

NO. 401-80453-08

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
VS.	§	401 ST JUDICIAL DISTRICT
MARK LYLE BELL	§	COLLIN COUNTY, TEXAS

AMICUS CURIAE BRIEF

FILED BY

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

*RAID ON LAWYERS OFFICE FOR EVIDENCE ALREADY SUBPOENAED IS
UNCONSTITUTIONAL WHEN THE LAWYER IS NOT ACCUSED OF CRIMINAL
ACTIVITY AND THERE WAS NO THREAT OF EVIDENCE DESTRUCTION*

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HARRISON KLINKLE
DISTRICT CLERK
COLLIN COUNTY, TEXAS
BY  DEPUTY

I. STATEMENT OF PURPOSE OF AMICUS CURIAE

The purpose of the Texas Criminal Defense Lawyers Association (TCDLA) is to protect and ensure by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases; To resist the constant efforts which are now being made to curtail such rights; To encourage cooperation between lawyers engaged in the furtherance of such objectives through educational programs and other assistance; And, through such cooperation, education and assistance to promote justice and the common good.

TCDLA condemns the raid on the lawyer's office in this case as being offensive to the Texas Constitution and the Constitution of the United States of America.

II. RAID ON LAWYER'S OFFICE WAS FOR EVIDENCE ALREADY SUBPOENAED AND THAT WAS SUBJECT TO A HEARING

The defendant, Mark Lyle Bell, is indicted for Capital Murder and is represented by attorneys Steven Miears and Keith Gore. On February 28, 2008, the State of Texas obtained a grand jury subpoena for certain physical evidence believed to be in Gore's possession. Gore was served with the grand jury subpoena on that same day and filed a motion to quash. A hearing on the motion to quash was scheduled for March 4, 2008, allowing Gore an opportunity to be heard regarding his objections to the subpoena. On February 29, 2008, before the hearing could be held, the State obtained a search warrant and raided Gore's office.

II. RAID ON LAWYER'S OFFICE WAS UNCONSTITUTIONAL

The search of a lawyer's office involves fundamental questions regarding the power and role of government in our society. The questions posed relate to the most basic and central liberties guaranteed to all persons by the Bill of Rights. It is the duty of the Court to protect against injustice and the erosion of constitutional rights. Law enforcement officials must act with reasonable diligence and care before invoking the heavy hand of the government, especially where the reasons offered by law enforcement authorities do not justify resorting to such drastic means especially when dealing with systemic rights.

Raids on lawyers' offices invoke more than a simple conflict between a lawyer's obligation to protect confidential communications with his clients on the one hand and the government's desire to obtain evidence in a criminal investigation on the other. The subpoena would have presented this simple conflict and that conflict would have been resolved through the hearing on the motion to quash. Instead, the State raised the stakes in the most dramatic way possible – a search warrant on an attorney to obtain material belonging to his client. Such invasions strike at the very heart of the attorney-client relationship by undermining the basic proposition that the attorney-client relationship will be protected.

Law office raids threaten the very core of constitutional protections. The possibility of the seizure of privileged documents has a demoralizing effect on society's faith in the confidentiality of information provided to counsel. The chilling effect of law office raids on client communication and trial preparation is

incalculable. Accused persons are dissuaded from providing information and records to counsel for fear that it might wind up in the hands of the government.

The most basic element of the adversarial process, the attorney-client relationship, is assaulted when the government is allowed to deprive the person accused and his counsel the opportunity to be heard and instead raid counsel's office. When persons accused cannot trust their attorneys, the prosecution has effectively isolated the accused, leaving only the government to present its version of what happened. No exploration of the truth can succeed under these conditions.

Keith Gore lawfully came into possession of evidence. He is accused of no illegal activity and was faithfully executing his duty to defend his client. The filing of the motion to quash the grand jury subpoena and requesting the opportunity to be heard was ethical and required by the oath he took to defend his client. The raid on his office by the State of Texas is reprehensible.

In O'Conner v. Johnson, 287 N.W.2d 400 (Minn. 1979), the Minnesota Supreme Court held that a warrant authorizing the search of an attorney's office is unreasonable and therefore invalid when the attorney is not suspected of criminal wrongdoing and there is no threat that the evidence sought would be destroyed. O'Conner went on to hold that before the government may raid a lawyer's office it must first attempt to obtain the information via a subpoena. That Court reasoned:

It will not unreasonably burden prosecutors' offices and effective law enforcement to require officers to proceed by subpoena duces

tecum in seeking documents held by an attorney. Attorneys are required by statute, the Code of Professional Responsibility, and the oath of admission to the bar to preserve and protect the judicial process. Thus, attorneys must respond faithfully and promptly, while still being allowed the opportunity to assert applicable privileges by a motion to quash. The very dearth of reported cases from other jurisdictions regarding the seizure by warrant of clients' files from an attorney's office indicates to us that the subpoena procedure is used elsewhere with satisfactory results. Subpoenas may be issued in conjunction with a grand jury proceeding or hearing or trial before the court. * * * Though this may be seen as limiting the ability of the police to obtain information in the early stages of an investigation, we find this measure necessary to protect the overriding interest of our society in preserving the attorney-client privilege, client confidentiality, the work product doctrine, and the constitutional right to counsel.

Id. at 405. (internal cites omitted).

The State not only abused its search warrant power in this case but also denied Gore (and his client) the opportunity to be heard and voice objections at the hearing on the motion to quash. In Boyle v. State, 820 S.W.2d 122 (Tex.Crim.App. 1989, 1991), a peace officer, believing that the appellant was involved in a murder but lacking probable cause, obtained a "grand jury material

witness attachment" from a district judge. On original submission, the Court in Boyle found a number of defects in the events and commented:

We * * * hold that the procedure utilized in placing [Boyle] under arrest pursuant to a grand jury material witness attachment was a pretext, subterfuge, and deceptive artifice intentionally employed to circumvent the principles and tenets of the Fourth and Fourteenth Amendments to the United States Constitution and Art. I, Sec.9 of the Texas Constitution.

Id. at 129-130 (Tex.Crim.App. 1989, opinion on original submission).¹

The issuance of the search warrant in the instant case was likewise an attempt to subterfuge the hearing that was previously set on the motion to quash the subpoena.

III. CONCLUSION

Keith Gore is accused of no crime. He was faithfully executing his duty to defend and protect the rights of his client. The filing of the motion to quash the government subpoena and requesting an opportunity to be heard was ethical, proper, and required.

Prosecutors today appear to be increasingly employing tactics -- including raids on lawyers' offices -- that are directed toward breaching and exploiting attorney-client confidentiality to obtain evidence. These searches infringe upon the basic principles of fundamental fairness ensured by the Texas and Federal Constitutions. Lawyers are bound by Code of Professional Responsibility and

¹ On motion for rehearing, the Court adopted a different analysis that made the validity of the arrest irrelevant. The Court did not, however, disclaim its analysis on original submission.

the oath taken upon becoming members of the State Bar. There was no evidence that Gore intended to destroy or tamper with evidence. Allowing the State to subvert due process and deny counsel the opportunity to be heard by raiding law offices results in a chilling effect on the attorney-client relationship in all cases.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above legal document was hand-delivered to the attorney for the State on the 5th day of August, 2008.



RICK HAGEN