IN THE SUPREME COURT OF FLORIDA

CLEO DOUGLAS LECROY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79,956

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Cleo LeCroy was indicted on two counts of first-degree murder and two counts of armed robbery (with a firearm). (ROA 4098).[1] LeCroy was found guilty of "felony murder" on one count and "premeditated murder" on the second. LeCroy was also convicted on both robbery counts. (ROA 3286 et. seq).

The advisory jury voted for "death" on both counts of murder (ROA 3730-31) but defense counsel won an override for "life" on Count I (ROA 4054), but a death sentence was imposed in Count II. (ROA 4054). LeCroy's convictions and sentences were upheld on appeal. LeCroy v. State, 533 So.2d 750 (Fla. 1988).

In 1990 a death warrant was signed, prompting the filing of a motion for post-conviction relief pursuant to Fla.R.Cr. P. 3.850.

Claim VII of the motion (R376 et. seq.) consists of various allegations of "ineffective assistance of trial counsel" during the guilt phase of the trial.

Counsel is faulted:

> "... for failing to introduce evidence that in fact John LeCroy was the prime instigator of these crimes as well as the actual triggerman." (R 380-381).[2]

Elsewhere in the complaint, counsel is accused of other errors that are "established" by references to counsel's files (R

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[1] References to the original appellate record will be designated as (ROA __). The record at bar will be cited as (R __). The transcripts at bar will be cited (TR ___).

[2] As confessed in LeCroy's brief, his brother Jon was tried separately and found to be not guilty.

381) or to investigative material such as Dr. Romanos' report. (R 382).

Mr. LeCroy, represented by the Office of the Capital Collateral Representative ("CCR") requested an "full and fair" evidentiary hearing. The State's Attorney for the Eleventh Circuit was primarily responsible for any actions in Circuit Court.

Inasmuch as Mr. LeCroy was challenging the theory of defense and had himself cited to "counsel's files," the State requested limited access to those files.

The State maintained that Mr. LeCroy's allegations of ineffective assistance of counsel constituted a limited waiver of the attorney-client privilege. In this instance, the challenge to counsel's selection of a theory of defense and counsel's alleged "failure" to blame the crime on Jon LeCroy raised fundamental concerns over counsel's legal obligation to prepare or present that defense.

The State requested limited access to LeCroy's (trial) files by letter, but CCR (the Capital Collateral Representative's Office) took the position that these files were privileged. (TR 156-157). The Court suggested that the State present a formal motion. (TR 158). The Court agreed with the State that a waiver of the attorney-client privilege is created when counsel's effectiveness is challenged (TR 165).

At the May 13, 1992, proceeding, (R 220) Assistant State Attorney, Ms. Roberts, apologized to the Court for the late filing of the State's motion (TR 220). The motion was filed on April 29, 1992, but the parties had discussed the issue for months previous to said action. (TR 220).

CCR's response to the State's motion was to assert the attorney-client privilege. (TR 221) CCR stated:

> "The 3.850 proceeding is a criminal proceeding. There is no provision for discovery of this file. Under the discovery rules under 119, work product is protected. All of these things are stated in my response." (TR 222).

CCR also alleged that counsel (Mr. Eisenberg) was not a "party" and was not represented by the state, thus making any disclosure of LeCroy's files a matter of privilege. (TR 224).

The Court agreed with the State but held that Mr. Eisenberg, as an officer of the court, was to examine the file and disclose documents relevant to his "defense" (TR 232).

CCR announced it could not abide by the court's order and objected to having Mr. Eisenberg review his files "for the State." (TR 235).

The Court made the final (oral) decision:

> "... it would be the Court's order that the claim, as it pertains to ineffective representation, would be stricken, just so we get it on the record.
> In other words, you have a choice here of respectfully following the court's directive regarding the limited disclosure that I think is appropriate here or suffering the consequences of having the claim stricken." (TR 241).

The Court went on to note that it wanted some direction from this Court, (TR 243) and added:

> "But and I think it would be appropriate for them, if they agreed with me, that he either produce it or suffer the consequences of the striking." (TR 244).

The Court then agreed that any appeal should be expedited. (TR 245).

SUMMARY OF ARGUMENT

The trial court was correct in holding that Mr. LeCroy waived the attorney-client privilege by challenging the competence of counsel during the guilt and penalty phases of his trial.

Mr. LeCroy does not have the legal right to file allegations of ineffective assistance, which the state must defend for counsel (sub nom), and then gather up and withhold all relevant evidence regarding those accusations.

The State agrees with Mr. LeCroy's assertion sub judice that the trial court, rather than defense counsel, should determine which portions of counsel's files are still protected by the privilege, if any.

ARGUMENT

THE APPELLANT HAS CONCEDED THAT A DISCLOSURE OF RELEVANT PORTIONS OF MR. LECROY'S FILES IS APPROPRIATE AND NECESSARY TO ADDRESS ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The Appellant's position appears to have softened substantially since the hearing at bar to the point that he now concedes the state's right to access to his files. Nevertheless, there are issues which must be resolved in this appeal regarding the nature and extent of any waiver of the attorney-client privilege under Rule 3.850 and the proper procedure for the preservation and inspection of the Petitioner's files.

(A) STANDING

Mr. LeCroy's petition specifically refers to alleged "contents" of defense counsel's (Mr. Eisenberg's) files which "prove" that counsel failed to utilize evidence, information and reports in his possession. Mr. LeCroy alleges that the state must respond to these allegations, but cannot see the evidence, cannot see the reports, and cannot see any other portion of the file which would explain why this "evidence" was not used.

On appeal, Mr. LeCroy's only justification for this stance is an irrelevant discussion of "Roman Law" and the philosophical and legal roots of the attorney-client privilege - none of which are challenged by the state.

We will begin dismantling Mr. LeCroy's position by correcting certain incorrect statements made (sub judice) by his lawyer. First, the state is not seeking disclosure under Chapter 119. Therefore, his adamant and continual citations to Kight v.

Dugger, 574 So.2d 1066 (Fla. 1990) are irrelevant. Second, Rule 3.850 proceedings are civil in nature (which is the basis for CCR obtaining documents under Chapter 119), not criminal as LeCroy alleged when it became his turn to disclose evidence. State v. White, 470 So.2d 1377 (Fla. 1985); State v. Lasley, 507 So.2d 711 (Fla. 2nd DCA 1987).

Originally, the issue of "ineffective assistance of counsel" was not available for collateral review. Later, the competence of public counsel was subject to review, but not private counsel. Eventually, the state's judgements and sentences were laid open to collateral attack due to "ineffective assistance" of any attorney. See, Cappetta v. Wainwright, 203 So.2d 609 (Fla. 1967); Vagner v. Wainwright, 398 So.2d 448 (Fla. 1981).

Collateral review of counsel's performance was originally limited because the courts realized that the State could not be held "liable" for the conduct of a third party (counsel) over whom it had no control. The State could not sit in on client conferences, nor could it discuss defense strategy, nor could it review counsel's private work product.

Vagner recognized a shift in this approach. After Vagner, the courts recognized the right of a defendant to competent counsel, which would not be subject to forfeiture because the defendant happened to draw a bad lawyer. As a result, the defense attorney assumed the de facto status of an agent of the State, for whose errors the State would be held responsible. Thus, while counsel for the State does not personally represent defense counsel during a Rule 3.850 proceeding, the prosecutor does represent a client who is subject to adverse judgment as a result of counsel's "ineffectiveness."

In Wilson v. Wainwright, 248 So.2d 249 (Fla. 1st DCA 1971), the district court recognized the state's right to invade the "privilege" when necessary to defend itself from a claim of ineffective counsel.

In Turner v. State, 530 So.2d 45, 46-47 (Fla. 1987), the petitioner filed a Rule 3.850 petition alleging ineffective assistance of counsel (in particular, regarding counsel's advice and a waiver of Turner's presence during a portion of the trial). Turner was granted a hearing and, like LeCroy, immediately asserted the "attorney-client" privilege to prevent trial counsel from responding to the accusations and to justify his own refusal to testify. Then, Turner had the temerity to suggest an entitlement to judgment since the record failed to refute the charges.

This Court held:

> "The record is silent only because Turner's counsel thwarted the requested evidentiary inquiry by asserting Turner's attorney-client privilege. The attorney-client privilege is not absolute and "may be outweighed by public interest in the administration of justice in certain circumstances." Sepler v. State, 191 So.2d 588, 590 (Fla. 3rd DCA 1966) Section 90.502 Florida Statutes (1985)."

After citing relevant portions of the Code of Professional Responsibility, this Court held:

> "Further, a lawyer who represents a client in any criminal proceeding may reveal communications between him and his client when accused of wrongful conduct by his client concerning his representation where such revelation is necessary to establish whether his conduct was wrongful as accused. Wilson v. Wainwright, 248 So.2d 249, 259 (Fla. 1st DCA 1971) see also Laughner v. United States, 373 F.2d 326 (5th Cir. 1976); Bennett v. State, 293 So.2d 1 (Miss. 1974) (citing Wilson)."

The final result was an express holding that Turner had no right to assert an attorney-client privilege as to any challenged conduct. Of course, the state, not defense counsel, was the "party" in Turner just as it is here.

The state's standing to probe the attorney-client privilege cannot honestly be questioned.

(B) WAIVER

Mr. LeCroy's petition contains two key assertions. First, he alleges the existence of evidence and medical reports in Mr. Eisenberg's files that were not used. Second, LeCroy challenges the theory of defense employed at trial on the theory that counsel was required under Strickland v. Washington, 466 U.S. 688 (1984) to blame the murder on Jon LeCroy or else be ineffective.

The waiver of the attorney-client privilege regarding LeCroy's references to his "secret" files is obvious. By citing to the files, LeCroy waived the privilege as to all relevant portions of those files containing the alleged evidence and any other material which might explain why this "evidence" was not used. Delap v. State, 440 So.2d 1242 (Fla. 1983); Hoyas v. State, 456 So.2d 1225 (Fla. 3rd DCA 1985); Home Insurance Co. v. Advance Machine Co., 443 So.2d 165 (Fla. 1st DCA 1983).

The second assertion by Mr. LeCroy was that counsel was ineffective for failing to put on evidence that Jon LeCroy, Cleo's brother, "instigated" the murders and was the "actual killer". This allegation is different in that it does not refer directly to the contents of any communication or file. Nevertheless, the privilege was waived because the allegation refers to the selection of a theory of defense and the factual basis for conducting such a defense.

In Strickland v. Washington, 466 U.S. 688, 691 (1984), the Supreme Court addressed the difficulty facing the State when attempting to defend the actions of counsel. In finding the attorney/client privilege inapplicable, the court said:

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigative decisions are reasonable depends critically upon such information. For example, when the facts that support a potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's other litigation decisions. See, United States v Decoster, 199 U.S. App. D.C. at 372-373, 624 F.2d at 208-210."

The Decoster citation relied upon by the Strickland court says:

> Realistically, a defense attorney develops his case in large part information supplied by the client. As the Third Circuit indicated in Green, choices based on such information should not later provide the basis for a claim of ineffectiveness even though that basis would have been undercut by inquiry of others. Judicial intervention to require that a lawyer run beyond or around, his client would raise ticklish questions of intrusion into the attorney-client relationship and should be reserved for extreme cases where an effect on the outcome can be demonstrated."

The Decoster case cites, in turn, to Matthews v. United States, 518 F.2d 1245, 1246 (7th Cir. 1975) which held:

> "Petitioners have not told us what was said in their conference with counsel. Perhaps, for all we know, they merely explained that

> they had indeed forged the 35 ballot applications which were placed in evidence by the government and that they were indeed guilty as charged. Surely, if that were the case, counsel had no duty to search for witnesses, expert or otherwise, who might falsely testify to the contrary."

These decisions also reflect the practical aspects of any review of counsel's conduct "from his shoes, at the time." To assess counsel's conduct, we must know "what" counsel knew. These decisions also bear upon counsel's duty to prepare any particular defense. If Cleo LeCroy confessed to counsel, then counsel, per Matthews and Strickland, had no duty to defend Cleo by blaming Jon LeCroy falsely. Accord: Scott v. Dugger, 891 F.2d 800 (11th Cir. 1990); Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990).

Therefore, as to all claims of ineffectiveness, Mr. LeCroy has waived the privilege. (See, Fla. Bar Ethics Opinion 70-40)

(C) METHOD OF REVIEW

The third issue deals with "how" the delivery of "relevant" portions of the file should be made. The state agrees with Mr. LeCroy's position (sub judice) that this burden should not be placed on the shoulders of trial counsel. The potential conflicts are too great. A vindictive lawyer might reveal too much, while a lawyer opposed to capital punishment, or still loyal to his ex-client, or even in concert with his client, might continue to withhold relevant documents.[3]

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[3] Note: Wainwright v. Sykes, 433 U.S. 72 (1977) and cases categorically assigning "no weight" to attorney confessions of malpractice. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Hill v. Dugger, 556 So.2d 1385 (Fla. 1990); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1984); Prejean v. Smith 889 F.2d 1391 (8th Cir. 1989); Williams v. Chrans, 945 F.2d 926 (7th Cir. 1991).

Neither party should be subject to these variables.

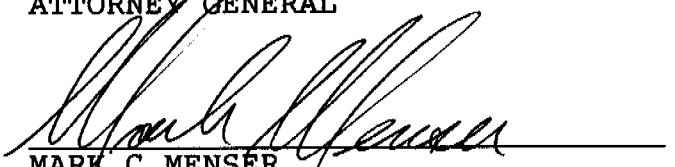
Upon filing a claim of ineffective assistance of counsel, the appropriate procedure would be for the parties (including trial counsel) to review the file and agree to any necessary disclosure. Disputed portions of the file would then be delivered to the court for in camera inspection and disposition.

CONCLUSION

The decision of the lower court should be affirmed with the exception that the Court, not trial counsel should conduct any in camera review of the files or requested evidence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Martin J. McClain, Esquire, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 11th day of February, 1993.

MARK C. MENSER
Assistant Attorney General