IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,956

CLEO DOUGLAS LECROY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of a circuit court interlocutory order waiving Mr. LeCroy's attorney\client privilege and right to cinfidentiality, and providing the state with privileged documents. The order was entered during the pendency of Mr. LeCroy's Fla. R. Crim. P. 3.850 motion.

Citations in this brief shall be as follows: the record on appeal of the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal from the Rule 3.850 proceedings shall be referred to as "PC-R. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. LeCroy has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF THE CASE AND THE FACTS

Mr. LeCroy was convicted on February 28, 1986, in Palm Beach County (R. 699-700). The penalty phase was conducted on March 10, 1986, an allocution hearing was conducted on June 20, 1986, and Mr. LeCroy was sentenced to death on October 1, 1986 (R. 700). Mr. LeCroy's brother, Jon LeCroy, was also indicted and tried for the same offenses, but was acquitted by a jury on April 18, 1986 (R. 700). Mr. LeCroy appealed his convictions and sentences. They were affirmed on direct appeal. LeCroy v. State, 533 So. 2d 750 (Fla. 1988). Former Governor Martinez signed a death warrant on May 17, 1990 (R. 294-295). This Court granted a stay of execution (R. 700).

The motion to vacate was filed on December 14, 1990, and amended on April 14, 1992 (PC-R. 345-426; 698-849). The state responded on April 16, 1991 (PC-R. 428-430; 431; 432-457).

In May 1991, defense counsel requested a hearing in order to resolve pending public record matters (PC-R. 460-463).[1] Subsequently, the circuit court held several pretrial hearings (PC-R. 66-151; 152-177; 178-212; 322-323; 324-325; 345-352; 698-

[1]Mr. LeCroy has had continuing difficulties in obtaining production of Chapter 119 materials. Despite repeated requests, as of the time of the evidentiary hearing, defense counsel still had not received all of the tapes taken by the state at the time of trial; nor had Mr. Menser submitted a proposed order to the defense or the court for the FDLE records as directed by the court on September 23, 1991. Defense counsel documented the existence of the requested materials with approximately 70 citations of documents from the state's files, the co-defendant's transcript, and original trial depositions (R. 577-649). On January 27, 1992, the state finally provided copies of the Welty tapes that it had previously denied having and had previously denied existed.

712). At the July 2, 1991, hearing, and again on September 23, 1991, assistant attorney general Mark Menser requested that Mr. LeCroy's trial defense file be turned over to the state (PC-R. 80-88, 156-58).

Counsel for Mr. LeCroy asserted the attorney-client privilege and right of confidentiality and requested an opportunity to present argument. The trial court instructed Mr. Menser to file a formal motion requesting with specificity the materials he wanted from the defense, after which the court would allow the defense to respond and would conduct a hearing (PC-R. 157-158).[2] Mr. Menser acknowledged that he was to file a formal motion at the court's direction (PC-R. 164).

On November 4, 1991, Mr. Menser again made an oral request that postconviction counsel turn over Mr. LeCroy's trial defense file (PC-R. 188). The court reminded Mr. Menser that he had not filed a motion to compel the materials he sought and that if he would do so, a hearing would be held to decide the issue (PC-R. 188; 191-192).

On February 11, 1992, the circuit court set the case for an evidentiary hearing to be held on May 13, 1992 (PC-R. 697). On April 29, 1992--just two weeks before the scheduled evidentiary

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[2]At the September hearing, the court ordered the state to draft a proposed order incorporating the court's Chapter 119 oral findings (PC-R. 176). The state filed the proposed order on Chapter 119 issues on September 24, 1991. Defense counsel objected that the state's proposed order did not accurately reflect the court's rulings and filed an alternative proposed order September 27, 1991. The court signed Mr. LeCroy's order on October 3, 1991 (PC-R. 464-467).

hearing--the state finally filed a motion for disclosure of Mr. LeCroy's trial defense file but made no attempt to set the motion for hearing. On May 13, 1992, Mr. LeCroy filed his response to the state's motion.

On the morning of May 13, all parties appeared in court with witnesses and fully prepared to proceed with the evidentiary hearing. At this juncture the state finally requested argument on the attorney-client issue (PC-R. 220). Mr. Menser argued that the state was entitled to access to all of the trial defense files (PC-R. 220). The circuit court ruled against the state finding that the state was only entitled to particular documents which were relevant to the issues (PC-R. 234). [3]

The court decided that an in camera inspection of the documents would be appropriate but was reluctant to do so under the time constraints (PC-R. 235).[4] As an alternative, the court ordered the trial attorney, mr. Eisenberg, to review the files and to give the state all "relevant" documents (PC-R. 234).

The court was then advised that Mr. Eisenberg had already reviewed the files in preparation for the hearing and did not find any documents which he felt were necessary to defend against the allegations in the hearing on the motion to vacate (PC-R. 233). Although Mr. Eisenberg did not believe that any of the documents were relevant for his testimony, the court instructed

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[3]The state has not cross-appealed that ruling.

[4]These time constraints arose from the State's failure to timely file its request.

Mr. Eisenberg to review the files again to determine whether there were any documents which the state might want (PC-R. 234). Counsel for Mr. LeCroy strongly objected that Mr. Eisenberg was being placed in the untenable position of acting as an agent for the state. Since compliance would render a later appeal a nullity, the court granted a stay of the proceedings pending an interlocutory appeal (R. 234).

On May 15, 1992, the court entered an order that the state's motion for production of Mr. LeCroy's trial defense file was granted to the extent noted on the record (PC-R. 852). This appeal was taken from that interlocutory order (PC-R. 855-56).

INTRODUCTION

At issue in this case is whether a circuit court can order a defense attorney to inspect his client's file and disclose to the state all documents and materials which may assist the state in seeking to carry out a death sentence.[5] Specifically in this case, trial counsel was aware of the pending claim of ineffective assistance and had reviewed his file with that claim in mind. Trial counsel determined that there was nothing in that file on which he needed to rely in testifying concerning the ineffective assistance claim. Despite trial counsel's conclusion that he did not need to disclose anything in the file, he was ordered to

[5]The state in requesting disclosure cited no authority for its request. It simply argued that "Rule 3.850 proceedings are equitable in nature". The state claimed its request was not a Chapter 119 request and therefore the decision in Kight v. Dugger, 574 So. 2d 1066 (Fla 1990), specifically holding that discovery of trial counsel's files was impermissible, did not apply.

inspect the file again and by placing himself in the state's shoes, attempt to determine any documents or materials which would assist the state. This ruling was erroneous and violated Mr. LeCroy's attorney-client privilege and right of confidentiality.

SUMMARY OF THE ARGUMENT

The circuit court erred in ordering the trial attorney to review the trial file and disclose to the State anything which may assist the State. The trial attorney is ethically bound to disclose no more than he or she believes necessary to respond. Here, the trial attorney reviewed the file and determined nothing in the file was necessary to respond to the claim of ineffective assistance. Trial counsel was ready to testify and answer questions put to him by the parties. Under these circumstances, the circuit court had no authority for ordering trial counsel to act as an agent of the State. The circuit court erred in ordering trial counsel to again review the file and disclose any evidence which may assist the State.

ARGUMENT I

ANY WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE MUST BE NARROWLY CONSTRUED PURSUANT TO THE DICTATES OF FLORIDA LAW AND THE REQUIREMENTS OF RULES OF PROFESSIONAL CONDUCT.

The attorney-client privilege and client confidentiality are critical component of the present day judicial system without which the adversary system would fail. It is based upon a simple premise -- without the assurance that an attorney-client

communication will remain confidential, no client will be willing to freely disclose a complete statement of the facts to his counsel. This is particularly true where an attorney could be compelled to reveal privileged material to a third party.[6] Likewise, without an assurance that an attorney cannot be forced to reveal privileged material to a third party, attorneys will be reluctant to elicit a complete statement of facts or to conduct a complete investigation of a case. The effect would be to chill attorney-client communications and severely hamper the ends of justice. Full and free communication is essential in a criminal case, and even more critical in a death case where sensitive information such as other crimes, alcoholism, child abuse, and sexual abuse can mean the difference between life and death.

A. The History of the Privilege.

The necessity of attorney-client confidentiality is deeply-rooted in Roman law. As the legal system has matured, the basis for the privilege has evolved:

> This theory, which continues as the principal rationale of the privilege today, rests upon three propositions. First the law is complex and in order for members of the society to comply with it in the management of their affairs and the settlement of their disputes they require the assistance of expert lawyers. Second, lawyers are unable to discharge this function without the fullest possible knowledge of the facts of the client's situation. And last, the client cannot be expected to place the lawyer in full possession of the facts without the assurance that the lawyer cannot be compelled, over the client's objection, to reveal the

[6]In the present case, the judge ordered trial counsel to disclose privileged material even though the attorney had already determined that under Florida Rules of Professional Conduct, the material was privileged and should not be disclosed.

> confidences in court. The consequent loss to justice of the power to bring all pertinent facts before the court is, according to the theory, outweighed by the benefits to justice (not to the individual client) of a franker disclosure in the lawyer's office.
>
> This clearly utilitarian justification, premised on the power of the privilege to elicit certain behavior on the part of clients, has a compelling common-sense appeal. The tendency of the client in giving his story to his counsel to omit all that he suspects will make against him is a matter of every day professional observation. It makes it necessary for the prudent lawyer to cross-examine his client searchingly about possible unfavorable facts. In criminal cases the difficulty of obtaining full disclosure from the accused is well known, and would certainly become an absolute impossibility if the defendant knew that the lawyer could be compelled to repeat what he had been told.

McCormick, Evidence, sec. 87 at 314-15 (4th ed.1992)(footnote omitted)(emphasis added).

The evidentiary attorney-client privilege as codified by statute is integrally related to the Rules of Professional Conduct. Any erosion of the privilege would have far reaching consequences for the fundamental system of ethics:

> Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business. To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, it is futile to envision drastic curtailment of the privilege without substantial modification of the underlying ethical system to which the privilege is merely ancillary.

McCormick, sec. 87 at 316-17 (emphasis added)(footnote omitted).

In Mr. LeCroy's case, the circuit court ordered the trial attorney to disclose materials which the attorney had already

determined were not implicated by the claim of ineffective assistance. This is a drastic curtailment of the privilege which would require a "substantial modification of the underlying ethical system to which the privilege is merely ancillary." Id.

B. The Law in Florida.

The existence of a privilege and its extent are matters of state law. The federal courts must defer to state law in this matter.

Florida has always recognized the critical importance of a viable attorney-client privilege. As this Court has observed in another context:

> One of the oldest privileges existing in this country is the attorney-client privilege. See Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct 677, 66 L.Ed.2d 584 (1981). Its purpose is to allow open and uninhibited discourse between the attorney and the client.

Neu v. Miami Herald Publishing Co., 462 So. 2d 821, 826 (Fla. 1985)(McDonald, J., dissenting).

The Florida Bar ethics rules have long emphasized the importance of the full and free communication between attorney and client to facilitate the full development of facts essential to proper representation of a client:

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

> **EC 4-1.** Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or

> sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

(emphasis added).

The Rules of Professional Conduct provide for very narrowly proscribed exceptions to the privilege:

> **Rule 4-1.6 Confidentiality of Information**
>
> **a)** A lawyer shall not reveal information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.
>
> **(b)** A lawyer shall reveal such information to the extent the lawyer believes necessary:
>
> (1) To prevent a client from committing a crime; or
>
> (2) To prevent a death or substantial bodily harm to another;
>
> **(c)** A lawyer may reveal such information to the extent the lawyer believes necessary:
>
> (1) To serve the client's interest unless it is information the client specifically requires not to be disclosed;
>
> (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
>
> (3) To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) To respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) To comply with the Rules of Professional Conduct.

(d) When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

Fla. Bar R. Prof. Conduct 4-1.6, (1992).

The only times when a lawyer must reveal confidences or secrets of a client are when necessary to prevent the commission of a crime or to prevent serious bodily harm to another. Otherwise, the lawyer may do so only to the extent he reasonably believes necessary to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The Comment to the Rule regarding confidentiality of information refers to the critical nature of the attorney-client privilege:

> The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Fla. Bar R. Prof. Conduct 4-1.6 cmt.

In a dispute concerning a lawyer's conduct, the Rules of Professional Conduct limit disclosure to those proceedings in which actual misconduct of an attorney is alleged:

> **Dispute concerning lawyer's conduct**
>
> Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the

lawyer reasonably believes necessary to establish a defense.

Id. (emphasis added).[7]

Mr. LeCroy has not precipitated any disciplinary action, malpractice suit, or criminal charge against his attorney. Nor has Mr. LeCroy made any allegations of misconduct or wrongdoing against his attorney. An allegation of ineffective assistance of counsel is rarely an accusation of misconduct or wrongdoing:

> We note that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation. . . .

The Florida Bar v. Sandstrom, 17 F.L.W. S672 (Fla. October 29, 1992) fn. 1.

The Comment to Rule 4-1.6 repeatedly emphasizes the importance of limiting to the bare minimum any disclosures deemed necessary by the attorney:

> In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Fla Bar R. Prof. Conduct 4-1.6 cmt.

Even if there is a charge of wrongdoing, the Comment exhorts attorneys to make every effort to limit disclosure:

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[7]In the comment to the Rules, misconduct is related to such behavior as "complicity of the lawyer in a client's conduct"; a third party accusation of the lawyer's complicity in wrongdoing; and a civil, criminal, or professional disciplinary proceeding against an attorney alleging a wrong.

> As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Id.

Finally, even in those situations where an attorney shall disclose information to prevent a crime or bodily harm, attorneys are cautioned that "In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose."

The Florida Evidence Code defines the evidentiary aspect of the attorney-client privilege:

> (2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services of the client.
>
> (3) The privilege may be claimed by:
> (a) The client
> (b) A guardian or conservator of the client.
> (c) The personal representative of a deceased client.
> (d) A Successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association of other entity, either public or private, whether or not in existence.
> (e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence.
>
> (4) There is no lawyer-client privilege under this section when:
> (a) The services of the lawyer were sought or obtained to enable or aide anyone to commit or plan to commit what the client knew was a crime or fraud.

> (b) A communication is relevant to an issue between parties who claim through the same deceased client.
> (c) A communication is relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer, arising from the lawyer-client relationship.
> (d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.
> (e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

Sec. 90.502(2) Florida Statutes.

The basis for the universal and time-honored protection of the attorney-client privilege is the necessity of confidentiality for the successful functioning of the adversary system. Without complete disclosure by the client, an attorney cannot effectively prepare and present a case, and the client cannot "obtain the full advantage of the legal system." This consideration becomes even more critical in a criminal case when the constitutional rights to assistance of counsel and the protection against self-incrimination are vital due process concerns.

This Court must zealously guard attorney-client confidentiality in order to assure the viability of the adversary system. Even in a malpractice action, Florida law only permits a lawyer to disclose confidential information to the extent it is reasonably necessary:

> Mrs. Adelman, in suing her ex-lawyer for legal malpractice, has not waived her attorney-client privilege with this lawyer as to the entire world, as such waiver is limited solely to the legal malpractice action. The ex-lawyer may only reveal confidential information relating to his representation of Mrs. Adelman to the extent necessary to defend himself against the malpractice claim, Fla.Bar R.Prof.Conduct 4-1.-6(c)(2)....

Adelman v. Adelman, 561 So. 2d 671, 673 (Fla. 3 DCA 1990) (emphasis added).[8]

The courts, the legislature, and the Florida Bar have all recognized the competing interests between the necessity of attorney-client confidentiality and the need for an attorney to defend a malpractice action or a grievance proceeding. In such situations the attorney may disclose a particular document if necessary to defend himself against a claim of wrongful conduct. However, only those documents reasonably necessary to defend can be revealed.

The conflict between the need for confidentiality and the need for an attorney to defend against an allegation of wrongdoing has been resolved by leaving to the attorney the initial decision as to which documents it is reasonable to disclose, so long as s/he makes every effort practicable to avoid unnecessary disclosure. Here, the court ordered trial counsel to disclose unspecified materials even though counsel had stated he did not believe disclosure was necessary.

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[8]Even in the most extreme case, this Court has clearly protected the attorney/client privilege against encroachment. See Turner v.State, 530 So. 2d 45 (Fla. 1987). This privilege extends beyond the immediate representation and even beyond death of the client.

The state argued below that the trial counsel should be required to disclose privileged materials beyond what he believed was necessary to defend himself as a protection against perjury.[9] There are several fatal errors in this novel proposition. The initial decision as to whether a particular criminal defendant has made an allegation of wrongdoing which rises to the level of misconduct providing a reasonable basis for a malpractice suit or a grievance complaint must be made by the court and not the state. If the court finds that the allegations do rise to the level of misconduct, then the lawyer may choose whether he reasonably believes it is necessary to disclose a particular communication in order to respond to the allegations of wrongdoing. Again, this decision does not rest with the state. If the trial attorney indicates a reasonable belief that a document is relevant and necessary to his defense, and if the defendant has no objection, the document would go into evidence. If the defendant raises an objection based on the attorney-client privilege, relevancy, or Fifth amendment rights, then the court

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[9]The unsupported and unprofessional allegations by the state in this, and other Fla. R. Crim. P. 3.850 actions, that a trial attorney who does not testify in a manner favorable to the state must therefore be perjuring himself is barely worthy of discussion. Any evidence of perjury in a postconviction proceeding should be presented to the appropriate authorities just as it would be in any other proceeding. Otherwise, the state should refrain from scurrilous and unsubstantiated charges which unnecessarily tarnish the legal profession.

must hear argument and conduct an in camera review if appropriate.[10]

No "special" provisions against perjury are necessary in postconviction proceedings. All the same protections against perjury apply at postconviction proceedings as at every other judicial proceeding which is conducted under oath. The state does not have any need for a special waiver of the attorney-client privilege in postconviction proceedings since the adversary system provides a full and fair opportunity to seek the truth through cross-examination and investigation. Furthermore, since the defendant has the burden of proof on an issue, the state can argue that the defendant has failed to meet that burden by failing to provide sufficient evidence to substantiate the claim.

In conclusion, Florida law has ample provisions to safeguard both the attorney-client privilege and the truth-seeking process without the creation of new exceptions to the privilege as proposed by the state.

C. The facts of the case.

Mr. Menser informed the court as early as July 1991 that he wanted postconviction counsel to turn over Mr. LeCroy's complete trial defense file. The court instructed the state to file a motion so that counsel would have an opportunity to respond and

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[10]Florida law favors such in camera proceedings. See sec. 119.07, Fla. Stat. See also Post-Newsweek Stations v. Doe, No. 78,915 (Fla. Nov. 25, 1992); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992).

the court could hear argument. In September and again in November the court instructed Mr. Menser to file a formal motion so that defense counsel would have the opportunity to fully respond. However, not until the morning of the evidentiary hearing did this issue come before the court. Mr. Menser acknowledged that he had been dilatory in not filing the motion earlier (PC-R. 220).

Mr. LeCroy asserted his attorney/client privilege as to all documents in the possession of postconviction counsel, which included all the files belonging to Mr. LeCroy that were received from the trial defense attorney. Mr. LeCroy's counsel then reviewed a number of important considerations for the court.

> 1. Confidential communications are privileged by statute.
>
> 2. The Florida Bar ethics rules restrict disclosure of attorney/client communications to permit (not mandate) an attorney to disclose only to the extent reasonably necessary to defend himself against a wrongful conduct accusation. Any disclosure must be restricted to the barest minimum necessary.
>
> 3. Florida law provides that a lawyer who represents a client in a criminal proceeding may reveal the communications where such revelation is reasonably necessary to establish whether his conduct was wrongful. Adelman v. Adelman, 561 So. 2d 671 (Fla. 3DCA 1990) (disclosure of confidential information upon waiver of the attorney/client privilege was not "to the entire world," but solely to the extent reasonably necessary to defend against a claim.)
>
> 4. The state has no independent claim to a defendant's files. If the attorney believes he needs to disclose, he may choose to do so to the extent reasonably necessary, but the state does not have an automatic right to review all confidential files.
>
> 5. Finally, the state's proposal would eliminate every criminal defendant's Fifth Amendment right

against self-incrimination and his Sixth Amendment right to counsel.

(PC-R. 221-27).

Postconviction counsel further advised the court that Mr. LeCroy's trial counsel was present in the courtroom and was prepared to state that he had previously reviewed the trial defense files and had determined there were no documents in those files relevant to the particular ineffective assistance of counsel claims raised in the motion to vacate (PC-R. 233). The court accepted this representation and declined testimony from trial defense counsel (PC-R. 237-38).

The state argued that because Mr. LeCroy had raised an ineffective assistance of counsel claim in his Rule 3.850 motion, the state was entitled to access to all of the trial defense files which were in the possession of CCR (PC-R. 220).[11] The state also noted that it was not a party to the issue (PC-R. 230-31). The circuit court ruled against the state and decided that access to the entire file was not appropriate.

After considering these arguments, the court found that making a claim of ineffective assistance of counsel did not

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[11]In Rule 3.850 proceedings, a criminal defendant is entitled to review the State's trial file by virtue of Chapter 119. The State refused to base its motion upon Chapter 119 because this Court ruled the State was not entitled because this Court ruled the State was not entitled to access to the trial attorney's file. Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990). The State cited no authority for its right to access. It simply argued equity. However, this Court previously rejected that argument. See Kight.

constitute a complete waiver of the attorney-client privilege as the state had asserted:

> I'm concerned about the scope of the issues involved in turning over the entire file to you.

(PC-R. 231-32). Later the court observed:

> It's not an unlimited waver(sic), counsel. It is limited to whatever might be relevant in this case.

(PC-R. 234).

Unfortunately, due to the state's failure to file a timely motion for disclosure and schedule a hearing for argument, the court was caught off guard. The court correctly ruled that wholesale disclosure of the entire trial defense file was not warranted under Florida law. However, when faced with the fact that numerous witnesses and court personnel were waiting for the hearing to proceed, the court fashioned a hasty, and unacceptable, solution.[12] Although the trial attorney had

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[12]McCormick discusses "a judicial tendency to view privileges from the standpoint of their hindrance to litigation." McCormick, Evidence, sec. 75 at 281 (4th ed. 1992). He further comments:

> At the same time it is desirable, whenever possible, to avoid a choice between the automatic and total override of privilege whenever a criminal defendant asserts a need for privileged matter, and the dismissal of the charges if the privilege is to be sustained. At least in those instances where accomplishment of the privilege objective does not necessitate absolute protection, an in camera weighing of the potential significance of the matter sought as against the considerations of privacy underlying the privilege may represent a desirable compromise.

Id., sec. 77 at 291.

reviewed the file and determined that none of the documents were relevant to the issues of ineffective assistance as found in the 3.850 motion, the court instructed Mr. Eisenberg to attempt to place himself in the position of an adversary for the state and produce documents which he believed would be helpful to the state.

CCR counsel strongly objected that Mr. Eisenberg was being placed "in a position of acting on the state's behalf to review -- to present anything that he thinks is relevant for the State." (PC-R. 234). Additionally, CCR counsel asserted that the files belonged to Mr. LeCroy and were privileged (PC-R. 237). See Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990).

There is no dispute under the law, or in this case, that the trial defense files belong to Mr. LeCroy, not to the trial attorney. Kight. The state has conceded this point (PC-R. 238).

The state asked the court to dismiss the ineffective assistance of counsel claim as the appropriate remedy for failing to review the file for the state. However, the court declined to rule on the request for dismissal until receiving direction from this Court on attorney-client confidentiality and considering Mr. LeCroy's compliance with the ruling (PC-R. 243-44).

Counsel for Mr. LeCroy had expended considerable expense and time to prepare for a lengthy evidentiary hearing. Due to the state's lack of diligence in raising this issue, postconviction counsel was faced with a Hobson's choice: (1) waive the attorney-

client privilege in order to proceed with the hearing or (2) take an interlocutory appeal. After a recess to consider the situation, counsel elected to pursue an appeal. As counsel explained to the court:

> Your Honor, the only thing I would say is that in making that decision, it isn't the type of thing where I could just give them the file and then take an appeal later on. It's something that's irreversible so if you order me to do that, then I would have to take action.

(R.228).[13]

D. The circuit court erred.

In this case, prior to the evidentiary hearing trial counsel reviewed the client's file and found that there were no documents which were relevant to his testimony. Mr. Eisenberg was fully advised and prepared to testify regarding the ineffective assistance of counsel claims raised in the motion to vacate. Accordingly the hearing should have gone forward. If, in the course of the hearing, Mr. Eisenberg had wished to refer to a document either during direct or cross examination, he would have so informed the court. At such time, if the document was moved into evidence and Mr. LeCroy had no objection, the document would have been admitted into evidence. If Mr. LeCroy had raised an objection the court could have heard argument and conducted an in camera review of the document if appropriate. This procedure protects the viable operation of the adversary system by (1)

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[13]This course is recommended in the Rules of Professional Conduct: "When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies." Fla. Bar R. Prof. Conduct 4-1.6(d)(1992).

providing an opportunity for the attorney to defend himself when reasonably necessary while (2) assuring that a lawyer will be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. The proper remedy would be to hear argument on the objection; to determine relevancy, necessity and constitutionality of revealing a given document; and to conduct an in camera review if appropriate. It is this determination that Appellant now seeks from this Court. This simple remedy, which is the law in Florida and has been applied in other jurisdictions as well, also protects the criminal defendant's constitutional rights to the assistance of counsel and to not incriminate himself. The circuit court erred in ordering trial counsel to reveal privileged material contrary to counsel's own determinationof what was necessary to respond to the issue raised.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to affirm the trial court's ruling that not every postconviction claim of ineffective assistance of counsel constitutes a blanket waiver of all attorney-client confidentiality, remand this case with directions for the trial court to proceed with the evidentiary hearing, and to hear argument and conduct in camera review of particular documents as it may become necessary to do so during the hearing, and to grant all other relief which the Court deems just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing initial brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January ___, 1993.

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