's behalf in defendant's prosecution improperly switched to the defense side); Kelly v. State, 640 S.W.2d 605 (Tex. Crim. App. 1982)(invoking per se rule where defendant represented by municipal court prosecutor); Howerton v. State, 640 P.2d 566, 567 (Okla. Crim. App. 1982)(invoking per se rule where defense attorney doubled as a part time district attorney in an unidentified county since a part-time district attorney "may not be appointed to defend persons either within or outside the jurisdiction in which he serves as assistant district attorney"); Skelton v. State, 672 P.2d 671, 671 (Okla. Crim. App. 1983) (invoking per se rule where defendant represented at trial by same person who prosecuted at arraignment and preliminary hearing as an assistant district attorney since "[t]he public has a right to absolute confidence in the integrity and impartiality of the administration of justice")(quoting Howerton, 640 P.2d at 568); Worthen v. State, 715 P.2d 81 (Okla. Crim. App. 1986)(invoking per se rule and reversing conviction where defense counsel had previously served as an assistant district attorney); United States ex rel. Miller v. Meyers, 253 F. Supp. 55, 57 (E.D. Pa. 1966)(invoking per se rule where defense counsel represented victims of the alleged crime in an unrelated civil suit while defending the accused without informing him of the dual representation).

[8]The eighth amendment requires heightened due process protections in capital cases. See Beck v. Alabama, 447 U.S. 625 (1980). Although Mr. Harich's claim is amply sufficient to warrant relief under the sixth amendment, the eighth amendment's mandate of heightened reliability in capital proceedings was violated because of the undisclosed conflict of interest in this capital case.

E. DEFENSE COUNSEL'S CONFLICT OF INTEREST VIOLATES THE FLORIDA CONSTITUTION

Mr. Pearl's representation of Mr. Harich while serving as a law enforcement officer also violates the right to effective assistance of counsel as envisioned by the Florida Constitution. Article I, Section 16 of the Florida Constitution plainly entitles criminal defendants to the undivided loyalty of counsel. See Davis v. State, 461 So. 2d 291, 294 (Fla. App. 1985).

The Florida Constitution's right to counsel is greater than that accorded under the federal constitution. See State v. Douse, 448 So. 2d 1184, 1185 (Fla. App. 1984). Although we have found no Florida conflict of interest claim where, as here, defense counsel's conflicting loyalties violates other provisions of the Constitution,[9] as well as statutory,[10] common law,[11] and disciplinary rule proscriptions,[12] we respectfully submit that this Court should follow other state and federal courts in adopting a **per se** rule of illegality under Article I Section 16 of Florida's Constitution.[13]

---

[9]See discussion of Fla. Const. art. 11, sec. 5(a) at pp. 22.

[10]See discussion of Fla. Stat. sec. 454.18 at pp. 22.

[11]See discussion of doctrine of incompatibility, supra.

[12]See discussion of Rules Regulating the Florida Bar-Rule 4-1.7(b), DR5-101(A) and DR5-105, supra.

[13]Florida courts can interpret the Florida Constitution more expansively than the federal constitution and thus accord individuals greater protections than accorded under the federal constitution. See, e.g., State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981)(Florida's Constitution provides greater rights

(footnote continued on following page)

ARGUMENT II

EVEN IF MR. PEARL WERE AN HONORARY DEPUTY SHERIFF, HE HAD A CONFLICT OF INTEREST WHEN HE REPRESENTED MR. HARICH BECAUSE HE WAS BEHOLDEN TO THE SHERIFF FOR HIS GUN AND RISKED CRIMINAL PROSECUTION IF HE WERE DISCOVERED.

The court below ignored the fact that even if one were to believe Mr. Pearl's explanation that he never really meant to be a sheriff but instead did a lot of contrary swearing ***so*** as to carry a concealed weapon between counties without being disturbed by the police, he had a conflict on two other grounds: he was beholden to the Marion County Sheriff for that privilege and was himself committing a crime.

First, even if Mr. Pearl were an honorary deputy sheriff at the time of ***Mr. Harich's trial, he was, all the same, just as*** beholden to the Sheriff's office for his right to carry a concealed weapon. That right was totally dependent on the largesse of the Sheriff: the commission was "at will" and could be revoked at any time. **See** Wilkerson v. Butterworth, 492 So. 2d 1169, 1170 (Fla. 4th DCA 1986); Szell v. Lamar, 414 So. 2d 276, 277 (Fla. 5th DCA 1982). Thus, while defending a criminal defendant, Mr. Pearl knew that if he questioned, cross-examined challenged, or cast doubt upon the police officers with too much vigor, he ran the risk that the Marion County Sheriff's Office

---

(footnote continued from previous page)

against governmental intrusions than federal constitution); Bova v. State, 410 So. 2d 1343, 1344 (Fla. **App.** 1982)(Florida's Constitution accords criminal defendants greater right to counsel than federal constitution); Winfield v. Division of Pari-Mutual Wagering, 477 So. 2d 544, 548 (Fla. 1985)(Florida's Constitution entitles Florida citizens to greater rights to privacy than federal constitution).

could strip him of his gun at any time and without any warning. Such a conflict cannot be squared with the sixth amendment's right to undivided loyalty, particularly given the eighth amendment's requirement of heightened reliability in capital proceedings. Cf. Beck v. Alabama, 447 U.S. 625 (1980).

The carrying of a concealed weapon was not simply a convenience to Mr. Pearl. He testified that carrying a gun was a matter of life and death to him, because his life had been threatened (T. 378), and that without a gun he felt "naked" or "incomplete" (T. 384). Hence Mr. Pearl was at the mercy of the Sheriff's office for something which was of the utmost importance to him. And as Professor Monroe Freedman, an expert in legal ethics, attested, "[t]he ancient aphorism reminds us that 'gifts are hooks,' and gifts that are subject to revocation or termination -- like defense counsel's power to carry a gun -- have an especially potent grappling effect" (T. 624; 628).

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

Moreover, if Mr. Pearl were only an "honorary" sheriff, he was running the classic risk presented in the sixth amendment conflict of interest cases that impose a **per se** rule: that of an

attorney who is himself at risk of being criminally prosecuted. As set forth above, if, as Mr. Pearl now claims, he was not really a deputy sheriff, he was guilty of committing several crimes for which he might be prosecuted should he push any police officer too far, such as:

a. Illegally carrying a concealed firearm, a felony under Fla. Stat. Ann. sec. 790.01(2);

b. Impersonating a law enforcement officer, a misdemeanor under Fla. Stat. Ann. sec. 843.08;

c. Falsifying records, a felony under Fla. Stat. Ann. sec. 839.25;

d. Making false statements, a misdemeanor under Fla. Stat. Ann. sec. 817.03.

The courts regularly apply a per se rule of reversible error where, as here, defense counsel is in violation of the law and may be discovered if too vigorous a defense or cross-examination of law enforcement witnesses can lead the police officers who take the stand one day to investigate him the next day. Here, Mr. Pearl, whose job with the public defender included the duty to aggressively attack law enforcement witnesses testifying against his clients, particularly Mr. Harich, undertook that responsibility while at the same time having a personal interest in not pushing those law enforcement officers too far. Thus, the court in Morales v. State, 513 So. 2d 695 (Fla. App. 1987), applied a per se rule, albeit not stating it as such. In Morales, defense counsel decided not to introduce into evidence an exculpatory tape recording of his client because defense counsel himself had instructed the defendant to secretly tape the conversation in violation of Florida law. Id. at 696. The

dissent argued for a harmless error holding, but the majority reversed the conviction with no further inquiry into adverse effect. Id. at 695.

The approach of the Morales court is in full concert with another leading **per se** case, Solina v. United States, 709 F.2d 160, 167-69 (2d Cir. 1983)(Friendly, J.). The defendant there was competently represented by someone who (unbeknownst to defendant) was a law school graduate who had failed the bar examination but held himself out as a lawyer. The unlicensed practice of law violated the rules governing attorneys and subjected defense counsel to possible prosecution. The district court upheld the defendant's conviction because the defendant "had not been prejudiced by [defense counsel's] not being a licensed attorney. . . ." Id. at 161. The fact that defendant plainly suffered no prejudice from his unlicensed advocate was recognized by the Second Circuit, which explained:

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

Id. at 162. Nevertheless, the Second Circuit reversed defendant's conviction, holding that this was a **per se** violation of the sixth amendment. That court's reasoning, which is squarely applicable to this case, is that an individual acting as an attorney in violation of statute might fear that if he defended his client too vigorously it would draw attention to his failure to comply with the applicable laws and that he might be unmasked. The court explained:

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

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

In United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984), the Court of Appeals applied the Solina **per se** rule to a situation where defense counsel may have been implicated in the crime for which his client was on trial. The court reasoned:

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

Id. at 870.

Here, too, Mr. Pearl labored under a concern that his divided loyalties in violation of statute would be unmasked by a vigorous defense. A defense which strenuously challenged a police officer's credibility might have caused inquiry into Mr. Pearl's criminal status as a sham special deputy. And even if criminal prosecution did not ensue, it certainly could have resulted in the Sheriff's withdrawal of Mr. Pearl's privilege to

carry a concealed weapon or, as Mr. Pearl put it, would have stripped him "naked" of his right to carry a gun, thus rendering him "incomplete." Under these circumstances, "it is difficult to see how counsel conflicted in this way could impartially have given [defendant] advice." Cancilla, 725 F.2d at 870. The per se rule should govern, thus mandating a new trial.

ARGUMENT III

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

Even assuming that Cuyler v. Sullivan's (446 U.S. 335 (1980)) "actual effect" test controls,[14] rather than the per se rule, Appellant can richly show that counsel's status "actually affected'' his trial performance. For Mr. Pearl repeatedly bolstered, rather than attacked, key testimony by police officers, even when the necessary consequence of such bolstering was to imply that his own client was a liar. Mr. Pearl's implicit attacks on his own client's credibility cannot be justified by any reasonable trial strategy; it is one thing not to challenge the officer, quite another to state that the officer

---

[14] Under the "actual effect" test, Appellant need not prove "prejudice" pursuant to the Strickland v. Washinston analysis normally applicable to claims of ineffective assistance of counsel. "Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated the denial of the 'right to have the effective assistance of counsel.' Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980), quoting and discussing, Glasser v. United States, 315 U.S. 60, 76 (1942).

is telling the truth (and therefore your own client must be lying). Put in this light, Mr. Pearl's claim that he did not vigorously cross-examine law enforcement officers because "(t)he law enforcement officers that I know have all been dedicated, professional, truthful people" (emphasis added) can better be explained by his law enforcement affiliations than by the supposed unfailing perfection of every single member of the law enforcement community. And even if Mr. Pearl himself believed that all law enforcement officers were perfect, a belief which cannot but be ascribed to his law enforcement affiliations, his duty was to attack law enforcement witnesses if such would be in his client's interest. His conflict, however, inhibited a vigorous attack: it affected the way Mr. Pearl perceived the law enforcement witnesses and the decisions made based on those perceptions. In short, it affected his representation.

Turning to the specifics of Mr. Pearl's performance, the following exchanges can be explained by nothing other than Mr. Pearl's partial loyalty to law enforcement:

(a) During Mr. Pearl's rebuttal cross-examination of one of the investigating officers, Officer Wall, Mr. Pearl ~~bolstered~~ Mr. Wall's damaging testimony by personally vouching for the officer's credibility, thus squarely contradicting his own client's testimony that Officer Wall was lying. As Mr. Pearl gratuitously put it during cross-examination:

> I suggest to you, Sergeant Wall, not, please believe me, that I mean to offend you or that I mean that you are lying, because I know you too well for that. . . .

(R.*606*).

(b) Again, contradicting his own client, Mr. Pearl

reemphasized his personal faith in Officer Wall's reputation for honesty during closing argument:

> I am not going to suggest, for a minute, the good, honest police officer like Tommy Wall would come in here and tell you a lie. I don't mean that. I wouldn't suggest it. It would offend me to do it as much as it would offend you if I were to suggest it.

(R. **639).**[15]

(c) Similarly, during the sentencing phase of the trial, Mr. Pearl again contradicted his client by reinforcing Deputy Sheriff Burnsed's testimony that Mr. Harich had confessed to him where the murder weapon could be found. Deputy Burnsed admitted, however, that neither he, Investigator Vail, nor the Crime Scene Unit had been able to locate the weapons (R. **761).** Rather than attempting to impeach Deputy Burnsed on this basis, since it would be logical that if Mr. Harich had made the statement the weapon would have been found, Mr. Pearl instead suggested that the weapon was there, but that the officer had failed to find it:

> [I]t is entirely possible, isn't it, I mean, you admit the possibility that even though you searched the drainage ditch that ran along the road and did not find it, that it is, nevertheless, possible, that it was there and that it is there and that you just failed to find it?

(R. **762).** Deputy Burnsed admitted that it was possible.

(d) Officer Thomas Wall, one of the arresting officers, testified that Mr. Harich made a spontaneous statement at the time of his arrest, which Mr. Harich vehemently denied making.

---

[15] As Professor Freedman noted, "[t]he irony is that if the prosecutor had similarly asserted his personal opinion of the officer's credibility, the prosecutor would have committed a disciplinary offense. DR7-106(C)(4); ABA Standards for Criminal Justice 3-5.8." **(T.631).**

Despite Mr. Harich's trial testimony that he had left the victims at a convenience store unharmed, Officer Wall claimed that Mr. Harich admitted that he left the victims in the woods "laying back behind the van" (R. 370). Rather than casting doubt on Officer Wall's supposed decision not to have defendant acknowledge or sign the transcription of his alleged inconsistent statement and suggesting that the reason the statement was not signed was that defendant had never made it, Mr. Pearl gratuitously explained to the jury that Officer Wall was not carrying a recording instrument and therefore could not have recorded defendant's alleged statement (R. 372). Thus, defense counsel made Officer Wall's failure to have a signed statement seem as if it were entirely reasonable and standard operating procedure, to his client's detriment.

(e) Mr. Pearl did not cross-examine Officer Champion, who responded to the initial call reporting an incident on Jimmy Ann Drive, which fixed the time of the incident in contradiction to Mr. Harich's testimony.

(f) Mr. Pearl acceded to Officer Vail's request to see the full trial, rather than demanding Officer Vail's sequestration, despite the fact that Mr. Harich wanted him sequestered. This gave Officer Vail the opportunity, if he wanted it, to tailor his testimony to fit the testimony of other witnesses when he testified. Because defense counsel had not demanded that Officer Vail be sequestered, he was allowed to observe the trial testimony of Officer Wall and was then called as a witness to buttress Officer Wall's testimony that Appellant had admitted

leaving the victims in the woods.[16]

These failings were caused by Mr. Pearl's conflicting loyalties. His failure to cross-examine his fellow officers vigorously notwithstanding their very damaging testimony; his failure to independently investigate the facts rather than relying on law enforcement's investigation; his failure to develop mitigating evidence despite the availability of such evidence; and his laudatory comments about the police officers' honesty, when such necessarily meant that his own client was lying, are all actual effects of Mr. Pearl's conflicting loyalties.[17]

---

[16]Moreover, defense counsel's repeated ineffective performance with respect to other aspects of the trial is an actual effect of his loyalties to the interests of law enforcement over those of his client. His admission, contrary to fact, that defendant had been indicted for and convicted of sexual battery (R. 901-02), his failure to fully investigate and prepare mitigating evidence, his failures to object to constitutional errors, his failure to investigate the crime and properly prepare a defense, and his failure to attack the surviving victim's version of the alleged sexual misconduct were all "actual effects" of defense counsel's conflicting status as a law enforcement officer.

[17]As Professor Blau, a noted Florida psychologist, attested, it is likely that these failings flowed from the conflict between Mr. Pearl's status as a sheriff and a defense attorney. A person who has "[t]he classic indicia of commitment and involvement in law enforcement [which] are the badge, the gun, and the commission" is "clearly and strongly antagonistic to perpetrators of crimes" (T. 646). The identification with law enforcement results in certain firmly held beliefs, "such as the belief that those who are apprehended are probably guilty, that law enforcement officers are necessarily trustworthy, or that criminal rehabilitation is ineffective if not impossible . . . ." (T. 646). Professor Blau concluded that:

> A defense attorney who is so assigned and who is also associated with law enforcement in any way is likely to be in conflict between the assigned role of

(footnote continued on following page)

In sum, even if the Court were to apply the "actual effect" test, Appellant has demonstrated that counsel's divided loyalties had an "actual effect" on his performance. Mr. Harich's conviction and sentence should therefore be vacated.

ARGUMENT IV

THE TRIAL COURT'S FAILURE TO HOLD A HEARING AND TO AFFORD DEFENDANT THE OPPORTUNITY EITHER TO OBTAIN SUBSTITUTE, CONFLICT-FREE COUNSEL OR TO PROCEED PRO SE VIOLATED FLORIDA LAW AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The lower court also ignored the fact that the obligation to reveal such a potentially debilitating conflict to a criminal defendant does not devolve solely upon the conflicted attorney. Rather, where "the trial court knows, or reasonably should know, that a particular conflict exists, the court should initiate the inquiry." Davis v. State, 461 So. 2d 291, 295 (Fla. App. 1985); Wood v. Georgia, 450 U.S. 261, 272-73 (1981)(when the record demonstrates "that the possibility of a conflict of interest was sufficiently apparent . . . [the] court should hold a hearing to determine whether the conflict of interest . . . actually existed . . ."); Cuyler v. Sullivan, 446 U.S. 335, 347 (1980)(court must initiate inquiry if it "knows or reasonably should know that a particular conflict exists . . ."); United States v. Winkle, 722

(footnote continued from previous page)

> protagonist, protector of defendant's rights and liberties, and the individual's role as antagonist in his capacity as a deputy or special deputy sheriff. It is likely that an individual in such psychological conflict will not be able to render full, committed, satisfactory professional services to his or her client.

(T. 647-48).

F.2d 605, 611 (10th Cir. 1983)("where the trial judge knows or reasonably should know that a particular conflict exists, the court should itself initiate such an inquiry, even if defendant and his counsel do not make an objection raising the conflict question.").

In this case there is no question as to whether the trial judge reasonably could have or should have known about the conflict under which Mr. Pearl operated. The judge's testimony at the Rule 3.850 hearing was that he in fact knew that Mr. Pearl was some kind of sheriff, though he thought that the position was honorary. The Florida and federal cases cited above required the judge to conduct an inquiry and determine whether a conflict existed. Had the trial court found such a conflict, it could have appointed substitute counsel, eliminating the constitutional infirmity. In any event, it was the court's duty (like Mr. Pearl's) to inform Mr. Harich of the potential conflict and to give Mr. Harich the opportunity to object. Here, Mr. Harich never had that opportunity -- neither the court nor Mr. Pearl ever told him anything about it.

A separate, but related, line of case law demonstrates that the failure to hold the hearing deprives a defendant not only of the right to obtain substitute, conflict-free counsel, but additionally deprives the defendant of the right to decide to proceed pro se. Thus, in cases in which a defendant makes a pre-trial request to discharge court-appointed counsel, the trial judge is required to hold a hearing as to the reasons for the request. Williams v. State, 427 So. 2d 768 (Fla. App. 1983); Nelson v. State, 274 So. 2d 256 (Fla. App. 1973). If the court

finds that the reasons for the request for substitute counsel are valid, it must appoint substitute counsel. Id. If, on the other hand, the trial court finds no reasonable basis for appointment of a substitute counsel, it must advise the defendant of his or her right to self representation, which is guaranteed by the Constitution. Faretta v. California, 422 U.S. 806 (1975). See also Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988) (approving the Nelson procedure); Black v. State, 545 So. 2d 498, 499 (Fla. App. 1989); Smith v. State, 444 So. 2d 542, 545-46 (Fla. App. 1984)(reversing conviction for failure to inquire "into the defendant's ability to knowingly and intelligently make the choice of self-representation."); Chiles v. State, 454 So. 2d 726, 727 (Fla. App. 1984)(reversal for failure to hold hearing).

In this case, the defendant never asked for substitute counsel because his trial lawyer concealed the conflict from him. He further never had the opportunity to ask for substitute counsel because the trial judge failed to inform him of the potential conflict and hold a hearing. Surely a case of conflict concealment should be treated by this Court with no less magnitude than the above-cited cases where the defendant asked for substitute counsel. As these Florida cases have held, the trial court must conduct a hearing in order to properly preserve either the right to substitute counsel or the right to self-representation. Having not held such a hearing, the trial court in this case deprived the defendant of those rights, and violated the sixth and eighth amendments. This itself is a basis for vacating Mr. Harich's conviction and death sentence.

ARGUMENT V

BECAUSE APPELLANT'S CLAIM OF CONFLICT OF INTEREST IS BASED ON NEWLY DISCOVERED EVIDENCE WHICH COULD NOT HAVE BEEN KNOWN EARLIER, ALTHOUGH DUE DILIGENCE WAS EXERCISED EARLIER, IT IS NOT PROCEDURALLY BARRED.

Contrary to the lower court's ruling, this Court has already determined that Rule 3.850 does not bar Appellant's claim,[18] and even if this Court did not rule on the issue previously, there is ample reason to reject any purported procedural bar now. What the lower court ruled was that "the deputy status issue should and could have been discovered" by Mr. Harich because it was "common knowledge in the Volusia County legal system." What the lower court ignored was that Mr. Harich was not part of that circle of professionals -- judges, prosecutors and defense lawyers -- who, because of their longtime association with Mr. Pearl as members of the "Volusia County legal system," obtained the "common knowledge" that he was a deputy sheriff. Unless someone told Mr. Harich of the conflict -- and it is undisputed that nobody did -- Mr. Harich had no way of knowing that his lawyer was also a deputy sheriff.

Moreover, the record is clear that post-conviction counsel conducted a thorough investigation and exercised due diligence prior to filing both the first and second 3.850 motions. Mr.

---

[18] On appeal of the Circuit Court's order dated March 28, 1989, this Court concluded that "as a result of the unusual factual allegations in this case, it may be that this [conflict of interest] issue could not have been discovered previously through due diligence and that, as a consequence, our procedural default rule would be inapplicable." Harich v. State, 542 So. 2d 980, 981 (Fla. 1989). Accordingly, the order was vacated and the case remanded for an evidentiary hearing on the merits of the claim of conflict of interest.

Pearl was interviewed several times, and many topics were discussed. He never disclosed his sheriff's status until confronted (T. 676-79). Ther is nothing in this record which would have signalled the need for investigation into a potential conflict. Cf. Lightbourne V. Dugger, 549 So. 2d 1364, 1366 (Fla. 1989)(Finding that a claim of conflict involving the trial judge should have been brought earlier in a case in which there was some indication of the conflict in the record: "Significantly, Judge Swigert pointed out at a motion hearing which took place before the trial that he had previously represented the victim's father and noted that defense counsel had no objection to his presiding at the trial.). Contrary to the holding below, Rule 3.850 does not require the unreasonable: it does not impose upon an indigent defendant a duty to conduct a background investigation of his court-appointed counsel to ferret out potential sources of conflict, especially where, as here, nothing came to the defendant's attention which should have led him or his post-conviction counsel to suspect a conflict of interest, and where, as here, the duty is on the attorney (and, where a potential conflict is known, on the court) to disclose the conflict.

The disciplinary rules promulgated by the Supreme Court of Florida properly impose the burden of disclosure of conflicts of interest on the attorney, not on the criminal defendant, who would have no way of knowing.[19] The United States Supreme Court

[19] See D.R. 5-101(A) (prohibiting conflicting employment except upon the consent of the client after full disclosure).

has also held that the duty of disclosure is borne by the attorney. See Cuyler v. Sullivan, 446 U.S. 335, 346 (1979). Moreover, the trial court itself has a duty to initiate an inquiry where it knows or reasonably should know that a conflict exists.[20] Under the law of this Court, Appellant's claim is not barred. See Lightborne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989)(defendant was not barred by Rule 3.850 because he could not have ascertained through the exercise of due diligence improperly withheld information regarding a deal made with a witness for the prosecutors). If Rule 3.850 were construed to bar the claim, the rule, as applied to the facts of this case, would itself offend due process. See, e.g., Felder v. Casey, 487 U.S. 131 (1988); Davis v. Wechsler, 263 U.S. 22 (1923).[21]

The lower court, in effect, has ruled that because the judge, the prosecutor and trial counsel all knew of Mr. Pearl's deputy sheriff status -- but failed to divulge it -- Mr. Harich waived his claim. Rule 3.850 does not allow such a perverse result.

---

[20] See Cuyler, supra, 446 U.S. at 347; Wood v. Georgia, 450 U.S. 261, 272 (1981)(a possibility of conflict of interest can be sufficiently apparent to impose upon the court a duty to inquire further).

[21] As the United States Supreme Court explained in Reed v. Ross, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause for not earlier presenting a claim] requirement is met." 468 U.S. 1, 14 (1984). See also Amadeo v. Zant, 108 S. Ct. 1771, 1776 (1988)(quoting and applying the Reed v. Ross standard).

ARGUMENT VI

APPELLANT WAS DENIED DUE PROCESS OF LAW BECAUSE THE EVIDENTIARY HEARING WAS NOT A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIM OF CONFLICT OF INTEREST.

As this Court has repeatedly held, Rule 3.850 proceedings must be conducted in accordance with the dictates of due process. See Holland v. State, 503 So. 2d 1250 (Fla. 1987); Steinhorst v. State, 498 So. 2d 414 (Fla. 1986). In his 3.850 hearing, Appellant was denied due process by the repeated attempts of the Court and the State to intimidate his counsel, by the precipitous scheduling of the hearing by a court without jurisdiction, by the denial of his right to take discovery, by the denial of his right to the assistance of expert witnesses, by the denial of his right to recall Mr. Pearl as a witness and by the denial of his right to the assistance of counsel at the final day of the hearing.

From the start, the Court positioned itself as defendant's adversary with a duty to conclude the hearing as quickly as possible, make short shrift of defendant's claims and render an adverse decision. The theme of the June hearing, foreshadowed when Appellant filed his 3.850 motion last March, was that defendant and his "New York counsel" had pleaded a fraudulent theory to evade a lawful execution. Judge Blount devoted the bulk of the March hearing to an attack on defendant's counsel for supposedly, albeit irrelevantly and erroneously, being an agent of the news media (T. 8-9). The Court's decision to schedule the hearing before the mandate issued, rather than after jurisdiction vested in this Court, and within the sixty days allotted by this Court, deprived Appellant of access to compulsory process to obtain depositions and documents prior to the hearing so counsel

could adequately prepare.

By improperly holding counsel in contempt at the outset of the hearing, Judge Blount made it unmistakably clear that defens counsel themselves would be at risk during the hearing. That set the tone for the rest of the evidentiary hearing and made plain that the Seventh Judicial Circuit was Mr. Harich's adversary, not an impartial finder of fact. Judge Foxman, who was present during the entire "contempt proceeding" and allowed it to proceed even though he, not Judge Blount, had been appointed to conduct the hearing, also refused at the outset to permit Appellant to take discovery, and refused to quash the contempt citation.

The hearing itself bordered on the farcical. When Judge Blount was called as the first witness he used the witness stand as a platform to harangue Appellant's "New York counsel" (T. 58; **64; 69)**. Judge Foxman was unwilling or unable to restrain Judge Blount to the point where Judge Blount, while serving as a witness, was able to mockingly rule on defense counsel's objections before Judge Foxman could so do (T. 70).

Although Judge Foxman later permitted Appellant to depose only those witnesses who had not already testified, he denied defense counsel time to call expert witnesses, repeatedly refused to permit counsel to examine witnesses on relevant topics and refused to adjourn the final day of the hearing after defense counsel were fogged in at the Newark airport, and, as they notified the Court, were unable to attend that day. By doing so, the Court ousted Appellant's closing argument to a handwritten argument, while permitting the State to argue orally, thus

denying Appellant the right of rebuttal (T. 607). More significantly, Appellant was deprived of the opportunity to call witnesses on this day, something to which the court had previously agreed.

From the contempt hearing at the outset to the refusal to reschedule the final day of the hearing when defense counsel were fogged in at the Newark airport, the Seventh Judicial Circuit rode roughshod over procedural rights. This conduct prejudiced Appellant by denying him his right to depose witnesses and subpoena documents in advance of the hearing, seek the assistance of and present expert testimony, and recall Howard Pearl as a witness. The Court's order should, therefore, be vacated and the matter remanded to another court for an evidentiary hearing where Appellant is given a full and fair opportunity to litigate his claims.

CONCLUSION

For all of these reasons, Mr. Harich's capital conviction and death sentence should be vacated and a new trial afforded at which Mr. Harich's right to conflict-free representation shall be accorded. Short of that, this case should be remanded to another court, where Mr. Harich will be given a full and fair opportunity to litigate his claims.

Respectfully submitted,

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE

LARRY HELM SPALDING
Capital Collateral
Representative
Florida Bar No. 0125540

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER

ALLAN M. PEPPER
STEVEN GLICKSTEIN
Florida Bar No. 0223281
JOHN D. CHAPMAN
Admitted Pro Hac Vice

BILLY H. NOLAS
Chief Assistant CCR
Florida Bar No. 0794351

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

STANLEY N. ALPERT
Florida Bar No. 0716073
SUZANNE M. JAFFE

425 Park Avenue
New York, New York 10022
(212) 836-8000

By: Billy H. Nolas (SK) for all counsel of record
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Margene Roper, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 11th day of February, 1990.

Billy H. Nolas (SK)
Attorney