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IN THE SUPREME COURT OF FLORIDA

CASE NO.SC12-2522

GARY RICHARD WHITTON

Petitioner,

v.

MICHAEL D. CREWS, Secretary, Fla. Dept of Corrections

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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COUNSEL FOR APPELLANT

CLAIM I: APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WITH RESPECT TO SATAN'S DESIRE TO REVEAL THE STATE'S MISCONDUCT AT TRIAL

Appellate counsel was told that a jailhouse snitch in this case stated that he had lied at trial, that the prosecutor had put him up to it, and that he had actually learned nothing from Appellant about the facts of the crime. She was told that this snitch had, after trial, been visited by trial counsel who threatened him with perjury, so the snitch wanted now to speak only with Whitton's appellate counsel.

Appellate counsel spoke to Mike Minerva and he stated the standard of care for attorneys in this situation-go get an affidavit from this snitch immediately. She did not do so.

Worse, she promised Appellant that she would go and meet with the snitch. Even if it were not the standard of care to interview the snitch under these circumstances, once counsel promised Appellant she would do so it was patently unreasonable for her not to have done it.[1]

After appellate counsel did not go and see the snitch, the snitch died. Now the state argues that the snitch's statements to others about recanting his trial testimony and stating that the prosecutor had him lie cannot be considered by the lower

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[1]The State writes in response that Appellant cites no case law for this Argument. When an attorney promises a client they will do something that has significant bearing on a case, the attorney acts unreasonably if they break that commitment.

court or this Court as a statement against penal interest or under any other legal rubric. If the State is correct, which Appellant contests, then appellate counsel's unreasonable actions prejudiced Appellant. This snitch was a key witness at trial and if his testimony was untrue and the State knew it - as he says - then Appellant would be awarded a new trial. *Giglio v. United States*, 405 U.S. 150 (1972).

CLAIM II: SECRET NOTES BETWEEN JURORS, BAILIFF, AND COURT VIOLATED FLORIDA STATUTE AND THE FEDERAL CONSTITUTION, APPELLATE COUNSEL WAS INEFFECTIVE, AND A NEW TRIAL IS REQUIRED

A. A New Trial is Required by Florida Statute, Rule, and Case Law

"[T]he statutes of the State of Florida prescribe certain safeguards pertaining to the conduct of the trial which *must be followed exactly.*" *Holzapfel v. State*, 120 So.2d 195, 196 (Fla. 4th DCA 1960)(emphasis added). One "of these safeguards is section 918.07, Fla Stat.," *id.* at 197, which provides:

> When the jury is committed to the charge of the officer, the officer shall be admonished by the court to keep the jurors together in the place specified and not to permit any person to communicate with them on any subject except with the permission of the court given in open court in the presence of the defendant or the defendant's counsel. The officer shall not communicate with the jurors on any subject connected with the trial and shall return the jurors to court as directed by the court.

Under this statute, "[n]o one is permitted to communicate with the jurors without permission from the Court given in open court in the presence of the defendant or his counsel." *Caldwell v.*

State, 340 So.2d 490, 491 (Fla 2d DCA 1977).[2] Similarly, F.R.Crim.P 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Thus, by Florida statute and rule, any questions from the jurors must be submitted to the Court and answered in open court after consultation with counsel for both parties. *Wright v. CTL Distribution, Inc.*, 650 So.2d 641, 643 (Fla. 2d DCA 1995); *Caldwell v. State*, 340 So.2d 490 (Fla. 2d DCA 1976). If a Court takes action on a jury request or question without the defendant being present, and/or without opening court, and/or without advising counsel for the parties, it is error requiring reversal. *Slinsky v. State*, 232 So.2d 451 (Fla 4th DCA 1970). If the bailiff answers the question - even correctly - outside the presence of the defendant, reversal is required. *Holzapfel, supra.*[3] These strictures were not followed exactly in

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[2] *See also State v. Merricks*, 831 So.2d 156 (Fla. 2002); *Ivory v. State*, 351 So.2d 26 (Fla. 1977).

[3] "[T]he potential for prejudice and the danger of an incomplete record of the trial court's communication with the jury are so great as to warrant the imposition of a prophylactic per se reversible rule." *State v. Franklin*, 618 So.2d 171 (Fla. 1993).

Appellant's case, and a new trial is required.[4]

During Appellant's capital trial at least four notes were written to the judge by the jurors and at least one note was written by the judge to the jurors. The State concedes that "[t]he record is silent as to three of the juror notes. The way the trial judge handled these three notes is not in the trial record." BA at 71. *Ipso facto*, Florida Statute and rule were violated and a new trial is required.[5]

B. The Evidentiary Hearing Conducted Below Illustrates the Need for a Per Se Rule

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[4]The lower court did not address the Florida statute, rule, or this case law. Neither did the State in the BA.

[5]The State argues that one of the four juror notes - the one in which the jurors expressed concern and uneasiness with a person recording the proceedings in the courtroom - was addressed by the judge in open court when the judge stated she "had dealt with the situation that you brought to my attention" and that she would "file this note with the clerk." There is no evidence that the note the judge was talking about was the one in which the jurors expressed their concerns. The complete record evidence is the following:

> Let me make a general announcement before you call your first witness, and that would simply be to advise the jury that I have dealt with the situation that you brought to my attention. And I will, for the record, just file this note with the Clerk.

Tr. Vol. 11, at 2152. This incident supports Appellant's arguments. How/when did the jurors write whatever note to which the judge referred? How did the judge get the note? When had the judge "dealt with the situation." How did she deal with it?

Thus, there are four notes which the record does not explain. Defendant agrees that the content of the fifth note - about a juror's feet not reaching the ground - was discussed in open court on the record. *See* BA, pp. 70-71.

Instead of granting a new trial, the lower court had a hearing on what happened at trial, but excluded any input from the actual jurors on the matter. The resulting hearing illustrates why there is a *per se* rule of reversal under these circumstances. The actual trial judge testified that she had no memory of what had happened and then testified to what her habits were under similar circumstances. One defense attorney testified that he remembered a note about a juror's feet not touching the ground and a note about how much time a model prisoner would have to serve on a life sentence. V20, at 3959. He did not recall how he found out about these two notes. *Id.* at 3960. The other defense attorney only remembered one note, did not remember what it said, and did not remember when it occurred. The prosecutor had no memory.

This was the evidence upon which the lower court concluded that everything was done at trial the way it should have been done, despite the fact that "[t]he way the trial judge handled these three notes is not in the trial record." BA at 71. But such a conclusion flies in the face of the rationale for the rules discussed above, *i.e.*, without a contemporaneous record, court's are necessarily "uncertain," *Caldwell*, 340 So.2d at 491, "[n]ot certain as to what actually happened," *Holzapfel*, 120 So.2d at 196, and "can not determine the effect," *Slinsky*, 2332 So.2d at 452, of actions taken but judges and bailiffs. "In the

criminal law the procedural aspects affecting the substantial rights of the defendant must be strictly observed," *Holzapfel*, 120 So.2d at 196, and that did not occur.

C. Appellant Counsel Acted Unreasonably and Prejudicially

Because these violations were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Whitton's] direct appeal." *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987). *See also Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985). The trial transcript revealed that communications with the jury were occurring but the record did not reflect what they were or what was done about them. Appellate counsel should have done what post-conviction counsel did-ensure that the record reflected as much as possible what had occurred. A simple review of the public file in the trial court would have reveled the sealed documents, a routine motion to unseal would have been granted (or its denial appealed), and the record would have been supplemented. Inasmuch as the trial record does not reveal anything done in open court about these matters, reversal would have been required. Prejudice is established.

CONCLUSION AND RELIEF REQUESTED

Mr. Whitton, through counsel, respectfully urges that the Court issue its Writ of Habeas Corpus, vacate his

unconstitutional conviction and sentence of death, and/or order a new direct appeal.

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy hereof has been furnished to Carol Dittmar at Carol.Dittmar@myfloridalegal.com and that Carol.Dittmar@myfloridalegal.com is the e-mail address on record with The Florida Bar as of this date for Ms. Dittmar, pursuant to Rule 2.516(b)(1)(A).

I also certify that this Reply was computer generated using Courier New 12 font.

Respectfully submitted and certified:

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