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

REPLY BRIEF OF APPELLANT

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ARGUMENT I:

REPLYING TO THE ANSWER=S ARGUMENT REGARDING ALLEGATION OF FIFTH, SIXTH, AND FOURTEENTH AMENDMENT VIOLATIONS OF RIGHT TO COUNSEL AND FAIR TRIAL

The Answer Brief exclusively relies upon resolution of the issue of whether the challenged communications were protected by the attorney/client privilege. Appellee then argues that the prejudice issue, considered under the Strickland standard, is determinative in denying Appellant relief. Thus, Appellee contends that the letters from Mr. Booker to various witnesses and to counsel were not protected by the attorney/client privilege and that, citing Weatherford v. Bursey, 429 U.S. 545 (1977) and Pietri v. State, 885 So. 2d 245, (Fla. 2004), Appellant did not prove he suffered any prejudice.

In reply, Appellant contends that Appellee=s arguments confuse the nature of the Constitutional violations which Appellant suffered when the State Attorney surreptitiously monitored his mail as he prepared for trial. Therefore, Appellee does not address the real issue, which is whether the record supports the trial court=s conclusion regarding the State=s covert activities, perhaps because the record overwhelmingly refutes the trial court=s conclusion. There is not a substantial basis in the record to support the trial

court=s speculation that Amail cover@ did not occur and that the investigator=s age might cause him not to recall correctly. Such a finding is not supported by any fact, and is specifically refuted by the portions of the state attorney=s file which were introduced into evidence and which compliment and corroborate the investigator=s testimony convincingly and precisely.

Any fair reading of the record and review of the trial exhibits establish beyond any doubt that the state did, indeed, conduct an illicit Amail cover@ of Mr. Booker=s communications as he prepared for the retrial. Therefore, Appellee=s Answer substitutes and advances the issue of attorney/client privilege and avoids addressing the issue of the propriety and covert use of the State=s surreptitious monitoring of Mr. Booker=s communications from the Union Correctional Institution or the Florida State Prison, where he was housed as he was preparing for the penalty phase retrial.

The State=s arguments construe the legal issues too narrowly. The State=s reliance upon Weatherford and Pietri are not justified in the context of the facts of this case as this is not an ineffective assistance of counsel claim, which Pietri, in particular presented.

In Pietri, the Court was presented a post-conviction claim of ineffective assistance of appellate counsel in a state habeas petition. The Court, therefore, utilized the test annunciated in Strickland v. Washington, 466 U.S. 668 (1984) and conducted a prejudice analysis under the Strickland rubric. In the instant case, however, the claim is presented as a derivative of Giglio v. United States, 405 U.S. 150 (1972).

Appellant is unaware of Florida precedent which is precisely on point, and, apparently, Appellee has also been unable to indentify a convincing controlling precedent in state law. Importantly, the hearing court had explicitly indicated that the hearing would cover the issue of whether a Amail cover@ was, in fact, instituted. Up to the time of the hearing and when the hearing began, the State contended that no Amail cover@ was ever conducted. The State Attorney indicated such an action would be ethically abhorrent. Therefore, the court originally was going to rule on that question, and, at a subsequent hearing, if necessary, would determine the proper law and proper test to apply. Appellant contends that he established, beyond question, that an illicit Amail cover@ was conducted but that the court then argeed with Appellee that the attorney/client privilege was the issue and concluded that a determination of that issue in the state=s

favor was dispositive. In its answer brief Appellee reiterates this argument and presses the prejudice issue under Strickland despite the fact that a full hearing in the lower court on prejudice, or even regarding the proper legal standard to utilize, was never conducted or determined.

Appellant contends that the lower court erred in denying him relief on his claim that the state deprived him of his right to due process and a fair trial by surreptitiously monitoring his communications to potential witnesses and to his lawyer. In this context the scope of Aprivileged information@ is broader than information protected by the attorney/client privilege. Thus, the broader question should be whether a surreptitious government intrusion was utilized to an unfair advantage and the burden should shift, once the Appellant establishes that the intrusion took place, to the State to prove beyond a reasonable doubt that the intrusion was not prejudicial. See, eg., United States v. Mastroianni, 749 F 2d 900 (1994) (A defense showing that a government agent learned privileged information about defense strategy shifts the burden to the prosecution to prove that the defendant was not prejudiced.)

Weatherford, which Appellee relies on and which this Court, in Pietri, referred to establishes, that aside from the Fifth Amendment privilege against self-incrimination, there is

another constitutional right more closely related to, but still distinct from, the attorney/client privilege, and that this right is the Sixth Amendment right to the assistance of counsel.

The issue in Weatherford was whether an undercover agent for a state agency deprived the defendant of his constitutional rights by being present for certain communications between the accused and his attorney. Briggs v. Goodwin, 698 F. 2d 486, 494 (DST of Columbia 1983) As Briggs noted, the intrusion in Weatherford imposed no additional effort or burden on the defense as the informant did not turn over any evidence to the prosecution. In the instant case, however, the information was obtained by the prosecution.

In Briggs, the court notes that improperly gathered information could have been used by the prosecution if it had not been challenged by the appellants. Briggs 698 F. 2d at 494 AThe prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into those decisions.@ Id. The Briggs court continues, Amere possession by the prosecution of otherwise confidentially

knowledge about the defense=s strategy or position is in itself sufficient to establish detriment to the criminal defendant.@ Id. Such information is Ainherently detrimental,**Y** unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice.@ Id., quoting Weatherford v. Bursey, 429 U.S. at 556. Thus, it is clear that the Strickland analysis propounded by Appellee is inapposite to the facts of the instant case. Further, the reliance in Pietri on United States v. Morrison, 449 U.S. 361, 66 L. Ed. 2d 564, 101 S Ct. 665 (1981), is not helpful either as that case merely holds that the sanction of dismissal was inappropriate despite the deliberate violation where there was no showing of demonstrable prejudice or a substantial threat thereof. The Morrison court does not apply the Strickland standard of prejudice but is merely looking for prejudice of any kind, either transitory or permanent.

In the instant case, the lower court explicitly stated that the scope of the hearing was not going to include the prejudice question absent an initial showing by Appellant that the surreptitious monitoring had occurred. In effect, the court ruled, without ever specifying the specific law to be applied and the specific test being used. Thus, the extent that the lower court and Appellee have attempted to shoehorn the facts of this case into the Strickland test, Appellant

urges this Court to clarify the proper standard to be applied and to remand the case for a full and fair hearing utilizing that legal standard.

The burden, Appellant contends, should be placed upon the State to establish that it did not use any of the illicitly obtained information to obtain the death sentence, as the state is the party whose action demands redress. See, generally, 5 ALR 3d 1360, Scope and Extent and Remedy or Sanctions for Infringement of Accused Right to Communicate with his Attorney.

ARGUMENT II

REPLYING TO THE ANSWER TO THE ARGUMENT REGARDING SUMMARY DENIAL OF CLAIMS

Appellant will rely on the arguments set forth in his initial brief in reply to Appellee=s Answer.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Appellant prays that this Court reverse the lower court and remand this case for a hearing on prejudice from the covert Amail cover,@ if necessary, and for hearing on the summarily denied claims, or for a new penalty-phase trial.

Certificate of Font and Service

Below signed counsel certifies that this brief was generated in Courier New 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 27th day of December, 2006.

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