IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-121
LT No. 01-1977-CF232-A

STEVEN TODD BOOKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

1. Procedural History

On December 2, 1977, Appellant was indicted for the November 9, 1977 murder, sexual battery, and burglary of Lorine Demoss Harmon. (PCR. 001) Subsequently, on June 21, 1978, a jury found Appellant guilty on all three counts and, in a penalty phase proceeding, recommended that Appellant be put to death by a 9 to 3 majority. Id.

On direct appeal, the Florida Supreme Court affirmed the convictions and sentences. Booker v. State, 397 So. 2d, 910 (Fla. 1981) The U.S. Supreme Court denied Mr. Booker's Petition for Writ of Certiorari. Booker v. Florida, 454 U.S. 957 (1981) Subsequently, in the initial post-conviction proceedings, the Court of Appeals affirmed the district court's holding that Hitchcock entitled Mr. Booker to a new penalty phase trial. Booker v. Dugger, 922 F 2d 633 (11th Cir. 1991) Cert. Denied, 502 U.S. 900 (1991); relying on Hitchcock v. Dugger, 381 U.S. 393 (1987).

While Mr. Booker's new penalty phase trial was pending the State unsuccessfully sought to have the 11th Circuit Court of Appeals vacate the remand based upon the authority of Brecht v. Abrahamson; 507 U.S. 619, (1993).

In 1998, at the re-sentencing trial, the State again sought to sentence Mr. Booker to death. The jury recommended a death

sentence by an 8 to 4 margin, and the Florida Supreme affirmed the Circuit Court's imposition of the death penalty. Booker v. State, 773 So. 2d 1079 (Fla. 2000); Cert. Denied, Booker v. Florida, 121 S. Ct. 1989 (2001)

The instant post-conviction proceeding challenging the death sentence imposed after the second trial was timely instigated by the filing of the Rule 3.850/1 Motion, and the Circuit Court's denial of Mr. Booker's claims therein, either summarily or after a limited evidentiary hearing on the Weatherford issue, is the subject of this appeal.

2. Evidentiary Hearing Testimony

On September 16, 2005, Mr. Booker was granted an evidentiary hearing on his claim that, prior to trial, the state violated Appellant's right to due process and to a fair trial by surreptitiously intercepting and reading his communications with counsel and with various witnesses.

At the evidentiary hearing, Assistant State Attorney Grabel testified that he and State Attorney Rod Smith represented the State at the re-sentencing proceeding. (T. 10) Mr. Grabel denied knowing that a "mail cover" had been done on Mr. Booker. (T. 11) In fact, Mr. Grabel denied that he had ever used a mail cover or ever spoke to anyone who had used one. (T. 11) Still, Mr. Grabel explained that mail cover is a review of all of the mail coming into and going out from an inmate. (T. 12) Mail cover

is not a routine procedure, Mr. Grabel made clear, but is, rather, only instigated at the specific request of a party (T. 12) Mr. Grabel understood that, while he was preparing for trial, Appellant was incarcerated at Florida State Prison on death row. (T. 13) At times he may have been moved to the Alachua County Jail. Id. Futher, Mr. Grabel conceded that At all times Appellant was represented by Counsel.

Despite denying that a "mail cover" was done Mr. Grabel identified a memorandum to the Booker file by Mick Price. After reviewing the memorandum, Defense Exhibit "A", Mr. Grabel denied that there was a mail cover done on Mr. Booker's mail The Memorandum appears to request authority for institution of such a mail cover, but Grabel testified that the State declined. Grabel did admit that "obviously, there was a memo sent," directed to him, regarding issues including "the mail cover issue." (T. 19)

Grabel flat denied that he discussed mail cover with anyone or that it was used. (T. 19). As far as checking with the prison regarding possible witnesses for trial, Mr. Grabel testified that State Attorney Smith did that. (T. 34)

Rod Smith testified that he was in charge of the re-sentencing. (T. 38)

Prior to becoming the State Attorney, he had, as a private attorney, represented employees of the DOC. (T. 40) In that

capacity, he had become aware of "mail cover," which he defined as monitoring the mail of inmates. Id. However, he had no recollection of monitoring Appellant's mail. Id.

Mr. Smith also testified that he didn't recall seeing the memorandum from Mr. Price regarding mail cover prior to preparing for the evidentiary hearing in 2005. (T. 43) He emphasized how weighty he'd consider a decision to use mail cover, so he believed that he'd have remembered the memorandum and any decision to proceed or not proceed. (T. 43)

Mr. Smith did provide the caveat that Mr. Grabel would have handled most of the documents, as he oversaw discovery issues and kept the files. (T. 44). Smith would have had to have given the "go ahead," however to institute mail cover. (T. 45)

Upon reviewing documents from the State Attorney's files stating that, in fact, mail cover was done by Mr. Price and that Mr. Price "picked up another collection of letters obtained under mail cover from FSP," Mr. Smith conceded that the documents indicate that mail cover was done. (T. 45). Smith did maintain, however, that mail cover was done without his knowledge. (T. 46) He did admit that there are circumstances under which he would do mail cover. Id. In other cases, he has used mail cover. Id.

He also wrote memoranda requesting the mail and Mr. Price identified the defense's exhibits as documents he generated. (T.

79-81) Upon review of the documents, Mr. Price clearly affirmed that mail cover was utilized by the State Attorney in Appellant's case. (T. 79-80)

Mr. Price also admitted that he collected the mail. (T. 81) He then took the mail to the State Attorney's office. Id. He identified Rod Smith as the recipient of his memorandum regarding the mail cover (T. 82). Mr. Grabel also received a copy of the memo. Id.

According to Mr. Price, one memorandum provided:

> On 4/11/97, while reviewing the above mail cover, I ran across a letter written by Booker to Betty V-O-G-H. (A Gainesvillian, who expects to be called as a witness) Which informs Vogh of "scuttlebutt" that the two officers ["…originator of the lies], hand up dress incident"], have received suspensions on an unrelated incident. (T. 83)

Mr. Price admitted that it is possible that he was reading the mail as part of his investigation and, after he reviewed the documents, his testimony is that this is what in fact happened. Undoubtedly, all actions he took would have been the result of specific assignments from Mr. Smith or Mr. Grabel. (T. 85)

Mr. Price anticipated and expected that his memoranda and work on the Booker case would be forwarded to Mr. Smith and Mr. Grabel. (T. 90) He also confirmed that, on 4/16/97, he picked up another packet of mail cover from the prison. (T. 91) Mr. Price further confirmed that he was

the author of the memorandum at issue and that he would have done the things which are discussed in the memorandum. (T. 93)

At the conclusion of Price's testimony, documents B, C, D, E, F and G were admitted as exhibits 2-8 sequentially. (T. 104-106) Thus, the documents which Price wrote regarding mail cover were admitted into evidence, with the Court noting that Mr. Price identified them as his.

The last witness, defense Attorney Kearns, testified that he would have objected to the State looking at any privileged mail ("Kearns would eat us alive if he found out."). (T. 120)

Mr. Kearns was never made aware that Mr. Price was picking up collections of Mr. Booker's mail obtained under mail cover. Id. Nor was Mr. Kearns advised that the state was reading mail from Appellant discussing trial witnesses such as Ms. Vogh. (T. 121)

Kearns testified that the memorandum regarding Price's mail cover indicated that "obviously" the State read some of Appellate's mail. (T. 122) Further, Kearns agreed with the court that "obviously either side would not like to expose…their strategy through the course of the trial." (T. 125)

3. The Hearing Court's Order

Despite the Price memoranda, the Hearing Court found that, as Mr. Grabel and Mr. Smith had testified, a mail cover was not done. The Court found that Mr. Grabel's testimony "completely refuted" the idea that Mr. Booker's legal mail was in anyway tampered with by anyone acting on behalf of the State (T. 158) The Court found that Price had told the prison there would be no mail cover. Id. Also, Mr. Grabel was in charge of the State Attorney's office's preparation. Further, the Court found Mr. Smith's denial credible. Id. The Court found Mr. Price "not quite as strong a witness" because he is older and his memory is perhaps not quite as good as it used to be. Id. Finally, the Court found that Attorney Kearns did not know that any mail from Appellant to him had been tampered with. (T. 139)

In sum, the court finds that "there is no evidence at all" that Appellant's mail was tampered with. (T. 139)

4. The Huff Order

The lower court denied the Appellant an evidentiary hearing on his remaining claims. (PCR. 0000119 et. seq.) Appellant will address each claim respectively in the text of the brief. As a general matter, he maintains that the claims, if the allegations are taken as true, are not rebutted by the record, and that the case should be remanded for a hearing on the remainder of Appellant's claims.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that he be granted oral argument on his claims. He is unconstitutionally incarcerated under a sentence of death, and his convictions are tainted with constitutional infirmity. Thus, this Court should hear Appellant's contentions fully argued pursuant to the practice and rules of this Court.

REFERENCE KEY

"R" -- Record in Direct Appeal;

"R2" -- Record in Direct Appeal following remand;

"T" -- Transcript of Trial;

"T" -- Transcript of second penalty phase;

"PCR" -- Post-conviction record;

"PCR2) -- Evidentiary Hearing Transcript;

"EX" -- Post-conviction evidentiary hearing exhibit;

"P" -- page; and

"pp" -- pages.

Other citations will be identified to the extent necessary for clarification.

SUMMARY OF ARGUMENTS

Argument I. The lower court erred in denying Appellant relief after the evidentiary hearing on his claim that the State improperly deprived Appellant to his rights to due process and to a fair trial under the Fourth, Sixth, and Fourteenth

Amendments. The State's review of Mr. Booker's communications with his attorney and trial witnesses by secretly operating a "mail cover" on Mr. Booker's mail deprived Appellant of a fair trial. In Weatherford v. Bursey, 429 U.S. 545, 1997, the government acted affirmatively to intrude into Mr. Booker's attorney/client relationship and to obtain privileged information. The lower court erred in completely ignoring the evidence presented of the government's violation of Mr. Booker's right to prepare for trial. Thus, this Court should reverse the lower court's findings and remand the case for a hearing in which the government will have the burden of proving by a preponderance of the evidence that it did not use the illicitly obtained information, that all of the evidence it used at trail was derived from independent sources, and that all of its trial and pretrial strategy was based on independent and untainted sources.

Argument II. The lower court erred in summarily denying the remainder of Mr. Booker's 3850 claims without a hearing. Mr. Booker's IAC Claim was sufficiently pled and the lower court erred in refusing to give him a hearing on his claims that counsel was ineffective for failing to conduct a proper investigation and to locate and present a wealth of mitigation, especially information with which Appellant could have persuasively challenged the prior violent felony aggravator.

Much of this mitigation was specifically identified in the pleadings and the lower court's ruling fails to properly apply the legal standard for an evidentiary hearing for ineffective assistance of counsel claims.

Again, Mr. Booker's claim regarding the counsel's failure to present evidence regarding the aggravator of prior violent felony is properly and specifically pled in the lower erred in failing to grant him an evidentiary hearing on this claim as well.

Also, Mr. Booker was erroneously denied a hearing on his claims that the cruel and unusual clause of the Eighth Amendment bars his execution because the thirty years that have thus far elapsed since the crime and the public's increasing interest in the progression of Mr. Booker's literary accomplishments.

Finally, Mr. Booker was improperly denied a hearing on his claim that his rights to Equal Protection and Due Process were violated by the Court's arbitrary and capricious jury instruction rules. In Hillsborough County, a penalty-phase jury was advised how long defendant would serve if given a life recommendation. However, Appellant was denied such an instruction, which clearly would have changed the outcome.

ARGUMENT I

The lower court erred in denying Appellant relief after the evidentiary hearing on his claim that the State improperly deprived Appellant to his rights to due process and a fair trial under the Fourth Sixth and Fourteenth Amendments.

1. STANDARD OF REVIEW

Under Weatherford v. Bursey, 429 U.S. 545, 1977, the State cannot methodically and knowingly violate an attorney-client privilege and utilizes that information at the trial to develop strategies and tactics that undercuts a defendant's right to due process. This Court must defer to the hearing court's factual findings to the extent that they are supported by competent, substantial evidence but must review de novo the hearing court's application of the law to those facts. Stephens v. State, 748 So. 2d 1048 (Fla. 1999); Philmore v. State, No. SC04-1036 (Fla. 2006). In sum, this Court conducts an independent de novo review of the trial court's legal conclusions, while giving deference to the trial court's factual findings and confirming that those factual findings are supported by the record. State v. Reichmann, 777 So. 2d 342 (Fla. 2000); Cherry v. State, 781 So. 2d 1040 (Fla. 2000); and Cave v. State, 899 So. 2d 1042 (Fla. 2005)

After an initial showing by the Defendant that an intrusion has been made into the attorney/client relationship to obtain privileged information, the burden shifts to the government to

introduce evidence to show by a preponderance of the evidence that it did not use the privileged information and to specifically show that all of the evidence that it did introduce was derived from sources independent of the tainted source. See United States v. Danielson, No. 01-30151 (9th Circuit 2003) (It is not enough to establish a prima facie case to show that the government informant was present at a meeting and passively received privileged information about trial strategy.) Briggs v. Goodwill, 698 F. 2d 486 (DST. of Columbia 1983) (Mere possession by the prosecution of otherwise confidential knowledge about defendant's strategy or position is sufficient in itself to establish detriment to criminal defendant; United States v. Mastroianni, 749 F. 2d 900 (1984) (A defense showing that a government agent learned privileged information about defense strategy shifts the burden to prosecution to prove that the Defendant was not prejudiced.)

A Weatherford violation is also a violation of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). Thus, the scope of "privileged information" is broader then protected attorney-client communication. The lower court erroneously reduces the question to whether that narrow privilege was violated. The dispositive question should be, instead whether an surreptitious government intrusion was used to unfair advantage.

2. THE LAW AND FACTS OF THE INSTANT CASE

The evidentiary hearing was on its face limited to the question of the Court determining whether the initial governmental intrusion had occurred, and the Court expressly reserved ruling on the issue of the proper procedural test to apply thereafter. The lower court, however, concluded no mail cover occurred. Thus, this Court must determine whether the lower court erred in finding that no intrusion took place in the face of the clear record evidence that a mail cover was authorized and undertaken by the prosecution. Appellant contends that the record of the surreptitious government intrusion is beyond question.

The evidence of an intrusion is overwhelming. Assistant State Attorney Grabel testified that mail cover is not a routine procedure, but is only instigated at the specific request of a party (T. 12) Mr. Grabel also understood that, while both parties were preparing for trial, Appellant was incarcerated at Florida State Prison on death row. (T. 13) Id. Further, Mr. Grabel conceded that Appellant was represented by Counsel. In fact, the court clarified that Appellant had been represented "from the very beginning of the case." (T. 14)

Mr. Grabel identified a memorandum to the Booker file by Mick Price, an investigator working for the State Attorney's Office. (T. 15). Mr. Grabel testified that Price had been a detective

with the Gainesville Police Department when he was involved with the apprehension and arrest of the Appellant. (T. 15) Subsequently, in 1996, he was employed by Mr. Smith's office and Mr. Smith selected him to be the investigator on the re-sentencing case. Id.

After reviewing the memorandum, which was admitted into evidence as Defense Exhibit "A", Mr. Grabel denied that there was a mail cover done on Mr. Booker's mail (The Memorandum appears to be requesting authority for such a mail cover.) However, Mr. Grabel testified that the State declined. Mr. Grabel denied that the State Attorney's Office had collected or received any mail from Appellant. (T. 18) However, after seeing the Price memorandum, Grabel did admit that "obviously, there was a memo sent," directed to him, regarding issues including "the mail cover issue." (T. 19)

Mr. Grabel flatly denied that he discussed mail cover with anyone or that it was used. (T. 19) As far as checking with the prison regarding possible witnesses for trial, Mr. Grabel testified that State Attorney Smith did that. (T. 34)

(In deference to Mr. Smith's busy schedule as a State Senator, the cross-examination of Mr. Grabel was delayed until after Mr. Smith's testimony. Appellant will follow that order in this recapitulation.)

From State Attorney Rod Smith testified at the evidentiary hearing that he was in charge of the re-sentencing. (T. 38) He acknowledged that assistant state attorney Grabel worked on the case too (T. 39).

Mr. Smith was the state attorney for the Eighth Judicial Circuit at the time of the re-sentencing. (T. 40) Prior to assuming responsibility for the job, he had, as a private attorney, represented employees of the Department Of Corrections. (T. 40) In that capacity, he had become aware of the use and meaning of "mail cover," which is monitoring the mail of inmates under certain circumstances. Id. However, he had no recollection of monitoring Appellant's mail. Id.

Mr. Smith also testified that he didn't recall seeing Defense Exhibit 1, the memorandum from Mr. Price regarding mail cover, prior to preparing for the evidentiary hearing in 2005. (T. 43) Mr. Smith emphasized how weighty he'd consider a decision to use mail cover, so he believed that he'd have remembered the memorandum and any decision to proceed or not proceed with a mail cover on Appellant. (T. 43)

Mr. Smith added that Mr. Grabel would have handled the documents, doing the discovery and keeping the file. (T. 44) He believed that he would have had to authorize the go ahead, however. (T. 45)

Upon reviewing documents from the State Attorney's trial files indicating that, in fact, a mail cover was done on Appellant and that Mr. Price "picked up another collection of letters obtained under mail cover from FSP," Mr. Smith conceded that those documents would indicate that mail cover was done. (T. 45). Thereafter, Smith testified that the mail cover was done without his knowledge and authority. (T. 46) He further admitted that there are circumstances under which he would do mail cover. Id. He has, in other cases, used it. Id.

Michael Price ("Mich Price") testified that he worked on the Booker case, first in his capacity as a police officer investigating the crime and, later, as an investigator for the State Attorney's office. (T. 75-76)

As an investigator, he would have picked up the mail and delivered it to the State Attorney. (T. 81)

Mr. Price identified the defense's exhibits as documents which he prepared in the course and scope of his duties as a State Attorney Investigator. Upon reviewing them, Price made it clear that mail cover was done in Appellant's case. (T. 79-80)

The record establishes that Price collected Appellant's mail. (T. 81) It shows that Price took the mail to the State Attorney's office. Id. Price further identifies Rod Smith as the recipient of his memorandum regarding the mail cover (T. 82). Mr. Grabel also received the memo. Id. The memo clearly

discusses strategic approaches to impeaching an important witness.

> On 4/11/97, while reviewing the above mail cover, I ran across a letter written by Booker to Betty V-O-G-H. [a Gainesvillian, who expects to be called as a witness] which informs her of "scuttlebutt" that the two officers (and that is the originator of the lies) regarding hand up dress incident… have received suspensions on an unrelated incident. (T. 83)

Thus, the record shows that Price was analyzing and reading Appellant's mail as part of his investigation. Further, Price confirmed that all actions he took would have been the result of specific assignments from Mr. Smith or Mr. Grabel. (T. 85)

Mr. Price anticipated and expected that his work product on the Booker case would go to Mr. Smith and Mr. Grabel for review. (T. 90) He also confirmed that, on 4/16/97, he picked up yet another packet of mail cover from the prison. (T. 91) Mr. Price confirmed that he was the author of the memorandum and flatly asserted that he would have actually done the things which are discussed in the memorandum. (T. 93)

Not surprisingly, Attorney Kearns testified that he would have objected to the State looking at any privileged mail ("Kearns would eat us alive if he found out.") (T. 120)

Further, he establishes that he was never made aware that Mr. Price was picking up collections of Mr. Booker's mail obtained under mail cover. Id. Nor was Mr. Kearns advised that the prosecutors were reading mail from the Appellant and to the Appellant discussing trial witnesses such as Ms. Vogh and strategies for dealing with them. (T. 121)

Kearns acknowledged that the memorandum regarding Price's mail cover indicated that "obviously" the State read some of Appellate's mail. (T. 122) Further, Kearns agreed with the court that "obviously either side would not like to expose…this strategy through the course of the trial." (T. 125)

Appellant contends that the lower court ignored substantial, competent evidence that the State methodically undertook a plan to surreptitiously review all written communications to and from the Appellant. The record clearly establishes that a mail cover was undertaken by the state, although the state was well aware that the defense would strenuously object. By its own admission, the State's actions were concealed and exercised in such a manner which assured that the defense attorney would have "eaten [the prosecutor] alive" to use the prison guard's own colorful vernacular. Surely, the court's complete reliance upon the reputation of the State

Attorneys and the defense attorney cannot entirely negate the clear content and logical implications of the evidence and Price's un-rebutted testimony. There is nothing in the record to support the court's conclusion that age somehow has diminished Mr. Price's credibility. Frankly, the court's refusal to even consider the documentary evidence shows the result-driven weakness of its analysis.

The record shows that Appellant was housed at Florida State Prison for the many years he was awaiting retrial. Mail was the primary means of communication for him. Thus, during this time, he was forced to plan his defense, construct his trial strategy, undertake his discussions with witnesses, and communicate with his attorney through the use of the mail. The confidentially he had a right to expect from legal mail was breached. The evidence is un-rebutted that all mail in and all mail out of FSP was compromised by the "mail cover". Further, Price's internal memoranda show that tactical and strategic responses to the covertly obtained information were undertaken.

The lower court refuses to address the stark and starkly probative content of Price's memoranda. The court makes a speculative conclusion regarding Mr. Price's age but fails to connect that observation to anything specific in the record. The court may be impressed by the reputation and records of Mr. Grabel and Mr. Smith, who the court jocularly notes is

responsible for court and capital funding. However, the Court's Order fails to demonstrate a casual nexus between the reputations and responsibilities of Grabel and Smith and its conclusion that their testimony, that no "mail cover" on Booker was instituted is credible.

The testimony of Grabel and Smith is that the 11/19/96 offer from FSP for mail cover, was declined. However, Price's subsequent memorandum from the State Attorney file indicates that "on 3/28/97, before leaving FSP, I picked up another collection of letters obtained under mail cover." The memorandum contemplates several possible avenues of impeachment of witnesses, as well as ways to argue, generally, against mitigation and for death. Price is obviously advancing the Booker as manipulative which the State used in cross examination and argument. This memorandum makes it clear that the prosecution is using Booker's mail to prepare for trial. It is also clear that this is not the first mail cover covertly picked up, reviewed, or processed by the State.

Another memo from Mr. Price to Rod Smith and Grabel is dated 4/23/97 and reveals that Price's documents are being used for preparing the witness list by the attorneys. The memorandum also includes information regarding proving the prior violent felony aggravator. One of the strategies the prosecution is trying to develop through the use of the mail cover is that

Booker manipulates people and situations. For example, Price notes that the "scuttlebutt" says that Booker wrung the alcohol (for his fire attack) out of the alcohol wipes that were distributed for athlete's foot. Price suggests that this demonstrates how Booker manipulates the system. The prosecution's theme at trial is that Booker is still manipulating the system.

On February 18, 1997, Price interviews Brenda Seeley, who was the mail room clerk for 19 years. She told him that because she was transferred to nights that she was angry and had threw out all of the files and notes that she had accumulated through the years. Price notes that she voluntarily uses the term "manipulates" when describing Booker. She tells Price that she can't recall an incident or an example of his manipulation. Importantly, there would be no reason for Price to be talking to the mail room clerk of 19 years if he was not picking up mail from her. There is also an entry in this February memorandum by Price involving the prior violent felony which indicates that, on that day, all of the inmates were aggressive and belligerent. This supports Mr. Booker's claim that the prior violent felony took place in the context of an exceptionally violent situation at the prison. Certainly, the entry regarding inmate Treweek (Trawick), where Booker yells to Treweek as Treweek is being removed from the cell for questioning, "If they touch you,

holler and I will take care of it." When Treweek began to yell the entry indicates that Booker said "I'll take care it (twice)". The entry concludes that "it was later the same day when Booker doused Thomas."

In the 3/12/97 interview notation regarding Mr. Johns, and particularly in the note thereafter, Price insinuates that he has "unusable information" but does not identify what that is.

Price notes that on 4/11/97, "while reviewing the above mail cover, I ran across a letter written to Booker by Betty Vogh (a Gainesvillian who expects to be called as a witness) which informs Vogh of "scuttlebutt" that the two officers "…originator of the lies [re: hand up dress incident]…have received suspensions on an unrelated incident". Price notes that he immediately called Ruise to determine if the scuttlebutt was true and finds out that it is. This is an example of the way that the prosecution used the mail cover to formulate its strategy, as Price concluded that, "likely we can expect this to surface in court if we call these officers. It may be as likely that Kearns will call them anyway because FSP officers give prisoners (Booker in particular) a good reason to exhibit a nasty attitude."

3. Conclusion and Relief Sought

The lower court erred in finding that there was no prosecutorial misconduct in conducting a mail cover on Mr.

Booker as part of the preparation for trial. The lower court's finding that it believed the testimony of Mr. Grabel and Mr. Smith that no mail cover was done is not supported by competent substantial evidence. On the contrary, the un-rebutted evidence is that the state did violate the Appellant's right to confidentiality in the preparation for trial and used information covertly gleaned to develop its own strategy and to counter the Appellate's tactics and strategies.

Appellant beieves that there is a split in authority regarding remedies for a Weatherford violation, and Appellant is unclear as to the Florida rule. However, Appellant contends that, at a minimum, the case should be remanded to the lower court to give the State an opportunity to prove by a preponderance of the evidence, if not beyond a reasonable doubt, that the State did not utilize information improperly obtained as a source for strategic or tactical decisions in the presentation of its case or in its defense to the Appellant's case.

ARGUMENT II

The Lower Court Erred In Summarily Denying Without An Evidentiary Hearing Claims From The 3850 Motion Sufficiently Pled And Not Rebutted By The Record

1. Standard Of Review.

Generally, a Defendant is entitled to an Evidentiary Hearing unless the post-conviction motion and any particular claim in the motion are legally insufficient or the allegations in the motion are conclusively refuted by the record. See, Freeman v. State, 761 So. 2d 1055 (Fla. 2000) In order to support Summary Denial the trial court must either state its rationale in denying relief or attach portions of the record that refute the claim. See, Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) Additionally, where no evidentiary hearing has been held an Appellant Court must accept the Defendant's factual allegations as true to the extent that such allegations are not refuted by the record. See Peede v. State, 748 So. 2d 253, 257 (Fla. 1999) The burden is on the Defendant to establish a legally sufficient claim period. Freeman v. State, 761 So 2d at 1061.

2. Allegation Regarding Counsel's Failure to Present Evidence of Testimony Regarding the Factual Inapplicability of the Prior Violent Felony Aggravator

Appellant alleged in the Motion that Counsel's performance was further deficient in failing to present to the jury abundant

available evidence and testimony regarding the factual inapplicability of the "prior violent felony aggravating factor in this case. Appellant alleged that he would call available witnesses who would have described the true facts and actual context of the "fire bomb" allegation arising from riots at the prison. Appellant further alleged that, in such a context, the jury would have understood and "known" Mr. Booker, the man, and understood that the charge, reporting, and judicial resolution of this alleged prior violent act did not argue for aggravation of Mr. Booker's sentence but, rather, constituted mitigation which is reasonably likely to have affected the outcome of the trial.

Appellant further alleged that witnesses to the 1980 "fireball" incident, which served as the basis for the prior violent felony aggravator, and which the state relied on repeatedly in its closing to attack the credibility of Page Zyromski (T. 2167 et. seq.), would testify to the context and causes of that incident in the prison system, and to the prison riot conditions that caused the disturbance, and Mr. Booker's involvement, and the judicial resolution of that involvement such that the incident will be seen as mitigating evidence and not aggravating evidence.

Appellant alleged that this evidence could and should have been used to teach the jury the severity of death row

conditions, where Mr. Booker had been caged for twenty years at the time of the re-sentencing trial (and approaching 30 years now). Appellant stated that the likelihood of the outcome of Mr. Booker's trial would have been different had this available evidence been presented and introduced when the juror inquiries and the jury and judge's deliberations are considered in this context.

Appellant further alleged that counsel could have presented evidence from other inmates, including Gary Trawick and William White, who were in cells near Mr. Booker's, as well as from Mr. Booker himself, and from long-time death-row liaison for the Palm Beach County's Public Defender's office, Susan Cary, and from other attorneys who challenged the prison guards' "riot" which took place after the Knight stabbing death of a prison guard. Appellant also alleged that inmates Trawick and White might have testified to the threats which the guard, Mr. Thomas, made against Mr. Booker to the effect that he was going to get Mr. Booker. The allegation continued that, further, these threats were made in the context of the "guard riot" that occurred after the Knight stabbing, and Ms. Cary and others involved in complaints stemming from the rampage which included the ransacking of cells and the destruction of legal papers and personal belongings of the inmates would testify.

Appellant alleged that, thus, the jury could have judged Mr. Thomas' crucial testimony at the trial and Mr. Booker's battery conviction not, as the prosecution argued, as the reason why a life sentence would not suffice, but as an act of self-defense in fact caused by Appellant's realistic fear of assault and even death at a time when the prison guards were reacting to the stabbing death of one of their own.

Appellant alleged that Ms. Cary could testify that she believes that there may have been litigation stemming from the guards' post-stabbing conduct which the Department of Corrections may have settled. Appellant alleged that these witnesses, as well as the testimony of Mr. Booker himself, would have placed the battery conviction, which served as a statutorily aggravator and as a basis for the prosecution's jury argument as to why life in prison would not be a proper sentence for Mr. Booker despite his literary accomplishments and the other evidence presented that mitigated against death, in a more sympathetic context.

Under the proper standard, taking these allegations as true except as specifically rebutted by the record, Appellant make sufficient allegations to entitle him to an evidentiary hearing on this issue.

3. Allegation Regarding Counsel's Failure To Investigate and Present Mitigation

Appellant alleged that trial counsel was ineffective for failing to call a variety of available witnesses who would testify to extensive mitigation regarding Mr. Booker's upbringing, his difficulty early life, his early interest in literature, which competed for his time with the lure of the streets, his service to the country overseas, and his emotional and mental-health history, including the problems of substance abuse as it effected him before and at the time of the crime. Appellant further alleged that, equally importantly, counsel failed to object to testimony regarding the introduction of non-statutory aggravators involving unrelated collateral crimes, including that Mr. Booker was looking for someone to kill, that he went to one house but saw a child, and that he was looking to steal some pot.

Appellant alleged that Counsel failed to present available evidence of the full scope and extent of Mr. Booker's accomplishment as an influential figure on the national and international literary "scene." Appellant alleged that numerous witnesses could have been called to explain to the jury Mr. Booker's accomplishment in this regard, as could exhibits of Mr. Booker's work, which would have explained the person in a unique and powerful fashion.

Appellant further alleged that Counsel failed to properly prepare the witnesses to elicit testimony regarding the uniqueness of Mr. Booker's case and his relation to a tradition of black poetry and literature and the relationship between the black artist and prison, and how those forces impacted Mr. Booker and his work. Appellant further stated that many available witnesses could have testified more powerfully of Mr. Booker's voice as a black prisoner in America than the white academics who were ill prepared. For example, Stuart Friebert brought up Hitler, which the State used in its closing. Ezra Pound was also involved but counsel failed to elicit testimony from an expert on Pound, Hayden Carruth, that Pound also faced the death penalty for treason, but was instead hospitalized as insane for 13 years, and was released, for the very reasons that the State disparaged in its argument, at the intercession of other poets, because the state did not want to silence this unique and important artist. Appellant further pointed out that, of course, Pound was not a black man in an American prison, though his crime was more onerous.

Appellant alleged that trial counsel failed to present voluminous argument and evidence available to undercut the state's main argument that a poet shouldn't be treated differently from anyone else. By allowing such a reductive argument, counsel failed to teach the jury that, in fact, the

state did not seek to execute Pound because of the intercession of poets like Robert Frost and Archibald McLeish. Appellant argued that, in fact, they put Pound in a place where he could work. Appellant alleged that Mr. Booker is a black man in an American prison, like Ethridge Knight and Leadbelly.

Appellant alleged that by allowing the State to introduce Pound and Hitler as analogies, the trial attorneys failed to utilize stronger available evidence to establish that special treatment has not been accorded Mr. Booker. Counsel did not properly educate himself regarding the poetry issue, or Appellant's contribution to the canon of prison literature by black men, and so he could not effectively respond to the argument of the State.

Finally, Appellant alleged that trial counsel did not use much of Mr. Booker's other work, including an autobiography and his writings on the Bible, "The Oracle At Patmos," both of which are being courted by major publishers.

Appellant alleged that substantial mitigation which would have established that sparing Mr. Booker, under the unique circumstances of this case, has precedent in literature. Appellant further alleged that counsel could have shown the jury how the prison experience itself exerts great force in black literature, but, while Pound is permitted to give the fascist salute as he sails back to Italy upon his release, and William

Burroughs, playing William Tell with his wife, shoots her in the head, and suffers no punishment, the Black Poet, Stephen Booker, is entitled to nothing but death, an irony Robert Johnson would toast with his poison liquor.

Thus, Appellant alleged, counsel did not know what to do with the mitigation available to him or how to counter the state's argument about the relative weight of the work and the death.

Appellant alleged that Counsel failed to present powerful, available mitigation and the failure to do so prejudiced the outcome of Mr. Booker's trial. He alleged that, at an evidentiary hearing, counsel will present the mitigation witnesses and other evidence which could and should have been presented and which, if counsel had presented it, would have led to a different verdict and judgment for Mr. Booker.

Appellant also alleged that counsel failed to object to the Court giving an instruction to the jury not to consider Page Zymromski's testimony that she found Booker's remorse sincere.

Further, Appellant alleged that Mick Price could have testified to rebut the State's repeated questioning of Dr. Barnard on issues of malingering and Booker's honesty. Appellant alleged that Price found Booker credible on the points at issue. Further, Price's memoranda, discussed supra, show

that Price, through the “mail cover” attempted to build a case attacking Mr. Booker’s “manipulation.”

Appellant also argued that Counsel failed to object to numerous improper arguments by the state in closing, including, minimizing Booker’s assignment to Page Zyromski of royalties by arguing that Booker couldn’t use the money anyway, by arguing that jury unanimity was not required, when it is required beyond a reasonable doubt as to the aggravators, by calling the battery conviction Mr. Booker’s work of art for 1980, by arguing that a finding of HAC requires death, and by making age a non-statutory aggravating factor by intoning (the victim’s age) 94 repeatedly, by arguing that her face was smashed and bruised, which had not been introduced in evidence, by arguing that because the DSM didn’t recognize dissociative disorder until 1990 that dissociative disorder could have existed prior, by arguing that Aniel was self-serving when the only testimony recognized that as possibility, and by asserting that “the devil made me do it” was a metaphor created by the poet when, in fact, a well known song by Billy Joe Shaver goes “The devil made me do it the first time/the second time I done it on my own…”

Finally, Mr. Booker alleged that his right to effective assistance of Counsel under the Fifth, Sixth and Fourteenth amendments, to due process and equal protection under the Fifth and Fourteenth amendments, to be freedom from cruel and unusual

punishment under the Fifth and Eighth Amendments, and to freedom of speech under the First and Fifth Amendments, and under the corresponding provisions in the State constitution, have been violated and he is entitled to imposition of a life sentence, to a new trial, or to such other and further relief as the Court deems proper under the facts and circumstances of this case after an evidentiary hearing has been held on his claims.

Appellant properly argued that to obtain relief on his claim, that penalty phase trial counsel provided ineffective assistance, Appellant must establish deficient performance of counsel and the prejudice he suffered as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668 (1984); Rutherford v. State, 727 So. 2d 216, 218 (Fla. 1998).

To establish deficient performance, Appellant must show that counsel's conduct was outside the broad range of competent performance required under prevailing professional standards. Strickland, 466 U.S. at 688. Secondly, Appellant must show that this deficient performance prejudiced him by so effecting the fairness and reliability of the proceedings that confidence in the reliability of the outcome is undermined. Id. At 694; Rutherford, at 727 So. 2d at 220; Gore v. State, 846 So. 2d. 461, 467 (Fla. 2003). Further, Appellant must satisfy the evidentiary requirements of both "prongs" of Strickland to prevail, and, if a court holds that the Defendant has failed to

meet his burden in his showing regarding either prong, the court does not need to make a determination on the merits of his case as to the remaining prong. Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001).

Finally, Strickland emphasized that the exacting nature of Appellant's burden requires the Court to be "highly deferential" when assessing the quality of trial counsel's performance. Strickland, 466 U.S. at 689. Thus, Strickland counsels the court to beware "the distorting effects of hindsight," to "reconstruct" the circumstances of counsel's challenged conduct, "and consider" counsel's perspective at the time. Id. Because of the difficulty "inherent in making the evaluation," the court must "indulge a strong presumption" that counsel's performance is constitutionally adequate. Id.; Philmore v. State, supra. In assessing the second prong, or "the prejudice prong, both Strickland and this Court's repeated application of the Strickland standard emphasize the importance of determining whether or not there was a genuine adversarial testing of the issue to be resolved. Strickland, 466 U.S. at 695. Thus, Appellant suggests that, in the instant case, the determinative touchtone is, whether there was, in fact, a genuine adversarial testing of the question of whether the appropriate penalty to be imposed in this case is Death. See, Harvey v. State, No. SC-

75075, P. 26-27, revised opinion (Fla. 2006) (Judge Anstead dissenting)

4. Allegation Regarding Claim That Mr. Booker Did Not Receive Hearing on "Simmons" Instruction Claim

In his Claim 3, Mr. Booker alleged that his jury instructions did not set out the length of time Mr. Booker would be in jail if he received a life sentence (his "extant legal regime", despite the inquiry of jurors and the obvious question which a jury considering life would ask, which is "if we give him life, will he every be released."

Appellant alleged that, at least, one and probably several circuit courts have given instructions in capital cases that include an instruction to the jury regarding the amount of time the defendant is facing in jail if he or she is given a life sentence. See Simmons v. South Carolina, 512 U.S. 154 (1994) Appellant specifically alleged that capital Defendant Kenny Stewart received a legal regime instruction at his penalty phase trial in 2001. See, Stewart v. State. SCO1-1998.

Thus, Appellant alleged that giving some defendants this instruction and denying it to others, including Mr. Booker, violates Mr. Booker's right to equal protection and constitutes arbitrary and capricious imposition of the death penalty.

Mr. Booker alleged that he would present witnesses and evidence regarding when he was this instruction has been given

and demonstrate the prejudice to him when not given the instruction. Appellant alleged that the prejudice to him, in a case where he is quickly approaching 30 years on death row and where he has shown the ability to use his prison time to the benefit of society and most importantly, where the jury asked to know specifically how long he would be in jail, is clear.

The lower court erred in failing to give Mr. Booker a hearing on this claim.

5. Allegation Regarding the "Crawford" Claim

Appellant alleged in Claim V that hearsay evidence was used in entering the 1974 judgment (T. 1582), the 1980 judgment (T. 1598; 1604), and in the summation testimony of David C. P. Smith.

Appellant alleged that this was a violation of the testimonial hearsay bar reiterated in Crawford v. Washington, 204 Lexis 1838 (2004).

Further Appellant alleged that the prejudicial nature of this testimony was that it was used to introduce sympathetic evidence regarding the victim, and to present damaging evidence and support of the aggravators. Particularly, this hearsay was involved in the testimony regarding the prior violent felony, arguably the most damaging aggravator introduced.

The lower court erred in failing to grant Appellant hearing on this claim.

6. Allegation Regarding the Cruel and Unusual Punishment Claim

Appellant alleged in Claim Six that his incarceration on death row for almost thirty years constitutes cruel and unusual punishment, violative of the Eighth Amendment.

While acknowledging that Lackey v. Texas, 115 S. Ct. 1421 (1995) and Knight v. State, 721 So. 2d 287 (Fla. 1998) were ultimately decided contrary to Appellant on their respective facts, Appellant alleged that to disallow this claim, at this embryonic stage of the proceedings, ignores the significant factual issues the lower court must resolve. For example, Appellant alleged that the long delay of almost of ten years between the announcement of Hitchcock relief and the commencement of the re-sentencing trial was caused by the State's Brecht appeal which vainly challenged the remand on new authority. Appellant further alleged that delays caused by the State have needlessly protracted his stay on death row under hostile conditions for almost thirty years and that, under these circumstances, this delay violates the Eighth Amendment's prohibition on cruel and unusual punishment.

The lower erred in denying Mr. Booker the opportunity to present evidence as to the unreasonableness of the State's delays.

7. Allegation Regarding Newly Discovered Evidence

Appellant alleged in Claim VII that he has newly discovered evidence to establish that executing him at this time can serve no legitimate penological purpose and that an execution infringes upon the public's continuing First Amendment interest in reading Mr. Booker's work.

Appellant alleged that his reputation as an important American writer has continued to mature and that he has been featured in the New York Times and other literary papers as an essential American voice. He has recorded CD's and videos for a leading literary magazines and his autobiography promises to join in importance the autobiographies of Malcolm X and George Jackson. He has recently completed a book interpreting biblical text and continues to publish prose and poetry in magazines around the world.

Appellant alleged that numerous editors and critics would testify to the value of preserving Mr. Booker's unique and important voice and that by virtue of his prominence over a 25 year span the American public has established an interest in the perpetuation and protection of Mr. Booker's work, such that executing him at this time, after thirty years of incarceration on death row, during which he literally created a living body of work while working beneath the thread-borne Sword of Damocles, would constitute cruel and unusual punishment. Further, he

alleged, the public's interest in benefiting from Mr. Booker's mature voice outweighs any interest it might have in vengeance.

Appellant alleged that because of the State's role in long delay in carrying out the sentence and because of the good works to which he has devoted his time in the interim and the promise of great benefits to the society if he is permitted to continue his creations in life-long confinement, the State should be estopped at this time from carrying out the death sentence.

Appellant is entitled to present witnesses and evidence on this claim and the lower court erred in denying him a hearing on it.

8. Conclusion and Relief Sought

Based on the foregoing, Appellant prays that this Court remand the case to the Circuit Court for a fair and full evidentiary hearing on the claims set forth herein and that the Court order such further relief as it deems appropriate.

Certificate of Font and Service

Below signed counsel certifies that this brief was generated in Universal 12 point font pursuant to Fla. R. App. P. 9.210 and served on all parties hereto by first-class U.S. mail on this __ day of July, 2006.

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